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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMPILATION**

**OF VENICE COMMISSION OPINIONS AND REPORTS**  
**CONCERNING COURTS AND JUDGES<sup>1</sup>**

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<sup>1</sup> *This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 101th Plenary Session (12-13 December 2014)*

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## Introduction

This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning the judicial system (courts, judges and council of justice). The focus of this compilation is on the status of judges, on the internal organisation of the judiciary, its relations with other branches of the Government, guarantees of independence and accountability of the judges. This compilation does not concern constitutional justice and organisation of prosecution system (these topics are presented in separate compilations), as well as other fair trials guarantees than independence and impartiality of the courts.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislations on the judiciary, researchers, as well as the Venice Commission's members, who are requested to prepare comments and opinions concerning legislation dealing with such issues. When referring to elements contained in this draft compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the opinions from which extracts are cited in the compilation relate to individual countries and take into account the specific situation there. The citations will therefore not necessarily be applicable in other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission reports and studies quoted in this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to shorten the text, most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this draft compilation ([venice@coe.int](mailto:venice@coe.int)).

## 1. LEVEL OF REGULATION – CONSTITUTIONAL AND LEGISLATIVE LEVELS

### 1.1 Provisions on appointments, dismissals and the status of the judges

“The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts.”

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §22

“It is [...] indispensable to provide [...] a constitutional right to have access to independent and impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights.”

CDL-INF(1996)006, Opinion on the draft Constitution of Ukraine, p.15

“Under Venice Commission standards, there is no requirement as such that the procedure for appointments to the judiciary be described in detail in the Constitution itself. Moreover, in view of the relative briefness of the Bill, it does not seem unnatural that no specific provision for this is made. [...]”

CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, §135

“[...] [I]n the majority of member states, the criteria for the recruitment or the promotion of judges are established by laws or regulations. The only tacit or explicit exceptions to this are those judicial systems where a discretionary power of selection exists through the election by the people (legislative power) or an independent authority, including a judicial one, which can sometimes have political characteristics.”

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §12

“Since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in [...] detail in the Constitution. [...]”

CDL-AD(2008)010, Opinion on the Constitution of Finland, §112

“For the [...] reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned.”

CDL-AD(2008)010, Opinion on the Constitution of Finland, §113

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §105

“[...] [I]t is essential that this constitutional law should provide detailed and precise grounds for termination of office of judges and a detailed procedure to be followed, including the possibility for the judges whose mandate is terminated to seek review of this decision by an independent body. [...]”

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §11

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §105

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“All the procedure of dismissal and cessation of office would now be contained in the law and would no longer be set out in the Constitution. It would have been preferable nevertheless to keep the basic elements of the dismissal of judges within the constitutional level, although the legislation should develop the detailed regulation in this respect. [...]”

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §10

## 1.2 Provisions on the courts and their structure

“The establishment and jurisdiction of courts, as well as the procedure before the courts, shall be specified by law.”

CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, p.44

“It is important that the different types of court are provided for at Constitutional level.”

CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §102

“Article 125 will be amended to provide that the network of courts and general jurisdiction is to be determined by law, and that the courts are to be established, reorganised and abolished through the law. The intention behind this provision is to prevent such changes being made by means of a decree. Parliament will be empowered (see Article 85) with the right to determine the structure of the court system (called ‘network’ in the Amendments), to establish, to reorganise and to abolish the courts upon the motion of the President of Ukraine. This solution seems to be reasonable and involves the co-operation between various organs. The Venice Commission welcomes that in the future the network will be defined by law.”

CDL-AD(2013)014, 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, §15

“It is a fact that alternative machineries for resolving conflicts are developing in many European states. The relationship between the ordinary courts and these alternative institutions certainly needs to be analysed and even regulated through legal norms. The Constitution is perhaps not the appropriate place to settle such problems, beyond a mere reference to the existence of the problem as such.

It is not necessarily correct that ‘the Constitution must define the individual elements of the court organisational structure’. [...] Only the general framework of the organisation of the court system deserves to be reflected in the Constitution itself.”

CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, p. 32

## 1.3 Provisions on the Judicial Council

“An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its [...] powers and autonomy.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §48

“Given their crucial role in appointing judges the composition of the Supreme Council [of the Judiciary], as well as their appointment or election, should be defined in the Constitution.”

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CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ ODIHR, §102  
See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §24

“The single body that has been specifically created in BiH to consolidate and strengthen the independence of the judiciary is the High Judicial and Prosecutorial Council (HJPC). [...] The corresponding Law on the HJPC was then adopted by the Parliamentary Assembly of BiH pursuant to Article IV 4. a) of the Constitution of BiH. This Law is currently being revised. The Venice Commission recommends that in due course, the HJPC be provided with an explicit constitutional basis.”

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §84

“The lawmaker should consider including in the Constitution provisions guaranteeing independence and impartiality of individual members of the [Judicial Council] and of the [Judicial Council] as a whole. The removal of a member before the expiration of his mandate should be possible only for the reasons specified in the law.”

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, §77

“The Montenegrin authorities have decided to propose two separate draft laws in the area of the judiciary: the Draft law on courts and the law on rights and duties of judges and on the High Judicial Council. To adopt two separate laws on this field seems, however, not to be the best solution, as both issues are closely connected. [...]

[...] ‘[A] single law would make the regulations more coherent and understandable’.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§13, 14

## 2. JUDGES

### 2.1 INDEPENDENCE AND IMPARTIALITY - DEFINITION

“Independence means independence from the executive and the parties. Courts should also be independent from the legislature except in so far as they are bound to apply laws emanating from the legislative body. While ‘independence’ primarily is a question of absence or presence of organic links between the judiciary and the other poles of public power, ‘impartiality’ is something normally decided in light of the circumstances of a particular case, i.e. a *prima facie* independent court may act partially. However, in light of the case-law of the ECtHR lack of guarantees of independence may easily create an appearance of lack of impartiality as well. Thus in the present context, as in others, it may be difficult to make a clear distinction between the requirements of independence and impartiality. According to the ECtHR, relevant in the assessment of independence (and impartiality) of a tribunal are ‘the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence’.”

CDL-AD(2010)003, Joint Opinion on the Draft 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, §34

“[...] [A] problem often discussed in Ukraine was that of ‘selective justice’, whereby – potentially well founded - charges [of corruption] would be brought only against some [judges], possibly including those who would be seen as being close to opposition or in conflict with the prosecution service. Such allegations should be taken seriously but they are not an issue of constitutional legislation and have to be addressed in its implementation.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §26

## 2.2 APPOINTMENT OF JUDGES

### 2.2.1 Qualifications, eligibility and quotas

“The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable.”

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §27

“In a number of countries judges are appointed based on the results of a competitive examination, in others they are selected from the experienced practitioners. *A priori*, both categories of selection can raise questions. It could be argued whether the examination should be the sole ground for appointment or regard should be given to the candidate’s personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §36

“The draft Law [...] sets out general requirements that persons wishing to be appointed as judges or prosecutors need to satisfy, as well as requirements for the appointments to the different courts and prosecutor’s offices. General requirements include citizenship of BiH, a good medical record, professional competence, the bar exam and the absence of any criminal proceedings. These appear to be appropriate and in line with European standards.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §73

“Article 127 proposes to require newly appointed judges to be 30 years old as against the current 25 and to have five years rather than three years’ experience. These provisions seem to be reasonable. [...]”

CDL-AD(2013)014, 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, §26

“[...] While it is usually a fundamental principle that a country cannot have foreign nationals serving as judges, this is one of the areas where the specificities of a very small country such as Monaco need to be taken into consideration: it is, even today, not possible to recruit only Monegasque nationals to all judges’ positions, as there are not enough qualified candidates. [...]”

CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §86



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“The opening of the profession of judge for candidates from outside the judicial system (e.g. lawyers in governmental service and in private practice in fields of work other than mainly court litigation) is to be welcomed.”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §49

“Provisions on the appointment of judges establish a closed judicial career with strictly defined requirements of judicial experience, the positions of Supreme Court judges being the only exception. This is not a self-evident choice, and arguments can be presented for facilitating the entry from outside the judiciary into at least the Commercial Court and the Administrative Court, perhaps even the High Courts and the Appellate Court.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §53

“[...] [T]he composition of both the Supreme Court and the Constitutional Court should include judges with particular expertise in human rights, especially [...] where a core body of case-law on such issues is being established.”

CDL(1999)078, Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, §32

“The list of grounds for which discrimination [in respect of judicial appointments] is prohibited does not include sexual orientation, which should be added. On the other hand, the (absence) of the knowledge of language can be a valid reason to discriminate. A command of the state language is a legitimate requirement for appointment as a judge. The term ‘or other features’ may also be too wide: Sufficient legal qualifications, for example, are of course necessary for appointment.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §38

“[...] Article 8 sets out the qualifications of trainees. Among the qualities required of a trainee judge or prosecutor is the following [...]: *‘Not to have physical or mental health problems or disabilities which will prevent to perform the profession of judgeship [...] throughout the country, or not to have handicaps such as unusual difficulties for speaking or controlling movement of organs that may be regarded as odd by other people.’*

This provision is far too broad and would not be regarded as generally acceptable according to European standards in its approach to how to deal with persons under a physical or mental disability. The test of something appearing odd to other people seems an inappropriate one.”

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §31

“ [...] In order to ensure the high quality and diversity of candidates, mandatory written exams should be introduced at the entry level; a national pool of vacancies should be established rather than having each vacancy published separately, as this would also improve the mobility of the judiciary across the country.”

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §91

“The criteria set out in some detail the ethical qualities required of a judge. These include honesty, conscientiousness, equity, dignity, persistence and the setting of good example. Under the latter, such matters as refraining from any indecent act, refraining from any action causing

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suspicion, raising doubts, weakening confidence, or in any other way undermining confidence in the court, refraining from hate speech, indecent or blunt behaviour, impolite treatment, expressing partiality or intolerance, using vulgar expressions, wearing indecent clothing and other improper behaviour are referred to.

These factors are to be evaluated on the basis of the results of interviews, and other methods such as carrying out of tests and other psychosocial techniques. They may also be evaluated on the basis of getting the opinions of persons the candidates have worked with, such as judges or members of the bar. **This may be very difficult to evaluate in practice.**"

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§30-31

"Draft Article 35(6) obliges the candidates for judge's office to make a property statement to the High Council of Justice and to authorise the latter to take the data in the statement into account when deciding on appointment. First, the statement of property by a candidate is not relevant at this stage, since only an increase of property during the mandate of the judge should trigger further investigation into possible corruption. It might also raise the issue of discrimination on the basis of the social, i.e. property status. In this respect, special attention should be paid to draft Art. 35(9) which states that during the competition, equality for candidates for judges shall be ensured irrespective, among others, of their social status.

Furthermore, the possibility of the 'structural unit' of the High Council of Justice to collect information on the financial status of the candidates (draft Art. 351) is also problematic for the same reasons and might jeopardise the right of every citizen to hold any public office protected by the Article 29 of the Georgian Constitution.

Second, although the consent of the candidate is necessary for that the 'structural unit' of the High Council of Justice has access to his/her personal details, in practice, it seems not to be possible for a candidate to refuse this consent."

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §§51, 52 and 56

## 2.2.2 Incompatibility with other occupations and activities

"The individual freedom of judges is an item for permanent discussions. The Concept seems to set high standards when it states that 'judges ... may not perform political activities, may not be party members ...'. Based on past experience, it is easy to understand the concern expressed. It should be added that in some other European states the private life of judges is not restricted in such a way."

CDL(1995)73rev, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, §10

"[Judges] may not be members of political parties or participate in political activities."

CDL-AD(2005)003, Joint Opinion on a Proposal for a Constitutional Law on the Changes and Amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §104

**"Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges."**

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CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §62

“Judges at present may not engage in any other occupation or remunerative activities except for ‘pedagogical activities’. To that is now to be added ‘scientific activities’, which is positive [...]. On a strict reading this provision might prevent the appointment of judges to public inquiries or commissions representing the state abroad, membership of charitable institutions or the like. Such an interpretation would seem unduly restrictive.”

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments Relating to the Reform of the Judiciary in Georgia, §§6-7

**“[...] [A] judge should first resign before being able to contest political office, because if a judge is a candidate and fails to be elected, he or she is nonetheless identified with a political tendency to the detriment of judicial independence.”**

CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, §45

“Article 89.3 of the draft Law provides that judges [...] may not be members of any organisation that discriminates on various grounds, including sex and sexual orientation. There are various churches and religions which do so discriminate and it is perhaps not intended to prevent judges [...] being adherents of or practising such religions.

Article 90.3 of the draft Law would prohibit the judge [...] from membership of any management or supervisory board of the public or private company or any other legal entity. This seems very broad and would prohibit membership of any charitable or non-profit organisation which had legal personality, possibly including even professional organisations.

Article 92 of the draft Law requires a judge [...] to seek the opinion of the [High Judicial and Prosecutorial Council] on whether activities he or she intends to undertake are in conflict with his or her duties under the law. Presumably this should be confined to cases where the judge [...] has reason to have at least a doubt about the issue.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§115 and 117-118

“[...] The drafters [of the constitutional law on disciplinary responsibility of the judges] may also consider imposing a duty on the judge to disclose any paid work.”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §33

**“Article 91** enounces that *‘upon request of the president of the court or the judge, the Judicial Council shall give opinion about whether certain activities are incompatible with discharging duties of judicial office’*. A reference to **Article 123 of the Constitution** should be added, to make it clear that incompatibility has been exhaustively regulated at constitutional level.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §63

“The situation with regard to remuneration seems to be more complicated. The draft Law should provide general restrictions on the type of remunerated work that is incompatible with a judge’s or prosecutor’s position. Any offer of remunerated work that may lead to or appear to lead to improper influence, must be declined. However, receiving remuneration should not

systematically be linked to disciplinary misconduct. For instance, where a litigant is a student at or involved in work with a university or research institution at which the judge or prosecutor is engaged in academic work, it would be unreasonable to demand from the judge or prosecutor to abandon the academic work altogether. However, this may (and in some cases must) lead to self-recusal and/or a declaration of conflict of interest.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §97

## 2.2.3 Appointing bodies and appointment procedure<sup>2</sup>

### 2.2.3.1 Multitude of systems

“Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies; where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

International standards in this respect are more in favour of the extensive depolitisation of the process. However no single non-political ‘model’ of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, **at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.**

In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed.

Notwithstanding their particularities appointment rules can be grouped under two main categories.

In elective systems, judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament [...]. This system is sometimes seen as providing greater democratic legitimacy, but it may also lead to involving judges in the political campaign and to the politisation of the process.

**Appointments of ordinary judges [in contrast to constitutional judges] are not an appropriate subject for a vote by Parliament** because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

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<sup>2</sup> See also the Section on Councils of Justice

In the direct appointment system the appointing body can be the Head of State [...].

In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. **What matters most is the extent to which the head of state is free in deciding on the appointment.** It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. **As long as the President is bound by a proposal made by an independent judicial council [...] the appointment by the President does not appear to be problematic.**

In some countries judges are appointed by the government [...]. There may be a mixture of appointment by the Head of State and appointment by the Government. [...] As pointed out above, this method may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise concern.

Another option is direct appointment (not only a proposal) made by a judicial council [...]. To the extent that the independence or autonomy of the judicial council is ensured, **the direct appointment of judges by the judicial council is clearly a valid model.**”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§2-3, 59 and 12-17

### **2.2.3.2 Appointment by political bodies (Parliament or President); popular elections**

“[...] [T]he principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) [...] requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

[...] [The appointment of judges by the Parliament is] a method for constituting the judiciary which is highly democratic but [...] the balance might be tilted much too far towards the legislative power. This is not without its risks from the point of view of judicial independence, *inter alia* since judicial appointments may over time be more likely than otherwise to become a subject of party politics.

The parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of parliament coming from one district or another will want to have his or her own judge. The right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a solution that depoliticizes the entire process of nominating a judge to a much greater degree.

[The appointment of judges by the Parliament is] acceptable by European standards, there may be reason to reconsider the possibility of entrusting the President as the appointment authority or by arranging the process of judicial appointments so as to go by submission from the Council of Justice to the President of the Republic (who also is to represent all the people) and from the President [of the Parliament].”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§13, and 21-23

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“[...] [I]t is in any case ill advised that the President should participate in the nomination of judges.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.2

“*A priori*, the Venice Commission has no objection against appointment of judges by the Head of State when the latter is bound by a proposal of the judicial council and acts in a ‘ceremonial’ way, only formalising the decision taken by the judicial council in substance. In such a setting, a situation where the President refuses to ratify a decision of the judicial council would be critical because it would de facto give the President a veto against decisions of the judicial council. In order to ensure that the President indeed only has a ceremonial role, the Constitution could provide that proposals by the judicial council would enter into force directly, without the intervention of the President if the President does not enact them within a given period of time. Of course, direct appointment of judges by the judicial council avoids such complex safeguards.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §16  
See also CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, §137

“[...] There would seem to be no common opinion yet about the most appropriate procedure. For the legitimacy of the administration of justice a certain involvement of democratically elected bodies like the Diet may be desirable. However, the Prince Regnant is not democratically elected. His involvement in the nomination procedure, other than in a merely formal way, is problematic, especially if this involvement is of a decisive character.

The proposed first paragraph of Article 96 provides that no candidate can be recommended to the Diet for election without the consent of the Prince Regnant. His far-reaching involvement in the election procedure could amount to undue influence and could give rise to doubt about the objective independence and impartiality of the elected judge. [...] Therefore, the proposed Article 96 would not sufficiently ensure respect for the guarantees laid down in Article 6 of the European Convention on Human Rights and could therefore create problems with respect to Liechtenstein's obligation under Article 1 of that Convention. This situation is not adequately remedied by the provision in the second paragraph of Article 96 that, if a proposed candidate is not approved by the Diet, the choice between the proposed candidate and any other candidate would be made by referendum, since a choice by the people would also not guarantee the impartiality of the elected candidate. [...]

CDL-AD(2002)032, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, §§29-30

“According to Article 117, justices of the peace and judges of the courts are appointed by the Government, not the Grand Duke. Members of the Superior Court of Justice and presidents and vice-presidents of the district courts are appointed by the Government on nominations from the Superior Court of Justice. In several other parliamentary monarchies, the power to appoint judges appertains to the Crown, which exercises it under ministerial responsibility. However, it is a matter of political choice. Most States have a higher judicial council which nominates judges, who are subsequently appointed by the Head of State. Furthermore, the ‘Commentaire’ proposes setting up such a body [...]. Whichever body is formally responsible for appointment (Grand Duke or Government), the necessary guarantees on judicial independence must be provided.”

CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg, §114

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“As regards the joint power of the President and the Parliament to form the whole judicial corpus, and in particular the election of all judges of local courts (district, city, regional, military and arbitrage) upon the approval of each nominee by the [Parliament], the Commission is of the view that this politicizes the process of nominating judges too strongly. [...]”

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §10

“[...] [In] designating the Parliament as a body entrusted with the task of electing and re-electing judges, the proposed amendments do not provide guarantees that the choices will not be politically biased. Such provision is therefore contrary to the principles of a free and democratic government and to the ECHR.”

CDL-AD(2003)019, Opinion on three Draft Laws Proposing Amendments to the Constitution of Ukraine, §40

“[...] [T]he Draft Law grants totally free discretionary power to the President of Armenia for appointment or rejection of the person (judge) elected by the Council of Justice. The President is not obliged to give reasons for his decision; the only consequence of rejection of the proposal of the Council of Justice is restarting the election process.

The Venice Commission recognised that ‘discretionary power is necessary to perform a range of governmental tasks in modern, complex societies’. However, ‘such power should not be exercised in a way that is arbitrary. Such exercise of power permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law’. Discretionary power granted to the President of Armenia can lead to conflict between the President and the Council of Justice, what may not only cause difficulties in proper administration of courts but it can harm citizens’ trust in the independence of the Judiciary. Rethinking of the power of the President (obligation to motivate rejection, limitation of his/her right to reject the elected person on certain reasons, e.g. irregularities in election process, or election of more than one candidate and obligation of the President to appoint one of them) may reduce either the undesirable opportunities mentioned above or the danger of politicization of the election/appointment process.”

CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §§34, 35

“There is a proposal to introduce elected justices of the peace. It is not clear what is intended. There is no problem with introducing lay judges, but this should not be done through popular elections. Judges would have to campaign for their election or – even worse – political parties would do that for them. This would endanger the impartiality of the judges who might later feel obliged to be ‘grateful’ to the political party, which supported their election. Such a system should not be introduced in Ukraine, in a context where the independence of the judiciary is essential in combatting corruption.”

