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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION  
ON  
THE LAW ON  
DISCIPLINARY RESPONSIBILITY AND DISCIPLINARY  
PROSECUTION OF JUDGES OF COMMON COURTS  
OF GEORGIA**

**On the basis of comments by**

**Ms Angelika NUSSBERGER (Substitute Member, Germany)  
Ms Hanna SUCHOCKA (Member, Poland)  
Mr Hans VOGEL (Member, Sweden)**

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\* This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.

1. By letter dated 25 October 2006 addressed to the President of the Venice Commission, the Chair of the Parliamentary Assembly of the Council of Europe's Monitoring Committee, Mr Eduard Lintner, requested an opinion on: (1) the Law on "Disciplinary responsibility and disciplinary prosecution of judges of common courts" of Georgia, in particular with regard to the principle of the independence of the judiciary and (2) the scope and application of Article 2.2.a of that Law, which was the basis for disciplinary proceedings brought against a number of judges, including judges of the Supreme Court who were dismissed by decision of the disciplinary board dated 26 December 2005 (decision confirmed by the Supreme Court of Georgia on 10 August 2006).
2. The present opinion was drawn up on the basis of comments by Ms Angelika Nußberger (CDL(2007)020), Ms Hanna Suchocka (CDL(2007)021) and Mr Hans Vogel, who were invited by the Venice Commission to act as rapporteurs.
3. This opinion was adopted at the ... Plenary Session of the Venice Commission (Venice, ...).

## GENERAL REMARKS

4. Disciplinary proceedings were brought against a number of Georgian judges for the misinterpretation of two provisions of the Criminal Procedure Code of Georgia. The accusations were based on Article 2 of the *Law of Georgia on disciplinary responsibility and disciplinary prosecution of judges of common courts* (hereinafter the "Law"). This provision, which sets out the basis for the disciplinary responsibility of judges and enumerates the types of disciplinary violations, also provides for sanctions in case of a "gross violation and repeated violation of law in the process of discussion of a case."
5. According to media reports, the proceedings, which resulted in a decision to dismiss a number of judges, opened a discussion in the country on disciplinary measures taken against judges and the threat that they pose to the guarantees for the judges' independence. The question raised, in particular, was how to seek a balance between the disciplinary responsibility of judges and the guarantees for their independence without compromising the latter by limiting it unnecessarily.
6. The legislation that regulates the basis for a judge's disciplinary responsibility and the disciplinary body that makes the decision need to be clearly defined. Countries often encounter difficulties when the grounds for disciplinary action are not sufficiently detailed. This lack of clearly defined rules creates the risk for arbitrary prosecution of judges for disciplinary offences. For this reason, the Consultative Council of European Judges (CCJE) of the Council of Europe, in its Opinion No. 1 of 2001 on the Independence of the Judiciary, recommended to set standards that define not just the conduct which may lead to removal from office of a judge, but also all conduct which may lead to any disciplinary steps or change in status.
7. Although grounds for disciplinary action vary from one country to the next, there are common grounds that can be identified. For instance, laws on judicial conduct or codes of ethics generally require the judge to refrain from conduct that is likely to compromise the integrity and independence of the judiciary; to avoid undue delays in the performance of their duties; to behave in such a manner as not to damage nor discredit the reputation of the judiciary; not to commit offences nor omissions in the discharge of their official duties or grave disregard of deadlines for delivering judgments.

8. The European Charter on the statute for judges<sup>1</sup> stipulates in its Article 5.1 that: *“The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.”*

9. The basis for disciplinary proceedings brought against judges based on the rule of law require the following:

- Violation of a duty expressly defined by law;
- Decision of a body composed at least to one half of elected judges;
- Fair trial with full hearing of the parties and representation of the judge;
- Definition of the scale of sanctions by law;
- Imposition of the sanction subject to the principle of proportionality;
- Right to appeal to a higher judicial authority.

