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სასამართლოს გუშაგი
GEORGIAN COURT WATCH

WHY THE JUDICIARY IS IMPORTANT TO YOU

Georgian Court Watch

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Why the Judiciary is Important to You

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MINISTRY OF FOREIGN AFFAIRS OF DENMARK
DANIDA | INTERNATIONAL DEVELOPMENT COOPERATION

13b, Lubliana Street 0159 Tbilisi, Georgia
info@courtwatch.ge / +995 32 219 70 04
www.courtwatch.ge

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JUDGE - SERVANT OF FREEDOM OR POWER?

Ketevan Eremadze

The Court should be the guide to the progressive understanding of fundamental rights for the adequate development of society, which will constantly create opportunities for people on the way to freedom and happiness. In this sense, each judge has an absolutely irreplaceable, unique role. They are equally entrusted with the rare opportunity to protect the most precious – freedom (human rights and freedoms); have a huge responsibility for fair justice in all cases; at the same time, they have the honor to "execute fair justice" in the name of the state. How can one wearing the judge's mantle not understand it correctly, appreciate it properly, waste it irresponsibly, or exchange it for something else?

When making a decision on each case, it is not only the task of correctly solving a specific legal case that the judge faces. Each sentence, phrase, or word written by the judge can significantly, even fatally, change peoples' lives, and sometimes even social and state development trends. Thus, the judge's decision is much more than just a well-drafted legal document. Therefore, he/she must be able to turn this sometimes breathtaking, frighteningly huge responsibility into an opportunity to take bold steps to protect human rights and take every challenge on this difficult, but undoubtedly very interesting path as a chance to develop himself/herself and the justice.

The efforts of each judge in the service of freedom are essential and equally valuable both in the process of considering and deciding the case individually or together with other judges collegially, however, depending on how correctly he/she understands his/her role and the cost of his/her efforts, the judge's voice/position in the process can create an opportunity or a dead end.

A proper understanding of the individual role of the judge is especially important in our reality when the court stands at a crossroads. Over the years, with often coordinated efforts of political authorities and court officials, Georgian justice has become the greatest threat to Georgian democracy.

As a result of several waves of legislative reforms, an appointment for unlimited term and/or promotion of those judges (the vast majority), who caused the greatest reputational damage to the judiciary was ensured. The most obvious lustration of the government's real intentions probably happened in 2019-2020, when people, who were remembered by the public only for flattering decisions of the government, were appointed to the position of judges of the Supreme Court. Even more, those who did not meet the minimum qualification requirements for the Supreme Court judge, among them, did not have a diploma confirming proper legal education.

It is even more alarming that the judges themselves do not feel the real need to improve the system from within, they do not see themselves from the public eye.

Unfortunately, at different times, the Constitutional Court also contributed to the staffing of the judiciary with "independent judges". Although the Court could have at least impeded this process and opened the door to significant changes, it did not take advantage of this opportunity and failed to understand its constitutional obligation. In frames of the so-called "cases of judges", there was an appeal against the appointment of judges to positions with improper procedures, which threatened the independence of the judiciary, and finally perspective of fair justice in the country. The Constitutional Court initially created the possibility of continuing the unhindered recruitment of the judicial corps with an unhealthy procedure by not suspending the disputed norms, and then, in one case, by deliberately delaying the decision of the case (was waiting for the legislator to adopt the legislative amendments in order to, legally make a decision in favor of the constitutionality of the disputed norms based on them), in the second case, it has significantly damaged this whole process by neglecting the standards set by the Court.

It is not surprising - the judges making the decisions for the independence of the court, must be independent themselves.

Unfortunately, the Constitutional Court (in 2016) did not protect even its own independence with the efforts of some judges, in close coordination with the political authorities, "exchanged" the professional dignity and independence of the institution for personal well-being and specific positions (Chairperson of the Constitutional Court, deputy chairperson, other administrative position, as well as unlimited term appointment as a judge in the Common Courts system and other high positions).

Particularly, in 2016, the Parliament of Georgia adopted a package of dramatic amendments in the legislation on the Constitutional Court. The aim of the so-called "reform" was to ensure the independence and more efficiency of the court activities; however, the main content of the changes clearly indicated the opposite - the legalization of the possibility of political influence on the court and the inevitability of creating a threat to its effectiveness. It is enough to focus on only a few provisions: as a result of the changes, the quorum required for considering the case and recognizing the law as

unconstitutional has increased (the plenum was authorized to initially discuss the case and make a decision if 7 out of 9 judges attended the session, instead of 6 judges; in order to recognize the law as unconstitutional, the consent of at least 6 members present at the plenum session was required, instead of the majority of those present); The authority to suspend disputed norms was granted only to the plenum of the Constitutional Court (the case review chamber was deprived of this authority); One member of the Constitutional Court was granted the authority to transfer the case to the plenary session at any stage of the case consideration.

A few hours after the entry into force of the legislative amendments, one of the judges, taking advantage of the said regulation specially created for him, addressed the plenum of the Constitutional Court with petitions, requesting to accept the three cases (the case of Rustavi 2 LLC Broadcasting Company, case of one of the politicians and the so-called "cables case") for consideration by the plenum. Such activity of the judge was a result of the following intentions – on the one hand, the consideration/decision of these cases would be entrusted to a sufficient number of judges trusted by the government, and on the other hand, the discussion would be delayed. And so it happened: the Constitutional Court plenum accepted all three cases into proceedings. From the very first minute, there was no doubt that the petitions would be unconditionally supported by the appropriate number of judges. The issue of supporting the mentioned motions was decided at the stage of their drafting. As a result, at the plenum, not only the discussion of cases was artificially delayed, but also the prospect of their resolution became very unclear. In all three cases, timely resolution of the case was of special, critical importance for the plaintiffs. In two cases, according to the plaintiffs, their imprisonment was based on unconstitutional provisions. In the case of Rustavi 2 LLC Broadcasting Company, the issue of editorial independence of the media was at stake. Therefore, it was crucial to resolve the issue of the constitutionality of the law to be used by the Supreme Court before making a final decision on the civil dispute (where the said TV company represented the party).

As a result of the "proper exercising" of the political authorities, certain judges took "all necessary measures" to stop the consideration of the cases. Unfortunately, they prioritized not human rights, but a political calendar of the country – having the political context, and consideration of the cases before the 2016 parliamentary elections, no matter how the cases would have been resolved, was perceived as a potential threat by the political authorities.

It is significant that two cases still have not been resolved (more than 6 years after the lawsuit was filed). The decision does not even matter to the plaintiffs anymore. In the case of "Broadcasting Company Rustavi 2 LLC", the Constitutional Court made a decision after the decision of the Supreme Court.

Right from the stage of working on the mentioned amendments to the legislation on the Constitutional Court, the real reasons, goals, and their (amendments) clearly unconstitutional content were foreseeable. As a result, most of the amendments were appealed to the Constitutional Court by one-fifth of the MPs (of opposition political parties) and citizens. Their main demand was the suspension of the disputed norms, which, if met, would avoid all the negative consequences that the amendments were intended to cause. Additionally, it was important that by requesting the suspension of

the disputed norms, the Constitutional Court was given an additional opportunity to protect its authority, and deal with the legislator's attempt to paralyze the court.

Unfortunately, only four out of nine judges supported the suspension of the disputed norms. Instead of finding every possible way to protect the institution's authority and fundamental human rights, most of the judges, by mutual agreement, chose a formalist approach and in such a manner, found a solution against the suspension of norms. As a result, Constitutional Court, which "needed protection more than ever, did not find enough defenders among judges who could and should have done it."

The majority of judges not only did not support the suspension of the disputed norms but also significantly delayed the consideration/decision of the case. Finally, the court found most of these norms (but not all problematic norms) unconstitutional. "However, this circumstance added even more awkwardness and cynicism to the whole process. Against the background that politicians, authoritative non-governmental organizations, lawyers, and later, the Venice Commission, were loudly speaking about the unhealthy reasons and purpose of amendments in the legislation on the Constitutional Court, as well as the unconstitutional content, from the days of working on the draft law, and in the conditions that the legislative amendments, including, using them by the court itself, immediately led to the results, which were the reason for their adoption, and taking into account how much damage was done to the reputation of the court, the ones who were most concerned about the unconstitutionality of the norms were the last to be convinced, who should have known the best and understood it the earliest."

