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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

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

by

Ms Hanna SUCHOCKA (Member, Poland)

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I. The Parliamentary Assembly of the Council of Europe has asked the Venice Commission for an opinion “on the Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts, in particular with regard to the principle of the independence of the judiciary”. This request has been made in context of the decision taken by the disciplinary authority in Georgia by which several judges have been dismissed from the office.

II. The decision has been taken on the ground of Art. 2.2.a of the Law on Disciplinary Responsibility.. which states that disciplinary responsibility can be imposed over a judge in the case of “gross violation or repeated violation of law in the process of discussion of a case”.

III. The Case: -- Disciplinary Collegium of Disciplinary Council of Common Courts of Georgia decided that judges sitting in the case violated articles of the criminal procedure code (the question was who was the bearer of the rights of the injured party). Collegium held that these judges have committed “gross violation” of two articles of the criminal procedure code by incorrect interpretation of the law. On the ground of this decision there were dismissed judges of the courts of different levels, including Supreme Court Judges. The disciplinary body did not apply reservation to Art. 2. (25.11.2005#2127), saying that incorrect interpretation of the law by a judge based on its belief, on intimate conviction shall not be considered a gross violation and/or repeated violation of law.

Disciplinary collegium clarified that in specific case there has been no incorrect interpretation on basis of intimate conviction, because the latter is necessary only when the provision of law does not bear imperative nature and needs some clarification. In opinion of the Collegium it was not the case in the given situation.

In the way of appeal Disciplinary Chamber of Supreme Court decided that decision of Disciplinary Collegium should remain in force. The Chamber expressed its view that according to the violations committed by judges, their contents and gravity, the types of disciplinary punishments applied against judges are correct.

To this decision has been expressed dissenting opinion by one judge.¹In his opinion he writes among others that: “ In the specific case shall be evaluated the question whether the norm in question asked for interpretation and whether the interpretation was based on the intimate conviction. In this case the norms in question (term spouse) needed interpretation, which was based on the intimate conviction of the judge. Consequently, the existence of these two institutions (interpretation of the law, even incorrect and intimate conviction of the judge) exclude the grounds of disciplinary liability and imposition of disciplinary penalty”. In his opinion finally the decision of disciplinary authority is not reasoned with regard to the gross violation, referred to in art. 2.2.a of the Law in the context of the reservation made to this article.

IV. The decision of the disciplinary court resulting in the dismissal of numerous judges has opened a discussion evaluating the law on the disciplinary responsibility of judges itself as well as the guarantees of the independence of judges it contains. The issue at stake is not disciplinary responsibility as such, because there is no doubt that the enforcement of disciplinary responsibility does not contradict not threaten the principle of independence. On the contrary, an insufficiently self-critical approach and failure to enforce ethical rules jeopardize independence by weakening public trust and encouraging the other branches to limit their support for judicial independence. Independence of judges requires however that the disciplinary accountability should be done in a way which does not discourage other judges in

¹ Dissenting opinion of Temur Todria, Supreme Court Judge

the free exercise of their judicial function.² The issue therefore, as I wrote above, is not the question of disciplinary accountability of judges as such. Doubts and reservations have emerged over the basis of the disciplinary responsibility of judges. Two issues of key significance to the guarantee of judicial independence are:

- the shape of legislation regulating the bases of a judge's disciplinary responsibility and
- the organ taking decisions on disciplinary responsibility.

The main problem in many countries is the general imprecision in elaborating grounds for disciplinary action. Usually the norms concerning behaviour of judges are described in very general terms and leave room for discretion. The lack of clearly formulated rules of conduct involves the risk of arbitrary prosecution of judges for disciplinary offenses.

The grounds for disciplinary action vary from country to country. There is however possible to list the most common ground for such a disciplinary accountability. Laws on judicial conduct generally put the obligation on judges: -to refrain from conduct likely to compromise the dignity of the judicial office, -undue delays in the performance of duties, -conduct within or outside office damaging the judiciary's reputation, - conduct discrediting the judicial office or the court, -offences and omissions in the discharge of their official duties or grave disregard of deadlines for delivering judgment.

