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Or. Engl

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

**REPUBLIC OF MOLDOVA**

***AMICUS CURIAE* BRIEF  
FOR THE CONSTITUTIONAL COURT**

**ON**

**THE CRIMINAL LIABILITY OF JUDGES**

**Adopted by the Venice Commission  
at its 110<sup>th</sup> Plenary Session  
(Venice, 10-11 March 2017)**

**on the basis of comments by**

**Ms Monika HERMANN (Substitute member, Germany)  
Mr Eirik HOLMØYVIK (Substitute member, Norway)  
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## I. Introduction

1. By letter of 12 January 2017, Mr Alexandru Tănase, the President of the Constitutional Court of the Republic of Moldova (hereinafter, the “Constitutional Court”), requested an *amicus curiae* brief from the Venice Commission on the criminal liability of judges, notably regarding Article 307 of the Criminal Code of the Republic of Moldova<sup>1</sup> (hereinafter, “Article 307 of the Criminal Code”).

2. Ms Hermanns, Mr Holmøyvik and Ms McMorrow have been invited to act as rapporteurs for this *amicus curiae* brief, which is based on an unofficial English translation of Article 307 of the Criminal Code and Article 116 of the Constitution of the Republic of Moldova. Errors may occur in this *amicus curiae* brief as a result of an incorrect or inaccurate translation.

3. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs and adopted by the Venice Commission at its 110<sup>th</sup> Plenary Session (Venice, 10-11 March 2017).

## II. Request

4. The issue concerns a request made by the Supreme Court of the Republic of Moldova to the Constitutional Court for the constitutional review of Article 307 of the Criminal Code in the context of a case concerning a judge of the Chisinau Court of Appeal, who is accused of having rendered an illegal decision in breach of Article 307. This “*illegal decision*” overturned the Central Election Commission’s decision, which rejected a citizens’ initiative to hold a “*republican constitutional referendum*.” On appeal, the Supreme Court quashed the decision of the Chisinau Court of Appeal and delivered a new decision upholding the Central Election Commission’s decision to reject the initiative to hold a referendum.

5. Following the Supreme Court’s decision, the Prosecutor General, acting *ex-officio*, initiated criminal proceedings against the judge of the Chisinau Court of Appeal. According to the request, which the Venice Commission received from the Constitutional Court, the grounds for the Prosecutor General’s order to initiate criminal proceedings against the judge (under Article 307 of the Criminal Code) were based on the fact that “*by its decision, the Supreme Court of Justice has acknowledged the erroneous interpretation by the first instance court [i.e. the Chisinau Court of Appeal] of the legal provisions and recognised the exceeding by the judge of the granted competences when rendering the interpretation of the Constitution and obliging the Central Election Commission to adopt a new act.*”

6. By letter of 2 February 2017, the President of the Constitutional Court informed the Venice Commission about the initiation of judicial proceedings against another judge on the same grounds as in the request of 12 January 2017. In this case, once again, the Prosecutor General has initiated – *ex-officio* and pursuant to Article 307 of the Criminal Code – criminal proceedings

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<sup>1</sup> The challenged provision, Article 307 of the Criminal Code of the Republic of Moldova no. 985-XV of 18.04.2002, amended by Law No. 277-XVI of 18.12. 2008, which entered into on 24.05.2009 and was then amended again by Law No. 207 of 29.07.2016, p. 178 (Law no. 985-XV of 18.04.2002), reads as follows:

**“Article 307. Issuance by a judge of a sentence, decision, ruling or judgment that is contrary to the law**

(1) *The wilful issuance by a judge of a decision, sentence, ruling, or court order contrary to the law shall be punished by a fine in the amount of 650 to 1150 conventional units or by imprisonment for up to 5 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years.*

(2) *The same action:*

a) *involving a charge of a serious, especially serious or exceptionally serious crimes;*

*[Letter b) excluded by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]*

c) *causing severe consequences;*

*shall be punished by imprisonment for 3 to 7 years with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years.*

*[Art. 307 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]”*

against a judge for delivering an illegal decision. The President of the Constitutional Court also sent the Venice Commission a statement of 1 February 2017 made by several NGOs (Human Rights Embassy, “Promo-Lex” Association, Legal Resource Centre of Moldova and Institute for European Policies and Reforms), which calls the criminal proceedings against the judges an attack on the independence of the judges of the Republic of Moldova.