The cases mentioned in the article dealt with the question of independence and effectiveness of the judiciary, becoming a kind of catalyst, on one hand, for demonstrating the role and potential contribution of each judge, And, on the other hand, to identify fundamental problems from this point of view. All these cases are accompanied by the dissenting opinions of specific judges, both on the question of suspension of the disputed norms, and on the final decisions. The attempt of judges with dissenting opinions to convince other judges with appropriate arguments to support the beneficial position of human rights and judicial independence, and protecting the authority is visible and compelling.

It is sad that judges supporting freedom are traditionally in the minority, but still, there is hope that their individual positioning is nurturing a small opportunity for the future development of justice and law in general.

TRUST AND CONFIDENCE IN JUDICIARY

Guram Imnadze

Introduction

Despite several legislative reforms carried out in recent years, public trust in the judicial system is still low. In addition to the fact that the waves of reform lacked systematicity and consistency, the challenges in everyday life beyond laws deserve special attention. For years, civil organizations and international partners talk about the problems such as the absence of political will to create an independent and free court; connections between the ruling political power and the influential group in the judicial system and the politicization of the court; attempts to suppress dissenting opinion within the court; non-meritocratic personnel policy and the appointment of judges to important positions who are distinguished by their loyalty to the inner influential group.

This incomplete list of problems affects the level of public trust in the judicial system, however, this article does not aim to criticize the institutional arrangement of the judiciary or to assess how free it is from internal or external influence. The purpose of the text is to show more broadly the importance of trust in the court and its possible consequences for citizens, especially those in our society who have less access to legal services and information.

A crisis of trust in the judiciary

Beyond political neutrality and institutional arrangements, trust in the judiciary is significantly influenced by the competence and integrity of the judge. Despite the fact that the Constitution of Georgia directly refers to the criteria of competence and integrity in the process of appointment of judges, Georgian justice still has acute problems in this direction. This became especially obvious in the process of staffing the Supreme

Court. First, in 2019, the process of selecting judges showed that there were serious questions regarding the professional competence and integrity of the candidates selected through the competition. In the following years, the process of selecting judges of the highest instance clearly showed us that only legislative and procedural improvements cannot automatically create guarantees for the selection of judges with high qualifications and integrity.

The institutional legitimacy of the judiciary is qualitatively different from the legitimacy of the political branches of the government and is entirely based on public trust. With the fragmented reforms, the risk of constant politicization, internal influences, and low qualifications of judges in the background, it is logical that today the Georgian court does not have high public trust. For example, a joint study by the Center for Social Justice and the Caucasus Research Resource Centers (CRRC) found that according to more than half of the population, the Georgian court is not free from political influence. According to a 2021 public opinion survey by NDI, only 16% of the population believe that the justice system has improved in the last 10 years, while more than twice as many - 32% - say that the situation has worsened in this regard. The 2022 public opinion survey of the International Republican Institute (IRI) also indicates a difficult situation. According to the survey, only 38% of the population have a positive attitude toward the court, and 48% have a negative one. The same survey shows that the population of Georgia is favorable towards institutions such as the police, the President, the Parliament, political parties, etc. more than the court.

As mentioned, trust in the judiciary is formed by different factors and it can be determined both by the institutional and political context and by the experience and perception of specific individuals. It is also significant that the lack of trust directly affects the behavior of individuals - whether they address the court or try to protect their rights through legal means. In other words, the higher the level of distrust in the court, the less chance a citizen will turn to it to protect their personal interests. The absence of trust in the judiciary can have a particularly acute impact on the legal status of those individuals who have the least access to legal information and assistance.

Vulnerable groups and accessibility of the judiciary

One of the strongest factors of trust in the court is experience, which largely shapes citizens' expectations of a potential legal dispute. Distrust towards the judicial system may be related to a discriminatory or less sensitive attitude from the courtside; insufficient clarifications regarding proceedings; the inconsistent practice of the court; duration of proceedings, related funds, etc.

According to a 2021 study by the Center for Social Justice, women victims of domestic violence often point to police indifference and ironic attitudes. The interviewees also talked about the high risk of social stigma and re-victimization towards women, as well as sexual harassment of women by the law enforcement officers themselves. In this case, the respondents focus not on the court, but on the attitude towards another agency, but this may also impact the belief in legal proceedings and legal protection of rights as a whole. Women victims of domestic violence also indicated hopelessness in terms of improving the situation and socio-economic vulnerability. These factors are also directly related to the court - in particular, how accessible, from a financial point of view, this

institution is and how sensitive the court is to the social and economic challenges of different groups or individuals.

According to the same study, in cases of domestic violence, people, especially those living in rural areas, often refrain from using legal mechanisms – mainly because of shame and shyness; There are cases when mothers encourage their children to endure violence from the men. The opinion that "family issues should be resolved in the family and the police should not interfere" is also common. It is also noteworthy that these trends are more visible in villages than in urban areas. This once again shows the nature of the problem – mistrust towards the court, or other barriers to it, in the end, may have the most negative impact on the legal situation of individuals who have fewer opportunities to receive quality legal aid or seek the necessary legal information.

It is also clear that trust in the judiciary alone is not a sufficient criterion for evaluating the judicial system, and the extent to which justice is accessible to citizens shall be taken into account as well. For example, a survey conducted in 2020 shows that In terms of access to justice, the population cites court costs and the length of proceedings as the biggest barriers, only followed by the lack of trust in court. According to the same survey, the threat of reprisals, the complexity of preparation documents, cultural factors, insufficient knowledge of the language, etc. are other barriers for the population on the way to the court.

For summary

In order for the court to actually ensure the rule of law and the proper protection of human rights, it is necessary to have high public trust in the judiciary, although trust alone is not enough for the effective work of the court, and citizens should also apply to the court to protect their rights. In other words, the courts should be accessible to citizens, especially to marginalized, vulnerable groups.

Considering the effectiveness of justice only from a narrow legal perspective often not only does not provide thorough and in-depth answers to correct the situation but even makes it impossible to identify the real problem. For this purpose, it is necessary not to lose sight of the social and cultural factors that can directly determine the degree of trust in the judiciary and strengthen or weaken the citizen's motivation to turn to the court.

Unfortunately, the history of the development of the Georgian judiciary in recent decades only speaks about the institutional arrangement, and the ongoing professional discussions on justice rarely went beyond legal frameworks. The legislative and institutional context is essential for the proper functioning of the system, but it is not enough to ensure quality and accessible justice for ordinary citizens. In order to increase trust in the judiciary, beyond institutional and political sustainability, it is necessary to have a high social sensitivity of the judiciary and to eliminate the cultural, economic, or other types of barriers that affect the trust of citizens, especially of vulnerable groups.

Beyond institutional and legal challenges, it is necessary to add topics to the political agenda, which may not be of vital importance for all citizens, but for a significant part of our population, they directly determine the degree of trust and access to the court.

THE HIGH COUNCIL OF JUSTICE – SYSTEM REPRESENTATIVE?

Nino Nozadze

The High Council of Justice is established to ensure the independence and efficiency of Common Courts and to develop proposals for judicial reform. Councils of Justice must contribute to gaining public trust and must work transparently in the public interest. The Council of Justice must protect the independence of the judicial system, for which the widest possible representation of courts and diversity of regions must be ensured.

In the article, we will talk about the role of the Council of Justice in the justice system, and how far the district courts are represented in it. We will consider to what extent their problems are brought to the central level and then discuss the effective operation of the system.

According to the law, the High Council of Justice of Georgia consists of 15 members. 8 members are elected by the self-governing body of judges of Common Courts - the Conference of Judges, at least one of them must represent the court of each instance. The Chairperson of the Supreme Court is at the same time a member of the Council of Justice. 5 non-judge members are elected by the Parliament and one is appointed by the President.

What is the Council composition now?

5 non-judge members have not been elected by the Parliament for more than a year now and during this time the Council is working with a 10-member composition. 8 out of 10 are judges elected by the Conference, 1 – is a member of the Supreme Court, who is an ex officio Council member, and 1 – is a non-judge member appointed by the President two years ago.

