



Strasbourg, 7 March 2014

CDL(2014)007*

Engl. only

Opinion no. 751 / 2013

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AND

DIRECTORATE FOR JUSTICE AND HUMAN DIGNITY
OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW

DRAFT JOINT OPINION

OF THE VENICE COMMISSION

AND THE HUMAN RIGHTS DIRECTORATE
OF THE DIRECTORATE GENERAL
OF HUMAN RIGHTS AND RULE OF LAW (DG I)
OF THE COUNCIL OF EUROPE

ON THE DRAFT LAW
AMENDING AND SUPPLEMENTING THE JUDICIAL CODE
(EVALUATION SYSTEM FOR JUDGES)
OF ARMENIA

on the basis of comments by

Mr James HAMILTON (Substitute member, Ireland)
Mr Johan HIRSCHFELDT (Substitute member, Sweden)
Mr Konstantine VARDZELASHVILI (Substitute member, Georgia)
Mr Gerhard REISSNER (Expert, Human Rights Directorate, DG I)

** This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Table of contents

I.	Introduction	3
II.	General remarks	3
III.	Draft Law amending and supplementing the Judicial Code.....	4
A.	Evaluation system.....	4
1)	In general	4
2)	Specific Articles	5
B.	Changes to procedures in the Judicial Code	15
C.	Changes to disciplinary measures against judges in the Judicial Code	15
1)	In general	15
2)	Specific Articles	16
IV.	Conclusions.....	19

I. Introduction

1. The Venice Commission received a request for an opinion on the draft Law amending and supplementing the Judicial Code of Armenia by letter of 12 November 2013 from Mr Hrayr Tovmasyan, Minister for Justice of Armenia.
2. The Venice Commission has invited Mr James Hamilton, Mr Johan Hirschfeldt and Mr Konstantine Vardzelashvili to act as rapporteurs for this Joint Opinion. Mr Gerhard Reissner, President of the Consultative Council of European Judges (CCJE), acted as rapporteur at the request of the Human Rights Directorate of the Directorate General of Human Rights and Rule of Law – DG1 (hereinafter, “HRD”).
3. A delegation of the Venice Commission went to Yerevan, Armenia from 20-21 January 2014 to meet with the representatives of the Association of Judges, the NGO on the Protection of Rights without Borders, the Civil Society Institute, the Armenian Helsinki Committee, the Council of Justice, the Human Rights Defender, the Committee of State and Legal Affairs of the National Assembly and the Ministry of Justice of Armenia.
4. This joint opinion takes into account the information obtained during the above-mentioned visit.
5. *The present Joint Opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. General remarks

6. This Joint Opinion was prepared on the basis of documents sent by the Armenian authorities to the Venice Commission consisting of an English translation of the draft Law amending and supplementing the Judicial Code of Armenia (hereinafter, the “draft Law”), the current text of Chapter 17 of the Judicial Code on disciplinary liability of judges and termination of powers and the Rationale for the adoption of the proposed draft Law, as they appear in document CDL-REF(2013)060.
7. The Venice Commission and HRD delegation that went to Armenia was informed during meetings in Yerevan that there were two other draft laws in circulation on issues related to the draft Law. One introduces the new Ethics and Disciplinary Commission and the other deals with the Court of Cassation’s admissibility procedures.
8. These other two draft laws were not mentioned in the Rationale that was sent to the Venice Commission along with the draft Law. It is, however, clear that the changes they introduce directly affect the draft Law. It is therefore regrettable that the Venice Commission and HRD obtained no information on these other two drafts, which is likely to affect the quality of the analysis in this Joint Opinion.
9. The draft Law will amend the current Judicial Code in two respects: (1) it will establish an evaluation system for judges and (2) it will introduce changes to the disciplinary system. With respect to the evaluation of judges, the Rationale of the draft Law provides that clear objective quantitative and subjective qualitative criteria should be introduced in order to ensure that the evaluation system is in line with international standards and that it should be regulated. The fact that a negative result in the evaluation procedure could lead to a disciplinary sanction, including dismissal, is problematic.

10. The Joint Opinion will first deal with the new evaluation system, then with the changes to the procedures in the Judicial Code, followed by the changes to the disciplinary measures against judges in the Judicial Code.

III. Draft Law amending and supplementing the Judicial Code

A. Evaluation system

1) In general

11. The evaluation of court and justice systems is generally seen as a good means of implementing managerial or political decisions aimed at improving these systems; whereas, the evaluation of the performance of individual judges is often seen as infringing judges' independence. Although this danger may well exist, it should not prevent an evaluation from taking place. It is, however, important that the evaluation has a sound basis.

12. With respect to the independence of judges, Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities taken together with Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges, conclude that the infringement of independence is any kind of external influence that could prevent a judge from fulfilling the task which is laid upon him or her by Article 6 of the European Convention on Human Rights (hereinafter, "ECHR"). Recommendation CM/Rec(2010)12 sets out that "efficiency is the delivery of quality decisions within a reasonable period of time following fair consideration of the issues."¹ Therefore: quality, within a reasonable period of time and fairness are the necessary prerequisites that the judge should meet when rendering a decision.

13. A judge's independent exercise of his or her judicial tasks may be infringed by other state powers or by undue influence that comes from within the judiciary itself.² In this respect, the Venice Commission delegation, while in Armenia, heard persistent reports of improper and extraordinary interference by judges of higher-level courts with those of lower-level ones. Notably, that lower-level court judges often seek instructions from higher-level court judges – in particular those of the Court of Cassation. Should these allegations be true, then a firm position must be taken in Armenia to ensure **that the independence of the judiciary includes the independence from interference by other judges.**

14. The Venice Commission's Report on the Independence of the Judicial System Part I: the Independence of Judges states that "the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity."³ Recommendation CM/Rec(2010)12 sets out that "The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law."⁴ And it goes on to state that:

"22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be

¹ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 31.

² Opinion No. 1 (2001), CCJE, paragraph 66; Report on the Independence of the Judicial System Part I: the Independence of Judges (CDL-AD(2010)004), paragraphs 68-72.

³ Report on the Independence of the Judicial System Part I: the Independence of Judges (CDL-AD(2010)004), paragraph 72; The Bangalore Principles of Judicial Conduct set out that "In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently", the Bangalore Principles of Judicial Conduct, 2002, Value 1 Independence, 1.4.

