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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

DRAFT
AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT

ON THE RIGHT OF RECOURSE BY THE STATE AGAINST JUDGES
(Article 27 of the Law on Government Agent no.151 of 30 July 2015)

on the basis of comments by

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I. Introduction

1. By letter of 25 March 2016, Mr Alexandru Tănase, the President of the Constitutional Court of the Republic of Moldova, requested an *amicus curiae* brief from the Venice Commission on Article 27 of Law no. 151 of 30 July 2015 on "Government Agent" (CDL-REF(2016)029, hereinafter, "Law no. 151/2015").

2. The context of this request is a claim brought to the Constitutional Court of the Republic of Moldova by a first instance judge, on behalf of the parties to the proceedings (seven judges in all) initiated by the Ministry of Justice under Article 27 of Law no. 151/2015 on the right of recourse by the State, following the judgment of the European Court of Human Rights against the Republic of Moldova in April 2014.[1]

3. The claim before the Constitutional Court is for the constitutional review of Article 27 of Law no. 151/2015, which provides for individual liability (including that of judges) for actions or omissions having caused or greatly contributed to violations of the European Convention on Human Rights (hereinafter, the "ECHR"), found by a judgment of the European Court of Human Rights (hereinafter, the "ECtHR") – or – by a friendly settlement imposed on the Republic of Moldova for a case pending before the ECtHR – or – by a unilateral declaration of the Government of the Republic of Moldova.[2] In addition, the claim alleges that according to the principle of the independence of judges, guaranteed by Article 19.3 of the Law on the Status of Judges, the lack of an act of a national court finding the judges guilty is an inadmissible interference in their procedural guarantees.

4. The question addressed to the Venice Commission is:
- Whether a judge can be held individually liable for judgments rendered on the national level, which are appealed to the ECtHR and result in a finding of a violation of the ECHR by the member State either by a judgment, a friendly settlement or a unilateral declaration, without an actual finding of guilt by a national court against the individual judge concerned; or
- Whether this is an inadmissible interference in the procedural guarantees of judges, in breach of the principle of the independence of judges.

5. A draft version of Law no. 151/2015 was assessed by the Council of Europe in July 2014 as to its compliance with ECHR standards and European best practices, at the request of the Ministry of Justice.[3] The Council of Europe's assessment at the time referred to a lack of clarity with respect to the content and scope of Article 27 of Law no. 151/2015: *"As a general comment, it is found that this provision […] should rather be part of a law on the State's responsibility for damages, as it primarily regulates other issues tha[n] the Agent's status, powers or tasks. It is also not*

[1] See *Case of Radu v. the Republic of Moldova*, Judgment, 15 April 2015. Application no. 50073/07, http://hudoc.echr.coe.int/eng?i=001-142398

[2] More specifically, under Article 27.3:
Article 27
Right of recourse
"(1) The State shall enjoy the right of recourse against individuals whose actions or inactions determined or significantly contributed to the violation of the Convention found by a judgment or imposed a friendly settlement of the case pending before the European Court or the submission of a unilateral declaration.
(2) The amounts awarded by the European Court in a judgment or decision, by friendly settlement agreement in a case pending before the European Court or by unilateral declaration, shall be returned by judicial decision, proportionally to the degree of guilt.
(3) The Ministry of Justice is obliged to institute proceedings for recourse, if the conditions established by law are met, within 3 years from the day of payment of the amounts awarded by the European Court in its judgment or decision, or by a friendly settlement agreement."

[3] See *Council of Europe Action Plan to support democratic reforms in the Republic of Moldova 2013 – 2016, Progress Review Report*, p. 17.
https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2884852&SecMode=1&DocId=2344730&Usage=2

entirely clear to which "persons" other than "civil servants" this provision may apply, as the personal scope thereof is not defined and is potentially unlimited."[4]

6. Mr Bartole, Mr Hirschfeldt, Mr Holmøyvik, Mr Kūtris and Ms McMorrow acted as rapporteurs for this *amicus curiae* brief.

7. This *amicus curiae* brief is based on an unofficial English translation of Law no. 151/2015. Errors may occur in this *amicus curiae* brief as a result of an incorrect or inaccurate translation.

8. This amicus curiae brief was drafted on the basis of comments by the rapporteurs and adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. European standards and practice

9. Member States of the Council of Europe are expected to implement the ECHR on the national level. The ECtHR only acts on the merits where an application's admissibility criteria under Article 35 ECHR are met and where the application is not manifestly unfounded. In the implementation of the ECHR, Member States may retain their legal traditions, as long as these are in conformity with the minimum rights laid down in the ECHR, as interpreted by the ECtHR, subject to a margin of appreciation. Where a judgment shows systemic shortcomings, the ECtHR may mandate the Member State in question to introduce, amend, or repeal a law and, exceptionally, to take specific actions.[5]

10. It is therefore important that Member States address the issues and shortcomings in their national judicial systems that prevent the proper application and implementation of ECHR standards as well as provide redress for breaches of ECHR provisions.