## **CONSTITUTIONAL ISSUES RELATING TO THE INDEPENDENCE OF THE JUDICIARY**

10. In its recent Opinion on the draft Constitutional Law of Georgia on amendments to the Constitution (CDL-AD(2006)040), the Venice Commission already referred to the need for rules on the appointment and dismissal of judges paying due attention to safeguarding their independence. Paragraph 11 of that Opinion sets out that *“The second proposed amendment to Article 73 provides for deleting the provision that the President chairs the highest Council of Justice and appoints and dismisses judges. This provision was indeed criticised by the Venice Commission in its above-mentioned Opinion on previous amendments to the Constitution of Georgia. Deleting this provision is, however, on its own not at all sufficient. What would be required is to clearly provide in the Constitution the composition and powers of the Council of Justice and to enshrine in its text rules on the appointment and dismissal of judges safeguarding their independence.”*

11. The above recommendation has a direct link to the present opinion because the High Council of Justice nominates the candidates for the Disciplinary Collegium.

## **SCOPE OF ARTICLE 2 OF THE LAW**

12. The Georgian Constitution regulates the principle of judicial independence by stating that a judge is subject only to the Constitution and the law and that the removal of a judge from considering a case, his or her pre-term dismissal or transfer to another position is permissible

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<sup>1</sup> DAJ/DOC (98) 23, dated Strasbourg, 8-10 July 1998, available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/legal\\_professionals/judges/instruments\\_and\\_documents/charte%20eng.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf)

only in circumstances determined by law (Article 84). In this way, the Constitution provides the grounds for pre-term dismissal of a judge, but places no material restrictions for the legislator on the circumstances in which this may occur.

13. The law implementing the question of a judge's independence and his or her disciplinary responsibility, alluded to in the Constitution, is the *Law of Georgia on disciplinary responsibility and disciplinary prosecution of judges of common courts*. The basis for the disciplinary responsibility of a judge and the types of disciplinary violations are enumerated in Article 2 of this Law.

14. Article 2.2.h of the Law contains an open clause referring to "*other kinds of violation of norms of judicial ethics*". In this clause, it is unclear whether reference is made to an existing Code of Ethics or to general, unwritten rules. It is therefore not foreseeable which actions fall under this provision.

15. With respect to foreseeability, the European Court of Human Rights has developed criteria, over the years, for deciding whether interference with a right is provided for by law and concluded that it is not sufficient that a legal regulation exist, but that it be precise and its consequences foreseeable for those concerned. These requirements are applicable to disciplinary proceedings because here too, it must be clear which actions are susceptible to disciplinary responsibility.

16. Article 2.2.a of the Law, a clause that was inserted on 23 June 2005, provides that the following qualifies as a disciplinary violation: any "*gross violation or repeated violation of law in the process of discussion of a case*" and is equally unclear. An explanation was added to this provision, which reads: "*A violation of the law, that caused damage (or could cause such) to legal rights and interests of the participant of court hearings or a third person shall be deemed as a gross violation. Violation committed three or more times shall be deemed a repeated violation of the law. Incorrect interpretation of the law by a judge based on its belief shall not be considered a gross violation and/or repeated violation of the law. (23.06.2005 # 1752)*". It is unclear if this explanation is meant to be an unofficial comment attached to the provision or whether it is a part of the provision itself.

17. The violations mentioned in Article 2.2.a are so broadly formulated that they could cover a great variety of judicial conduct engaged in while a case is being decided. In this way, rather than clearly restricting the scope of a judge's disciplinary responsibility, it actually poses a threat to the principle of judicial independence. The purpose of this principle is to ensure that judges are free from outside influence when deciding a case on the basis of the law and do not have to fear any consequences for performing their duties except for the (criminal) case of distortion of justice.

18. In this provision, the grounds on which a judge may face disciplinary responsibility centre exclusively on a judge's conduct whilst discussing a case and when handing down a verdict or ruling. They therefore apply to the judicial process itself, to the judge's interpretation of the law while considering a case and to the very essence of a judge's function i.e. independent adjudication. This provision therefore encroaches on the extremely delicate sphere of a judge's independent decision-making in accordance with the Constitution and the law.

