Strasbourg, 22 October 2018 **CDL-AD(2018)022**

**Opinion No. 927 / 2018** Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

# OPINION

# ON THE LAW AMENDING THE LAW ON THE JUDICIAL COUNCIL

# AND

# ON THE LAW AMENDING THE LAW ON COURTS

**adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018)**

**on the basis of comments by**

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## I. Introduction

1. On 22 May 2018 the Ministry of Justice of "the former Yugoslav Republic of Macedonia" requested an opinion of the Venice Commission on the amendments to the Law on the Judicial Council (the Law on the JC) and to the Law on Courts of 8 May 2018 (see CDL-REF(2018)029 and CDL-REF(2018)030 correspondingly; see also the consolidated versions of the two laws in CDL-REF(2018)027 and CDL-REF(2018)028).

2. Mr Barrett, Mr Dimitrov, Mr Ribičič, and Mr Varga were invited to act as rapporteurs for this opinion. On 9-10 July 2018, a delegation composed of Mr Barrett, Mr Dimitrov, and Mr Ribičič, accompanied by Mr Dikov from the Secretariat, visited Skopje and held meetings with representatives of the authorities, politicians, NGOs and other stakeholders. The Venice Commission is grateful to the Macedonian authorities for the excellent organisation of the visit.

3. The present opinion was prepared on the basis an English translation of the two laws provided by the Macedonian authorities. The translation may not always accurately reflect the original version on all points; therefore, certain inaccuracies may be due to problems of translation.

4. This opinion was prepared on the basis of the contributions of the rapporteurs and was adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018).

## II. Analysis

### A. Previous opinions on the Macedonian judiciary; the scope of the present opinion

5. The legal framework governing the Macedonian judiciary has been assessed by the Venice Commission on several occasions. In 2005[1] and in 2014[2] the Venice Commission examined constitutional amendments concerning the judiciary. In addition, earlier versions of the Law on the JC and the Law on Courts were analysed in the opinions of 2015[3] and 2017[4] (hereinafter "the 2015 opinion" and the "2017 opinion").

6. The 2014 opinion on the draft constitutional amendments invited the authorities to reconsider whether ethnic quotas in relation to the election of lay members of the Judicial Council (hereinafter - the JC) were still justified (§ 65). That opinion recommended that lay members should be elected by a qualified majority in Parliament (§ 67), and warned against overrepresentation of judges within the JC if their number was to be increased (§ 76). The draft constitutional amendments analysed in the 2014 opinion have not been finally enacted.

7. The 2015 opinion analysed earlier versions of the Law on the JC and the Law on Courts. The Venice Commission observed that the legal regulations in this area were "overly complicated, overlapping and at places obscure", and that too much weight was attached to the statistics: productivity levels, the reversals' rate, and to the procedural delays (§ 111). The opinion further stressed (§ 113) that the judges should not be disciplined for the delays or underperformance which can be explained by the malfunctioning of the judicial system as a whole, and should not be held liable for differences in legal interpretation of the law or judicial mistakes.

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[1] CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia"

[2] CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones

[3] CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia"

[4] CDL-AD(2017)033, "the former Yugoslav Republic of Macedonia" - Opinion on the draft law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for judges, on draft law amending the Law on the Judicial Council, and on the draft law amending the Law on Witness Protection

8. The 2015 opinion also analysed the role and the composition of the Council for the Establishment of Facts (the CEF).[5] The CEF was tasked with the investigations into the alleged misbehaviour of judges, before such cases would go for further examination by the JC. The Venice Commission recommended to abolish the CEF and transfer its functions to the JC (§ 113).

9. From the procedural perspective, the legislation at the time provided for two separate disciplinary procedures,[6] both potentially leading to the dismissal of a judge. The 2015 opinion criticised the parallelism in the procedures (§ 14). The Venice Commission also recommended that appeals in disciplinary cases be heard by a judicial body predetermined by law, and that the evaluation process should be distinct from the disciplinary procedures.

10. The recommendations formulated in the 2015 opinion were partly implemented by the Macedonian legislator in 2017. In particular, the CEF was abolished, and its functions were transferred to the JC. Furthermore, the legislator sought to ensure that those members of the JC who started the disciplinary proceedings against a judge would not take part in the adjudication at a later stage. The Venice Commission, in its 2017 opinion, welcomed those changes, but identified additional issues that the new procedural arrangement may raise (see § 111; these issues are analysed in more detail below).

11. Further amendments to the two laws followed in May 2018. The present opinion will deal with those last amendments. The substantial work done by the Macedonian authorities to develop workable solutions to the difficulties identified previously, in 2015 and 2017, deserves praise. This last round of amendments contributes to the simplification of the system of governance of the judiciary and generally goes in the right direction. Moreover, it is very important that the ruling coalition and the opposition reached a compromise and obtained the qualified majority of votes needed for approval of the amendments, despite the tumultuous political climate of the recent years. Such constructive approach is commendable.

12. That being said, besides the quality of the legislative texts, proper functioning of the judiciary depends on a number of other factors. One of them are good practices, which can only settle if there is time for the laws to be operated and the solutions to be evaluated over time. In the past several years the legislation on the Macedonian judiciary has been repeatedly amended, and those amendments have not always been coherent. The Macedonian authorities might consider planning for an overall review of the operation of these laws, after three or four years, to evaluate how they work in practice.

13. The present opinion focuses on three main topics: on the principles governing disciplinary liability of judges, on the disciplinary procedures and bodies, and on the performance evaluations. Thus limited, the opinion does not cover all other aspects related to the functioning of the Macedonian judiciary. As to those other aspects (such as the system of recruitment of judges, the composition of the JC, etc.), the Venice Commission refers the Macedonian authorities to its previous opinions, and to other applicable European standards.

[5] In a previous translation of the law this body was referred to as the Council for the Determination of Facts; this name was used in the 2015 opinion of the Venice Commission.

[6] The term “disciplinary procedures” is not entirely precise in the Macedonian context. Under the Law on Courts, the judge’s liability may be invoked under different headings, “disciplinary offence” being just one of them. However, for the sake of simplicity all legal procedures, which may lead to the imposition of a disciplinary sanction or to the dismissal will be called in the present opinion “disciplinary”.