CDL-AD(2013)014, 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, §47

### ***2.2.3.3 Involvement of an expert body (Judicial Council) in the appointment***

**“The mere existence of a high judicial council cannot automatically exclude political considerations in the appointment process.**

“[...] The Venice Commission is of the opinion **that a judicial council should have a decisive influence on the appointment [...] of judges [...].**”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§23 and 25

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“[...] It would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge.”

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §30

“[...] The main role in judicial appointments should [...] be given to an objective body such as the High Judicial Council provided [...] in the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. [...]”

CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, §17

“[...] Candidatures [for judicial appointments] should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same.”

CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, §17

#### **2.2.3.4 Appointment procedure**

“In Europe, a variety of different systems for judicial appointments exist and even the proposal for appointment by a single individual, such as the President of the NJO (National Judicial Office), is in principle compatible with the provisions of the ECHR. It seems that the procedure offers guarantees that the appointment of judges is based on merit, applying objective criteria, although the set of substantive and procedural rules do not contain sufficient safeguards in order to exclude that improper considerations play a role.

Doubts arise notably as concerns Section 18.3 ALSRJ, which states that the ‘President of NJO may decide to deviate from the shortlist and propose the second or third candidate on the list to fill the post’. No conditions nor criteria are referred to under which the President of the NJO may deviate from the order of the shortlist. This seems to be a full discretionary power of the President of the NJO and thus violates the rule of law and the principle of transparency. The Venice Commission was told, during its visit in Budapest, that the decision cannot be appealed to a court. This means that there is no way to check this kind of use of the discretionary power. While there are other legal systems in Europe that do not provide for judicial review of decisions on judicial appointments, in the specific context of a system, where a largely non-accountable person exercises wide discretionary powers, such review appears necessary. In order to enable the courts to review these decisions, the law would have to indicate the criteria to be used by the President of the NJO.”

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§57-58

“The Venice Commission finds the proposal contained in the first set of amendments to be very positive. Indeed, the Commission had indicated in former opinions that granting the final decision on both the appointment and the dismissal of the President of the Supreme Court to the Parliament conveyed the impression of political control. This proposed amendment fully takes



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such criticism into account, and eliminates any political intervention in the choice of the President of the Supreme Court. In this respect, the transparency of the procedure for appointment and dismissal of the President of the Supreme Court by the two-third majority of the Judicial Council, at the proposal of the Supreme Court's judges, should be ensured.

As concerns the proposal set out in the second set of amendments, the requirement of a two-third majority represents an improvement compared to the present situation; however, the Venice Commission considers that the first proposal – election and release from duty by the Judicial Council - is more appropriate and should be retained.”

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §§16-17

“There is nothing in the Constitution to require such a two-candidate rule. It would be preferable if the High Judicial Council were to put forward only one candidate for each vacant position [...]. [T]he two-candidate rule has as a consequence that the final appointment remains in the hands of the parliamentary majority.”

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §§59-60

“Nevertheless, the draft Law seems to leave open the possibility of a politicised appointment method, despite the commendable inclusion of the parliamentary opposition in the Council for the Selection of Judges. No detailed criteria for the appointment of judges are provided. Only very basic ones concerning age limit, length of employment and basic legal qualification are set out. There is no written examination, nor does there appear to be any provision for training before a judge is appointed to office. The only competitive element is an interview. After the Council for the Selection of Judges has made a recommendation, the President has discretion whether to accept the recommendation, but no criteria are established to give guidance as to whether he or she should do so or not.”

CDL-AD(2011)017, Opinion on the Introduction of Changes to the Constitutional Law "On the Status of Judges" of Kyrgyzstan, §74

“The new Kyrgyz Constitution does not provide for a single body in charge of appointment and career of judges but has charged separate bodies with this task. Article 64.3 of the Constitution provides that the judges shall be appointed on the proposal of the Council for the Selection of Judges (hereinafter, ‘Council’) and same article provides judge shall be dismissed on the basis of a proposal by the Council of Judges, which is distinct from the Council for the Selection of Judges. Regrettably, this constitutional provision makes it impossible to establish a single body competent to take decisions on appointment and career of judges. A future constitutional revision could provide for a single body, possibly with sub-commissions for specialized functions (e.g. discipline).

When a Constitution provides for more than one body competent for all aspects of the career of the judges, provisions on each of these bodies should be examined in the light of the standards developed for single judicial councils.

The Constitution also designates the President and the Parliament as authorities competent to appoint (elect) judges. As a point of departure, this is not problematic. [...] However, special precautions are needed to guarantee that in such appointment procedures the merits of the candidate are decisive, not political or similar considerations. The law should clearly determine the procedure for the selection of judges. Excellence and proficiency of judges are the best guarantees for their independence and for a better service to the citizens. A system of competitive entry examination is appropriate for the selection of judges in countries where

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judges enter the judiciary right after their law studies (as opposed to the common law system of appointing experienced barristers as judges).”

CDL-AD(2011)017, Opinion on the Draft Law on the Council for the Selection of Judges of Kyrgyzstan, §§13-15

“Article 90.2 provides that the decision on election to a permanent post shall be taken by a majority of the constitutional composition of the Verkhovna Rada. This is a kind of qualified majority as proposed by the Venice Commission. Despite this improvement there are still strong doubts about the role of Parliament in the election of judges. [...]

The election process is susceptible of being highly politicised. Democratic as it may seem at first sight, a process involving intensive questioning by Parliamentarians may create the image of judges being dependent on the views of the legislature in a manner not compatible with the separation of powers needed in a democracy. Independence of judges means that judges must feel free to render also decisions that are sometimes unpopular with the politicians or which certain persons do not like. In the minds of some judges the prospect of being scrutinised by politicians who dislike those decisions or being subjected to a campaign of ‘petitions’ by citizens and others (Article 87) who feel disgruntled by the judge’s decisions may have a ‘chilling’ effect and impact the judge’s independence. Even in case of those judges who uphold their integrity the outside appearances may be such as to put in question their objective independence. That a judge later may have to work under the threat of being subjected to similarly politicised dismissal procedure [...] is likely to create a picture of a judiciary which somehow is at the mercy of political forces, quite in breach of the principle of judicial independence. [...]”

CDL-AD(2010)003, Joint Opinion on the Draft 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, §§44-45

“There is a written qualifying exam for the appointment as a judge [...]. The introduction of such an exam [...] is to be welcomed. [...]

[...] The Article also provides for an appeal to the HJPC. It is not clear how this can work, since the HJPC is both the body making the decision and hearing the appeal. **There does not appear to be any provision for an appeal to a court of law, which should be added.**”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§77-78

“The appointment process starts with a public announcement of vacancies that must be well-publicised. The announcement is followed by nominations of candidates by special departments set up by the judicial or prosecutorial sub-councils of the [High Judicial and Prosecutorial Council] for nominations for vacancies in the different courts and prosecutors’ offices consisting of four or five judges or prosecutors. This suggests that candidates cannot apply for a certain position directly, but only through the sub-councils. Such a practice could be seen as problematic, as it could undermine the transparency and openness of the process.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §76

“According to Article 13.4.2.3 of the draft Law, the Judicial Legal Council Secretariat must publish on its webpage, *inter alia*, information on results of written and oral examinations for the selection of nominees to the position of judges, appraisals of nominees after long-term trainings and of final interviews. It has to be noted that information on the depth of the legal knowledge of judges or candidates for judges should be of limited access to avoid unwanted impacts on the

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independence of judges after they enter into office. For this reason, the Venice Commission considers that the draft Law should be interpreted in such a way as to **only make information on the results of examinations and interviews available to indicate a pass or a fail, without providing further details.**"

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §38

## 2.3. TERM OF OFFICE AND CAREER

### 2.3.1 Duration

**"[...] [T]he Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence."**

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §38

"[...] [T]ime-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges."

CDL-AD(2003)019, Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine, §39

"[...] Judicial appointments are to be for a period of no less than ten years and a judge must retire at the age of 70. Appointment for life would give a better guarantee of judicial independence [...]. At least, in the case of a general time-limit, for instance of 10 years, for the appointment of judges to a specific court, re-appointment for a second term should be excluded. [...]"

CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §105  
See also CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §8

"The term of office of five years for the members of the administrative court [...] is a rather short one. From the point of view of independence, appointment of judges for life is to be preferred. It is true that so far the Strasbourg Court has not found comparable provisions concerning terms of office to be in violation of Article 6. However, the greater the political influence on the re-election procedure, the greater the risk that a short term of office may throw a shadow on the independent position of the judge concerned. There again, the facts which were put before the European Court of Human Rights in *Wille v. Liechtenstein* [...] show that this is not a theoretical issue."

CDL-AD(2002)32, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, §31

"[...] Any possible renewal of a term of office could adversely affect the independence and impartiality of judges."

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §57

"[...] At any rate, given that [judges of local courts] are appointed for seven years only [...], the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence."

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §10

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“[...] The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure. [...]”

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

“[...] It would be appropriate to specify the term of the chairs [of the different courts in the Constitution] [...]”

CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §105

### 2.3.2 Probationary period

“[...] The Venice Commission considers that **setting probationary periods can undermine the independence of judges**, since they might feel under pressure to decide cases in a particular way [...].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a **‘refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office’**.

The main idea is to exclude the factors that could challenge the impartiality of judges: *‘despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value’*.

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they cannot yet take judicial decisions which are reserved to permanent judges.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§40-43

“[...] [T]he system [established by the statute of the High Council of Justice] of having professional tests following appointment is obviously open to abuses in connection with the confirmation of a magistrate in his or her post.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

“[...]The evaluation of judges, prosecutors and investigators during the three-year period before they become irremovable in their office should be restricted to courts of first instance [...]”

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

“At present judges, prosecutors and investigating magistrates become permanent upon completing a third year in office. This will be changed to completion of five years’ service as a judge and the irremovability will not operate unless the judge has been attested and the Supreme Judicial Council decides that he or she is to become irremovable.

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The rule does not specify the conditions in presence of which the Supreme Judicial Council could deny its consent. It would be advisable to offer to that body some criteria or test of judgment to circumscribe its discretion in confirming or denying the permanent status to the concerned officials. These guidelines could refer to the provisions dealing with the revocation of the permanent status, but it might be convenient adding criteria concerning the evaluation of the performance of the concerned officials after their temporary appointment and during the five years of service necessary to qualify for the irremovable status.

In its 2002 Opinion the Commission recommended that the evaluation of judges, prosecutors and investigators during the three-year period before they became irremovable in their office should be restricted to courts of first instance. This would seem to be all the more important if the period during which a judge is to be evaluated is now to be extended to five years [...].

[...] [T]he discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria [...]. In any case, this procedure should be restricted to courts of first instance.”

CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §§12-14 and 26

“[...] Some states have a practice that gives the opportunity to persons who are qualified as judges or prosecutors to gain experience of the legislative process by serving for a period of time at the Ministry of Justice. However, it is vital that there is a clear demarcation in their rights and duties when they serve in these quite different functions, on the one hand as civil servants within a hierarchy and on the other as independent prosecutors or judges.”

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §47

“The appointment of temporary or probationary judges is a very difficult area. A recent decision of the Appeal Court of the High Court of Judiciary of Scotland [...] illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6.1 ECHR was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to a discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability, to say the least, of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.

[...] Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

**[...] A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.”**

CDL(2005)066, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in “the former Yugoslav Republic of Macedonia”, §§23 and 29-30

“Initial appointment as a judge is for a five-year term, apparently intended as a kind of probationary period. [...] A period of five years cannot be regarded as acceptable. [...] Their situation is worsened by the fact that in order to be finally elected to a permanent position they

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have to face what may be - or at least to an outsider may seem to be - a politicised procedure in Parliament [...]. The system leaves the probationary judges for too long a period in a situation in which they do not have sufficient guarantees against outside pressures - or in which at least an appearance of potential pressures may be created.

First appointment to a permanent position is also comparable to promotion. [...] [P]olitical and the like considerations are inadmissible. The proposed regulation gives rise to a suspicion in the mind of an outside observer that political considerations do play a role in the appointment of judges in Ukraine.

The procedure foreseen for the permanent appointment of judges should be amended, by removing the involvement of Parliament through an amendment of Article 128 of the Constitution. In the absence of such amendment, the independence of the High Qualification Commission should be strengthened. Alternatively, the decisive say in the election of judges could be entrusted to a High Council of Judges having a pluralistic composition [...]. In this spirit, the questioning by Parliament should be excluded. The role of petitions from natural and legal persons (Article 87) should be eliminated altogether as far as the election process is concerned.”

CDL-AD(2010)003, Joint Opinion on the Draft 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, §§39 and 46-47

“[...] **Submitting a candidate’s performance as a judge to scrutiny by the general public, i.e. including by those who have been the object of unfavourable rulings, constitutes a threat to the candidate’s independence as a judge and a real risk of politicisation.** [...]

[...] Article 79.2 of the Law provides that the issue **concerning the election of a candidate to a lifetime judicial position will be considered at once at a plenary meeting, without preliminary discussions and investigations by a committee of the Verkhovna Rada. This provision is clearly aimed at reducing the role of the Verkhovna Rada in the election process. As such it enhances the independence of the judges, and is therefore welcomed.**”

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, §§60 and 63

“[...] [I]n order to meet the proportionality test, the introduction of probationary periods should go hand in hand with safeguards regarding the decision on a permanent appointment. Especially in countries with judicial systems newly established in the 1990s, such as in Hungary, there might be a practical need to first ascertain whether a judge is in fact able to carry out his or her function effectively before permanent appointment. If probationary appointments are considered indispensable, a ‘refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office’.

Sections 3.3.c and 25.4 ALSRJ even provide for the possibility of repetitive probationary periods. **The Law should provide *expressis verbis* for a maximum limit of cumulative probationary periods** with the aim of balancing the need for judicial independence, on the one hand, with the interest of the state, on the other.

The delegation of the Venice Commission was informed that, usually a person who intends to become a judge would first become court secretary and, in some cases, stay in this position for up to six years before he or she would be appointed as a regular judge. Under the new Fundamental Law, Court Secretaries may exercise judicial functions in misdemeanour cases

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(see also below). This means that a person who is already acting in a judicial function could remain in a precarious situation for up to nine years (six years as court secretary and three years in probationary period). The problem is not so much that the evaluation during the time as court secretary and the probationary period would objectively exert pressure on the person concerned. However, the court secretary or probationary judge will be in a precarious situation for many years and - wishing to please superior judges who evaluate his or her performance - may behave in a different manner from a judge who has permanent tenure ('pre-emptive obedience'). Probationary periods are problematic already as such. The additional time as court secretary further aggravates this problem."

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§66-68

"[...] In order to identify suitable candidates, candidate judges could rather assist sitting judges as trainees. They would prepare judgments which would be adopted under the authority of a judge with permanent tenure."

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §32

"The drafters have managed to introduce criteria [for the refusal of reappointment] that are objective and verifiable, for instance quantitative evaluations (number of overruled decisions is significantly higher than the average in the court where he or she works (paragraph 9/3), less number of cases were concluded than are required by the orientation norm (paragraph 9/4)) and so on.

However, **this is a matter that should be approached with a great degree of caution.** It does not necessarily follow that because a judge has been overruled on a number of occasions that the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, **any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled.**

In addition, **a distinction might be drawn between decisions made on the basis of obvious errors**, which any lawyer of reasonable competence should have avoided **and decisions where the conclusion arrived at was a perfectly arguable one which nonetheless was overturned by a higher court.**

With respect to the workload of the judge concerned, where he or she has concluded a lesser number of cases than required by the orientation norm or where criminal cases have had to be abandoned due to delays for which the judge is responsible, these are matters to be considered. **It is important**, once again, that the **actual cases be evaluated. It cannot be ruled out that some judges may be given more difficult cases than others as a result of which their workload appears to be less than that of their colleagues.**"

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§35-38

### 2.3.3 Evaluation and promotions

"[...] [A] competition should be the rule for all promotions of judges in order to prevent any abuse. Also, there is the risk that the promotion procedure without competition negatively affects

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the development of regular promotion procedure and of its criteria which should be determined and developed by the High Council, as required by Article 41(1) of the Organic Law.”

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §64

See also CDL-AD(2013)014, 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, §54

“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. [...]”

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §11

“A system on evaluation of judges is generally to be welcomed. [...]However it should be stressed that such a system properly implemented will consume a lot of time, personal and economic resources to guarantee results that could be relied upon in the long run. [...] [I]t is recommended to include the Supreme Court judges in an evaluation system.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§59-60

“[...] [I]t should be noted that ‘individual evaluation’ is far from being considered as indispensable by European judicial systems in general.

Countries that have decided not to proceed with an individual evaluation of judges (such as Denmark, England and Wales, Finland, Ireland, Netherlands, Sweden and, to some extent, Spain), have instead developed general performance evaluations of the judicial procedure.”

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§10-11

“If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. [...] Secondly, the criteria for evaluation must be clearly defined. [...]”

CDL(2005)066, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in “the former Yugoslav Republic of Macedonia”, §30

“[...] This provision looks problematic as it defines the President of the Court as a central figure in the process of the evaluation of judges. This may not only lead to a conflict of interest, but also result in malpractice, limiting the independence of individual judges.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §66

“[...] [S]ince the decision assessing the performance of a judge is to be made by the President of the court, it would be desirable that the President of the court not have the sole decision in this matter. Cases where Presidents of courts abuse their position with regard to ordinary judges are not unknown in many countries. [...]”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§84



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“[...] [E]valuation and disciplinary liability are (or should be) two very different things. 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. [...]  
[...] [I]t should be underlined that not every shortcoming in a judge’s performance is a disciplinary offence.”

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§28, 102 and 108

“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.”

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §55

“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. [...] 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.

Measurement of the ‘observance of procedural periods’ [...] 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.

Measuring the ‘stability of judicial acts’ [...] 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. [...] 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. [...].

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 [...].

[...] [T]he 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. [...]

The proposal [...] to measure the average duration of examination of cases is inappropriate for similar reasons to those already referred to above [...]. 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 judge

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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.

[...] [T]he ‘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.

Criterion (2) Professional abilities [...] raises the problem how one measures the ‘(a) ability to withstand pressure and threats’ [...]. 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.

[...] [T]he 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 Venice Commission recommends] 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. Unless there is malice or repeated gross negligence, qualitative criteria should not relate to the interpretation of the law.”

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§37-40, 42-43, 49-50 and 77-78

“The draft Law contains no details with regard to the procedure and frequency of the evaluation as well as the consequences of such an evaluation. Although the draft Law provides that the HJPC is authorised to adopt evaluation criteria, it is crucial for the criteria, procedure and consequences to be clearly formulated, easily accessible and foreseeable. It is important that the evaluation system be neither used nor seen to be used as a mechanism to subordinate or influence judges.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §68

**“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).

[...] [T]he evaluation of judges with the involvement of prosecutors and advocates is a very sensitive issue. 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.

[...] [T]he 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

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evaluations this could give rise to allegations of cronyism. There is a danger that such a system could lack credibility.

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.

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. [...]"

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§62, 67, 69-70 and 75

## 2.4 ACCOUNTABILITY

### 2.4.1 Immunities

"It is indisputable that **judges** have to be protected against undue external influence. To this end they **should enjoy functional – but only functional – immunity** (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)."

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

"[...] **Magistrates** [...] **should not benefit from a general immunity** [...]. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts. [...]"

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15  
See also CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §8

"It is **reasonable to grant immunity from civil suit to a judge acting in good faith** in the performance of his or her duty. But, **it should not be extended to a corrupt or fraudulent act carried out by a judge.**"

CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, §24

"As regards the immunity of judges, it is necessary to separate the substantive issue relating to the material scope of the functional immunity, which should provide the legal grounds to pronounce the inadmissibility of a complaint against a judge, from the procedural safeguards which exist to protect such functional immunity [...]"

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §38

"[...] [A] limited functional immunity from arrest and detention which would interfere with the workings of the court is one thing but a total immunity from prosecution is difficult to justify. [...]"

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CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §11

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §107

“[...] It is worth highlighting that even if the material scope of the functional immunity is reduced (e.g., by expressly excluding certain criminal offenses such as bribery, corruption or traffic of influence), the procedural safeguards [...] will still protect the judges e.g., from blackmail relating to an alleged crime committed in office, by ensuring that only duly substantiated claims or complaints will get the consent of the Council of Judges to proceed further.”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §42

“In the Commission’s view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions. [...]”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.2

“The issue of the personal liability of judges was raised by the Committee of Ministers in its Recommendation CM/Rec(2010)12 on judges [...].

While imposing civil liability on a judge is a possibility, the grounds for the compensation of damage should be considered with great caution, as this may have a negative impact on the work of the judiciary as a whole. It could limit the discretion of an individual judge to interpret and apply the law. [...]