11. To that end, it is essential that there is a working judicial system in Member States, which contributes to the good administration of justice. The enforcement of human rights ultimately depends upon the proper administration of justice. Judges play a key role in this and it is therefore paramount that they are competent and carry out their judicial function fairly, impartially and independently in order to uphold the rule of law.

12. Judicial independence is key in safeguarding the individual's rights and freedoms in accordance with the law and is therefore not an end in itself. It is a part of the aim of providing a fair trial under Article 6 ECHR, which requires courts to be independent. This has also been clearly stated in Article 3 of the Recommendation of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (CM/Rec(2010)12): *"The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence."*

13. Judicial independence requires that judges be shielded from external influence by other state powers and that the individual judge have the professional freedom to interpret the law, to assess facts and to weigh evidence in individual cases. Accordingly, erroneous decisions

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[4] Article 27.1 at the time read as follows: *"The state has the right of individual regress* ***against the persons or civil servants*** *whose actions or omissions, intentionally or negligently, had determined or had contributed significantly to certain infringement found by the European Court in a certain judgement or had determined the friendly settlement or the formulation of an unilateral statement."*
See Chapter V: Regress (pp.23-24)
http://www.coe.md/images/stories/Articles/Expertises_and_reports/opinion_draft_organic_law_on_governmental_agent_en.pdf

[5] The European Court of Human Rights Question and Answers for Lawyers, CCBE
http://www.echr.coe.int/Documents/Guide_ECHR_lawyers_ENG.pdf and
http://www.echr.coe.int/Documents/Anni_Book_Chapter05_ENG.pdf

should be challenged through the appeals process, and not by holding the judges individually liable.[6]

14. Judges, however, are not above the law. Disciplinary measures for judges can therefore be found in European legal systems, and European standards recognise the need for holding judges accountable for their actions through disciplinary, civil or even criminal liability.

15. European countries that allow the personal liability of judges, for instance Bulgaria,[7] the Czech Republic,[8] Germany[9], Italy,[10] Norway[11], Serbia[12], Spain (up until October of 2015)[13] or Sweden[14], among others, require that the judge's guilt be proven.[15]

16. The independence of judges in applying the law can be protected by having judges enjoy functional immunity for acts performed in the exercise of their judicial function.[16] Judges should not be exposed to individual liability for the exercise of their judicial function, except in cases of malice or, at the very least, gross negligence.

17. This is also supported by the case law of the ECtHR. For instance, in the *Case of Gyaznov v. Russia* (2012),[17] which was reiterated in the Case of *Sergey Zubarev v. Russia* (2015),[18] the ECtHR stated: *"80. […] A civil action for damages can also be lodged in cases where judicial acts have been done with malicious intent or corruptly and the judge's guilt has been established in a final criminal conviction […]".*

18. It must be stated that with respect to the liability of judges brought about by a judgment of the ECtHR, following that Court's case law can be a difficult task. The ECtHR has consistently viewed the ECHR as a living instrument that must be interpreted in the light of present-day conditions.[19] The living instrument doctrine of the ECtHR means that this Court may be bolder and more dynamic in its interpretation of the ECHR than national courts. It also means that from time to time, it may be hard for national courts to predict how the ECtHR will rule if the case is brought before that Court. The contested legal question may also be novel or particular to a specific jurisdiction, so that the existing case law of the ECtHR does not provide a reliable guideline of interpretation for the national judge. The case law of the ECtHR may also be more or less settled or in development, depending on the issue and the rights concerned.

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[6] CM/Rec(2010)12, Article 70.
[7] The Bulgarian Constitution in Article 132 (of 2003) says that judges, prosecutors and investigators are not criminally or civilly responsible for actions carried out, and acts they issued, in the context of their work, except in cases where that action or act constituted an intentional publicly prosecutable criminal offence; See also Section 9 (1) (of 2008) of the State and Municipalities Responsibility for Damage Act 1988.
[8] See *Law no. 82/1998 Coll., on the Responsibility for the Damage Caused in the Exercise of Public Power by a Decision or by an Incorrect Official Act*, §§ 16-18, notably §17(2) (judges). It is very rarely applied.
[9] For judges, Article 34 (on liability for neglect of duty) of the *Basic Law for the Federal Republic of Germany* applies together with Section 839(II) of the *German Civil Code* on liability in case of breach of official duty.
[10] Under *Law no. 234/2012*, the State has a right of financial redress to the regions, provinces and other public authorities responsible under national constitutional law for the infringement of EU law (see http://www.loc.gov/law/foreign-news/article/italy-civil-liability-of-judges/). However, Article 43(10) of this Law extends the right of redress to violations of the ECHR as well, but the provision is very rarely applied.
[11] See *Courts of Justice Act of 1915* (last amended in 2007), Article 200 on liability for negligent or otherwise inappropriate acts during *i.a.* court proceedings.
[12] See *Law on amendments to the Law on Judges* (entered into force on 21 November 2013), Article 6.
[13] In October 2015, Spain repealed a law providing for the possibility of personal liability of judges, see SG/Inf(2016)3rev Challenges for judicial independence and impartiality in the member states of the Council of Europe. http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp
[14] See the *Tort Liability Act* from 1972 with general provisions (Chap. 4 par. 1) on liability and recourse.
[15] See also CCJE *Opinion no. 3*, paragraph 56.
[16] See *Report on the Independence of the Judicial System Part I: The Independence of Judges*, paragraph 61.
[17] Application no. 19673/03, 12 June 2012.
[18] Application no. 5682/06, 5 May 2015.
[19] See, among many authorities, *Tyrer v. the United Kingdom*, Application no. 5856/72, 25 April 1978, § 31, Series A no. 26.

