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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JOINT OPINION

OF THE VENICE COMMISSION
AND
THE DIRECTORATE OF HUMAN RIGHTS (DHR)
OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS
AND RULE OF LAW (DGI)
OF THE COUNCIL OF EUROPE

ON
THE DRAFT LAW
ON MAKING CHANGES
TO THE LAW ON DISCIPLINARY LIABILITY
AND DISCIPLINARY PROCEEDINGS OF JUDGES
OF GENERAL COURTS

OF GEORGIA

Adopted by the Venice Commission
at its 100th Plenary Session
(Rome, 10-11 October 2014)

on the basis of comments by:

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I. Introduction

1. In a letter dated 14 May 2014, the Minister of Justice of Georgia requested the opinion of the Venice Commission on the Draft Law Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts (hereinafter, "the draft law") (CDL-REF(2014)022).

2. Mr. Johan Hirschfeldt (Sweden) and Ms. Slavica Banić (Croatia) acted as rapporteur on behalf of the Venice Commission.

3. Mr. Grzegorz Borkowski (Poland) analysed the draft amendments on behalf of the Directorate of Human Rights ("the Directorate" or "DHR").

4. On 30 June and 1 July 2014, a delegation of the Venice Commission accompanied by DHR experts visited Tbilisi and held meetings with the Deputy Minister of Justice, members of the Parliament and of the High Judicial Council, the President of the Supreme Court, members of the Association of Judges and several NGOs. The Venice Commission and the DHR are grateful to the Georgian authorities and to other stakeholders for the excellent co-operation during the visit.

5. This Joint Opinion is based on the English translation of the draft law, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

6. The Venice commission and the Directorate are thankful to the Georgian authorities for having provided also a translation of the full version of the current Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of Georgia (hereinafter, "the Law on Disciplinary Liability") (CDL-REF(2014)032). They observe that there is discrepancy between the translation of the provisions subject to amendment which were communicated for review and the translation of these provisions within the full versions of the Law. Therefore, the full version of the Law on Disciplinary Liability is used only for the understanding of the legal context of the amendments under review.

7. This joint Opinion of the Venice Commission and the Directorate, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 100th Plenary Session, in Rome (10-11 October 2014).

II. Background

8. On 27 June 2014, the Georgian authorities sent to the Venice Commission an "Explanatory Note" on the Draft Law Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts, providing some explanations on the background and the purpose of the said amendments.

9. According to the Explanatory Note, the draft law aims at improving the conduct of disciplinary proceedings, ensuring a higher degree of protection for the independence of judges, eliminating defects in the current Law and improving the existing disciplinary procedures.

10. One of the most important aspects of the amendments concerns the authority to initiate disciplinary proceedings against judges. The draft Article 7 excludes the power of the Chairperson of the Supreme Court and of the Chairperson of Court of Appeals for initiating disciplinary proceedings, and identifies the High Council of Justice as the sole authority empowered to initiate disciplinary proceedings against judges. It appears that the power of Supreme Court and Appeals Court presidents is limited to informing the High Council on disciplinary misconduct by a judge, by means of submitting an explanatory note to the High Council, as any other judge, under Article 6(1) b of the Law on Disciplinary Liability.

11. According to the Explanatory note, in order to "optimise the stages of disciplinary proceedings", the amendments also considerably limit the powers of the Secretary of the High Council of Justice (hereinafter, "the Secretary") in disciplinary proceedings against judges. According to the current Article 9, the Secretary shall decide, on the basis of the preliminary examination of the complaint, either to terminate disciplinary proceedings or to take explanations from the judge concerned. The decision by the Secretary to terminate the disciplinary proceedings shall be submitted for review to the High Council of Justice[1]. In the draft Article 9, however, the power of the Secretary is limited to submit the preliminary inspection results to the High Council which decides directly on the termination or initiation of disciplinary proceedings against a judge.

12. The Explanatory Note underlines that one of the main purposes of the draft law is to ensure a higher degree of transparency in the conduct of disciplinary proceedings against judges. In this respect, the draft Article 5, while maintaining the principle of confidentiality of disciplinary proceedings, gives the judge against whom the disciplinary proceedings are conducted, the possibility to demand for the publicity of proceedings. In the same vein, whereas the current Article 17(5) of the Law on Disciplinary Liability gives the High Council the discretionary power to invite or not the judge concerned to the hearing, according to draft Article 17(5), the High Council shall be obliged to invite the judge. It is also significant in terms of ensuring more transparency to disciplinary proceedings that according to draft Article 58(1), the decision on the disciplinary liability of the judge shall also be communicated to the complainant (author of the application) and not only, as in the current version of this Article, to the judge, the High Council of Justice and the Conference of Judges.

III. Standards

13. The Venice Commission and the Directorate have examined the draft amendment law in the light of international standards of various degree of authority on the independence of the judiciary, as in particular reflected in:

- Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, "ECHR") and the case-law of the European Court of Human Rights (hereinafter, "ECtHR");

- Report on the Independence of the Judicial System Part I: the Independence of Judges adopted by the Venice Commission at its 82th Plenary Session (Venice, 12-13 March 2010).

- Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe to Member States on Judges: independence, efficiency and responsibilities (which replaces the Recommendation Rec (94)12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges);

[1] According to the Explanatory Note, in the current system, the decision of the Secretary to take explanations by the judge concerned is also submitted to the High Council for approval. This interpretation is not in conformity with the wording of current Article 9 which obliges the Secretary to submit to the High Council only the decisions concerning the termination of disciplinary proceedings.