## B. Disciplinary procedures and bodies

### 1. Major changes concerning the disciplinary procedure since 2015

14. Under the Macedonian Constitution, the JC is a multi-mandate body, entitled to decide on disciplinary liability of judges,[7] amongst other functions.[8] Indeed, other models are also possible: thus, the OSCE expressed a preference[9] for a disciplinary body (like a specialised court in disciplinary matters) which is distinct from the rest of the judicial council dealing with other matters.[10] The Venice Commission does not insist on a separation between the disciplinary body and the judicial council – quite the contrary, in the Report on the Judicial Appointments it stressed that judicial councils should have "a *decisive influence* on the appointment and promotion of judges *and* disciplinary measures against them" (emphasis added).[11] The Macedonian Constitution entrusts the adjudicative function to the JC itself. Furthermore, the Macedonian judiciary is relatively small; very complicated institutional arrangements may be too expensive and cumbersome. These factors explain the choice made by the legislator in the amendments of 2017-2918: to simplify disciplinary procedures and concentrate them within the JC itself.

15. The Venice Commission repeats that previous arrangements for disciplinary procedures were overly complicated. In 2017-2018 the CEF was abolished, and two parallel disciplinary procedures where merged into one, now described in Articles 54 – 61 of the Law on the JC, as amended.[12] This is an improvement: irrespective of the potential outcome and the type of the judge's misbehaviour, any complaint will start in the same manner and go through the same procedure, conducted entirely within the JC. This procedure may be summarised as follows.

### 2. Commencement of the procedure

16. The law does not specify who may lodge a complaint about the judge's alleged misbehaviour. From Articles 54 and 55 of the Law on the JC it transpires that a complaint may be introduced with the JC by any person, and that such complaints may either be submitted directly to the JC or, as provided by the Law on Courts for ethical breaches[13] by judges, first addressed to the president of the respective court who may then transmit it to the JC. Under Article 68 of the Law on Courts, complaints about ethical breaches by a judge may be lodged to the president of the respective court, who has to give a reply. Under Article 79, the president is required to initiate disciplinary procedure before the JC when the president "knew or was obliged to know about the existence of the legal reasons" for initiating disciplinary procedure (see pp. 10 and 12).

17. In the CCJE Opinion no. 3 it is recommended as follows: "there must be a filter, or judges could often find themselves facing disciplinary proceedings, brought at the instance of

[7] See Amendment XXIX to the Constitution.
[8] Such as judicial appointments and performance evaluations.
[9] See the OSCE Kyiv recommendations, p. 9: "Judicial members during their time of office [within the body dealing with disciplinary cases] shall not perform other functions relating to judges or the judicial community, such as administration, budgeting, or judicial selection."
[10] See, for example, CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, § 46
[11] See the conclusions in CDL-AD(2007)028.
[12] Thus, the chapter regulating the special procedure for the establishment of unprofessional exercise of the judicial office" was removed (Article 77 – 95).
[13] Which are defined as "improper or inappropriate behaviour of a judge in official relations with the parties that are contrary to the Code of Ethics"; it is not clear whether ethical breaches *outside* of the work context are examined in the same manner, and whether the Code of Ethics deals only with ethical breaches *stricto sensu* or also with other types of misbehaviour.

disappointed litigants" (p. 67). The Venice Commission agrees with this view.[14] The question is which bodies or officials should perform the filtering function in the Macedonian system.

18. It is not entirely clear whether the court president has this function, i.e. whether he/she may reject clearly unmeritorious/inadmissible complaints. If the president may decide not to transmit a complaint to the JC, this has the advantage of reducing the work-load of the JC, but, at the same time, increases the president's role vis-à-vis his/her fellow judges. As follows from the 2017 opinion,[15] to the extent that the president's powers to bring disciplinary cases to the JC are not *exclusive* (i.e. do not prevent interested parties from addressing directly the JC), the proposed model does not create a risk for judicial independence. But, in this case, there should be a filtering at a later stage.

19. Once the complaint is received by the JC, it is distributed to a member of the JC acting as a rapporteur. The role of the rapporteur is essentially formal: she/he does not express an opinion on the merits, but simply verifies whether the complaint is "timely and complete" and submits a proposal on admissibility to the JC (see Article 56 of the Law on the JC). As it was explained by the authorities, the complaints are assigned to the rapporteurs on a rotation basis. This is positive, but should be specified in the law.

20. The admissibility of the complaint is then confirmed by the JC. From the second paragraph of Article 52 it appears that such decision is to be taken by the plenary JC, but this solution may seriously increase the work-load of the body. At the same time, when the JC decides disciplinary cases on the merits, it does not sit in the full composition (on this see below, in sub-section 4). So, it would be more logical to give the power to take admissibility decisions to a smaller body within the JC, for example, to the commission entrusted with the inquiry (on this commission see the following sub-section).

### 3. Inquiry

21. The next phase in the process consists of an inquiry, conducted by a three-member "commission for determination of liability of a judge or a president of the court" (Article 56; hereinafter the "Inquiry Commission").[16] The purpose of the Inquiry Commission is to collect and assess the evidence and formulate a proposal to the plenary JC which takes the decision. The Inquiry Commission is formed, from the members of the JC, by drawing lots. Its members will not take part to the decision taken by the plenary JC on that file.

22. The Macedonian legislator seeks to separate the inquiry stage from the further decision-making phase within the JC. This is a reasonable approach.[17] A clear *institutional* separation is not necessarily required, provided the same individuals do not carry out different (and mutually exclusive) roles in the process. The earlier model (involving the CEF as an external inquiry body)

[14] See, *mutatis mutandis*, CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, § 68.
[15] See §§ 25-28.
[16] The Inquiry Commission received the powers of the now abolished CEF.
[17] See CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §16. The OSCE, in its Kyiv recommendations, suggested that "Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures" (§ 5). Furthermore, the OSCE recommends that judicial members involved in disciplinary cases should not be dealing with "administration, budgeting, or judicial selection" (§ 9). The CCJE in p. 64 of its Opinion no. 10 recommends to entrust disciplinary cases in the first instances to special disciplinary commissions, with the substantial representation of judges elected by their peers and "different from the members of the Council of the Judiciary". See also CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §16.

was problematic and was repealed in 2017. The solution now proposed is to keep both functions *within* the JC, but to entrust them to two different compositions: a three-members Inquiry Commission and the plenary JC, which excludes the participation of the members of the Inquiry Commission in the decision on the case at issue.

23. The composition of those two bodies may raise a constitutional issue. Under Article 104 of the Constitution, the JC has a certain ratio of judicial and lay members, and members representing ethnic communities not belonging to the majority (non-majority communities, NMC). Members of the Inquiry Commission are defined by drawing lots, which makes the selection process unpredictable. This issue was already discussed in the 2017 opinion.