7. The questions addressed to the Venice Commission are the following:

*Does Article 307 of the Criminal Code comply with European standards on the functioning of democratic institutions, more particularly:*

1. *Is it possible for a judge to incur criminal liability for his or her interpretation of the law, ascertainment of facts or assessment of evidence while reviewing a case brought before him or her?*
2. *Is it possible for the quashing by a higher court of a decision of a lower court to serve as a ground for determining the illegality of that decision?*
3. *Does the challenged provision secure the independence and impartiality of judges in a state governed by the rule of law?*

### III. European standards and practice

#### A. General remarks on the independence of judges

8. The Constitutional Court has asked the Venice Commission to answer three questions in this *amicus curiae* brief, which all concern the independence of judges. More specifically, these questions address an individual judge’s freedom to exercise his or her adjudicating functions in relation to that of other judges and that of higher courts, which may – as in the case at hand – quash decisions rendered by lower-court judges.

9. When it comes to the independence of judges, it is important to reiterate that *judicial immunity* – that is, immunity from prosecution for acts performed in the exercise of a judge’s function, with the exception of intentional crimes (i.e. functional immunity)<sup>2</sup> – forms an integral part of the wider concept of *judicial independence*. As there are no strict European standards on judicial immunity, States enjoy a large margin of appreciation in organising the judiciary, including setting up systems to ensure the professional and ethical conduct of judges.<sup>3</sup> Nevertheless, it must be underlined that judicial immunity is important as it serves the independence of the judge to the extent that it enables him or her to decide cases without fearing civil or criminal liability for judicial adjudication carried out in good faith.<sup>4</sup> Independence, impartiality, integrity and professionalism are the core values of the judiciary.<sup>5</sup> Since the concepts of independence and objective impartiality are closely linked, depending on the circumstances, they may require joint examination.<sup>6</sup>

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<sup>2</sup> Venice Commission, *Report on the independence of the judicial system Part I: the independence of judges* (CDL-AD(2010)004), paragraph 61.

<sup>3</sup> *Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine* (CDL-AD(2015)013), paragraph 23.

<sup>4</sup> *Amicus curiae* brief on the *Immunity of Judges for the Constitutional Court of Moldova* (CDL-AD(2013)008), paragraph 20.

<sup>5</sup> *Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine* (CDL-AD(2015)007), paragraph 17.

<sup>6</sup> ECtHR: *Case of Parlov-Tkalčić v. Croatia*, application no. 24810/06, Judgment of 22 December 2009, paragraph 86; *Case of Oleksandr Volkov v. Ukraine*, application no. 21722/11, Judgment of 9 January 2013, paragraph 107; *Case of Findlay v. the United Kingdom*, application no. 22107/93, Judgment of 25 February 1997, paragraph 73.

10. Judicial independence has been regarded traditionally as a matter of independence from *external influences* on the exercise of judicial power. Recent standards for the judiciary, however, also address the *internal dimension* of judicial independence. That is, the particular freedom for individual judges, in relation to other judges at the same court and at higher courts, “*Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.*”<sup>7</sup>

11. The Venice Commission has insisted on the principle of the independence of the individual judge,<sup>8</sup> in particular in its 2010 Report on the Independence of the Judicial System Part I: the Independence of Judges, in which it states that “*the principle of internal judicial independence means that the independence of each individual judge is incompatible with the subordination of judges in their judicial decision-making activity.*”<sup>9</sup>

12. The internal dimension of the independence of judges is also emphasised in the Consultative Council of European Judges’ (CCJE) Opinion No. 1 (2001): “*The fundamental point is that a judge is in the performance of his or her functions no-one’s employee; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.*”<sup>10</sup>