4 out of 9 members are from the Supreme Court (3 elected by the Conference and one ex officio, Chairperson of the Supreme Court), 3 - are judges of first instance, and 2 – are judges of the Court of Appeals.

Nowadays, only Tbilisi courts are represented in the Council of Justice, while the majority of the system is made up of district (city) courts located in different cities. Since 2013, up to today, the conference has elected 25 judges to the Council. Of the 25 members, only Dimitri Gvritishvili represented the Kutaisi Court of Appeal at the same time.

The legislation does not provide a quota for district courts. Observing the Conference of Judges shows that the conference does not set a high standard either. Any judge has the opportunity to nominate a member of the council, however, only the "chosen" enjoy this right, and the rest of the judges select them by a majority of votes. It is not in the interest of the influential group to ensure the real involvement of judges in making important decisions of the system or to encourage individualism. The ruling party is supporting this. If we look at the last changes, we will see that it was completely tailored to the interests of the influential persons of the system. Even though the quota of the chairpersons in the Council is determined and the judges who have been faithful for years are appointed as the chairpersons. With an expedited amendment in December, instead of encouraging to have a broad representation of judges, the lawmaker restored the legal possibility of electing the same person as a member of the Council of Justice twice in a row. As read in the explanatory card, this change served "to staff the Supreme Council of Justice based on the principle of professional experience and merit and to preserve institutional memory in the Council." This happens with the background that corporatism and clan rule remain the main challenges in the system, and one and the same judges have been holding managerial positions for years.

The argument of a ruling party is that the amendment corresponds to the international standards. However, the Venice Commission, in one of its conclusions, highlighted that the context of Georgia is special because, considering the past, the High Council of Justice failed to gain public trust and recognition.

When the system is managed by an influential group, which immediately suppresses any manifestation of individualism, and when there is no competitive environment, only the introduction of regional quotas, of course, will not change anything. Along with the introduction of regional quotas, fundamental reforms are needed, which should be reflected in banning judges in administrative positions from being members of the Council of Justice, encouraging individual judges, and changing the way important decisions are made.

Judicial strategy and involvement of district courts

Within the framework of the EU-Georgia Association Agreement, as a result of the inclusive process, the judicial strategy and action plan for 2017-2021 was developed, which included many important issues for the development of the judicial system and the fulfillment of obligations undertaken by Georgia under international agreements. The strategy and action plan focused on the involvement of the district judges in the activities related to the management or reformation of the system, and "on the representation of the courts of all instances and, as far as possible, the district courts

in the Council." The strategy highlighted accessibility to the court, especially for the mountainous and sparsely populated regions. Improvement of the intranet to simplify and refine the communication between the courts, so that the district courts could actively get involved in various processes taking place in the system was also discussed. In the strategy, one of the ways to reduce the overloading of courts and judges was to call for the development of alternative means of disputes and their effective use.

On the issue of the development of alternative means of discharging the overload, the annual report of the secretary of the Council of Justice states that "court mediation halls were organized with modern standards and mediation processes have already been conducted in Rustavi city and Gori district courts." To what extent the use of mediation as an alternative mechanism eased the courts has not been discussed at any session of the Council of Justice. Overloading still remains one of the main challenges of the system.

According to the strategy, to ensure the involvement of judges, the Council made changes to the regulations. It was decided that the materials on important topics related to the judicial system, envisaged by the agenda, will be posted on the intranet for the purpose of receiving written notes/comments from the judges. While the Council of Justice appoints sessions chaotically, and the date and agenda of the session are published the evening before the session instead of being published three days in advance, it is completely impossible that this change will improve the situation even a little and give a boost to the involvement of judges.

During the implementation of the activities provided by the strategy and action plan, it was revealed that the solution to problematic issues in the judiciary was only technical and served the formal performance of activities, while the qualitative improvement of the judicial system remained beyond the interest of the agencies responsible for the implementation of the action plan, which is clearly confirmed by the above examples.
The adoption and implementation of a transparent and effective judicial reform strategy and an action plan for 2021 onwards, through a broad, inclusive, and cross-party agreement-oriented process, is still one of the conditions on the path to EU membership.

How does the High Council of Justice work?

Nowadays, the schedule of conducting Council meetings is chaotic. Often, the staff of the Council does not know whether the session will be held or not even half an hour before the session. Hence, the question arises, if a judge of any district court was a member of the Council of Justice, how effectively he/she would be able to participate in its activities? This may seem like a small thing in the big picture, but again, it clearly shows the sad reality of the Council of Justice.

In addition to high-profile topics such as the nomination of Supreme Court judges, appointment/re-assignment of judges, and appointment of chairpersons, other topics are also discussed by the Council, however, it is questionable to what extent the problems of the district courts are a priority for the Council. During 2021, about 10 topics related to the district courts were discussed, but mainly covered the issues such as providing the judge with an apartment and fuel, business trips, and initiation of transfers without competition.

The state provides the necessary living area or compensates the necessary expenses to a judge who does not have a residential apartment in a self-governing city (municipality) to exercise his judicial powers. In the case of the Court of Appeals and district court judges, the Council of Justice takes this decision and determines the number of funds to be allocated for the rental of a residential apartment considering the self-governing units. In addition, the Council authorizes the Department of Common Courts to set limits on fuel and communication expenses for judges.

Creating dignified living and working conditions for judges is undoubtedly an important condition for ensuring their independence, but the independence of judges is impossible without individual freedom, and an environment free of internal and external influences.

In recent years, the Council has been actively initiating the issue of transferring judges without competition (a kind of internal competition). The frequency of transfers of judges to other courts and the rotation of judges raise doubts about certain strategic moves by the influential group, serving not to relieve the overloading in the courts, but the appointment of loyal judges in important courts for them.

The Council of Justice is inconsistent in the transfer of judges to other courts, explaining it by the number of cases, and does not take into account the problem of overcrowding, which is acute in other courts as well. If we look at the practice of transfers, the justification for giving preference to a particular candidate is unclear. It gives the impression that the transfers of judges are based on personal recommendations and do not serve to solve the real problem of overcrowding in the courts.

The Council has not discussed the needs of the district (city) court, or the challenges specific to the region at any of its meetings. It is impossible for the system to work effectively without examining the needs that the district courts face. When reviewing the topics on the agenda, the plans and strategies of the influential group of the court become clear. Such an approach once again indicates the absence of will to make decisions important for the effective work of the judicial system, and not those that will further strengthen the influential group.

REFUSING THE RIGHT TO FAIR AND TIMELY TRIAL

Ana Chapidze

Access to justice in Georgia is still a problematic issue and there are many gaps in this regard. Full access to justice means that all people have the right to address the court for the protection of their rights and that they are guaranteed a fair and timely trial, however, this right sometimes only exists in theory, as in some cases, citizens practically do not have access to the court.

As of today, people apply to the court to restore their violated rights depending on their territorial location, however, only formal application is not enough for fast and fair consideration of their case. In this regard, people face many obstacles, such as the inability to pay state duty fees, formal fluency of the application for the lawsuit (which requires access to legal aid), fast, fair, timely consideration of the court case, and other factors. Among the listed factors hindering access to justice, I would highlight one of the main issues - timely consideration of the cases. It is impossible to talk about access to justice if there is no opportunity in the country for timely consideration of cases, in a reasonable timeframe.

The legislation of Georgia establishes different terms for consideration for different categories of disputes in court, however, it is very problematic today, as the court often does not complete the consideration of cases within the time limits set by the law. Moreover, the case may remain unconsidered for years. To better illustrate the problem, below are some cases when people have been waiting for years for their hearing.