24. The legislator tackled this issue in the second and fourth paragraphs of Article 56: under those provisions the composition of the Inquiry Commission should include both judicial and lay members, and, where the judge concerned belongs to the NMC, one of the members should be from the NMC as well. The Inquiry Commission has only three members, so it is impossible to reproduce there the *exact* proportion of judicial members, lay members, and the NMC members, as in the JC as a whole. Furthermore, final composition of the plenary JC will be perturbed by the exclusion of those members who sat on the Inquiry Commission.[18]

25. However, those variations will not be very important, and, in any event, the members of the Inquiry Commission are selected by lot, which is likely to limit the risk of manipulations. In sum, the proposed model seems to comply, to the maximum extent possible, with the constitutional precepts.

26. That being said, it would be advisable to describe in more detail the process of selection of the members of the Inquiry Commission. For example, two candidates to the Inquiry Commission might be selected by drawing lots from the pool of judicial members of the JC, whereas one is to be selected from the pool of lay members. A special selection procedure may be provided for cases where the judge accused of a misbehaviour belongs to the NMC. Those rules may be developed by the JC itself in its rules of procedure.

27. Article 67 of the Law on Courts provides that the judge may be suspended pending the disciplinary procedures in case of "initiated procedure for establishing liability". Article 56-h of the Law on the JC provides that temporary suspension is to be decided by the JC upon the proposal of the Inquiry Commission based on a "well-grounded request". The formula used in the Law on the JC is preferable. Suspension should not follow *automatically* the commencement of the procedure. Such decisions should be taken only in the most serious cases, and the JC (or a body within the JC) should have a discretion in these questions, by taking a case-by-case decision.

### 4. Decision on the merits

28. Under the amended provisions, the decision on the merits is adopted by the plenary JC, by a 2/3 majority of votes "of the total number of members of the Council having the right to vote". Out of 15 members of the JC, the Minister of Justice has no right to vote,[19] and 3 members of the JC who have taken part in the Inquiry Commission are excluded from the voting. In addition, Article 60 paragraph 4 provides that the member of the JC who "submitted the request" is excluded from taking part in the decision of the JC on the disciplinary liability.[20] It means that a decision on disciplinary liability should normally have the support of 8 members of the JC.[21]

[18] Together with the member who initiated the proceedings against the judge – on this see more below.
[19] See Article 6 of the Law on the JC.
[20] This clause seems to address a problem identified by the European Court of Human Rights (the ECtHR) which examined the previous version of the Law on the JC and concluded that a person who played the role of an "accuser" in the disciplinary proceedings against a judge cannot participate in taking decision on the merits. See, among other authorities, *Poposki and Duma v. "the former Yugoslav Republic of Macedonia",* nos. 69916/10, 36531/11, 7 January 2016. The question arises whether Article 60 refers to the rapporteur, appointed under

29. The Venice Commission notes that the role of the rapporteur in the disciplinary procedure seems to be rather formal (see above). Therefore, it is questionable whether the rapporteurs should be excluded from voting when the decision on the disciplinary liability is made. That being said, it is a matter of preference and the exclusion of the rapporteurs from voting is not against any European standard.[22]

30. The next question is the majority required to take a decision in a disciplinary case. The 2014 opinion on Georgia stressed that "the decisions in the High Council in disciplinary matters should be taken by simple majority".[23] In contrast to the situation in Georgia, under the Macedonian law the 2/3 majority appears to apply only to the decisions on the merits, not to the commencement of the procedure.[24] Moreover, in practice the majority needed to pass decisions is equal or slightly more than a half of the *overall* number of members of the JC with the right of vote (14).

31. While the Venice Commission expressed a preference for a simple majority, there is no hard international standards on this point. If the legislator fears judicial corporatism, it is better to avoid a 2/3 majority rule; by contrast, if the aim is to protect the judges from political pressure the 2/3 majority may be helpful. In the amended version of the law, it will not be possible to take purely "guild-based" decisions in neglect of the lay and *ex officio* members' opinion. At the same time, any decision will always require a strong support of the judicial members of the JC. So, the choice of the legislator gives a better protection to the judges, subjected to disciplinary procedure.

32. The requirement of a 2/3 majority raises another, more technical, question. Under Article 56-g of the Law on the JC, the Inquiry Commission submits to the plenary JC a report with one of the following proposals: to dismiss the judge, to impose a lesser disciplinary measure or to drop the case. Under Article 60 paragraph 2, the plenary JC should decide on the Inquiry Commission's report by 2/3 majority. It means that whatever decision is made, it should have support of 8 of members out of 11.[25] But what happens if, for example, 4 members are for the dismissal, 3 are for a lesser sanction, and 4 are for dropping the case? None of the three proposed decisions will obtain 2/3 of votes needed for its adoption. The law must specify what happens if this majority is not reached.

33. Another question is whether the JC may depart from the proposal of the Inquiry Commission and adopt another solution than the one proposed in the report. Article 60 paragraph 2 implies that the plenary JC is bound by the report ("shall decide on the proposal for a decision", therefore accept or reject the proposal made by the Commission), whereas under Article 60-a, and subsequent articles 60-b, 60-c, 60-d and 60-e, the JC may decide for one of the three options (dismissal, lighter sanction, dropping the case) or to return the documents of the case to the Inquiry Commission for "further elaboration". It would be useful to specify that the JC may depart from the proposal formulated by the Inquiry Commission. The law must also clarify whether the decision to return the documents to the Inquiry Commission (see Article 60-e) for "further elaboration" is taken by a simple or 2/3 majority.

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Article 56, or to the member who (in his/her private capacity or as a president of the respective court) submitted the case to the JC.

[21] Or even 7, if one of the members of the JC was at the origin of the complaint.

[22] See, for example, CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, § 74.

[23] CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, § 24 and § 72

[24] This 2/3 majority extends to temporary removals from office also pursuant to Article 30(a).

[25] Or 7 out of 10, depending on the circumstances.

34. In sum, Articles 60 – 60-e need to be clarified. As regards the 2/3 majority requirement, the authorities might wish to consider intermediate solutions: for example, a higher majority may be required for the dismissals, whereas lesser disciplinary sanctions may be imposed by a simple majority. When the simple majority in favour of a lesser disciplinary sanction is not reached, the case may be considered as dropped.

35. Further, the role of the report of the Inquiry Commission should be explained. It should be made clear whether the plenary JC is limited by the proposal of the Inquiry Commission, or may go beyond it. If the Inquiry Commission may "fix the upper limit" for the sanctions, which cannot be exceeded by the plenary JC, this increases the importance of this body in the process (and, again, in this scenario the Inquiry Commission becomes an additional barrier for holding judges accountable).