13. Internal judicial independence is also enshrined in the notion of “*independent*” tribunals in Article 6 of the European Convention on Human Rights (hereinafter, the “ECHR”). The European Court of Human Rights has stressed the importance of individual judges being free not only from undue influence outside the judiciary, but also from within it.<sup>11</sup>

14. In this broad sense, judicial independence means that each individual judge is independent in the exercise of his or her adjudicating functions. Judges should be independent and impartial in their decision-making and capable of acting without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including “*authorities internal to the judiciary*”.<sup>12</sup>

15. In general, therefore, judicial independence must be protected both in its “external” and “internal” components.<sup>13</sup>

16. It must be noted, however, that *judicial independence* is not a prerogative or privilege granted in the judge’s own interest, but is a fundamental principle, an essential element of any democratic state, a pre-condition of the rule of law and the fundamental guarantee of a fair trial.<sup>14</sup> The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law.<sup>15</sup> The judiciary must be independent to fulfil its role in relation to the other state powers, society in general, and the parties to litigation.<sup>16</sup> It is

<sup>7</sup> Recommendation CM/Rec(2010)12 on *Judges: independence, efficiency and responsibilities*, paragraph 5.

<sup>8</sup> CDL-AD(2010)004, paragraphs 13-14, CDL-AD(2014)007, paragraph 4.

<sup>9</sup> See CDL-AD(2010)004, paragraph 72.

<sup>10</sup> See CCJE Opinion No. 1 (2001), paragraphs 64 and 66.

<sup>11</sup> See *Case of Parlov-Tkalčić v. Croatia*, Judgment of 22 December 2009, application no. 24810/06, paragraph 86.

<sup>12</sup> Recommendation CM/Rec(2010)12, paragraph 22; ECtHR, *Case of Parlov-Tkalčić v. Croatia*, application no. 24810/06, Judgment of 22 December 2009, paragraph 86.

<sup>13</sup> *Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine* (CDL-AD(2007)003), paragraph 61.

<sup>14</sup> *Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic*, (CDL-AD(2014)018), paragraph 14; CCJE Opinion No. 1 (2001), paragraph 11; CCJE Opinion No. 17 (2014), paragraph 5; ECtHR, *Case of Agrokompleks v. Ukraine*, application no. 23465/03, Judgment of 6 October 2011, paragraph 136.

<sup>15</sup> Recommendation CM/Rec(2010)12, paragraph 11; CCJE Opinion No. 1 (2001), paragraph 10; CCJE Opinion No. 18 (2015), paragraph 10.

<sup>16</sup> CCJE Opinion No. 18 (2015), paragraph 10.

therefore not only an element based on the rule of law, but also the pre-condition for the guarantee that all individuals (and the other state powers) will enjoy equality and have access to a fair trial before impartial courts.<sup>17</sup> Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised<sup>18</sup> and can breach Article 6.1 ECHR.<sup>19</sup>

## **B. Protecting the independence of judges through functional immunity**

17. A balance needs to be struck between immunity as a means to protect the judge against undue pressure and abuse from state powers or individuals (immunity), on the one hand, and the fact that a judge is not above the law (accountability), on the other.<sup>20</sup> The Venice Commission has consistently pointed out that judges should not be granted *general immunity*, but *functional immunity* for acts performed in the exercise of their judicial functions. This is because, in principle, a judge should only benefit from immunity in the exercise of his or her lawful functions. If he or she commits a criminal offense in the exercise of his or her office, he or she should have no immunity from criminal liability.<sup>21</sup>

18. Another type of liability that applies to judges is disciplinary liability. It has different constitutive elements from criminal liability and applies a different standard of proof, however, it should be pointed out that criminal and disciplinary liability are not mutually exclusive. 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 of establishing criminal guilt or the facts in a criminal case, does not mean that no disciplinary breach was committed by the judge concerned, precisely because of the different nature of both liabilities. If the misconduct of a judge is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt.<sup>22</sup> In any event, it is important that both types of liability be used sparingly in order not to cause a chilling effect on the judiciary.