⁴ Recommendation CM/Rec(2010)12, paragraph 4.

independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence.

23. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.”

15. The European Court of Human Rights also notes that judicial independence demands that individual judges be free not only from undue influence outside the judiciary, but also from within. **This internal judicial independence requires that they be free from instructions or pressure from their fellow judges and *vis-à-vis* their judicial superiors.**⁵

16. In the more recent case of Oleksandr Volkov v. Ukraine, and on the more general notion of the independence of the judiciary, the European Court of Human Rights found that a system of judicial discipline must be organised in a proper way to ensure that there is sufficient separation of the judiciary from other branches of State power. The Court added that in order to safeguard judicial independence, which is one of the most important values underpinning the effective functioning of democracies, appropriate guarantees against abuse and misuse of disciplinary measures must be in place.⁶

17. The alleged existence of interference in the independence of the individual judge in Armenia is not only disquieting, but points out the necessity for proper evaluation of judges’ conduct at every level.

18. Seeking instructions in individual cases from higher instance judges, who would be deciding the appeal, deprives the parties from an independent review of their judgment, thereby violating their right of access to the courts (Article 6 ECHR and of Article 2 Protocol 7 ECHR in criminal cases). Such practice (including providing instructions) is not only inefficient (one level of jurisdiction is, *de facto*, removed), but it also violates human rights. **This practice, if persisted in, should be dealt with through disciplinary means against judges taking part in such practice.**

19. It should be noted that the question of the evaluation of judges is a topical one in several countries at the moment, which are considering introducing or revising their evaluation systems. The CCJE has therefore decided to draft Opinion No. 17 on the topic of “Justice, evaluation and independence”⁷.

2) Specific Articles

Article 96.1 Evaluation activities of judges

20. Armenia’s judicial system is made up of three levels: first instance courts, courts of appeal and the Court of Cassation (replacing the two-level system that existed previously consisting of people’s courts and the Supreme Court). Article 96.1 envisages an evaluation only for the courts of first instance and the courts of appeal. It is not clear why the Court of Cassation is excluded from the evaluation process. There seem to be no specific provisions in the Constitution on the Court of Cassation and the system for appointments seems to be the same as that for other courts. The explanation the Venice Commission and HRD

⁵ See European Court of Human Rights, case of Parlov-Tkalčić v. Croatia, application no. 24810/06, Judgment of 22 December 2009, paragraph 86.

⁶ See European Court of Human Rights, case of Oleksandr Volkov v. Ukraine, application no. 21722/11, Judgment of 27 May 2013, paragraph 199.

⁷ This may not be its final title once adopted, but the Opinion will deal with the evaluation of judges.

delegation received in Armenia is that the question of promotion does not arise at this Court, because it is the highest court of the land.

21. However, evaluation is also designed to secure proper performance standards, including self-analysis by the judges and increased efficiency. It will also be needed to identify and respond to malpractice and it is therefore not clear why the Court of Cassation should be excluded from such an evaluation process. There will also eventually be a need for statistics or for a quantitative evaluation of the general performance of that Court.

22. The Venice Commission and HRD therefore **recommend that the Court of Cassation be included in an evaluation system**. In addition, this would send an encouraging and useful signal to the entire judiciary if the highest-ranking judges were also part of the evaluation process.

23. The new evaluation system has a threefold aim: 1) to show (identify for) judges means of increasing efficiency, 2) to encourage judges to engage in self-analysis and 3) to serve as a basis for selecting the best candidates for promotion. The first two aims seem praiseworthy, but the third is more controversial and the use of an evaluation system for such purposes needs to be approached with great care. For example, while the body deciding or recommending on promotions should have access to evaluations, the judge in question should have the opportunity to explain or challenge any adverse finding before that body. The grading system should not be used to exclude candidates from being considered for promotion unless, perhaps, a judge is evaluated as being in the very lowest category.

24. A good system of performance evaluation is likely to work best when it is used primarily as a developmental tool and when it has the co-operation of the evaluated person with the evaluator. If it is seen as leading to consequences such as exclusion from promotion, that co-operation may not so willingly be given. **Evaluation should not be seen as a tool for policing judges, but on the contrary, as a means of encouraging them to improve, which will reflect on the system as a whole.**

25. It is important that a certain number of issues be clarified at this point in order to understand what bodies are involved in the evaluation process. First of all, there is a Judicial Council (set up under the Constitution) and a Committee of Court Chairpersons (a self-regulating body - but the chairs are currently appointed by the President of the Republic). A new Council of Judges will replace the existing Committee of Court Chairpersons, which should be more democratic in its composition and functions (no other details were provided). The Venice Commission delegation was informed in Armenia that these changes are dealt with in another draft law.

26. In addition, Article 96.1 envisages that a new Ethics and Disciplinary Commission under the new Council of Judges organise and conduct the evaluation. This new Commission will be set up by this other draft law that is in circulation at the moment and that the Venice Commission has not seen.

27. According to the Law on the Judicial Code of Armenia⁸, the function of the current Disciplinary Committee of the Council of Justice is "to instigate disciplinary proceedings against first instance and appellate judges and court chairmen and to file motions thereon to the Justice Council". Empowering a(n) (Ethics and) Disciplinary Commission with the task of conducting evaluations – assuming that this new Commission will inherit this power - invites one to reach the conclusion that these will be mainly used for disciplinary purposes. This may therefore not be a good arrangement and might send the wrong signal.

⁸ Judicial Code of the Republic of Armenia, adopted on 21 February 2007, Article 106, available online: <http://www.court.am/upload/file/Judicial%20Code%20Eng%20final%20-%20290607.pdf>

28. Moreover, evaluation and disciplinary liability are (or should be) two very different things.

29. Article 96.1.1 provides that an evaluation should take place every two years. This is a relatively short period of time. Such a short period of time establishes a system of permanent observation. Any evaluation procedure will have an impact on those who are evaluated.

30. This proposal will also raise the question of the availability of the necessary funds for such a procedure. There also seems to be a contradiction with Article 96.2.2, which states that the evaluation based on quantitative criteria shall be carried out annually.

31. Article 96.1.4 provides that the Council of Judges shall define the procedure, schedule and methodology for evaluating the activities of judges. This is in line with international standards: having the principles in the law and entrusting the Council of Judges with the details. Problems will however arise in deciding the details.