- The European Charter on the Statute of for Judges (adopted at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998);

- Opinion no 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.

- Opinion no. 3 (2002) of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality;

- Opinion no. 10 (2007) of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society;

- The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (23-25 June 2010) (hereinafter "the OSCE/ODIHR Kyiv Recommendations");

- The Bangalore Principles of Judicial Conduct, 2001, as revised at the Roundtable Meeting of Chief Justices held in the Peace Palace, The Hague, November 25-26, 2002;

- United Nations Basic Principles on the Independence of the Judiciary endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

IV. General remarks

14. The draft amendments introduce quite a comprehensive change of the current disciplinary mechanism for judges in Georgia. The amendments change the approach in the initiation of disciplinary proceedings, adapt the disciplinary proceeding steps and withdraw important disciplinary competences of some bodies which did not sufficiently contribute to the development of independence of the judiciary. Generally, the amendments appear to be on the track of the paragraph 68 of the CCJE Opinion no. 3 which provides that the procedures leading to the initiation of disciplinary action need greater formalisation. The amendments, indeed, enable the High Council of Justice as the unique body "*with responsibility for receiving complaints, for obtaining the representations of the judge concerned upon them and for deciding in their light whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action, in which case it would pass the matter to the disciplinary authority*"[2] (Disciplinary Board according to the Law on Disciplinary Liability[3]).

15. It is thus a positive step that the High Council of Justice be the sole authority to initiate disciplinary proceedings against judges, which would provide for more guarantees compared to a system of plurality of disciplinary authorities competent to initiate those proceedings. It appears also from the meetings held in Tbilisi that the fact that the High Council is the sole authority, in the draft law, to initiate disciplinary proceedings against judges is met positively by many interlocutors who informed the delegation that the disciplinary procedures before the High Council are more transparent than those before the Supreme Court. The proposed system provides also for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of the disciplinary sanction, i.e. the Disciplinary Board. This is in line with international recommendations which suggest the establishment of an independent body to initiate

[2] Paragraph 68 of the CCJE Opinion no. 3.
[3] See Chapter III of the Law on Disciplinary Liability.

disciplinary proceedings, which is separate from the independent body or court which will take the decision relating to the disciplinary liability of a judge[4].

16. The amendments introduce a significant change in the status of the High Council of Justice which appears to become the main actor in disciplinary proceedings with, in addition, various and broad competences. According to the draft Law, the High Council of Justice has the power to initiate proceedings (draft Art. 7), has investigative powers (draft Art. 9 and 12), accusatory powers (draft Art. 39, para. 4) including the power to drop charges against a judge even at an advanced stage of the proceedings (Draft Art. 42). The High Council also has, to some extent, adjudicative powers, since according to draft Article 19, the High Council can decide that the preliminary investigation "evidences" that a judge has committed a disciplinary offense and choose to send a letter of reprimand to the judge concerned, if it considers "inappropriate" to arraign the judge on disciplinary charges before the Disciplinary Board. Finally, the Council has the power to execute the ruling issued in disciplinary proceedings (Draft Art. 80 dismissal of a judge). The Venice Commission and the Directorate consider that such a mixture of different powers in one hand, in particular, the power to initiate the proceedings and the power to adjudicate (decision on sending a letter of reprimand) risks leading to problems in the application of the above mentioned standard concerning the clear division of tasks between the investigative authority and the adjudication authority (footnote 4), and consequently, the principle of fairness[5].

17. The importance of the principle of transparency in the conduct of disciplinary proceedings against judges should be underlined. As stated in paragraph 91 of the CCJE Opinion no. 10, "*transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self protection and cronyism within the judiciary*"[6]. In this respect, it is to be welcomed that Article 81 of the Law on Disciplinary Liability provides for the publishing of the decisions of the Disciplinary Board on an official web-site upon their entry into force. As to the disciplinary proceedings, the draft Article 5 is a step in the right direction, since it introduces an exception to the principle of confidentiality, i.e. the judge's request to make the proceedings before the High Council public.

18. Precise catalogue of disciplinary offences should be introduced in the draft law and the reference to "judicial ethics" should be removed (See Section V.C of the present opinion).

19. Lastly, for the sake of the principle of legal certainty, it is recommended to review the terminology used in the context of different procedural stages and where necessary, to harmonise them. For instance, terms like "disciplinary prosecution" to identify the stage of initiation of disciplinary procedures before the High Council of Justice (for instance, draft Article 13(1) b)) or interchangeable use of "disciplinary prosecution" and "disciplinary proceedings" to point to the same procedural stage, should be reviewed accordingly. However, this could also be a matter of translation.

[4] See par 69 of the CoE Recommendation CM/Rec(2010)12. See also pars 68, 69 and 77 of the CCJE Opinion 3 (2002) and par 5 of the OSCE/ODIHR Kyiv Recommendations: "*In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures.*"

[5] The paragraph 17 of UN Basic Principles on the Independence of the Judiciary states that the judge shall have the right to a fair hearing. See also, *mutatis mutandis,* ECtHR *Kyprianou v. Cyprus*, no. 73797/01, Grand Chamber judgment of 15 December 2005, para. 127.

[6] Paragraph 91 of the CCJE Opinion no. 10.

