

Results of Public Opinion Poll and International Practice

About the Draft Law on the General Courts, Amendments and Supplements to the Criminal Code of Georgia, and Draft Law on Amendments and Supplements to the Law of Georgia on Disciplinary Liability of Judges of the General Courts and Disciplinary Lawmaking
June 2007

1.1 Focus group analysis¹

In June 2007 Transparency International Georgia, with financial assistance from the Swiss Agency for Development and Cooperation, held focus group on the Draft Law on General Courts, the Draft Law on Disciplinary Responsibilities and Disciplinary Actions for Judges, and on Amendments and Supplements to the Criminal Code of Georgia in Kutaisi.

The representative of Transparency International Georgia chaired the meeting.

In Kutaisi the meeting was attended by representatives of local self-governance, law enforcement bodies, private advocacy bureaus, non-governmental sector, regional office of majoritarian MP and other interested persons. A total of 20 people participated in the focus group.

Participants' opinions on the drafts

The main positive sides of the drafts

Participants approved of the draft's main objectives, which are to strengthen the independence of the court system, to restrict interference in the activities of the court, and to promote unbiased and effective justice.

The following components were positively assessed:

- a) Innovation that thoroughly defines the categories of disciplinary violations of judges in the draft law on Disciplinary Responsibilities and Disciplinary Actions for Judges;
- b) Adoption of the opinion of the Venice Commission that a judge's misinterpretation of the law is not a disciplinary violation and cannot be subject to disciplinary action;
- c) Consideration of the opinion of the Venice Commission that the disciplinary norms should be proportional to the disciplinary violation and the addition of articles that define the norms of responsibility in case of certain violations; and,
- d) Innovation that the reason for a judge's dismissal must be a very serious violation that could greatly harm trial participants, the legal rights of a third party, or the public interest.

It was mentioned that the new draft, in comparison with the previous version, is more effective and clearly defines the regulatory mechanisms for judges' disciplinary violations.

Most participants agreed that the essential part of the law was that the opinion of the Venice Commission was considered and there were efforts to harmonize legislation with European and international standards.

¹ The views expressed in this report are those of the focus group participants and not those of Transparency International Georgia or the Swiss Agency for Development and Cooperation.

Remarks made on the draft law

During the discussion participants also pointed out the disadvantages of the draft. They expressed their dissatisfaction about the following topics:

Draft law on amendments to the Organic Law of Georgia on General Courts

The draft states that “in court buildings and courtrooms photo, video, and audio recording is prohibited. Only the court is authorized to record sessions and disseminate the material (photo, video, audio recording) if it does not violate the law.”

Participants mentioned that subsequent events proved that society is interested in the activities of the courts. According to participants, publicity of the court sessions is more important than the fear that photo, video, or audio recording during the sessions could potentially have a psychological influence on the judge and thus hinder the appropriate examination of the case.

Participants noted that the amendment passed in 2006 made the sanctions on disorderly conduct during court sessions stricter. So this issue is well regulated.

Participants think that it is important to protect the rights of detainees and the presumption of innocence. When the society is informed about the detention of a person before the investigation is over it influences the investigation process and violates the rights of the detainee.

Participants mentioned that the draft does not have any financial justification although its enforcement will affect the expenditures of the state budget as all recordings made and disseminated by the courts will increase spending.

Draft Law on Amendments to the Criminal Code

The draft law abolishes the article of the Criminal Code that stipulates criminal liability for delivering an unlawful verdict or other unlawful court decision.

Participants of the meeting think that the argumentation of the draft authors that the amendment will support the independence of the court does not coincide with the ideas of the amendment itself. According to participants, to guarantee immunity for judges must not exempt them from criminal liability for crimes committed.

Participants agree with the general opinion that the court must administer unbiased justice: The court must be independent in its activities and make decisions only in accordance with law. The idea of abolishing criminal prosecution of judges for making illegal decisions will lead to the destruction of the rule of law which, in turn, must be inviolable for both ordinary citizens and judges.

It was underscored during the meeting that non-governmental and international organizations did not participate in elaboration of the draft.

Draft Law on Amendments and Supplements to the Law of Georgia on Disciplinary Liability of Judges of the General Courts and Disciplinary Lawmaking

The draft law defines the types of disciplinary offences, kinds of punishment (different for different offences), and new grounds for dismissing judges. All the participants of the meeting objected to the removal of **repeated violation of law by a judge** from the disciplinary offences list.