[...] It is not uncommon for violations of the rights and freedoms guaranteed by the European Convention on Human Rights and/or the national Constitution to occur as a result of the application and/or interpretation of the law. It is also not unusual for the European Court of Human Rights [...] to reach different conclusions in defining the scope and content of a right (including procedural rights) or of a legal provision. [...] Should the judge be liable if s/he ‘wilfully’ did not follow the standards established by any of these international organisations? The argument could be made that where the international case-law is well-established, the judge should be expected to follow it. However, the fact that a judge has wilfully chosen not to follow the established standards should not in itself become a ground for personal liability. [...] [I]t is of great importance that issues pertaining to the personal liability of judges be determined by national courts, but this should only be allowed on the basis of criteria and procedures that are clearly defined by the law.”

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §§18-19 and 22

“[...] [I]t may go too far in giving the judge immunity for such matters as failure to give judgment at all or improper conduct such as giving a judgment as a result of an inducement or bribe, which would be dealt with in criminal and disciplinary proceedings.”

CDL-AD(2010)003, Joint Opinion on the Draft 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, §28

“There is a suggestion that the decision on detention or arrest in the case of judges of the Constitutional Court should be by Parliament. This would certainly not be desirable, as it would

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represent a continued politicisation of judicial immunity and endanger judicial independence. [...] For ordinary judges, immunity should be lifted by the HCJ. [...]"

CDL-AD(2013)014, 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, §49

"[...] [T]he judges' immunity [...] should be lifted not by the Verkhovna Rada but by a truly independent judicial authority."

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §79  
See also CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §57

## 2.4.2 Disciplinary control

### 2.4.2.1 Grounds for disciplinary proceedings (material aspect)

"Article 2 sets out the 'Principles of procedure on disciplinary cases of judges'. These principles (legality, respect for judicial independence, fair procedure, proportionality of the sanction with the committed offence, transparency) are in line with international standards and are to be welcomed."

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, §12

"It must be pointed out that internationally, there is no uniform approach to the organization of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations. [...]"

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 23

"[...] Only failures performed intentionally or with gross negligence should give rise to disciplinary actions. [...]"

"[...] Applying disciplinary sanctions to an act that could have merely 'affected the court's activity' is excessive. [...]"

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, §§19 and 35

"[...] In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague, is a good practice/approach in conformity with international standards."

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, §15

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“[...] [T]he conduct giving rise to disciplinary action be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct. More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application.”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 24  
See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §90

“[...] [P]eriodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

“[...] [T]he Venice Commission strongly criticised the vague term of ‘breach of oath’ as a basis for the dismissal of a judge and welcomed the introduction of the clause ‘commitment of an offence, incompatible with further discharge of the duties of a judge’.

[...] No dismissal should be possible unless the conduct of a judge is covered by the definition of a disciplinary offence. The obligation to typify disciplinary offences on the level of the law also stems from the judgment *Oleksandr Volkov v. Ukraine* of the European Court of Human Rights.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§54-55  
See also 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, §33

“[...] [A legislative measure penalising the imposition of] a final judicial verdict, recognised and known to be unjust [...] is so clearly open to abuse [and] it should be repealed as a matter of urgency.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

“It is important to underline that, as a rule in European practice, **it is not the judge’s task to supervise the execution of judgments**. There are specialised bodies which deal with this. The judge will not have the means nor the time to ensure that judgments are implemented in practice. **It therefore seems to be inappropriate to establish the judge’s liability in this context. This could even be used to undermine the judges’ independence.**”

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §15

“The principle *ne bis in idem* prohibits double trial and punishment for the same offense in two different criminal proceedings (Article 4 of Protocol no. 7 ECHR). This, in principle, does not exclude the initiation of disciplinary proceedings for the same offence in parallel to criminal proceedings. [...]

[...] As mentioned above, the criminal and disciplinary liabilities have different natures and objectives, are subject to different standards of proof and have different constitutive elements, and they do not exclude each other. Consequently, [...] the disciplinary authorities [...] should not be obliged to terminate the disciplinary proceedings when a criminal case is initiated for the

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same offense. In order to prevent the breach of the principle *ne bis in idem* those authorities should rather have the possibility to terminate the proceedings if they consider that the disciplinary case has a criminal character (the nature of the offense and the gravity of the correspondent disciplinary penalty will be the guiding criteria in the light of the case law of the European Court). [...]"

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, §§58 and 60

"[...] It would seem desirable to provide that where an event consists of an offence under criminal or administrative law as well as under the disciplinary law, the criminal or administrative proceedings take precedence. [...]"

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, §14

"A disciplinary sanction might be imposed on a judge after an acquittal before a criminal court or where the criminal proceedings against him or her have been discontinued but such disciplinary actions and proceedings must not violate the presumption of innocence provided by Article 6.2 of the European Convention on Human Rights. 'Disciplinary bodies should be capable of establishing independently the facts of the cases before them'."

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, §28

"In this provision, the 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. This provision therefore encroaches on the extremely delicate sphere of a judge's independent decision-making in accordance with the Constitution and the law."

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

"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. The basic rules on disciplinary misconduct are outlined in Article 39 of the Constitutional Law. The first ground mentioned therein, namely 'breaching the law while reviewing court cases', is open to a very wide application. [...] [I]t is recommended that Article 39 par 1 (1) is amended in order to clarify that it only refers to gross and inexcusable misbehavior and not to the incorrect application of the law."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §60

"A judge may not be limited to applying the existing case-law. The essence of his/her function is to independently interpret legal regulations. Sometimes judges may have an obligation to apply and interpret legislation contrary to 'uniform national judicial practice'. Such situations can occur, for instance, in light of international conventions, and where decisions from international courts supervising the international conventions may alter the current national judicial practice."

The legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence. While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider right to do so.”

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, §§21-22

“[...] It should be expressly provided that inspection proceedings regarding judges on the performance of their duties in accordance with the laws, regulations, by-laws and circulars, does not refer to laws etc. on court decisions themselves, but solely to general provisions which provide for the proper functioning of courts. The same restriction should apply when inspection rights arise with respect to the ‘behaviours and conducts’, enquiring whether they are ‘compatible with the requirements of their profession and status’.”

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §95

“The draft Law defines an apparent violation [which gives rise to disciplinary liability] 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.

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 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. [...]”

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§114 and 122

“[...] [I]t would be problematic to discipline judges for merely criticising judicial decisions [...] or ‘assessments with regard to the activities of state authorities and local authorities, and of the heads of those authorities’ [...].”

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §33

“Article 66.j defines as a disciplinary offense as ‘unjustified delays in making decisions or other actions in connection with the performance of the duties of a judge or any other repeated disregard of the duties of a judge’. Due to a lack of clarity and the ability to foresee consequences of one’s own actions, this paragraph should also be revised. The wording such as ‘other actions in connection with performance of the duties’ or ‘repeated disregard of duties’



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should be more detailed and clarified. The draft Law should stipulate more specifically what types of duties and actions may result in disciplinary proceedings.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §101

“Similarly, without providing any guidance or reference to the meaning of ‘inappropriate contact with a party to the proceedings or his/her representative’, Article 66.k may potentially result in an overbroad interpretation. Is a meeting with either or both parties always inappropriate? Do judges have clear guidance with regard to the actions that are inappropriate?”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §103

“Article 66.n, which makes it a disciplinary offense for a judge to make – ‘any comments while the case is deliberated in court, which may be reasonably expected to interfere with or harm the equitable proceedings or trial, or failing to take appropriate steps to ensure that court employees subordinated to him/her also refrain from making comments’ - also seems to be vague and may result in a disproportionate response. It is not clear if this restriction applies to all judges or only to those who are in the process of deliberation. A judge, while making certain public comments or statements during the deliberation may indeed harm the reputation and credibility of the court. It would, however, be unreasonable to punish a judge where a court employee, who is subordinated to him or her, fails to refrain from making similar comments. It is not immediately clear from the draft Law in what circumstances the disciplinary committee may decide that a judge failed ‘to take appropriate steps to ensure that court employees refrain from making comments’ on the case being deliberated’.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §105

“[In the draft code on judicial ethics] [t]here is a requirement of judges [...] not to disclose **any** information in the performance of their duties which seems excessive. It would be appropriate to refer to confidential information. [...]”

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §61

#### ***2.4.2.2 Disciplinary sanctions – types and proportionality***

“Article 6.1 prescribes four different types of disciplinary sanctions, namely warnings, reprimands, reductions of salary, and removal from office.

Having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality [...]. From this point of view, the authors of the draft may also wish to consider adding ‘temporary suspension from office’ as another possible disciplinary sanction. Other possible sanctions could be withdrawal of cases from a judge, or moving a judge to other judicial tasks.”

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, §§37-38

See also CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §63

“Article 69.2 stipulates that ‘the disciplinary measure of dismissal shall be imposed only in cases in which a serious disciplinary offense has been established, and the severity of the offense

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clearly shows that the offender is unfit or unworthy of continuing to perform his/her duty'. However, the draft Law does not contain any indication which offences may qualify as 'serious'."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §109

"As concerns reduction of salary [...] it is recommended to specify that reduction of salary may be applied only in cases of deliberate wrongdoing and not in cases having more to do with performance.

As concerns 'removal from office' [it] should be reserved to most serious cases or cases of repetition. It could also be applied in cases of incapacity or behaviour that renders judges unfit to discharge their duties."

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, §§41-42

"[...] According to **Article 97, paras 3, 4**, it is considered to be a 'severe disciplinary offense' when a judge '4. Unjustifiably fails to recuse himself/herself in the cases in which there is a reason for his/her recusal'. The reasons on the basis of which a judge has to recuse himself/herself should be determined and defined by the law. The decision of a judge not to recuse him/herself should only be considered a 'very serious offense' in cases in which there is manifestly a reason for his/her recusal and not in cases in which this decision is based on his or her interpretation of the law."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §65

"All of the privileges provided to a judge, as well as retirement benefits, can be withdrawn pursuant to a decision terminating the powers of a judge by the Disciplinary and Qualification Board or a decision by the Judicial Jury according to Article 55-1. The termination of all benefits may be justified in certain cases, however, the sanction imposed should be proportionate to the violation in the individual case. The present provision does not in sufficient detail outline the connection between the breaches of ethics or other offences and the sanction. It is recommended that the provision is further elaborated and describes in more detail which offence or misdemeanour can trigger which sanction."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §54

### **2.4.2.3 Examination of disciplinary cases against judges – procedural aspects**

#### **2.4.2.3.1 Who may initiate a disciplinary case and decide on it**

"[...] Any action to remove incompetent or corrupt judges had to live up to the high standards set by the **principle of the irremovability of the judges** whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small **expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges** concerned before an independent body would make a final decision."

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15

"[...] It would be dangerous to give every person the right to initiate proceedings for the dismissal of a judge. A complaints mechanism for individuals should exist for cases where the judge has

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misbehaved, but such a complaint should not directly result in initiating dismissal proceedings of the judge.”

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §68

“[...] According to Article 19.1.a the notification regarding the committed actions which may constitute disciplinary offenses committed by judges can be submitted by ‘any interested person’. This right should be limited either to persons who have been affected by the acts of the judge or to those who have some form of ‘*legal interest*’ in the matter.

According to Article 21, notification on actions that may constitute disciplinary offences shall be filed with the secretariat of the Superior Council of Magistracy, which does not investigate. Investigations are the task of the inspector-judges to whom cases are distributed on a random basis. These provisions are to be welcomed.

Article 26 seems to limit the role of the inspector-judge to preparing and substantiating the disciplinary case file. Inspector-judges should have a strengthened role and in particular should be responsible for drafting the disciplinary charges. Such a provision should be usefully added to the draft Law which is silent on this aspect of the procedure. The inspector-judge would be the best placed for this since the admissibility panel should act only as a filter – deciding on the admissibility – but should not be involved in the drafting of charges.”

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, §§64, 68, 69 and 71

“**Article 99** grants the Minister of Justice the right to initiate disciplinary proceedings against judges. It may be asked whether this is in harmony with the independence of the judiciary and the principle of the separation of powers.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §68

“[...] [A] qualified majority [of 2/3 of votes] for the initiation of disciplinary proceedings creates the serious risk that too many complaints would not be followed up at this early stage because of corporatist attitudes within the High Council of Justice. A simple majority should be enough in this respect. Furthermore, draft Article 15 also requires a 2/3 majority in the High Council for the ‘arraignment of the judge’ on disciplinary proceedings and draft Article 60(3) requires again the same qualified majority to appeal against decisions of the Disciplinary Board. Those are too high majorities which may hamper the legitimate aim of the amendment of Article 7 and slow down, if not impede the efficient development of disciplinary proceedings as a whole. [...]”

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, §24

“[...] [A] mixture of different powers in one hand, in particular, the power to initiate the proceedings and the power to adjudicate [...] risks leading to problems [...]”

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

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“The President of the Supreme Court and the presidents of local courts have extraordinarily vast powers. Some of the amendments aim to reduce the scope of these powers, for instance, the competence to initiate disciplinary proceedings is transferred to the Judicial Council, **which is welcomed**. [...]”

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

“[...] **The reporting member of the High Qualifications Commission, whose position is similar to that of a prosecutor, should be excluded from the deliberations and the vote.**”

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

See also CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

“**Article 103** deals with the composition of the disciplinary panels. [...] It is not clear whether the disciplinary panel is composed case-by-case, or whether there is only one disciplinary panel which will conduct all disciplinary procedures. The principle of the ‘natural judge’ implies that disciplinary procedures have to be conducted by a disciplinary jurisdiction ‘foreseen by the law’. This excludes an *ad hoc* disciplinary panel, composed on a case-by-case basis. [...]”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §69

“Article 28 deals with the admissibility examination of the notification. A decision on admissibility is to be adopted where at least one member of the panel voted in favour of declaring the notification admissible. Rejection of the notification, on the other hand, requires a unanimous vote [...]. This seems to balance the system in favour of acceptance. While this is an unusual system, it is acceptable [...].

It is to be welcomed that decisions rejecting the notification shall be mandatorily motivated [...]. Article 28.7 should provide that decisions of admissibility panels should be notified not only to the person who submitted the notification, but also to the judge concerned.”

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, §§73-75

“[...] Article 32, in its last paragraph, requires decisions about the **submission of the HCJ’s petition regarding dismissal of a judge to be taken by a simpler rather than a two thirds majority. In the light of the flawed composition of the HCJ, this is a regrettable step which would go against the independence of the judges.**”

CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal 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, §46

“The creation of a Disciplinary Board [i.e. a body which examines disciplinary cases and applies disciplinary sanctions to judges] which is separate from the Superior Council of Magistracy is to be welcomed [...].

Article 9.1 defines the composition of the Disciplinary Board (5 judges and 4 persons from civil society). Such a composition is to be welcomed as it should help ensure transparency, as well

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as community involvement in disciplinary proceedings, while also averting the risk of judicial corporatism.”

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 and 48

#### 2.4.2.3.2 Due process requirements in the disciplinary proceedings against judges

“[...] [T]he draft law [should] be amended so as to enable the judge to be informed of the investigation as early as the preliminary investigation stage to allow him/her to benefit from his/her right to counsel in early stages. In this respect, it is not sufficient that draft Article 39(4) states that the judge may invite a counsel to the hearing before the High Council, but this right should be set out in a different article and apply to all stages of disciplinary proceedings and not only in the context of hearing before the Disciplinary Board.”

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, §50

“The provisions concerning the right of the judge [...] accused to be heard and represented before the panel seems appropriate but **there is no mention of a right to be heard and represented before the Supreme Judicial Council, which takes the actual decision [...].**”

CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, §26

“The legal solution concerning the involvement of the complainant into disciplinary procedure against a judge may differ from one country to another. On one hand, in general the disciplinary liability of judges is regarded as an internal matter to the judiciary [...]. On the other hand, the complainant can be the direct victim of the judge’s possible disciplinary misconduct, and may have a legitimate interest in participating to the proceedings, in particular where his/her rights are infringed as a result of judge’s misconduct. The input of the complainant may also serve to shed light on the concrete circumstances of a given case [...]. Yet in order to guarantee the rights of the judge subjected to disciplinary procedures, the non-disclosure provisions should be effectively implemented.

“[...] [T]he draft law should also provide for some indications on the consequences of disclosure of information on a disciplinary case by the complainant. It is also recommended that clear criteria be provided in Article 17(5), on the basis of which the High Council of Justice can decide whether the hearing of the complainant is necessary in a given case. Further, Article 39(7) should also indicate unambiguously whether the complainant may be invited to the hearings before the Disciplinary Board as an exception to the principle of confidentiality and under which conditions.”

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, §§47-48

“[...] [T]he statute [of the Supreme Council of Justice] provides for secret deliberations and a discretionary power to summons and interrogate affected persons quite contrary to the right to be heard and other procedural rights. The Commission notes in this connection that the practice

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of the High Council of Justice confirms that affected persons are frequently notified of decisions affecting them only after such decisions have been taken.

Decisions on the transfer of judges [...], also require to be circumscribed by appropriate procedural safeguards.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

“[The] Article sets out that the [High Judicial Council]’s sessions are open to the public and that it may decide to work in closed session in accordance with the rules of procedure. It is recommended that this be regulated by law rather than by the rules of procedure and clear criteria for in camera proceedings should be provided.

It is, however, also important that provisions be included which allow the judge – whose position is being deliberated on – to request a closed session, especially where disciplinary proceedings are concerned. [...]”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§35 and 37

“[...] [P]ublicity should also be the guiding principle for later stages of disciplinary proceedings. [...] [T]he draft Article 30(4), according to which ‘Sessions of the Disciplinary Board shall be closed’, is problematic. First, it is recommended that sessions, as a general rule, be held in public and be held in camera only exceptionally, at the request of the judge and in the circumstances prescribed by law. Secondly, it is not clear from the wording of Article 30(4) whether the judge’s request for publicity, as in the procedure before the High Council [...], constitutes an exception to the principle of confidentiality of sessions of the Disciplinary Board or only of information related to the hearings. [...]”

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, §§26

See also CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §60

“Article 31 [...] provides in paragraph 3 that ‘Repeated absence and in the absence of pleas alleging of the judge or of the person who filed the notification or of their representatives at the meeting of the Disciplinary Board shall not prevent its consideration’. This provision is to be welcomed as it is a preventive tool against obstructive non-appearances before the Board.

Article 31.5 further states that ‘The Board member appointed reporter or any member of the Disciplinary Board may require hearing of witnesses or to other persons within meeting of examination of disciplinary case’. The judge whose case is considered by the Board should be provided with similar rights.”

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, §§77 and 78

“Concerning the complaints procedure about the judges performance [...], it can be indeed be regulated in the rules of procedure. However, the law should require clearly the **publication of the decisions taken in this respect in order to ensure transparency and accountability.**

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Finally, Article 52.5, which provides that the record of the disciplinary proceedings taken will be deleted after 2 years seems to establish a period too short to allow the appropriate information to be available when considering promotion procedures or future disciplinary cases.”

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §§41 and 44

“With respect to Article 60, it should be clarified what is meant by ‘open records’. The right of personality has to be protected. Therefore, it may not be appropriate to include medical reports in open records as well as disciplinary and penal investigations and prosecutions, at least if they have not resulted in sanctions. If there have been sanctions, only sanctions for severe violations should be included in open records. In any case, access to the file should be regulated, i.e. not just anyone should have access to this information.”

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §58

“[...][W]hile 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. [...]”

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §23

“[...] [T]he representative [of the High Council of Justice] should at least be obliged to provide reasons for dropping the case, not only because of the requirements of the principle of legal certainty but also in order to protect the professional and personal reputation of the judge in question.”

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, §62

“It is thus recommended to supplement the draft law to clearly indicate that in case a procedural issue is not regulated in the Law on Disciplinary Liability, one of the procedural codes can be applied by analogy and to state that only the evidence collected in compliance with the rules of evidence contained in that code will be admissible. The fact that the criminal procedural codes provide generally better safeguards to ensure the fairness of the procedure should be taken into account.”

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, §34

“The random case distribution [amongst members of the Disciplinary Board] [...] is to be welcomed.”

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, §60

#### 2.4.2.3.3 Appeals against disciplinary measures

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**“The Venice Commission is of the opinion that a **judicial council should have a decisive influence on the [...] promotion of judges and** (maybe via a disciplinary board set up within the council) **on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.**”**

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §25

See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110

“[...] Once the disciplinary panel of the Supreme Judicial Council has found in favour of the judge, this decision should be final. [...]”

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

“Finally, on a point of general importance, the Commission has learned that the Constitutional Court has jurisdiction to hear complaints against decisions of the High Council of Justice which allegedly violate the independence of judges, guaranteed by [the constitution], and that it has struck down a decision to transfer a judge in at least one case.

