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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

"THE FORMER YOUGOSLAV REPUBLIC OF MACEDONIA"

DRAFT OPINION

ON THE DRAFT LAW AMENDING THE LAW ON COURTS

on the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Mr Philip DIMITROV (Member, Bulgaria)
Mr Ciril RIBIČIČ (Member, Slovenia)
Mr Andras Zs VARGA (Member, Hungary)

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Contents

I. Introduction

1. By letter of 28 November 2018, Mr Zoran Zaev, the Prime Minister of "the former Yugoslav Republic of Macedonia" requested the Venice Commission to provide an opinion on the Draft Law amending the Law on Courts (consolidated version) (hereinafter the "Draft Law", CDL-REF(2018)62).

2. Messrs R. Barrett, P. Dimitrov, C. Ribičič, and A. Varga were invited to act as rapporteurs. The present opinion was prepared on the basis of a translation of the Draft Law provided by the national authorities. Inaccuracies may occur in this opinion as a result of incorrect translations.

3. Due to the limited time available for the preparation of the present opinion, this opinion was prepared without a visit to Skopje. The authorities submitted some clarifications during a videoconference with the Secretariat of the Venice Commission which took place on 26 November 2018.

4. This opinion was *adopted by the Venice Commission at its … Plenary Session (Venice, … 2018)*.

II. Previous opinions on the Law on Courts and the scope of the present opinion

5. This opinion follows three opinions by the Venice Commission concerning the judiciary of "the former Yugoslav Republic of Macedonia", adopted in 2015, 2017 and 2018: see CDL-AD(2015)042,[1] CDL-AD(2017)033,[2] and CDL-AD(2018)022[3] accordingly.

6. In the 2015 opinion, the Venice Commission assessed the Law on Courts (which is being amended now) and the Law on the Judicial Council (JC). Insofar as the Law on Courts is concerned, the Venice Commission focused on the disciplinary violations and sanctions.

7. In the 2018 opinion, the Venice Commission again examined the Law on Courts and the Law on the JC. The recommendations regarding the Law on Courts related to the suspension of judges pending disciplinary procedures (§ 27), grounds for disciplinary liability of judges (§§64 and 67-70), grounds for the dismissal of court presidents (§§ 71 and 81), effects of the ECtHR judgments in the context of disciplinary liability of judges (§§ 72-77), and eligibility requirements for judges (§ 80).

8. The Draft Law under examination in the present opinion implements many of the earlier recommendations of the Venice Commission. However, the focus of the present opinion is narrower than that of the previous opinions, since the Venice Commission was only asked to examine the proposed amendments to the Law on Courts, and not to the Law on the JC. As it was explained by the authorities, amendments to the Law on the JC are envisaged and are being discussed within the Government; the Venice Commission is ready to consider them in due course.

9. In the interests of conciseness, the present opinion focuses mainly on problematic areas rather than on the positive aspects of the Draft Law. Minor changes, which seem to be reasonable, are not commented upon.

[1] Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia"
[2] Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for judges, on the Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection
[3] Opinion on the Laws amending the Law on the Judicial Council and the Law on Courts

10. In general, the Draft Law improves the current Law on Courts and follows the recommendations of the 2015 and 2018 opinions. Amendments increase coherence and clarity of the Law on Courts. However, some new issues appear in the Draft Law.

III. Analysis

A. The subject matter of the Law on Courts

11. First of all, the Venice Commission observes that there is a good deal of overlapping between the Law on Courts and the Law on the JC. In some places the two laws regulate the same issues. For example, the selection, termination of office and dismissal of judges and lay judges are partly regulated by the Law on Courts and partly by the Law on the JC (compare Article 73 of the Law on Courts and Article 47 of the Law on the JC,[4] or Article 74 of the Law on Courts and Article 53 of the Law on the JC). For the future it would be useful to delineate more clearly the matters which are regulated by the Law on Courts, and those which are regulated in the Law on the JC, and avoid any parallelism and overlapping between the two.

B. Specific comments

1. Selection of judges (Articles 45 and 46)

12. Article 45 sets out eligibility criteria for a judicial office. Amongst others, it requires that a candidate has to *know* English, French or German. The previous requirement of *fluency* in one of those languages was criticised in the 2018 opinion as too demanding (§ 80); the Draft Law replaces it by a requirement of "knowing" one of them, which is welcome.

13. The Draft Law adds to Article 45 § 1 a new eligibility criterion: a candidate should not have been convicted by a final judgment for an offence for which at least six months of imprisonment is provided for, and should not be banned from exercising legal profession. This is a welcome amendment as it brings consistency with Article 73 § 1 which mentions those conditions as a ground for the automatic termination of the judicial office.

