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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Independence of judges and lawyers

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, in accordance with Human Rights Council resolution 35/11.

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Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán

Summary

In the present report, the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, focuses on the disciplinary proceedings against judges for alleged misconduct in the exercise of their functions. The Special Rapporteur also covers "disguised" sanctions imposed on judges with the aim of intimidating, harassing or otherwise interfering with the professional activities of judges.

Disciplinary proceedings against judges must be based on the rule of law and carried out in accordance with certain basic principles aimed at safeguarding judicial independence. International standards and the jurisprudence of regional courts and independent advisory bodies provide that: (a) the disciplinary procedure should be established by law; (b) the behaviour that may give rise to disciplinary liability should be expressly defined by law; (c) disciplinary proceedings should be adjudicated by an independent authority or a court; (d) the disciplinary procedure should afford adequate procedural guarantees to the accused judge, and the decision of the disciplinary authority should be motivated and subject to review by a higher judicial authority; and (e) sanctions should be previously established by law and their imposition should be subject to the principle of proportionality.

In order to safeguard the independence of the judiciary and shield judges from prosecution or vexatious civil claims, international and regional standards provide that judges enjoy a certain degree of immunity from civil or criminal jurisdiction. Such immunity is not general; it relates only to activities undertaken in good faith in the exercise of judicial functions. Existing standards do not provide comprehensive guidance on the kinds of behaviour that may trigger the liability or the procedures to establish it.

In the present report, the Special Rapporteur has documented the pattern of various forms of disguised sanctions imposed on judges to harass, punish or otherwise interfere with the legitimate exercise of a judge's professional activities. Unlike the penalties imposed at the outcome of formal proceedings, disguised sanctions are not imposed in the cases provided for by law and/or in accordance with a regulated procedure. Their aim is to induce a judge to dismiss the consideration of a case, to adjudicate a case in a particular way or to punish the judge for a decision taken in the exercise of the judicial function. Judges dealing with politically sensitive cases are particularly exposed to these sanctions.

In the light of existing international and regional standards, the Special Rapporteur offers some recommendations to State authorities on ways to establish and implement clear procedures and objective criteria for sanctioning cases of professional misconduct that are gross and inexcusable and are susceptible to bringing the judiciary into disrepute.

Contents

I. Introduction

1. The present report is the fourth submitted by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, pursuant to Human Rights Council resolution 35/11.

2. In the present report, the Special Rapporteur focuses on disciplinary proceedings against judges for alleged misconduct in the exercise of their functions. He also covers "disguised" sanctions imposed on judges with the aim of intimidating, harassing or otherwise interfering with the professional activities of judges. Throughout the report, different kinds of disguised sanctions have been identified, ranging from "soft" forms of harassment (e.g., a move to a smaller office) to serious and continuous pressure or threats.

3. Since the establishment of the mandate, the mandate holder has dealt with the issue of disciplinary, civil and criminal liability of judges in a number of thematic reports, including one specifically focusing on judicial accountability (A/HRC/26/32). The issue of disciplinary proceedings against judges has also been considered in reports on the exercise of the rights to freedom of expression, association and peaceful assembly (A/HRC/41/48, paras. 5–7), national judicial councils (A/HRC/38/38, paras. 60–65) and guarantees of judicial independence (A/HRC/11/41, paras. 57–63). Judicial accountability has also been addressed in several country mission reports.

4. In preparing the present report, the Special Rapporteur called for contributions from States, international and regional human rights mechanisms, professional associations of judges and civil society. At the time of writing the present report, the Special Rapporteur had received 57 responses to the questionnaire. He wishes to convey his gratitude to all States and non-State actors that contributed to the preparation of the report (see annex). The questionnaire and the submissions are available on the website of the Office of the United Nations High Commissioner for Human Rights.[1]

5. The Special Rapporteur thanks the Human Rights Clinic of the Human Rights Research and Education Centre of the University of Ottawa for its valuable support in the research of the present report.

II. Legal standards

International standards

6. The Basic Principles on the Independence of the Judiciary contain a number of provisions on disciplinary proceedings against judges. In accordance with principle 18, judges can only be suspended or removed from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties. Disciplinary sanctions can only be imposed on the basis of an appropriate and fair procedure (principle 17) and in accordance with established standards of judicial conduct (principle 19), and should be subject to an independent review (principle 20).

7. The revised Universal Charter of the Judge devotes two provisions to the issue of judicial liability. Article 7–1 builds upon the general principles of disciplinary liability set out in the Basic Principles on the Independence of the Judiciary, while article 7–2 regulates the civil and criminal liability of judges.

8. The Human Rights Committee has dealt with the issue of judicial liability in in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial and in a number of views adopted under the communications procedure, where it found that the dismissal of judges in breach of the established procedures and safeguards constituted a violation of article 14 (1) of the International Covenant on Civil and Political

[1] See www.ohchr.org/EN/Issues/Judiciary/Pages/ResponsesDCCLJ.aspx.

Rights read in conjunction with article 25 (c), which recognizes the right of every citizen to have access, on general terms of equality, to public service.[2]

Regional standards

9. A number of regional instruments contain provisions on the disciplinary, civil and criminal responsibilities of judges. They include:

(a) The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA (Law Association for Asia and the Pacific) Region;

(b) The European Charter on the Statute for Judges;

(c) The Commonwealth (Latimer House) Principles on the Three Branches of Government;

(d) The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa;

(e) The Council of Europe recommendation on judicial independence;[3]

(f) The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia.[4]

10. The European Court of Human Rights and the Inter-American Court of Human Rights have considered several disputes involving judges who were dismissed from judicial office,[5] removed from an administrative position without the termination of their duties as a judge,[6] suspended from judicial office[7] or subject to disciplinary proceedings that did not afford basic due process guarantees to the defendant.[8]

11. Advisory bodies of the Council of Europe have also contributed to clarifying the main aspects of judicial liability. The Consultative Council of European Judges adopted an opinion specifically devoted to the principles and procedures governing criminal, civil and disciplinary liability of judges,[9] and referred to this issue in a number of other opinions as well as in the Magna Carta of Judges.[10] The European Commission for Democracy through Law ("Venice Commission") has dealt with the issue of judicial liability in a number of thematic reports,[11] as well as in opinions relating to individual member States.[12]

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2 See *Pastukhov v. Belarus*, communication No. 814/1998, 5 August 2003; *Mundyo Busyo et al. v. Democratic Republic of the Congo*, communication No. 933/2000, 31 July 2003; *Bandaranayake v. Sri Lanka*, communication No. 1376/2005, 24 July 2008.

3 Council of Europe, recommendation of the Committee of Ministers on judges: independence, efficiency and responsibilities, CM/Rec(2010)12, 2010.

4 Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability (June 2010).