19. It should also be noted that, although European standards allow for judges to be held criminally liable in the exercise of their judicial functions, the threshold is high. Article 66 of Recommendation CM/Rec(2010/12) reads: “*The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.*” The high threshold for criminal liability is reiterated in the explanatory memorandum to Recommendation CM/Rec(2010/12): “*When exercising judicial functions, judges should be held criminally liable only if the fault committed was clearly intentional.*”<sup>23</sup>

20. The CCJE has taken the same position in Opinion No. 18 (2015): “*With respect to civil, criminal and disciplinary liability (what has been called above “punitive accountability”), the CCJE stresses that the principal remedy for judicial errors that do not involve bad faith must be the appeal process. In addition, in order to protect judicial independence from undue pressure, great care must be exercised in framing judges’ accountability in respect of criminal, civil and disciplinary liability. The tasks of interpreting the law, weighing of evidence and assessing the*

<sup>17</sup> CCJE’s *Situation report on the judiciary and judges in the Council of Europe member States Updated version* No. 1 (2013), paragraph 5; CCJE Opinion No. 18 (2015), paragraph 10.

<sup>18</sup> CCJE Opinion No. 18 (2015), paragraph 44.

<sup>19</sup> ECtHR, *Case of Coyne v. United Kingdom*, no. 124/1996/743/94254, Judgment of 24 September 1997, paragraph 58.

<sup>20</sup> CDL-AD(2014)018, paragraph 41.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the 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*, (CDL-AD(2014)032), paragraph 56.

<sup>23</sup> See Recommendation CM/Rec(2010)12 and explanatory memorandum, paragraph 67.

*facts that are carried out by a judge to determine cases should not give rise to civil or disciplinary liability against the judge, save in cases of malice, wilful default or, arguably, gross negligence.*"<sup>24</sup>

21. Similarly, the Venice Commission in its 2016 Rule of Law Checklist requires that the grounds for disciplinary measures be "*clearly defined*" and "*sanctions limited to intentional offences and gross negligence.*"<sup>25</sup>

22. The Venice Commission also followed that line in its 2016 *amicus curiae* brief for the Constitutional Court of the Republic of Moldova on the right of recourse by the state against judges, where it noted that: "*Finding the right balance between judicial accountability and the safeguard of judicial independence is a difficult task. The Venice Commission has always been in favour of according judges functional immunity, so as to allow them to exercise their function according to professional standards without being exposed to individual liability, except in cases of malice or gross negligence. The professional standards according to which judges are to exercise their function must be clearly defined by law.*"<sup>26</sup>

23. On the other hand, in the 2013 Opinion on the draft amendments to laws on the judiciary in Serbia, the Venice Commission accepted individual liability of judges where the damage at stake was "*caused with intention or extreme negligence*", but added that: "*The argument could be made that where the international case-law is well-established, the judge should be expected to follow it. However, the fact that a judge has wilfully chosen not to follow the established standards should not in itself become a ground for personal liability.*"<sup>27</sup>

24. This is raised in the 2015 Opinion on the disciplinary liability and evaluation of judges of "The former Yugoslav Republic of Macedonia", where the Venice Commission repeated that judges should incur liability only in the case of "*stubborn resistance against an enhanced practice which leads to a repeated overturning in cases where there is well-established and clear case-law.*"<sup>28</sup>

25. The Venice Commission also concluded in the above-mentioned 2016 *amicus curiae* brief for the Constitutional Court of the Republic of Moldova<sup>29</sup> that individual liability for judges solely based upon the outcome of a complaint to the European Court of Human Rights, "*interferes with judges' professional freedom to interpret the law, to assess facts and to weigh evidence in individual cases, as recognised by European standards. According to these standards, erroneous decisions should be challenged through the appeals process and not by holding the judges individually liable, unless the error is due to malice or gross negligence by the judge.*"<sup>30</sup>

26. Paragraph 70 of the Council of Europe's Recommendation CM/Rec (2010)12 also categorically states that "*[j]udges should not be personally accountable where their decision is overruled or modified on appeal.*" In the same vein, in the context of the use of decisions reversed on appeal as an indicator of the quality of judicial decisions, the CCJE in its Opinion

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<sup>24</sup> See CCJE Opinion No.18, paragraph 37.