19. The central question here is how to approach demands for more judicial accountability while safeguarding the fundamental principle of judicial independence.

20. Article 66 of Recommendation CM/Rec(2010)12, mentioned above, balances the judge's independence and liability in the following manner: *"The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence."*

21. The Consultative Council of European Judges (CCJE), in its Opinion no. 18 on the position of the judiciary and its relation with the other powers of state in a modern democracy, has also consistently held that the: "*tasks of interpreting the law, weighing of evidence and assessing the facts that are carried out by a judge to determine cases should not give rise to civil or disciplinary liability against the judge, save in cases of* ***malice, wilful default or, arguably, gross negligence*****.**" (bold added). The CCJE had already adopted a cautious approach in this respect in its Opinion no. 3 (2002), where it supports legislation that allows, on the one hand, a claim for recourse action by a State against a judge where the judge's misconduct has been established in criminal or disciplinary proceedings but, on the other, only in the presence of wilful deceit or gross negligence.[20]

22. The Venice Commission holds the same view in its Report on the Independence of the Judicial System Part I: The Independence of Judges[21] as well as in its individual opinions. For instance, in the Opinion on draft amendments to laws on the Judiciary of Serbia (2013), the Venice Commission was positive about the amendments made to the laws on the judiciary, which provided for the liability of judges (to pay damages), but added the requirement that the damage at stake "*was caused with intention or extreme negligence*".[22] In paragraph 22, the opinion sets out that*: "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. […] Finally, it 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."*

23. In its Opinion on the laws and the disciplinary liability and evaluation of judges of "the former Yugoslav Republic of Macedonia" (2015), the Venice Commission stated that it is possible to recognise "*a blatant lack of professionalism"* only in the case of "*stubborn resistance against an enhanced practice which leads to a repeated overturning in cases where there is well-established and clear case-law."*[23]

24. The general tendency, therefore, is in favour of the admissibility of judges' liability, but only in the presence of a culpable mental state of the judge (intent or gross negligence). Hence, with respect to the liability of judges brought about by a negative judgment by the ECtHR, either their intent or gross negligence must be shown, it cannot be bases on the mere fact of the adoption of a judgment by the ECtHR.

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[20] See *CCJE Opinion no. 3 (2002) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality*, paragraph 56.
[21] Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e, paragraphs 59-61.
[22] See Venice Commission, *Opinion on draft amendments to laws on the Judiciary of Serbia*, CDL-AD(2013)005, paragraph 20, but also paragraphs 17-23, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)005-e,
[23] See Venice Commission, *Opinion on the laws and the disciplinary liability and evaluation of judges of "the former Yugoslav Republic of Macedonia"* (CDL-AD(2015)042), paragraph 47, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)042-e,

III. Analysis of the relevant Moldovan legislation

A. General remarks

1. Background

25. The right to State recourse action existed in the Republic of Moldova prior to Law no. 151/2015, under Article 17 of the Law on Government Agent no. 383 of 18 October 2004. Article 17 provided for recourse action by the State where a person's activity intentionally or due to serious fault led to a negative judgment by the ECtHR or friendly settlement (there is no mention of unilateral declarations), [24] and this was based on a national court judgment.[25] At the time, this was notified to the Prosecutor General and the Supreme Council of Magistracy (SCM) by the Government Agent. This type of recourse action was carried out by the Prosecutor General (not the Ministry of Justice, as it is now under Law no. 151/2015) and could only be done with the consent of the SCM. The entire procedure was severely criticised by the SCM as violating judges' independence.

26. It therefore seems that the former Law on Government Agent did require individual guilt to be determined by a court of law. The Venice Commission is unaware as to why this requirement was left out of Article 27 of Law no. 151/2015.