32. The draft Law sets out a very detailed formula that must be used for statistical data. For the qualitative criteria, the draft Law not only enumerates these criteria, but also sets out their 'aspects' that should be examined.

33. The draft Law provides for a system of points that must be used: 60% of the points should be attributed to quantitative criteria (see below), but the concrete distribution of points to the criteria themselves should be decided by the Council. The latter is also responsible for the way in which surveys are organised among the different stakeholders. Therefore, on the one hand, there are a number of very important issues that are transferred to the Council, but on the other, the Council is bound by details.

Article 96.2 Criteria for evaluating activities of judges

34. Article 96.2 provides for both quantitative and qualitative criteria for the evaluation of activities of judges. There is an obvious problem with the use of quantitative criteria. Here, the comments of the group who drew up the Kyiv Recommendations should be echoed, notably that "the quality of a judge's performance cannot be measured by counting the number of cases processed regardless of their complexity, or the number of judgments upheld at the higher instance. While it was acknowledged that statistics regarding case processing and reversal rate can be useful for purposes of judicial administration, management and budgeting, they should not be used to the detriment of the individual judge."⁹

35. Furthermore, should it be assumed that all judges will undergo an evaluation simultaneously? Taking into account that there are about 230 judges in the country, an annual evaluation will put a huge administrative burden on the body in charge of the whole process.

36. The evaluation of quantitative criteria is carried out every year, whereas those regarding the qualitative criteria will be carried out every second year. How are these two evaluations going to be brought together? Will there be an additional evaluation every two years that will consider the results of the evaluation of the qualitative criteria and those of the quantitative criteria over the past two years? This should be clarified. Article 96.3.12 below does not deal with this in a satisfactory manner.

⁹ See Expert meeting on judicial independence in Eastern Europe, South Caucasus and Central Asia, 23-25 June 2010, OSCE/ODIHR, p.14.

37. If there were to be a measurement of workloads, systems would need to be in place to evaluate the weight and the difficulty of different files. Any judgment requires an assessment of the optimum time that should be allocated to each case. Every manager of professionals will (or should) be aware that the person who takes longer over work may do a more thorough job. Simply counting the number of cases dealt with is crude and may be completely misleading. At most, such a measurement may serve as a useful tool to indicate a possible problem, but can do no more than this and certainly should not be determinative of a problem.

38. Measurement of the “observance of procedural periods” (Article 96.2.4.2) again may point to a possible problem, but it is important that the judge be given an opportunity to explain any apparent failings in this regard.

39. Measuring the “stability of judicial acts” (Article 96.2.4.3) is questionable. It effectively means counting the number of successful appeals. Such a measure should be avoided because it involves an interference with the independence of the judge. It is particularly inappropriate in a system where the doctrine of binding precedent does not apply. Where a case is overturned on appeal, who is to say that the court of first instance got it wrong and the appeal court got it right? The decision of the judge of the first instance court quashed by the Court of Appeal could well later be supported by the decision of the Court of Cassation, the Constitutional Court or the European Court of Human Rights. However, due to the differences in time-limits of the evaluation procedures and the review of the case (or the legal issue) by the higher courts or international judicial (or quasi-judicial) bodies, the first instance court judge may still receive a negative evaluation.

40. The threshold of reversals would need to be quite high and the rule for exceptions to be established by the Council of Judges would have to be very generous. Such a system of on-going assessments is likely to produce a timid judiciary which looks over its shoulder all the time. Furthermore, its application to criminal proceedings would be particularly improper.

41. Article 96.2.5 to 96.2.7 provides what looks like a scientific formula for determining quantitative performance of the workload. However, the scientific basis for this formula is more apparent than real, since the entire basis for the calculation rests on the assumption that the caseload assigned to the judge was fair and reasonable.

42. In addition, although properly compiled statistics may be a generally useful tool for assessments, they should be analysed in their context. According to some reports, the caseload of judges in Armenia increases annually and could potentially reach unsustainable levels. Insofar as a judge is able to dispose of a certain number of cases annually, should the caseload continue to increase, it would be unfair to evaluate the judge on the basis of a percentage of disposed cases without properly analysing the reasons for the increase in the caseload. It should also be noted that the caseload of judges at first instance courts is usually higher than that of upper level courts. Thus, the proportion of disposed and pending cases may be lower at the first instance court.

43. The proposal, under Article 96.2.9, to measure the average duration of examination of cases is inappropriate for similar reasons to those already referred to above, in relation to the counting of cases in general. Who is to say that a judge who takes longer over a case is not doing a more thorough job than the speedier colleague? The use of such a managerial tool in the evaluation process should be approached with great caution, as it will affect the judge’s independence. The judge seeking to meet these time frames might be tempted to disregard what would normally be seen as necessary under the law and his or her interpretation of it.

44. It is true that most of the cases that appear before the European Court of Human Rights are those that have breached Article 6 ECHR due to delays in the proceedings. But, with this criterion, a certain percentage of cases beyond a standard time frame should not, *per se*, be an input for evaluation marks, but may be the starting point for a more general examination of this criterion in the situation at hand.

45. In addition, it is important that, for the results to be well accepted by the judiciary, the very challenging task of classifying cases and elaborating time frames by the Council be done with the involvement of experts, experienced judges, and the Association of Judges in the preparatory work.

46. On the whole, the qualitative criteria set out in Article 96.2.10 seem to be appropriate. It lists them as follows:

- (1) Legal knowledge;
- (2) Professional abilities;
- (3) Communication skills;
- (4) Skills of communication with colleagues;
- (5) Professional involvement; and
- (6) Organisational skills (for chairpersons of courts only).

47. The weight of each of the above-mentioned criteria will be attributed by the Council.

48. Criterion (1) Legal knowledge, under Article 96.2.10.1, is certainly one of the most important criteria for the evaluation of judges as it is a fundamental requirement.

49. Under Article 96.2.10.1.b, the “quality of justification” (reasoning) is often a problem in new democracies and coherent reasoning should be promoted. Logical argumentation, clarity, and other aspects are of interest and are dealt with in Opinion No. 11 of the CCJE on Quality of Judicial Decisions.