5 In relation to the jurisprudence of the European Court of Human Rights, see *Oleksandr Volkov v. Ukraine*, judgment of 9 January 2013; *Sturua v. Georgia*, judgment of 28 March 2017; and *Denisov v. Ukraine*, judgment of 25 September 2018. With regard to the Inter-American Court of Human Rights, see *Reverón Trujillo v. Venezuela*, judgment of 30 June 2009, para. 70; *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, judgment of 23 August 2013; and *Colindres Schonenberg v. El Salvador*, judgment of 4 February 2019.

6 European Court of Human Rights, *Baka v. Hungary*, judgment of 23 June 2016.

7 Ibid., *Paluda v. Slovakia*, judgment of 23 May 2017.

8 Ibid., *Ramos Nunes de Carvalho e Sá v. Portugal*, judgment of 6 November 2018.

9 Consultative Council of European Judges, Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

10 Ibid., Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, paras. 59 and 60; Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, paras. 62–64; Opinion No. 21 (2018) on preventing corruption among judges, para. 30; Magna Carta of Judges, 17 November 2010, paras. 6 and 18–22.

11 See, for example, European Commission for Democracy through Law, "Report on the independence of the judicial system: part I – the independence of judges" (CDL-AD(2010)004), March 2010, paras. 39–43, and "Report on the freedom of expression of judges" (CDL-AD(2015)018), June 2015, paras. 16–23.

12 European Commission for Democracy through Law, "Compilation of Venice Commission opinions and reports concerning courts and judges" (CDL-PI(2019)008), December 2019.

III. Disciplinary liability

Established by law (legality principle)

12. In order to safeguard the independence of the judiciary, some international and regional standards expressly provide that judges may be subject to disciplinary proceedings only in the cases, and in accordance with the procedure, previously established by the constitution or the law.[13] The Human Rights Committee and the Consultative Council of European Judges also consider that the criteria and the procedure for disciplinary action must be regulated by ordinary legislation.[14] The Inter-American Commission on Human Rights has underscored that the absence of clear rules on the grounds and procedure for removing judges from office can adversely affect the independence of the judiciary and "lead to arbitrary abuses of power, with direct repercussions for the rights of due process and of freedom from ex post facto laws".[15]

13. To be characterized as a law, a norm should be accessible to the persons concerned and formulated with sufficient precision to enable them to regulate their conduct and foresee the consequences which a given action may entail. In *López Lone et al. v. Honduras*, the Inter-American Court of Human Rights affirmed that, like criminal sanctions, disciplinary sanctions are an expression of the punitive powers of the State, since they can seriously affect the enjoyment of human rights (especially in situations of the most serious disciplinary measures, such as dismissal). Consequently, the principles of legality, foreseeability and narrow interpretation, which apply in criminal matters, also apply, mutatis mutandis, to disciplinary matters.[16]

Grounds for disciplinary liability

14. International and regional standards do not provide detailed guidance in relation to the behaviour that may lead to the imposition of disciplinary sanctions. Some standards provide that judges may be suspended or removed from office for "behaviour that renders them unfit to discharge their duties"[17] or in cases of gross or serious misconduct incompatible with judicial office,[18] while others state that disciplinary sanctions may be imposed when judges fail to carry out their duties in an efficient and proper manner[19] or in cases of professional misconduct that are gross and inexcusable and are susceptible to bringing the judiciary into disrepute.[20]

15. In a report on judicial accountability, the Special Rapporteur identified persistent failure to perform their duties, corrupt practices, habitual intemperance, wilful misconduct in office, conduct which brings the judicial office into disrepute and substantial violation of judicial ethics as examples of conduct or behaviour that may justify the imposition of disciplinary sanctions, including suspension and removal from office (A/HRC/26/32, para. 84).

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[13] International Association of Judges, Universal Charter of the Judge (2017), art. 7–1; LAWASIA: The Law Association for Asia and the Pacific, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1997), para. 20; Iberoamerican Summit of Presidents of Supreme Courts and Tribunals of Justice, Statute of the Iberoamerican Judge (2001), art. 19; African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle 4 (m) and (r); Magna Carta of Judges, para. 19.

[14] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 19; Consultative Council of European Judges, Opinion No. 3 (2002), para. 63.

[15] Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators: towards strengthening access to justice and the rule of law in the Americas* (December 2013), para. 207.

[16] Inter-American Court of Human Rights, *López Lone et al. v. Honduras*, judgment of 5 October 2015, para. 257.

[17] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary (1985), principle 18.

[18] Beijing Statement, paras. 20 and 22; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle 4 (p).

[19] Council of Europe, European Charter on the Statute for Judges (1998), art. 5.1; Council of Europe recommendation on judicial independence.

[20] Kyiv Recommendations, para. 25.

16. The grounds for disciplinary liability of judges must be established in a State's constitution or in ordinary legislation. When established in the constitution, the grounds for disciplinary liability should be restated in more precise terms in ordinary legislation, as the broad nature of constitutional clauses may not meet the strictest test of legality. Establishing grounds for disciplinary liability enables judges to become aware of the minimum standards of conduct that are expected of them, and provides fair warning to any who may be tempted to transgress those standards.

17. Vague and ambiguous grounds for disciplinary action, such as "offences to the dignity of the judiciary", "unethical behaviour" or "social scandal", open the door to overly broad or abusive interpretations, and therefore risk undermining the independence of the judiciary (A/HRC/44/47/Add.1, para. 58, and A/HRC/23/43/Add.1, para. 76). Overly general formulations may also create uncertainty and unpredictability as to the conduct requiring disciplinary action, in breach of the principle of legality.

18. The responses to the questionnaire show that in some countries, judges continue to be subject to disciplinary proceedings on the basis of overly general and vague grounds for disciplinary action. In Ghana, for instance, national legislation provides that judges may be subject to disciplinary proceedings for "laziness", "lack of punctuality" or "non-performance of [their] duties". In Poland, a retired judge may be subject to disciplinary responsibility "for offending judicial dignity", either after retiring or during his or her time in service. In addition to gross and serious misconduct, in some countries, judges can be removed from office for "gross incompetence", "inefficiency" or "failure to comply with the judicial code of ethics".[21]

19. The Special Rapporteur considers that these grounds for disciplinary action are too broad and general, and expose judges to the risk of being disciplined or removed for the content of their decisions or for a behaviour that does not meet the threshold of serious misconduct. In a number of country mission reports, the Special Rapporteur noted with concern that legislation on judicial liability failed to provide detailed guidance on the infractions triggering disciplinary measures, including the gravity of the infraction that determines the kind of disciplinary measure to be applied in the case at hand (see, e.g., A/HRC/44/47/Add.1, paras. 57 and 58, A/HRC/29/26/Add.1, para. 53, and A/HRC/11/41/Add.2, para. 62).

20. Codes of ethics may serve as a supplementary source of guidance for judges in the interpretation of the law, but they should not be used as a primary source for establishing judicial liability. In some cases, serious violations of ethical norms could also imply fault and acts of negligence that should, in accordance with the law, lead to disciplinary sanctions. Whether disciplinary action is appropriate or not may depend on other factors, such as the seriousness of the transgression, whether or not there is a pattern of improper activity and the effect of the improper activity on others and on the judicial system as a whole.