V. Analysis article by article

A. Authority to initiate disciplinary proceedings (draft art. 7)

20. In the current system provided for by Article 7 of the Law on Disciplinary Liability, there are three different authorities competent to initiate disciplinary proceedings against judges:

a) the Chairperson of the Supreme Court of Georgia against judges of the Supreme Court, of the Court of Appeals and of the district courts (Art. 7(1) a));

b) the Chairperson of the Court of Appeals against judges of a respective Court of Appeals as well as against judges of the district courts within the jurisdiction of the Court of Appeals (Art. 7(1) b)); and

c) the High Council of Justice against all judges of common courts of Georgia (Art. 7(1) c)).

21. The draft Art. 7 excludes the power of court chairpersons for initiation of disciplinary proceedings against judges of general courts and identifies the High Council of Justice as the unique body competent to initiate disciplinary proceedings against judges. The court presidents seem however to maintain their power, under Article 6(1) b) of the current Law on Disciplinary Liability, to inform the High Council, as any judge, on disciplinary misconduct of a judge by submitting to the High Council an "explanatory note".

22. In its Report on the Independence of the Judicial System (Part I), the Venice Commission considered that "*[j]udicial independence is not only the independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts."* The Commission also added that *"the best protection for judicial independence, both internal and external can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence"*[7].

23. In view of the above, such disciplinary powers of court presidents as in the current Law, may lead to weakening the independence of a judge in case, for instance, of conflict with the president of the court. It is thus welcomed that the High Council of Justice is indicated as the unique authority in the draft Law, to formally initiate disciplinary proceedings against judges. The limitation of court presidents' competence to "inform" the High Council on disciplinary misconduct of a judge is also a positive step which strengthens "internal" judicial independence.

24. According to draft Article 9, following the presentation of the preliminary inspection results by the Secretary of the High Council of Justice, the latter decides by 2/3 majority whether to "require explanations" from the judge concerned. However, such a qualified majority for the initiation of disciplinary proceedings creates the serious risk that too many complaints would not be followed up at this early stage because of corporatist attitudes within the High Council of Justice. A simple majority should be enough in this respect. Furthermore, draft Article 15 also requires a 2/3 majority in the High Council for the "arraignment of the judge" on disciplinary proceedings and draft Article 60(3) requires again the same qualified majority to appeal against decisions of the Disciplinary Board. Those are too high majorities which may hamper the –legitimate- aim of the amendment of Article 7 and slow down, if not impede the efficient development of disciplinary proceedings as a whole. In view of the new role of the High Council of Justice as the initiator of disciplinary

[7] Report on the Independence of the Judicial System Part I, para. 71 *in fine.*

proceedings and in order to establish an efficient disciplinary system, the decisions of the High Council of Justice in those matters should be taken by simple majority.

B. Confidentiality of disciplinary proceedings (draft Art. 5 and 30(4))

25. The draft Article 5 introduces an exception to the principle of confidentiality of disciplinary proceedings before the High Council and provides that "the process of disciplinary proceedings shall be confidential, unless the judge demands to make it public". This draft provision appears to be in line with the UN Basic principles on the Independence of the Judiciary which require that "[t]he examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge"[8].

26. However, publicity should also be the guiding principle for later stages of disciplinary proceedings. As stated in paragraph 26 of the Kyiv Recommendations on Judicial Independence, "(...) transparency shall be the rule for disciplinary hearings of judges. Such hearings shall be open, unless the judge who is accused requests that they be closed". From this point of view, the draft Article 30(4), according to witch "Sessions of the Disciplinary Board shall be closed", is problematic[9]. First, it is recommended that sessions, as a general rule, be held in public and be held *in camera* only exceptionally, at the request of the judge and in the circumstances prescribed by law. Secondly, it is not clear from the wording of Article 30(4) whether the judge's request for publicity, as in the procedure before the High Council (draft Art. 5), constitutes an exception to the principle of confidentiality of sessions of the Disciplinary Board or only of information related to the hearings. It is thus recommended that, in case the principle of confidentiality of sessions of the Disciplinary Board were to be maintained in the draft Law, the request of the judge should then be clearly identified as an exception to the principle of confidentiality.

C. Grounds for disciplinary proceedings (Article 2 of the Law on Disciplinary Liability)

27. In its Opinion on the Georgian Law on Disciplinary Responsibility[10], the Venice Commission considered that "the grounds for responsibility (…) 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".

28. It is regrettable that, despite the criticism of the Venice Commission in its 2007 Opinion, the provisions concerning the grounds for disciplinary liability of judges (Art. 2 of the Law on Disciplinary Liability) are not dealt with in the draft law subject to the present Opinion. Although it appears that para. a) of Article 2(2) of the Law on Disciplinary Liability, which was criticised by the Venice Commission, has been repealed in March 2012, para. h) of this Article ("other kinds of violation of norms of judicial ethics"), also subjected to criticism by the Commission, is maintained in Article 2(2) i) with a different wording ("breach of judicial ethics"). The Venice Commission and the Directorate reiterate that in this clause it is unclear whether reference is made to an existing Code of Ethics or to general, unwritten rules. In a number of opinions, the Venice Commission has criticised the general penalisation of breaches of codes of ethics as too general and vague and insisted that much more precise provisions are needed where disciplinary liability is to be imposed[11]. Therefore, the Venice Commission and the Directorate reiterate the previous recommendation of the Venice Commission to eliminate this provision from the Law and provide for a detailed catalogue of disciplinary offences.

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[8] See para. 17 of the UN Basic Principles on the Independence of the Judiciary.

[9] CDL-AD(2014)007 Joint Opinion on the Draft Law Amending and Supplementing the Judicial Code (Evaluation System for Judges) of Armenia, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), para. 97.