14. Article 46 of the Draft Law enumerates new eligibility criteria for the appointment of judges to courts of first instance, courts of appeal, the Administrative Court, the Higher Administrative Court and the Supreme Court. The selection procedure is explained in detail in the Law on the JC (Articles 39 et seq.). The Draft Law also sets out eligibility criteria for the appointment of judges of a court of first instance and an appellate court to another court of the same degree. These are useful clarifications.

15. The Draft Law proposes for the judges of the Administrative Court to have six years of experience in the Administrative Court to be elected to the Higher Administrative Court (compared to three years under the current Law). This amendment is welcome in so far as it brings to the Higher Administrative Court more experienced judges.

2. Selection of the president of court (Article 47)

16. According to Article 47 of the Law currently in force, the president of court shall be selected under the same conditions and following the same procedure as those applied for the selection of a judge to the respective court. Under the Draft Law, to be selected as president the judge should have six years' experience in the court of the same degree or a higher degree. For the President of the Supreme Court it means that only a judge having six years' experience in the Supreme Court may become a President. The question is whether there is a sufficiently large

[4] CDL-REF(2018)028

pool of potential candidates to compete for the position of the President of the Supreme Court, given this criterion.

17. Article 47 § 4 removes the duty of candidates for presidency of a court to specify measurable parameters and time-frames for the realisation of the objectives of the work programmes that they have to annex to their application when they compete for the position of a president. This amendment follows the recommendation of the 2018 opinion (§ 81). Although a candidate still has to attach a work programme to his/her application, the failure to implement it is removed by the Draft Law from the list of grounds for the dismissal of the president of court (see Article 79 § 1 p. 8), which is a reasonable approach.

3. Temporary re-assignment and permanent transfer of judges (Articles 39 and 40)

18. The Draft Law makes a clarification in Article 39 § 9 regarding the assignment of a judge of an appellate court or a basic court by the JC to another court of the same or lower level, for a period of one year at the most. The proposed rule stipulates that, after expiration of the period for which a judge is assigned to another court, s/he will return to her/his former court. A similar sentence should be added, for the sake of consistency, to paragraph 8 of this same Article, which regulates the temporary assignment of a judge to another division within the same court by a decision of the president of court.

19. The re-assignment within the same court can be ordered when this is required by an increase of the workload of one of the divisions. As for the re-assignment to another court, it should be necessitated by the ill-functioning of that another court caused by the "recusal of a judge, [...] significantly increased workload, reduced efficiency, or due to the complexity of the cases". These grounds are reasonable: pursuant to § 3.4 of the European Charter on the Status of Judges, a judge can exceptionally and temporarily be assigned to reinforce a neighbouring court. The maximum duration of such an assignment should be strictly limited. Article 39 §§ 8 and 9 limits the temporary assignment of a judge to a one year period at the most. However, there is no guarantee that the same judge will not be re-assigned once again after the expiry of the previous one year period. In order to avoid that, it would be advisable to provide for an additional limit, e.g. a judge can be re-assigned every five years for a maximum period of one year.

20. The re-assignment to another court is ordered by the JC; the judge concerned has the right to file a complaint against the re-assignment, but this complaint goes to the JC itself (Article 39, § 12), which does not make sense. It should be possible to file an appeal against the re-assignment decision of the JC to another body, for instance, to the Appeals Council established under Article 96 of the Law on the Judicial Council.

21. As for the permanent transfer of a judge, it can be decided by the JC only in the event of "abolishment or reorganisation of a court". The judge can be transferred to another court of the same or lower instance (Article 40). The Law is silent on whether this decision may be challenged. Nor is it clear what happens if the judge does not agree with the transfer and as a consequence refuses to go to his/her new workplace. It would be useful to clarify these points.

22. The Venice Commission has previously pointed out that judges must not be under the threat of being transferred from one court to another, as this threat might be used to exert pressure on them and to attack their independence.[5] Therefore, transfer against a judge's will may be permissible only in exceptional cases.[6] Paragraph 52 of Recommendation

[5] 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, § 76.
[6] *Ibid.*

CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe states that "a judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system." In the same vein, the European Charter on the Status of Judges, § 3.4, stipulates that transferring a judge against his/her will is an exception permitted "in the case of a lawful alteration of the court system".