21. International and regional standards recognize that no disciplinary action can be instituted against a judge as a consequence of the content of her or his decisions, differences in legal interpretation or judicial mistakes. [22] The Special Rapporteur has emphasized this principle in a number of thematic and country mission reports (see, e.g., A/HRC/26/32, para. 87, A/HRC/11/41, para. 58, A/HRC/44/47/Add.1, para. 110, and A/HRC/26/32/Add.1, para. 103). In general terms, legal and procedural errors are to be corrected through the system of appeals. Judicial mistakes can become grounds for disciplinary action only when they are done in bad faith, with the intent to benefit or harm a party at the proceeding or as a result of gross negligence.

[21] J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (London, Bingham Centre for the Rule of Law, 2015), p. 85.

[22] Universal Charter of the Judge, art. 7–1; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle 4 (n) (2); Council of Europe recommendation on judicial independence, para. 66; Magna Carta of Judges, para. 21; Kyiv Recommendations, para. 25.

22. There is no uniform approach at the national level in relation to the definition of grounds for the disciplinary liability of judges. The majority of the countries that responded to the questionnaire have opted for the development of an inclusive list of violations, often grouped together according to the seriousness of the infraction. Other countries chose to define these grounds in general terms,[23] or to link disciplinary offences to the violation of rules of professional conduct set out in the code of ethics.[24] The Special Rapporteur considers that it is a good practice to accompany a comprehensive definition with a non-exhaustive list of the types of behaviour which may trigger a disciplinary liability.

Body in charge of hearing disciplinary cases against judges

23. The power to discipline judges should be vested in an independent body,[25] in the judiciary[26] or in either an independent authority or a court.[27] The principle of the "natural judge" requires that the disciplinary authority be established by law. The establishment of an ad hoc disciplinary panel, composed on a case-by-case basis, cannot be regarded as being compatible with the institutional independence of the judiciary.

24. Some standards expressly provide that the disciplinary authority should be composed primarily of judges elected by their peers.[28] In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, this authority should also include members from outside the judicial profession, but in no case should such persons be members of the legislative or executive branches of the State.[29]

25. In order to establish whether a tribunal or a disciplinary body can be regarded as "independent", regional human rights courts are of the opinion that consideration must be taken with regard to, inter alia, the manner of appointment of the body's members, the duration of their terms of office, the existence of guarantees against external pressure and the question of whether the body presents an appearance of independence.

26. In the case *Oleksandr Volkov v. Ukraine*, for instance, the European Court of Human Rights found that the composition of the High Council of Justice – which consisted of a majority of non-judicial staff appointed directly by the executive and the legislative authorities, with the Minister for Justice and the Prosecutor General serving as ex officio members – disclosed a number of structural shortcomings which compromised the requirements of independence and impartiality, in breach of article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

27. In a preliminary ruling concerning the independence of the Disciplinary Chamber of the Polish Supreme Court, the Court of Justice of the European Union held that national courts applying European Union law have a duty to disregard provisions of national law granting jurisdiction to a court that cannot be regarded as an independent and impartial tribunal pursuant to European Union law.[30] On 8 April 2020, the Grand Chamber of the Court of Justice of the European Union issued an interim measure ordering Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges.[31] In a country mission report, the Special Rapporteur had expressed serious

[23] Sweden, United Kingdom of Great Britain and Northern Ireland.
[24] Cyprus.
[25] Universal Charter of the Judge, art. 7–1.
[26] Statute of the Iberoamerican Judge, art. 20; Beijing Statement, para. 24.
[27] European Charter on the Statute for Judges, art. 5.1; Council of Europe recommendation on judicial independence, para. 69; Kyiv Recommendations, para. 26.
[28] Universal Charter of the Judge, arts. 2–3 and 7–1; European Charter on the Statute for Judges, art. 1.3; Council of Europe recommendation on judicial independence, paras. 26–29; Conference of Chief Justices and Senior Justices of the Asian Region, Istanbul Declaration on Transparency in the Judicial Process (November 2013), principle 15.
[29] Universal Charter of the Judge, art. 2–3; Kyiv Recommendations, para. 9; Istanbul Declaration, principle 15.
[30] Court of Justice of the European Union, *A.K. and others (Independence of the Disciplinary Chamber of the Supreme Court)*, judgment of 19 November 2019, para. 166.
[31] Ibid., *European Commission v. Poland*, order of 8 April 2020.

concerns over the independence of the Disciplinary Chamber, whose members are selected by the "new" National Council of the Judiciary, largely dominated by the political appointees of the current ruling majority (A/HRC/38/38/Add.1, paras. 60–62).

28. With regard to the functions of the disciplinary body, the competence to receive disciplinary complaints and conduct disciplinary investigations and the competence to adjudicate cases of judicial discipline should be vested in separate branches of a judicial council or in different authorities.[32] This does not mean that the creation of a separate institution is required; it is sufficient that when a member of the judicial council initiates a disciplinary procedure as an "accuser", that member does not then take part in the determination of charges in the capacity of a "judge".[33]

29. State practices relating to the composition of the authority in charge of adjudicating disciplinary proceedings against judges differ among countries. In some States, the judiciary retains the competence to hear disciplinary cases,[34] while in others this competence is entrusted to an independent authority, usually the council of the judiciary.[35]

30. In some countries, members of the executive branch, usually the Ministry of Justice, formally appoint the members of the disciplinary authority[36] or participate in disciplinary proceedings as ex officio members of the disciplinary body.[37] In common law jurisdictions, it is still common practice for disciplinary bodies to submit their recommendations on the removal of a judge to the Head of State, who is responsible for the formal act of revocation.[38]

31. The Special Rapporteur has underscored on a number of occasions that the involvement of the executive branch of power in the selection of members of disciplinary bodies or in the disciplinary procedure raises serious concerns with regard to the independence of the judiciary and the separation of power (A/HRC/38/38, para. 61, A/HRC/26/32, paras. 91–93, and A/HRC/11/41, paras. 60 and 61). In paragraph 20 of general comment No. 32 (2007), the Human Rights Committee stressed that the dismissal of judges by the executive, for example, before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal, is incompatible with the independence of the judiciary.