While this is to be welcomed, a future law on the status of magistrates should provide for judicial review of decisions affecting judges and prosecutors more generally, prior to the review exercised by the Constitutional Court.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary? (chapter VI of the Transitional Constitution of Albania), p.4

“The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases.”

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §76

“Art 39.1 provides that decisions of the Disciplinary Board can be appealed to the Superior Council of Magistracy and that the Disciplinary Board decisions become final after 15 days from the receipt of the copy of the motivated decision. Every appeal against disciplinary proceedings should prevent the decision from becoming final until the appeal is determined (not only decisions to dismiss a judge from the office of Court chairman or from office as a judge as provided in Article 38.2).

The procedure before the Superior Council of Magistracy is very briefly mentioned in Article 39. It should be regulated in more detail to ensure to the parties to the case a fair and transparent judicial review.

Under the provisions of this draft Law alone, it appears that a member of the Superior Council of Magistrates may file a notification on a disciplinary offense (under Art. 19.1b), and later appeal against the decision of the Disciplinary Board (Art. 39.1) thereby bringing the case before the Superior Council of Magistrates, on which he or she may then also vote on appeal, along with the other Superior Council of Magistrates members (Art. 39.4). In other words, the current draft Law lacks a clear provision that would prevent the same member of the Superior Council of Magistrates from engaging in all these consecutive steps of the disciplinary proceedings, which might raise very valid concerns of potential bias and lack of impartiality. [...].



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Article 40 provides that decisions of the Superior Council of Magistracy can be appealed to the Supreme Court of Justice ‘by people who have filed complaints, judicial inspection or the judge concerned’. It is not clear why the judicial inspection should be allowed to appeal. The appeal should be allowed to the parties concerned – the complainant and the judge concerned.”

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, §§81-84

“The performance of the Presidents of the most senior courts and the Chief Prosecutor are assessed by the relevant sub-council. It seems appropriate that assessments of judges take place at every level. There is an appeal to the HJPC itself. Assessment of performance is to be taken into account when making appointments to senior positions. In addition, where the President of a court or the Chief Prosecutor receives one of the two lowest assessments he or she loses office. Given the importance of these assessments the specific statement that the appeal to the HJPC is final and no remedies shall be available seems difficult to justify. **An appeal should lie to a court of law.**”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §92

#### 2.4.3 Ethical rules of behaviour: duty of restraint, conflicts of interest, duty to disclose certain information, etc.

“[...] Judges should not put themselves into a position where their independence may be questioned [...].”

Although there are countries in Europe and beyond that have achieved high standards of judicial conduct without adopting a code of conduct or ethics for judges, the Council of Europe recommends that a code be adopted: [...].

In addition, ‘new democracies’ of Central and Eastern Europe and of Central Asia tend to acknowledge the need for establishing codes of professional conduct as part of an overall judicial reform. [...]

Such a code, or in other words a statement of standards of professional conduct, should also not be seen as a piece of legislation or other provisions of a legal nature, and it should be the judges and their organisation(s) that take the responsibility for the implementation of such a code.

[...] A code of ethics should not be directly applied as a ground for criticism or disciplinary sanctions. Guidelines provide the principles which enable judges to assess how to address specific issues which arise in conducting their day-to-day work, whereas disciplinary procedures are designed to police misconduct and inappropriate conduct which calls out for some form of disciplinary sanction.”

[...] The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence.

However, serious violations of ethical norms could also imply fault and acts of negligence that should, in accordance with the law, lead to disciplinary sanctions. Judges may be held accountable accordingly for their unethical conduct by appropriate institutions, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge. There will always be a certain interplay

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between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice.”

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§8, 12-13, 15 and 16, 30-31

“ [...] [The law at issue] implies that the non-compliance with the ethical principles of professional conduct included in the Code of Honor of Judges may trigger the imposition of disciplinary sanctions. It must be pointed out that generally, given the nature of rules of professional ethics, they should not be equated with a piece of legislation and directly applied as a ground for disciplinary sanctions. Additionally, these ethical norms are often drafted in general and vague terms which do not fulfil the requirement of foreseeability.

The purpose of a code of ethics is to provide general rules, recommendations or standards of good behaviour that guide the activities of judges and enable judges to assess how to address specific issues which arise in conducting their day-to-day work, or during off-duty activities. In the majority of countries, codes of ethics have only unofficial status and the breach of the ethical principles does not constitute direct ground for disciplinary action.

This is entirely different from the purpose achieved by a disciplinary procedure which is designed to police misconduct and inappropriate acts which call for some form of disciplinary sanction. [...] Breaches of the ethical norms should, in the end, usually result in moral rather than in disciplinary liability.”

[...] [I]t is important to ensure a strict separation of duties and responsibilities between the advisory body on ethics and the disciplinary body, since the judge should not have to face the risk that his/her request to the advisory body on ethics be transferred to another procedure that could result in a disciplinary sanction. [...]”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §§25-27 and 30

“[...] [Under the draft Code of judicial ethics] judges who chose to retire following at least 25 years of impeccable service [...] [are] entitled to receive social benefits and special treatment which is different from that of ordinary retirement. [...] If a retired judge violates the requirements of this draft Code, s/he will risk losing these benefits.

Although the State may attach certain conditions to the social benefits it extends to retired individuals (for example, social benefits may be suspended temporarily if retired an individual engages in a fulltime job), however, most restrictions foreseen by this draft Code seem excessive.

There are a number of restrictions imposed by this draft Code (including relations with the media, political activities, legal practice, limits related to acceptable remuneration, etc.), which should logically not be applicable to individuals after they retire from judgeship.”

Article 8.4 [...] seems to request judges to inform the ‘persons participating in a case’ that the nature or content of their ‘extra-procedural application’ may result in a conflict of interest. Apart from merely ‘informing’ parties, a judge should request the termination of the communication, which may lead to the conflict of interest. Judges are under the obligation not to allow communication from the parties to a case (or other individuals), in which they may engage

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intentionally or by mistake, if such communication may lead or may be seen as leading to the conflict of interest and thus result in the disqualification of the judge from the case.”

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§39-41 and 52

“This Article states that the chairman of the court, chief, Judicial Legal Council Secretariat, proper executive body or other persons that has been given authority by the chairman is the official representative of the court or Judicial Legal Council Secretariat or proper executive body in relationship with editorial offices of the mass media.

The aim of this Article could be understood as being that persons who have not received an authorisation by the chairman are not allowed to be in contact with journalists. This would limit the publicity of courts’ activities. Furthermore, it should be noted that the chairman of the court has no authority to intervene in the decision-making process and statements of courts are public.”

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §§49, 50

“ [...] [J]udges should indeed exercise caution while discussing or criticizing the work of their colleagues. Indeed ‘they shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality’.

However, judges should not be limited in their freedom to discuss shortcomings of the judiciary outside the circle of their colleagues (for instance, at events such as seminars, conferences, in academic or educational circles. Judges must not fear sanctions for expressing their views publicly on issues that are problematic for the judiciary.”

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§65-66

“Article 5-1 par 1 sub-par (2) of the Constitutional Law states that a judge should ‘avoid any circumstances which may discredit the authority and the dignity of a judge’. A concept such as the ‘dignity of a judge’ is relatively vague and too subjective to form the basis for a disciplinary complaint. According to Article 5-1 par 1 sub-par (6) of the Constitutional Law, a judge should ‘observe the working procedures established in the relevant court’. The working procedures established by a court may cover a great variety of judicial acts or tasks required from a judge, some of which may be quite insignificant. Disciplinary proceedings, on the other hand, should deal with gross and inexcusable cases of professional misconduct that also bring the judiciary into disrepute. Additionally, it is not foreseeable which actions fall under the scope of this provision. Both of the above provisions under Article 5-1 par 1 (sub-par (2) and sub-par (6)) should thus not serve as a ground for the imposition of disciplinary sanctions.”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §32

“This Article is intended to prevent the judge from showing any signs of religious, political, ethnic or other affiliation and is to be welcomed. The references to ‘signs’ and to ‘such insignia’ suggest that it is only physical emblems which are covered. **The prohibition should also extend to conduct such as praying or religious gestures or utterances.**”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §35

“Article 93 of the draft Law requires judges and prosecutors to provide an annual financial report concerning their activities outside their duty as a judge or as a prosecutor. However, the

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provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §120

“[...] While judges should conduct themselves in a respectable way in their private life, it is difficult to lay down very precisely the standards applying to judges’ behaviour in their off-duty activities, also considering the constant evolution in moral values in a given country.”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §29

“[...] [I]t is unclear whether the prohibition [for a judge] of ‘speaking in support or against any political party’ should be understood as a complete ban on expressing views on any political matter, including the functioning of the justice system. The ECtHR pointed out the ‘chilling effect’ that the fear of sanctions such as dismissal has on the exercise of freedom of expression, for instance for judges wishing to participate in the public debate on the effectiveness of the judicial institutions. Consequently, should the expression ‘speaking in support or against any political party’ be interpreted as including speech on the functioning of the judicial system, the fact that this may lead to dismissal would constitute a disproportionate interference.”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §34

## 2.5 TRANSFERS AND EARLY TERMINATION OF OFFICE

### 2.5.1 Transfers and missions

**“The Venice Commission has consistently supported the principle of irremovability in constitutions. Transfers against the will of the judge may be permissible only in exceptional cases. [...]”**

CDL-AD(2010)004, Report on the independence of the judicial system – Part I: The independence of judges, §43

“Under this Article, a judge working in a court that will be abolished is allowed to continue to work in a court of the same or of approximately the same type and instance. It is important that the judge not be appointed to a lesser position following the abolition of a court.”

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §23

“[...] Section 31 ALSRJ entitles the chair of the tribunal to re-assign judges without their consent to a judicial position at another service post on a temporary basis out of service interests, every three years for a maximum of one year, or for the promotion of his or her professional development. Section 34 enables the President of the NJO to transfer a judge to another court, if a court is closed or its competence or territorial jurisdiction is reduced to such an extent that it no longer permits the employment of a judge. If the President of the NJO transfers a judge to an inferior court, the judge shall retain his or her former salary and shall be entitled to use the title referring to his or her previous position as a judge.

As long as such transfers are made with the agreement of the judge concerned, it seems that these provisions comply with the above-mentioned principles on the transfer of judges, with the

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exception of the generally phrased and excessively large possibility of transferring a judge 'for service reasons', for a maximum of one year every three years, which seems to be too often.

**However, if the judge does not agree with the transfer he or she is automatically 'exempted from office' for six months and his or her service relationship is terminated [...]. This seems to be an overly harsh automatic sanction. While under certain circumstances transfers may be justified, in exceptional cases even without the consent of the judge – for instance due to an organizational reform - there must be clear and proportional rules for such actions as well as a right of appeal."**

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§77-79

**"[...] The Commission welcomes the fact that the amendments provide for judicial review by the administrative and labour court in the event of a transfer. However, this should be a full review on procedure and substance of the decision [...]."**

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §56

"[...] [A]ssignment [of the judge to a different court or] sending on mission should only be possible under strict criteria clearly identified in the law, for instance, the number of cases at the receiving court, the number of cases at the sending court, the number of cases dealt with by the judge who is being assigned. Vague criteria as 'in the interests of justice' [...] may not be considered as 'strict criteria' as required by the above-mentioned standards. Also, the maximum duration of the assignment or the mission should be indicated in the law."

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §36

"Linking the transfer of a judge to his or her consent even if the court is 'disbanded or reorganized' [...] goes too far. In such cases, a transfer of the judge against his or her will should be possible. On the other hand, the immediate dismissal of the judge because he or she refuses such an involuntary transfer would go too far as well. [...]"

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §17

"The absence of consent to a transfer to another court in case of closure or reorganisation of a court is too wide a formulation for a ground for dismissal of a judge, even if the closure or reorganisation has been decided by the *Verkhovna Rada* in the form of a law. Much will depend on the proposals for transfer made to the judge and on their timing. It may well be the case that right at the moment of closure or reorganisation no adequate position for transfer is available but soon thereafter such a position becomes available. Before being faced with a dismissal, the judge should receive more than one proposal for transfer and the prospect of upcoming retirements of judges in other courts should be taken into account when making such proposals. Rather than simply dismissing the judge, he or she should be transferred against his or her will. If the judge then does not turn up for work at the new post, ordinary disciplinary measures could be taken, which eventually could lead to a dismissal of the judge but not because of the refusal of the transfer but because of the refusal to work."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §29

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“Proposal no. 12 would remove the competence of the High Qualification Commission (‘HQC’) to make proposals for the office of judge and attribute this power to the High Judicial Council. While the draft Law provided for a competence of the High Qualification Commission to submit a motion for the transfer of judges, Proposal no. 25 would attribute the final decision in this matter to the HQC.

It seems not logical to attribute the transfer of judges to a body called ‘qualification commission’ while the competence to make proposals for the office of judge is withdrawn from that body. If it were retained as a separate body, the HQC should be in charge of the qualifications rather than transfers of judges.

Ideally, in order to ensure a coherent approach to judicial careers, the HQC should become part of the HJC, possibly as a chamber in charge of the selection of candidates for judicial positions. Admittedly there is no European standard that judicial appointments and careers should be dealt with by a single body, however.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§33-35

“[...] The term ‘court restructuring’ [as a ground for transferring a judge] may be too wide. To use the term ‘restructuring of the court system’ would be preferable, thereby sorting out minor changes that do not give reason for transfer against the will of a judge. It could also be argued that a judge should not be transferred against his/her will due to court restructuring to a lower court than the court where he/she has his/her actual judgeship. A provision guaranteeing this principle and the principle of securing the same future salary for the judge as in his/her actual position would also be welcomed.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §58

### 2.5.2 Early termination of office and impeachment<sup>3</sup>

“[...] It would not be in accordance with the principles of a society governed by the rule of law to allow the dismissal of serving judges without providing any guarantees. [...]”

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §61

“[...] [T]he President [...] may dismiss by his own initiative the Chairman and the members of the Constitutional Court (even those appointed by the Council of the Republic), the President and the members of the High Economic Court [...]: even if the grounds for the exercise of these prerogatives shall be provided by law (regrettably they are not defined in the Constitution), it is possible to say that the interference of the President in the sphere of other state bodies could not be stronger.”

CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by i: the President of the Republic & ii: the Agrarian and Communist groups of parliamentarians, §34

“[...] [G]ranting the [Chair of Parliament] the right to propose the dismissal of judges of the Supreme Court [...] and of the Economic Court [...] is a serious distortion of the principles of judicial independence and of the separation of powers.”

<sup>3</sup> See also section 2.4.2 above on disciplinary control

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CDL-INF(1997)006, Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic), p.5

“[...] [T]he Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges [...].”

CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, §9

“The discharge of a judge should not be the subject of a decision of the Assembly.”

CDL-CR-PV(1998)004, Meeting of the Working Group on Albania of the Sub-commission on Constitutional Reform with the Constitutional Commission of Albania, «Parts of the constitution considered for the first time», «Article 130».

“The Commission observes that decisions as to the removal of judges is left to the Constitutional Court [...]. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court. [...] The Commission is now satisfied that the initiative for the dismissal of a judge belongs to the Minister of Justice [...]. Of course the question remains as to the role of the Judicial Council in this matter.”

CDL-INF(2001)017, Report of the Venice Commission on the Revised Constitution of the Republic of Armenia, §63

“The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. [...] Or, also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence (‘perform activities that undermine the prestige of the judiciary’), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his or her life. [...]”

CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §16

“The consequences of the dismissal/suspension are the suspension of the payment of salary [...].

It should, in the view of the Venice Commission, be taken into consideration that the suspension of salary, besides the fact that it also affects the family of the judge, may seriously hinder the right to a legitimate defence by taking away all of his or her financial means and might therefore seriously affect the human rights of the judge who, until a final condemnation is made, is deemed to be innocent. [...]”

CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law “on the status of judges” of Kyrgyzstan, §§55-56

“[...] [T]he idea which lies behind the draft provision is that the appointment of a post holder by a state body necessarily entails the competence for dismissal by the same body. However, the guarantees for dismissal of post holders need to be higher than those for appointment. In particular, it is essential that dismissal due to offences committed by the post holder be investigated by an independent body and not by a political organ as the Parliament or the

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President. It is those independent bodies or courts which should determine whether the allegations against a post holder are founded. Consequently, it should be that decision that leads to dismissal and not the decision of a political organ. Such dismissal should be distinguished from votes of no-confidence, which Parliament can take against certain state officials, like ministers (political responsibility). A vote of no-confidence is not appropriate for judicial officials who do not have a political responsibility before a representative body.”

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §72

“This proposal would introduce an impeachment procedure against a judge of lower instance courts, which would be initiated by at least 20 per cent of the citizens of Ukraine of the respective court district or by one third of the members of the *Verkhovna Rada*. Following such an initiative, the *Verkhovna Rada* voted on the impeachment and the judge would be dismissed if more than half of all members of the Rada voted for it. Initiatives for the impeachment of judges of the high specialised courts and the Supreme Court could be introduced by one third of all members of the Rada and would be carried if two thirds of all members voted for it.

The introduction of such a procedure is clear contradiction of the principle of the independence of the judiciary and would make the position of the judges dependent on a political organ, the *Verkhovna Rada*. The initiation of an impeachment by the citizens could even lead to judges trying to please ‘the voters’ rather than to apply the Constitution and the laws, for example through harsh sentences in highly mediated criminal cases.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§31-32

“A qualification test for all sitting judges is a very delicate matter. The Venice Commission was very critical of the dismissals of all judges in Serbia who had to re-apply for their positions. A qualification test for all sitting judges could create similar problems, endanger judicial independence and should be avoided. Problems with the qualification of judges should be settled through efficient disciplinary proceedings in individual cases.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §48

## 2.6 RETIREMENT

“The retirement age for judges should be clearly set out in the legislation. Any doubt or ambiguity has to be avoided and a body taking decisions on retirement should not be able to exert discretion. [...]”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §52

“[...] One may doubt whether it is the best solution to allow for applications to extend the period of work beyond the age envisaged by the statute. Experience has shown that the vast majority of judges and prosecutors apply for this extension. This gives some discretionary authority to the Council of Justice. Would it not be better to embrace the opposite principle? That is, raise the age limit in the statute coupled with the statutorily-guaranteed right to take early retirement. [...]”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §57



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“Sections 90.h.ha, 94.3 and 96.2 ALSRJ provide for judges who are reaching the so-called ‘upper age limit’ to be exempted from office six months before the actual retirement date. It seems questionable – even more so in times of strained budgets – to exempt people from office with full payment just because they are going to retire within the next six months.”

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §95

“[...] The text of these provisions implies that retired judges are permanently limited in the possibility of engaging in law practice, which is clearly an unnecessary and excessive limitation. Although there may be some restrictions, such as temporarily limiting the possibility of a former judge to act as a lawyer before the court of which that judge was a member, they should be narrowly targeted and proportional. [...]”

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §67

“Proposal no. 10 sets the age of 75 as the retirement age for judges of the Supreme Court and the high specialised courts whereas 65 is fixed as the retirement age for all other judges. Such a stark distinction seems excessive because it would create two classes of judges, the ‘upper’ judges who can work until the age of 75 years and the ‘lower’ judges who have to retire at 65 (and as a consequence have to live with a retirement pension, which is much lower than the income of active judges). The consequence of such a split system would probably be that ‘lower’ judges will make every effort – and possibly compromises in their judgments - to be appointed as a judge of a high specialised court before they have to retire at 65. Such a distinction within the profession of judges is not only discriminatory, it might also lead to judges being willing to compromise in their adjudication in order to obtain promotion before they have to retire at 65.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §30

## 2.7 REMUNERATION

**“[...] [T]he Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out.”**

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §51

“[...] Although there is no strict international requirement in this regard, it would be advisable to define the scale of the remuneration for the different types of positions within the judiciary, in the Constitutional Law.”

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §52

“[...] [T]he low level of salaries of judges in Albania, relative to other professions and activities though not to comparable positions in the civil service, was repeatedly identified as an objective factor contributing to corruption among judges and to the consequent reduction of public confidence in the courts.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

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“[...] [T]hat the salaries of judges cannot be reduced during their term of office [...] is a common and desirable guarantee of judicial independence.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

“[The questions regarding the application measures of the general principles on the budget of the judiciary and the remuneration of judges] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

“The proposed increase of salary in article 99.3 for a judge acting upon a case on the criminal offence of organized crime or corruption or terrorism or war crimes, as well as in cases of ‘difficult work conditions’ could be problematic, creating the danger that judges categorize ordinary cases as organized crime cases in order to keep their salaries higher.”