### 5. Appeal

36. Article 96 of the Law on the JC provides that decisions of the plenary JC are subject to an appeal to an Appeal Council – a body composed of judges of different levels defined by drawing lots at a plenary meeting of the Supreme Court, for each individual case.[26]

37. The need to provide for *an appeal to a court* against the decision of a disciplinary body (in this case, the JC) has been stressed by the Venice Commission[27] and by some other international bodies. Thus, for example, the CCJE, in its Opinion no. 3 considers that "the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court" (p. 72). The Committee of Ministers in its Recommendation CM/Rec(2010)12 indicates, in p. 69, that the judge should be able to challenge the decision in a disciplinary case (without indicating, however, whether this means an appeal to a court of law or to another body). Thus, the availability of an appeal to a judicial body against the decisions of the JC in disciplinary sanctions appears to be in line with the European standards.

38. That being said, Article 96 leaves several questions open. The first relates to Article 96 paragraph 1, which gives the right of appeal only to the judge concerned (or to the court president whose responsibility is invoked), thereby excluding those having initiated the procedure. If this is the intention of the Macedonian legislator, this should be stated more clearly.

39. The second question concerns the effects the determination of the Appeal Council might have. Article 96 paragraph 3 states that the Appeal Council shall "uphold or repeal" the decision of the plenary JC. Article 96 paragraph 4 seems to indicate that in the case of "repeal" the case is reopened and the JC takes a *final* decision, "appraising the guidelines" of the Appeal Council. This suggests that the Appeal Council lacks jurisdiction to *overturn* a decision of the JC and cannot take a new decision, but may merely re-open the case for reconsideration by the JC, the latter having the final say. Elaboration of what exactly "appraising the guidelines of the Appeal Council" entails is necessary. Moreover, the law should explain what happens if the JC, following the re-opening of the case, insists on its original position and disregards the guidelines of the Appeal Council.[28]

[26] It shall contain three judges of the Supreme Court, four from the Courts of Appeal and two judges from the court to which the judge against whom the procedure is conducted belongs, all drawn by lot.

[27] See, for example, CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 92; see also CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 76.

[28] In the system where the appellate body has a final say, it should not substitute the Judicial Council; thus, in the opinion on the Draft Judicial Code of Armenia (CDL-AD(2017)019) the Venice Commission stressed that "Judicial Councils should have a certain discretion, which must be respected by the appellate body", and that "in exercising its appellate review the appellate body should act with deference to the [judicial council] as regards the establishment of the factual circumstances and interpretation of the relevant rules of conduct" (§ 151).

40. The third question relates to the composition of the Appeal Council. The 2015 opinion observed that "entrusting the power to a permanent court of law (instead of an *ad hoc* body) would probably be a preferable solution" (§ 96). In the old version of Article 96 of the Law on the JC,[29] the method of selection of the Appeal Council was not defined. The Venice Commission noted that "it is very important that the composition of the appellate judicial body be predetermined by law" (§ 96). Now the law describes that the members of the Appeal Council are to be selected by lot at a plenary session of the Supreme Court and other relevant courts. Indeed, the Appeal Council remains, to some extent, an *ad hoc* body, but now there is more certainty for the participants of the procedure about how it is to be formed. The selection of its members by drawing lots (if conducted fairly) reduces the risk of manipulations, and the fact that judges of all levels are represented ensures that it will reflect the broad range of opinions within the judiciary. So, one may conclude that this amendment goes in the right direction.

### C. Performance evaluation system

41. The criteria and procedures for the evaluation of the work of a judge have been elaborated in the new amendments to the Law on the JC. The evaluation of the judge's work is based on a combination of qualitative and quantitative elements. In the process of evaluation, the judge receives a certain number of points. Depending on the final score, a judge may receive a "positive" or a "negative" evaluation grade; the positive evaluation involves three sub-levels: satisfactory, good and very good. Two consecutive "negative" evaluations lead to the dismissal of the judge.

#### 1. Criteria for the evaluation

42. A judge is evaluated on the basis of quantitative and qualitative elements. Under Article 102 of the Law on the JC, the quantitative element reflects the numerical output of a judge (i.e. how many files the judge has processed). All other elements are labelled as "qualitative": they include the number of reversals (i.e. decisions quashed or modified on appeal), the number of missed procedural deadlines, and the results of an individualised assessment of the quality of a number of "sample" decisions.[30] A certain number of points is assigned to each element;[31] points may also be withdrawn for disciplinary breaches and for other reasons (such as, for example, for a finding of a violation of Article 6 of the ECHR by the ECtHR in a case handled by the judge). In general, the evaluation system still appears highly complicated and mechanical.

43. The CCEJ observed, in Opinion no. 17, that "evaluation must be based on objective criteria. Such criteria should *principally* [italics added] consist of qualitative indicators but, in addition, may consist of quantitative indicators". The Venice Commission also considers that qualitative elements should be given priority.[32] Under the Law on the JC, "qualitative" elements seem to weight more than "quantitative".[33] However, the Law on the JC uses the terms "qualitative" and "quantitative" not in the same meaning as the Venice Commission and the CCEJ.[34] Be it as it

[29] See CDL-REF(2015)046, Legislation related to the Disciplinary Liability of Judges - Law on the courts and Law on Judicial Council (consolidated version with draft amendments of 2015); Law on the Council for Determination of the Facts of "the former Yugoslav Republic of Macedonia"; see, in particular, Article 96 of the Law on the JC.
[30] The assessment is made by a three-member commission which is set up, by drawing lots, from the judges of the competent higher court (see Article 104).
[31] For example, up to 80 points for achieving a set productivity threshold, or up to 30 points for having less than 10% of decisions quashed on appeal.
[32] CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, § 77
[33] 120 points against 80 – see Articles 107 and 108.
[34] The CCEJ, in Opinion no. 17, describes as "quantitative" such elements as "the number of cases decided by the evaluated judge, the time spent on each case and the average time to complete a judgment". The Venice Commission, in CDL-AD(2017)019, mentions amongst quantitative elements the number of the judgments overturned on appeal, the number of procedural delays, etc. In CDL-AD(2011)012, Joint Opinion on the

may, it is clear that the evaluation in the Macedonian system is based predominantly on three elements: numerical output, reversals rate, and compliance with the time-limits.[35]

44. Previously, the Venice Commission advised against heavy reliance on these elements in the evaluation of the judges' work.[36] In the 2015 opinion, the Venice Commission noted that the productivity levels and time-limits must be realistic. It warned that a system essentially based on numerical objectives may lead to a destructive pattern of behaviour.[37] As to the reversals rate, it should be *particularly high and persistent* in order to be used in the evaluation process.[38] Otherwise the evaluation will "produce a timid judiciary".[39]

45. That being said, "the way criteria are assessed in the evaluation process differs widely" in Europe.[40] What value is to be attached to different elements depends on the priorities set by the legislator. For example, in a system suffering from chronic delays, compliance with time-limits may be given more weight than other factors. Assigning values to different elements requires an in-depth analysis of the courts' statistics, and long experience with the Macedonian judiciary. The Venice Commission does not have this information and experience; therefore, it may only reiterate its general advice that the evaluation of judges' work should not rely heavily on the productivity levels, missed deadlines, and particularly on the reversals' rate. Such system does not necessarily improve the quality of justice and the promotion of best judges to the top positions.