32. In some jurisdictions, the legislative power retains a central role in impeachment procedures against judges.[39] International mechanisms, including the Special Rapporteur, consider that the disciplinary control exercised by legislative bodies in impeachment proceedings poses a threat to the guarantees of the independence and impartiality of judges, especially in the light of the broad and vague language used to define many of the grounds for impeachment.[40]

Disciplinary procedure

33. International and regional standards do not provide detailed guidance on the person or authority that may initiate disciplinary proceedings against judges. According to the Consultative Council of European Judges, the procedures leading to the initiation of disciplinary action need greater formalization.[41] In order to protect the independence of

[32] Consultative Council of European Judges, Opinion No. 10 (2007) on Council for the Judiciary in the service of society, para. 64. See also Kyiv Recommendations, para. 26.
[33] European Court of Human Rights, *Volkov v. Ukraine*, para. 115.
[34] Georgia, Hungary, Poland, Slovakia, United Kingdom.
[35] Argentina, Armenia, Brazil, Colombia, Cyprus, Kazakhstan, Latvia, North Macedonia, Portugal, Romania, Slovenia.
[36] Poland, Sweden, Turkey.
[37] Montenegro, Serbia, Turkey.
[38] J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles*, p. 104.
[39] Argentina, Canada, Colombia, Japan, Maldives, Serbia.
[40] Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators*, paras. 202–205.
[41] Consultative Council of European Judges, Opinion No. 3, para. 68.

individual judges vis-à-vis their hierarchical superiors, some standards provide that court chairpersons should have a limited role in the disciplinary field.[42]

34. The question of who can initiate disciplinary action against judges, and how they do so, is primarily dealt with at the national level. In the majority of countries that responded to the questionnaire, disciplinary proceedings are instigated by certain judges or by an independent authority, such as a judicial council. In some countries, the power to initiate proceedings may also be exercised by members of the executive and the legislative branch,[43] as well as by any individuals having a legitimate interest.[44]

35. International standards provide that disciplinary proceedings against judges must be processed expeditiously and fairly under an appropriate procedure, and stress that the accused judge is entitled to certain minimum procedural guarantees. The Special Rapporteur has consistently held that disciplinary proceedings must be carried out in compliance with due process and fair trial guarantees and that the accused judges must be provided with all the procedural guarantees set out in article 4 of the International Covenant on Civil and Political Rights (A/HRC/38/38, para. 63, A/HRC/26/32, para. 90, and A/HRC/11/41, para. 61).

36. Regional courts have contributed to clarifying the minimum guarantees to which judges subject to disciplinary proceedings are entitled. In *Olújic v. Croatia*, the European Court of Human Rights stated that equality of arms implies that the judge whose office is at stake "must be afforded a reasonable opportunity to present his or her case … under conditions that do not place him or her at a substantial disadvantage vis-à-vis the authorities bringing those proceedings against a judge".[45] In *Constitutional Court v. Peru*, the Inter-American Court held that in order to determine whether dismissed judges have been given an opportunity to defend themselves, regard must be had to whether they had sufficient time to become familiar with the charges against them, whether they had proper access to the probative material, whether the period granted for exercising their defence was adequate and whether they were allowed to cross-examine the witnesses whose testimony was the basis of the disciplinary proceedings.[46]

37. The Basic Principles on the Independence of the Judiciary provide that at the initial stage, the examination of complaints against judges must be kept confidential, unless otherwise requested by the judge (principle 17). However, publicity and transparency should be the guiding principles for later stages of disciplinary proceedings. Disciplinary hearings can be held in camera only exceptionally, at the request of the judge and under the circumstances prescribed by law.

38. International and regional standards provide that decisions in disciplinary cases should be subject to an independent review. This is the case in the majority of countries that responded to the questionnaire. In some countries, however, decisions of the disciplinary authority are final and not subject to appeal, although the affected judge may bring a complaint before a different authority.[47] The lack of judicial review is particularly troublesome with regard to removal decisions adopted by parliament on the basis of impeachment proceedings.[48]

39. In order to enable the effective exercise of the right of appeal, some standards expressly provide that the decisions of disciplinary authority must be motivated and published.[49] As the Inter-American Court of Human Rights has held, the obligation to provide the grounds for decisions is essential to assess the conduct, suitability and

[42] Kyiv Recommendations, para. 14.
[43] Armenia, Ecuador, Slovenia, Sweden.
[44] Argentina, Colombia, Maldives, Portugal, Romania, Russian Federation, Serbia, United Kingdom.
[45] European Court of Human Rights, *Olújic v. Croatia*, judgment of 5 February 2009, para. 78.
[46] Inter-American Court of Human Rights, *Constitutional Court v. Peru*, judgment of 31 January 2001, paras. 81–83.
[47] Sweden, United Kingdom.
[48] Maldives.
[49] Beijing Statement, para. 28; Kyiv Recommendations, para. 26.

performance of the judge as a public official and, ultimately, "to analyse the seriousness of the conduct and the proportionality of the sanction".[50]

Sanctions

40. International and regional instruments do not provide detailed guidance in relation to the sanctions that may be imposed on a judge. Some standards only identify the most serious sanctions, such as "suspension" and "removal from office",[51] while others leave the determination of disciplinary sanctions to national legislation.

41. The responses to the questionnaire reveal wide differences at the national level with regard to the type and scale of disciplinary sanctions that may be imposed on judges. Generally speaking, in common law countries, the only formal sanction outlined in the constitution or national legislation is the removal from office in cases of gross misconduct, while minor disciplinary issues are usually not codified and are dealt with by the Head of the Judiciary (usually the Chief Justice). In civil law countries, legislation usually provides a comprehensive list of sanctions, which may include financial penalties. In some countries, legislation also includes a sort of de minimis requirement to prevent the pursuing of disciplinary proceedings in cases where the violation is in itself insignificant.[52]

42. Disciplinary sanctions must be proportional to the gravity of the infraction.[53] In *Kudeshkina v. Russia*, the European Court of Human Rights held that the dismissal from office as a penalty for criticizing the judiciary's lack of independence did not correspond to the gravity of the offence.[54] In order to assess the proportionality of the sanction, all the circumstances of the case, including the seriousness of the transgression, whether or not there is a pattern of improper activity and the effect of any improper activity on others and on the judicial system as a whole, must be taken into account.

IV. Civil and criminal liability

43. International standards provide that judges enjoy a certain degree of immunity from civil or criminal jurisdiction.

44. Judicial immunity stems from the principle of judicial independence, and aims at shielding judges from any form of intimidation, hindrance, harassment or improper interference in the performance of their professional functions. Without a certain degree of immunity, prosecution or civil claims could be used as a retaliatory or coercive measure to erode independent and impartial decision-making by diverting the court's time and resources from the execution of regular duties.

45. Judicial immunity is not general, but is limited to decisions taken or activities carried out in good faith in the exercise of judicial functions (functional immunity). Like other persons, judges may be subject to civil or criminal responsibility for breaches of civil or criminal legislation committed outside their judicial office.

46. Civil, criminal and disciplinary liability are not mutually exclusive. Acts or omissions put in place by a judge intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence may give rise to disciplinary actions and penalties on the one hand, and to criminal responsibility or civil liability on the other. Disciplinary sanctions may even be appropriate in cases where the civil or criminal liability of the judge

[50] Inter-American Court of Human Rights, *Chocrón Chocrón v. Venezuela*, judgment of 1 July 2011, para. 120.

[51] Basic Principles on the Independence of the Judiciary, principle 18; Beijing Statement, para. 22; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle 4 (p); Istanbul Declaration, principle 15.

