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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Questionnaire for the preparation of CCJE Opinion No. 18 (2015):

“The independence of the judiciary and its relations with the other powers in a modern democratic state”

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE’s next Situation Report.

Questions

- 1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the

judicial power on one side, and the executive and legislative powers on the other side?

The Constitution of Republic of Macedonia provides in the Art. 8 that the fundamental values of the constitutional order of the Republic of Macedonia are, among others, the division of state powers into legislative, executive and judicial. According to Amendment 25, judicial power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. Emergency courts are prohibited. The types of courts, their spheres of competence, their establishment, abrogation, organization and composition, as well as the procedure they follow are regulated by a law adopted by a two-thirds majority vote of the total number of MP's, Amendment 27, a judge shall not be held responsible for an opinion given in the process of rendering a court decision. A judge shall not be detained without the consent of the Judicial Council, except when caught in committing a criminal act for which a prison sentence of at least five years is prescribed. The judicial function is incompatible with membership in a political party or with another public function or profession determined by law.

Amendment 28 regulates the status of the Judicial Council. The Judicial Council of the Republic of Macedonia is an independent and autonomous institution of the judiciary. The Council shall ensure and guarantee the independence and the autonomy of the judiciary. The composition of the Council, the terms of office, but the criteria and manner of election, as well as the basis and the procedure for termination of the mandate and dismissal of a member of the Council is determined by law. The office of a member of the Council is incompatible with membership in political parties and with performance of other public offices and professions determined by law.

Amendment 29 regulates the basic competences of the Council. i.e. ...
- elects and dismisses judges and lay judges; determines the termination of a judge's office; elects and dismisses presidents of Courts; monitors and assesses the work of the judges decides on the disciplinary accountability of judges; has the right to revoke the immunity of judges; proposes two judges for the Constitutional Court, from among the judges; and performs other duties stipulated by law. On the election of judges, lay judges and court presidents, equitable representation of citizens belonging to all communities shall be observed. The Council shall submit an annual report for its work to the

Assembly of the Republic of Macedonia in form, content and manner determined by law.

According to the Law on courts, the basic principles, regulate that the judicial power shall be exercised by the courts. The courts are autonomous and independent state bodies. They courts are ruling and establishing their decisions on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution. The procedure before the court is regulated by law and shall be based on the following principles: - legality and legitimacy, equality of parties, - trial within a reasonable period of time, fairness, publicity and transparency, contradiction, two instance procedure, sitting in a panel ,oral hearings, directness, the right to defence, that is, representation, free evaluation of evidence, and economy.

The relations between the judicial and the other powers can be seen in the following provisions that regulate the status of the judicial decisions. The judge shall decide impartially by applying the law on the basis of free evaluation of the evidence. Any form of influence on the independence, impartiality and autonomy of the judge in the exercise of the judicial office on any grounds and by any entity shall be prohibited. The legally valid court decision shall have undisputed legal effect. The court decision may only be amended or abolished by a competent court in a procedure prescribed by law. The court decisions shall be binding for all legal entities and natural persons and shall have greater force with regard to the decision of any other body. Everyone shall be obliged to obey the legally valid and enforceable court decision under threat of legal sanctions. Everyone shall be obliged to restrain from commission or omission of an action that obstructs the adoption or enforcement of the court decision. Any state body shall be obliged, when it falls within its competence, to ensure the enforcement of the court decision. The supervision of the enforcement of the court decisions shall be conducted by the court in accordance with the law. The enforcement of a legally valid and enforceable court decision shall be carried out in the fastest and most effective manner possible, and it cannot be obstructed by a decision of any other state body. The court shall raise an initiative for conducting a procedure to assess the compliance of the law with the Constitution when the procedure questions its compliance with the Constitution, and shall inform the next higher court and the Supreme Court of the Republic of Macedonia thereof.

As regard the relation towards legislative power, also, there is a provision that regulates the possibilities for the court to challenge the Law before the Constitutional court. Namely, if the court deems that the law to be applied in a

particular case is not in compliance with the Constitution, and the constitutional provisions cannot apply directly, it shall suspend the procedure until the Constitutional Court of the Republic of Macedonia adopts a decision.

On request of the court, in the exercise of its competence, the state bodies and other legal entities shall be obliged to submit all the necessary data, acts or documents at their disposal and required for the procedure, without any postponement.