Citizen B. K. addressed Kutaisi City Court requesting to prevent interference with the examination of his property rights. Kutaisi City Court started a case review in January 2022. During this time, one of the opposing parties passed away and the citizen had to file a new lawsuit (clarify the claim) and remove the deceased from the opposing parties. The new lawsuit was subject to the procedures established for filing a claim, which the citizen had to undergo during the initial claim. Thus, the judge had the right to refuse

to accept the claim on certain grounds and continue the process indefinitely. The judge tried to refuse consideration of the case, but, finally, took a final decision on June 5, 2022. The reasoned decision was handed over to the parties on July 3, 2022. It took 4 years for citizen B. K. to complete the case in the first instance. Despite the completion of the case review at the first instance, the citizen does not agree with the court's decision and has appealed to the Kutaisi Court of Appeals. Case consideration takes even longer in the higher instance court. Accordingly, we can say that citizen B. K. does not have access to his/her right to the fast, fair, and timely consideration of his case. It should be noted that according to the Civil Procedure Code of Georgia, the term of consideration of civil cases by the court is 2 months, and for especially difficult category cases, it can be extended for 5 months.

G. J.'s case is about his residential house, in which one of the microfinance organizations secretly alienated other persons with a gross violation of the law and without any prior warning. He and his family members accidentally found out about the alienation. The plaintiff does not have other residential places. The plaintiff lives in the disputed residential house with his mother, father, wife, and two young children. G. J.'s submitted the claim to the court in 2020, with the aim to get his residence back. The case has not been reviewed yet. The plaintiff's right to a fair trial has been violated. Due to the incapability of timely restoration of ownership of his residential house, the plaintiff faces many problems, such as, for example, registering as a subscriber for gas supply, requiring the consent of the property owner, etc.

I would also like to mention one of those cases, where the Kutaisi City Court left the plaintiff without the possibility to exercise the right to the trial at all. In 2018, citizen R. S. filed a lawsuit to the Kutaisi City Court due to his illegal dismissal from a workplace. The plaintiff was refused 5 times to accept the lawsuit into the proceeding. The grounds for the court refusing the suit were different. One of the reasons for the refusal was the amount of state fee, which appeared should have been paid for each defendant separately. According to the Civil Procedure Code, amount of state fee on civil cases, including labor disputes, shall be 3% of the value of a subject matter of dispute, but not less than GEL 100. Accordingly, the amount of the state fee is determined not by the number of defendants, but by the value of a subject matter of dispute. Despite this, R.S. for the claim to be accepted in the proceedings agreed to the request incorrectly determined by the court and paid the state fee according to the number of defendants. In 2020, the court proceedings started on the case. Kutaisi City Court refused R. S. to satisfy the claim due to the limitation period of the claim. The court had violated citizens' right to a fair trial. R.S. filed a lawsuit within the time limit established by law but did not attach the decision of refusal to accept his lawsuit in the proceedings. With this ground, the same judge did not satisfy the suit. By doing so, the court deliberately denied citizen R. S. the right to a fair and timely consideration of the case.

The cases indicated above clearly show that citizens' constitutional to a fair trial was not implemented in practice. Therefore, it is obvious that in some cases, citizens may be left without the right to judicial review and deprived the possibility to recover their violated rights. Additionally, the efficiency of dispute resolution by the court decreases when consideration of civil cases take years in the court. Thus, it is important that every citizen equally enjoy their right to the fair and timely consideration of their cases.

STANDARDS OF THE ISTANBUL CONVENTION IN THE JUDGMENTS OF KUTAISI CITY COURT

Ana Shalamberidze

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic violence (hereinafter the Istanbul Convention) is the first regional tool, which allows both member and non-member countries of the Council of Europe to join and establish effective mechanisms of combating violence against women and domestic violence.

The specificity of crimes - violence against women and domestic violence lies in the fact that its main cause and result is the historically unequal distribution of power between men and women. Violence is a social mechanism used in a patriarchal society, which puts women in a subordinate position in relation to men. Violence against women is based on the idea of their secondary role and inferiority in society.

In 2017, Georgia ratified the Istanbul Convention and developed an accompanying legislative package. This important news, as a rule, should have been a turning point in court practice as well, but it did not happen. Along with the positive changes, there is a number of tangible problems and challenges in practice.

The article analyzes the justification of judgments on criminal cases published in the 2020 unified base of court decisions by the Kutaisi City Court. A total of 39 judgments were studied, among them: 7 decisions by judge Nikoloz Margvelashvili, 21 decisions by judge Tatia Gogolauri and 11 decisions by judge Nana Jokhadze.

"Fate" of the offender depending on the testimony of the victim

The Istanbul Convention (Article 55) states:

"Parties shall ensure that investigations into or prosecution of offenses shall not be wholly dependant upon a report or complaint filed by a victim if the offense was committed in whole or in part on its territory and that the proceedings may continue even if the victim withdraws her or his statement or complaint."

According to the Criminal Procedure Law of Georgia, "A victim shall be assigned all rights and obligations of a witness", among them, their testimony is considered evidence if it meets the criteria for admissibility. they have the right not to give evidence that implicates them or their close relative in committing a crime.

As a result of the analysis of Kutaisi city court decisions, it was revealed that if the victim does not testify against the accused at the stage of case consideration in the court, the court issues an acquittal decision. The judge, as a rule, does not take into account the whistleblowing testimony given by the victim at the stage of the investigation.

Judges ignore the specific nature of domestic crime: The victim and the accused have a joint household/cohabitation or had one in the past, and the victim has a social and emotional connection with the perpetrator; often they have common children or are family members; in addition, in many cases, the victim does not have economic independence and fearing that their child(ren) will be left without a breadwinner, tries to avoid prosecution of the abuser; the victim does not feel safe and is vulnerable towards the perpetrator. Due to these factors, it is very common when the victim, who called the law enforcement officers for help, refuses to give evidence confirming the accusation during the court hearing.

Kutaisi City Court usually bases its decision on the testimony of the victim and justifies this approach with the Supreme Court practice.

The trend, seen as a result of the analysis of the justifications of Kutaisi City Court fundamentally contradicts the above-mentioned standard and spirit of the Istanbul Convention.

We met an exceptional case as well, when Kutaisi City Court relied on the interview of the victim as part of the evidence, however, this did not happen because the court took the interest of a victim into consideration, as obliged by the Istanbul Convention. In this case, the accused pleaded guilty and the judge issued a guilty verdict.

“The accused repents the crime”

The Istanbul Convention (paragraph 2 of Article 49) reinforces this obligation and requires states to effectively investigate and prosecute crimes defined by this Convention through the court. This implies establishing relevant facts, interviewing all available witnesses, forensic examinations using multidisciplinary approaches, and managing criminal proceedings using modern investigative methods for the purpose of a complete analysis of the case.

In the court decisions we examined, there are frequent cases when the perpetrator’s repentance of the crime is considered a mitigating circumstance and, taking it into account, is given a suspended sentence or community service.

Even more, in one of the cases, evidence of such an essential nature as the medical report of the court was completely ignored:
“The case also includes medical examination conclusion No. ---, according to which – based on presented medical documentation (copy of the ambulance call card N327): in regards to the received injury, citizen M--- G--- was provided emergency medical assistance on 25.10.2018 and was diagnosed: with an open head injury. Personal examination of citizen M--- G---’s body conducted on 25.10.2018 at 20:16-20:25 showed an external injury in the form of an irregular cut (see description and exact localization on the personal examination data). As the result of the aforementioned, the injury had been developed as a result of the impact of some dense-blunt object and belongs to the light degree of body injuries, not affecting health.”

Since the accused did not plead guilty and the victim changed her testimony in his favor at the trial, the judge issued an acquittal verdict despite the medical report confirming body injury.

Such practice is not compatible with the fundamental principles of a comprehensive investigation of the fact of violence against women and criminal prosecution of the perpetrator, which the Istanbul Convention obliges the state to fulfill.

“Sanction with proportionate and dissuasive effect”

According to the Istanbul Convention (Article 45) “Parties shall take the necessary legislative or other measures to ensure that the offenses established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include, where appropriate, sentences involving the deprivation of liberty…”

The examined sentences show that judges generally give probation or hours of community service to those convicted of domestic violence. Such a response from the judiciary to violence deepens the victim’s feeling of helplessness and fear that the abuser will again apply physical or psychological pressure on them.