[52] Armenia, Hungary, Sweden.

[53] Universal Charter of the Judge, art. 7–1; European Charter on the Statute for Judges, art. 5–1; Council of Europe recommendation on judicial independence, para. 69.

[54] European Court of Human Rights, *Kudeshkina v. Russia*, judgment of 26 February 2009, para. 98.

cannot be established, for instance when criminal proceedings have not been initiated owing to the failure to establish criminal guilt beyond any reasonable doubt.

47. A number of international and regional instruments contain provisions on the civil liability of judges. As a general rule, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions performed in good faith in the exercise of their judicial functions,[55] and in particular for the content of their decisions. International instruments contain different rules with regard to the conduct that may trigger a civil liability of the judge. Some standards provide that it is not appropriate for judges to be exposed to any personal liability, even by way of reimbursement of the State, except in a case of wilful default,[56] while others extend the judge's liability to cases of "gross negligence".[57]

48. The responses to the questionnaire show that at the national level, the issue of civil liability of judges is dealt with in several different ways. In some countries, civil action against judges is not possible, and victims of judicial mistakes can only request damages to the State.[58] In another group of countries, civil action against judges is possible only in limited circumstances provided for by the law and with the authorization of the judicial council or another State authority.[59] In a third group of countries, judges may incur civil liability for wilful default or gross and inexcusable breach of the rules governing the performance of judicial duties, particularly at the instance of the State, after the dissatisfied litigant has established a right to compensation against the State.[60]

49. International and regional standards provide that in the exercise of their professional functions, judges enjoy personal immunity from arrest and prosecution for improper acts or omissions performed in good faith in the exercise of their judicial functions. Judges can only be subject to criminal liability when they wilfully commit a crime in the conduct of their office (e.g., accept a bribe).[61] With regard to offences committed outside their office, judges are subject to criminal liability on the same basis as other individuals.[62]

50. In some countries that responded to the questionnaire, judges can be held responsible for a criminal offence committed in the exercise of their functions only in cases of intentional failings. In other countries, however, judges can be punished, like other public servants, in some cases of gross negligence (e.g., putting or keeping someone in prison for too long).[63]

51. In a few countries, judges may be subject to criminal proceedings as a result of the decisions they have taken in the exercise of their functions.[64] This was the case, for instance, in Ukraine, where the delivery of a deliberately unjust decision by judges constituted a criminal offence pursuant to article 357 of the Criminal Code. The Special Rapporteur notes with appreciation that in June 2020, the Constitutional Court declared this article unconstitutional, stating that the term "unjust decision" was too vague and thus susceptible to undermining the independence of the judiciary.[65]

52. Even in cases when a judge may be legally stripped of immunity, for example in relation to criminal offences such as bribery or corruption, appropriate procedural safeguards must be put in place to protect judges from vexatious or manifestly ill-founded

[55] Basic Principles on the Independence of the Judiciary, principle 16; Beijing Statement, para. 32; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle 4 (n) (1).
[56] Universal Charter of the Judge, art. 7–2; Magna Carta of Judges, para. 22.
[57] European Charter on the Statute for Judges, art. 5–2; Council of Europe recommendation on judicial independence, para. 66.
[58] Cyprus, Estonia, Latvia, North Macedonia.
[59] Armenia.
[60] Brazil, Colombia, Ecuador, Georgia, Hungary, Slovakia, Slovenia, Sweden.
[61] Universal Charter of the Judge, art. 7–2; Council of Europe recommendation on judicial independence, para. 68.
[62] Magna Carta of Judges, para. 20.
[63] Brazil, Sweden.
[64] Moldova, Romania.
[65] Submission of the human rights monitoring mission in Ukraine (of the Office of the United Nations High Commissioner for Human Rights).

complaints that have the sole aim of threatening or putting pressure on them. In some jurisdictions, the procedure aimed at lifting judicial immunity requires the intervention of a judicial council or a similarly independent authority,[66] while in other countries the authorization to proceed is given by the Head of State or national assembly.[67]

V. "Disguised" sanctions

53. The responses to the questionnaire underscore that in several countries, judges are subject to "disguised" sanctions. According to the Global Judicial Integrity Network, judges who lack minimum institutional protection are susceptible to various types of non-disciplinary interference, such as financial insecurity, career instability, a lack of physical safety or undue pressures arising from other institutions or within the judiciary itself. All may be considered forms of disguised sanctions.[68]

54. Disguised sanctions against judges are not regulated in international instruments. Their elements have been identified in the jurisprudence of international and national courts.

55. To qualify as disguised sanction, a measure must have a subjective and an objective element.

56. The subjective element lies in the aim of the measure. Unlike disciplinary measures, which aim at disciplining a judge for misconduct in the exercise of the judge's professional functions, disguised sanctions are not used to pursue a legitimate aim as prescribed by law. Their real aim is to intimidate, harass or otherwise interfere with the professional activities of judges. A measure does not qualify as a disguised sanction if it is imposed to punish alleged misconduct perpetrated by the judge, even if the proceedings were not in compliance with international or national standards.

57. The objective element consists in the fact that such measures always have an adverse impact on the professional life of the judge (e.g., term of office, financial security, personal safety, adequate remuneration, conditions of service or age of retirement). Measures that do not have an adverse impact on the career of the judge do not constitute a disguised sanction.

58. Disguised sanctions may take various forms, from "soft" forms of harassment (e.g., a move to a smaller office) to serious and continuous pressure or threats. They may be adopted to induce a judge to dismiss the consideration of a case or to adjudicate it in a particular way, or constitute a punishment for an opinion expressed or a decision taken in the exercise of the judge's professional activities, even if the sanctioned behaviour is in line with national legislation and relevant standards of professional conduct. Regional human rights courts considered various cases in which judges have been subject to disciplinary proceedings or removed from office as a result of the critical views they expressed on the judiciary or the reform of the justice system.[69]

59. Disguised sanctions may be imposed by the judicial hierarchy or by other State institutions, and be aimed at an individual judge, at a particular category of judges (e.g., Supreme Court judges) or at the judiciary as a whole. Judges who deal with cases that have high political or social impact (e.g., anti-corruption, organized crime, human rights violations perpetrated by State officials) are particularly exposed to these sanctions. Even when addressed to an individual judge, these sanctions may have a chilling effect on other judges, who may be discouraged from engaging in similar activities out of fear of being subjected to punitive measures.

[66] Armenia, Georgia, Montenegro, North Macedonia, Sweden.
[67] Hungary, Kazakhstan, Latvia, Slovenia.
[68] Submission of the United Nations Office on Drugs and Crime (UNODC).
[69] See, for example, European Court of Human Rights, *Baka v. Hungary*, *Kudeshkina v. Russia* and *Wille v. Liechtenstein*, judgment of 28 October 1999. See also Inter-American Court of Human Rights, *López Lone et al. v. Honduras*.