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §34

“The system of grades as foreseen by the draft Law in articles 4.4 and 8-10 is transparent, as far as can be judged from the outside, but it should not conceal some sort of bonus system. [...] The attribution of housing facilities and allocations are subject to a considerable amount of appreciation and discretion and are a source of possible abuse which, in post-socialist countries, persist. The Venice Commission recommends the phasing out of such benefits and that these be replaced by an adequate level of financial remuneration.”

CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §71

“In some countries, the prohibition to decrease the remuneration of judges is expressly set out in the constitution. [...]

Some constitutional courts have decided that even in a situation when a state experiences financial difficulties, the judges’ salaries must be especially protected against excessive and adverse fluctuations [...].

However, if there is no specific constitutional provision unconditionally prohibiting a reduction of the salaries of judges, there is some room for the legislature in case of (economic) crisis. [...] Other constitutional courts have also concluded that the prohibition to reduce the remuneration of the judiciary cannot be absolute. [...]

The conclusion, therefore, is that, in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges’ salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge’s profession and his or her burden of responsibility. [...].

[...] In [a situation of a serious economic crisis], a general reduction of salaries funded by the state budget may include the judiciary, and cannot be qualified as a breach of the principle of the independence of judges. Such a general measure is in line with the Venice Commission’s

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Report on the Independence of the Judicial System which states that ‘the level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria’. Finally, it may be seen as a token of solidarity and social justice [...].”

CDL-AD(2010)038, Amicus Curiae brief for the Constitutional court of “The Former Yugoslav Republic of Macedonia” on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, §§16-20

## 2.8 JURORS, LAY ASSESSORS, MILITARY JUDGES AND OTHER PERSONS PERFORMING JUDICIAL FUNCTIONS<sup>4</sup>

“[...] Although the perception that a jury system can enhance fair trial and lead to higher acquittal rates may be explained through historical evidence, this view should be approached with caution. Jury systems in and of their own are no guarantee for the independence and fairness of the justice system. This will depend on the legal framework and the practical application of the rules.

The number of jurors is set at 12. This seems to have been controversial, as the presidential administration wanted to have only 7 or a maximum of 9 jurors. **However, it is better to have 12 jurors, as a larger number of jurors helps to base the decision on a broader consensus.**

**[...] The draft Law should explain the process of ‘random selection’ in order to exclude any misuse and corruption.**

Article 9 is of great importance as it regulates who can be excluded from the list of candidates by the administration. **This provision excludes a wide range of professionals such as judges, prosecutors (*prokuror*), military servicemen etc. This is to be highly welcomed.**

Article 12 regulates **the material compensation for jurors**. This **seems to be acceptable** insofar as it does not place jurors at a financial disadvantage due to their work.

The regulations on independence and immunity of jurors are very short also in comparison with earlier versions of the draft. **The guarantees of the independence and immunity of judges on the basis of the *Law on the status of judges of the Kyrgyz Republic* is extended to jurors and members of their family. It is however strange that immunity also applies to the members of the family.”**

CDL-AD(2008)038, Opinion on the Constitutional Law on Court Juries of Kyrgyzstan, §§7, 14, 18, 21, 22 and 23

“The lay assessors seem to be a firm part of the Bulgarian judicial system [...]. They have the same rights and obligations as the judges and the fact that they are nominated by the next higher general assembly of judges helps to ensure their qualification. The lay assessors can be removed by the general assembly under certain conditions. The procedure for their nomination, remuneration and other organisational matters are fixed in an ordinance by the Minister for Justice. However, their nomination to the specialised criminal court will be made by the Municipal Council of Sofia [...], which might be in line with the Bulgarian legal system but, in the context of the accurate selection of judges, may not be an appropriate solution, taking into consideration that those lay assessors have the majority vote in the senate.

<sup>4</sup> See also section 3.1.2 below on military, commercial and other specialised courts

Having chosen to have lay assessors in their system to fight corruption and organised crime, the Bulgarian authorities may be aware that these could represent a weak link in their system as they could perhaps be exposed to a greater risk to potential undue influence by persons being judged by the specialised criminal courts. For this reason, lay assessors must be carefully chosen. The criteria for choosing judges has been clearly set out in the draft Law on [Judicial Powers], however, there seem to be no set criteria for choosing lay assessors, other than the need for their nomination to be approved by the general assembly of the specialised criminal court. It is clear that lay assessors should not be specifically qualified persons (professionals) and it may simply be enough that the judges who approve them are aware of the potential risk. [...]"

CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §§36, 37

"[...] It does not seem clear from the text how people's assessors are to be selected. How does one become an assessor? Does one have to apply for the position? Has one to be interviewed or are assessors selected at random? How many people are to be assessors? What qualifications are required? It would seem that because assessors sit with professional judges effectively as judges, they are in a somewhat more powerful position than jurors and it seems as if they are intended to be more an elite group than jurors who presumably are to be selected at random from the entire population. However, none of this is made clear. It is true that in Article 58.4 there is a list of matters which disqualify a person from being an assessor or juror, but it is not clear whether any person who is not so disqualified is to be on the list. Furthermore, it is not entirely clear what the role of an assessor is when he or she sits as a member of a court panel together with a judge, whether the role of assessor is to be confined to the adjudication of fact, or whether he or she also has a role in determining the law notwithstanding that the assessor is presumably not a lawyer.

In Article 59 it is stated that a court is not to engage people's assessors and jurors in a particular case more than once a year. Presumably what is meant here is that no particular juror or assessor is to be summoned more than once a year and this may be a translation difficulty in the English text.

Article 62 envisages that people's assessors and jurors are to be paid compensation for the period of their service. This is in principle a very welcome provision but in practice may well create an inhibition to the use of jurors on a wide scale. It is certainly likely to be expensive if juries are commonly used."

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §§42-44

"[...] [T]he Act provides for court assessors in military courts who may be generals, admirals, officers or non-commissioned officers in permanent military service. They take part in court hearings. **There seem to be no safeguards in the legislation to ensure that serving military personnel acting as court assessors are independent and impartial** unless the requirement in Article 68.3 that they be designated by the General Assembly of the judges of the Appellate Military Court on the proposal of their commanding officers can be so regarded (see the case of *Findlay v. the United Kingdom* [...])."

CDL-AD(2009)011, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §29

"With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law 'On Universal Conscription and Military Service'. The

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Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights.”

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, “General Comments”, p. 5

### 3. COURTS

#### 3.1 ESTABLISHMENT AND STRUCTURING

##### 3.1.1 Establishment, structuring, and composition of the courts

“[...] While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary.”

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.2

“The most competent body for designing and changing the court network is the High Judicial Council (‘HJC’). The adoption of the network can of course be a competence of Parliament because such decisions have important budgetary implications. However, the initiative for such decisions should come from the HJC rather than the President.

Proposal no. 5 provides that courts shall be established, reorganised and removed through a Resolution of the Verkhovna Rada. While it is positive that the court network is established by the Rada, this should not be done through a resolution but through the ordinary legislative procedure.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§13-14

“It would seem that the territorial organisation of the court system under the draft would be based on the administrative structure of [a country], both as regards the local general courts of first instance and the establishment of [...] courts of appeal [...]. While the overriding criteria determining the territorial structure of the court system should be the needs of the court system itself and the facility of access by people to the courts, such a system is acceptable in principle. In a new democracy [...] it would however seem preferable to avoid such a link between administrative division and court organisation to make it more difficult for the administration to exert undue influence on the courts.”

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.4

“However, it would be preferable to leave the composition of the panels to the rules of procedure.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §59

“It would be desirable to avoid extensive involvement of the executive (Ministry of Justice) in adopting court rules for internal operation and procedure and delegate the adoption of the internal regulation and rules of procedure to the courts, within the limits set by the laws.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §70

“The court system is rather complex [...]. There are four levels of jurisdiction, although it seems that after cassation proceedings before a high specialised court the Supreme Court would enter the picture only exceptionally (Article 40.2), thus meaning that in practice there would normally be three levels.

Even so, the system looks unnecessarily heavy [...]. It should be kept in mind that a very elaborate and complicated judicial system carries with it the risk of prolongation of proceedings. [...] Thus structural features in a legal system that cause delays are not an excuse under Article 6. Although the Supreme Court is apparently overloaded today, the solution in a longer term can hardly lie in the establishment of additional court levels but in the streamlining of the proceedings and making them more effective. [...] [T]he complicated system of judicial self-government may potentially deprive many judges of the time needed for the real judicial work. [...].”

CDL-AD(2010)003, Joint Opinion on the Draft 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, §§20-23

“Article 20.1 deals with the creation of courts of general jurisdiction, including by reorganisation. The power of creating courts remains with the President but it is now proposed that he or she will act upon the recommendation of the State Judicial Administration based on a proposal from the Council of Judges of Ukraine. [...] [I]t is still recommended that the President’s role should be the formal one of making the order once the appropriate proposal and recommendation had been made.”

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §22

“The Venice Commission [...] consider that the appropriate body to make the ultimate assessment on the number of Supreme Court judges and of the need for more judges is usually the legislator or the High Council of Justice, given that the choice depends, inter alia, on the available budgetary means, which cannot be determined by the Supreme Court judges. It is nevertheless highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process [...].”

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §19

“Article 4(3) reads: ‘The total number of judges for each court shall be determined by the HJPC, on the elaborated proposal of the President of the Court and the express consent of the Ministry of Justice’. While the first part of the provision [...] is logical and not objectionable, it is less clear (1) why the proposal should be submitted by the President of the Court, and (2) when this should be done. It seems that since the total number of judges is to be determined for each Court, the President of each Court should make a proposal, but this needs to be clarified. Equally problematic is the requirement of the express consent of the Minister of Justice of BiH. The draft Law does not provide details on whether and in what case the Minister of Justice may refuse consent or what is to happen in such an eventuality, which has the potential to lead to deadlock.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §25

“Article 4(2) provides that ‘the High Court shall have an equal number of judges from each of the constituent Peoples and the appropriate number of judges from the ranks of Others’. The Venice

Commission understands that this provision aims to ensure the equitable representation of various peoples living in the territory of BiH. While such an effort is legitimate in the political sphere, for instance in setting the parameters of the voting system, it would be highly problematic to apply it within the judiciary. The judiciary is not a representative institution. Here, the principle of the independence and impartiality of individual judges should prevail over other considerations.

[...] [O]rganising courts along ethnic lines would be wrong, counterproductive and damaging to the credibility of the judicial institutions. Such an approach may also counter Article 14 on the prohibition of discrimination of the European Convention on Human Rights and should therefore be approached with extreme caution. [...]"

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §§21 and 23

" [...] [S]everal provisions of the Draft confer to the Ministry of Justice powers over the judiciary. Article 47 imposes the obligation on the president of the court to deliver the activity report of the court to the Ministry of Justice, and, at the request of the Ministry of Justice, to deliver specific or periodic reports which are necessary for the performance of tasks falling under their jurisdiction. These obligations seem to place the president of the court in a position of subordination to the Ministry of Justice.

According to Article 50, 'the performance of court administration tasks shall be supervised by the Ministry of Justice. In exercising its supervision functions, the Ministry may not take actions that interfere with court's decision issuance in legal cases '. Article 52 further establishes the possibility for the Ministry of Justice to carry out inspections in courts , for example, in relation to the organisation of work in courts, acting upon citizens' petitions and complaints against the work of courts [...], or concerning the work of the Secretariat of the Judicial Council, specifically, its activities relating to court administration or the work of clerks and archives.

Article 50, para. 2 includes a specific provision which rightly sets out that 'In exercising its supervision functions, the Ministry of Justice may not take actions that interfere with court's decision issuance in legal cases'. However, it should be noted that no clear-cut boundary separates supervision of court administration from supervision of fulfilment of adjudicative tasks. It should also be noted that Articles 25 and 29-30 of the Draft law on rights and duties of judges and on judicial council implies a certain supervisory task of the Judicial Council as well. It should be considered whether the Judicial Council could be entrusted with the supervision of court administration as defined in Chapter IV of the Draft law on courts [...].

It should be considered to harmonize the two laws in this respect, limiting the supervisory role of the Ministry of Justice in a clearer manner. It is recalled in this context that Montenegro has a long history of risk of politicisation of the judiciary, and that, as proposed in the Draft law on rights and duties of judges and on judicial council, the Judicial Council will have a special (more balanced) composition to combat both this risk and the risk of too corporatist approach within the judiciary."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§33-36

### 3.1.2 Specialised courts

"[...] [I]t would seem *inter alia* desirable to state clearly that the general courts have residual jurisdiction, i.e. that they are competent to deal with all justiciable matters which are not specifically referred by law to the specialised courts within the overall system."

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CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 3

“[...]Different states in Europe (and elsewhere) have based themselves on different models for the organisation of the court system. [...] The answer to these questions cannot be adequately offered until one is more familiar with the socio-political conditions (including the structure and composition of the legal profession) in the present and future [...] society [concerned].”

CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, p.34

“[...] [The] need to subject administrative acts to judicial review is one of the fundamental elements of the rule of law. However, as regards the establishment of administrative courts (Article 92), the Commission notes that this is not a necessary element of judicial review of acts of the administration. It may well be envisaged that control over normative acts is carried out by the Constitutional Court (as it is the case under the actual Constitution), whereas judicial review of individual administrative acts is performed by specialised sections or chambers of ordinary courts (usually courts of appeal and courts of cassation), as it is the case in Croatia and Latvia, for example. [...]. There are of course arguments in favour of establishing separate administrative courts and the Commission does not wish to take a definite position on this point. [...] [T]he establishment or non-establishment of an administrative judiciary is a solution of such importance that it should be made at constitutional level.”

CDL-INF(2001)017, Report on the Revised Constitution of the Republic of Armenia, §59

“As regards this novelty, it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts, and this is likely to contribute to the efficiency of judicial handling of administrative law cases, which presumably will constitute a relatively large portion of the judicial case load to be expected in the near future. A system of general courts with universal jurisdiction (in civil, criminal and administrative law cases and with power of constitutional review) may however be the most democratic structure for the judicial power, and judges preferably should be generalists rather than specialists in the fields of substantive law.

In relatively small countries not having a tradition of administrative courts, it may not necessarily be desirable to establish such separate courts, especially if the countries also have an effective Ombudsman institution. [...] the Supreme Court [as the court of ultimate appeal] is [therefore] extremely important [...]. As a second matter, if the administrative courts are created, it preferably should be possible to organize the judiciary so as to allow for rotation between these courts and the general courts among the judges of first and second instance, in order to promote a broad outlook and experience within the system. [...].”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§6, 7

“The draft provides for a system of separate economic (arbitration) courts. Such systems exist in various countries and the need for judges to specialise in various areas of commercial law to efficiently deal with commercial disputes justifies dealing with commercial cases separately. It is however more common in Western Europe to use special panels of the ordinary courts for such matters, often providing for the involvement of merchants as lay judges. By contrast, the Ukrainian solution appears problematic since it is a simple continuation of the Soviet model which was based on different legal regulations for individuals and socially owned entities. The conceptual justification for this model does not exist in a market economy in which inter-enterprise relations are governed by private law. Under these circumstances the maintenance of the old system appears excessively conservative and the transfer of these cases to economic divisions of the ordinary courts [...].”



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CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 5

“[The law provides that Regional Courts shall have a Civil Case Panel and a Criminal Case Panel]. Ideally there should be the principle of rotation of the judges between panels from time to time. The same applies to the Supreme Court (having Senates) [...]”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §42

“The extent of jurisdiction of the military courts is not defined in the draft but according to information given to the rapporteurs such courts are competent in cases involving soldiers having no relation with their military duties such as the divorce of a military serviceman. [...] [A system of granting jurisdiction to military courts for cases involving civilians and where there seems no need to have recourse to military judges is bound to produce violations of the Convention.]”

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 5

“[Following] the system of military courts established by the draft [there] will be courts martial of garrisons [...], military courts of appeal [...] and a military division of the Supreme Court [...]. Even the judges within the military division of the Supreme Court will have military ranks [...]! Therefore this division of the Supreme Court will also have the character of a military court.

It is true that military courts exist in other countries and are not objectionable as such. The proposed system nevertheless goes beyond what is acceptable. In a democratic country the military has to be integrated into society and not kept apart. Democracies therefore generally provide for the possibility of appeals from military courts to civilian courts and a final appeal to a panel composed of military officers appears wholly unsatisfactory.”

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 4

“The court system laid out in Article 3 of the Constitutional Law follows a three instance system (district courts, regional courts and the Supreme Court). The law allows for the establishment of ‘specialized courts’ for certain types of cases. In particular, a system for administrative courts, deciding on appeals of administrative acts, can be very beneficial for the development of respect for the rule of law and good governance in public administration. When revising the Constitutional Law [...] it may be considered beneficial to draft a specific section on administrative courts, preferably establishing a system similar to the regular court system with three instances.”

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §17

“[The Draft Constitution] guarantees everyone the right of appeal to a court against decisions, actions or inactions of the bodies of state power, bodies of local self-government or public officials. It is to be welcomed that in this way the judicial control of administrative authorities is established and a constitutional basis for administrative jurisdiction is provided. [...]”

CDL-INF(1996)006, Opinion on the draft Constitution of Ukraine, p. 15

“[...]The transfer of the power to adjudicate misdemeanour proceedings to the judiciary is to be welcomed. Under the current system, bodies in charge of misdemeanour procedure do not have the status of courts, although in such procedures sentence of imprisonment may be passed.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §15

## 3.2 ORGANISATION OF WORK WITHIN THE COURTS

### 3.2.1 The role of the higher courts vis-à-vis the lower courts

“[...] [T]he Venice Commission underlines 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.”

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §72

“[...] Judicial decisions should not be subject to revision outside the appeal process [...]”

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §8

“[...] Th[e] internal judicial independence requires that they be free from instructions or pressure from their fellow judges and vis-à-vis their judicial superiors.

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 [...]. 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.**”

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§ 15 and 18

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §101

“Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches.”

“In the previous Opinion, the Venice Commission pointed out different ways in which the Curia and the court leaders can interfere in the administration of justice of the lower courts. The Curia ensures the uniformity of the application of the law by adopting ‘an obligatory decision applicable for courts’ [...], by ‘publishing court rulings and decisions or authoritative rulings’ [...], by making a ‘legal standardisation decision’ [...] and by conducting an analysis of the jurisprudence.

Crucially, chairs and division heads of courts and tribunals continuously monitor the administration of justice by the courts under their supervision and have to inform the higher levels of judgments handed down contrary to ‘theoretical issues’ and ‘theoretical grounds’ [...]. Non-compliance with the rulings of the higher courts could have a negative influence on the evaluation of the judges and thus on their career.

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[...] [U]niformity procedure and its system of supervision by the court presidents might have a chilling effect on the independence of the individual judge [...] [and] may only be acceptable if it does not have a negative influence on the career of the judges [...].

**[...] The supervision of judges by chairs and division heads of courts and tribunals should be abolished.”**

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§ 50-53

“The cassation procedure has as one of its main goals to guarantee and bring about uniformity in the case-law. [...] The internal judicial independence does not exclude doctrines such as that of precedent in common law countries [...], and, indeed, in civil law countries, the lower courts tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. [...].

However, this admissibility criterion should not be used beyond the purpose for which it is established, i.e. ensuring the uniformity of the case law, and therefore not be applied in such a way as to give the Supreme Court the possibility to address to the lower courts general ‘recommendations/explanations’ on matters of application of legislation. [...].”

CDL-AD(2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, §§ 33, 34

“ [...] [B]inding positions [formulated *in abstracto* by the general assembly of judges of the country] can be deemed problematic from the perspective of the internal independence of judges. [...].”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §22  
See also CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 4

“[...] [T]he Venice Commission delegation [...] 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.**

[...] 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.”**

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§13 and 18

“Article 15(3)(b) permits the State Court to reopen criminal proceedings that have been concluded with a legally-binding decision of the Court. This provision is too wide in its current form and would permit the Court to reopen an acquittal in breach of the rule against double jeopardy. The circumstances in which a legally-binding decision can be revisited need to be set out. [...].”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §45

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“[...] [If] a non-judicial body were to review judicial decisions, the rights of all possible victims of the criminal conduct punished by the courts would remain unprotected. In addition, if new circumstances have arisen, including awareness of past miscarriages of justice, only courts can be able to review them in final instance. This is why it is essential that when deciding whether or not a case should be referred to a Court of Appeal, the [commission on the miscarriages of justice] should not touch upon what should have been or should be the outcome of the case at issue. Moreover, the outcome of the new procedure – despite the fact that the procedural flaws of the original one will have been fixed – might be the same as the original procedure. In other words, the court reviewing a case of alleged miscarriage of justice will not necessarily reach the conclusion that the plaintiff was innocent and should be released.”

[...] The establishment of a special ‘chamber for miscarriages of justice’ would be contrary to the constitutional prohibition of extraordinary courts.”