According to the motivational part of the court decisions, an aggravating circumstance is used in case of domestic crime in the sentencing part in accordance with Article 531 of the Criminal Code. The first part of the mentioned legal norm, among other grounds, concerns the aggravation of responsibility for the crime committed on the grounds of

gender intolerance. According to the second part, Commission of crime by one family member against another family member, against a helpless person, a minor or in his/her presence, with extreme cruelty, with the use of a weapon or under the threat of using a weapon, by abusing the official position shall be an aggravating factor for liability for all respective crimes.

The principle of this provision is as follows: When imposing a fixed term imprisonment for a crime committed with an aggravating factor under paragraph 1 or 2 of this article, the term of a sentence to be served shall exceed, at least by one year, the minimum term of sentence provided for the committed crime under the respective article or part of an article of this Code.

Although the court usually discusses the circumstances provided for in Article 531 of the Criminal Code as an aggravating circumstance for the punishment in the motivational part of the judgment, often it is not mentioned in the resolution.

There are cases where the court uses imprisonment as a form of punishment, however, these are mainly the cases where the convict was given a conditional sentence and reoffended - domestic violence.

Observing such cases gives us the basis for an additional conclusion: using lenient sentences, such as probation or community service, increases the risk of reoffending against the victim.

In one of the exceptional decisions, Kutaisi City Court used imprisonment as a sentence. However, the Court of Appeals changed it with a more lenient measure, which is a kind of indication for the lower instance courts in choosing the way of punishment.
According to the statistics of the Supreme Court, the trend revealed in Kutaisi City Court decisions regarding the use of lenient measures of punishment reflects the overall picture of the Common Courts. During 2020, in the Common Courts, the first instance courts had 225 acquittal verdicts out of a total of 1491 cases, 379 were sentenced to imprisonment, 706 – were conditional sentences, 196 were community service, and 2 - were fines.

Justification of Decisions on Gender-based Offences

The Istanbul Convention recognizes the gendered nature of violence against women. "Gender-based violence against women" refers to "violence that is directed against a woman because she is a woman or that disproportionately affects women."
Unfortunately, studying Kutaisi City Court decisions revealed that the court does not consider the gendered nature of violence against women, as required by the Istanbul Convention.
As we read in some motivational parts of the verdict, "the implementation of the laws adopted to combat domestic violence is hindered by the existing attitude in the society and deep-rooted patriarchal attitudes and gender stereotypes, leading to a tolerant attitude towards gender-based violence, while domestic violence is considered a very personal and not a public issue in most parts of the country."
A judge then cites the 2015 decision of the Committee on the Elimination of Discrimination against Women in X and Y v. Georgia, and the case of the European

Court of Justice OPUZ V. TURKEY, in the part of the performance of the positive obligation by the state.

Finally, the judge makes the following decision:

"The court believes to determine a fine and community service for K---L---. Regarding the amount of the fine, the court takes into account the nature of the offense committed by the accused, the personality of the accused, and his economic situation, and considering all these, A fine of 5000 (five thousand) GEL is imposed towards K--- L--- as an adequate and proportionate measure, which, on the one hand, will be thought-provoking for him to better understand the nature of the committed action, degree of reprehensibility, to get a sense of law and order and responsibility towards the law, but on the other hand, determination of the above-mentioned fine and community service as a punishment for the accused by the court fulfills the goals of the punishment – the restoration of justice, preventing new offense and resocialization of the offender."

Although the judge mentioned the principle of applying an adequate measure in the case of domestic violence, as well as several international decisions, he still made a decision taking into account the condition of the accused and did not focus on the presence/absence of gender-based offense signs at all. In addition, it is unclear, how the monetary fine will make an offender think about the "reprehensibility" of his behavior. The risk of reoffending is not assessed in the verdict either.

Model use of European Court Decisions

In the decisions of Kutaisi City Court, we find quotes from the decisions of the European Court of Human Rights, mainly on the infallibility of evidence, relevance, and standards beyond a reasonable doubt. There is no development of justification against gender-based violence based on European standards.

None of the cases show that the application of the case law of the European Court has influenced the final outcome of the case or the resolution of a particular legal issue. A review of the court decisions made it obvious that court resolutions on the cases of domestic violence do not reflect the spirit of the Istanbul Convention and do not correspond its main point – "protect women from any kind of violence and prevent, criminally prosecute and eliminate violence against women and domestic violence." In order for the benefits of the Istanbul Convention to become tangible for women in Georgia, Georgian judicial practice should also develop in its footsteps.

WHAT GEORGIAN JUDGES ARE (NOT) PUNISHED FOR - THE PRACTICE OF THE DISCIPLINARY CHAMBER FROM 2012 TO THE PRESENT

Kakha Tsikarishvili

It is recognized that an independent and accountable judiciary is the main cornerstone of the development of a democratic society and the protection of human rights. The disciplinary responsibility of a judge is one of the forms of accountability.

The system of disciplinary responsibility of judges must meet the following basic requirements:

- Pre-determine the unacceptable and disciplinary punishable action of the judge, which will be foreseeable both for the judge and for society;
- Effectively respond to the complaints made by society towards the judge and give back justified responses to society;
- Protect the rights of a judge;
- Be transparent and public within the frames envisaged by the interest of disciplinary proceedings, protection of the rights of a judge and the public;
- Set a fair balance between judicial independence and accountability.

Until 2012, the disciplinary system of the Common Courts was completely closed. The decisions of the disciplinary chamber were not published, thus judges and the public did not have information about what misdemeanors were actually punished and what was their severity; institutions for investigation or substantive review of disciplinary cases did not exist, who would have at least formal guarantees for independence. Disciplinary systems (as well as other administrative levers) were often used to intimidate and subdue politically disobedient judges.

In 2013-2019, significant changes were made in the legislation to increase the transparency of disciplinary proceedings, accountability, independence of disciplinary bodies, and the rights of judges. Among them, new bodies for investigation and substantive review of disciplinary cases were created, the system of disciplinary offenses was re-established, the publication of disciplinary decisions was determined, etc.

It is noteworthy that with the amendment of 13th December 2019, "breach of the norms of judicial ethics" and "non-fulfillment or untimely performance of the duty of a judge" were removed from the list of disciplinary misconduct. Cases of violation of judicial ethics, leading to disciplinary misconduct have been determined by the legislation. Nowadays, Article 751 of the Organic Law on Common Courts includes 21 types of disciplinary misconduct that violate principles of independence, impartiality, integrity, order, equality, and discretion, or in any other way damages the court's authority. In 2019, the majority of these amendments were positively evaluated by the civil sector, as well as international society.

On the other hand, the amendments of December 2021 to the Organic Law on Common Courts received strong criticism. The changes covered the following:

- Violation of the principle of political neutrality of public expression of opinion by a judge;
- The quorum required for taking decisions on disciplinary issues by the High Council of Justice, which was reduced from 2/3 to the majority;
- In case of initiation of disciplinary proceedings, the possibility of removing the judge from consideration of specific cases.

The changes were assessed as an additional lever limiting the independence of judges in the hands of the dominant group in the judicial administration - the clan.
Generally, only changing the regulations is not enough to create a reliable and effective disciplinary system. Whereas, before 2012, the disciplinary system was too strict and oriented at punishing judges and controlling their decisions, after 2012, the system lacks independence and is characterized by corporatism and the exemption of favored judges from responsibility. The disciplinary system lacks the appropriate degree of credibility, which is why the justice system users, especially lawyers, refrain from filing disciplinary complaints.

Nowadays, disciplinary cases are handled by the following agencies:

- Independent Inspector of the High Council of Justice (conducts preliminary inspection and investigation of disciplinary cases);
- High Council of Justice (resolves the issue of bringing the judge to disciplinary responsibility, supports disciplinary prosecution);
- Disciplinary Board of Judges of the Common Courts (reviews disciplinary cases);
- Disciplinary Chamber of the Supreme Court (reviews complaints on the decisions of the Disciplinary Board).

Every stakeholder who believes that a judge has committed a disciplinary offense has the right to file a complaint to the Independent Inspector of the High Council of Justice. The Independent Inspector annually receives from 130 to 320 disciplinary complaints,

however, the vast majority of these complaints are resolved at the stage of preliminary inspection and investigation of disciplinary cases and did not last till the actual review stage.