[10] CDL-AD(2007)009 Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

[11] Opinion on draft Code on Judicial Ethics of the Republic of Tajikistan (CDL-AD (2013)035); CDL-AD(2014)006, para. 35; CDL-AD(2014)007, para. 111.

29. It is positive that, by an amendment introduced in March 2012, a new paragraph 3 was added to Article 2 of the Law on Disciplinary Liability in order to prevent disciplinary liability from extending to judge's legal interpretation in adjudication process: "[i]*ncorrect interpretation of the law based on judge's personal interpretation shall not constitute disciplinary misconduct and disciplinary liability shall not be imposed*". This is in line with the recommendation of the Venice Commission in its 2007 Opinion on the law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia.[12] However, during the visit in Tbilisi, some interlocutors stressed that because of lack of clarity in the Law as to the grounds on which disciplinary proceedings against a judge can be initiated, the matter of grounds for disciplinary liability is subject to the interpretation given by the High Council of Justice and that in practice, majority of the complaints dealt with by the High Council concern delays in the administration of justice and *improper fulfilment of the obligations of a judge* (Art. 2(2) f) of the Law on Disciplinary Liability). It is not clear whether those complaints led in the practice to the initiation of disciplinary proceedings against judges; however, this shows the importance of effective implementation of the newly introduced Article 2(3) which excludes "incorrect interpretation" from the scope of disciplinary liability. This provision should thus be subjected to a strict interpretation by disciplinary authorities and in order to protect the very essence of a judge's function i.e. independent adjudication, a wide and open interpretation of the various grounds for disciplinary liability should be avoided.

30. The Venice Commission and the Directorate also recommend further revisions of the legal provisions concerning the substance (i.e. the grounds) of disciplinary liability (art. 2(2) of the Law on Disciplinary Liability).

D. Standard of proof in disciplinary proceedings

31. Neither the current Law nor the draft amendments regulate the question of the standard of proof and the nature of evidence permitted in disciplinary proceedings, nor contain any provision referring to the administrative, civil or criminal procedural codes, to use by analogy the standard of the respective code in disciplinary proceedings, in particular for procedural matters not regulated by the Law on Disciplinary Liability. It is thus not clear which evidence is considered to be relevant, admissible or sufficient and what criteria are used for that purpose.

32. Although Article 6 of the current Law identifies the author of the complaint (any person, other than anonymous, another judge, court or High Council of Justice officer, investigative bodies, mass media) and the means that shall be used when complaining (special form prepared by the High Council, notification in case of a complaint by an investigative body, an explanatory note in case the complainant is a judge or court officer *et cetera*), it is not regulated in the Law for instance whether the High Council or the Disciplinary Board will consider evidence obtained by unlawful means (which would be declared inadmissible in civil, administrative or penal procedure). This potentially has implications during the appeal proceedings, where certain of the evidence taken into consideration by the High Council or the Disciplinary Board may be considered inadmissible by the Disciplinary Chamber of the Supreme Court.

33. It is understandable that the Law on Disciplinary Liability cannot cover all potential procedural issues that may arise during disciplinary proceedings. However, the lack of clear rules on procedural issues which may potentially affect the defence rights of the judge concerned, may lead to serious doubts as for the compliance of the proceedings with the standard of fair trial guaranteed in Article 6 ECHR, applicable to disciplinary proceedings either under its civil or criminal limb[13].

[12] CDL-AD(2007)009 Opinion on the law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia, para. 21.
[13] ECHR *Campbell and Fell,* no. 7819/77, *Olujić v. Croatia,* no. 22330/05, *Volkov v. Ukraine,* 21722/11.

34. It is thus recommended to supplement the draft law to clearly indicate that in case a procedural issue is not regulated in the Law on Disciplinary Liability, one of the procedural codes can be applied by analogy and to state that only the evidence collected in compliance with the rules of evidence contained in that code will be admissible. The fact that the criminal procedural codes provide generally better safeguards to ensure the fairness of the procedure should be taken into account.

E. Private letter of reprimand

35. The draft Article 19(1) and Article 48 read together with Article 51 of the Law on Disciplinary Liability empower the High Council of Justice and the Disciplinary Board respectively to terminate the proceedings by sending a special "letter of reprimand" to the judge under examination. The High Council may decide to do so, according to draft Article 19(1), if preliminary examination of the case "evidences" that the judge has committed a disciplinary offence, but for which arraignment of the judge on disciplinary charges is considered inappropriate. Article 51(1) of the Law on Disciplinary Liability which regulates the reprimand letter during the proceeding before the Disciplinary Board provides for more detailed, but still vague provisions. According to Article 51(1), after deciding that a disciplinary misconduct by the judge concerned has been proven during the case hearing, the Disciplinary Board may consider inappropriate to impose a disciplinary penalty on the judge "due to an insignificant nature of the misconduct, a minor degree of the guilt or due to other grounds, such as the delicacy of the case in question, or other reasons, taking into account the judges personality" and "apply to the judge with a private reprimand letter".

36. Despite the explanations given in draft Article 51(2) that the letter of reprimand is a letter sent to the judge who has committed the disciplinary offense and in which the disciplinary offense is assessed negatively, these do not shed light on whether the letter of reprimand is considered as a disciplinary sanction. During the meetings in Tbilisi, the delegation was informed that the letter of reprimand should be considered rather as a notification concerning the disciplinary issues raised during the proceedings and in essence contain recommendations set out in 51(1) of the Law on Disciplinary Liability, such as how to eliminate "the infringements, and the ways and solutions for overcoming the problems and difficulties associated with fulfilling the duties of a judge". It is noted that the letter of reprimand is not listed among the "disciplinary penalties" in Article 4(1) of the Law on Disciplinary Liability (such as dismissal, severe reprimand *et cetera*), but it is listed among the "disciplinary measures" in Article 4(2).