There are no doubts that disciplinary liability is strictly connected with the violation of the code of ethic. It has been stated in several Venice Commission opinion that such code should be approved by the Supreme Judicial Council and regulated at the level of law. (CDL-AD (2002)15 . There would be a very clear base for describing all types of the judge's liability. The problem is that in many countries, not only new democracies the code of ethics does not exist. In such a situation the law on disciplinary responsibility or chapter on the disciplinary responsibility in the Law on judiciary lists the basis for disciplinary responsibility. There is always very general description even in the situation when the list is rather long. This is also the case of Georgia.

V. In Article 84, the Constitution of Georgia in a general and therefore classic manner regulates the principle of judicial independence by stating that a judge is subject only to the Constitution and the Law. Point 2 of the same article states that the removal of a judge from consideration of a case, his/her pre-term dismissal or his/her transfer to another position is permissible only in circumstances determined by law.

The Constitution thus provides the basis for a judge's possible pre-term dismissal. But it places no restrictions on the circumstances in which that may occur. In light of Article 84, point 2, the entire detailed regulation is referred to an ordinary law. Hence, exceptionally broad is the extent to which law-makers regulate the question of a judge's disciplinary responsibility, which is not to suggest that it is unrestricted (unlimited). An essential and fundamental restriction (limitation) is adherence to the principle of judicial independence, hence the bases of a judge's responsibility are defined in such a way as not to threaten his/her independence.

The executory law to the Constitution in that regard is the law On Disciplinary Responsibility and Disciplinary Prosecution of Judges on Common Courts passed in 2000 and substantially amended in 2005. The Basis for Disciplinary Responsibility of a Judge and Types of Disciplinary Violations are contained in Article 2 of the law and read as follows:

a) gross violation or repeated violation of law in the process of discussion of a case;

² Monitoring the EU Accession Process: Judicial Independence, Open Society Institute, Budapest 2001

- b) corruption law violation, or a misuse of a public office doing harm to justice and official interests;*
- c) activity incongruent with the position of a judge or incongruence of interests with the duties of a judge;*
- d) an action inappropriate for a judge, which abuses the prestige and authority of a court or promotes the loss of confidence towards a court;*
- e) groundless extension of a case discussion, improper fulfillment of duties of a judge or other kinds of violation of official duties;*
- f) disclosure of confidences of a meeting of judges or professional secrets;*
- g) hindering the activity of bodies (agencies) having disciplinary authority, or showing disrespect towards them;*
- h) other kinds of violation of norms of judicial ethics;*

The catalogue of grounds for the enforcement of disciplinary responsibility is extensive and varied.

Listed are different types of conduct, which may be referred to as service violations, as well as those constituting a breach of the dignity of office. As a rule, the basis for instituting disciplinary proceedings is the conduct specified in points b) to g).

Apart from those detailed points, there is also point h) pertaining in a general way to other kinds of violation of norms of judicial ethics. It must be assumed that it involves violations other than those mentioned in the preceding points, otherwise it would amount to needless repetition. To evaluate those violations, a code of judicial ethics would be needed.

For the purpose of the present analysis, point a) is of key importance to this catalogue. 'Gross violation or repeated violation of the law in the process of discussion of a case' is mentioned as grounds for disciplinary responsibility.

This regulation is so broadly formulated that it can encompass a great variety of judicial conduct engaged in while a case is being decided. Therefore, instead of clearly restricting the scope of a judge's disciplinary responsibility, it may actually pose a threat to the principle of independence.