23. The notion of "reorganisation" of a court might be interpreted in a way that makes the transfer of a judge possible on the grounds of minor changes that do not in reality necessitate such a transfer. Such broad interpretations should be avoided; it is advisable to interpret this notion in the strictest sense of the term, i.e. covering only major restructuring of the court system making the transfer inevitable, so as to ensure that transfer will not be used as a threat against judges. Furthermore, in order to avoid abuses, the law should provide for the right of appeal against such decisions.[7]

24. It could also be argued that a judge should not be transferred against his/her will to a lower court. A provision guaranteeing this principle and the principle of securing the same level of salary for the judge as in his/her current position would also be welcomed.[8] This is all the more necessary as Article 60 § 1 mentions the type of a court where the judge serves amongst the factors to be taken into account for determination of the judge's salary.

4. Termination of the judicial office (Article 73)

25. The most significant amendments are made to Articles 73 – 79 of the Law on Courts, which regulate conditions in which the office of a judge is terminated (Article 73), grounds for dismissal (Articles 74 - 76), grounds for disciplinary liability and lesser disciplinary sanctions (77-78), and grounds for disciplinary liability of court presidents (Article 79).

26. Article 73 is dealing with the termination of the judicial office for objective reasons: personal request, incapacity, conviction for a crime, etc. The Law currently in force stipulates that in the event of the "election or appointment [of a judge] to another public office" the JC terminates the judge's office. The Draft Law proposes to replace this wording by a more general reference to "the conditions referred to in Article 52". This reference is problematic, and that is for the following reason: Article 52 deals with the incompatibility of the judicial office with some other occupations. Some of the provisions of Article 52 are clear and cannot give rise to any contestation. Thus, the judge cannot be an MP or a manager of a private company (see §§ 1 and 3 accordingly).

27. However, some of the paragraphs of Article 52 describe less evident situations, where it is necessary to assess to what extent the parallel occupation of a judge is incompatible with his/her status. In particular, the judge should not "use his office or the reputation of the court to accomplish his personal interests" (Article 52 § 6). This is not an "incompatibility" situation, but rather a breach of ethical and even disciplinary rules, which would require the JC to assess the facts more closely and to exercise discretion. By itself, this rule is reasonable, but it should not be assimilated with cases of *automatic* termination of the judicial office, for which the JC has ten days to decide (under Article 73 § 2). This situation may, under certain conditions, become a ground for the dismissal under Articles 75 or 76, or give rise to a lesser disciplinary sanction under Articles 77 and 78; but any decision taken under Article 52 § 6 should then follow the logic of *disciplinary proceedings*.

[7] *Ibid.,* § 79.

[8] See 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; CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, § 52 and CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, § 23

28. Article 73 § 2 of the Draft Law sets a time limit of ten days for the JC to decide on the termination of the judicial office. This time-limit starts running from the day when conditions referred to in Article 73 § 1 are met. Article 73 § 1 refers, amongst others, to the conditions laid down in the aforementioned Article 52. As it will not always be possible for the JC to get informed about a violation of Article 52 within the short period of ten days, it is recommended that the said time-limit starts running from the day on which the JC *became aware* of the fulfilment of the conditions referred to in Article 73 § 1. And, as stressed above, this should not include Article 52 § 6 (which may be incorporated in the Law as a ground for disciplinary liability or, in the most extreme cases, for a dismissal).

5. Dismissal and lesser disciplinary sanctions (Articles 74-78)

a. General overview

29. A judge may be dismissed, by virtue of Article 74 of the Law on Courts, currently in force, either for a "serious disciplinary offence", or for an "unprofessional and neglectful exercise of the judicial office". Article 75 enumerates the actions which amount to "unprofessional and neglectful exercise of the judicial office". Article 76 describes the types of misconduct which amount to a "serious disciplinary offence". As for Article 77, it describes the types of misconduct which constitute disciplinary offences falling short of the "serious" one and thus leading not to a dismissal but to one of the lesser disciplinary sanctions listed in Article 78.

30. The law in this respect reproduces Article 99 of the Constitution, which stipulates that a judge may be dismissed either for a "serious disciplinary offence defined in law, making him/her unsuitable to perform a judge's office", or for "unprofessional and unethical performance of a judge's office". In the 2018 opinion, the Venice Commission noted that Articles 75 and 76 contained many overlapping provisions which was very confusing (§ 67). Furthermore, these Articles allowed for the dismissal of judges for professional errors which are not intentional or particularly gross and inexcusable (§ 70).