50. Criterion (2) Professional abilities, under Article 96.2.10.2, raises the problem how one measures the “(a) ability to withstand pressure and threats” (see Article 96.2.10.2.a). If the pressure or the threat is made in open court, one can make a judgment, but pressures or threats made behind-the-scenes are unlikely to be known to the evaluator.

51. In Article 96.2.10.2.b, the criterion referred to is “observance of rules of professional conduct”. Is this a criterion about ethics or does it concern more precise legal provisions on professional conduct? Does it only concern cases resulting in disciplinary sanctions against the judge or are other cases or incidents also relevant (cf. Article 154 in the current Judicial Code)?

52. Criterion (3) Communication skills, under Article 96.2.10.3.d, lists “polite manner”, as one of the characteristics. This could perhaps be an ethical characteristic and if so should perhaps appear under the previous Criterion (2) above. But politeness also concerns questions of culture and personality, which are not readily susceptible to being measured. One person’s blunt, brusque or outspoken nature may to another person seem rude. Within limits there should be room to accommodate difference.

53. Criterion (4) Skills of communication with colleagues, under Article 96.2.10.4, is important, although it should also come under ethical behaviour. In certain cases, for instance when deciding on the promotion of a particular judge, professional as well as personal characteristics, communication skills and the ability to work in a team may be relevant criteria. However, taking into account potential implications of the evaluation (which may result in disciplinary sanctions), the evaluators should approach the personal or working

relationships between the colleagues with great care. There are cases where colleagues do not get on with each other, but both may be very good judges and with proper management the need for interaction between them may be minimised. It should be stressed that if no proper safeguards are put in place that would minimise the risk of conflicts of interest, evaluation of collegial relationships may raise issues of bias and create a lack of credibility of the entire evaluation process.

54. The “willingness to exchange professional knowledge and experience” might be better placed under Criterion (5) below.

55. Criterion (5) Professional involvement, under Article 96.2.10.5, brings several different aspects together, which seem to be important. At least participation in training is so important that it deserves to be a separate criterion. However, the participation in professional unions should not be an evaluation criterion. The individual judge must be free to decide whether or not to join a union.¹⁰ Participation in self-governing bodies or professional unions is a right and not an obligation for a judge.

56. Criterion (6) Organisational skills, under Article 96.2.10.6, are not only particularly necessary for chairpersons of courts but – perhaps in a slightly different manner – for every judge. Several countries have such a criterion, which also covers case management and the ability to manage one’s own workload in their evaluation schemes.

57. Consideration might be given to bringing together Article 135 and Article 96.2.10 because Article 135, in its new version proposed by the draft Law, also enumerates eight qualitative criteria in addition to the criterion workload. The grouping and terms for the criteria that are used in Article 135 seem to be more convincing.

58. Article 96.2.11 deals with quantitative criteria. It is not clear, however, what is meant here. The first sentence seems to indicate that the assessment of the quantitative criteria of judges in courts of appeal shall be performed in a way that all judges in a same panel are given the same result. Or does it mean that when a panel of judges in a court of appeal has rendered a judgment, and there was a dissenting opinion, and that judgment was later overturned by the Court of Cassation – the judge who made the dissenting opinion will not be “punished” in the evaluation? In any case, it is odd to make a difference in the evaluation between judges in a panel. Any evaluation of the actual decisions of judges risks crossing a line and interfering with the independence of judges, which is a core value.

59. In the Rationale, the authors of the draft Law pointed out that the “evaluation of judges must be conducted **mainly** by judges”, thereby suggesting that apart from judges, there should be other legal professionals involved in the evaluation. However, there is no indication about the background and the number of ‘non-judges’ involved in such an evaluation.

60. It is also not immediately clear from the draft Law whether a **quantitative** evaluation will be conducted by the judges. Article 96.2.12 provides for a **qualitative** assessment to be carried out by fellow judges randomly selected, which appears to be an appropriate way to proceed, but it is recommended that the evaluation be carried out by judges randomly selected from a pool of judges – preferably retired judges or judges serving at the same level in the court system as the judge being evaluated. It is recommended that all evaluators receive training.

61. The draft amendments contain no obligation for judges (or other persons) selected to conduct an evaluation to declare any conflicts of interest or recuse themselves in cases

¹⁰ Recommendation CM/Rec(2010)12, paragraph 25.

where the evaluator considers that professional or personal relationships may affect the evaluation or where there are circumstances which might influence his or her ability to fairly and reasonably evaluate the performance of a judge.

62. The draft Law also lacks a mechanism for the disqualification of an evaluator at a later stage who fails to recuse him or herself or to report a conflict of interest.

Evaluators should also be under the obligation to report any form of communication that attempts to influence the evaluation process by improper means (including, but not limited to, undue pressure, duress, or coercion).

63. The draft Law should also contain requirements for the recusal or a declaration of conflict of interest where the judge is given the task of evaluating a colleague within the same court or of the same Bench.

64. In order to ensure the credibility of the evaluation process as well as the integrity of the work, evaluators should be obliged - under the law - to keep the results of the evaluation confidential.

65. It is also not clear whether or in what circumstances judges may refuse to carry out an evaluation assignment.

66. Article 96.2.12 goes on to suggest two possible options. Option 1 provides for the assessment by prosecutors and advocates appearing in court and Option 2 provides for the prohibition on prosecutors and advocates taking part in the assessment.

67. Although each option exists in some countries, the evaluation of judges with the involvement of prosecutors and advocates is a very sensitive issue.¹¹ Of course, both prosecutors and advocates are well placed to know a judge's strengths and weaknesses. However, they are not disinterested observers. There is a risk that a judge may tailor his or her relations with particular prosecutors or advocates to secure a more favourable assessment or may be perceived as doing so. Furthermore, there is a particular risk in involving prosecutors in assessments of judges in legal cultures where historically the prosecutors dominated the judiciary. However, these considerations would not have the same force if retired advocates or prosecutors were to be used as assessors.

68. The risks of compromising the judge's independence outweigh the benefit of the prosecutor's and the advocate's potential knowledge and expertise as assessors. Option 1 should therefore not be adopted and Option 2 is the preferable approach.

69. However, the use of serving judges to evaluate their colleagues has the potential of causing some difficulties. It could lead to bad personal relationships between colleagues and has the potential to further undermine the morale of the judiciary. Alternatively, where judges receive favourable evaluations this could give rise to allegations of cronyism. There is a danger that such a system could lack credibility.