46. The last question is whether those matters should be regulated by the law. Currently, the evaluation criteria and the value assigned to them are described, in the smallest detail, in the law itself. If the current system proves to be unreliable (because too much value is assigned to one element and not to another), it may be hard to amend, for political reasons. An alternative solution would be to entrust the JC, in cooperation with the judiciary, the task of developing a system of indicators, publishing it and revisint it regularly. Indeed, the law may still contain more general parameter, to be followed in the JC-made regulations.

### 2. Bodies conducting evaluations; evaluation procedures

47. Article 100 of the Law on the JC distinguishes between regular (every 2 years) and extraordinary evaluation, the latter applied to judges seeking promotion. The two years' period for regular evaluation appears to be too short/frequent: it means practically permanent assessment, which may affect negatively the independence and efficiency of judges. The Venice Commission would recommend a longer period for ordinary judges and an even longer one for senior judges.

48. Article 116 of the same Law stipulates that the decision on evaluation is taken by the JC on the basis of an arithmetical sum of points. As demonstrated above, the biggest part of the overall score (180 out of 200 maximum points) is based on the *external* and *objective* data about the judge's work (his/her performance levels, compliance with the time-limits, number of decisions

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constitutional law on the judicial system and status of judges of Kazakhstan, § 55, the number of reversals is, again, labeled as "quantitative"; in the Macedonian system, it belongs to the "qualitative" set of criteria.

[35] Under the amended Law on the JC (see Articles 107 and 108), out of 200 maximum points that a judge may receive in the course of evaluation, his/her numerical output is worth 80 maximum points, and the number of quashed/modified decisions and compliance with deadlines is worth 100 points *in toto*. The judge gets only 20 points from the commission assessing the quality of his/her "sample judgements".

[36] See, in particular, CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§37 – 40.

[37] See §§ 103 – 105.

[38] See the 2015 Opinion: "Only stubborn resistance against an enhanced practice which leads to a repeated overturning in cases where there is a well-established and clear case-law should probably be counted as a blatant lack of professionalism" (§ 47).

[39] CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 40

[40] CCEJ, Opinion no. 17 (p. 14)

quashed on appeal, etc.).[41] Calculation of "points" in the process of evaluation depends on the "automated court case management information system" (ACCMIS). With all the reasonable scepticism towards the reliability of such technical devices, there is a general tendency to use such instruments. Be it as it may, in this respect the JC involvement seems to consist only of collecting necessary information from the ACCMIS, and calculating the final score. This system bestows significant influence on the officials inspecting the data. The operation of Article 104 and the mathematical calculations in Articles 106 to 116 could benefit from a trial period or pilot project.

49. 20 points may be gained by a judge from another type of assessment, described in the third paragraph of Article 104: it is an assessment of the *quality* of the legal reasoning in 10 sample judgements (5 selected randomly and 5 selected by the judge him/herself). This assessment is made by a three-member commission composed of judges of the higher court drawn by lot. This is an interesting model; however, such assessment should only extend to such aspects as the style and clarity of drafting, and not call into doubt the validity of the decisions taken by the judge.[42]

50. In the current system, it is not clear whether the JC itself have any discretion in the process of evaluation. On the one hand, the JC takes decision by *voting*, which necessarily involves exercising discretion and assessing *subjectively* the judges' professionalism and other skills and qualities.[43] On the other hand, the evaluation may appear to be a purely arithmetical exercise (where only the assessment under Article 104, conducted not by the JC but by an external commission selected by judges, involves some sort of subjective assessment of the quality of the judge's work).

51. The law must make it clear which of the two approaches it prefers. If the evaluation is based on a mixture of both the "objective" data about the judge's work and the "subjective" evaluation of his/her qualities and skills by the JC, the relative weight of those two factors should be specified.

### 3. Role of the evaluation in promotion

52. Under the Law on the JC, the evaluation system serves three main purposes:

- general monitoring of the situation within the judiciary (for the purposes of promotion of the independence and impartiality of judges and the judiciary, personal motivation and professional development of judges, etc. - see Article 99 of the Law on the JC),
- promotions (for which extraordinary evaluations are conducted – Article 100 of the Law on the JC), and
- discipline (see Articles 75 and 76 of the Law on Courts).

53. It is reasonable to use the system of performance evaluations to monitor the situation within the judiciary, provided that the elements for measurement are chosen correctly. The use of

[41] One of the components of the evaluation process consists of the examination of the quality of 10 selected decisions, by a special three-member commission composed of judges of a higher court (see Articles 104 and 109). This evaluation involves, indeed, more subjective review of the judges' skills and knowledge. However, this factor gives the judge to be assessed only up to 20 points, out of the maximum of 200 points. The remaining 180 points are calculated on the basis of objective statistical information about the judge's performance.

[42] According to the ENCJ report 2012-2013 (ENCJ Project Distillation of ENCJ Guidelines, recommendations and principles 2012-2013), the evaluation must not include any review or re-examination of judicial decisions (principle 41 (2)).

[43] Furthermore, under Article 126, prior to issuing an evaluation report on a particular judge, the JC should obtain an opinion of the president of the respective court and two of the fellow judges of the former. Does this opinion play any role in the final decision on evaluation? Finally, under Article 129, the decision on evaluation should contain "explanation of the reasons", and the judge concerned may ask for a reassessment (Article 130).

performance evaluations for the purpose of promotion is also reasonable, in principle.[44] The question is what is the exact role of the evaluation in the promotion process.

54. Under Article 46 of the Law on Courts, as amended, to be eligible for the appointment to the Court of First Instance, the Court of Appeal, and the Supreme Court, a candidate should obtain the "highest positive mark" in two regular consecutive evaluations.[45] Under Article 41 of the Law on the JC, the JC selects judges of the higher courts on the basis of a long list of criteria (expert knowledge and specialization in the field, capability in resolving legal issues, communication and inter-personal skills, attitude to work, etc.).

55. Thus, the "very good" evaluation grade appears to serve as an eligibility threshold. In principle, this is a reasonable approach, but the threshold may be set too high: there might be practical reasons why a judge might not be able to achieve the highest grade over two consecutive years, and yet be a good candidate for promotion.