27. The Law on the Status of Judges (1995) defines misconduct of judges, under Article 22, as arising when there is an intentional uneven application of the law or due to gross negligence. Article 19.3 of this Law makes it clear that a "*judge shall not be held liable for his/her opinions expressed in justice making and for judgments s/he passed unless s/he is found guilty of criminal abuse by final sentence"* (emphasis added). This Law was not rescinded by Law no. 151/2015. Under Article 19.3 of the Law on the Status of Judges, judges are granted functional immunity by limiting their liability to criminal abuse and by requiring individual guilt to be determined by a final sentence in a court of law. This limitation of judges' liability is similar to that found in the above-mentioned European standards, and Article 19.3 of the Law on the Status of Judges is in line with these standards.

28. In a broader context, another relevant text is the Moldovan Civil Code (2002), which provides for general regulations on recourse action. Article 1415.2 sets out that *"The State, when repairing damages under Article 1405, is entitled to institute proceedings regarding the recourse actions against law enforcement officials within criminal investigation bodies, prosecutor's offices or courts of law* ***if their guilt is ascertained by a judicial sentence"*** (bold added). Here too, an individual's guilt is to be ascertained by a "*judicial sentence*". This is a civil action, but its application appears to be contingent on a preceding criminal conviction of the judge for certain illegal acts enumerated in Article 1405 of the Civil Code.

29. However, the phraseology of Article 1405 of the Civil Code is slightly problematic and uncertain as "*sentences*" do not necessarily follow from determinations of guilt and it offers no

[24] Although prior to Law no. 151/2015, the Moldovan legislative framework did not provide for recourse action by the State where a unilateral declaration of the Government was made before the ECtHR, this unilateral declaration could be brought before it where a friendly settlement was unsuccessful and where the respondent Government acknowledged that there was a violation of the ECHR and undertook to provide the applicant with redress. On the national level, a unilateral declaration by the Government in a pending case before the ECtHR against the Republic of Moldova therefore had similar results to a friendly settlement. It should also be noted that, even if the ECtHR accepted unilateral declarations made by the respondent Government resulting in the pending application being struck out under Article 37.1 ECHR, unilateral declarations were only introduced in the Rules of Court on 2 April 2012 (Rule 62A).

[25] Article 17 of *Law on Government Agent no. 353* of 18 October 2004, which was repealed, provided that:
"***Article 17*** *– (1) The State enjoys the right of recourse actions against persons whose activity,* ***intentionally or due to serious fault****, served as grounds for the adoption of the judgment on mandatory payment of the amounts established by a judgment of the Court or by an agreement on the friendly settlement of the case.*
(2) The amounts established by a judgment of the Court or by the agreement on friendly settlement of the case shall be returned entirely, ***on the basis of a judgment,*** *by persons who, intentionally or due to serious fault, have led to the mandatory payment of these amounts by the Republic of Moldova."* (emphasis added).

guidance as to what kind of "*sentence*" is envisaged as capable of triggering the recourse. Unless this judicial "*sentence*" is an ambiguous translation, which could more usefully be translated as a judicial *"determination*".

2. Recent developments

30. The Council of Europe, since March 2014, has focused its intervention in the Republic of Moldova on addressing major issues and shortcomings in the Moldovan national judicial system that are preventing the proper application and implementation of ECHR standards.[26]

31. At the beginning of 2015, the new Moldovan government announced that it would carry out extensive reforms and one of the aspects it would focus on, is to avoid receiving judgments against the Republic of Moldova from the ECtHR. This appears to be the impetus behind the introduction of Article 27 of Law no. 151/2015,[27] which was adopted by the Moldovan Parliament on 30 July 2015 and entered into force on 21 August 2015.

32. The provision on recourse in Article 27 of Law no. 151/2015 broadens judges' liability as compared to the limitations in Article 19.3 of the Law on the Status of Judges (1995). Recourse proceedings may be instituted against any "*persons*", which thus could include judges, whose "*actions or omissions have led or significantly contributed to*" a violation of the ECHR (Article 27.1). These liability criteria appear to be a purely formal requirement to initiate recourse proceedings, as they do not require individual guilt to be proved. Moreover, according to Article 27.3, the Ministry of Justice must institute recourse proceedings if these conditions are met. The requirement in Article 27.2 of a *"judicial decision, proportionally to the degree of guilt*" relates to quantum i.e. the amount to be returned by the individual, not to the grounds for individual liability.

33. Yet, it is also evident that Article 27 is not confined to quantum, since it implies the existence of guilt, which sets the yardstick for the amount to be returned in proportion to the degree of liability found. This means that an actual evaluation of the judge's guilt is needed, which leads to the conclusion that recourse could only be required on the basis of a special judicial ascertainment of a link between the ECtHR judgment (or friendly settlement or unilateral declaration by the State) and the actions of the "*persons*" concerned.