70. In general, establishing a mixed team of evaluators, inviting legal professionals from outside the current judicial system may be the least bad option. It is essential to establish an evaluation team with a balanced composition. This will avoid cronyism and the perception of self-protection. In addition, the evaluation must be conducted in a transparent manner and impartially.

¹¹ See Opinion on the draft Law on the amendments to the Constitution, strengthening the Independence of Judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine (CDL-AD(2013)014), paragraph 39.

71. There seems to be a technical error in Article 96.2.13: the reference to Part 10 of Article 96.3 is not correct. The reference should be to Part 12 of Article 96.3.

72. Article 96.2.14 states that “data on at least five court sessions” must be taken into account. This is to be welcomed and this method could be broadened to include the number of hearings and/or case and/or a certain number of decisions on remedies. This work should, however, be carried out by – preferably a retired judge or a judge serving at the same level in the court system as the judge being evaluated.

73. In Article 96.2.15-17 reference should be made to Part 12, not Part 11.

74. Under Article 96.2.16, the Council of Judges is to prescribe the format of questionnaires and self-evaluation reports. Here, the Council will need the assistance of experts, experienced judges and the participation of the Association of Judges in order for these questionnaires and reports to be accepted.

75. Article 96.2.17 provides for the identity of assessors to be kept confidential. Since this rule is not to be applied in cases where the results of an evaluation are appealed against, it is difficult to see what the point of it is. In any event, any system of evaluation should be transparent. The identity of the evaluator may be highly relevant since the person concerned may be biased against the judge. In addition, the Rationale on page 47 (cf. p. 32) states that “Randomly selected judges shall randomly attend court sittings of their fellow judges.” Is this approach still kept? If so, this should be explicitly stated here. However, the Venice Commission doubts that such a procedure is advisable.

76. Article 96.2.18 - A “brief justification” of grades given by evaluator’s in the evaluation of a judge might not be sufficient. If objective elements to prove fairness are not available, a longer description and argumentation needs to be provided to explain why the evaluator graded the judge as he or she did. This will allow the judge to have a reasoned decision on the attribution of his or her grade that he or she may then challenge before the Council.

77. Article 96.2.19 – the proposed rating scheme to be assigned to judges is not recommended because it creates more problems than it solves. Although it looks precise, it is not. It is subjective - if the proposed questionnaire or experience judges are used – which is bound to influence the distribution of points. An evaluation does not need exact points. What is important is to know whether or not a judge fulfils all the criteria, where his or her strong points and weaknesses lie and how to improve his or her capacities. This can be done without assigning points. The “rough” evaluation foreseen in Article 96.3 for an overall result could also be applied to the 10 criteria and that would be sufficient.

78. According to Article 96.2.20, grades are allocated as follows: 60 % on quantitative criteria and of 40 % on qualitative criteria. This form of grading is not in line with what is mentioned in the Rationale on p. 31, citing the Kyiv Recommendation, where quantitative evaluation should not be the main element of the evaluation of the activities of a judge.¹² In addition, one would expect it to be the other way around: a greater attribution to the qualitative criteria than to the quantitative ones, because the former include the most important aptitudes that a judge should have, such as knowledge and personal skills.

79. Opinion No. 1 of CCJE sets out an example from Lithuania, in paragraph 27: “Statistical data have an important social role in understanding and improving the workings and efficiency of courts. But they are not the same as objective standards for evaluation, whether in respect of appointment to a new post or promotion or otherwise. Great caution is required in any use of statistics as an aid in this context.” Although the Venice Commission does not

¹² Kyiv Recommendation, p. 27.

share such a general distrust of well-designed statistics, it is however questionable whether so much emphasis should be placed on quantitative criteria. A 50%-50% compromise might be chosen, which would at least provide a simple and neutral signal. If judges are required to achieve a certain minimum standard under both quantitative and qualitative criteria, then the relative allocation of marks between the two would have less importance. In reality it is clear that there are some judges that are more skilled than efficient and *vice versa*, but we would all like to have judges that are both skilled and efficient.

Article 96.3 Summarising the results of the evaluation of the activities of judges

80. Article 96.3.1.2 refers to Article 154.1 of the current Judicial Code, which sets out that the Ethics 'Committee' discuss certain reports (communications) against judges, while other reports result in a request for disciplinary proceedings. Are all these communications received relevant in the evaluation process and, if so, how will these be taken into account? Should an "open" disciplinary case, not yet finally decided upon, have any relevance in the evaluation?

81. Article 96.3.3 provides that the Ethics and Disciplinary Commission is to prepare individual evaluation sheets for each judge setting out grades and providing reasons for each criterion. It is not clear what is meant by "grades" here – are these points given by the evaluator or does it summarise the grades for each criterion or is it the overall result?

82. Article 96.3.5 – the self-evaluation sheet prepared by the judge is crucial. The judge has two weeks to prepare it. This may be too short a period of time to check the evaluation sheet.

83. Article 96.3.5 should refer to parts 4 and 12 (not 11) of Article 96.2.

84. Article 96.3 provides for the evaluation of judges' activities by the Ethics and Disciplinary Commission of the Council of Judges with an appeal, under Article 96.3.9, to the Council which is to function as a court. It is not clear exactly what is meant by this – if it simply means that the Council is to apply the rules and safeguards which an administrative court would have to apply, it may be reasonable, but the fact is that the Council of Judges is not a court and cannot be a court. It is not clear whether this procedure is intended to exclude a reference to a court of law.

85. According to Chapter 13 of the Judicial Code, the members of the Council of Judges are composed of nine judges and four other persons (professors of law). Every year, a disciplinary committee consisting of three members (of which two are judges) is set up. Is it this committee that represents the Council and in its own capacity that acts as a court? Or will the Council of Judges in plenary sessions (without the committee members) serve as an appeal forum? If the Council of Judges is an organ that comprises all of Armenia's judges, it would probably be too large to act effectively as a court as set out in Article 96.3.9.

86. On the whole, **it would be preferable simply to provide for an appeal to a court of law rather than a procedure involving the Council of Judges.**

87. Article 96.3.13 seems to introduce a choice between either an evaluation only on quantitative criteria or an evaluation on both quantitative and qualitative criteria. This seems to contradict the 60% – 40% provision in Article 96.2.20.