31. The Draft Law implements those recommendations. First, the amendments proposed by the Draft Law avoid parallelism and lead to a clearer categorization of different types of misbehaviour into three groups: "serious disciplinary offences" (Article 75), "unprofessional and neglectful exercise of the judicial office" (Article 76), and lesser disciplinary breaches (Article 77).

32. Second, Articles 75-77 of the Draft Law shortens the long list of circumstances which can lead to the dismissal or a lesser disciplinary sanction and does not use anymore the multitude of vague and overlapping formulas, such as "unconscientious, untimely or neglectful exercise of the judicial office in the conduct of the court procedure in particular cases", unequal "treatment of the parties", "postponement of the court procedure without having a legal basis", (see § 69 of the 2018 opinion). The Draft Law repeals, in accordance with the recommendations of the 2018 opinion (§§ 72-77), provisions allowing dismissal of a judge on the ground that s/he failed to apply the case-law of the ECtHR (Article 76 § 1) or that his/her decisions led to a finding of a violation by the ECtHR under Articles 5 and 6 of the Convention (Article 75). These amendments are commendable.

33. Third, a new paragraph added to Article 74, which makes the dismissal of a judge subject to the condition that the impugned act or omission is committed "with the intention or apparent negligence by the fault of the judge without justified reasons" and that "the injury caused severe consequences". Already in its 2015 opinion the Venice Commission had recommended introducing "a general clause that would require the disciplinary bodies to take due account of the degree of the judge's fault and permit the judges to forward defences [based on the absence of their fault]." (§ 19). These are very positive amendments which deserve praise. However, some difficulties remain.

b. Article 75 – grounds for the dismissal under the heading of a "serious disciplinary offence"

34. The first ground on which a judge can be dismissed under Article 75 is the following: "[m]ore severe disturbance of the public order and peace and other more serious forms of misconduct that violate the reputation of the court and his/her [own] reputation". The concept of undermining the reputation of the court and judicial function was criticized in the 2015 opinion for being excessively broad (§ 36). At the same time, the Venice Commission recognised that "depending on the constitutional tradition of the State, a more general formula for judicial misconduct can be acceptable, but only under condition that it is understood to be narrowly interpreted".[9] It is difficult to indicate how precise the wording of such general formulas should be. It is up to the JC to interpret this provision on a case-by-case basis and develop it with a view to bringing clarity to this general formula and making thus the liability more foreseeable.

35. Article 75 § 3 refers to "a final judicial decision" in respect of this particular ground. However the use of this term ("where there was a final judicial decision") does not make it easier to understand whether or not a "severe disturbance" or "misconduct" referred to in the first paragraph should first be established by a final judicial decision or not. During the videoconference the authorities explained that the JC does not need necessarily to rely on a court's findings to establish the misconduct, which is, in the view of the Venice Commission, acceptable but it would be preferable to make this clear.

36. The second ground listed in Article 75 § 1 is "gross influence and interference in the performance of the judicial function of another judge". Indeed, it is understood that this provision is meant to cover unlawful forms of such interference.

37. The third ground for the dismissal is the failure "to file a statement of assets and interests according to law". The Venice Commission has already highlighted the importance of such a statement of assets as a means of fighting corruption in its Rule of Law Checklist.[10] In its 2015 opinion, the Commission recommended that the judge's failure to declare his/her property should be associated with dismissal and not with a medium-gravity disciplinary violation (§ 39). The amendment follows this recommendation. However, not only the failure to file a declaration should be punishable with the dismissal – a declaration containing gross inaccuracies may also lead to the dismissal. And, by contrast, minor or unintended omissions in a declaration of assets should not lead to the dismissal. It is important that the dismissal on this ground is to be decided on the basis of a decision of the Judicial Council, and not of any external body dealing with such declarations.[11]

38. The last ground for the dismissal listed under Article 75 § 1 is the "violation of the rules for [recusal] in situations in which the judge knew or should have known about the existence of one of the grounds for [recusal] provided for by law". The situations in which a judge has to recuse himself/herself should be clearly determined by law. This provision should be implemented very carefully. The decision of a judge not to withdraw from a case might only be considered a 'serious disciplinary offense' where there is *manifestly* a reason for his/her recusal and not in cases in which this decision is based on his or her reasonable interpretation of the law and of the factual circumstances.[12] Normally, in the latter cases the parties should be able to challenge the judge, and, if the judge refuses to withdraw, the question should be decided by the appellate court. However, one may imagine a situation where a judge knows about a serious conflict of interests, which is not known to the parties, and, nevertheless, does not withdraw. In these situations the normal chain of appeal will not work, since those facts will be discovered

[9] CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, § 67
[10] CDL-AD(2016)007, § 90
[11] Which does not mean that the JC cannot take into account the position of this external body.
[12] 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

only later. This kind of situations may be considered as a serious disciplinary breach. If interpreted in this light, and in conjunction with Article 74 § 3 (which stipulates that a judge may be dismissed if the impugned violation is committed intentionally or with apparent negligence and caused severe consequences), this provision is not problematic.