34. Article 27 of Law no. 151/2015 is nonetheless incomplete, since it does not directly deal with intent or negligence. But, perhaps Article 27 is intended to apply in conjunction with Article 25.2 for the implementation of individual liability, which requires that "*guilt and liability of individuals*", presumably also of judges, be determined in each particular case and must be established by the authorities competent to adopt decisions on criminal, administrative, disciplinary and civil liability. However, there is no explanation as to which authority this provision refers to, Article 25.2 merely states "*the authorities that are competent under the law*" – with no indication as to which law.

35. It is also not clear how Article 25, if at all, relates to the recourse action under Article 27 – as this is not explained in the law. According to the comments the rapporteurs for this *amicus curiae* brief received from the Ministry of Justice, the recourse action against the seven judges only refers to the conditions set out in Article 27.3 of Law 151/2015.

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[26] See GR-DEM(2015)27 final (3 February 2016), *Council of Europe Action Plan to support democratic reforms in the Republic of Moldova 2013 – 2016 Progress Review Report Document,* prepared by the Office of the Directorate General of Programmes, p. 17. https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2884852&SecMode=1&DocId=2344730&Usage=2

[27] *Moldova's governmental agent's activity to be optimised* (9 April 2015), http://www.gov.md/en/content/moldovan-governmental-agents-activity-be-optimised

36. If we were to conclude that Article 27 can stand on its own and directly allow recourse proceedings by the State for the amount of damages caused by the behaviour of a judge, the fact that this provision is incomplete is a serious problem. It is missing the identification of guilt, which apparently only implies that a judge is subject to recourse action on the mere basis of a judgment by the ECtHR finding a violation of the ECHR. But, according to European standards on the matter, the liability of judges cannot legitimately derive from the ECtHR's judgment alone, even if the ECtHR found a breach of the ECHR.

37. The Venice Commission and OSCE/ODIHR have clearly stated in an Opinion of 2014, that *"it is essential to ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of the initiation of prosecution or civil action by an aggrieved party, including states authorities".*[28] In that Opinion, the protection of judges from liability for their decisions is seen *"as an essential corollary of judicial independence and is expressed as a functional immunity".*[29]

38. As provided for in the Rule of Law Checklist (2016), offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s).[30]

39. Therefore, if the legislator intends to introduce judges' liability for their decisions, the legislator cannot derive their obligation to pay damages caused by their behaviour from the mere ascertainment of the violation of the ECHR found by the ECtHR only. The legislator must provide for a new procedure aimed at analysing the behaviour of the judge concerned and his or her psychological or mental state.

40. The ECHR only establishes the liability of the defendant State. It cannot reasonably be said or presumed that the primary focus of the ECtHR's jurisprudential role in dealing with the case of any applicant before it would be to assess, quantify and review the nature or degree of guilt (criminal abuse or criminal intention or gross negligence) on the part of each of those judges whose decisions in the national courts was brought before the ECtHR. That has to be the object of a different, internal judicial procedure.

41. It must be remembered that the matter which is before the ECtHR is not the prosecution of the judges involved in the case at the national level. Therefore, even following any determination of that Court in the applicants favour (including the finding of a violation) would not of itself meet the standard required for determining the individual's criminal culpability, as the case is not procedurally framed as a prosecution of the wrongdoing of the individual or judge.

42. The recourse action under Article 27 of Law no. 151/2015 is entrusted to the State and, in particular, to the Ministry of Justice. However, this separate recourse action and the following procedure are only meaningful if they examine the behaviour of the judge concerned and not only the mere finding of a violation of the ECHR by the ECtHR.

43. It seems as if Article 27 effectively imposes a strict liability on national judges for their decisions to be in line with the ECHR. Liability is contingent on a future decision by the ECtHR, a friendly settlement by the State in a case before the ECtHR or even a unilateral declaration by the State in such a case. There seems to be no requirement of individual guilt in relation to the

[28] See Venice Commission – OSCE/ODIHR, *Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic* (CDL-AD(2014)018), paragraph 37, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)018-e
[29] Ibid.
[30] See Venice Commission, *Rule of Law Checklist* (CDL-AD(2016)007), paragraph 78 http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e

judge's application of the law according to professional standards defined by law, such as Article 15 of the Law on the Status of Judges.