As regard election and dismissal, this process is in the competence of the Judicial council, exclusively. The judges and presidents of the courts shall be elected and dismissed by the Judicial Council, under the conditions and in the procedure defined by law. The election, that is, dismissal of the judges and the presidents of the courts shall be published by the Judicial Council in the "Official Gazette of the Republic of Macedonia" within a period of 15 days as of the day the election, that is, dismissal is completed. Lay judges shall be elected and dismissed by the Judicial Council, under the conditions and in the procedure laid down by law.

The Judicial Council shall by a decision define the number of judges in each court, upon previously obtained opinion from the general session of the Supreme Court of the Republic of Macedonia and opinion from the session of judges of the respective court.

Following the international documents, but as well, recommendations posed by numerous of international organizations, NGO,s, GRECO, European Commission, progress reports, in order to meet the political criteria for the accessing process to the EU, towards strengthening the independence, impartiality and competence of the judiciary, the authorities in Macedonia, in close cooperation with the judiciary, have introduced, with the amendments of the Law on courts in 2010, and 2013 th, new more strict criteria for entering in the judicial profession and for promoting in the higher instances of the courts. A new merit system, based on knowledge, qualification and results of the work, has been introduced. In brief, the vacancies in the first instance courts, can be filled with the graduated candidates of the Academy, only, and the candidates for posts in the higher positions (Appelate courts, Supreme court, Higher Administrative court, can be, among on- sitting judges, only, with certain, fixed in the Law, years of working stage as judges, they need to take psychological tests and test of integrity, to have international certificate in foreign language).The vacancies in the first instance courts and prosecution offices can be filled with the graduated candidates in the Academy for judges and prosecutors. The

concept of the merit system is commencing through the conditions for entering in the Academy (the candidates for entering in the Academy shall be graduated on Law Faculties with master studies completed, with at least 8 grade, achieved during the both phases of the studies, they need to have international certificate in foreign language and passed a bar exam, with at least 2 years working experience and psychological tests and test of integrity. All these strict criteria for entering and promoting in the judicial profession were introduced in order to enhance the independence of the judiciary, but as well, its capacities to be more resistant towards the political pressures.

As an example of a good practice in Macedonia, is the cooperation between the judicial and the other powers, related to the joint and transparent work in the process of preparing the draft laws. The amendments in the Law on courts, but also in all other laws that are related to the status, the rights and obligation of the judges and the Judicial council, are being prepared by the working groups established in the Ministry of justice, that always include judges, as well lawyers and law professors.

The relations toward executive power are regulated through the provisions in ensuring the guarantees for detention and criminal liability of judges. Namely, in the exercise of the judicial office, the judges shall enjoy immunity, a judge cannot be held criminally liable for a stated opinion and manner of deciding during the adoption of a court decision, also a judge cannot be detained taken in without an approval of the Judicial Council, unless being caught in commission of a crime for which an imprisonment sentence in duration of at least five years is foreseen. The Judicial Council shall decide upon revocation of the immunity of judges.

The judge shall be suspended from exercising the judicial office while in custody, or while the procedure for the crime for which an imprisonment sentence of at least five years is foreseen, is ongoing. The judge can be suspended from exercising the judicial office in case of initiated disciplinary procedure or dismissal procedure. The decision to suspend the judge from exercising the judicial office shall be adopted by the Judicial Council.

As regards complaints related to the exercise of the judicial office, they are to be reviewed by the bodies to which they are submitted, fast and fair and without presence of the public in the procedure, and judge against whom the complaint is submitted, shall reply within a time period defined by law.

A procedure for damage compensation or another procedure, cannot be conducted against a judge or a lay judge, by a party that is not satisfied with the decision of the judge.

As regard relations with the other powers, it is important to refer to the provision that the state shall be held liable for a damage caused to the citizens or legal entities, by a judge or lay judge in unlawful exercise of the office. In case of dismissal of a judge, because of the caused damage, the state, by means of a lawsuit, shall require the dismissed judge to return the amount of the paid damage, in the amount defined by the court, in accordance with the law. After the dismissal of a judge who has caused a damage to citizens or legal entities by unlawful operations, in a period of eight days as of the legal validity of the decision on dismissal, the Judicial Council shall notify the State Attorney's Office in order for it to undertake the measures, within the framework of its competences defined by law. That has never been a case in the practice and these provisions will be redrafted, following the GRECO recommendations.