60. The responses to the questionnaire show that many judges have been subject to "judicial harassment" – the malicious and often simultaneous use of disciplinary proceedings, civil suits and/or prosecution as a retaliatory or coercive tactic to force a judge to dismiss the consideration of a particular case, move to another court or tribunal or resign.[70] At times, judicial harassment has constituted a punishment for a decision rendered by the judge in the exercise of professional functions, or for critical views expressed with regard to the judicial hierarchy or the reform of the judiciary.[71] In some cases, legal proceedings against judges remain pending for years in order to exert continuous pressure on independent judges who are not willing to follow the directives imposed by the Government or the judicial hierarchies.

61. Some of the judges' associations that responded to the questionnaire reported that their executive members have been subject to threats, pressure or judicial harassment as a result of the activities they carry out in favour of their constituency.[72]

Measures affecting security of tenure

62. Disguised sanctions affecting the judge's tenure include, among others:

(a) Removal from office outside the instances and/or without the procedure provided for by the law;

(b) Pressure to resign, request early retirement or take an extended leave of absence or medical leave;

(c) Temporary suspension pending the outcome of civil or criminal proceedings;

(d) Dismissal as a result of a negative professional evaluation;

(e) The non-renewal of a judge's temporary appointment.

63. Independently of whether the mandate of the judge is for life or for a limited period of time, judges' tenure must be guaranteed through the irremovability of the judge for the period the judge has been appointed, except for cases of incapacity or serious misconduct. The mandate holder has considered several cases in which members of the executive or the legislative branches of power have removed judges from office in reprisal for actions or decisions taken in the exercise of their functions.[73] In other cases, the judge was forced, through threats and intimidation, to resign, request early retirement or take an extended leave of absence.

64. Temporary suspension pending the outcome of legal proceedings initiated against the judge may be justified as necessary to maintain public confidence in the judiciary, in particular in those cases where a judge faces credible allegations of serious misconduct. However, there are several cases in which temporary suspension is used as an indirect way to intimidate or to punish an independent judge or to prevent a judge from adjudicating a case pending before him or her. In extreme cases, the suspension may last for a very long time, and amount to a de facto removal from office.

65. In countries where judges are subject to professional evaluations at regular intervals,[74] the assessment procedure may be used to exert pressure on independent judges or to remove them from office in reprisal for their independent position on issues relating the application of the law or the organization of the justice system. In some of these countries, judges may be dismissed from office as a result of unsatisfactory marks received

[70] Bolivia (Plurinational State of), Brazil, Ecuador, Guatemala, Moldova.
[71] Poland, Romania.
[72] Guatemala, Poland, Romania.
[73] See, for example, UA LKA 7/2012 (available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=20485), AL PHL 6/2018 (available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23835) and AL NGA 1/2019 (available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24327), concerning the removal of the Chief Justice in Sri Lanka, the Philippines and Nigeria, respectively.
[74] Kazakhstan, Moldova, Serbia, Slovakia, Slovenia.

in the process, often on the basis of an evaluation that focuses mainly on productivity, rather than on qualitative parameters.[75]

66. In countries where judges are not appointed for life,[76] judges on a fixed-term contract may feel pressured to decide in favour of the State in order to improve their chances of being reappointed. In a number of reports, the Special Rapporteur has noted with concern that the system of temporary appointments exposes judges to the risk of undue pressure and interference, weakening both the actual and perceived independence of the judge (A/HRC/11/41, para. 54, A/67/305, para. 52, and A/HRC/44/47/Add.1, para. 46). Similar concerns have been expressed by the Consultative Council of European Judges and the European Commission for Democracy through Law.[77]

Measures affecting conditions of service

67. Disguised sanctions affecting the judge's conditions of service have an adverse impact on the judge's personal or financial security, physical safety or career opportunities. They include:

(a) "Soft" forms of harassment that adversely affect day-to-day work (e.g., a move to a smaller or shared office or the discontinuation of administrative assistance);

(b) Financial penalties, such as the reduction of basic remuneration or the elimination or reduction of benefits, such as a rental subsidy or the use of a service vehicle;

(c) Transfer to a different court or tribunal without the judge's consent and outside the situations referred to in international standards;

(d) Discriminatory treatment in relation to career development, for example with regard to promotion or access to continuous training.

68. The mandate holder has considered various situations in which disguised sanctions affect the judge's conditions of service. Usually, these measures are portrayed as legitimate decisions taken by the judge's hierarchical superior with a view to rationalizing the organization or strengthening effectiveness. Examples include when a judge is transferred to another department of the same court that deals with unfamiliar issues, or is moved to a smaller or shared office. Another example is when a judge's entitlement – for instance, administrative support or police escort for a judge at risk – is rejected or discontinued on the basis of alleged financial cuts or budgetary reasons.

69. One of the most recurrent forms of disguised measures affecting a judge's conditions of service is the transfer to a different court or tribunal as a measure to punish an independent and courageous judge and to deter others from following her or his example. This measure has reportedly been used as a disguised sanction in several countries, sometimes under the threat of dismissal or the imposition of disciplinary sanctions, in order to prevent a judge from adjudicating on a particular case or to punish and marginalize a judge regarded as too independent or unsympathetic to the Government's interests.[78]

70. International standards provide that a judge should not be transferred from one jurisdiction or function to another "without his freely given consent, except pursuant to a system of regular rotation or promotion formulated after due consideration by the judiciary".[79] The Special Rapporteur has stated on a number of occasions that the principle of irremovability extends to appointment (including by way of promotion) or assignment to a different office or location without the judge's consent (other than temporarily, or in the case of a court's reorganization).

[75] International Commission of Jurists, *Serbia's Judges and Prosecutors: The Long Road to Independent Self-Governance* (2016), pp. 35–38.

[76] Serbia, Switzerland, Uzbekistan.

[77] Consultative Council of European Judges, Opinion No. 1, paras. 46–53; European Commission for Democracy through Law, "Judicial appointments" (CDL-AD(2007)028), paras. 40–43.

[78] Hungary, Mongolia, Poland, Russian Federation, Serbia, Turkey.

[79] UNODC, *The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11* (2015), para. 59.

71. In some countries, decisions on the career development of judges are taken by Government authorities, usually the Ministry of Justice. This exposes judges to the risk of political pressure, especially in cases where decisions on promotion are not based on objective factors, such as integrity, qualifications and experience, or are not taken in accordance with a clear and transparent procedure established by law. This is reportedly the case in Serbia, where decisions on promotion adopted by the High Judicial Council do not indicate the criteria used for ranking candidates, creating suspicion that "obedient" candidates may be given advantage at the expense of independent judges.[80]

72. In a number of country mission reports, the Special Rapporteur has noted that in countries in which the system of career advancement is either not regulated by law or based on a procedure that is not followed in practice, promotion may be used as undue means of influencing the work of judges and, ultimately, their independence (see, e.g., reports on Sri Lanka (A/HRC/35/31/Add.1, para. 40), Pakistan (A/HRC/23/43/Add.2, para. 42) and Bulgaria (A/HRC/20/19/Add.2, paras. 52 and 53)).