CDL-AD(2013)013, Joint opinion of the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law (DG I) of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia, §§ 15 and 83

“[According to the draft amendments to] the constitution of Kyrgyzstan, the Supreme Court of the Kyrgyz Republic has a right of legislative initiative. The Commission finds that the Supreme Court should not be directly involved in the negotiating efforts to force specific draft legislation through the parliament because this could draw the Supreme Court into the political arena and may thus endanger its independence.”

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §29

### 3.2.2 Allocation of cases

“[...] [T]he Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated.”

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §§62, 81  
See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §70.7

“[...] [T]he Venice Commission recommends that the Hungarian authorities use other mechanisms for the distribution of cases [...] ‘[...] for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases’. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges sit in on that case. The criteria for making such decisions by the court president or presidium should, however, be defined in advance on the basis of objective criteria. [...]”

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §91

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See also [CDL-AD\(2011\)012](#), Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §27

See also [CDL-AD\(2013\)005](#), Opinion on Draft amendments to Laws on the Judiciary of Serbia, §39

**“[...] [I]t should be made sure that specialisation of judges cannot be used to circumvent the system of random case assignment [...].”**

[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, §13

“[...] [W]henver there is an electronic case-attribution system [of distribution of cases amongst judges], the rules according to which it operates must be clear and it should be possible to verify their correct application. Ideally, the allocation should be subject to review. The absence of such rules could easily lead to abuse which may jeopardise the internal independence of the judiciary. For these reasons, it is recommended that detailed rules are provided in the draft law on the functioning of the electronic system and on the review of case allocations. The rules laid down in the second paragraph of the draft article, concerning the case-allocation in case the electronic system is out of order, should also be amended in order to provide all technical indications needed, as in the current Law on distribution of cases (articles 4 to 9).”

[CDL-AD\(2014\)031](#), 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 Amendments to the Organic Law on General Courts of Georgia, §80

**“Articles 31 to 33** establish the rules concerning the adoption by the president of the court of the annual schedule of assignments. It is a well-conceived system, which excludes any external interference, provides for the participation of the judges of the court and guarantees transparency.”

[CDL-AD\(2014\)038](#), Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §37

### 3.2.3 Transfer of cases from one judge to another

“[...] [W]orkload statistics provide objective statistical data, but they are not sufficient as a basis for the decision on transferral, since they do not contain criteria for the selection of certain cases for transferal or for the selection of the individual receiving court. In order to prevent any risk of abuse, court presidents and the President of the NJO (National Judicial Office) should not have the discretion to decide which cases should be transferred or to select the ‘sending’ or ‘receiving’ courts. In addition, any such case allocation should be subject to review in order to take into account possible harsh situations where persons without the means to come to a court that is far away from their home town.”

[CDL-AD\(2012\)001](#), Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §91

“The second urgent topic is the procedure of the transfer of cases. While the NJC adopted criteria on the selection of the court, which is to receive the case, the most critical decision is the selection of individual cases by the president of the overburdened court. The amendments do not provide for the establishment of criteria for this selection.

The NJC should be mandated to establish such criteria, which would have to be objective (e.g. a transparent random selection). The conformity of the selection of a case with such criteria should be the standard for the judicial review of the transfer.

In addition, further issues are linked to the transfer of cases:

1. the date of notification of the transfer to the parties should be the starting point for the 8 days deadline for appeals against transfers, not the date of their publication on the web-site;
2. in case of annulment by the Curia of the assignment of a case to another court, the case should be dealt with by the original court and the President of the NJO should not be able to assign a case to another court instead;
3. even if the Curia uses the NJC's principles on the transfer of cases, the President of the NJO should be explicitly bound by them (and not only 'take them into account') and the judicial review of the transfer of cases should not be restricted to compliance with 'legal provisions' but should explicitly include the principles established by the NJC;
4. as a contradiction of the principle of equality of arms, the competence of the Prosecutor General to give instructions that charges be brought before a court other than the court of general competence should be removed."

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§90-91  
See also CDL-AD(2013)012, Opinion on the fourth amendment to the fundamental law of Hungary, §§73-75

"Cases should not be transferred from a judge without good reason and this is covered by the last paragraph of Article 25. This paragraph states that cases may be transferred from a judge due to reasons of: 'his/her prolonged absence [...], or if efficient operation of court is endangered, or if he/she was issued a final disciplinary sanction due to a disciplinary offence for unjustified procrastination, and other situations provided by the law'. Some specific reasons for the transfer of the case to another judge, which are listed in this paragraph, would qualify as valid reasons, however, formulations such as 'efficient operation of the court' and 'other situations provided by the law' are clearly too broad and vague."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §42

### **3.2.4 Presidents (chairpersons) and senior judges: appointment, status, role and powers**

#### **3.2.4.1 Appointment of the presidents**

"[...] [T]he power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice [...] appears to be problematic."

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §60  
See also CDL(1999)088, Interim report on the constitutional reform In the Republic of Moldova, §26

"[The draft according to that] Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are elected by [the parliament...] is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.3

"[...] [R]egarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the independence of the judiciary."

CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, Chapter B.I, §9

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“[...] [T]he President and the Vice President of the Court of Cassation are elected by Parliament at the proposal of the President, whereas the other members of the Court are elected by the Assembly without any such intervention by the President. This difference of treatment between members of the same court does not appear to be justified [...]”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 2

“[...] As long as the Constitution of Serbia authorises the National Assembly to appoint the president of the courts, the risk of politicisation may, at least, be diminished by limiting such appointment to one non-renewable term.”

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §71

“The appointment of court presidents by the organs of judicial self-administration [...] would go too far as well if this term were to refer only to the Congress of Judges. Even after the reduction of the functions of court presidents, there is indeed a danger that these positions can be abused in order to exert pressure on judges to decide cases in a certain way. However, such appointments should be rather made by the High Judicial Council, which has a higher democratic legitimacy than the organs of judicial self-administration. If the term ‘organs of judicial self-administration’ were to include the High Judicial Council then this should be spelled out explicitly.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §18

“The Venice Commission and the Directorate welcome the proposed system of election of court presidents by the judges of the same court by secret ballot which is in line with the requirements of the principle of internal independence of the judiciary [...]”

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, § 84

“Paragraph 13/2 sets out that candidates for president of courts, in addition to having the normal qualifications, competence, and worthiness to perform the judicial function, must also have the capacity to manage and organise the activities of the courts. [...] All these criteria appear to be appropriate to take into account in choosing a president of a court. It is also to be welcomed that these prerequisites are set out in a normative text, which is far from being the case in all member States.

In evaluating these matters, account is to be taken of the candidate’s record (paragraph 13/4) in any court where he or she has performed a managerial function, the duration of his or her judicial experience and experience as a manager, the opinion of the board of all judges of the court to which the candidate belongs, as well as the candidates for president of a court, the opinions of the board of judges in which the candidate performs a judicial function, of the court for which the president is proposed, as well as boards of all judges of an immediate higher court are to be taken into account. If a previous president is among the candidates, the evaluation of his or her previous mandate is to be taken into consideration. These criteria appear to be appropriate.

Nevertheless, the question is once again the manner in which these criteria are evaluated. This is all the more important as, by definition, a person who is a candidate for president of courts for the first time will not have had the opportunity to show his or her managerial skills. This means that the criteria seem to be subjective: does the candidate have the skills required, taking into

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account that he or she will not have had the opportunity to show said skills? This might be revisited.”

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§50-52

### ***3.2.4.2 Term of appointment, tenure, re-appointment***

“[...] [A]ppointing court presidents with administrative functions for a limited period of time does not violate the European standards. However there is not a single standard – in several European countries the principle is that also court presidents are irremovable.”

CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §41

“[...] [T]he limitation of the term of office of chairpersons appears to be a guarantee of independence where the executive authorities have a decisive influence on the appointment procedure for chairpersons. In this latter case, according to the Venice Commission, appointments should be for a fixed term and there should be a limit on possible renewals. The influence of chairpersons may grow ever stronger over a long period of time and renewable terms of office may also substantially jeopardise the independence of a Chairperson, who may at some point be influenced in his/her work by the desire to be reappointed by the executive. However, a short-term appointment risks undermining courts presidents’ possibilities to realise effective leadership and to ensure a solid and strong courts’ organisation.

[...] It is recommended that immediate reappointment be excluded from the draft law. Further, as analysed above, the appointment of court presidents by the judges of the same court ensures a better guarantee for the independence compared to the current system where court presidents are appointed by the High Council of Justice. However, the Venice Commission and the DHR cannot see the reason why the term of office of court presidents which is five years in the current system, is reduced to three years in the draft amendments. On the contrary, in an appointment system which guarantees better internal independence as the newly proposed one, the court presidents may even have a longer term of office to ensure a solid and strong courts’ organisation.

Having regard in particular to the proposed appointment system of court presidents, three years term appears rather short. The Commission and the Directorate recommend thus the extension of the term of office of court presidents.”

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §§86, 88, 90, and 91

“[...] The possibility and hope to be reappointed might influence the attitude of a judge towards the executive in such a way that his/her independence and even his/her integrity could be jeopardised. Excluding any possibility of re-appointment is also a guarantee against politicization. On the other hand a short-term appointment can undermine courts presidents’ possibilities to realise effective leadership and to ensure a solid and strong courts’ organisation. The Venice Commission finds the appointments of court presidents for a longer term without or a shorter term with the possibility of renewal in general as compatible with the principle of judicial independence. However, the proposed term of office of four years (and the reappointment for the same period) in the Armenian context appears rather short, taken into account that the procedure for election and appointment, as proposed by the Draft Law and as regulated in the Judicial Code, will take time and will most probably start already in the third year of taking up by the court presidents of their functions. [...]”



CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §§30, 31

“[...] The provisions providing for the automatic termination of the mandates of court chairperson upon the enactment of the draft amendment law is problematic and should be removed.”

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §101

### **3.2.4.3 Powers of the presidents**

“[...] [T]he competence of the court chairperson should stay purely administrative and should not interfere with the judicial functions of judges.”

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §93

“It is not clear what is meant by being responsible for the management of the ‘comprehensive performance’ of the Court and its administration. This may be a translation problem [...], but the powers and responsibilities of Court Presidents need to be very clearly defined.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §62

“[...] It is thus welcomed that the High Council of Justice is indicated as the unique authority in the draft Law, to formally initiate disciplinary proceedings against judges. The limitation of court presidents’ competence to ‘inform’ the High Council on disciplinary misconduct of a judge is also a positive step which strengthens ‘internal’ judicial independence.”

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, §23

“The President of the Supreme Court and the presidents of local courts have extraordinarily vast powers. Some of the amendments aim to reduce the scope of these powers, for instance, the competence to initiate disciplinary proceedings is transferred to the Judicial Council, which is welcomed. [...]”

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

“However, this also means that the President of the court may order more frequent assessments of a judge where he or she decides that it is necessary. It is not clear why the President of the court should be deciding on the timing and frequency of the assessment. He or she may have the power to signal the need for an assessment or request for a disciplinary investigation. However, it should not be the President’s responsibility to make decisions on those issues.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §86

“**Article 37** of the Draft law confers the right to the president of the court to examine the files of a case assigned to a judge. This right is very largely defined as it may be exercised in relation to: a) a petition filed by a party to a proceeding; b) a request filed by the Protector of Human Rights and Freedoms; c) initiation of a procedure to establish disciplinary accountability; d) an

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application for recusal of a judge; e) an application to expedite proceedings (application for review); withdrawal of an allocated case, and f) in other cases where so stipulated by law. In the cases referred to in paragraph 1 of Article 37, the president of the court may request the judge to deliver him/her data in writing or a report on the cases and on the reasons due to which such cases were not finalised within the statutory deadline or within a reasonable time.

This provision confers the president of the court a very large right to interfere in the cases assigned to the judges of the court and thus threatens to undermine the internal independence of these judges. Only when there are serious and objective indications of the dysfunction of the judge can such interference be justified. The Venice Commission recommends to add this as a prerequisite condition, and to delete, among the reasons given to examine the case, a) ('a petition filed by a party to a proceeding') and f) ('in other cases where so stipulated by law'), as they are too large."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§23, 24

"Article 8.3 sets out what judges should do when there are any attempts to influence them or put undue pressure on them. It might be useful to recommend that the president of the court in question act in support of the individual judge concerned when notifying the judicial community and the law enforcement agencies of this situation."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §51

### 3.2.5 Remedies against the problem of the length of procedure

"[...] [I]n parallel to introducing the right of a fair trial within reasonable time, the respective superior court or directly the Supreme Court should be entrusted with a specific compensatory and acceleratory remedy against the excessive length of procedure."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §10

"[The law] enables the President of the NJO to designate another court based on the vague criterion of 'adjudicating cases within a reasonable period of time'. This relates to Articles 11.3 and 11.4 of the Act on Transitional Provisions of 30 December 2011, which were adopted on the constitutional level in order to overcome the annulment of a similar provision on the legislative level by Constitutional Court judgment no. 166/2011 of 20 December 2011. The Constitutional Court had found that provision contrary to the European Convention on Human Rights. The fact, that some courts in Hungary are so small that the designation of such a court would effectively amount to the designation of a single judge or a special chamber, further adds to this. Even though the reasonable time requirement is part of both Article XXVIII Fundamental Law and Article 6.1 ECHR, it is not absolute, but forms a field of tension with the often conflicting right to a fair trial with respect to the fact that having and exercising more procedural rights necessarily goes hand in hand with a longer duration of the proceedings. Taking into account the importance of the right to a lawful judge for a fair trial, the state has to resort to other less intrusive means, in particular to provide for a sufficient number of judges and court staff. Solutions by means of arbitrary designation of another court cannot be justified at all."

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §90

"[...] It seems that the aim of these Articles is to address the serious problem of dilatory or vexatious proceedings and thus protect the right to a fair trial. Such an aim should be welcomed.

The possibility to apply to a higher court with the request to remedy unjustified delay can be an effective tool for the protection of the right to a fair trial. However, the reasons for the dilatory or vexatious proceedings could be many: inefficient and/or cumbersome regulations, increased caseload, lack of training or recourse, etc. Thus, in order to eliminate the problems, the reasons for such delays need to be analysed in order to be addressed correctly.

The basis for this set of provisions is the obligation of a member state, under Article 13 of the European Convention on Human Rights, to provide an effective remedy including, as a last resort, paying damages if a violation of the Convention occurs. Article 6 of the European Convention on Human Rights requires that court proceedings be carried out within a reasonable period of time. The State must provide individuals with an effective remedy against the violation of this requirement.

The starting point for a regulation should be to view financial compensation as one of several remedies. Financial compensation must thus not be the only remedy or the remedy to be considered first. It all depends on the circumstances of the specific case. The payment of an 'indemnity' may not always be necessary and/or in some cases should not be the only available remedy. This means that, as far as possible, violations should primarily be redressed or remedied within the framework of the process in which they arise. For this to be possible, courts and administrative authorities must be aware of all the issues that concern the European Convention on Human Rights in both procedural and material terms. At the same time, individuals cannot remain passive in their contacts with courts and authorities.

It should be emphasised that the Contracting States have great freedom to choose how they fulfil their commitments in this regard. There are various alternatives for damage-regulation for violations of the European Convention on Human Rights, for example a reduction of a criminal sentence could be an effective remedy in certain cases.

The legislation of a state may also contain a number of proactive safeguards to ensure that judges handle cases without undue delay. For instance, there could be provisions giving a party the right to request the acceleration of the proceedings of a case in court. If a case has been unreasonably delayed, the case could be given priority in the court. Under such provisions the president of a court may have the responsibility to intervene in situations where there is a serious risk that a single case cannot be settled within a reasonable period of time. If a case or matter is not moved forward to a ruling within a reasonable period of time, the president of the court could be obliged to have another judge take over the case.

In both the draft amendments to the laws on judges and on the organisation of courts, the problem of delays in court proceedings within the administration of justice is dealt with. The draft amendments to Article 28 of the Law on judges contain a new procedure for the notification of the duration of proceedings [...]. The draft amendments of the Law on the organisation of courts have three new provisions, Article 8A – 8C, which include elements such as the 'pro-active safeguards' mentioned above. These elements of the draft are to be welcomed.

However, draft Article 8A – 8C also introduces a procedure where a request for and a decision on damages are interlinked with the concept of the acceleration of the case handling. The damages, or 'the appropriate indemnity', will be decided beforehand and a system with parallel processes is introduced accordingly.

This decision on damages will serve as a sort of penalty or fine, forcing the judge to deal with the case. This could put him/her under pressure, which in turn could endanger the principle of a fair trial. The principle of state liability followed by the liability of the judge under certain conditions set out in Article 6 of the Law on judges, could also increase this pressure. In following the management of and decision-making in a case, new and unforeseen facts or

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aspects may be brought into the case or otherwise change the conditions under which justice is or should be rendered in that case. It is therefore important to underline that it is the State that is responsible under the European Convention on Human Rights and not the individual judge.”

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §§87-95

“In principle, fining lawyers for causing deliberate delay of court proceedings is acceptable as long as standards of fair trial are respected. No automatic sanction can be foreseen and the circumstances in each case need to be examined individually.”

CDL-AD(2014)016, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania, §16

“A major issue [...] is the backlog of some 12.000 cases at the Supreme Court. Many of the pending cases relate to issues of immovable property. The Minister of Justice and the President of the Supreme Court agree that the Court should reduce its case-load through more uniformisation judgements.

In uniformisation judgements, the plenum of the Supreme Court decides on the provisions of the law, which have been interpreted differently by various appeals courts or – preventively – when such diverging interpretations are likely. These decisions have the force of binding precedent and should allow deciding similar cases more quickly. Given that uniformisation judgements are not abstract but are given in individual cases, the Venice Commission’s delegation did not object to this practice.”

[Another] solution [to reduce backlog] was to transform the Supreme Court into a real cassation court, which should not take any evidence and look into points of law only. In addition, any first instance jurisdiction should be removed from the Supreme Court. The Venice Commission’s delegation supported this idea.”

CDL-AD(2014)016, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania, §§22-23 and 25

### 3.3 BUDGETARY AND STAFF AUTONOMY

“It is [...] important that courts are not financed on the basis of discretionary decisions of official bodies, but in a stable way on the basis of objective and transparent criteria. It would be more practical to entrust one institution (preferably the HJC) with the competence to draft all parts of the budget for the system of the judiciary as a whole.

Additional guarantees may also be applied to ensure financial independence of the judiciary, such as the prohibition of reducing the budget of courts in comparison to the previous financial year or without the consent of the HJC, except in the case of a general reduction of the State Budget.”

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia §§124, 125

“[The practice according to which, contrary to the principle of budgetary autonomy of the magistracy, the Ministry of Justice in fact controls every detail of the courts’ operational budgets] contains obvious dangers of undue interference in the independent exercise of their functions.”

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 3

“[...] [T]he parliamentary budget battles [...] are undoubtedly of a political nature. [...] While wanting to ensure greater independence of judges and courts, and thus to bring about their de-

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politicization, [by involving the Council of Justice into this battles] it may turn out that they will, quite to the contrary, be engulfed in the political debate. Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a de facto judicial independence, these of powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding.”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §48

“[...] The independence in financial matters, i.e. the right of the judiciary to be granted sufficient funds to properly perform its functions and to have a role in deciding how these funds are allocated, is one of the main elements of the institutional (and also individual) independence of the judiciary. [...]

The budgets of courts and prosecutors’ offices are determined at the level of the State (state courts), the Republika Srpska (RS courts), the Federation (Central FBiH Courts), the cantons (cantonal courts), and the Brčko District (BD courts). The Federation, due to its structure, bears the brunt of the budget fragmentation, which directly undermines the efficiency of the judiciary of the Entity.

No uniform rules exist in this area with the result that there are quite different budgets allocated to different courts and prosecutors’ offices. Moreover, judicial bodies become easily vulnerable to pressure from the institution deciding on the budget.

The HJPC has made an initiative aimed at centralising the financing of the judiciary and bringing it to the state level. So far, this initiative has not been implemented, although the centralisation of the financing could be counted among the most important steps to be taken. On a lower scale, consideration should be given by the Federation, in the long run, to the financing of the judiciary (both courts and prosecutor’s office) being concentrated at the entity level. In the short run, the Federation might consider at least bringing the financing of salaries of judges and prosecutors to the Federation level and leaving, for the time being, the financing of the expenditure relating to the running of courts to the cantonal levels.”

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §§95-98

“[...] In order to guarantee judicial independence, it is paramount that the courts receive sufficient funds to live up to their obligations to ensure fair trials in accordance with international standards. The judiciary shall, [...] be financed directly from the Republic’s budget, which is commendable. Furthermore, Article 57 par 2 states that sufficient funds should be provided for the courts’ exercise of their constitutional powers.