As regard the issue of the competences of the Ministry of justice, in the Law on courts, it is regulated that the activities of the judicial administration shall be carried out by the Ministry of Justice. In order to carry out the activities of the judicial administration, the Ministry of Justice shall communicate with the president of the relevant court. The scope of work of the judicial administration shall include provision of general conditions for exercising the judicial power, and in particular drafting laws and other regulations in the field of organization and work of the courts and the procedure before the courts, adoption of a Court Rulebook, responsibility for continuous training of the judges and the judicial service, provision of material, financial, safety, spatial and other conditions for operation of the courts, carrying out activities related to international legal assistance, enforcement of sentences imposed for crimes, collection of statistical and other data about the work of the courts, supervision over the efficient performance of the works in the court and implementation of the Court Rulebook, supervision of the implementation of the regulations on court deposits and guarantees, reviewing the complaints from the citizens about the work of the courts pertaining to delay of the court procedure or the work of the judicial services, as well as other administrative tasks and activities defined by law. For the purpose of reviewing the complaints of the citizens about the work of the courts pertaining to delay of the court procedure, the Minister of Justice shall form a commission composed of two representatives from the Ministry of Justice and one representative selected by the Supreme Court, for which a report shall be prepared, which shall be prepared by the

commission and shall be delivered to the Ministry of Justice in a period of 30 days as of the day of receipt of the complaint, and the Ministry of Justice shall deliver the report to the Judicial Council within a period of three days as of the receipt at the latest. The manner of reviewing the complaints of the citizens about the work of the courts pertaining to delay of the court procedure, shall be regulated by a bylaw, adopted by the Government of the Republic of Macedonia, on proposal of the Minister of Justice.

The Minister of Justice adopts a Court Rulebook, upon previous opinion from the general session of the Supreme Court. The Court Rulebook shall regulate the internal organization of the courts, the manner of operation of the courts, the keeping of case records, as well as the keeping of entry books and other books, the treatment of the documents, forms, the work related to the international legal assistance and acting upon complaints, the calling up and assignment of lay judges, the assignment of regular court translators, interpreters and experts, the keeping of statistics and records and professional development of the personnel, the rules on special marks of the vehicles of the court, the information system of the court, the audio-visual recording of a hearing, as well as other issues significant to the work of the courts. The Ministry of Justice supervises the application of the Court Rulebook.

The Ministry of Justice is ensuring the implementation, maintenance and operation of the information technology system on a single methodological and technical base. A single information technology centre, containing a database of all judicial bodies, is being implemented in the Ministry of Justice. The Minister of Justice, by an act, defines the manner of operation of the information technology system in the courts referred.

As regard the financial independence of the judiciary , it is stated that the funds for operation of the courts is provided from the Court Budget, as a separate part of the Budget of the Republic of Macedonia, marked as “Judicial Power”. The court budget is being administrated by the Judicial budget council that is composed of president of the Judicial council who is presiding with the Council, The amount of the salaries and the other compensations for the judges in the courts shall be defined by law. The amount of the salaries and the other compensations for the court servants and the other employees in the courts shall be defined by law and collective agreement. The salaries and the other compensations, as well as the weapons, equipment and uniform of the members of the court police shall be provided from the funds of the Budget of the Republic of Macedonia, marked as “Judicial Power”. The minister of justice has supportive role for defending the budget in front of the Parliament.

The Judicial council is competent to submit to the Parliament, the request for annual budget for the judiciary (for all courts, Academy for judges and prosecutors and the Council itself), after submitting the draft budget to the Ministry of finance. The Ministry can formulate its comments directly to the Parliament, and the president of the council can defend its position, in front of the Parliament. More independent position is needed in relation to the Ministry of finance as a consolidator in the process of formulating the budget.

Despite the global economic crisis, the salaries of the judges and court administration personnel have not been reduced, in contrary, the salaries of the public administration employees, including the holders of the judiciary, judges and prosecutors have been recently increased for 4 %.

Macedonia is distributing 63,6% of the budget for the courts. The problem is the effective use of these means inside the judiciary. There is a need for further strengthening the relations and negotiations with the Ministry of finance and the Parliament for better strategic planning and spending of the judicial budget. One of the reasons is that Macedonia has a large number of professional judges.