37. However, the letter of reprimand may still have a negative impact on the judicial career of judges: the High Council or the Disciplinary Board first establish that the judge committed disciplinary misconduct, then decides not to apply one of the disciplinary penalties listed in Article 4(1) which it considers "inappropriate" in the circumstances of the case, but to apply the disciplinary measure, i.e. the letter of reprimand, listed among others in Article 4(2). Also, Article 60(1) of the Law on Disciplinary Liability which regulates the appeal procedure against the decisions of the Disciplinary Board before the Disciplinary Chamber of the Supreme Court, by a reference to Article 48(1) (b-e), enables the parties to appeal against decisions of the Disciplinary Board to "apply to the judge with a letter of reprimand". The possibility of appeal against the imposition of a letter of reprimand by the Disciplinary Board support the above consideration that the letter of reprimand may have negative consequences on the judicial careers of judges. However, it appears that neither the Law on Disciplinary Liability nor the draft law contain any provision enabling the parties to appeal against the decision of the High Council of Justice to send a letter of reprimand to the judge concerned. This means that the same disciplinary measure listed in Article 4(2) of the Law on Disciplinary Liability may be issued by two different authorities, one being the Disciplinary Board, the other, the High Council of Justice, and whereas appeal against the measure pronounced by the Disciplinary Board is possible, appeal against the same measure pronounced by the High Council is not.

38. Further, the High Council of Justice, when issuing a letter of reprimand against a judge, indeed acts at the same time as an investigative body and as a body in charge of establishing the misconduct and deciding on the sanction to apply, which functions should be separated in accordance with the relevant international standards[14]. In addition no possibility of appeal is provided either by the Law or the draft law.

39. Also, in the light of the information received during the visit in Tbilisi, it appears that the judge against whom a procedure is pending before the High Council may receive a letter of reprimand from the High Council without even knowing that there were allegations against him/her which were investigated and without being provided the opportunity to give an explanation on the disciplinary misconduct allegations.

40. In the light of the above, in the view of the Venice Commission and the Directorate, the letter of reprimand, considered in the Law as a disciplinary measure and which can affect the judicial career of judges, should be issued only by the Disciplinary Board, the independent body in charge of deciding on the substance of the disciplinary allegations, against the decisions of which an appeal before the Disciplinary Chamber of the Supreme Court is possible. The action of the High Council of Justice may then be limited to send to the judge a list of recommendations "for eliminating the infringements, and the ways and solutions for overcoming the problems and difficulties associated with fulfilling the duties of a judge" which, in the current system, should be attached to the letter of reprimand according 51(2) of the Law on Disciplinary Liability. These recommendations should not be listed however neither as disciplinary penalty (Art. 4(1)) nor as disciplinary measure (Art. 4(2)) and should not affect the career of judges, in which case the requirement that the investigative body and the decision body should be separated, might be infringed.

41. If the power of the High Council of Justice to send a reprimand letter to the judge (draft Art. 19(1)) were to be maintained, which would be hardly reconcilable with the abovementioned international standards, appeal against the decision of the High Council on sending a reprimand letter should be possible and the judge concerned should have the possibility to give an explanation before this decision is taken. Otherwise the principle of equality of arms would be breached.

42. Further, the discretionary power left to the High Council of Justice and the Disciplinary Board in assessing the grounds for application of the disciplinary measure of reprimand letter is excessively broad. The High Council can apply this measure if it considers that disciplinary charges are "inappropriate" (draft Article 19(1)) and the Disciplinary Board (Article 51(1)), if it considers "inappropriate" to impose a disciplinary penalty on the judge because of the insignificant nature of the misconduct, a minor degree of the guilt and some other vaguely drafted motives. It is highly recommended that the grounds on which a letter of reprimand can be sent to the judge be indicated with a clear wording and in an unequivocal manner in Article 51(1) and draft Article 19(1) if maintained, so as to sufficiently limit the discretion of the disciplinary authorities in assessing the "appropriateness" of disciplinary charges, before sending the letter of reprimand to the judge concerned. In its current version, Article 51 can be used to penalise the independent adjudication function of judges.

43. Lastly, it is recommended to add the term "when necessary" at the end of para. 2 of draft Article 51. Otherwise, the Disciplinary Board would be obliged to add a list of recommendations each time it decides to send a reprimand letter, even in cases of simple one time incidents, which would only increase the workload of the Board.

[14] See footnote 4.

F. Status of the complainant in disciplinary proceedings (draft Art. 17(5) and 58(1), Art. 39(7))

44. The draft law gives the author of the complaint the possibility to be heard, before the High Council of Justice if the latter considers it necessary (draft Art. 17(5)), and also, before the Disciplinary Board, as it stems from Article 39(7) which states that the "[p]resenter of a disciplinary charge shall only be limited to presenting a disciplinary charge and its substantiation (...). However, according to the same provision, "he/she may not request imposing a specific disciplinary penalty and disciplinary measure on a judge".

45. Furthermore, according to draft art. 51(3) the author of the complaint, along with the judge concerned, shall be notified of the letter of reprimand, as an exception to the principle of confidentiality of its content, with the necessary safeguard of non-disclosure (the complainant shall sign a document of non-disclosure of the content of the reprimand letter). However, there is no provision in the Law on Disciplinary Liability and in the draft law on the consequences of such a disclosure of the letter content by the complainant.