<sup>25</sup> See CDL-AD(2016)007 *Rule of Law Checklist E*, 1 a. lii.

<sup>26</sup> See, *Amicus curiae brief for the Constitutional Court of Moldova on the right of recourse by the state against judges* (CDL-AD(2016)015), paragraph 69; see also *Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan* (CDL-AD(2011)012), paragraph 60; *Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The former Yugoslav Republic of Macedonia"* (CDL-AD(2015)042), paragraph 43 and *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia* (CDL-AD(2009)023), paragraph 37.

<sup>27</sup> See *Opinion on Draft amendments to Laws on the Judiciary of Serbia* (CDL-AD(2013)005), paragraphs 20 and 22.

<sup>28</sup> CDL-AD(2015)042, paragraph 47.

<sup>29</sup> See CDL-AD(2016)015.

<sup>30</sup> *Ibid*, paragraph 75.

No. 6 notes that *“one should take into account the principle of judicial internal independence and the fact that reversal of decisions must be accepted as a normal outcome of appeal procedures, without any fault on the part of the first judge”*.<sup>31</sup>

27. Therefore, the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in case of ordinary negligence.<sup>32</sup> 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.<sup>33</sup> Civil (or criminal) liability may limit the discretion of an individual judge to interpret and apply the law.<sup>34</sup> Therefore, the liability of judges should not be extended to judges' legal interpretation in the adjudication process.<sup>35</sup> Only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties,<sup>36</sup> criminal responsibility<sup>37</sup> or civil liability.<sup>38</sup>

28. As was stated by the Venice Commission in the above-mentioned 2013 Opinion for Serbia, *“ ‘A judge is free in holding his/her views, determination of facts and application of law in all matters under his/her deliberation’ and is ‘not required to justify to anyone, even other judges and/or the president of the court, his/her understanding of the law and the facts found... including [our addition] the basic guarantees that ensure the independence of an individual judge to decide cases impartially, in accordance with his/her conscience and interpretation of the facts, and in accordance with the prevailing rules of the law.”*<sup>39</sup>

29. As a general clarification, the CCJE has stressed that, although criminal investigations with respect to judges and courts are not illegal and there is no general immunity for judges, the authorities concerned must observe, guarantee and provide for the proper functioning of the judiciary as the third power of the state. It follows from this that the greatest care should be taken before investigatory measures are employed by any prosecution authority, which could have the effect of impeding or obstructing the functioning of judicial proceedings.<sup>40</sup>

### **C. Independence of judges within court systems**

30. The independence of any individual judge in the performance of his or her functions exists notwithstanding any internal court hierarchy. Otherwise the hierarchical power conferred in many legal systems on higher courts might in practice potentially undermine individual judicial independence.<sup>41</sup>

31. European legal systems are diverse when it comes to the role attributed to the judge with respect to the legislator as well as to the parties to a case. Among the European legal systems, there are also different legislative drafting techniques, ranging from detailed and comprehensive codes to legal systems with more open-ended provisions, leaving the judge a

<sup>31</sup> See CCJE Opinion No. 6, paragraph 36.

<sup>32</sup> Recommendation CM/Rec(2010)12, paragraphs 66 and 68; CDL-AD(2011)012, paragraph 60.

<sup>33</sup> Recommendation CM/Rec(2010)12, paragraph 5; *Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro* (CDL-AD(2014)038), paragraph 27.

<sup>34</sup> CDL-AD(2013)005, paragraph 19.

<sup>35</sup> CDL-AD(2015)007, paragraphs 49-50.

<sup>36</sup> *Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova*, (CDL-AD(2014)006), paragraphs 19 and 35; CDL-AD(2015)007, paragraphs 49-50.

<sup>37</sup> CDL-AD(2010)004, paragraph 61; CDL-AD(2014)018, paragraph 41.