39. Article 75 § 2 establishes the duty of the president of a court to inform the JC in writing about the situations listed in § 1, which may give rise to the dismissal of a judge of his/her court. The JC should be informed within eight days from the date on which the president became aware of the situation and no longer than three months upon its occurrence. It is not clear why the general "duty to inform" exists under Articles 75 and 77 and not under Article 76 of the Draft Law.

40. Under Articles 75 and 76, the president of the court which convicted a judge for a crime or for other serious misbehaviour should inform the JC and the president of the court where this judge works about such conviction. This is a reasonable rule. However, Article 73 of the Draft Law (which deals with the automatic termination of the office of the judge in cases of a conviction of this judge to a prison term of 6 months or more) does not contain a similar obligation of the president of the respective court to inform the JC. This should be specified.

c. Article 76 – grounds for the dismissal under the heading of "unprofessional and unethical" performance of the judicial function

41. Article 76, as reformulated by the Draft Law, enumerates cases of "unprofessional and neglectful exercise of the judicial office", which constitute grounds for the dismissal. The Draft Law proposes to reduce the number of grounds from eleven to six by removing some vague grounds and merging overlapping ones. The remaining grounds are formulated more narrowly and clearly. These amendments are positive; however, there is room for improvement.

42. A judge can be dismissed by virtue of this Article "if in two consecutive exceptional assessments the judge does not fulfil the criteria for successful work, by his fault without justifying reasons, for which he has received two negative grades, in procedure established by the Law on Judicial Council". Criteria and procedure for the performance assessment (evaluations) are laid down in the Law on the JC, which is under revision by the Government with a view to possible amendments. Without examination of those amendments, it is difficult to comment on this provision.

43. In principle, if the method and indicators of the performance evaluation are in line with the previous Venice Commission opinions,[13] repetitive bad evaluations may be used as a ground for dismissal. The Venice Commission recalls that in the 2018 opinion it did not criticise the fact that two consecutive negative evaluations are to be used as a ground for the dismissal, but rather concentrated on the way the performance evaluation were to be conducted, on the criteria to be used for evaluation and on the fact that Article 76 § 5 did not refer to the fault of the judge (§§ 41 et seq.).

44. Now these concerns are partly addressed: there will be a general provision requiring demonstrating the fault of the judge (Article 74 of the Draft Law). In addition, Article 76 itself also refers to the fault of the judge as a pre-condition for dismissal for two bad evaluations.

45. The reference to "extraordinary" evaluations, is, however, new, and may be potentially problematic. It is unclear in which circumstances it will be possible to conduct such evaluations under the revised Law on the JC, which indicators will be used and what period such

[13] See in particular the 2018 Opinion, §§ 42-64; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia", §§ 51-54, 99-105; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§ 70-77; CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§ 37-96.

evaluations will cover. This should be explained in the revised Law on the JC. In the opinion of the Venice Commission, to serve as a ground for dismissal bad evaluations should cover a substantial period of the judge's work, and be based on carefully chosen indicators. It would be wrong to conduct two "exceptional" evaluations quickly one after another and dismiss the judge on this basis.

46. Under Article 76 § 1 (2) a judge can be dismissed if s/he "was convicted by a final court verdict" for an offence related to the performance of the judicial office. The Venice Commission assumes that this Article refers to less severe sentences, as compared to Article 73 which provides for a conviction for a crime to unconditional imprisonment of minimum six months as a reason for the automatic termination of the judicial office. If this is the case, it would be better to state it clearly in order to exclude the risk of overlap between those provisions.

47. Article 76 § 1 (3) speaks of the unauthorised public disclosure of a classified information; however, non-public leaking of such information should also be covered.

d. Article 75, 76 and the question of gross professional errors

48. The Venice Commission observes that the current text of Article 75 and 76 of the Law on Courts refers to several grounds which relate to professional errors: biased or neglectful conduct of court proceedings, intentional violation of the rules of fair trial, including trial within reasonable time, etc. (see CDL-REF(2018)027). The 2018 opinion criticised these formulas as being vague, overlapping and permitting to dismiss the judge for procedural or substantive decisions which are normally within his or her discretion.