In 2013-2022, the Disciplinary Board of Judges of the Common Courts reviewed 16 disciplinary cases. The cases were on the following disciplinary misconduct:

- Violation of the judicial ethic norms – 3;
- Non-fulfilment or inappropriate performance of judicial duty (the mentioned is not a disciplinary misconduct since 2019) – 5;
- Unreasonable delay of the case consideration – 4;
- Showing obvious disrespect to the participant of the process – 1;
- Refusal by the judge to dismiss/self-dismiss the case when there is a legal basis for it – 1.

In the given period, the Disciplinary Board made 9 convictions and 5 acquittals. In 2 cases the disciplinary proceedings were suspended due to the expiration of the statute of limitations for the prosecution. As for the disciplinary sanctions, during 2013-22, the Disciplinary Board used:

- 5 private recommendation cards;
- 1 reprimand;
- 3 notices.

Below is a brief summary of each of these decisions.

Case №1/03-12 (Decision of 12th April, 2013)

During the oral explanation of the decision, the judge referred to the representative of the party in a familiar context inappropriate for a judge.
According to the decision of the Disciplinary Board, the judge committed a violation of the judicial ethics rule and improper performance of duty. The disciplinary measure imposed on the judge: referral with a private recommendation card.

Case №1/03-12 (Decision of 12th April, 2013)

In the resolution of the decision, the judge indicated 14 days instead of the 7-day deadline for appealing the decision.

The judge was accused of inappropriately performing his judicial duties (removed from the list of disciplinary misconduct).

The Disciplinary Board considered that the action was not a disciplinary offense, but a judicial mistake and lifted the responsibility from the judge.
The Disciplinary Board mentioned that while drawing the line between a judicial mistake and disciplinary misconduct, one should take into consideration the possibility of correcting the mistake, its quality, repetitive and non-recurring nature, the good faith of the judge, and his motive.

Case №1/01-15 (decision of 21st January, 2016)

The judge addressed the defense with the following words: **"I want to explain to you as lawyers that your legal thinking is very disturbing, to put it simply. I'm not even talking about incompetence."**

And after the panel of judges approved the motion of the defense, said: **"I'm disturbed with the precedent we just created. This is a very bad precedent. Unfortunately, my colleagues, I will say directly, made absolutely wrong decision to create this precedent."**

According to the decision of the Disciplinary Board, the judge was found guilty of violating the norms of judicial ethics and was reprimanded as a disciplinary sanction.

Case №1/01-16 (decision of 20th May 2016)

According to the disciplinary charge, the requirements of Article 83 of the Civil Procedure Code of Georgia were violated by increasing the demand at the main session during the consideration of the civil case in order to increase the claim at the main session of the court, the consent of the defendant is necessary, which was not the case here.
The Disciplinary Board acquitted the judge in this episode and noted that granting/disagreeing with the plaintiff's motion to clarify or increase the claim cannot be considered an inappropriate act for the judge, which violates the authority of the court or harms trust towards it.

According to the second episode of the disciplinary charge, by making a partial decision on the case without the petition of the parties, they ignored the imperative requirement of Article 245 of the Civil Procedure Code of Georgia, thereby committing a disciplinary offense: improper performance of the judicial duties.

Case №1/01-17 (decision of 21st April, 2017)

Preparing criminal case verdicts and handing them over to the parties with a delay of 5-6 months (or more), as well as sending the case to the higher instance with a delay of 5-6 months (or more) was considered as the improper performance of the judicial duties.

The judge also violated an imperative requirement of the Prison Code and did not give permission to the convict to conduct phone calls, thus limiting the convict's rights granted by law. The judge also failed to ensure that the minutes and stenographic records of the court session were handed over to the convict in a complete condition and in a reasonable time; The documents were delivered to the party two months late, violating the imperative requirement of Article 195 of the Criminal Procedure Code of Georgia.

In one of the episodes of the charge, related to the delay in the case consideration, the judge was acquitted, since it was considered that the case was not a custodial one, or imprisonment as a preventive measure was not imposed against the convict. The case consideration was postponed every time at the request of the prosecutors involved, due to the absence of the witnesses; In addition, the prosecutor of the case was changed several times, and each of them petitioned the court to allocate a reasonable period of

time to get acquainted with the case. The court session was postponed several times due to the non-appearance of the defendants and their lawyers. The judge did not leave the case inactive at any stage, - without some kind of procedural action. Postponing the case consideration did not violate the rights of the parties participating in the process, and the delay was not caused by the judge. The judge was found guilty of non-fulfillment and improper fulfillment of the judicial duties and was subjected to disciplinary measures and a fine - notice.

Case № 2/01-2018 (decision of 24th September 2018)

The judge violated the terms of case consideration and decision preparation for civil cases; In particular, one case reviewed took 2 years and 4 months; in the second case, no procedural action was taken within 1 year and 10 months, and in the third case, the decision was sent to the party 9 months and 20 days after it was made.

The Disciplinary Board took into account the circumstances that the unjustified delay in the consideration of the case by the judge is not inspired by criminal signs and is mostly caused by the abundance of civil cases in his/her proceedings, his/her little judicial experience, in addition, the judge had to periodically exercise his/her powers without an assistant. Additionally, it should be taken into account that in order to avoid delay in the administration of justice, the judge simultaneously had to implement various procedural actions on administrative cases and was also responsible for exercising the authority of a magistrate judge in the municipality.

The judge was found guilty of ungrounded delay in case consideration and a private recommendation card was issued to him/her as a disciplinary measure.

Case № 3/01-2018 (decision of 21st January 2019)

It took 1 year and 5 months for the judge to complete the case consideration; additionally, 5, 7, and 5 months apart, he carried out procedural actions and the Disciplinary Boards considered that the case consideration delay by the judge is not inspired by criminal signs and is largely based on logical reasoning such as the internal factor of the court, particularly, overloading of judges and lack of judges, or, in other words, shortage of judges necessary for effective examination of justice. This is evidenced by the data presented by the judge about his workload, which the representatives of the High Council of Justice did not doubt. The judge was acquitted of the disciplinary charge.

Case № 4/01-2018 (decision of 21st January 2019)

The judge addressed the party involved with ironic expressions, including the words: **"Of course, there will be justification. I will not ask a thank you for this."** The judge was found guilty of violating the norms of judicial ethics and a private recommendation card was issued to him/her as a disciplinary measure.

Case № 5/01-2018 (decision of 21st January 2019)

During the review of the administrative case, the judge did not take any procedural action for a year and a half. The Disciplinary Board took into account the circumstances

that the unjustified delay in the consideration of the case by the judge is not inspired by criminal signs and is mostly caused by the abundance of cases in his/her proceeding. In addition, while exercising his/her authority, he/she had only one employee in the office, who performed the functions of both the assistant and the secretary of the session. Moreover, at the same time, the judge had to carry out various procedural actions - both civil and administrative, as well as review administrative violations, preventive measures, and criminal cases. The judge was found guilty of ungrounded delay in case consideration and a private recommendation card was issued to him/her as a disciplinary measure.

Case № 2/0-2019 (decision of 10th June 2019)

During the consideration of the civil case, the judge violated the deadline for handing over the justified decision to the party; in particular, violated the 1-month term determined by the Article 257 of the Civil Procedure Code by 8 months and 8 days.
The Disciplinary Board took into account the overloading of the judge and the lack of judges and issued an acquittal decision.

Case № 3/0-2019 (decision of 10th June 2019)

The judge violated the 1-month term for handing over the justified decision to the party with 5 months' delay. The Disciplinary Board took into account the overloading of the judge and the lack of judges and issued an acquittal decision. (The Disciplinary Board noted that in 2015-2017, the judge had approximately 579 cases, and 634 cases were completed (109.4%).

Case № 5/01-2019 (decision of 10th June 2019)

The judge handed the verdict to the accused with a delay – in 1 month and 14 days, instead of 14 days. Also, the judge referred the case to the Court of Appeals 3 months and 16 days after the submission of the defense to the appeal. In this case, the Disciplinary Board considered the following while reviewing the case:

- In this case, due to a reason independent from the judge, namely after the end of the case review, it was revealed that the audio recording of the minutes of the court session was made with a flaw; During the substantive consideration of the case, the statements of the persons questioned as witnesses were not heard, which were required for the preparation of court verdict; as a result, it became necessary to created a printed version of the session minutes using audio-video recording system requiring certain time.

