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(VENICE COMMISSION)

COMMENTS

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

by
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Introduction

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 on the basis of Article 2 Nr. 2 (a). Therefore the opinion focuses on the problems caused by this regulation.

The Law of Georgia “On Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts in Georgia” determines the grounds of disciplinary responsibility of judges, possible sanctions as well as procedural regulations.

European and international standards defining disciplinary responsibility of judges

The evaluation of the law has to be based on international rules concerning the independence of judges as well as common European constitutional traditions.

The European Convention on Human Rights establishes in its Article 6 a direct link between the right to a fair trial and the independence of the judge, but does not define criteria for assessing independence.

The European Charter on the statute for judges explains in Article 5.1.:

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

The basis requirements for disciplinary actions against judges based on the rule of law therefore are:

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

The regulations in the UN Basic Principles on the Independence of the Judiciary are quite similar: They have the following wording:

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Grounds for disciplinary responsibility

The Georgian Law on Disciplinary Responsibility contains in its Article 2 an open enumeration of “types of disciplinary violation”.

In order to be compatible with European and international standards these types of violations must be “expressly defined” in order to be “provided for by law”. The European Court of Human Rights has developed clear criteria for deciding whether interference into a right is provided for by law. It is not sufficient that a legal regulation exists, but it has to be precise and the consequences have to be foreseeable for those concerned. These requirements can be transferred to the case of disciplinary violations. Here, too, it has to be clearly defined which actions are susceptible to disciplinary responsibility. The stipulations in Article 2 of the Georgian Law on Disciplinary Responsibility do not live up to these requirements.

This is true for the open clause of Article 2 (h) “other kinds of violation of norms of judicial ethics”. It is not clear if this provision refers to an existing Code of Ethics or to general – unwritten – rules. In any case, it is not foreseeable which actions fall under this provision.

The provision of Article 2 (a) “gross violation or repeated violation of law in the process of discussion of a case” is not sufficiently clear as well. It was inserted on the 23 June 2005. At the same time an explanation was added that reads as follows:

“A violation of the law, that caused damage (or could cause such) to legal rights and interests of the participant of court hearings or a third person shall be deemed as a gross violation. Violation committed three or more times shall be deemed a repeated violation of the law. Incorrect interpretation of the law by a judge based on its belief shall not be considered a gross violation and/or repeated violation of the law.” (23.06.2005 # 1752)

It is also not clear if the “note” is meant as an unofficial comment to the norm or if it is to be considered as a part of the norm itself. In any case, this violation alludes to a breach of duty in the process of adjudicating a case before a tribunal. This is the sphere especially protected by the constitutional guarantee of “judicial independence”. On the basis of this concept judges should be free from any outside influence when deciding cases on the basis of the law. They should also not be afraid of facing any consequences for performing their duties except for the (criminal) case of perversion of justice. As generally acknowledged interpreting the law is an essential part of rendering a decision in a concrete case. It is not possible to decide on any case without interpreting the law. In fact, there are no absolutely clear legal provisions that would never necessitate an interpretation. Interpretations can also go beyond the wording of a provision, e.g. if they have to be interpreted in line with the Constitution or with international law. The concept of “judicial independence” serves the purpose of securing the process of interpreting the law and applying it to concrete cases.

Even assuming that the note is part of the law and wrong interpretations cannot be considered as violations of Article 2 No. (a) of the Law (an assumption that is not confirmed by the practical application of the law in the past), the regulation cannot be considered to be precise enough to be compatible with the rule of law. It would be necessary to distinguish between “incorrect interpretation of the law based on its belief” and “violation of the law”. As the violations have to occur “in the process of discussion of a case” they might consist only in misbehaviour of judges during the trial. But that would also fall under Article 2 (d) of the Law. So it is not clear what the provision aims at.

Therefore the disciplinary violation regulated in Article 2 of the Georgian Law on disciplinary responsibility is incompatible with European and international standards for two reasons: it is too imprecise and it enables interference into the work of the judges protected by the concept of judicial independence.