During the meeting, participants expressed the idea that in order to increase public trust of the court system, it is necessary to rearrange the court into an open, public establishment that reinforces the rule of law. Backing judge impunity normatively will contradict the main idea of the draft, which is to strengthen the independence of the court and restrict outside interference in court activities.

1.2. International Experience Related to Criminal Liability of Judges

The given analysis discusses international experience about issues of judicial immunity and judge criminal liability. The current practice of leading countries (USA, Germany, and France) and the experience of Eastern European member countries of the European Union are analyzed.

One important factor for ensuring the independence of judges is judicial immunity. The term involves judge protection guarantees and mechanisms in case of existing complaints and appeals against him/her. The main aim of judicial immunity is to support a judge in making just and lawful decisions, although the classical definition of judicial immunity covers only the immunity on civil responsibility and it does not exempt judges from criminal liability.

In the legal systems of the **USA** as in many other civilized countries, judicial immunity means that a judge is inviolable on civil activities. No legislation of the U.S. states exempts judges from criminal liability (criminal liability related to case decisions as well as generally, criminal liability for the judge as a civilian).

The federal legislation of the U.S., in particular the articles of Chapter 73 of the Criminal Code covering the rule of law, applies to any violator of the law, regardless of whether s/he is an ordinary citizen or a judge. The code and other federal criminal legislation do not include immunity from criminal liability for judges.

In **Germany** special attention is paid to the issue of a judge's criminal liability. Judge criminal liability is entirely separate from judicial immunity. Chapter 30 of the Criminal Code of Germany, which strictly regulates the issue of public servants' criminal responsibilities for committing such offences as taking or giving a bribe and giving preference to favorable persons, also defines and regulates the criminal liability of judges (Articles 331-335).

For instance, according to Paragraph 2 of Article 332 of the Criminal Code, a judge or an arbiter, which demanded, promised, for himself or for another person accepted advantage in the present or future in exchange for making a legal decision, by which s/he violated/will violate his court duties, shall be punished with imprisonment for a period of one to ten years; in case of a less severe crime – from six months to five years.

It is also important that avoiding responsibilities is equal to the above mentioned violations of the law.

In **France**, as in Germany, the criminal liability of a judge is strictly regulated. The Criminal Code of France particularly regulates the unlawful ruling of a judge.

In Article 434-7-1 of the Criminal Code impeding the execution of the law or refusing to execute, despite being warned by a higher echelon, requires that a judge, court member, or court administration will be fined 7,500 Euros and deprived of holding state office for a period of 5 to 20 years.

A separate article of the Criminal Code of France determines the charge for delivering an unfair ruling or avoiding delivering a verdict in exchange for a bribe or other privilege. Article 434-9 sets the punishment of deprivation of liberty at ten years and the fine at 150,000 Euros (both of these measures are imposed together) for the actions specified above.

The **new Eastern European member states of the European Union**—in particular Bulgaria, Slovenia, Estonia, and Latvia—are observed to have a similar practice for the criminal liability of judges.

Article 294 of the Criminal Code of **Bulgaria** envisages criminal liability for an unfair ruling made by a judge, prosecutor, or investigator. Deprivation of liberty from two to eight years is envisaged as part of a sanction.

Article 360 of the Criminal Code of **Slovenia** deprives a judge, prosecutor, or his deputy of freedom from six months up to five years for issuing an unlawful act or infringement of the law.

The Criminal Code of **Latvia** stands out with its thoroughness, which determines the criminal liability of a judge and investigator for committing illegal actions, such as:

- issuing an unlawful ruling (Article 191);
- fabrication of evidence (Article 289);
- illegally depriving an innocent person of freedom (Article 290);
- detaining a person without legal grounds (Article 292);
- unlawful interference in the investigation process (Article 294).

The sanction part is strict enough and implies imprisonment from 3 months to 10 years in accordance the above mentioned disposition of illegal actions.

A specific article of the Criminal Code of **Estonia** regulates the issue of criminal liability of a judge. Article 311 determines that a judge, who supposedly makes an unlawful ruling, shall be imprisoned for a period of five to ten years.

Hence, the experience in the sphere of justice of such leading countries as the USA, Germany, France, and developed countries such as Bulgaria, Slovenia, and the Baltic States clearly shows us that judicial immunity does not extends in case of committing a crime by a judge. The criminal liability of a judge in case of taking unlawful decision or committing another kind of crime is unavoidable legal fact and does not consider any exemption.

Sources:

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