56. Furthermore, Article 46 of the Law on Court refers to *two* eligibility criteria: the highest grade of the candidate and "the most points compared to other candidates". Does it mean that only *one* candidate (having the highest *score* in points) may be presented to the JC for promotion under Article 41 of the Law on the JC? If this is the case, the promotion will be essentially predetermined by the evaluation score – which is, as it was explained above, the result of a purely mathematical exercise. It would make more sense for the JC to select from a pool of several candidates, all of them having the same threshold *grade* (for example, "good" or "very good") but not necessarily the same *score*. This will permit the JC to exercise discretion and will reduce the impact of the overly mechanical approach to the evaluation.

57. Next, the role of the "extraordinary" evaluations in this process is not entirely clear. If the grade obtained in the course of a regular evaluation serves as an eligibility criteria, what is the role of the extraordinary evaluation? If the results of the extraordinary evaluation are used *in addition* to the regular evaluation, the law should specify over which period the judge's work is assessed, and how this extraordinary evaluation affects the decision taken by the JC under Article 41 of the Law on the JC.[46]

### 4. Negative evaluation as a disciplinary breach

58. Articles 75 and 76 of the Law on the Courts provide that a judge who received two consecutive "negative" evaluations is to be dismissed. In the 2014 opinion on the judicial code of Armenia,[47] the Venice Commission noted that "[…] evaluation and disciplinary liability are (or should be) two very different things" (§ 28). It further observed that "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] instigating disciplinary proceedings raises problems, because the reasons for a negative result could be other than a disciplinary offence […]."

59. This does not mean that bad evaluation can never lead to a disciplinary sanction. The CCJE acknowledges, in p. 29 of Opinion no. 17, that judicial tenure may be terminated where "the

[44] Previously the Venice Commission noted that where the evaluations are used only in the context of judicial promotions, such system "is less dangerous for the independence of the judiciary than the system of comprehensive and regular evaluation of performance of all judges; see CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, § 70.

[45] Similar eligibility requirement is provided for candidates to the positions of presidents of the courts (Article 47 of the Law on Courts).

[46] In CDL-AD(2017)019, Armenia – Opinion on the Draft Judicial Code, the Venice Commission detected a similar problem, namely a disconnect between the grade obtained in the evaluation process, and the final decision on promotion, adopted by the Judicial Council (see §§ 125 et seq.).

[47] CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia

inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged." Thus, for the CCJE, this is a matter of degree: to serve as a ground for dismissal "bad evaluation" should convincingly demonstrate *total ineptitude* of the judge to perform judicial functions.

60. In the previous version of the law the dismissal could have been ordered by the JC with reference to *any* of the grounds which now make part of the overall evaluation (such as the insufficient productivity, high rate of reversals, non-compliance with the procedural time-limits, etc.).[48] This approach was criticised by the Venice Commission. Now the dismissal is linked to the negative grade, which reflects an *aggregate* evaluation of different aspects of the judge's work. Thus, the fact of having more than 20% of decisions quashed on appeal during a calendar year cannot *by itself* serve as an independent ground for dismissal. It will only remove 50 points from the judge's overall score (see Article 109). The judge still has a chance of obtaining a "satisfactory" or even "good" evaluation grade, if his/her performance was irreproachable in other respects.

61. The new approach is certainly preferable than the one analysed in the 2015. At least, in the new system the judge seemingly has to worry less about the rate of reversals. Dismissal follows *two* negative assessments; that means that the judge has more time to restore his/her productivity and improve the quality of his/her judgments (before the assessment period was equal to one year). Again, it is not excluded that the currently existing scoring will need to be adjusted; however, the system should first be observed in operation for few years to make such conclusions.

62. What can be seen right now is that the evaluation system does not take into account the judge's "fault". For example, a missed deadline would reduce the score irrespectively of whether there was a reasonable justification for this delay. The 2015 opinion stressed that the fault of the judge concerned is the crucial element of the disciplinary liability.[49] So, to the extent that two consecutive negative evaluations are to be used as a ground for dismissal, the law should require the JC, as a pre-condition for deciding on the dismissal, to establish the existence of the fault of the judge concerned (maybe in the form of negligence, indolence, etc.).

63. Article 75 of the Law on Courts, which provides *inter alia* that two consecutive negative assessments should lead to the judge's dismissal, refers to "the judge's fault with no justified reason". This is positive. However, quite surprisingly, Article 76 (5) of the same law provides that a judge may be dismissed on the very same ground (two negative evaluations) irrespectively of his/her fault.

64. In the 2015 opinion the Venice Commission recommended introducing "a general clause that would require the disciplinary bodies to take due account of the degree of the judge's fault and permit the judges to forward defences [based on the absence of their fault]. […] [T]he very existence of a disciplinary breach (not only the sanction) should be conditioned upon the fault of the judge. The honest and hard-working judges should not be disciplined for the situations which result from the poor management of the judicial system as a whole or from other circumstances outside their control" (§ 19). This recommendation remains valid.

[48] The 2015 opinion, § 45: " […] [I]t is a serious disciplinary violation if during a calendar year the Judicial Council established that the judge missed deadlines in more than five cases, or (italics added) if more than 20% of his/her decisions have been repealed, or more than 30% of them have been modified."
[49] "Individual judges cannot bear individual liability for the efficiency of the judicial system as a whole" (§ 18).

### D. Substantive grounds for disciplinary liability

65. Article 70 may be interpreted as providing for the dismissal of the judge "for unlawful exercise of the office". It is understood that this provisions does not introduce a new ground for dismissal, but simply refers to the dismissal under Articles 75 and 76 of the Law on Courts.

66. Under Article 74 of the Law on Courts, the judge may be dismissed either for (1) a serious disciplinary offence, or for (2) an "unprofessional and neglectful exercise of the judicial office". Article 75 describes types of conduct which amount to a "serious disciplinary offence"; Article 76 describes actions amounting to "unprofessional and neglectful exercise of the judicial office." In addition, Article 77 describes types of conduct which amount to a disciplinary offence falling short of the "serious" one and thus leading not to a dismissal but to a lesser disciplinary sanction.

67. The law in this respect reproduces Article 99 of the Macedonian Constitution, which stipulates that a judge may be dismissed either for a "serious disciplinary offence defined in law, making him/her unsuitable to perform a judge's office", or for "unprofessional and unethical[50] performance of a judge's office". Although the Constitution speaks of two separate grounds for dismissal, Articles 75 and 76 of the Law on Courts are very similar. Each contains a catalogue of situations which may lead to the dismissal of the judge, and those catalogues are largely overlapping. Thus, for example, two consecutive negative assessments in the performance evaluation may lead to the dismissal either under the heading of "unprofessional and neglectful exercise of judicial office" or under the heading of a "serious disciplinary offence" (cf. Article 75 (1) p. 1 and Article 76 (1) p. 5). Disclosure of information from the case-file may lead to the dismissal either under Article 75 (1) p. 6 or under Article 76 (1) p. 9. Behaviour of the judge which "ruins the image of the judicial office" is mentioned in Article 75 (1) p. 10, while the Article 76 (1) p. 4 speaks of the disturbance of public peace "causing harm to the reputation of the court". The list of parallel clauses in Articles 75 and 76 may be continued.