The relation towards the other powers is important through presenting the provisions on the composition, status and competences of the Judicial Council.

The Judicial Council of the Republic of Macedonia is an autonomous and independent judicial body. The Council shall ensure and guarantee the autonomy and independence of the judicial authority, through performing its function in accordance with the Constitution and the laws. Political organization and activity shall be forbidden in the Council. The members of the Council must not carry out any party activity while performing the functions in the Council. The Council through its work shall prevent the political influence in the judiciary.

The Council shall consist of 15 members, out of whom:

- The President of the Supreme Court of the Republic of Macedonia and the Minister of Justice shall be *ex officio* members;
- eight members of the Council shall be elected by the judges from among their ranks. Three of the elected members shall be members of the communities that are not in majority in the Republic of Macedonia, where the principle of equitable representation of citizens belonging to all the communities shall be observed;

- the Assembly of the Republic of Macedonia shall elect three members of the Council with a majority of votes from the total number of representatives, wherefore there has to be majority of votes of the representatives belonging to the communities that are not in majority in the Republic of Macedonia, and
- two members of the Council shall be proposed by the President of the Republic of Macedonia and elected by the Assembly of the Republic of Macedonia, one of whom shall be a member of the communities that are not in majority in the Republic of Macedonia.

The Minister of Justice as a member of the Council shall participate in the operation of the Council without a right to vote. The work of the Council shall be chaired by President.

The president of the Council shall be elected from among the members of the Council, by a majority of the votes of the members having voting rights, by secret voting. The term of office of the president of the Council shall be two years, without a right to re- election. The Council, on a proposal of the president of the Council, at the same session when a president is elected, shall also elect deputy president who acts for the president in his/her absence. The Minister of Justice and the President of the Supreme Court of Republic of Macedonia cannot be elected as president and deputy president of the Council.

The independence of the Council has been guaranteed through the profile of the judges, members. Namely, any judge who exercises the office of a judge at the moment of publication of the announcement and meets the following requirements: has at least five years of service as a judge and has positive assessment in the last three years in exercising the office of a judge, given by the Council, can apply to the announcement.

As to the members of the Council, elected by the Assembly of the Republic of Macedonia, as well as the members elected by the Assembly of the Republic of Macedonia on a proposal of the President of the Republic of Macedonia, shall be elected from among the university law professors, attorneys-at-law and other eminent law-graduates.

The term of office of a member of the Council shall terminate: upon the expiry of the time for which he/she is elected; on his/her request; by fulfilling the conditions for old age retirement in accordance with law; if, by an effective verdict, he/she is sentenced to unconditional imprisonment of at least six months for a crime, or is imposed a milder punishment for another criminal offense which makes him/her

disreputable for exercising the office of a member of the Council; if it is determined that she/he permanently loses the ability to perform the office, and he/she is elected to another public office or profession.

In the case referred to members elected by the Assembly, the term of office shall terminate when the Council, that is the Assembly of the Republic of Macedonia accepts the resignation at a session.

Towards further strengthening the independence of the judiciary, the recommendations by the EC 2013 Progress report, GRECO Fourth round evaluation report and the complains and critics, contained in the reports of the domestic NGO and international organizations on Macedonia, mostly, as regard the political influence on the process of election, promotion and dismissal of the judges, the National Assembly is in a process of adopting the Constitutional amendments 38 and 39, as regard judiciary, that have been previously submitted to the Venice commission and got positive opinion.

Namely, the composition of the Council has been changed, in order to exclude any political influence in the process of requirement, election and promotion of judges. The minister of justice and the president of the Supreme court as ex-officio, members will not anymore be members of the Council, thus increasing the number of the members, judges in the Council, elected on secret and immediate elections, among the judges from all the instances. The mandate of the members will be 6 years, without possibilities for re-election. The conditions as regard personal and professional integrity and background of the judges, members in the Council, will be increased.