88. The aim of the evaluation process is set out in Article 96.1.2 (above). One of them is "to serve as a basis for selection of best candidates when compiling promotion lists of judges". There is, however, no need and no justification for establishing an on-going ranking of all judges. This could lead to an improper competition between judges, which could

compromise the judges' decisions. It might be sufficient to rank those judges that have applied for a promotion. In addition, the annual evaluation (only quantitative criteria) will be applied here, which is questionable.

89. The purpose of compiling a list, under Article 96.3.15, showing all the judges and their rankings with the detailed rating points assigned to each, is not clear. This list is to be sent to all judges, the Council of Justice and to the staff of the President of the Republic. The list is meant to be for internal use only. It seems quite unrealistic to have such a wide circulation of the list and expect it to remain confidential. If such a list were to be made public, it could have serious consequences for the administration of justice. How is a litigant expected to react if his or her case is assigned to a judge who has been ranked in the low group? There is no good reason for this information to be made available to the President of the Republic. No justification for this is provided under Article 96.3.16 and Article 96.3.18 (and the explanatory memorandum is silent on this point).

Article 96.4 Implications of the evaluation of the activities of judges

90. Article 96.4.1 combines certain implications with certain results of the evaluation. These are mandatory or recommended training; disciplinary sanctions; suspension of the right to be included in the promotion list or privileged possibility to be included in the promotion list.

91. According to Article 96.4.1 and Article 96.4.2, where a judge scores a low-grade, mandatory training is required and this is appropriate. But, it may not be necessary or appropriate for the Council of Judges to make an order for such training to take place. It should be sufficient that the judge in question be under an obligation to undergo the training in question within a specified period of time.

92. According to Article 96.4.3 and Article 96.4.4, where a judge scores a low grade on two or three successive evaluations, the matter is subject to a disciplinary complaint. Again, this point underlines the inappropriateness of the Ethics and Disciplinary Commission having a role in the matter. This problem would be avoided if a specialised independent Evaluation Commission dealt with the matter.

93. In addition, the benefits of application of the sanctions in case of low performance are highly questionable, especially taken in conjunction with Article 153, according to which judges may be subject to the disciplinary sanctions in case of "apparent and gross violation of a substantive norm in the process of administering justice", "apparent and gross violation of a procedural norm in the process of administering", etc. Article 153.2(10), (15) and (16) define as a gross violation a case of judge "(10) rendering a judicial act inconsistent with the principle of legal certainty; "(15) arriving at a decision on quashing the proceedings of a case in violation of the law"; "(16) other apparent or gross violations of substantive or procedural norms, which led to strict limitation of rights of persons guaranteed by respective legal acts or to deprivation of such rights and had an impact or could have had an impact on rendering a proper judicial act regarding the case". Article 153 being problematic of its own creates an additional danger when combined with Article 96.4.3 and Article 96.4.4.

94. Article 96.4.6 to Article 96.4.9 deal with the impact of assessments on promotions. The effect of these provisions is to virtually make promotions automatically follow the evaluation results. This is so because not only candidates with a low grade, but those who are graded average are excluded from promotions, whereas those who are graded excellent are given a preferential right over all other candidates. While it seems reasonable to take the evaluations into account, they should not be the sole determining factor in relation to promotions.

95. In addition, the possibility for the Council to deviate from the rule to include a judge who has been graded as excellent three times (paragraph 7) is surprising. The Council has to

provide “substantial arguments” to do so, but it is difficult to imagine what kind of argument could be provided to exclude such a judge.

96. On a technical note, Part 7 of Article 96.4 refers to Part 12 of the same Article, when it should refer to Paragraph 12 of Article 96.3. There is no Part 12 in Article 96.4. In addition, at the end of Paragraph 9, reference should be made to Part 7, not to Part 6.

B. Changes to procedures in the Judicial Code

97. There are consequential amendments to Article 109 of the Code concerning procedures in the Council of Justice. These provide that sessions of the Council are to be held *in camera* with the exception of cases concerning subjecting a judge to disciplinary action (paragraph 2). It is recommended that sessions – as a general rule - be held in public and that they be held *in camera* only exceptionally, at the request of the judge. This would be more in line with Article 6 ECHR.

98. Another question arises, notably whether there is a right to appeal against the decisions of the Council of Judges. There seems to be no provision on that.¹³

99. Article 135 is to be amended to require members of the Council of Justice, when voting with ballots in regard to compiling promotion lists, to take into account the results of the evaluation, and in particular certain aspects of the evaluation. This Article is confusing. Firstly, it is not clear what is meant by taking the results into account. There seems to be not much of a choice in any case, since the promotion lists must exclude certain people and give preference to others. Secondly, why are some aspects of the evaluation included in this list and not others (those excluded are, among others, the ability to maintain self-control, having an impartial attitude towards participants in proceedings, appearing on time for court sessions, polite manners, participation in professional unions of judges), while at the same time reference is made to upholding the reputation of the court and observance of the judicial code of conduct, which are not in fact referred to in the evaluation criteria, at least not expressly.

100. Article 135.2 sets out that the overall results of at least the last two evaluations should be taken into account during the drawing up of promotion lists for judges. The provision refers to Part 8 of Article 96.3, but perhaps either Part 12 or 13 of Article 96.3 was meant to be quoted here.

C. Changes to disciplinary measures against judges in the Judicial Code

1) In general

101. The draft Law contains provisions amending Chapter 17 of the Judicial Code that deal with disciplinary liability. The Venice Commission and HRD have been given the full text of Chapter 17, for information only.

102. Disciplinary liability requires a disciplinary offence. A negative performance, which leads to a negative overall result of an evaluation, can also originate from other factors than a disciplinary offence. Therefore, the proposal that repeatedly low or negative overall evaluation results shall lead to the Ethics and Disciplinary Commission instigating disciplinary proceedings raises problems, because the reasons for a negative result could be other than a disciplinary offence. The draft Law does not differentiate between the implications of the evaluation and the overall results, it simply connects them. This leads to an undesirable mixture of disciplinary liability and evaluation.

¹³ See CDL-AD(2010)004 and CCJE Opinion No.3, paragraph 72.