49. The Venice Commission noted, at the same time, that "the law may penalise decisions taken in blatant disregard of the law and in bad faith (to further his or her personal interests, for example), or as a result of a gross and obvious negligence, but the very fact of procedural or substantive irregularity – even if it led to the overturning of the judgment on appeal – should not lead, in the absence of the judge's fault, to the dismissal" (§ 69).

50. The Draft Law removed most of those grounds for liability, leaving only few of them: disclosure of a classified information (Article 76 § 1 (3)), unjustified delays in the proceedings (§ 1 (4)), not examining the case quickly enough which leads to the expiration of the statutory time-limits (§ 1 (5)), accepting a case for examination in breach of the normal order of automatic allocation of cases (§ 1 (6)). In addition, Article 75 § 1 (4) speaks of the failure of the judge to withdraw from the case when there are reasons for it.

51. The judge may be dismissed for two consecutive bad evaluations (Article 76 § 1 (1)), but those evaluations, under the current system, reflect a holistic assessment of a multitude of indicators over a certain period of time, professional errors being just one of them. Criminal behaviour of a judge in the professional sphere is covered by Article 76 § 1 (2), but the behaviour falling short of criminal threshold is not covered by Article 76.

52. Article 75 § 1 (1) speaks of the dismissal for "more serious forms of misconduct that violate the reputation of the court and his/her reputation", but it is open to doubt whether this formula is supposed to cover gross professional errors.

53. The Venice Commission stresses that professional errors *may* lead to disciplinary liability and even to dismissal, but only when they are "particularly gross and inexcusable". Article 74 § 3 of the Draft Law now introduces a general clause, referring to the fault of the judge and to the consequences of the breach, and this is positive. However, at the same time, the general concept of the "gross and inexcusable professional error" as a ground for dismissal is not present in the Draft Law (unless the Article 75 § 1 (1) is interpreted as covering such errors). With a view to bringing more clarity to the Law, the authorities might wish to consider

introducing a clear general formula on the "gross and inexcusable professional error" as a ground for disciplinary liability or even a dismissal, while stressing in the text that *honest judicial errors and differences in the interpretation of the law and facts should not give rise to dismissal or a disciplinary liability*.

54. That being said, the Venice Commission understands that the distinction between "gross and inexcusable" professional errors and a reasonable yet mistaken exercise of judicial discretion is a fine one. Under such a general formula judges run the risk of being penalised for any incorrect interpretation of the law or of the facts. A lot will depend on the institutional characteristics of the JC and on the general legal culture: if the legislator believes in the independence and professionalism of the JC, such general formula is perfectly acceptable, and those matters may be left within the discretion of the JC. However, failing that assumption, it may be safer not to have in the law a general formula penalising judges for "gross and inexcusable" professional errors, because of the risk of an overbroad interpretation of this concept. Thus, it belongs to the national legislator to choose whether or not this "general formula" is appropriate in the current circumstances.

e. Article 77 – lesser disciplinary violations

55. Article 77 lists the grounds leading to disciplinary sanctions other than dismissal. Neither the current text of the Law on Courts nor the Draft Law amending it link disciplinary breaches contained in that Article to the fault of the judge. This article enumerates acts which may be committed intentionally or by negligence but may be explained as well by circumstances totally outside his/her control, e.g. the absence of a judge from work might be due to such circumstances.

56. The Draft Law adds a third paragraph to Article 78, which stipulates that "when determining and pronouncing disciplinary measures, the severity of the violation, the degree of responsibility, the circumstances under which the violation and the conduct of the judge have been committed, the consequences of the violation as well as the previously stated disciplinary measures shall be taken into consideration". This is a useful addition as it enumerates the main factors to be considered in order to impose a proportionate disciplinary *sanction*.

57. Nonetheless, the very *existence of a disciplinary breach* is also to be defined with reference to the fault of the judge and to the severity of the consequences. Article 74 mentions the fault and the severity of the consequences as a pre-condition for the *dismissal* of a judge (which is positive) but not in relation with *other disciplinary sanctions* (which is a gap). A similar provision should therefore be added to Article 77. The honest and hard-working judges should not be subject to disciplinary procedures for the situations which result from the circumstances outside their control or occur without their fault.