68. Such parallelism should be avoided. The Constitution mentions two *separate* grounds for dismissal; it is reasonable to assume that these two types of situations should be somewhat different in nature. It should be possible to regroup in the law the situations leading to the dismissal, so that the distinction made in the Constitution makes sense. For example, one article might deal with cases of extreme and unjustified underperformance, whereas other might describe severe breaches of professional ethics outside of the working context, etc. Indeed, it belongs to the national legislator to decide how different grounds for dismissal are to be distributed between Articles 75 and 76.[51]

69. A source of concern is the vagueness of some formulas used in Article 75 and 76. For example, under Article 75 the judge may be dismissed for "unconscientious, untimely or neglectful exercise of the judicial office in the conduct of the court procedure in particular cases"; for breaching the principle of trial within reasonable time, for postponing proceedings "without legal basis", or for treating parties "unequally", or for "violation of the regulations", or for "exceeding official powers". These formulas are very vague and permit to dismiss the judge for taking procedural or substantive decisions which are normally within his or her discretion. Indeed, the law may penalise decisions taken in blatant disregard of the law and in bad faith (to further his or her personal interests, for example), or as a result of a gross and obvious negligence, but the

[50] The Law on Courts speaks of "neglectful" exercise of judicial office, while the Law on the JC, in the title of Chapter preceding Article 78 (now removed), speaks of the "unprofessional and bad faith exercise" of the judicial office. The Venice Commission assumes that this difference in the terminology is a matter of translation, and that they all refer to the same type of situation.

[51] Some of the situations enumerated in Article 75 and 76 should rather be described in terms of incompatibility with the judicial office (like the membership in the political party or the fact of holding another public office, set in Article 76 (1) p. 1 and p. 6), whereas other will require the JC to apply discretion (for example, "neglectful exercise of the judicial office" or "acting upon cases contrary to the principle of trying within a reasonable period of time", in Article 75 (1) pp. 2 and 4), and the dismissal under those headings will not be automatic.

very fact of procedural or substantive irregularity – even if it led to the overturning of the judgment on appeal – should not lead, in the absence of the judge's fault, to the dismissal.[52] Honest judicial errors should not give rise to disciplinary liability.

70. The Venice Commission recommends supplementing Articles 75 and 76 in order to make the dismissal conditional on two concurrent elements: an objective element (particular gravity of the breach and the seriousness of the damage caused thereby to the parties) and a subjective element (i.e. fault in the form of an intention of the judge to breach the law, or of a gross and obvious negligence). Now the subjective and objective elements are present in some parts of Article 75, but not everywhere; for example, paragraph 7 speaks of "intentional violation of the rules of fair trial"; paragraph 9 speaks of the "severe violation of the rules of the Court Code". The Venice Commission considers that these elements should be formulated as a general principle applicable throughout Articles 75 and 76. A general clause to this end is needed to ensure that only particularly gross and inexcusable professional errors may lead to a disciplinary liability.

71. Article 79 of the Law on Courts contains a list of grounds for dismissing a court president. It is understood that the dismissal from this administrative position does not involve automatic termination of the judicial tenure for the judge concerned. Amongst other grounds, the president may be dismissed for the failure to start disciplinary proceedings against the judge of his/her court when there are reasons for it.[53] Indeed, the president of the court may be sanctioned for "covering up" for his/her judges in the most evident cases of their misbehaviour. However, the question of whether or not a disciplinary offence has been committed is a matter of assessment. Articles 75, 76 and 77 (which described grounds for disciplinary liability for judges) use a lot of vague and overbroad formulas. In such situation, the presidents of the courts may feel obliged to report to the JC every minor incident, which may be a very onerous obligation. This duty should be formulated so as to concern only the *evident and gross* breaches committed by the judges, known to the president, and not every potential irregularity.

### E. Effects of the ECtHR decisions in the context of disciplinary liability and evaluations; personal liability of the judges

72. Article 18 (6) of the Law on Courts instructs the judges to "apply the views expressed in final judgement of the European Court of Human Rights" (hereinafter – the ECtHR). To the extent that this clause incorporates the ECtHR case-law as a source of domestic law, this amendment is welcome: when faced with a human rights question, domestic courts should resolve it in line with the legal positions expressed in the case-law of the ECtHR.

73. That being said, this is a very significant development, which may require a lead-in period, extra training and analysis as to what its effects might be on the Macedonian legal system. Conflicts between principles enunciated in the ECtHR case-law and the norms and practices of the Macedonian law may arise, and the judges will have a difficult task of resolving them.

74. Besides integrating the ECtHR case-law in the legal system, the Macedonian legislator goes further: under Article 75 (1) p. 11 of the Law on Courts the judge may be dismissed if the ECtHR finds that in the case handled by this judge there has been a violation of Articles 5 or 6 of the Convention (the right to liberty and the right to fair trial). Under Article 76 (1) p. 8 the judge may be dismissed if she/he failed to "apply the views expressed in final judgments of the ECtHR". Furthermore, under Article 109 of the Law on the JC, the judge's evaluation score is reduced by

[52] Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges ("Independence, efficiency and responsibilities") in p. 66 provides that "the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence." Further, in p. 70 the Recommendation states that "judges should not be personally accountable where their decision is overruled or modified on appeal".

[53] See Article 79 (1) pp. 10 and 12; see also Article 77 (2).

10 points (i.e. 5% of the maximum overall score) if his/her decisions led to a finding of a violation by the ECtHR under Article 6 of the Convention (see the paragraph before the last one).

75. These provisions are a source of concern for the Venice Commission, in particular in view of their potential impact on judges' independence. First, the same breach is at the same time a ground for the dismissal (Article 75 of the Law on Courts) and a ground for removing 10 points from the evaluation score (Article 109 of the Law on the JC). This is inconsistent. Second, the meaning of Article 76 (1) p. 8 is unclear: does it speak of the judge's failure to apply general principles contained in the case-law of the ECtHR, or the judge's failure to follow a particular ECtHR judgment which directly concerned the case the judge was dealing with?