46. It appears that the complainant has a reasonable degree of involvement in the proceedings before the Disciplinary Board since, apart from the possibility to participate in the hearing before this body (although this possibility is not very clearly set out in Article 39(7)), according to draft Article 58(1), the decision of the disciplinary board shall be notified to the author of the complaint. The complainant will thus be aware of the outcome of the disciplinary procedure which has started on the basis of his/her complaints.

47. The legal solution concerning the involvement of the complainant into disciplinary procedure against a judge may differ from one country to another. On one hand, in general the disciplinary liability of judges is regarded as an internal matter to the judiciary, a matter between the judiciary and the judge, which justifies restrictions on the role of the complainant in disciplinary proceedings. On the other hand, the complainant can be the direct victim of the judge's possible disciplinary misconduct, and may have a legitimate interest in participating to the proceedings, in particular where his/her rights are infringed as a result of judge's misconduct. The input of the complainant may also serve to shed light on the concrete circumstances of a given case and allow the members of the disciplinary authorities (the High Council and the Disciplinary Board) to verify the veracity of his/her allegations by listening to his/her oral explanations. Yet in order to guarantee the rights of the judge subjected to disciplinary procedures, the non-disclosure provisions should be effectively implemented.

48. In the light of the above, the provisions which allow the complainant to participate in the proceedings before the High Council of Justice and the Disciplinary Board are in principle welcomed. However, the draft law should also provide for some indications on the consequences of disclosure of information on a disciplinary case by the complainant. It is also recommended that clear criteria be provided in Article 17(5), on the basis of which the High Council of Justice can decide whether the hearing of the complainant is necessary in a given case. Further, Article 39(7) should also indicate unambiguously whether the complainant may be invited to the hearings before the Disciplinary Board as an exception to the principle of confidentiality and under which conditions.

G. Status of the judge in disciplinary proceedings

49. The judge subject to disciplinary proceedings should be informed at an early stage of the investigation and should have the right to counsel and this right should apply in all stages of the disciplinary proceedings. However, neither the current Law, nor the draft amendment law, contain clear provisions as to the formal starting point of disciplinary proceedings against a judge. It is not clear whether the proceedings should be considered as initiated when the High Council of Justice decides with a two thirds majority to require an explanation

from a judge or when the Secretary's preliminary inspection starts. During the visit in Tbilisi, the delegation was informed that the Secretary of the High Council of Justice, already at the stage of preliminary inspection of the case, requires written explanations from the judge concerning the allegations and that at this moment, the judge learns about the investigation and is free to benefit from the assistance of a lawyer. However, Article 8 of the current Law which regulates the preliminary investigation by the Secretary, does not impose on the latter an obligation to contact the judge under examination to require written observations; this seems to depend on the Secretary's discretion. In case the judge is not contacted before, he/she will learn about the investigation if the High Council decides by two thirds majority according to draft Art. 9(1), to require explanation from the judge. Until then the judge will not be aware of the proceedings and will not be able to seek advice of a legal counsel. Further, in case the High Council decides to send to the judge a letter of reprimand by virtue of Article 19(1), the judge will learn about the investigation not before the receipt of the reprimand letter and thus be deprived of his right to counsel.

50. The Venice Commission and the Directorate recommend that, in order to ensure compliance with the principle of equality of arms, the draft law be amended so as to enable the judge to be informed of the investigation as early as the preliminary investigation stage to allow him/her to benefit from his/her right to counsel in early stages. In this respect, it is not sufficient that draft Article 39(4) states that the judge may invite a counsel to the hearing before the High Council, but this right should be set out in a different article and apply to all stages of disciplinary proceedings and not only in the context of hearing before the Disciplinary Board.

51. It is welcomed that the High Council of Justice is obliged to invite the judge to the session where it considers the issue of arraignment on disciplinary charges or termination of disciplinary proceedings (draft Art. 17(5)), whereas in the current version of this provision, the High Council has a discretionary power to invite or not the judge subject to proceedings to that session.

52. Draft Article 35(1) regulates the procedure of challenging a member or all the members of the Disciplinary Board by the judge arraigned on disciplinary charges or by the representative of the High Council, but does not indicate the grounds for challenging (e.g. the grounds indicated in Article 34(1) and in draft Article 34(2) for self-recusal of a member of the Disciplinary Board are lack of independence, impartiality or the situation where a court judgment or order, or a private judgment or a report made by or with participation of that member of the Board, served as a basis for initiating disciplinary proceedings against the judge concerned). In addition, the provision does not refer to any other code of procedure or procedural standards. It is recommended to introduce a reference in Article 35(1), to the criteria indicated in Article 34(1) and draft Article 34(2) on self-recusal of a member of the Disciplinary Board.

53. Article 42(2) of the Law on Disciplinary Liability gives the judge the possibility to make an avowal and fully recognise the disciplinary accusation and request from the Disciplinary Board to make a decision on finding him/her guilty and on imposing a disciplinary penalty without substantive case hearing. A considerable part of disciplinary proceedings are conducted before the High Council and it is likely for this reason that this recognition of misconduct can intervene already during the procedure before the High Council, before the case is deferred to the Disciplinary Board. It is recommendable that the draft law foresees and regulates this possibility and clarifies its legal consequences on the procedure before the High Council. It has to be ensured that judges are not pressured into accepting guilt.