In order to ensure that the funds allocated to the judiciary are sufficient, it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures. The High Judicial Council could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary. [...]

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §§24,25

“Article 35(4) stipulates that ‘Legal associates, senior legal associates and legal advisors shall be appointed by the High Judicial and Prosecutorial Council’. As far as legal associates and legal advisors shall assist judges in their work, it may be advisable to allow the involvement of the Court and the judges in the selection process. The advisors shall closely work with judges

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and the operation of the Court may be more efficient if the judges have a say in the selection of their advisors.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §72

“According to Article 48(5), ‘At the end of each budget year, the Presidents of the Courts shall inform the Parliamentary Assembly of Bosnia and Herzegovina on the execution of the budget of the respective court’. The rationale for such a procedure is questionable, and it may also have a negative impact on the independence of the judiciary. The President of the Court should be relieved from such a legal obligation and, at the same time, the highest possible standards of transparency for budgetary expenditures by the courts should be provided.”

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §81

“Under Article 25 of the draft Law, the HJPC prepares a draft annual budget, which is then submitted, through the Ministry of Justice, to the Ministry of Finance and Treasury of BiH for approval. Under Article 23.2 of the draft Law, the HJPC may also make recommendations relating to the annual budgets of courts and prosecutors’ offices. The system of financing the judiciary remains, however, highly fragmented, with the budgets determined at several different levels (BiH, the Entities, the FBiH cantons, the District Brčko).

The extent of the competences seems to be in line with European standards, with the exception of the reservations made under Sections D, E and F above.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§67-68

## **4. COUNCIL OF JUSTICE<sup>5</sup>**

### **4.1 FUNCTIONS, REMIT AND DUTIES**

“Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State. [...]”

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §5

“A report on judicial councils in Europe, commissioned by the Netherlands in the late 1990s, distinguishes two main models of judicial councils: the Southern European model, in which the council primarily focuses on the management of the judiciary; and the Northern European model, in which the council has extended powers in the area of administration, court management and budgeting. . [...]”

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<sup>5</sup> This section speaks of specialized bodies which deal with judicial appointments, promotions, disciplinary proceedings against judges and, more generally, secure autonomy of the judicial system vis-à-vis other branches of the Government. These bodies are often called “councils of justice” but the name, as well as composition and powers may vary from one country to another. Some countries have no councils of justice at all.

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CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §22

“To sum up, it is the Venice Commission’s view that it is an appropriate method for guaranteeing for the independence of the judiciary that **an independent judicial council have decisive influence on decisions on the appointment and career of judges**. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. **While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.**”

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §32

See also CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §§88-89

“The role of the high judicial council can vary to a large extent [...].

The Venice Commission is of the opinion that **a judicial council should have a decisive influence on the appointment and promotion of judges and** (maybe via a disciplinary board set up within the council) **on disciplinary measures against them.** [...].”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§24, 25

See also CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §59

“While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §26

“[...] [I]n part three of Article 126, the Amendments refer to the judges’ qualification commission. The Venice Commission maintains its position that there is no need for two separate bodies [i.e. judicial council and the qualification commission] [...].”

CDL-AD(2013)014, 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, §40

“It is thus a positive step that the High Council of Justice be the sole authority to initiate disciplinary proceedings against judges, which would provide for more guarantees compared to a system of plurality of disciplinary authorities competent to initiate those proceedings. [...] The proposed system provides also for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of the disciplinary sanction, i.e. the Disciplinary Board. This is in line with international recommendations. [...].”

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, §15

“[...] It is striking that, while the recommendation by the High Qualifications Commission is to be based exclusively on objective criteria, the High Council of Justice can apparently disagree with

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a recommendation for reasons that are not determined by the law. This opens the door to arbitrary decisions. It is strongly recommended to circumscribe the role of the High Council of Justice in a much more transparent way. Taking into account the characteristics of the decision-making process before the High Qualifications Commission and the composition of the High Council of Justice, the role of the High Council of Justice should be made of a marginal nature, short of being removed.”

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, §50

“[A legislative measure] establishes that the Minister of Justice shall have the power to authorize leaves of absence of the presidents of district and appellate courts. This provision may be considered to confer on the Executive Power an administrative competence over certain judges that contravenes the principle of independence of the Judiciary. It seems that it would be more coherent with this principle to confer that competence to the Council of the Judiciary.”

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §39

“It is not uncommon in Europe to have some kind of inspection body that supervises judges [...] to some extent, to see if they perform their duties correctly. Some countries have such institutions, others manage without them. However, from a comparative perspective it is clear that the powers of the Turkish HSYK to supervise and control the judges [...] are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial [...] powers, in a politicised manner that has been quite controversial.

The core issue with regard to the future independence, efficiency and legitimacy of the Turkish judiciary is whether the recent institutional reform will lead to a change in the way the substantial powers of the HSYK are used, or whether the tradition for political interference will be continued within the new framework.”

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §§50, 51

“The system of judicial self-government is too complicated. There are too many institutions: meetings of judges on different levels, conferences of judges, the Congress of judges of Ukraine, council of judges of respective courts and Council of Judges of Ukraine which is a different organ than the High Council of Justice. The structure should be simplified to be effective. This pyramid structure can become an obstacle for building a real self-government and the scope for 'judicial politics' seems enormous. The dispersal of powers through many bodies seems to lead to a potentially confusing situation where different bodies would exercise the same powers.”

CDL-AD(2010)003, Joint Opinion on the Draft 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, §122

“The President of the Supreme Court and the presidents of local courts have extraordinarily vast powers. Some of the amendments aim to reduce the scope of these powers, for instance, the competence to initiate disciplinary proceedings is transferred to the Judicial Council, which is welcomed. [...]”

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17



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“[...] [The] [p]rovisions relating to the training of judges and the establishment of a National Institute of Justice [...] should be more detailed and should determine the main action of the Institute. The Institute should be controlled by the Supreme Judicial Council rather than the Ministry of Justice. [...].”

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

“The amendments to Article 128 [of the Constitution] reflect the proposed competences of the Judicial Council to elect and release from duty the President of the Judicial Council and of the Supreme Court, and are therefore to be welcomed. [...].”

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §26

“In order to ensure that the funds allocated to the judiciary are sufficient, it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures. The High Judicial Council could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary. This influence could be exercised by preparing a draft budget or by commenting on a draft received from a competent ministry. Against this background, it is recommended that the Constitutional Law be amended by adding certain provisions on the budgeting process that would envisage a role for the High Judicial Council.”

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §25

“The [High Judicial and Prosecutorial Council] has broad competences [...]: it appoints judges and prosecutors [...], decides on the suspension of judges, determines criteria for the assessment of judges and prosecutors, decides on the appeals in disciplinary proceedings, gives its views on the annual budget for courts and prosecutors’ offices, gives its opinions on draft laws and regulations concerning the judiciary etc. [...].”

Article 24 of the draft Law gives the HJPC power to require courts, prosecutors’ offices and state authorities, as well as judges and prosecutors to provide it with information, documents and other materials in connection with the exercise of its competencies. It can also have access to all premises of courts and prosecutors’ offices and their records. Such competences confirm that the HJPC is the central organ within the judiciary.

Under Article 25 of the draft Law, the HJPC prepares a draft annual budget, which is then submitted, through the Ministry of Justice, to the Ministry of Finance and Treasury of BiH for approval. Under Article 23.2 of the draft Law, the HJPC may also make recommendations relating to the annual budgets of courts and prosecutors’ offices. The system of financing the judiciary remains, however, highly fragmented, with the budgets determined at several different levels (BiH, the Entities, the FBiH cantons, the District Brčko).

The extent of the competences seems to be in line with European standards, with the exception of the reservations made under Sections D, E and F above.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§65-68

“The structural unit of the High Council of Justice provided for in draft Article 351(1) seems to be an investigative body with very wide and discretionary powers. It is absolutely free to search all possible information on candidates [to judicial positions], without almost any restriction, since these research powers, including those concerning personal details, are covered by the

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candidate's consent (draft Art. 35(4)). First, it is by no means clear in the draft law how the structural unit of the High Council of Justice will be composed and which working methods will be used. For dealing with highly confidential information, special requirements for the members of such a unit must be laid down in the legislation and also the conditions for their appointment/selection by the High Council and their responsibilities must be made clear."

CDL-AD(2014)031, 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 Amendments to the Organic Law on General Courts of Georgia, §55

"In the Commission's view, this provision enables the High Council of Justice to determine its own rules of procedure by adopting an appropriate 'statute', but does not allow for important matters governing its powers and affecting the rights and duties of magistrates to be so regulated. These matters should rather be regulated by a law adopted by Parliament."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 3

"The obligation [of the Council] to provide an annual report to the National Assembly seems reasonable.

The information provided to the public on the activities of the Council will also assist in rendering the judges' work at the Council more transparent. It will notably allow the public to see that there are sanctions against judges that have committed disciplinary offences etc."

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36  
See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72

## 4.2 COMPOSITION OF THE JUDICIAL COUNCIL

### 4.2.1 General approach

"There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions."

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §28

"An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. [...]"

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §9

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“As regards this body, the Venice Commission repeats its observations on the two obstacles to be avoided: corporatism and politicisation [...]

[...] [P]oliticisation can be avoided if Parliament is solely required to confirm appointments made by the judges.”

CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §§21, 22

“The Venice Commission does not consider that there can be, in itself, any objection to the election of a substantial component of the Supreme Judicial Council by the Parliament.”

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §29

“[...] [A] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §29

See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §76

“[...] [I]n a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...] In general, it seems legitimate to give Parliament an important role in designating members of the Council [of Justice] [...].”

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9, 19

See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §13

#### 4.2.2 Judicial members of the Council and lay members: search of appropriate balance<sup>6</sup>

“The European Charter on the statute for judges [...]states: ‘In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary’ [...].

The CCEJ commends the standards set by the European Charter ‘in so far as it advocated the intervention [...] of an independent authority with substantial judicial representation chosen democratically by other judges’.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§19, 20

“Under current international standards, there is no uniform model for the composition of judicial and/or prosecutorial councils. [...].

Several international instruments, however, provide that when a judicial council is established, a substantial part of its members should be recruited from among judges. [...].”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§27, 28

<sup>6</sup> This section should be read in conjunction with section 4.2.4 below on lay members of the judicial councils

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“[The] Commission welcomes the proposal [...] to have the Judicial Council composed of nine judges out of twelve members [...]”

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

“Changes in the government or parliament should not influence the judiciary. In the particular case of the HJC, such changes will not affect its elected members, but they may influence the appointment and termination of office of *ex officio* members. [...]”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §22

“[...] [A]mong the judicial members of the Judicial Council there should be a balanced representation of judges from different levels and courts, and this principle should be explicitly added.”

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §23

“It is recommended that the Constitutional Law be amended so that the High Judicial Council is composed of a substantial number of judges from both the first instance and appellate level courts, who are to be elected, or at least proposed, by their peers, following a transparent procedure laid down in the Constitutional Law. [...]”

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §20

“The number of judges in the entire composition of the Council (only 8 out of 24 members) does not seem to be adequate. The limitation of the number of judges to one third falls short of the standards requiring a substantial judicial representation within such institutions. The Venice Commission has stressed that ‘[i]n all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges’.”

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law ‘on the status of judges’ of Kyrgyzstan, §24

“The [High Judicial Council] would thus have 11 judges among its 15 members. This proportion seems even too high and could lead to inefficient disciplinary procedures. While calling for an appeal to a court against disciplinary decisions of judicial councils is required, the Venice Commission insists that the non-judicial component of a judicial council is crucial for the efficient exercise of the disciplinary powers of the council.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §41

See also 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, §§74-76

“[...] [M]embers from the basic courts and members from higher courts should also be ensured a fair representation within the judicial members of the Judicial Council.”

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §39

“In its previous Opinion, the Venice Commission emphasised the importance of ensuring that not only judges, but also the ‘users of the judicial system’ such as advocates, representatives of the civil society and academia, have a seat in the NJC, as uniformity ‘can easily lead to mere

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introspection and a lack of both public accountability and understanding of external needs and demands' (paragraph 45).

The Hungarian legislator addressed this criticism in Section 106 AOAC. Although the NJC is composed solely by judges, the external perspective is now introduced, as **other persons than judges persons will be able to attend the meeting of the NJC with consultative vote**. In addition to the President of the NJO, the Minister for Justice and the Prosecutor General, Section 106 AOAC refers to the President of the Hungarian Bar Association, the President of the Hungarian Chamber of Notaries Public as well as experts and representatives of any civil society and other interest groups, which can be invited by the President of the NJC, but who are not members of the NJC. Although the Venice Commission acknowledges that States – if they are to establish a judicial council – have a large margin of appreciation in regulating the composition of judicial councils, the Commission is still of the opinion that the composition of the Council should be 'pluralistic' and the Council should not be composed of judges only. **It is important that such a pluralistic composition is achieved not only by inviting non-judges as guests, but also by including them as full members with voting rights.**"

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§33, 34

"Article 10.1 provides that members of the Disciplinary Board from among judges shall be elected by the General Assembly of Judges, as follows: 2 judges from the Supreme Court of Justice, 2 judges from the Courts of Appeal and 1 judge from the courts. It is to be welcomed that judges are elected by their peers. However, it is not clear what the rationale is for composing the Disciplinary Board mainly of representatives of the senior judiciary. Why are the judges requested to elect of 4 out of 5 judges from the Supreme and appellate courts? Furthermore it should be expressly mentioned that election is done by secret ballot."

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, §52

#### 4.2.3 Representation of the executive in the Council; *ex officio* members

"The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, [and] at the appeal stage [...]. [I]t is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §16

"Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...] Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, **the Minister of Justice should not participate** in all the council's **decisions**, for example, the ones **relating to disciplinary measures**."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §33

See also 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, §97

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“[...] The Proposal [...] removes all participation of prosecutors from the HJC but retains powers of the HJC in respect of prosecutors (incompatibility requirements and discipline). However, the HJC should have no such powers if there is a separate prosecutorial council.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §42

“ [...] It seems that the Volkov judgment does not rule out *ex officio* members. They could be members of the HCJ without a right to vote.“

CDL-AD(2013)014, 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, §57

#### 4.2.4 Lay members : importance of having the civil society represented

“[...] The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council’s objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council’s performance of this control will cause citizens’ confidence in the administration of justice to be raised. Furthermore, in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...] [A] basic rule appears to be that a large proportion of the membership [of the Supreme Council of Justice] should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other *ex officio* or elected members. [...]”

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9-12  
See also CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§27 and 30

“ [...] It is common practice that ‘judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sector’ and the Venice Commission even recommends that a substantial part of the members be non-judicial. [...]

[...] [I]nstead of excluding legal professionals altogether, consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§30,31

“Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches).”

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §66  
See also CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §§21, 22  
See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ ODIHR, §102

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See also CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §45

“[...] It is advisable for judicial councils to include members who are not themselves representatives of the judicial branch. But, such members should preferably be appointed by the legislative branch instead of by the executive.”

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §34

**“In the Venice Commission’s view, this composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicisation and autocratic government.**

A crucial additional element of this balance would be that the President of the Judicial Council should be elected by the Judicial Council from among its lay members (with the exception of the Minister of Justice) by a majority of two thirds, and should have a casting vote. [...]

[...] Like for the Plenary, among the judicial members of the disciplinary panel there should be a balanced representation of judges from all different levels and courts (see infra the comments on the amendments to the laws).”

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §§20-22

“With the proposed new composition of the Judicial Council, a parity between judicial and lay members is sought to be achieved. The Venice Commission welcomes this new composition, which would avoid both the risk of politicisation and the risk of self-perpetuating government of judges.

However, the parity of judicial and lay members would not pertain in disciplinary proceedings, as the Minister of Justice could not sit and vote in such cases and, as a consequence, the judges would have a majority [...]. Therefore [...] a crucial additional element of this balance would be to add a provision in Article 127 of the Constitution on a smaller disciplinary panel within the Judicial Council with a parity of judicial and lay members (with the exclusion of the Minister of Justice). The details concerning this disciplinary panel could be regulated by the Law, taking into account the importance of reconciling the independence of the judiciary and at the same time ensuring accountability.”

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §§20, 21

“[...] [T]he organisation of a competition to choose the civil society representatives on the Disciplinary Board is to be welcomed. However, it would be desirable that the criteria for selection of candidates as well as the mechanism for the appointment and functioning of the Commission which is intended to select candidates be specified in the law itself rather than in a regulation. Furthermore, it should be made clear that the Minister’s function in appointing these persons is a formal one and that the appointment is carried out in accordance with the recommendations of the Commission which selects candidates.”

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, §54

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“[...] [T]he Venice Commission recommends that the authorities consider election of the lay members of the JC by a qualified majority in the Parliament. In its Report on Judicial Appointments the Venice Commission emphasised that it is ‘strongly in favour of the [depoliticisation] of [Judicial Councils] by providing for a qualified majority for the election of its parliamentary component’ (§ 32). At the same time the Venice Commission is mindful of the fact that requiring a too high number of votes from the non-majority MPs may lead to a political stalemate, where few people would be able to block elections of lay members to the JC.”

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, §67

#### 4.2.5 Qualification requirements for the candidates to the council; incompatibilities and quotas

“It is vital that the members of the Council have sufficient practical experience to carry out their work. Therefore, the requirement of seven years’ experience provided [...] seems adequate.”

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §51

“The requirement of 10 years of experience for judges [to be eligible at the Council] should be reconsidered because it will make the election of qualified candidates from all levels of the judiciary, especially from first level courts, very difficult.”

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law “on the status of judges” of Kyrgyzstan, §36

“ [...] [T]he amendments could provide that should a chairman of a court be elected in the Council, he or she would have to resign from his or her position as chairman while of course retaining his or her position as an ordinary judge.”

CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §50

“[...] [I]n order to insulate the judicial council from politics its members should not be active members of parliament.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §32

“[...] Out of 15 members [of the Judicial Council] 4 must belong to the non-majority communities, and, in addition, three more must be elected by the double majority vote by the Parliament.

In its 2005 Opinion, the Venice Commission stated that the provisions concerning representatives of the non-majority communities ‘are to be welcomed’ (§ 40). The question is whether the direct ethnic quota for selecting candidates is still an acceptable solution in the present-day conditions.

Ethnic-based criteria for selecting State officials are suspect, and it is particularly true in respect of the judiciary. In the 2014 Opinion on the high judicial and prosecutorial council of the Bosnia and Herzegovina the Venice Commission emphasised that ‘the judiciary should not be organised along ethnic lines’. That being said, such method of selecting candidates is not ruled out. Mechanisms of power-sharing between different ethnic communities are to be assessed in the light of the country’s recent history; ethnic criterion for eligibility to political posts may be defensible in the aftermath of a civil war but must be reconsidered after a passage of time - see, in particular, the 2005 opinion on the constitutional situation in Bosnia and Herzegovina. [...]



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In the Macedonian context the proposed Amendment serves to protect non-majority communities. Furthermore, ethnic quotas do not close access to the JC for the candidates from the majority communities. Consequently, the case of *Sejdić and Finci* cannot serve as a precedent. That being said, the method of the Court's reasoning, namely the 'dynamic' approach to the analysis of the ethnic-based election criteria, still applies.

The Venice Commission recalls in this respect that Point 10 of the UN Basic Principles on the Independence of the Judiciary requires that judges are appointed without discrimination based on the ground of 'national origin'. Recommendation of the Committee of Ministers of the Council of Europe no. R(94)1224 calls for merit-based appointment of judges with regard to 'qualifications, integrity, ability and efficiency' (see Principle 1, point 1(2)-c). Similar principles are proclaimed by the European Charter on the statute for judges: see, for example, point 2.1, which requires that judicial appointments are based on capacities and that the candidates should not be excluded on the basis of their ethnic origin. The principle of 'merit-based' appointment is cited with approval by the Venice Commission in its Report on Judicial Appointments, §§ 10 and 36-37.

In the opinion of the Venice Commission, there is a certain tension between the principle of 'merit-based' selection of judges and selection of members of the JC along ethnic lines. The solution proposed in the 2005 and 2014 Amendments - namely the ethnic quotas for non-majority communities in the Judicial Council - appears to be even more radical than the legal mechanism of 'double majority' provided originally by the Constitution for the election of the members of the JC.

That being said, in the circumstances the Venice Commission is prepared to maintain its previous recommendation. The 'double majority' principle can hardly be applied in the context of election of judicial members of the JC. Further, the Commission reiterates that the ethnic quota in the specific context of the country is supposed to protect minorities and may thus be regarded as a sort of a 'positive discrimination'. Therefore, direct ethnic quotas remain another possible mechanism securing adequate representation of non-majority communities. The authorities must consider, however, whether ethnic quotas should exist in relation to the lay members of the JC elected by the Parliament."