According to this Amendment, the new Council will be composed of 15 members, out of which 10 will be judges, the other 5 candidates for members of the Council, proposed by the President of the State, and Parliament, cannot be among judges, but among law professors, attorneys, and other distinguished lawyers. The Amendment 39, introduces two important novelties following the complains and critics that were posed towards transparency of the process of selection and to reducing the political influence and discretion in the process of dismissal of judges. Following the GREKO recommend. for enhancing the guarranties for judges, in the disciplinary procedure, the Constitutional court will decide on the appeals, against decisions of the Council for election and dismissal of judges, or any other disciplinary measure, imposed to a judge or a president of a court. Also, a new legal remedy – constitutional appeal has been introduced in front of the Constitutional court. The status, competences of this Court will be for the first time regulated with a

law, instead of having a situation where the position of the court was regulated with an internal Rulebook.

- 2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Last past years, Macedonia was mostly criticized for allegedly, lack of independence in the judiciary, political influence, reflected in the process of election and promotion of judges, and for the influence of the other two powers in deciding of some particular cases, lack of transparency of the highest representatives of the judiciary, etc. Without an ambition to elaborate the objectiveness and the validity of the sources of information, reliability of all these reports, because of the different, certain and uncertain motives, powers, political and party interests, behind them, it is obvious, that the authorities of Macedonia, have reacted in a greatest possible, extent, all these critics, with adequate and constant amendments in the Constitution and the laws. For example, the NGO, "Reporters without boarders", has commenttes a first instance decision, on the day, when the Appellate court, was to decide on the appeal, giving a clear example for interference of the international organizations and their pressure on the judiciary, but, unfortunately, this is not a sole example. Of course, the process of promoting the independence is a ongoing process, and the criteria, recently enhanced, for entering and promotion in higher positions, based on merit system, and improving the quality of the judiciary, in general, cannot be fulfilled over night, but it will take some time. Also, the problem is in the confidence in the judiciary. The GREKO Report has referred to the Euro barometer index, where 68 %of the population does not trust to the judiciary. Despite of all reforms achieved, the judiciary has to put lot of efforts on further improving the quality of the judicial decisions, their elaboration, promoting of the transparency of the judiciary, building good relations with the NGO and the media in order to improve the image of the judiciary, to promote and to present to the public, the good practices (the progress in solving the backlog, introducing IT, better access to justice, publishing the court decisions on the websites, open sessions of the Council when reviewing the complains of the citizens, employing PR,s in the courts, regular press releases, etc.). In comparison with the other powers, the judiciary has less funds to create and realize its own comprehensive communication

strategy, that is important for enhancing the trust in the judiciary and towards creating the perception among citizens about its power to be independent towards the other powers.

The relations and communications with the other powers should be improved through regular channels of communication and should be more visible to the public.

It is worth to mention that the pressures on judges and on deciding process, comes mostly from the NGO, s, international organizations and the certain media that are commenting the judicial decisions, even when they are not valid. Also, some lawyers use to comment the judicial procedures, the statements of the witnesses, the behaviour of the judges and prosecutors that is an example of pressure and of a violation of the presumption of innocence and the principle of proper administration of justice. There are very rare cases when the politicians have commented the judicial decisions (with an exception of the opposition parties).

The Association of judges very rare, publicly reacts on the statements and comments given by the politicians, the media, NGO and the international organizations on selected judicial procedures and decisions. (only two or three times in the past years).It has been, always through written statements, given to the press.

The Academy for judges and prosecutors plays a key role in the enhancing the independence, and professional competence of the judges. (EC 2013 Progress Report). Following the GRECO 4 round evaluation report, the Academy is organizing a lot of seminars on ethics, conflict of interests that are very important to strengthen the capacities of judges, especially young ones, to become more resistant to the pressures posed by the powers, but also the media, NGO,s , business groups that are potential risks for classical forms of corruption ,through bribe, but also for political corruption in the judiciary.(promoting in higher positions, improper relations with the other powers, getting leading positions etc.)

- 3) Has there been any significant debate on the issue of “judicial restraint” or “judicial moderation” with regard to the exercise of the judicial

function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No.

- 4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

According to the Law on courts in 2006, the number of the courts with extended jurisdiction was reduced, to 11, out of total 27, that has caused a reaction by those courts, that have become courts with basic jurisdiction. The complains were that the state has been reduced the access to courts by the citizens, but these critics lasted very shortly as the changes were justified with the size of the country, number of the population, the number of pending cases and of course, the most important, the economic condition of the state.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the “official” reason for the changes or proposed changes.

No.

- c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

No.

- 5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of “public opinion”.

Look above.

- 6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Look above.

- 7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

No.