H. Termination of disciplinary proceedings

54. It is recommended at the outset to adjust the terminology in respect of the termination of the proceedings. The terminology used in draft Article 14 concerning the termination of the proceedings in case the preconditions for termination are fulfilled, should be different from

that used in the context of draft Article 9 dealing with the assessment of grounds for initiation of disciplinary proceedings.

1. Initiation of criminal proceedings (draft Art. 14 (c), 37(2) and 49(d))

55. Article 37(2) of the draft law provides for the suspension of disciplinary proceedings by the Disciplinary Board if elements of crime in the action of judge are obvious according to disciplinary case materials. In this case, the Disciplinary Board forwards the case material to an appropriate body and notifies the judge subject to the proceedings. Initiation of criminal proceedings on the basis of disciplinary material is regulated in draft Articles 14(c) and 49(d) as a ground for termination of disciplinary proceedings both for the High Council and the Disciplinary Board. According to draft Article 14(c), the High Council of Justice shall terminate the proceedings if criminal prosecution against the judge is initiated on the basis of materials forwarded. Draft Article 49(d) concerning the termination of proceedings by the Disciplinary Board has the same wording. In addition, the Disciplinary Board shall also terminate the proceedings, in case the criminal proceedings have not been initiated due to the failure to establish the guilt of the judge or the facts serving as the basis for disciplinary charge (draft Art. 49(d) *in fine*).

56. The independent nature of criminal and disciplinary liabilities which have different constitutive elements and apply dissimilar standards of proof does not mean that they exclude each other. Disciplinary sanctions may still be appropriate in case of a criminal acquittal. Also, the fact that criminal proceedings have not been initiated due to the failure to establish the criminal guilt or the facts in a criminal case, does not mean that there was not a disciplinary breach by the judge concerned, precisely because of different nature of both liabilities. If the misconduct of a judge is capable of destroying the public confidence in the judiciary, it is in the interest of the judiciary to institute disciplinary proceedings. The criminal proceedings however, do not consider the particular disciplinary aspect of the misconduct, but the criminal guilt.

57. The Venice Commission understands the concern of the Georgian authorities vis-à-vis the principle of *ne bis in idem* when they introduce provisions on termination or suspension of disciplinary proceedings in case a criminal procedure is initiated for the same offense. However, the following observations and recommendations shall be made:

58. The principle *ne bis in idem* prohibits double trial and punishment for the same offense in two different criminal proceedings (Article 4 of Protocol no. 7 ECHR). This, in principle, does not exclude the initiation of disciplinary proceedings for the same offence in parallel to criminal proceedings. However, the legal characterisation of a procedure under national law is not the only criteria and the European Court also considers the nature of the offense or severity of the penalty in order to determine whether a procedure categorised as "disciplinary" under the domestic law has indeed a criminal character under the European Convention, in which case Article 4 (1) of Protocol no. 7 (*ne bis in idem*) applies.

59. First, according to the case law of the ECtHR the principle *ne bis in idem* prohibits a second criminal trial for the "same offence" which should arise "from identical facts or facts which are substantially the same"[15]. The draft articles 14(c), 37(2) and 49(d) refer to "the initiation of a criminal proceeding on the basis of disciplinary material" which is too vague to precisely point to "same offense arising from identical facts". It is recommended to replace the terms "on the basis of disciplinary material" in draft articles by "same offense arising from identical facts" in line with ECtHR wording.

60. Secondly, when a criminal proceeding is initiated on the basis of the disciplinary material, according to draft provisions, the Disciplinary Board and the High Council are obliged to terminate the disciplinary proceedings (draft Articles 14 c) and 49 d)). As

[15] ECHR *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, 10 February 2009, para. 82.

mentioned above, the criminal and disciplinary liabilities have different natures and objectives, are subject to different standards of proof and have different constitutive elements, and they do not exclude each other. Consequently, in the view of the Venice Commission and the Directorate, the disciplinary authorities, i.e. the High Council and the Disciplinary Board should not be obliged to terminate the disciplinary proceedings when a criminal case is initiated for the same offense. In order to prevent the breach of the principle *ne bis in idem* those authorities should rather have the *possibility* to terminate the proceedings if they consider that the disciplinary case has a criminal character (the nature of the offense and the gravity of the correspondent disciplinary penalty will be the guiding criteria in the light of the case law of the European Court). The same should apply in the context of suspension of disciplinary proceedings according to draft Article 37(2). In case the offense subject to criminal proceedings is not the same offense arising from identical facts, or the disciplinary proceedings do not have any criminal character, there is no reason to terminate the disciplinary proceedings because of the initiation of criminal proceedings on the basis of the same disciplinary material.

2. Dropping the charges (draft Art. 42(1))

61. According to draft Art. 42(1), the representative of the High Council of Justice may, at any stage of the proceedings before the Disciplinary Board, drop the disciplinary charges against the judge. In this event, the Disciplinary Board shall be obliged to terminate the proceedings irrespective of the stage of consideration. First, the draft provision shows the strong position of the High Council of Justice in the entire procedure. Secondly, the scope of competence of the representative of the High Council of Justice is not clear in the draft law. Since the arraignment of the judge on disciplinary charges is decided by the High Council even by two thirds majority, the representative should not be entitled to drop the charges without a vote by the High Council.

62. Paragraph 28 of the Recommendation CM/Rec(2010)12 of the Committee of Ministers states that Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions. Consequently, the representative should at least be obliged to provide reasons for dropping the case, not only because of the requirements of the principle of legal certainty but also in order to protect the professional and personal reputation of the judge in question.