The Disciplinary Board also took into consideration the fact that in 2017 the judge had 881 to consider, out of which, 762 were completed 762 (86%).

The Disciplinary Board decided that in this case, the violation of the term for handing over a copy of a verdict to the convicted person and the late transfer of the criminal case to the Court of Appeals by the judge are not inspired by criminal signs and accordingly, he/she is not guilty if this disciplinary misconduct.

Accordingly, the judge was acquitted in the disciplinary charge (non-fulfillment or improper fulfillment of the duties of a judge).

Case № 1/01-2020 (decision of 9th November 2020)

During the consideration of the criminal case, the judge stopped the questioning of the witness without the request of the party and demanded an explanation from the lawyer in the following way – **"Maybe you can explain the connection?" we are reviewing the case with part 6 of the Article 260; Your client is accused of illegal purchase and possession of narcotic drugs; This explanation is given to the witness by the court and, surprisingly, when the lawyer asks the witness what he knows about the case under consideration, all the witnesses start talking about the fact that — — he had a spouse; can you explain how this is connected to Article 260... you ask a witness to start telling as if you have pre-arranged what the witness shall talk about?"**

The Disciplinary Board resolved that the judge with such an opinion and form of address, the judge went beyond the function of a neutral arbitrator and expressed clear displeasure and disrespect to the party involved in the process. The judge was found guilty of showing obvious disrespect to a party of the trial and a notice was issued to him/her as a disciplinary measure.

Case №2/01-2020 (decision of 11th December 2020)

The judge heard a private complaint on the case, in which his wife participated as a representative. As the Disciplinary Board explained, the judge was obliged to recuse himself and not participate in the consideration of the private complaint. The judge was found guilty of disciplinary misconduct (refusal to recuse/dismiss the case by the judge when there is a clear ground for that) and a private recommendation card was issued to him/her as a disciplinary measure.

Case №2/01-17 (decision of 25th September 2017 of the Disciplinary Board)
Case № 1/01-18 (decision of 9th March 2018 of the Disciplinary Board)

The cases were about renewing disciplinary proceedings on the decisions taken in 2004-05 due to newly discovered circumstances (since the European Court of Human Rights found a violation of Article 6 of the Convention (right to a fair trial). The Disciplinary Board suspended proceedings of the mentioned cases, due to the expiration of the statute of limitations for disciplinary responsibilities.

REALITY EQUATING RESOLUTION ON CHARGES TO A GUILTY VERDICT

Megi Shamatava

In Georgia, in approximately 50% of criminal cases, bail is granted to the accused as a preventive measure, and the statistic has not changed significantly for years. Bail is one of the types of preventive measures defined by the Criminal Procedure Code of Georgia. Generally, the prevention measure is used for the following purpose:

- The accused not be able to avoid appearing in court;
- To prevent his further criminal activities;
- To ensure the execution of the verdict.

"If the defendant, for whom bail has been selected as a preventive measure, has violated the condition of using this measure or the law, based on the motion of the prosecutor, the bail shall be replaced by a stricter preventive measure." So, to replace bail (as a type of preventive measure) with a stricter preventive measure, one of two grounds must be present:

- The accused does not comply with the condition, which may be expressed in non-payment of bail or failure to comply with the condition of using bail established by the court;
- The accused violated the law, for example, committed a new offense; committed administrative misconduct, or violated the requirements of the law within the framework of a civil relationship.

Thus, even in the presence of one of these two grounds, based on the prosecutor's motion, the bail will be replaced with a more severe preventive measure by the court's decision.

The court is authorized to use imprisonment as a preventive measure against the accused only if it is impossible to achieve proper behavior of the accused by using other,

less severe measures. Thus, imprisonment is the most severe preventive measure. In case the topic of replacing bail with stricter measures, it shall be replaced only with imprisonment, as other preventive measures (Agreement on not leaving the country and good conduct, personal warrant, command oversight of military serviceman's conduct, applicable to military serviceman only) with their context and intensity of intervening in human rights are stricter, but even much lighter.

Let's discuss the case when bail was imposed on the accused as a preventive measure, and because of a violation of the law (for example, in case of committing a new offense), the bail was replaced with imprisonment.

It is interesting, what was meant under "committing the new offense"? A final court verdict of guilty or an indictment?

According to the presumption of innocence, a person is considered guilty (in this case, of committing a new offense) only when a guilty verdict is established by the court. The said process requires so much time that neither prosecution nor the court will wait for the final clarification of the issue. Therefore, in practice, when revising a preventive measure, the commission of a new crime is determined not by a legally binding court verdict, but by a decision on charges. Equating the decision on charges with the verdict of guilty creates such a contradictory reality that using it in practice becomes impossible.

On the other side, if the decision on charges equals a legally binding guilty verdict, this means interpreting the law against the accused, which is unfair. In addition, the prosecution is given an extremely broad opportunity to simply, based on the decision of charges, request replacing bail with imprisonment.

In theory, under such conditions, it would be best if the prosecution, in all cases, would investigate the circumstances of the case in detail and would never abuse the above-mentioned leverage at its disposal. However, this is only a theory and even assuming this theory, every time a defendant's bail is changed to imprisonment, the principle of legality becomes questionable.

Generally, any legal norm must meet the criterion of foreseeability. This requirement is especially strict when the basic human right – of freedom is at stake. The legal norm must be both legal and fair, and at the same time, clear.

The discussed provision defines a condition, in the case of which the prevention measure can no longer achieve its goal - cannot ensure the proper behavior of the accused and, for this reason, it is replaced by the imprisonment of a person, which is logical and appropriate; however, the Code of Criminal Procedure does not define clearly enough how to assess that the condition (violation of the law) for replacing the bail with a stricter preventive measure is in place.

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THE JUDICIARY - A SECRET ENEMY OR FRIEND OF THE ECONOMY?!

Davit Kldiashvili

"Unemployment or economic hardship seems to be the main problems in the sociological studies, judicial independence is usually at the bottom of the list."

Davit Klidiashvili, a lawyer and a master of economic analysis of law, has eleven years of experience in cooperation with the banking sector. Considering this experience, we decided to interview him.

- How judicial independence and freedom of business are interconnected? What is the correlation there?

- Before starting to talk about the direct importance of the judiciary in the development of the economy, we should mention, what is the correlation between law and the economy in general. We often say that justice can be either a hidden enemy or a best friend of the economy. We live in times where the business operates within legal frameworks. It is important for them that the deals achieved (starting a business, labor relations, product sales, etc.) are made effective by the law. If not for the law, these transactions cannot be effective – they would not have a binding force.

Thus, the law is the main driving force for business, and therefore for the economy. To split it into three parts, these are: Material norms, based on which we enter into legal relations, second – dispute review and resolution, and third – so to speak, enforcement of the resolution. The dispute will have no point if the decision is not or cannot be executed, will it?!

- Let's clarify, what is the role of the judiciary in the above-mentioned circumstances?

- Let's start with the matter of competence. Court resolution has a so-called ex- ante function, meaning that court decision affects the future actions of the businesses, or economic agents; a specific type of business relations. When saying the judiciary has a problem of competence, we mean that the judge often has not studied the specifics of a particular type of business relationship. Of course, there are exceptions. The reader shall not think that this issue concerns all the judges, but unqualified decisions are many and it creates a general impression of the system being unqualified and inefficient.

There are cases where it is clear that the judge did not consider the nature of the particular business relationship (what it consisted of, what was the risk, and what would be the consequences of the decision in the future). The judge also did not consider how effectively enforceable his decision would be.

Such are, for example, decisions related to the use of a bank card, the cancellation of a mortgage, and the granting of consent to the disposal of a property by a minor. Let's move to the next problem. Such is delayed court proceedings. In the Economy, there are transactional expenses and the golden rule – the lower these expenses, the faster development of the economy, the higher investments, etc.