<sup>38</sup> Recommendation CM/Rec(2010)12, paragraph 66; CCJE Opinion No. 18, paragraph 37.

<sup>39</sup> CDL-AD(2013)005, paragraph 21.

<sup>40</sup> CCJE *Situation Report on the judiciary and judges in the Council of Europe member States. Updated version* no. 2 (2015), paragraph 41.

<sup>41</sup> Recommendation CM/Rec(2010)12, paragraph 22; CCJE Opinion No. 1 (2001), paragraphs 66, 68 and 73 (9).



wider scope for interpretation. Nonetheless, there will always be a certain discretionary element in the interpretation of laws, the assessment of facts and the weighing of evidence. This is the essence of the judicial function, which is an essential element of a judge's independence.

32. It is important to stress that internal independence does not exclude doctrines such as that of precedent, which is applied in common law countries (i.e. the obligation of a lower court judge to follow a previous decision of a higher court on a point of law directly arising in the latter case).<sup>42</sup> But, the independence of every judge must allow each of them and every panel of judges to make an effort to change the practice – to adopt a different decision – if he or she thinks it appropriate to do so in a particular case.<sup>43</sup> Of course, such an attempt must be made openly and the judge must provide coherent arguments as to why the present case differs from earlier case-law or why the reasoning applied in earlier case-law should be overturned. It will then be up to the appeal instance to decide whether or not to follow this new reasoning.

33. Above all, a judge should not be limited to applying merely existing case-law. The essence of his or her function is to interpret legal regulations independently. Sometimes, judges may have an obligation to apply and interpret legislation contrary to “*uniform national judicial practice*.”<sup>44</sup> Such situations may occur, for instance, as a result of international treaties, and where decisions from international courts supervising international treaties may require altering the current national judicial practice. A judge's legal interpretation, which may not be in line with the established case-law, should not in itself become a ground to impose disciplinary sanctions, unless it is done in bad faith, with intent to benefit or harm a party to the proceedings or as a result of gross negligence. While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider it right to do so.<sup>45</sup> Only stubborn resistance against an enhanced practice, which leads to a repeated overturning of cases, for which there is a well-established and clear case-law, may result in disciplinary sanctions.<sup>46</sup>

34. The important conclusion to draw from all of the above – including the case-law of the European Court of Human Rights, the opinions of the Venice Commission, the CCJE and from the emphasis placed by European standards on the independence of the individual judge – is that adjudication is not, and has never been, a purely mechanical operation. For this reason, European standards on the judiciary safeguard the right and duty of the individual judge at all levels of the judicial hierarchy to exercise his or her adjudicating functions free from any authority, whether external or internal.

35. The non-mechanical aspect of adjudication means that individual liability for the exercise of judicial functions should not depend solely on the outcome of a case at higher instance. Rather, liability should only be related to a judge's observance of professional standards of conduct, ethics and adjudication. The simple fact that a court decision is quashed at higher instance does not mean that the lower-court judge has violated professional standards or acted in contravention of the law.

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<sup>42</sup> CDL-AD(2014)038, paragraph 27.

<sup>43</sup> CDL-AD(2015)042, paragraph 47.

<sup>44</sup> *Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova*, CDL-AD(2014)006, paragraph 21.

<sup>45</sup> *Ibid*, paragraph 22.

<sup>46</sup> CDL-AD(2015)042, paragraph 47.

#### IV. Assessment

##### A. First question: *“Is it possible for a judge to incur criminal liability for his or her interpretation of the law, ascertainment of facts or assessment of evidence while reviewing a case brought before him or her?”*

36. Important as the freedom of judges in the exercise of their judicial function may be, it does not mean that judges are not accountable. The independence of judges serves to safeguard their individual rights and freedoms in accordance with the law.<sup>47</sup> If judicial power is abused and misused it cannot serve its purpose. Judges who, in the exercise of their functions, commit what would be regarded in any other circumstances as a crime, such as accepting a bribe, cannot claim immunity from ordinary criminal proceedings.<sup>48</sup>

37. When judges are exercising judicial functions, however, the considerations under section III above, on judicial independence come into play.