The grounds, on which a judge may face disciplinary responsibility, specified in that point, differ from others mentioned in Article 2.2. They centre exclusively on a judge's conduct whilst discussing a case and handing down a verdict or ruling. They apply, therefore, to the judicial process itself — to the judge's interpretation of the law while considering a case and the very essence of a judge's function: independent adjudication. That regulation therefore encroaches upon the extremely delicate sphere of a judge's independent decision-making in accordance with the Constitution and the law. In his/her adjudication, a judge may not be restricted solely by existing case-law. The essence of his/her function is to independently interpret legal regulations. In view of that manner of formulating disciplinary responsibility, there exists the justified fear that such responsibility might extend to the adjudication process itself.

Another issue is criminal violation of the law, but the premise of Article 2.2.a) does not spell out its attributes.

It appears that the law-makers themselves acknowledged the defectiveness of that regulation, since in 2005 they introduced the reservation that 'incorrect interpretation of the law by a judge, based on his/her belief, shall not be considered a gross violation and/or repeated violation of the law.'

In practice, however, it may prove exceedingly difficult to distinguish a judge's defective interpretation from one based on his/her personal conviction (and that is precisely what occurred in the above-mentioned case which resulted in the dismissal of numerous judges).

Lacking the possibility of an unequivocal evaluation, disciplinary responsibility formulated in this way may undermine the very principle of a judge's adjudication. That regulation could therefore be used to restrict the intimate conviction of judges and their freedom to interpret the law.

An open question is the extent to which it might become a convenient tool instrumentalising the process of disciplinary proceedings.

It would appear, therefore, that the only way to undo an infraction committed by a judge in the course of the adjudication process can be by way of appeal. The correction of an erroneous interpretation should take place solely through the appeal process.

Without any doubt, such a vague formulation of the principle of a judge's disciplinary responsibility in such a sensitive area as the adjudication process should be eliminated from the law.

In that context, doubts may also arise with regard to the extremely general way in which Article 4 refers to the disciplinary penalty of dismissal without any added qualification. The dismissal of a judge should be resorted to only in exceptional cases. The permanent removal of judges should be limited to instances in which judges have been found guilty of a criminal offence, have seriously breached their obligations or, for reasons of health, are permanently prevented from performing their duties.³ In no instance should it be linked to bad or, all the more so, doubtful interpretation of the law.

Article 56 does mention grounds on which a disciplinary Panel may decide to remove a judge. Nevertheless, they are too vaguely formulated, particularly as regards the formulation 'general, official or moral reputation of a judge.' A restriction on the imposition of the penalty of removal is placed by Article 2.2.a), but that restriction is a defective one considering the imprecision of the article itself. I would seem, therefore, that the regulations pertaining both to the grounds for responsibility as well as to the resultant penalties ought to be revised and more precisely redefined in the new law in such a way as to prevent their being used to instrumentalise disciplinary proceedings.

VI. In accordance with Article 21 (amended in 2005), the right to adjudicate in disciplinary cases belongs to the Disciplinary Collegium of Judges of Common Courts of Georgia. The regulations governing the composition of the said Collegium are imprecise and may therefore give rise to doubts. Article 24 states that the Collegium comprises six members, of whom three are to be judges of Common Courts of Georgia. All are to be chosen by the High Council of Justice from amongst its composition.. The wording suggests that not all its members must be judges. The Article 24, point d) states that member who has not received the high legal education may not be member of the Collegium. If they hold law degrees, they may be admitted to the Collegium even if they are not judges. I do not regard such a solution as proper.

In general, it may be stated that the present law is imprecise as far as disciplinary proceedings are concerned. The relationships between individual instances and organs taking decision in disciplinary matters are often illegible. Undoubtedly as a result of changes effected in the law, different terms are used for individual organs, thereby diminishing the transparency of the present solutions.

I believe the law should be changed and its provisions made more precise. The principle should be adopted whereby only a court should rule in cases of disciplinary responsibility, especially if a judge's removal is an eventuality. Such rulings should not be made by other disciplinary bodies, even if judges participate therein. Only a court, whose ruling may be appealed to a court of a higher instance, can guarantee judicial independence.

³ Monitoring the EU Accession Process...p. 56