One part of this fee is the alleged dispute – how effectively and fast will come to an end; how well a system reviewing a dispute is protected from external interference. In Georgia, we have very high transactional expenses. This is also due to the fact that the court proceedings last for an illogically long time. Imagine a simple example: you sold a product and should have received money, but the other party did not fulfill their obligation. You go to the court to request money from them, but the dispute is delayed in time.

A lease is another simple example. Nowadays, leasing relations are very frequent in Georgia – Many citizens of foreign countries have entered the country. Georgian citizens lease apartments to them. As you know, according to legislation, if the lessee does not pay the lease amount and does not leave the apartment either, the lessor shall address the court for the eviction. In such cases, the first question arising is about the timeline - how long will the case last? Although the legally mandatory case consideration period is short, practice shows that at best, the process in the first instance court lasts a year, a year and a half. Add to this, appeal in the second and third instances, and most importantly - the enforcement. Imagine how this hampers the lease relationship. Your property may become absolutely useless for a certain period – someone could be living in it but you would not have a chance to benefit from it. Most importantly, this encourages us to go beyond legal frameworks.

If the judiciary is not efficient (in terms of time, as well as competence and independence), we choose non-legal ways.

- What do you mean in particular?

- For example, I had a case when a person was telling me that the lessee was neither paying a lease amount nor leaving the property. I was told that he should go to court, but the process would last a year and a half or two years. He goes and tries to evict the lessee by means of physical confrontation. This is already an offense. This is the most important thing we are often forgetting: inefficient judiciary encourages us to go beyond legal frameworks. We as humans have a need for justice. The state must ensure the satisfaction of this need.

- Is this example relevant to larger deals?

- Of course. For example, corporate disputes between shareholders are frequent, including who owns what percentage and what part of the profit. The bigger the deal is, the harder and heavier result of taking the dispute beyond legal frameworks.

The next issue is so-called Clan Management in the judiciary. I have talked about it many times. The only ones not recognizing this are the court and the state. From non-governmental organizations (playing the role of Watchdogs) to the Embassy of the United States, everybody is saying that the judiciary is not independent of the influence. Naturally, the court and the state would not say on their own that these problems exist in the system, but all external observers point to it.

- What is a share of politics in this problem?

- It is hard to specify the exact percentage. The existence of the clan is allowed by the state – a political group. If there was no particular benefit, it would not be like that. What other motive one could have as a political group allows the clan to exist?!

Criminal cases are discussed more often. E.g. if we remember the case of Nika Gvaramia – He is tried and punished under such an article, I do not remember anyone being charged with it. Such cases come to the fore and media attention, but there are hundreds of cases behind them on very simple private legal relations and there are risks to impartiality in them.

Unfortunately, everyone avoids publicly talking about this. Nobody says, for example, that they have traced impartiality in a specific case. If the other party "settles things", they try choosing the same way, instead of speaking out about the problem in the judiciary. Business sees the situation from a short-term perspective. Its motivation is not improving the system, instead, it tries to satisfy its specific interest for that moment.

The problem is well explained through the so-called game theory. Imagine – if every business simultaneously decides that they want a good judicial system, we will have it the second day. However, there is a fair: I may express my concern, but others will not support me. I will be the only one losing.

One additional factor: Questions related to the Georgian court are known even to foreign investors. All those with whom I have worked in private practice say that they know this and therefore evaluate investing here as high-risk. Why do all businessmen want their disputes to be heard by international arbitration? Because there is no trust in the

Georgian judicial system. Also, the problem is not directly perceived by the population. They do not have daily contact with the court. At the beginning of the interview, I mentioned the secret enemy and the secret ally. I highlighted the "secret." Secret means not being directly revealed. To take a simple example: Unemployment or economic hardship seems to be the main problem in sociological studies, and judicial independence is usually at the bottom of the list. Perceptually it is so, but in reality, on the contrary – unemployment and economic hardship are only manifestations of the problem in the judiciary. A private citizen is certainly concerned by the manifestation of the problem, a healthy court is not his demand, and the state benefits from it. In my opinion, our main goal should be explaining as simply and clearly as possible to the widest possible society that their problems are actually the result and the cause is somewhere else.

- Let discuss the issue of competence in more detail. Business disputes are mainly considered by narrow specialization judges. Is this good or bad?

- The presence of narrow specialization is necessary at the principal level. A family dispute and a banking case cannot be considered by the same judge. None of the cases will have the proper quality. It is physically impossible for a particular judge to know the law so deeply in all directions. In theory, it is good for the judges to be specialized, but going deeper, there are two questions arising: is the number of judges considering a particular type of case enough, and the second – is the competence of these judges relevant to the dispute in review.

The higher we move on the judicial hierarchy, of course, the more competence is required. Do not read this as if we have especially incompetent judges in the first instance. No, there are good judges as well in the first instance. Also, judges who have made many controversial decisions, to say the least, suddenly become judges in the Supreme Court and Court of Appeals. Many of my lawyer colleagues share this opinion in private conversations. The problem is that such judges leave the profession of a lawyer dysfunctional. I can recall decisions that radically contradict the principles of law the law students have been studying in universities for years. Such decisions cannot withstand even minimal criticism; they cannot meet the elementary criteria of foreseeability. However, foreseeability is very important. Of course, justice is not always as simple as two times two is four, but two times two cannot be ten either and it shall be somewhere closer to four if translated into math. When the decision of a judge says two times two is ten, it completely ruins the material legal system. It turns out that, as a lawyer, you studied for years for absolutely nothing.

- Is a problem of competence easy to solve? Can it be resolved without reforming the whole system?

- In terms of solution, it is entirely different. If, for example, eradication of clans requires only political will, in terms of competence we face greater difficulty. To start solving this problem today, we will probably need at least ten years. This does not only imply the training of judges but necessary changes in the material legislation too to ease the pressure on the court. Cases should be also resolved through mediation and arbitration, or by so-called pre-trial hearing. Truth is, no one wants to change the situation.

- Do you not think, it is better to create commercial chambers and not to define the narrow specialization of judges?

- Yes, I agree that defining the narrow specialization does not qualitatively solve the problem. It would be much better to create specific chambers within the framework of the reform. This would be more structured.

As for the specialization – of course, I believe that people can acquire new specific professions in a short time, but, when talking about large cases, other circumstances are to be taken into account. For example, some corporate disputes require compliance with not only Georgian but international norms and deep knowledge of practices established in different countries for decades.

- The government brags about its good positioning in international ratings. When investors plan to enter our market and draft a business plan, do they rely on these ratings or are there other sources?

- Let's say this way: when an investor has this rating on one side and on the other side, the assessment of all non-governmental organizations and even the US Embassy that a clan is operating the court, the rating becomes just a piece of paper. No investor will implement a project worth several million based on the rating only.

- How often do they consult with existing business operators? Do they ask the ones who already have business experience in Georgia?

- Per my observation funds that come to Georgia are mainly of high-risk, from countries where Georgian court problems are a common story.

- Why is it bad?

- Because a legal culture that has nothing in common with the Western one is being introduced to us. If we look closer, Western institutional investments are very few in our country. They are mostly from the post-Soviet countries, where corruption and clans are familiar and organic, and maybe, on the contrary, they even feel comfortable here.

- Does political corruption mean that business helps political actors to achieve electoral goals?

- Generally, everybody operates based on logic. Imagine, you are a businessman and have directly or indirectly paid a certain amount of money to the governing party. This is an ordinary investment for you, from which you expect to get a profit. This profit may come in different forms. E.g. winning the tender. This is one of the profits as well.

When the political class is in debt to someone, an investor going for a legal dispute can go to them and ask for help. This is logically expected – if a political class is in material debt to me, I will request a return of favor from them.

- **Can we separate this way - large businesses are more vulnerable to political corruption, and medium and small businesses are more vulnerable to everyday, banal corruption?**

- Of course. Big businesses are more prawn to patronage, small businesses try to survive by different means.

- According to the practice established here, there are criminal case lawyers who cooperate with the Prosecutor's office and can also "settle" the cases informally. Are such lawyers in your field as well?

- When talking about the judges, we shall not forget the corps of lawyers who cooperate with the system in non-legal ways.

- Their identities are known to interested parties, aren't they?

- When there is someone answering, there will be one addressing it.

*Interview was prepared by **Irakli Absandze**.*