58. One of the grounds for disciplinary measures listed in Article 77 is the "violation of the rules of the Code of Ethics". As outlined previously by the Venice Commission, such codes are ill-suited to be relied upon in disciplinary proceedings and often lack sufficient specificity to fulfil the requirement of foreseeability.[14] The conduct giving rise to a disciplinary action should be defined *in the law* with sufficient clarity, so as to enable the person concerned to foresee the consequences of his or her actions and thereupon regulate his or her conduct.[15] The use of the Code of Ethics for disciplinary action was also criticised in the 2015 opinion for this same reason (§ 32). It is therefore recommended to repeal the concerned paragraph. In the event

[14] CDL-AD(2014)018, Joint opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 25

[15] *Ibid.*, § 24; CDL-AD(2014)006, Joint Opinion on the draft Law on disciplinary liability of Judges of the Republic of Moldova, § 16

that this recommendation is followed, Article 68 which refers to the Code of Ethics should be amended accordingly.

59. That being said, inappropriate behaviour of a judge in public which harms the image of the judiciary may constitute a ground for disciplinary liability. As outlined in the 2015 opinion, in the event that such inappropriate behaviour in public is serious or repeated, it must even constitute a ground for the dismissal of a judge (§ 41). The latter situation may lead to the dismissal under the terms "other more serious forms of misconduct that violate the reputation of the court and his/her reputation" of Article 75 § 1 (1). Nevertheless, if the reference to the violation of the Code of Ethics is removed from Article 77, less serious inappropriate behaviour of a judge in public risks not being punishable under this Article. As a consequence, the drafters are invited to consider adding to Article 77 a new disciplinary ground referring to less serious misconduct of a judge which harms the public image of the judiciary.

60. By referring to the "failure to fulfill the duty of continuous training" as a ground for disciplinary liability, Article 77 § 1 (4) seems to introduce a mandatory system of training for judges. However, according to Opinion No. 4 of the Consultative Council of European Judges on initial and in-service training for judges at national and European levels, "the in-service training should normally be based on the voluntary participation of judges; […] there may be mandatory in-service training only in exceptional cases; examples might (if the judicial or other body responsible so decided) include when a judge takes up a new post or a different type of work or functions or in the event of fundamental changes in legislation" (§ 37). Taking this into account, not all training should be mandatory and only non-attendance of mandatory trainings should be taken into consideration when deciding whether or not a judge failed to fulfill his/her duty of continuous training.

f. Article 79 - grounds for the dismissal of court presidents

61. Article 79 § 1 of the current text enumerates grounds leading to the removal of a judge from the position of a court president, which apparently does not involve an automatic termination of the judicial tenure for the judge concerned. The president may be dismissed for, amongst other grounds, the failure to notify the JC regarding serious disciplinary offences committed by judges of his/her court.

62. This provision has been criticised by the Venice Commission in its 2018 opinion for the simple raison that the question of whether or not a disciplinary offence has been committed is a matter of assessment. Since Articles 75, 76 and 77 of the Law (which describe grounds for disciplinary liability for judges) use vague and overbroad formulas, the president of court may feel obliged to report to the JC every minor incident. This may be a very onerous obligation for a president (§ 71). In response to this comment, the Draft Law proposes to remove this ground, but the text still speaks of the failure of the president "to lodge a proposal for commencement of a procedure determining liability of a judge pursuant to the law, while he knew or he was obliged to know about the existence of the legal reasons."

63. One should admit that there is no significant difference between informing the JC of disciplinary misconduct or making a proposal for the initiation of a disciplinary procedure for misconduct. Indeed, the grounds for dismissal of judges or bringing them to disciplinary liability have been reformulated under the Draft Law, became clearer and narrower, and hence, the presidents have now more certainty as to what they should report to the JC. However, even after those improvements, the question of whether or not there are reasons for starting a disciplinary procedure is still a matter for subjective assessment.

64. It is questionable whether there should be a duty of the court presidents to report to the JC all alleged cases of misbehaviour of the judges of their courts, or all professional errors. This question should be decided in the light of how the disciplinary proceedings are organised, who may trigger a disciplinary case, and what role court presidents play in this process. Article 68 of the Draft Law provides that "anyone shall have the right to lodge a written complaint to the president of the court due to improper or inappropriate behaviour of a judge in official relations with the parties that are contrary to the Code of Ethics and to receive a reply." Il follows from Article 55 of the Law on the JC that a complaint may be introduced with the JC by any person, and that such complaints may either be submitted directly to the JC or, as provided by Article 68 of the Law on Courts for ethical breaches by judges, first addressed to the president of the respective court who may then transmit it to the JC. However, as pointed out in the 2018 opinion, it is not clear whether the president of court may decide *not to transmit* a complaint to the JC in case, for instance, it is clearly inadmissible (§ 18). This point should be clarified. If the presidents are to play a filtering function, it would be better not to discourage them from doing so by a sanction for the "failure to report".[16]