3. Expiration of the timeframe (draft Art. 14(b) and 36(2))

63. In case the timeframe for arraigning the judge on disciplinary charges or for imposing disciplinary liability and penalty is expired, the High Council (draft Art. 14(b)) or the Disciplinary Board (draft Art. 36(2)) shall terminate the disciplinary proceedings. It is recommended that such termination intervene only if the delay is not attributable to the judge concerned. Otherwise, the judge could try to delay the proceedings by abusing for instance his/her possibility to raise a motion and make additional explanations according to Article 12(2), in order to escape liability.

4. Decision of the Disciplinary Board

64. The draft Article 56(1) is most welcome because it sets the standard for the dismissal of a judge much higher by identifying this disciplinary penalty as an “extreme measure” which shall be applied “in special cases”. This is in conformity with the principle of proportionality. However, the expression “in special cases” is vague and should be read in the light of Article 54(1) of the current Law which sets out guiding principles to be taken into account when deciding on disciplinary cases (non-interference in the activities of a judge) and related comments in the present Opinion. The ambiguity of certain expressions contained in Article 2(2) of the Law on Disciplinary Liability concerning the grounds for disciplinary proceedings, as “any activity incompatible with the position of a judge” (see section C – grounds for

disciplinary proceedings- of the present Opinion), makes it even more important the new standard for dismissal in draft Article 56(1).

65. The draft Article 85(1) restricts the promotion of a judge against whom disciplinary proceedings have been instituted. This is welcome as the promoted judge might be later found guilty of disciplinary misconduct of which he/she has been accused during the promotion procedure. On the other hand, the disciplinary proceedings are strictly time-barred (e.g. draft art. 60(2)), so the draft provision should not be a great burden for judges waiting promotion. It is recommended to clearly indicate in the draft Law that the termination of disciplinary proceedings lifts automatically the restriction on promotion.

I. Appeal (Art. 60(1), draft Art. 60(2) and 60(3))

66. According to draft Article 60(3), the High Council of Justice may appeal against the decision of the Disciplinary Board (before the Disciplinary Chamber of the Supreme Court) by two thirds majority of its full composition, through its representative. As stated above, this is a too high majority. In order to establish an efficient disciplinary system, the decisions in the High Council in disciplinary matters should be taken by simple majority.

67. The draft Article 60(2) provides that the decision of the Disciplinary Board shall be appealed to the Board itself. However, this is probably an error of translation since the appeal against the decisions of the Board is introduced before the Disciplinary Chamber of the Supreme Court (Article 60(1)).

J. Additional issues

68. It is recommended to review the Article 9(3) of the current Law, which is not subject to the amendment in the current draft law. This provision should be amended as it is obviously in conflict as such with the amendment introduced in paragraph 1 of this Article. For instance, in Article 9(3), the authority to make a decision to take explanations from the judge concerned is indicated as the Secretary of the High Council of Justice, whereas this authority belongs to the High Council of Justice itself according to draft Article 9(1).

69. Current Article 77 provides that the Disciplinary Board or the Disciplinary Chamber shall submit its legally effective decision on dismissal of a judge for enforcement to the High Council of Justice. However, according to Article 80(2), the High Council shall “consider” the legally effective decision of the Board or the Chamber on dismissing a judge, “based on the recommendation” of the Board or the Chamber. The wording of Article 80 creates doubts on the binding nature of the Disciplinary Board decisions on dismissal of a judge on the High Council of Justice. It appears from this wording that the High Council of Justice should make an appropriate decision on dismissal on the basis of a recommendation of the Board or the Chamber. This is in contradiction with the character of Board and Chamber decisions, in particular because Article 56(1) clearly states that “the Disciplinary Board shall make a decision on dismissing a judge”. It is recommended to modify the wording of Article 80 in order to clarify the binding effect of Board and Chamber decisions on dismissal of a judge on the High Council of Justice.

VI. Conclusion

70. The effort of the Georgian authorities to improve the present legal framework and establish higher standards of judicial independence should be welcome. The draft amendments introduces improvements to the conduct of disciplinary proceedings in order to ensure a higher degree of protection to the rights of judge subjected to disciplinary proceedings and contribute to their transparency.

71. As a result of the draft amendments, the High Council appears as the unique body enabled to initiate disciplinary proceedings against judges which is a positive step in terms of ensuring the independence of judges. In this respect, the suppression of the power of the court chairpersons for initiating disciplinary proceedings is welcome. Also, the fact that the proposed system provides for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of disciplinary sanctions (Disciplinary Board) is in line with international standards.

72. The Venice Commission and the Directorate however consider, in the light of considerations made in the present opinion, that additional work is required on the following matters:

- The power of the High Council to send a reprimand letter -as a disciplinary measure- to the judge concerned should be removed or, if maintained, limited to sending of a "list of recommendations" to the judge.

- The requirement of a two thirds majority for all the decisions of the High Council of Justice in disciplinary proceedings is too high. A simple majority requirement should be introduced for a better efficiency of the disciplinary system.

- More precise provisions concerning the grounds for initiating disciplinary liability are necessary, as well as increased procedural guarantees, in line with the fair trial principle in the ECHR and related case-law. Publicity of the sessions should be the general rule and not the exception.

- The conditions for termination of disciplinary procedure in case a criminal procedure is initiated on the basis of the disciplinary material should be reviewed to enable the High Council to decide on a case-by-case basis.

73. The Venice Commission and the Directorate are at the disposal of the Georgian authorities for further assistance in this and other areas.