38. The accountability of the judiciary is a complex issue, which may also have a “punitive” dimension through the application of individual disciplinary, civil and criminal liability.<sup>49</sup> In order not to subvert judicial independence, however, criminal liability in the exercise of a judicial function should be reserved for the most serious cases and not be applied to unintentional failings. If judges were to be held criminally liable for unintentional mistakes in the exercise of their judicial function, this might endanger both the impartiality and the independence of judges. The impartiality of judges will be at risk, as the threat of sanctions may subconsciously affect his or her judgment. The independence of judges will be at risk, since criminal liability for unintentional mistakes would make the judiciary vulnerable to interference in the judicial function by the executive.<sup>50</sup>

39. It appears from the assessment in section III above that, while judges may be subject to criminal liability for the interpretation of a law, the ascertainment of facts or the assessment of evidence, such liability is only possible in cases of malice and – arguably – gross negligence.

40. It is important to distinguish between situations in which a judge wilfully interprets a law contrary to its wording, original meaning or previous case-law. This is acceptable if the judge does so openly and provides coherent reasoning as to why he or she is departing from previous case-law. Depending on the legal tradition, the role of the judge in a legal system and the given legal methodology, an interpretation of a law contrary to its wording, original meaning and previous case-law may nevertheless very well fall within the ambit of professional scrutiny of the standards of adjudication.

41. The overriding principles emerging from previous Venice Commission opinions, CCJE opinions and the established European standards outlined above is that judges should not be held liable for (1) judicial mistakes that do not involve bad faith and (2) differences in the interpretation of the law. The principal remedy for such mistakes is the appeals process.

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<sup>47</sup> Recommendation CM/Rec(2010)12, paragraph 3: *“The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.”*

<sup>48</sup> See CCJE Opinion No. 3 paragraph 52.

<sup>49</sup> See CCJE Opinion No. 18, paragraphs 33 and 37.

<sup>50</sup> See CCJE Opinion No. 3, paragraph 53.

**B. Second question: *Is it possible for the quashing by a higher court of a decision of a lower court to serve as a ground for determining the illegality of that decision?***

42. This question is closely related to the first one. While it may be possible to hold judges criminally liable in the exercise of their judicial functions, the requirement of malice or gross negligence for criminal liability demands an assessment of individual guilt in each case. Using the negative outcome of appeals proceedings as the condition precedent establishing an objective criterion or basis for attributing criminal culpability cannot meet the requirement of individual guilt.

43. For these reasons, the Venice Commission has previously noted that the criminal liability of a judge and the outcome of an appeals process are two separate issues, which should not be mixed.<sup>51</sup> The Venice Commission has consistently taken the view that the fact that a judge has been overruled by higher courts does not necessarily mean that the judge has not acted in a competent or professional manner.<sup>52</sup>

44. In order to hold a judge personally liable for his or her decisions, it is not sufficient to refer to the fact that the decisions have been overturned by a higher court. Any decision on the competency and professionalism of a judge based on cases being overturned on appeal, must be made on the basis of an actual assessment of the cases concerned. In any case, judges can only be held criminally liable for their decisions if individual guilt is proven and the error is due to malice or gross negligence.

45. In conclusion, using the fact that a decision of a lower court has been quashed by a higher court as a ground in itself for the determination of the illegality of that decision, is not in accordance with European standards.

**C. Third question: *Does the challenged provision secure the independence and impartiality of judges in a state governed by the rule of law?***

46. European standards require individual guilt to be ascertained to a level of wilful intent or gross negligence. Judges are only criminally liable for the “*wilful issuance*” of illegal decisions, sentences, rulings and court orders.

47. A provision setting out the criminal liability of judges can only be compatible with the independence and impartiality of judges if it is formulated precisely enough to guarantee the independence of judges and the functional immunity of the individual judge in his or her interpretation of the law, assessment of facts or weighing of evidence.<sup>53</sup>

48. Vague, imprecise and broadly-worded provisions that define judges’ liability may have a chilling effect on their independent and impartial interpretation of the law, assessment of facts and weighing of evidence. Regulations of judges’ liability that lack these qualities may also be abused to exert undue pressure on judges when deciding cases and thus undermine their independence and impartiality.<sup>54</sup> In general, and in light of the European Court of Human

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<sup>51</sup> See CDL-AD(2014)018, paragraph 48.