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, §§58, 60-65

" [...] The draft Law indicates that the composition of the [High Judicial and Prosecutorial Council] needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. These requirements were already present in the 2004 Law, but at the time, no numbers were given, the Law simply spoke of 'general representativeness' (Article 4.4). **The need to have at least six representatives of each Constituent People, together with the requirement of the gender equality, may make the selection of appropriate members very difficult and inflexible [...]**

[...] [I]n a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, **an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country's size and population into account - may undermine the effective functioning of the system**".

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CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32 and 35

#### 4.2.6 Chair of the Council; structure and working bodies of the Council

“It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the **chair of the council could be elected by the Council itself from among the non-judicial members of the council**. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §35

“There may be different approaches with regard to the role of presidents of supreme courts within judicial councils. Some countries choose not to impose any restrictions and allow the President of the Supreme Court to be elected/appointed President of the Council and hold both positions simultaneously (as still is the case in Serbia, but is now proposed to be abandoned). In view of enhancing the independence of the judiciary others may prefer to separate the administrative positions within the judiciary and the membership in the Council; and therefore, should the president of the court be appointed President of the Council, this person should then resign from his or her position at the Supreme Court [...].”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §23

“The Minister for Justice has been given a new power to address proposals to the Supreme Judicial Council for the purposes of appointing and dismissing the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor, for determining the number of judges, prosecutors and investigators and for appointing, promoting, demoting, moving and dismissing all judges, prosecutors and investigators. Formerly, such proposals could only be made by the heads of the different branches of the Judiciary, the prosecution service and the investigation service. The Commission does not consider the conferring of a power to make such a proposal on a Minister of the Government is in itself objectionable as an interference with the independence of the Judiciary. Again, the doctrine of separation of powers does not require that there can be no involvement by either of the other two branches of power in a decision to appoint or dismiss a judge. The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality [...]. [...]

There is, however, a case to be made that when the [Supreme Judicial] Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it. [...].”

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria §§34-35

“The Minister of Justice as the chairman of the Supreme Council of Justice should not be able to block the discussion of a particular issue within this body. When the Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it”.

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

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“In addition, the Commission considers that [the proposed measure], providing that the President chairs the Council of Justice, could prove rather problematic. Having the President as the Chair is not necessarily the best solution (although provided for in a number of European Constitutions) and his or her role as the Chair should be purely formal. In this regard, the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers.”

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §58

“It is very positive, as part of the balance sought, that the President of the Judicial Council will be elected by the Judicial Council itself by a two-third majority among its lay members.”

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §22

“[...]Taking into account the powers granted to the HCJ, it should work as a full time body and the elected members, unlike the ex officio members, should not be able to exercise any other public or private activity while sitting in the HCJ.”

CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal 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, §30

“The election of the Chairman of the Board by its members, by secret ballot [...] is to be welcomed. However, it would be desirable for the Board also to elect a Vice-Chairman to act in the absence of the Chairman rather than the arrangement provided for in Article 12.3 that in the absence of the Chairman the oldest member present should take the chair.

With regard to the provision for the removal of the Chairman, as well as a reasoned proposal from three members (Article 12.4) there also needs to be a vote of the members of the Board, who should not have to wait for three months of inaction before taking action themselves. A 2/3 majority could also apply as in the case of the removal of ordinary members.”

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, §§58-59

**“[...] [I]t is not appropriate for the President and the Vice Presidents of the [High Judicial and Prosecutorial Council] to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC.**

[...] [I]t is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president. It is hard to imagine the reasons (except resignation), which may result in a decision being made by the Parliamentary Assembly to end the term of office of the president and vice-president, but retaining membership in the HJPC. **There should be input from an expert body before Parliament takes a decision.** In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, **in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own. This is inappropriate and needs to be reconsidered.**”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§47, 48

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“The work of the [High Judicial and Prosecutorial Council] should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly ‘may remove the Presidency or a member of the Presidency from the Council’. [...].”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72

See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36

“The 2004 Law created the [High Judicial and Prosecutorial Council] as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. The Venice Commission’s requirement is that: ‘If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other’s appointment and disciplinary proceedings because due to their daily ‘prosecution work’ prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings’.

The Venice Commission therefore welcomes the establishment by the draft Law of two sub-councils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§58-59 and 61

#### 4.3 PROCEDURAL ASPECTS OF APPOINTMENT/ELECTIONS OF THE MEMBERS OF THE COUNCIL

“[...] [The Venice Commission is] aware that the participation of the legislative power in the election of the members of a judicial council is, to an extent, common practice - reflecting the conviction that ‘in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament’. [...]

In the context of BiH it is **crucial that a clear separation of state powers be maintained to ensure the independence of the judiciary – especially - on the institutional level**, because institutions such as the HJPC are not (yet) provided with an explicit constitutional basis. For this reason, the Venice Commission is convinced that, in the particular context of BiH, involving the legislative power **in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome.**

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[...] [T]he Venice Commission is convinced that, in the particular context of BiH, involving the legislative power in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome.

It is recommended that a substantial element or a majority of the members of the HJPC be elected by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. [...].”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§43-45

“The National Assembly should not be given a real choice of candidates and the ‘authorised nominators’ should only propose one candidate per vacant position. In this way, the National Assembly will have a right of veto. This seems to be the only solution which would avoid political considerations being taken into account in the nomination of the Council members.”

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §48

“[The Commission] considers however that the non-judge members should rather be elected by Parliament than by the President of the Republic.”

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

“[...] [T]he delegation reiterated the proposal of the Commission to have the parliamentary component of the Council elected with a qualified majority. This would make sure that this component reflected the composition of the political forces in Parliament and would effectively make it impossible that the majority in Parliament fills all positions with its own candidates as it had been the case in the past.”

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15

See also CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §25

See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§19, 21

See also CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, §25

“[...] [A] solution should therefore be found ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require a two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate.”

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §19

“The Venice Commission is of the opinion that elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council.

It is a matter for the Georgian authorities to decide which solution is appropriate, but the anti-deadlock mechanism should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance.”

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CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§52-53

“[...] By leaving the definition of the election procedure [of the members of the High Judicial and Prosecutorial Council] to a separate regulation to be adopted by the Parliamentary Assembly in the future, the draft Law makes it difficult to assess the extent to which the requirement of transparency of the procedure has been met. [...]

This election procedure should be developed in the law [...].”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§41-42

“Article 5.2 delegates the determination of the procedure for the election of the judges’ component of the Council to the Congress of Judges. While it is possible to have practical questions of the procedure decided by the Congress, at least its principles should be set out in the draft Law. For example, in order to be in line with the standards it is necessary to provide that the Council of Judges has to elect judges respecting the proportion between all instances of courts, including first instance courts.”

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law ‘on the status of judges’ of Kyrgyzstan, §31

“It is not necessary to create an electoral register or directory for the judges who are allowed to vote in the Council elections. It is difficult to see how a president of a court could ignore a colleague in the distribution of ballot papers or how an individual who is not a judge would obtain such a ballot.”

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §53

“This Article sets out that for each polling station the electoral commission shall appoint polling boards consisting of three judges who are not running for election. It is not clear how these judges are selected. Will it be a random selection? This should be clarified.”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §41

“[...] [D]ecisions on appointments of judges and prosecutors cannot be delegated to commissions. The election of judges and prosecutors is by a majority vote of all members, but for the election of judges the decision must be supported by at least seven judges, and likewise for prosecutors. This prevents either judges or prosecutors from imposing their will on the other profession.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §57

“[...] The draft Law therefore leaves the entire process of the election of two members of the HJC to the discretion of the Bar Association and the joint session of deans of law faculties. This approach is questionable because – although the respect for the autonomy of these institutions is relevant in the context of self-governance or other internal matters – the election of the HJC member is clearly not an internal matter of the university or the Bar Association. It is in the interest of society as a whole (rather than the legal community, academia or the judiciary) that the HJC operate in an effective and efficient manner so as to uphold the independence of the judiciary and the rule of law. The procedures for the election of the HJC candidates as well as detailed requirements for the candidates should be set out in this Law.”

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CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §48

“[...] [T]he procedure of selecting the HJPC members could be regarded as deficient in some respects. Of the 15 members, two are selected by members of the House of Representatives, of the Parliamentary Assembly of BiH and of the Council of Ministers of BiH; two are selected by the Bar Chambers of the Entities; five or six by prosecutors, and five or six by judges. Due to this procedure, the selection could be vulnerable to inter-institutional and inter-personal rivalries in the judiciary”.

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §88

“[...] It should be expressly mentioned that election [of members of the Disciplinary Board] is done by secret ballot.”

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, §52

“The decision to provide for a majority presence of members elected by the judiciary in the HSYK is to be welcomed. However, [...] the second sentence seems to give every judge and prosecutor the right to vote: ‘for the total number of regular and substitute Council members to be elected’.

If this is so, it does not leave much room for the election of minority candidates (i.e. candidates who do not share the opinions of the majority), because the candidates who are voted for by the majority of the voters could cover all the seats and exclude those supported by the votes from a minority. It is true that the submission of the candidatures is made on an individual basis and not within the framework of ‘multi-person’ lists (Articles 20 and 21) and electioneering is prohibited (Article 25), but these rules do not exclude the possibility of informal electoral majority agreements aimed at avoiding the election of candidates who are the expression of minority orientations, which should, in any case, be present in the body if the HSYK is to be representative of the entire judiciary.

In the original proposal of the Government for a new Article 159, it was stated that each voter could vote for only one candidate, which is a way of promoting a pluralistic composition. [...] The electors should be authorised to vote for a smaller number of candidates than the number of members to be elected. This would lead to the representation of the broad range of interests in compliance with the principle of democracy. Moreover, the possibility of being elected again for the members at the end of their term of office could be subject to criticism. [...]”

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §§36-38

“[...] [I]t would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections.

The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council.

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In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. While the Commission was informed that there are no cases pending in Georgia, any such change must be regarded with concern.

[...] The Commission is cognisant of the dilemma which the Georgian authorities face. Nevertheless, even though the composition of the current High Council of Justice seems unsatisfactory, the Venice Commission recommends that the members complete their mandate. However, it would seem possible to apply transitory measures which would bring the current Council closer to the future method of composition, for example by providing that incumbent chairmen of courts should resign as chair in order to remain on the Judicial Council. [...].”

CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§69-72 and 74

#### 4.4 STATUS OF MEMBERS

“Granting immunity to members of the Council guarantees their independence and allows them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations.”

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §26

“Alleged criminal conduct by members of the HSYK should be investigated and prosecuted in the normal way. Presumably this is intended to give protection to members of the HSYK against arbitrary or unjustified accusations. However, it seems to go very far indeed to provide, as Article 38.1 does, that the Plenary of the HSYK must authorise an investigation and prosecution for an offence committed by an elected council member even in the case of personal offences which are nothing to do with the performance of their duties as members of the HSYK. In other opinions, the Venice Commission has been critical of overbroad immunities being granted to judges. In this case, it is difficult to see why members of the HSYK should have an immunity from investigation and prosecution unless this immunity is waived by the HSYK. The only exception to this provision seems to relate to flagrante delicto cases (Article 38.9).”

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §68

“[...] [T]he members of the HJC should exercise their functions as a full-time profession.”

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §43

“Under the draft Law, members of the [High Judicial and Prosecutorial Council] shall serve a term of four years and may be re-elected once (Article 9). No one may be elected for more than two consecutive terms (Article 3.7). The length of the term of office is a standard one, as in most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in ‘the former Yugoslav Republic of Macedonia’ etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §49



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“Councillors who are not *ex officio* members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the [...] members [of the High Council of Justice].

Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the ex-officio members. The influence of the ex-officio members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Council’s work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten.”

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§20, 21

“The three years mandate of the Council’s members could give rise to problems related to the independence and impartiality of the Council. Because of the relative short mandate Parliament will have a possibility of political influence on the selection of the judges, especially in the light of Parliament’s powers to appoint the two thirds non-judicial members.

Article 4.4 provides for the non-reappointment of the members of the Council. This is unusual. Such limits usually exist for the Head of State. The purpose of this provision is probably to ensure the independence and impartiality of the members. This can be better ensured by providing for a single but long term.”

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law ‘on the status of judges’ of Kyrgyzstan, §§26, 27

“Members [of the Disciplinary Board as a body which examines disciplinary cases and applies disciplinary sanctions to judges] will be selected for a fixed term of six years (Article 9.4) and this is to be welcomed, as well.

According to Article 9.5 ‘the term of office of a member of the Disciplinary Board is extended *de jure* until the establishment of a college in a new composition’. It is recommended to extend the term of the member until the examination of the cases, in which the member is involved, is completed.”

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, §§50-51

“According to the second paragraph of Article 12 ‘Elected members of the Council may be re-elected, but not consecutively’. It would be advisable for the draft Law to provide for guidance on the minimum amount of time that should pass between the terms. For instance, will it be considered ‘non-consecutive’ if a member is re-elected shortly after his or her term ends due to the early dismissal or retirement of another member of the HJC?”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §33

“[...] Indeed, conviction of a member of the Council for the criminal offence itself renders him/her dishonourable to exercise the function.”

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CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §53

“[...] Decisions on suspending a member should be linked to the gravity of the charges against him or her and/or be based on the reasoning that suspending the member is necessary for the effective functioning of the HJC. [...]

Although according to Article 43, any member of the HJC has the right to initiate the dismissal of any other member, there are no mechanisms in the draft Law which would provide for the suspension or dismissal of the *ex officio* (non-elected) members if they act in violation of the Constitution or the law. [...].”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§30 and 32

“[...] It would [...] be more appropriate to deal with ‘breach of duty’ cases through the usual disciplinary procedure, which should be clearly set out by the draft Law and an appeal to a court of law should be provided [...]. The proportionality principle should be adequately taken into account and the dismissal [of a member of the Judicial Council] should only be applied as a measure of last resort.”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §58

“According to Article 11.2 the reasoned proposal of the Disciplinary Board to revoke the term of office of a member of the Disciplinary Board shall be submitted to the body that appointed or elected that member in order to revoke and replace him/her with another member. The Board should itself be able to dismiss the member rather than simply remitting the matter to the body which elected the member to revoke the appointment. The credibility of the Disciplinary Board would be undermined if this body failed to do so. However, there needs to be a very clear provision to invoke the procedure where a member fails to attend to duties to ensure that proper notice is given.”

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, §56

“[...] [The law] seems to mean that a person can be removed from the [High Judicial and Prosecutorial Council] for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member’s status as a judge or prosecutor is suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

In particular, [...] the Parliamentary Assembly is empowered to dismiss the member of the HJPC where ‘the member fails to perform his/her duties in a proper, effective or impartial manner’ [...].

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However, it is not clear how the effective and proper performance of the HJPC member will be evaluated and what the procedures for such an evaluation are. This needs to be reconsidered.

Article 10.1.e sets out that dismissal may arise ‘if the member fails to fulfil the obligations arising from the function he/she performs due to illness or for other reasons’. The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought.

All these provisions should be much more precise and decisions on cessation/dismissal should not be left to the Parliamentary Assembly.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§51-56

“**Article 18** of the Draft law deals with the dismissal of a Judicial Council member. According to **Article 18, para. 1** the grounds for dismissal are: ‘1) he/she discharges his/her duties unconscientiously and unprofessionally; 2) he/she is convicted of an offence which makes him/her unworthy of discharging duties of the Judicial Council member’.

The notions ‘unconscientiously and unprofessionally’ and ‘unworthy of discharging duties’ are too vague, and can lead to an arbitrary application of the power to dismiss members of the Judicial Council. It is strongly recommended to define these dismissal grounds more closely. Council’s members are also dismissed if a disciplinary sanction is imposed (**Article 18, para. 2**). However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure.

It is important to make it clear in the law that the Council’s motion concluding that a Council member has to be dismissed should not be based on the substance of the position/decision of the concerned member in respect of individual files. This is essential for ensuring the independence and autonomy of the Judicial Council.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§45-48

“A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the [High Judicial Council], whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of ‘lack of confidence’. Article 41 clearly defines the reasons that can lead to a dismissal of the HJC members. The disciplinary procedure must only focus on the question whether the HJC member failed to perform his or her duties ‘in compliance with the constitution and law’. This question must not be confused with the question whether said member still enjoys the confidence of the judges who participated in his or her election. In addition, the disciplinary procedure has to guarantee the HJC member a fair trial. It is noted that a general reference to a fair trial is made under Article 46a, but further details on related guarantees would be needed. In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, i.e. whether an ‘impeachment’ of a member is

allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how, by whom and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. [...].

[...]Members of judicial councils are independent and often have to make decisions that are unpopular or will not please judges. In subjecting them to a vote of no confidence, their independence will be reduced, making them too dependent on the wishes of the judges and removing them from their role of pursuing the goals of an independent and efficient judiciary for the state as a whole. Furthermore, such a vote is difficult to reconcile with the disciplinary functions of a judicial council. The Venice Commission therefore strongly recommends for such a procedure not to be introduced.”

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§66-70

#### 4.5 OTHER SELF-REGULATORY BODIES OF THE JUDICIARY

“The Law on Bodies of Judicial Self-regulation is relatively short and establishes two bodies of judicial self-regulation: (1) the Congress of Judges and (2) the Council of Judges. [...]

Article 5 provides for the aims of the two bodies of judicial self-regulation, which are to protect the rights and lawful interests of judges, to assist in improving the judicial system and proceedings, and to represent the interests of judges in dealings with state bodies, public associations and international organisations. It seems, therefore, that the idea is to provide a framework to form coherent standpoints for the judicial community with respect to all questions concerning judges.

Regulating self-regulation seems to be a contradiction, however, if such a law is deemed necessary its provisions should not be too rigid. Although it is important to provide a solid basis for judges’ self-regulation, it is important not to suffocate it.

In this respect, there are a number of provisions that raise doubt. First, Article 4.4 provides that the status of individuals exercising the activities of judicial self-regulation is governed by the Law on civil service. The content of this Law is not known to the Venice Commission, but it might be too rigid if it provides for strict regulations on responsibilities or perhaps even regulations subordinating the representatives to the administration.

Second, it seems unnecessary for **the Congress to be convened by the President of the Kyrgyz Republic**, as foreseen by Article 6.2. This provision contradicts the very idea of self-regulation.

Third, Article 8.4 sets out that ‘*The organisational, technical, material, financial and methodological resources for the activity of the Council of Judges shall be provided by the Judicial department of the Kyrgyz Republic.*’ This could create a strong dependency that would be incompatible with the idea of self-regulation.

Fourth, the rules for the election of the representatives are also very rigid, for instance, the prohibition of the re-election of members of the Council of Judges for a second consecutive term (Article 8.8). This means **a complete turnover in the membership every three years. Some continuity may be desirable, perhaps the terms of office could be staggered (partial renewal)**.

The Venice Commission would [...] recommend the following: [...] [i]nclude, in this Law, how the Council's various representational and advisory functions are to be carried out. It should also be

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clarified in which cases binding decisions are adopted and what the legal consequences of those binding decisions are.”

CDL-AD(2008)040, Opinion on the Constitutional Law on bodies of Judicial self-regulation of Kyrgyzstan, §§6, 11-16, and 23

“[...] Concerning Article 127.5.1 item 1, which refers to meetings of judges of local and appellate courts, these apparently can discuss the performance of specific judges and take decisions on these issues binding for the judges. This does not appear to be an appropriate provision. Judicial independence requires that judges should not be subjected to peer pressure in relation to any specific cases. Article 127.5.2 also provides that the judges’ meetings of the Supreme Court and the high specialized courts have the same powers. This should be deleted or at least clarified to make clear that pressure may not be brought on a judge concerning an individual case.

In relation to Article 130, which provides for a number of persons to be present at the Congress of Judges (including the President of Ukraine, the speaker of the *Verkhovna Rada*, and the Minister for Justice), it is not clear why politicians should be present at these meetings. The presence of politicians may well lead to political pressure being brought. While it is specified that the invited persons may not participate in the voting, it is not clear why their presence is necessary at all.

Draft Article 131 provides for a new system for the election of delegates to the Congress of Judges. The Venice Commission has previously recommended a proportionate representation of the various orders of jurisdiction (CDL-AD(2010)026, para. 96). The same comment could be made here concerning the representation on the basis of the meetings of judges.”

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §§69-71

“The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

Given the comprehensive powers of the Council of Justice and the broad administrative mandate of the Judicial Administration under its auspices, it does seem desirable to provide also for these other institutions, and their specific roles appear to be logically determined. The problems which may be involved accordingly do not relate to the number of institutions as such but mainly to the question whether the overall power vested in the system may be too great.

“[...] The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication.”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§11, 12, and 64

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