65. In sum, it is difficult to assess this provision without knowing how the Law on the JC will be amended, and what role the court presidents will play in the disciplinary proceedings. Generally speaking, the Venice Commission has serious doubts as to whether it would be reasonable to dismiss a president of court for the failure to report a case of a potential disciplinary breach. It is possible, however, that a president may be held liable for covering up judges in certain *evident* situations. Thus, the 2018 opinion did not advise to remove but rather to reformulate this duty and the corresponding liability, "so as to concern only the *evident and gross* breaches committed by the judges, known to the president, and not every potential irregularity" (§ 71). The last phrase of Article 79 § 1 should be amended accordingly.

6. Suspension of judges pending the disciplinary procedures (Article 67)

66. The second paragraph of Article 67 of the current Law provides that the judge "shall" be suspended pending the disciplinary procedures in the event of "initiated procedure for establishing liability". This provision was criticised in the 2018 opinion, because the suspension seemed to follow *automatically* the commencement of the procedure. The opinion recommended that such decisions should be taken only in the most serious cases, and that the JC (or a body within the JC) should have discretion in these questions, by taking decisions on a case-by-case basis. The Draft Law follows this recommendation by adding to the second paragraph the condition that the "judge shall be suspended [...] in accordance with law and when there are justified reasons for suspension from exercising judicial office". The proposed amendment should be welcomed. Such an amendment would be more consistent with the discretion indicated in the parallel provision in Article 56-h of the Law on the JC.

IV. Conclusion

67. The Draft Law is a clear improvement as compared to the current text of the Law on Courts. Most of the proposed amendments are in line with the European standards, and demonstrate the willingness of the national authorities to follow previous recommendations of the Venice Commission. The Venice Commission welcomes the announced intention of the authorities to amend the Law on the Judicial Council as well, in line with the recommendations

[16] As follows from the 2017 Opinion, to the extent that the president's powers to bring disciplinary cases to the JC do not prevent interested parties from addressing directly to the JC, the fact that the president make a proposal for the initiation of a disciplinary procedure does not create a risk for judicial independence. CDL-AD(2017)033, Opinion on the draft law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for Judges, on draft law amending the Law on the Judicial Council, and on the draft law amending the Law on Witness protection of "The former Yugoslav Republic of Macedonia", §§ 25-28.

of the 2018 opinion. When doing so, it is important to separate the subject matters of the two laws in order to avoid duplication and the risk of contradictions.

68. Despite this generally positive assessment, the Venice Commission has several recommendations, which could help to improve the text of the Law on Courts even further. The Venice Commission recommends, in particular:

- as regards the re-assignment of judges to other courts, to exclude repeated re-assignments within a certain period of time, to provide for a right of appeal against the decision of the Judicial Council, to exclude the transfer of a judge without his/her will to a lower court, and the reduction of salary in the case of re-assignment/transfer; mandatory transfers should be possible only in cases of a major restructuring of the court system making the transfer inevitable;
- to remove Article 52 § 6 as a ground for automatic termination of the office of a judge; at the same time, the "use [of] his office or the reputation of the court to accomplish his personal interests" may, with necessary qualifications, serve as a ground for disciplinary liability and even dismissal;
- the situations in which a judge has to recuse himself/herself should be clearly determined by law and the decision of a judge not to recuse him/herself should only be considered a 'serious disciplinary 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 reasonable interpretation of the law and of the factual circumstances;
- the duty of the president of court to inform the Judicial Council of the cases of misconduct and trigger the proceedings should only concern evident and gross breaches committed by the judge, known to the president, and not every potential irregularity;
- Article 77 should link disciplinary liability to the fault of the judge, should not refer to the Code of Ethics as a ground for disciplinary sanctions, but may deal with cases of less serious misbehaviour or lesser breaches of public order, and should ensure that only non-attendance of mandatory trainings may lead to a disciplinary sanction.

69. Finally, the Draft Law refers to a number of specific professional errors which may give rise to the dismissal of a judge, but it does not have a clear general formula covering all other "gross and inexcusable professional errors" as a ground for disciplinary liability. The authorities might wish to introduce such a general formula in the law. However, if they decide to do so, it would be important to specify that honest mistakes and differences in the interpretation of the law and facts should not give rise to a dismissal or a disciplinary liability.

70. The Venice Commission remains at the disposal of the authorities for any further assistance they may need such as the assessment of the draft amendments to the Law on the Judicial Council.