<sup>52</sup> See *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia* (CDL-AD(2009)023) paragraph 36 and CDL-AD(2015)042, paragraph 46.

<sup>53</sup> See *N.F. v. Italy*, Judgment of 2 August 2001, application no. 37119/97, paragraphs 29-30 and *Oleksandr Volkov v. Ukraine*, Judgment of 9 April 2013, application no. 21722/11, paragraph 173 ff.

<sup>54</sup> *Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia* (CDL-AD(2007)009), paragraphs 25 and 29; CDL-AD(2015)042, paragraph 113; see also *Oleksandr Volkov v. Ukraine*, Judgment of 9 April 2013, application no. 21722/11, paragraphs 185-186.

Rights' case-law, provisions on criminal liability for judges should be interpreted in such a way as to protect judges from arbitrary interference in their judicial functions.<sup>55</sup>

49. The conclusions drawn in the two previous questions also apply here: 1) judges should not be held individually liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law; 2) nor should it be sufficient for judges to incur individual criminal liability to define a judicial decision as illegal by referring to the fact that his or her decisions have been overturned at higher instance.

50. Finally, criminal liability of judges may be compatible with the principle of the independence of judges, but only pursuant to the law, which has to be narrowly tailored and cannot rely merely on the fact that a case was overturned on appeal. To that end, it is important that the relevant law not be in conflict with the overriding principle of the independence of judges.

## V. Conclusion

51. In an *amicus curiae* brief, the Venice Commission provides the Constitutional Court with European standards and practice on the questions raised in the request so as to facilitate the Court's consideration of the issue(s) at hand. It is, however, for the Constitutional Court to determine the final interpretation of national laws and the Constitution of the country concerned.

52. The questions addressed to the Venice Commission for this *amicus curiae* brief by the Constitutional Court of the Republic of Moldova with respect to Article 307 of the Criminal Code of the Republic of Moldova, are:

- (1) *Is it possible for a judge to incur criminal liability for his or her interpretation of the law, ascertainment of facts or assessment of evidence while reviewing a case brought before him or her?*
- (2) *Is it possible for the quashing by a higher court of a decision of a lower court to serve as a ground for determining the illegality of that decision and*
- (3) *Does the challenged provision secure the independence and impartiality of judges in a state governed by the rule of law?*

53. The answer to these questions may be summarised as follows:

- Important as the freedom of judges in the exercise of their judicial function may be, this does not mean that judges are not accountable. A balance must be struck between their immunity as a means to protect them against undue pressure and abuse from other state powers or individuals (functional immunity) and the fact that a judge is not above the law (accountability);
- while judges may be subject to criminal liability for the interpretation of a law, the ascertainment of facts or the assessment of evidence, such liability should only be possible in cases of malice and, arguably, gross negligence;
- judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. The principal remedy for such mistakes is the appellate procedure;
- criminal and disciplinary liability are not mutually exclusive: 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 criminal guilt or the facts in a criminal case, does not mean that there was no disciplinary breach by the judge concerned, precisely because of the different nature of these liabilities;
- if a judge's misconduct is capable of undermining public confidence in the judiciary, it is

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<sup>55</sup> See, for instance, *Oleksandr Volkov v. Ukraine*, paragraph 170; *P.G. and J.H. v. the United Kingdom*, paragraph 46.

in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt;

- In conclusion: only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability.

54. Finally, criminal liability of judges may be compatible with the principle of the independence of judges, but only pursuant to the law. The law in question must not be in conflict with the overriding principle of the independence of judges. This is a question that the Constitutional Court will have to pronounce itself upon.

55. The Venice Commission remains at the disposal of the Constitutional Court or other authorities of the Republic of Moldova for any further assistance they may need.