19. Interpreting the law is an essential part of rendering a decision in a concrete case and it is impossible to decide any case without doing so. In a judge's adjudication, s/he should not be

restricted solely by existing case-law. The essence of a judge's function is to independently interpret legal rules and to apply them to the facts of a given case. There are no absolutely clear legal provisions that would never necessitate an interpretation. Interpretation may also go beyond the wording of a provision, for instance if the provision has to be interpreted in line with the Constitution or with international law.

20. The principle of judicial independence serves the purpose of securing the process of interpreting the law and applying it to concrete cases. According to Principle I 2 d) of Recommendation No. R(94)12 on the independence, efficiency and role of judges, "*judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts and in pursuance of the prevailing rules of the law*". Therefore, as further set out by Principle V 3 a) and b), a judge should have the responsibility "*to act independently in all cases and be free from any outside influence*" and "*to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law...*" .

21. If we were to consider that the explanation to Article 2.2.a was a part of the Law and that, according to its wording, a wrong interpretation of the law cannot be considered a violation of Article 2.2.a, the latter cannot be considered to be sufficiently precise to be compatible with the rule of law. A distinction would have to be made between incorrect interpretation of the law based on the judge's belief on the one hand and violation of the law on the other. Since the violation has to occur "*in the process of discussion of a case*", it might consist only of the misbehaviour of a judge during a trial. This situation would, however, also come under Article 2.2.d of the Law, according to which the following qualifies as a disciplinary violation: "*[a]n action inappropriate for a judge, which abuses the prestige and authority of a court or promotes the loss of confidence towards a court*". Article 2.2.a is therefore unclear and there is a justified fear that disciplinary responsibility might extend to the adjudication process itself.

23. It appears that the only way to undo the consequences of an offence committed by a judge in the course of the adjudication process is by way of appeal. The correction of an erroneous interpretation of the law should take place solely through the appeal process.

22. Therefore, the disciplinary violations regulated by Article 2.2.a and h of the Law are incompatible with European and international standards for two reasons: (1) they are not sufficiently detailed and (2) they enable interference into the work of judges, which should be protected by the principle of judicial independence. These provisions should, therefore, be eliminated from the Law in question.

## **DISCIPLINARY PROCEEDINGS**

23. The Charter's explanatory memorandum points out that guarantees must be laid down for disciplinary hearings, notably that disciplinary sanctions must be imposed by "*...a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation.*" The memorandum also underlines the right of appeal of this decision to a higher judicial authority. This view is supported by the United Nations' Basic Principles on the Independence of the Judiciary. In its Principle 17, they emphasise the judge's right to a fair hearing and under Principle 20 they mention that decisions in disciplinary proceedings should be subject to an independent review. This position is also

supported by Article 6 of the European Convention on Human Rights on the right to a fair trial, which establishes a direct link between this right and the independence of the judge.

24. The Law is imprecise as concerns disciplinary proceedings. The relationship between individual instances and decision-making organs in disciplinary matters are often unclear. Due to the numerous modifications that have been made to this Law or perhaps due to translation problems, different terms are often used to refer to the same bodies (e.g. Disciplinary Council or Collegium). This reduces the transparency of the present solutions.

### **PROPORTIONALITY OF DISMISSAL AS A DISCIPLINARY SANCTION**

25. Article 4 of the Law, which sets out disciplinary penalties as well as disciplinary measures, also gives rise to concern due to the very general manner in which it refers to the disciplinary penalty of dismissal without any added qualification. Such an early termination of the mandate of a judge should only be used as a last resort in exceptional cases, for instance if found guilty of a criminal offence, or for health reasons or if s/he is permanently prevented from performing his or her duties. It should not be linked to bad or doubtful interpretation of the law.