103. However, a mechanism to exclude those judges that are unable to carry out their function in the judiciary is needed. In such a case there should be no punishment (e.g. cut in salary etc.) but only a motion for that judge's dismissal. This may need an amendment to Article 167 of the Judicial Code.

104. It should be noted that, in a number of respects, the currently existing procedures on disciplinary proceedings do not comply with European standards. In particular, it appears that the Disciplinary Commission can both initiate a complaint and make an initial decision on it subject to an appeal to the Council of Justice. The Council of Justice sits as a court in hearing the appeal (Article 158), but since it is not in fact a court of law it would appear that no appeal to a court of law against disciplinary decisions is provided for.

105. The draft Law provides a strong link between evaluation and disciplinary liability. However, detecting wrongdoing should not be the main task of an evaluation. It is therefore, once again, questionable whether it should be the same body – i.e. the Ethics and Disciplinary Commission - that should have jurisdiction for the evaluation and disciplinary procedures or whether it should not be a separate organ that should deal with them.

106. An additional argument to separate the two tasks is the composition of the Disciplinary Commission which, according to Article 106 of the Judicial Code, is composed of three members (two judges and one non-judge) for a term of one year only. Such a short period of time may be sufficient to deal with disciplinary issues, but not for an evaluation. This needs experience and there should be consistency and a regular evaluation over time. This might be considered for the new Ethics and Disciplinary Commission.

107. It is important that, in the end, a proper system be established, that is clearly set out by law, in which information about errors or misconduct of judges - including those discovered during an evaluation process - can be assessed, with discretion and that can be transferred to a disciplinary procedure, where this is appropriate.¹⁴

108. Finally, it should be underlined that not every shortcoming in a judge's performance is a disciplinary offence.

2) Specific Articles

Article 153.1 Time frames for instigating proceedings with a view to subjecting to disciplinary action.

109. This Article clarifies that the time limitation period starts with the entry into force of the respective decision. This is a positive step. Any interference with the proceedings before the court should be avoided.

110. The text of Article 153.1 starts with "1." but other paragraphs do not follow. In the end of paragraph 1 there is a provision (5) that refers to Article 153 (6). This is the old version of Article 153, whilst in the new version of Article 153 as amended by this draft Law, (6) no longer exists. It is therefore not clear whether the other points of Article 153.1 refer to new Article 153 or the old version.

Article 153.2 Apparent and gross violation of substantive and procedural norms

¹⁴ For more information on this, see Opinion on the Law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia (CDL-AD(2007)009), paragraphs 6-7.

111. Article 153.2 of the existing law on disciplinary liability provides for six bases for disciplinary liability. These are firstly, obvious and grave violations of substantive law norms, secondly, obvious and grave violations of procedural law norms, thirdly, regular or grave violations of work discipline, fourthly, regular or grave violations of the code of conduct, fifthly, failure to carry out certain duties under the Judicial Code, and sixthly, failure to notify the Ethics Committee of interferences with the course of justice. Here it may be noted that 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 (the Venice Commission has not seen the Code of Conduct/Ethics)¹⁵.

112. The draft Law would delete from this list the provision concerning work discipline which will now be dealt with under the new evaluation procedure. It will add, as a ground of disciplinary liability, failure to fulfil the duty of participating in mandatory training or to carry out duties set by the probation supervisor.

113. The draft Law proposes to define what is meant by an apparent and gross violation of substantive and procedural norms. The attempt to do this is welcome since the existing text is unclear in that it makes no attempt to clarify the scope of the provision. However, a number of reservations about the content of the definition proposed in the new Article 153.2 could be raised.

114. The draft Law defines an apparent violation as “such a violation of a substantive or procedural norm in the administration of justice, the existence of which cannot be questioned by any reasonable legal assumption or argument.” This certainly sets the bar very high. However, it would still be preferable that most of these matters be dealt with by way of appeal or judicial review rather than treating them as the proper subjects of disciplinary proceedings.

115. The definition of “apparent and gross violation” in the heading of Article 153.2.1 is a good start for restricting this term. This could also be the place where the principle of proportionality could directly be expressed.¹⁶ However, there is a need to restrict disciplining so that it does not include a well-reasoned interpretation of the law, even if it differs from previous case-law of higher instances.

116. Under Article 153.2.2(1) a one off application of a norm that is no longer in force already constitutes an “apparent and gross violation”, which is too wide. Such errors should be settled in appeal and should not immediately constitute a disciplinary offence.

117. Under Article 153.2.2(2), even “subjecting a person to liability not provided for in law” could be interpreted in too wide a manner. A minor fault or error of this kind must not be regarded as gross. Such errors should be settled in appeal and should not immediately constitute a disciplinary offence.

118. Although the rationale behind Article 153.2.2(3-4) is clear: judges are not to apply provisions of the law that have been declared unconstitutional, the wording is too wide. The interpretation of a decision of the Constitutional Court may not always be obvious enough to justify disciplinary proceedings against a judge who did not misinterpret this reasoning in bad faith (the same may be true for European Court of Human Rights judgments).¹⁷

¹⁵ See, notably, the Venice Commission’s Opinion on draft Code on Judicial Ethics of the Republic of Tajikistan (CDL-AD(2013)035).

¹⁶ Opinion on the Law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia (CDL-AD(2007)009), paragraphs 4 and 16.

¹⁷ Roundtable Session II p. 9 and Opinion on the Law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia (CDL-AD(2007)009), p.3.

119. The provisions in Article 153.2.2(5-10) seem problematic as they are open to various interpretations; they lack clarity and precision, which is important when applying disciplinary sanctions. For instance, issues related to the separation of powers, defining the scope of the powers of local-self-governments, or even the retroactive application of the law may be associated with decisions made or to be made by a judge in relation to complicated or even controversial legal issues.

120. Further points in Article 153.2 are not specific enough. Maybe this problem could be tackled with a change in the heading of Article 5 of the draft Law (amending Article 153.2.2 of the Code) as follows: "Within the meaning of this chapter measures or omissions of the following kind may be regarded as so serious and flagrant that they constitute a gross violation of substantive or procedural norms".

121. A violation of the code of conduct, as provided in Article 153.2.3, should not be a ground for disciplinary action on its own. Disciplinary action should be taken on the basis of specific disciplinary offences.