44. On 27January 2016, the Ministry of Justice announced, on its official website, that it had initiated recourse action under Law no. 151/2015 against 37 individuals (judges, prosecutors and other officials). These individuals will have to indemnify the Moldovan State for the moral and material damage caused and repair the violation of rights of the citizens and businesses affected.[31]

45. Further developments have taken place in relation to the Moldovan judiciary. These include two draft laws amending provisions of the Constitution, in order to enhance the independence, impartiality and transparency of the judiciary, which were approved by the cabinet of ministers on 6 April 2016. These changes altered the previous measure, whereby judges were appointed for a five-year term and also altered the method of selection of judges by the Supreme Court. The Supreme Court henceforward will be appointed by the Head of State at the proposal of the SCM. As a result of the changes, judges will only be entitled to functional immunity. These changes were introduced on the basis of the National Action Plan on the implementation of the Moldova-EU Association Agreement and the Strategy for Justice Reform for 2011-2016.[32]

B. Constitutional admissibility of the liability of judges

46. In a state governed by the rule of law, the principle of judicial independence comes with several guarantees, which are vital to the institutional and individual judicial independence and without which the effective and impartial functioning of the courts would be impossible.

47. The Moldovan Constitution has lacunas when it comes to the status of judges, i.e. it does not describe the content of the guarantees for the independence of judges. There are other similar examples to the Moldovan one in the constitutions of other European countries.[33] In some countries, the constitution directly delegates the regulation of the status of judges to the legislator,[34] while in others the constitution extensively and precisely defines the guarantees for the independence of judges and their scope.

48. Although international texts (including the Venice Commission's Report on the Independence of the Judicial System) state that *"the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts*",[35] neither of these methods are considered inappropriate.

49. Since Article 27 of Law no. 151/2015 is being challenged as to its compliance with Article 116 of the Moldovan Constitution, this provision must be examined. Article 116.1 of the Moldovan Constitution states that judges, sitting in courts of law, are *"independent*", and stipulates further, in Article 116.6 that "*sanctioning of the judges*" may only be "*carried out pursuant to the law"*. The sanctioning of the judges, including holding judges liable for recourse, may thus be compatible with the constitutional principle of judges' independence, but only pursuant to the law.

50. However, holding judges liable for the application of the ECHR, without any assessment of individual guilt, may impact their constitutional obligation of impartiality (Article 116.1 of the Constitution). It could lead to the situation where Moldovan judges, fearful of recourse action for

[31] See Links 1: http://justice.gov.md/libview.php?l=ro&idc=4&id=2883;
Links 2: http://justice.gov.md/libview.php?l=ro&idc=4&id=2995
[32] See http://www.gov.md/en/content/moldovan-government-approves-constitutional-amendments-enforce-justice-reform
[33] Constitution of the Czech Republic, Constitution of the Republic of Lithuania, Constitution of the Republic of Latvia, Constitution of the Kingdom of Spain.
[34] Constitution of the Italian Republic, Constitution of the Republic of Croatia (regarding immunity).
[35] Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004.

violations of the ECHR, consistently interpret the law in favour of the private party, even when an objective assessment of the legal question could, and even should, have led to a different outcome.

51. As the Constitution outranks all other laws according to the principle of *lex superior,* Article 116 is therefore an overriding legal provision.

52. This *amicus curiae* brief will now consider the interaction between the other relevant laws.

C. Applicability of Law no. 151/2015, the Law on the Status of Judges and the Civil Code

53. While the status and application of Law no. 151/2015, the Law on the Status of Judges and the Civil Code fall within the exclusive remit of the Moldovan courts, it is nevertheless of interest to analyse the interaction between the relevant laws on the issue at hand.

54. Articles 15.3, 19.3 and 21-23 of the Law on the Status of Judges (1995) as well as Article 27 of Law no. 151/2015 and Article 1415 of the Civil Code (2002) all seem to regulate judges' liability. But, what is their status i.e. which law merits primacy and how do they relate to each other?

55. These three laws could all be considered organic laws pursuant to Article 72 of the Constitution. If we consider all three laws to be organic laws and therefore on the same level in the Moldovan hierarchy of laws, which one prevails in respect of judges?

56. The provisions of the three laws must therefore be analysed under the principles of *lex generalis, lex specialis* and *lex posterior*.

57. Article 1415.2 of the Civil Code applies to "*law enforcement officials within courts*", a term which may include judges, but Article 15.3 of the Law on the Status of Judges provides that, where a judge does not comply with his or her obligation, s/he shall be held liable under this law. This wording seems to include civil liability and recourse action is a civil action.

58. The Law on the Status of Judges (1995) was not amended when the Civil Code (2002) came into force. One may argue that, according to *lex posterior,* the provision in the Civil Code has primacy, but according to *lex specialis,* the provision in the Law on the Status of Judges has primacy.

59. Article 27 of Law no. 151/2015 uses the term "*persons*", which may include judges. Did the legislator intend to include the liability of the original author of the breach and all subsequent persons who did not remedy the situation, but were in a position to and had the responsibility of doing so (or is it a mere chain of causation, where the last person having acted or omitted to, is liable)? This is also not entirely clear.

60. Although Law no. 151/2015 seems in general to be part of administrative law, this provision has a civil-law character that seems to be applicable under or in parallel with the Civil Code provision.