26. Article 54 of the Law defines, in 3 paragraphs, the general rule of imposing disciplinary measures:

*“1. During the selection of a disciplinary penalty for a judge the Disciplinary Panel takes into consideration the extent and severity of the disciplinary infraction, its outcomes or expected outcomes, the extent of guilt and the personality of the judge and his official and moral reputation.*

*2. The Disciplinary Panel is entitled to impose only one type of disciplinary penalty. Additional penalties can be imposed either separately or in conjunction with the measure determined by the Article 4, (2) “b”. The disciplinary measure determined in Article 4 (2) “a” will only be imposed separately.*

*3. If the primary penalty, which has been imposed for previous disciplinary violation, has not been annulled, as a rule [the] Disciplinary Panel shall impose a more severe penalty upon a judge.”*

27. This provision was applied by the Supreme Court of Georgia, which explained that the gravity and the consequences of the violation are decisive and it goes on to say *“But the punishment may be gravest according to the contents and gravity of the violation even in the case where the moral and business reputation of the judge is not under question”* (Decision of the Supreme Court of Georgia, 10 August 2006, p.19).

28. According to Article 2.2.a of the Law, it is a precondition for disciplinary responsibility that the violation of the law cause damage to legal rights and interests. Therefore, the normal consequence of a breach of Article 2.2.a will be the most severe sanction, especially if, according to the case-law of the Supreme Court, the personal and moral integrity of the judge does not outweigh the accusation. Article 2.2.a, taken together with Article 54, provide a mechanism for *de facto* sanctioning misinterpretations of the law by dismissal. That is not compatible with the principle of proportionality.

29. The aim of disciplinary rules for judges is to secure the authority of the courts, not to secure the correct application of the law, which is the task of the appeals procedure.

Dismissal as an almost automatic sanction for “*violations of the law*” is contrary to the core concept of judicial independence. According to this principle, the law should clearly set out that the sanction of dismissal is the most serious sanction which is to be applied only in the most extreme cases and as a last resort. The disciplinary panel should be aware that all its decisions must pass the test of proportionality, as developed in the case-law of the European Court of Human Rights. This principle is also underlined by Article 5.1 of the Charter, which states that sanctions and their imposition are subject to this principle.

30. Article 56 of the Law mentions grounds on which a disciplinary panel may decide to remove a judge. Unfortunately, these are also formulated vaguely, especially as regards the formulation “*general, official or moral reputation of a judge*”. A restriction on the imposition of the penalty of removal is contained in Article 2.2.a, but this restriction is defective because the whole Article is imprecise. Therefore, the grounds for responsibility and the resulting penalties should be revised and redefined more precisely and in such a way as to prevent them from being used to instrumentalise disciplinary proceedings for other purposes than those intended and thereby endanger judicial independence.

31. According to Article 7 of the Law, “*A complaint or an application from any person (except anonymous application)*” is sufficient to “*serve as the basis for commencing the disciplinary prosecution against a judge*”. If read together with Article 2.2.a, the result is as follows: if a violation of the law causing damage to an individual can serve as a ground for disciplinary responsibility of a judge and if anyone is allowed to commence a disciplinary action against a judge, this can be interpreted as encouraging those losing a case to take personal revenge against the judge. This does not serve the interest of justice.

## **COMPOSITION OF THE DISCIPLINARY COLLEGIUM**

32. According to Article 21 of the Law, which was amended in 2005, the Disciplinary Collegium of Judges of Common Courts of Georgia has the right to adjudicate in disciplinary cases. The provisions that govern the composition of this Collegium are imprecise and may give rise to concern. Article 24 stipulates that the Collegium is composed of 6 members, of whom 3 are judges of Common Courts of Georgia. All members are to be chosen by the High Council of Justice from amongst its members. The wording suggests that not all its members must be judges: Article 24.2.d states that a member of the Collegium cannot be a member of the High Council of Justice if s/he has not received a higher legal education. This provision could be read as meaning that there is a requirement for members to hold a law degree. However, at the same time, it can be interpreted as meaning that they may be admitted to the Collegium if they merely hold a degree, which could lead to the admission of a High Council of Justice to the Collegium, who is not a judge. This may not be an encouraging solution. However, the European Charter on the statute for judges only demands that the authority be composed at least as to one half of elected judges (see paragraph 8 above).