122. The grounds for disciplinary actions such as "decision on quashing the proceedings of a case in violation of the law" (Article 153.2), is open to interpretation and potentially to wide application and therefore "a distinction would have to be made between incorrect interpretation of the law based on the judge's belief on the one hand and violation of the law on the other."¹⁸

123. The Venice Commission's Joint Opinion with the OSCE on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan also recommends that "disciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the law or judicial mistakes."¹⁹

124. In its Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts, the Venice Commission recommended that "... grounds on which a judge may face disciplinary responsibility centre exclusively on a judge's conduct whilst discussing a case and when handing down a verdict or ruling. They therefore apply to the judicial process itself, to the judge's interpretation of the law while considering a case and to the very essence of a judge's function i.e. independent adjudication. It encroaches on the extremely delicate sphere of judges' independent decision making in accordance with constitution and law".²⁰

125. Article 155.5.7 of the existing Code, which will not be amended, also seems to be problematic as it allows disciplinary proceedings in cases where a "judicial act issued by an international court acting with the participation of the Republic of Armenia, which establishes that a court of the Republic of Armenia violated human rights and fundamental freedoms set by a relevant international treaty to which the Republic of Armenian is a party...".

126. It seems, therefore, that many of what are defined as gross violations effectively seek to penalise the judge who makes a wrong decision. This is true of decisions contradicting decisions of the Constitutional Court or of the European Court of Human Rights, or imposing a disproportionate measure of liability. Some of the grounds are extremely vague – for

¹⁸ Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, CDL-AD(2007)009, paragraph 21.

¹⁹ Joint Opinion on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan, CDL-AD(2011)012.

²⁰ Venice Commission Opinion on the law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia (CDL-AD(2007)009), adopted by the Venice Commission at its 70th Plenary Session (Venice, March 2007), paragraph 18.

example, rendering a judicial act in violation of the principle of separation and balance of powers. And it is unclear what is meant by making it a subject of disciplinary responsibility to render a judicial act inconsistent with the principle of legal certainty. Does this mean that any decision inconsistent with previous case-law would be a subject of disciplinary responsibility? It is difficult to think of a more obvious interference with judicial independence. The wording “gross violation” of a substantive or procedural norm should be amended to exclude a well-reasoned interpretation of the law, even if it differs from previous case-law of higher instances.²¹ However, virtually all of the matters referred to in the definition could perfectly well be dealt with by means of a functioning appellate system.

127. In conclusion, it should be repeated here that an evaluation system should not be seen as a tool for policing judges. Instead, it should be seen as a means of encouraging judges to improve their work. As stated by the Committee of Ministers in its recommendations “Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation”.²² The Venice Commission finds it all the more important that disciplinary actions are not applicable here.

IV. Conclusions

128. The Venice Commission and HRD were concerned to learn about the alleged existence of interference in the independence of the individual judge in Armenia coming from higher elements within the judiciary. This is not only disquieting, but the practice needs to be addressed and eliminated before a proper evaluation system can be established. In an evaluation system, such phenomena should be identified and reported. This is a compelling reason for establishing a proper evaluation of judges’ conduct at every level in the country, including at the level of the Court of Cassation.

129. Although the introduction of an evaluation system for judges and the reform of the disciplinary system in Armenia are undoubtedly necessary, a number of fundamental issues concerning the meaning of the independence of the judiciary and notably that of the individual judge, need to be addressed.

130. It needs to be clearly stated that the independence of the judiciary includes the independence of the individual judge from all influences regardless of whether they emanate from within the judiciary or come from outside the judiciary. This means that each individual judge is independent in the exercise of his or her adjudicating functions. Superior courts should not address instructions to judges about the way they should decide individual cases with the exception of preliminary rulings or when deciding on legal remedies according to the law. In turn, lower-court judges should not seek instruction from higher-level court judges in their adjudicating functions.

131. The Venice Commission and HRD have made recommendations on a number of issues raised in the draft Law that the Armenian authorities are invited to address, in particular:

²¹ See Opinion on the Law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia (CDL-AD(2007)009), p. 3.

²² Joint Opinion on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan, paragraph 55, CDL-AD(2011)012.

- a) consider establishing a mixed team of evaluators with a majority of judges working together with legal professionals from outside the current judicial system;
- b) although the quantitative and qualitative criteria chosen for the evaluation and the procedure (involvement of the judge in question) are in line with international standards, the idea of evaluating every criterion on a points scale and calculating the overall result of the evaluation on the basis of these points should be reconsidered;
- c) the ranking list achieved by these points in the evaluation endangers the independence of judges and should therefore not be introduced;
- d) the application of all criteria (quantitative and qualitative) need clarification;
- e) the evaluation of the activities of judges by the new Ethics and Disciplinary Commission of the new Council of Judges with an appeal to the Council which is to function as a court, is questionable. Evaluation and discipline should be two separate processes. It would be preferable to provide simply for an appeal to a court of law rather than a procedure involving the Council of Judges;
- f) the drafting of any bye-laws, entrusted to the Council, should be done with the participation of experts, experienced judges and the Association of Judges;
- g) Court user surveys (including prosecutors and lawyers), which may be used for managerial decisions, are not the best choice for the evaluation of individual judges. They could be biased and there will be conflicts of interest and undue influence on judges;
- h) initiating disciplinary proceedings solely on the basis of overall results of an evaluation should not be possible. The Law should reflect the fact that disciplinary liability cannot arise without the judge's wrongful conduct and unlawful exercise of his or her function (i.e. disciplinary liability requires a disciplinary offence);
- i) a different procedure to the disciplinary one should be considered in dismissing judges who are unable to fulfil their tasks;
- j) a mechanism for the disqualification of an evaluator at a later stage if he or she fails to recuse him or herself or to report a conflict of interest should be introduced;
- k) the proposal to define cases of apparent and gross violation of law is misleading and should be eliminated or completely re-drafted.

132. In addition, the Court of Cassation should be included in the evaluation system. This would also send an encouraging and useful signal to the entire judiciary if the highest-ranking judges were also part of the evaluation process.

133. It is important that, in the end, a proper evaluation system be established, that is clearly set out by law, in which information about errors or misconduct of judges - including those discovered during an evaluation process - can be assessed, with discretion and that can be transferred to a disciplinary procedure, where this is appropriate.

134. The Venice Commission and the Human Rights Directorate remain at the disposal of the Armenian authorities for any further assistance they may need.