Attacks against the judiciary

73. Example of collective disguised measures imposed on the judiciary as a whole or on certain categories of judges may include:

(a) Threats and intimidation affecting the liberty and security of judges;

(b) Arbitrary arrest and detention;

(c) Collective dismissal/removal from office outside the cases and/or without the procedure provided for by the law;

(d) Attacks on the prestige and the authority of the judiciary through the media.

74. In many countries, certain categories of judges, for instance those dealing with corruption, organized crime or gross human rights violations perpetrated by the armed forces, are subject to systematic criminalization, threats, intimidation (including through surveillance and monitoring) and discriminatory treatment with regard to career opportunities. These measures may be put in place by State authorities or by non-State actors with the acquiescence of State authorities, and aim at preventing judges from dealing with politically sensitive cases or adjudicating them in a particular way. Overall, these measures also have the effect of casting doubt on the independence of the judiciary, and indirectly on the legitimacy of its decisions.

75. Since its establishment, the mandate holder has considered several cases of judges who were deprived of their liberty as a punishment for their decisions or actions taken in the exercise of their profession. In 2018, for example, the Special Rapporteur denounced the allegedly arbitrary arrest and detention of two Supreme Court judges in Maldives as a way of pressuring the remaining judges to overturn the Court's previous unanimous ruling on the release and retrial of nine political leaders.[81] In Turkey, measures undertaken under a state of emergency have resulted in the summary and mass dismissal of around 30 per cent of active judges and prosecutors, as well as in the mass arrest and detention of judges and prosecutors on the basis of overly broad and vague allegations of being members of the armed Fethullah terrorist organization (FETÖ/PDY).

76. The mass removal of judges by parliament as a result of changes in the parliamentary majority is a recurrent example of a disguised measure affecting the judiciary as an institution. In the case *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, the Inter-American Court of Human Rights concluded that the arbitrary removal of 27 magistrates of the Supreme Court through a parliamentary resolution and in the absence of a clear legal framework for their removal from office constituted a breach of the right to

[80] Submission of the Judges' Association of Serbia.

[81] See AL MDV 2/2018. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23641.

judicial independence.[82] Other examples of the removal of judges as a result of political changes in the parliamentary majority have been reported in a number of Commonwealth countries, such as Eswatini, Lesotho, Maldives, Nauru and Seychelles.[83]

77. The dismissal of judges has sometimes been justified by the need to reorganize or rationalize the country's justice system. In some cases, the removal from office is the result of the abolishment of the court as part of a broader reorganization of the justice system. In other cases, the effect of legislative changes is aimed at increasing the efficiency of the judiciary. An example of the latter measure is the adoption of an Act with regard to the Supreme Court in Poland, which lowered the mandatory age of retirement for Supreme Court judges from 70 to 65. This measure, in the Special Rapporteur's view, would result in the early retirement of approximately 40 per cent of judges and constitute a disguised measure to get rid of "old" judges appointed by the previous parliamentary majority and replenish them with new judges chosen along political lines (A/HRC/38/38/Add.1, paras. 55–57 and 72).

78. Sometimes, the prestige and authority of the judiciary is undermined by attacks carried out by political parties, State institutions or non-State actors, such as powerful business enterprises. Such attacks may be addressed to the judiciary as a whole, depicting it as an inefficient, corrupt or unaccountable institution, or to particular categories of judges, for instance those dealing with politically sensitive cases. These attacks have the hidden scope of undermining the independence of the judiciary and the separation of powers, with a view to bringing the judiciary under the control of the executive branch. Campaigns against judges have traditionally been carried out through traditional media, but are now increasingly taking place on social media.

79. An example of these attacks is the large-scale propaganda against the judiciary that accompanied the implementation of the judicial reform in Poland. In the country mission report, the Special Rapporteur noted with concern that the negative and unfair rhetoric against judges hampered public trust and confidence in the judiciary and undermined the capacity of the judiciary to decide the matters before it impartially and in accordance with the law (A/HRC/38/38/Add.1, paras. 17–19 and 79).

80. Sometimes, individual judges come under attack because of the decisions they have taken in the exercise of their profession. The mandate holder has documented a number of attacks on individual judges carried out by members of the legislative and executive branches through media associated with them or on social media. In July 2019, for example, the Special Rapporteur expressed concerns at the derogatory statements made on social media by the then Minister for Interior of Italy against the judge for preliminary investigations of Agrigento, who ordered the immediate release of the captain of a vessel who docked in the port of Lampedusa, in breach of the order of Italian authorities, in order to save the lives of people on board.[84]

81. Some of the judges' associations that responded to the questionnaire have also reported attacks on individual judges in relation to the decisions they have adopted or the nature of the cases they are responsible for.[85] In Guatemala, judges of the "high-risk" jurisdiction, dealing with cases of corruption, organized crime and gross human rights violations, are subject to systematic attacks, reprisals and intimidation in the press, largely controlled by political parties or powerful economic groups, and in social media. The Special Rapporteur documented widespread media campaigns aimed at discrediting individual judges during a country visit that took place in 2009 (A/HRC/11/41/Add.3, para. 80). The Inter-American Commission on Human Rights has adopted interim protection

[82] Inter-American Court of Human Rights, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 155.

[83] Submission of the Commonwealth Magistrates and Judges Association.

[84] See AL ITA 6/2019. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24702.

[85] Guatemala, Serbia.

measures for a number of judges who face threats to their lives and personal integrity as a result of the cases for which they are responsible.

VI. Conclusions

82. **The present report provides an analysis of the disciplinary, civil and criminal liability of judges. It analyses the cases in which judges may be subject to discipline for alleged misconduct in the exercise of their functions and the procedure to be followed to establish whether the imposition of a sanction is justified, taking into account all the circumstances of the case. It also covers the phenomenon of "disguised" sanctions that may be imposed on judges with the aim of intimidating, harassing or otherwise interfering with their professional activities.**

83. **Disciplinary proceedings against judges must be based on the rule of law and carried out in accordance with certain basic principles aimed at safeguarding judicial independence. International standards and the jurisprudence of regional courts and independent advisory bodies provide that: (a) the disciplinary procedure should be established by law; (b) disciplinary proceedings should be adjudicated by an independent authority or a court; (c) the disciplinary procedure should afford adequate procedural guarantees to the accused judge, and the decision of the disciplinary authority should be motivated and subject to review by a higher judicial authority; (d) the behaviour that may give rise to disciplinary liability should be expressly defined by law; and (e) sanctions should be previously established by law and their imposition should be subject to the principle of proportionality.**

84. **In order to safeguard the independence of the judiciary and shield judges from prosecution or vexatious civil claims, international and regional standards provide that judges enjoy a certain degree of immunity from civil or criminal jurisdiction. Such immunity is not general; it relates only to activities undertaken in good faith in the exercise of judicial functions. Existing standards do not provide comprehensive guidance on the kinds of behaviour that may trigger the liability or the procedure to establish it. This is an area that is comparatively less developed than the disciplinary liability of judges, and is mainly regulated at the national level, especially with regard to the question of whether, and to what extent, a person alleging to have been a victim of a miscarriage of justice can bring a complaint against the judge.**