61. The relationship between Law no. 151/2015 and the Law on Status of Judges (1995) is of interest. According to *lex posterior,* the provision in Law no. 151/2015 has primacy. But, it could be argued that according to *lex specialis,* the provisions in the Law on the Status of Judges (Article 15.3 in connexion with Article 19.3) have primacy – Article 19.3 limits the liability to cases where the judge is found guilty of criminal abuse by a final sentence. By its scope, contents and wording, this Law seems to be the special law for judges, regulating the exercise of their judicial function.

62. In addition, Article 15.3 of the Law on the Status of Judges clearly presupposes that the liability of judges is to be regulated by this Law: *"If a magistrate does not comply with his/her obligations, s/he shall be held liable under **this law**"* (bold added). The wording makes it clear that the Law on the Status of Judges is specifically intended to regulate judges' liability. Moreover, among the obligations listed in Article 15.1 is "*c) … to ensure uniform interpretation and application of legislation"*. The wording indicates that this Law was intended to regulate all situations of wrongful application of the law, in this case the ECHR. Grounds, limits and procedures for disciplinary liability are further defined and regulated in Article 21-23. According to the translation of this Law, a provision in Article 21 on pecuniary liability existed, but was repealed in 2012.

63. There is nothing in the final and transitory dispositions in Law no. 151/2015 to indicate that it should have primacy over the special regulation of judges in the Law on the Status of Judges. On the contrary, Article 30.3 seems to presuppose that conflicting legislation must be formally amended for Law no. 151/2015 to have primacy.

64. Regulating judges' liability in different legal instruments is not a problem in itself. It only becomes a problem if different regulations on the same issue are incompatible, in this case by applying different standards of liability. The fact that Law no. 151/2015 seems to allow for recourse action without ascertaining individual guilt by a final sentence, may undermine judges' functional immunity as defined in the Law on the Status of Judges.

65. This formal analysis reveals what appear to be weaknesses and a lack of clarity in the different parts of the Moldovan legislation aimed at regulating the matter.

66. Since the constitutional principle on the independence of judges is a substantial legal provision, the provisions on the liability of judges (including recourse action) in the administration of justice must be clearly limited and exhaustively legally regulated or enunciated in a special law on the judiciary. If such a special law exists and it has provisions on judges' liability, then these provisions should be presumed to be exhaustive and to prevail according to the principle of *lex specialis*. This would exclude the possibility of applying other laws of a more general nature or concerning other officials than judges on this matter. The Law on the Status of Judges could be presumed to be that special law – a law where the judge must be found guilty of criminal abuse by a final sentence to become liable.

67. This would mean that Law no. 151/2015 is not compatible with the limits on the liability of judges stipulated under the Law on the Status of Judges. If the limits for the civil liability of judges are drawn with care and restrictively, such liability, including recourse action, could be regarded as fully compatible with the principle of the independence of judges. However, the Law on the Status of Judges fails to provide for civil liability of judges, including recourse. Even if it would instead be acceptable under the Constitution to regulate these obligations in another law than in a special organic law on the judiciary, it is questionable whether Law no. 151/2015 could be applicable to judges outside the scope of the Law on the Status of Judges.

68. It may forcefully be argued that the regulation of judges' liability in other laws should comply with the limitations in Article 19.3 of the Law on the Status of Judges. The strict liability for judges introduced by Law no. 151/2015 does not sit well with the constitutional and general legal framework for judges. If there is to be substance in the constitutional principle of judges' independence, and keeping in mind that Article 116.6 of the Constitution specifically requires that the sanctioning of judges be regulated by law, the liability of judges should be defined and limited by law in a clear and coherent manner. Such a legal framework is provided in the Law on the Status of Judges only.

D. Article 27 of Law no. 151/2015 in the light of European standards

69. Finding the right balance between judicial accountability and the safeguard of judicial independence is a difficult task. The Venice Commission has always been in favour for judges to be accorded functional immunity[36], so as to allow them to exercise their function according to professional standards without being exposed to individual liability, except in cases of malice or gross negligence. The professional standards according to which judges are to exercise their function must be clearly defined by law.

70. The Republic of Moldova's recourse action, under Article 27 of Law no. 151/2015, may be initiated following a judgment by the ECtHR finding a violation of the ECHR or a friendly settlement of the case before the ECtHR or a unilateral declaration. With regard to the judgment, we have seen above that, according to European standards on the matter, the liability of judges cannot legitimately derive from the ECtHR's judgment alone, even if the ECtHR found a breach of the ECHR. A finding of guilt by a national court is needed.

71. With respect to friendly settlements and unilateral declarations, the situation is even more complicated. From the perspective of the government, a friendly settlement of a case before the ECtHR, or a unilateral declaration acknowledging a violation of the ECHR, may be motivated by political considerations more than legal ones. If national judges are subsequently held liable for the government's decision without ascertaining individual guilt in the exercise of their judicial function, judges are not only vulnerable to external influence by the government, but may also become liable for reasons beyond the exercise of their judicial function.