Due to the scope of the request of the Parliamentary Assembly the other types of violations enumerated in Article 2 of the Law will not be analysed in detail.

Consequences of breaches of disciplinary responsibility

Article 4 sets out the disciplinary penalties (notice, reprimand, strict reprimand, dismissal, dismissal of a judge from the reserve list of the common courts) as well as the disciplinary measures (private letter of recommendation, dismissal from a certain position).

Article 54 defines the general rule of imposing disciplinary measures. It reads as follows:

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

Applying this provision in practice the Supreme Court of Georgia has explained that the gravity of the violation and the consequences of the violation are decisive. Furthermore it writes: “But the punishment may be gravest according to the contents and gravity of the violation even in the case where the moral and business reputation of the judge is not under question.” (Decision of the Supreme Court of Georgia, August 10, 2006, page 19).

According to Article 2 (a) it is a precondition for disciplinary responsibility that the violation of the law causes damage to legal rights and interests. Therefore the regular consequence of a breach of Article 2 (a) will be the most severe sanction, especially if, according to the jurisprudence of the Court, the personal and moral integrity of the judge does not outweigh the reproach.

Thus Article 2 (a) together with Article 54 of the Law provides a mechanism for sanctioning violations of the law that is not compatible with the principle of proportionality.

Another factor is important in this context. The aim of disciplinary regulations for judges is to secure the authority of the courts, but not to secure the correct application of the law. This can be done only by appeal procedures. The judicial system as a whole is responsible for rendering justice; individual faults in applying the law have to be corrected in higher instances. Dismissal as an almost automatic sanction for “violations of the law” is contrary to the core concept of judicial independence.

Generally, according to the principle of proportionality, it should be set out in the law that the sanction of dismissal as the strongest sanction should be applied only in extreme case as “ultima ratio”. It should be clear for the Disciplinary Council that all decisions have to stand the test of proportionality as developed in the jurisprudence of the European Court of Human Rights

Procedural Issues

Disciplinary prosecution based on Art. 2 No. 2 (a) can be started only by the high Council of Justice of Georgia (Article 6). According to Article 7 “a complaint or an application from any person (except anonymous application) is sufficient to “serve as a basis for commencing the disciplinary prosecution against a judge”. This provision has to be seen in connection with

Article 2 No. 2 (a). If a violation of the law causing damage to individuals serves as a ground for disciplinary responsibility and if everybody is allowed to give hints for commencing a disciplinary action, this can be interpreted as encouraging those losing a case to take personal revenge against the judges.

The High Council of Justice of Georgia does not only commence disciplinary prosecution in the case of a violation of Article 2 No. 2 (a), but also nominates the candidates for the Disciplinary Council of Judges of Georgia. It should be excluded that those initiating a disciplinary procedure have also influence on the personal composition of the deciding body.

According to Article 33 the disciplinary cases of judges are distributed by the Chairman of the Disciplinary Council regarding the order of cases. This is an abstract way of assigning cases to one of the panels of the Disciplinary Council. It is not understandable why there are exceptions to this rule provided for in Article 33 para. 2. It reads as follows: "In a case of inability to distribute the cases in accordance the order, the distribution will be conducted in accordance with the Chairman's opinion." This exception should be eliminated, especially as it is not clear what a "case of inability" should be.

In the case of the disqualification of one of the members of the Disciplinary Council the Chairman of the Disciplinary Council can, among others, appoint a "representative of a accusatory body instead of the disqualified member of the Disciplinary Panel". This regulation should be eliminated as it grants an arbitrary power to influence the composition of the Disciplinary Council. Whereas all the other members of the Disciplinary Council have to be elected, this member could be appointed without the consent of the electorate body.

Conclusion

Despite its very detailed regulations the Georgian Law on Disciplinary Responsibility contains several provisions that can be misused and thus undermine the independence of the judges.