85. **In the present report, the Special Rapporteur has documented various forms of disguised sanctions imposed on judges to harass, punish or otherwise interfere with the legitimate exercise of their professional activities. Unlike the penalties imposed at the outcome of disciplinary, civil or criminal proceedings, disguised sanctions are not imposed in the situations provided for by the law and/or in accordance with a fair, transparent and objective procedure. Their aim is to induce a judge to dismiss the consideration of a case or adjudicate it in a particular way, or to punish the judge for a decision taken in the exercise of the judicial function. Judges dealing with politically sensitive cases are particularly exposed to these sanctions.**

VII. Recommendations

86. **In the light of existing international and regional standards outlined in the report, and taking into account the jurisprudence of regional human rights courts and independent advisory bodies, the Special Rapporteur would like to offer the following recommendations.**

Disciplinary liability

87. **Judges may be subject to disciplinary proceedings only in the cases, and in accordance with the procedure, previously established by the constitution or the law. The law should regulate the main aspects of the disciplinary procedure, including the**

grounds for disciplinary liability of judges, the composition and functions of the body in charge of handling these proceedings, the procedural guarantees afforded to the accused judge and the sanctions that may be imposed in relation to the specific offence perpetrated by the judge.

88. **The grounds for disciplinary liability of judges must be established in the constitution or in ordinary legislation. The law should provide a clear definition of the punishable conduct and its main elements, so as to distinguish that conduct from non-punishable behaviours. Only cases of professional misconduct that are gross and inexcusable and are susceptible to bringing the judiciary into disrepute should be punished.**

89. **A judge should not be subject to disciplinary action as a consequence of the content of his or her decision, except in cases of wilful default. Legal or procedural mistakes committed by a judge are to be corrected through the system of appeals.**

90. **The power to discipline judges should be vested in a judicial council (or a similarly independent authority) or a court. Judicial councils should be composed primarily of judges elected by their peers. In order to avoid the risk of corporatism and self-interest, judicial councils may also include members from outside the judicial profession. Active politicians and members of the legislative or executive branches of power cannot simultaneously serve on a judicial council.**

91. **In countries where the power to remove judges from office is entrusted to the parliament, the constitution or the law should regulate the main aspects of the impeachment procedure, including the grounds for removal and the procedural guarantees afforded to the accused judge. The use of qualified majority may reduce the danger of executive control over impeachment procedures.**

92. **The competence to receive disciplinary complaints and conduct disciplinary investigations and the competence to adjudicate cases of judicial discipline should be vested in separate branches of a judicial council or in different authorities. In order to protect the independence of individual judges vis-à-vis their hierarchical superiors, court chairpersons should not have the power to either initiate or adopt a disciplinary measure.**

93. **Disciplinary proceedings must be determined in accordance with established standards of judicial conduct. The accused judges must be provided with all the procedural guarantees set out in article 14 of the International Covenant on Civil and Political Rights, including the right to defend themselves in person or with the assistance of a legal counsel of their choice and the right to a fair hearing.**

94. **Decisions in disciplinary cases should be subject to judicial review. The Special Rapporteur underscores that the right to an independent review is of particular importance in cases of disciplinary decisions adopted by political bodies, for example in the case of dismissal by the parliament (A/HRC/11/41, para. 61).**

95. **The Special Rapporteur considers that it is neither possible nor desirable to develop a general list of disciplinary sanctions applicable to judges worldwide. It is for competent national authorities to define the sanctions permissible under their own disciplinary systems. Disciplinary measures must be proportional to the gravity of the infraction. Removal from office should be reserved for the most serious offences, or in cases of repetition (A/HRC/41/48, para. 99, and A/HRC/11/41, para. 59).**

Civil and criminal liability

96. **Judges should be immune from civil and criminal liability in relation to activities carried out in good faith in the exercise of their judicial functions, except in a case of wilful default. In particular, they should never be held criminally liable for handing down "unjust judgments" or committing legal errors in their decisions (A/HRC/11/41, para. 65).**

97. **In order to protect judges from potentially frivolous or false accusations or complaints, judges may only be legally stripped of their immunity with the intervention of a judicial council or a similarly independent authority.**

98. **Judges may be subject to civil or criminal responsibility on the same basis as other individuals for breaches of civil or criminal legislation committed outside their judicial office.**

"Disguised" sanctions

99. **States must adopt all appropriate measures to protect and promote the individual and institutional independence of the judiciary. In order to safeguard their independence, the status of judges, including their terms of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement, should be adequately secured by law.**

100. **In order to avoid being used as a means to interfere with the independence of the judiciary, accountability mechanisms should follow clear procedures and objective criteria provided for by law and established standards of professional conduct, provide a clear distinction between disciplinary, civil and criminal liability, and prescribe the types of sanctions to be applied (A/HRC/26/32, para. 78).**

101. **Accountability mechanisms should protect judges from any kind of threat, harassment, pressure or interference, regardless of the source, and impose adequate penalties on those who attempt to interfere with the free and independent exercise of the judicial profession.**

Annex

List of respondents

States

Argentina

Armenia

Brazil

Colombia

Croatia

Cyprus

Ecuador

Georgia

Ghana

Hungary

Kazakhstan

Maldives

Mauritius

Montenegro

North Macedonia

Poland

Portugal

Russian Federation

Slovakia

Slovenia

Sweden

Togo

Tunisia

Ukraine

United Kingdom of Great Britain and Northern Ireland

Judges' associations

Association of Croatian Judges

Mongolian Judges' Association

Association of Judges of the Republic of Armenia

Association of Austrian Judges

Bulgarian Judges Association

Canadian Superior Courts Judges Association

Commonwealth Magistrates and Judges Association

Czech Union of Judges

Cyprus Judges Association

Estonian Association of Judges

Georgian Association of Judges

Association of Guatemalan Judges for Integrity

Association of Polish Judges IUSTITIA

Judges' Association of Japan

Judges' Association of Serbia

Judicial Conduct Investigations Office (England and Wales)

Judicial Conference of Australia

Latvian Association of Administrative Judges

Romanian Judges Forum Association

Association of Magistrates in Romania

Slovenian Association of Judges

Professional Association of the Judiciary (Spain)

Swiss Association of Magistrates

Association of Judges "THEMIS" (Poland)

Union of Judges of Kazakhstan

Union Syndicale des Magistrats (France)

Civil society organizations

Due Process of Law Foundation (DPLF)

International Commission of Jurists

Maat for Peace, Development and Human Rights (Turkey)

Open Dialogue Foundation

Intergovernmental organizations

Human rights monitoring mission in Ukraine (of the Office of the United Nations High Commissioner for Human Rights)

United Nations Office on Drugs and Crime