72. In addition, when the ECtHR finds a violation of the ECHR, it does not necessarily follow that judges at the national level should be criticised for their interpretation and application of the law and thus blamed for the violation. Moreover, ECHR violations often do not result from the negligence or fault of a judge, but stem from systemic shortcomings in the member States, e.g. length of proceedings cases, in which personal liability cannot be raised.

73. Furthermore, the living instrument doctrine of the ECtHR, mentioned above, means that this Court may be, *inter alia*, bolder and more dynamic in its interpretation of the ECHR than national courts, making it difficult for national courts to predict how the ECtHR will rule.

74. For all of these reasons, a recourse procedure under Article 27 of Law no. 151/2015 may lead to arbitrary results where the liability of national judges is nothing more than a corollary of a judgment by the ECtHR finding a violation of the ECHR.

75. Liability without individual guilt proven by a judicial sentence interferes with judges' professional freedom to interpret the law, to assess facts and to weigh evidence in individual cases, as recognised by European standards. According to these standards, erroneous decisions should be challenged through the appeals process and not by holding the judges individually liable, unless the error is due to **malice or gross negligence by the judge**.

IV. Conclusion

76. This is an *amicus curiae* brief for the Constitutional Court of the Republic of Moldova. As such, it does not have the intention of taking a final stand on the issue of the constitutionality of Article 27 of Law no. 151/2015, but merely provide the Court with material as to the compatibility of this provision with European standards and with elements of comparative

[36] See Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges*, CDL-AD(2010)004, paragraph 61; *Amicus curiae brief on the immunity of judges for the Constitutional Court of Moldova* (CDL-AD(2013)008), paragraph 18.

constitutional law, so as to facilitate the Court's consideration of this provision under the Constitution of the Republic of Moldova. It is the Constitutional Court of the Republic of Moldova that has the final say on the binding interpretation of the Moldovan Constitution and of national laws' compatibility with this text.

77. The question addressed to the Venice Commission by the Constitutional Court of the Republic of Moldova:
"whether a judge can be held individually liable for judgments rendered on the national level, which are appealed to the European Court of Human Rights and result in a finding of a violation of the European Convention on Human Rights by the member State, either by a judgment, a friendly settlement or a unilateral declaration, without an actual finding of guilt by a national court against the individual judge concerned; or whether this is an inadmissible interference in the procedural guarantees of judges, in breach of the principle of the independence of judges"
may be answered as follows:

a) Judges' liability is indeed admissible, but only where there is a culpable mental state (intent or gross negligence) on the part of the judge.
b) Liability of judges brought about by a negative judgment by the ECtHR should therefore only be based on a national court's finding of either intent or gross negligence on the part of the judge. The judgment of the ECtHR should not be used as the sole basis for judges' liability.
c) Even more so, liability of judges brought about by a friendly settlement of a case before the ECtHR or a unilateral declaration acknowledging a violation of the ECHR, must be based on a finding by a national court of either intent or gross negligence on the part of the judge. All the more so as these may be (partly) motivated by political considerations.
d) In general, judges should not become liable for recourse action when they are exercising their judicial function according to professional standards defined by law (functional immunity).
e) A finding of a violation of the ECHR by the ECtHR does not necessarily mean that judges at the national level can be criticised for their interpretation and application of the law (i.e. violations may stem from systemic shortcomings in the member States, e.g. length of proceedings cases, in which personal liability cannot be raised).
f) Also, the living instrument doctrine of the ECtHR gives this Court the power to be bolder and more dynamic in its interpretation of the ECHR than national courts, making it difficult for national courts to predict how the ECtHR will rule.

78. For the above reasons, a recourse procedure against judges may lead to arbitrary results where the liability of national judges is nothing more than a corollary of a judgment (or friendly settlement or unilateral declaration) by the ECtHR finding a violation of the ECHR.

79. Furthermore, holding judges liable for the application of the ECHR without any assessment of individual guilt may have an impact on their independence, which includes giving them the professional freedom to interpret the law, assess facts and weigh evidence in each individual case. Erroneous decisions should be challenged through the appeals process and not by holding judges individually liable, **unless** the error is due to **malice or gross negligence by the judge**.

80. The liability of judges may be compatible with the principle of judges' independence, but only pursuant to the law. However, the relevant law must not conflict with the overarching principle of the independence of judges.

81. Finally, holding judges liable for the application of the ECHR without any assessment of individual guilt may also impact their obligation of impartiality and could even lead to a "chilling effect" on Moldovan judges, fearful of recourse action for violations of the ECHR.

82. The Venice Commission remains at the disposal of the Constitutional Court or other authorities of the Republic of Moldova for any further assistance they may need.