33. Furthermore, the High Council of Justice does not only commence disciplinary prosecutions in the case of a violation of Article 2.2.a, but also nominates the candidates for the Disciplinary Collegium. It should not be possible for those initiating a disciplinary procedure to also have influence on the composition of the deciding body.

34. According to Article 33 of the Law, “*the Disciplinary cases of judges are distributed by the Chairman of the Disciplinary Council [Collegium] regarding the order of cases*”. This is an abstract way of assigning cases to one of the panels of the Disciplinary Collegium, and it is

unclear as to why there are exceptions to this rule in the second sentence of Article 33: “*In a case of inability to distribute the cases in accordance [with] the order, the distribution will be conducted in accordance with the Chairman’s opinion*”. This exception should be eliminated, especially as it is unclear what is meant by a “*case of inability*”.

35. Under Article 35.6 of the Law, in the case of the disqualification of one of the members of the Disciplinary Collegium, the Chairman of the Disciplinary Collegium can, *inter alia*, appoint a “*representative of an accusatory body instead of the disqualified member of the Disciplinary Panel*”. This rule should be eliminated, as it grants arbitrary power to influence the composition of the Disciplinary Collegium. Whereas all the other members of the Disciplinary Collegium have to be elected, this member could be appointed without the consent of the electorate body.

## CONCLUSION

36. As concerns Article 2 of the Law, since:

- Article 2.2.a and h are phrased in such a broad manner that it is unclear which actions fall under these provisions, which, in turn, poses a threat to the principle of judicial independence, as these provisions do not clearly restrict the scope of a judge’s disciplinary responsibility;
- Article 2.2.a taken together with Article 54, provide a mechanism for sanctioning violations of the law by dismissal of a judge that is not compatible with the principle of proportionality;
- Article 2.2.a taken together with Article 56, regulate the removal of judges and restrictions on such a removal in an unclear and vague manner;

the grounds for responsibility and the resulting penalties should be revised and redefined more precisely and in such a way as to prevent them from possibly being used to instrumentalise disciplinary proceedings for other purposes than those intended. Another solution would be to eliminate this provision from the Law.

37. Article 4 gives rise to concern due to the very general manner in which it refers to the disciplinary penalty of dismissal without any added qualification. Therefore, this provision should either be clarified by the addition of further qualifications or eliminated from the Law.

38. The provisions concerning the composition of the Disciplinary Collegium are imprecise and suggest that not all its members must be judges, which is not an encouraging solution. Furthermore, the task of nominating candidates for this Collegium falls to the High Council of Justice, which also commences disciplinary prosecutions in the case of a violation of Article 2.2.a. This provision should be changed as the body initiating a disciplinary procedure should not have any influence on the composition of the deciding body.

39. As regards the distribution of disciplinary cases for judges under Article 33, the exception concerning the inability to distribute cases should be eliminated from this provision as it is unclear what is meant by “inability”. Article 35.6 regarding the replacement of a disqualified member of the Disciplinary Collegium, should also be eliminated because it grants arbitrary power to influence the composition of this Collegium.

40. Although the *Law of Georgia on disciplinary responsibility and disciplinary prosecution of judges of common courts* is founded on the good intention of providing a legal basis for

sanctions against judges who fail to carry out their responsibilities and thereby, *inter alia*, fight against corruption of the judiciary - its vaguely worded provisions pose a real threat to the independence of the judiciary and ultimately to the rule of law. This Law should therefore be revised and its provisions redrafted in a clearer and more precise manner in order to bring it into line with European standards.

41. The Commission remains at the disposal of the authorities of Georgia for further assistance.