76. The Venice Commission reiterates that § 70 of the Council of Europe's Recommendation CM/Rec (2010)12 categorically states that "[j]udges should not be personally accountable where their decision is overruled or modified on appeal." This applies *a fortiori* to an "overruling" by the ECtHR. Indeed, the ECtHR may detect a malfunctioning in the national legal order, but in such case the blame is not put on an individual judge; it is *the State as a whole* who is responsible under the Convention. Most often, such "malfunctioning" results from bad legislation, or from the case-law, or from the predominant practices and traditions, and cannot be reduced to the ill will or to the lack of professionalism of a particular judge. So, the finding by the ECtHR of a violation of the Convention in a particular case handled by the judge should never *directly and automatically* lead to a disciplinary liability or to the reduction of the performance evaluation score.[54]

77. Article 76 (1) p. 8 is even more problematic, since it may be interpreted as requiring the dismissal of a judge for the alleged failure to apply the case-law of the ECtHR in a particular case. Who is to decide whether the contested decision is compatible with the case-law of the ECtHR? What if the ECtHR case-law is subject to different interpretations, which is sometimes the case?[55] Again, as with the national law, the judge should have the freedom to interpret the ECtHR case-law, and cannot be punished for honest errors in doing it.[56] The Venice Commission strongly recommends the Macedonian authorities to repeal those provisions.

78. Article 97 describes the process of reopening of a disciplinary case if the ECtHR has established that the judge's rights have been violated in the disciplinary proceedings. In principle, the domestic law should provide for a possibility of reopening in such situations. However, while procedural breaches may be easily remedied by the reopening, in some other cases the reopening is not necessarily the best response to a finding of a violation of the Convention by the ECtHR. For example, if a judge was held liable on the basis on a substantive provision of the Macedonian law which was later found to be contrary to the European Convention, the reopening will not be effective, at least until the provision of the substantive law at issue is invalidated by the Constitutional Court or abrogated by Parliament. In such cases, the proceedings before the JC might be suspended until the matter is duly resolved. The reopening of the proceedings should be possible where it is dictated by the findings of the ECtHR, but not mandatory in all cases where a violation has been found.

[54] There may be (rare) cases where a finding of a violation of the Convention by the ECtHR will coincide with the serious breach of professional duties by the judge, amounting to a disciplinary or even a criminal offence – but in this case the judge should be held liable for a disciplinary breach or a crime, and not because of the ECtHR judgement.

[55] As noted in CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, "it is also not unusual for the European Court of Human Rights, international organisations, constitutional courts or other national courts to reach different conclusions in defining the scope and content of a right (including procedural rights) or of a legal provision" (§ 22).

[56] See CDL-AD(2017)002, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the criminal liability of judges: "A judge's legal interpretation, which may not be in line with the established case-law, should not in itself become a ground to impose disciplinary sanctions, unless it is done in bad faith, with intent to benefit or harm a party to the proceedings or as a result of gross negligence" (§ 33).

79. Article 70 speaks of personal liability of judges and the liability of the State. The Venice Commission has long been in favour of affording judges functional immunity. This is a corollary of judicial independence.[57] So, while the State may (if this is so intended) assume strict liability for unlawful decisions, this is not appropriate for engaging the personal liability of judges.[58]

### F. Other amendments

80. The eligibility requirements to achieve judicial office in Article 45 of the Law on Courts were amended to require fluency in either English, French or German. A requirement of *fluency* is perhaps rather rigid and might reduce the pool of persons available for appointment; probably, a more lenient standard (such as the requirement to have a basic knowledge of one of those languages) would be more appropriate.

81. Article 47 of the Law on Courts provides that the candidate to the position of president of the court should produce to the JC a work program which should include "measurable parameters" and "time frame for realisation of program objectives". Furthermore, the court president may be dismissed from this position for the "failure to complete work program" (see Article 79, (1) p. 8). These provisions risk turning the court president into a "productivity watchdog", and, in addition, do not take into account objective factors which may prevent the judge from completing the "work program" (such as understaffing, sudden influx of new cases, etc.). These provisions should be reconsidered.

## III. Conclusion

82. The recent amendments to the Law on the Judicial Council and the Law on Courts are to be assessed positively. The new institutional arrangements and procedural rules are simpler and more intelligible, and protect judicial independence better than before. The Venice Commission congratulates the governing coalition and the opposition for reaching a compromise on these amendments and encourages them to continue in the same spirit. The two laws lay solid foundations to the well-functioning judiciary. A lot will now depend on the application of those two laws in practice, which will be possible to assess only after a certain period of time.

83. That being said, the two laws would certainly benefit from clarifications, and few amendments must be made as well. In particular, the Venice Commission recommends the following:

- the Law on the Judicial Council should specify who has the filtering function in the new system of disciplinary proceedings (this function may be given to the Inquiry Commission, but other models are also possible);
- the role of the plenary Judicial Council vis-à-vis the Inquiry Commission and the Appeal Council should be better explained (namely whether the Judicial Council is bound by the proposal of the Inquiry Commission, and who takes the final decision in a disciplinary case if the Appeal Council returns the case with "guidelines"); the authorities should reconsider which types of decisions need a 2/3 majority in the Judicial Council, and specify what happens if this majority is not reached;
- the effectiveness of the performance evaluation system (elements of evaluation, scores attached to them, etc.) should be reviewed, after a test period; the function of devising the

[57] CDL-AD(2010)004, Report on the Independence of the Judicial System – Part I: The Independence of Judges, § 61

[58] Indeed, this does not exclude that the judge may be held personally liable under the civil heads for such acts as intentionally destroying evidence, neglecting facts as a result of proven bribe, etc. or on other similar grounds. See the opinion of the Venice Commission on the material liability of judges in CDL-PI(2018)007, Romania - Preliminary Opinion on draft amendments to Law No. 303/2004 on the statute of judges and prosecutors, Law No. 304/2004 on judicial organization, and Law No. 317/2004 on the Superior Council for Magistracy, §§ 107 et seq.

system of performance evaluation may be given to the Judicial Council itself; the role of the extraordinary evaluations in the promotion process should be clarified;

- Articles 75 and 76 of the Law on Courts should be reformulated in order to avoid parallelism and reflect the distinction made by the Constitution between "unprofessional and neglectful exercise of the judicial office" and a "serious disciplinary offence"; the law must make clear that the dismissal of a judge for a professional error is possible only if two pre-conditions are established: the fault of the judge concerned (in the form of intent or gross and evident negligence), and the gravity of the error and its consequences. In any event, individual judges should not bear responsibility for the malfunctioning of the judicial system as a whole.
- While judges have to apply the case-law of the European Court of Human Rights, they should not be punished for honest errors in performing this task. Where the European Court finds a violation of the Convention in a case handled by a judge, this should never lead automatically to the dismissal of this judge, or to the reduction of the overall score in the performance evaluation process.

84. The Venice Commission remains at the disposal of the Macedonian authorities for further assistance in this matter.