

# Individual Assessment of Judges in Albania

## A General Overview and Comparative Analysis of Career Advancement and Reward Systems Based on Performance Evaluation

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### **Abstract**

Assessment of judges in itself is one of the criteria in relation to the establishment of specific rules for the career of judges, creation of a healthy judicial system and a proper one. Professional Assessment process of judges based on objective, clear and transparent criteria, has a great importance for the consolidation of judicial power, because on its base, transfer and promotions of judges are performed only on the basis of individual merit. Considering the fact that the approximation of the Albanian legislation with the European one, has become a task of the Albanian legislator, the draft "On the evaluation system of judicial activity in RA" deserves special attention. This article takes in a comparative analysis the current law "On the individual assessment of judges in Albania" and the draft law "On the evaluation system of judicial activity in RA". The main attention of the analysis focuses on some basic elements for evaluation of the judges, pointing to some basic procedures relevant and necessary in relation to the performance and their role in the process of administering justice in our country. In the analysis of this draft law we will mainly focus on the establishment of procedures, principles and criteria for professional and ethical assessment of the judges of courts of first instance and courts of appeal that predicts the draftlaw. In the following the article is focused on a comparative view of the assessment criteria, according to the Italian model. Analysis of the Italian system of individual assessment of judges may highlight on some the practical aspects of the most suitable model of assessment to be implemented in Albania.

**Keywords:** Legal procedure; Personal assesment of judges; Professional assesment of judges; Judiciary personnel and organization; Appeals; Appeal courts

### **Introduction**

In Albania, the foundations of the assessment system of the judges were created in 2002 by the High Council of Justice, which for the time in which it was implemented was at an acceptable level. With the ratification of Stabilization and Association Agreement, certainly was born a new perspective which inevitably required the implementation of European legislation and the establishment of new rules regarding the judicial

system. All foreign and internal factors requested exceedingly an assessment system in conformity with the practices of European Union member states.

Legislative and regulatory framework of professional assessment system of judges in Albania has been leveled with European Union legislation and with the recommendations of international organizations.

Concretely, in the following analysis we'll focus on two themes that relate to the analysis of professional assessment procedure and analysis of criteria and principles of professional assessment.

From these analysis we point out at best the main characteristics of current assesment model, which is regulated by Decision 261/2, date 14/04/2010 of the High Council of Justice and by the model that predicts the new draft law.

### **Procedure of Judges' Professional Assessment**

#### *The Assessment procedure under the current system.*

If we analyze the current system of judges assessment in Albania we note that the Institution responsible for the appointment of judges is the High Council of Justice (HCJ). Exclusive competence of this body is provided for in Article 1 of the Law "On the organization and functioning of the High Council of Justice", no. 8811, date 17.05.2001, amended by Law no. 9448, date 05.12.2005, which provides that the HJC is responsible for the appointment, transfer, discharge, education, career, assessment and control of judges' activity of the Courts of the first instance and Courts of appeal.

This body is composed of the President of the Republic, Chairman of the Supreme Court, Minister of Justice, 3 members elected by the Assembly of the Republic of Albania (who must be lawyers with not less than 15 years of experience in the profession (Article 3, 4) and 9 judges of all levels, elected by the National Judicial Conference (Article 3), which must have a minimum of ten years of experience (Article 4) as judges. Elected members operate for a five years term.

In practicing of its functions High Council of Justice relies on the HCJ Inspectorate that performs most of the work related to the Assessment of judges. It consists of the Chairman of the High Council of Justice or the Chief Inspector, and by inspectors who are appointed and discharged by the HCJ with the proposal of Vice Chairman. Chief Inspector organizes inspectorate duties, as provided in Article 16, respectively the assessment of judges. In the current system of assessment each judge is assessed by an appointed inspector, which prepares the draft assessment to the Chief Inspector. Later Chief Inspector checks draft assessment and signs overall assessment, which is then reinforced or changed by the HCJ. All judges are positively evaluated for their

work in the period 2005-2006<sup>1</sup>. Currently, the HCJ Inspectorate is working for the period 2007-2009.

Article 13 of Law no. 9877, date 18.02.2008 "On the organization of the judicial power in the Republic of Albania" provides that any judge of the Court of first instance and Courts of appeal should be professionally evaluated at least once every three years according to the Assessment criteria defined by HJC<sup>2</sup>, a judge may be assessed "very good", "good", "acceptable" and "incompetent"<sup>3</sup>. The Assessment "incompetent" constitutes reason to start discharge proceedings from the duty of the judge, subject of this assessment. A judge assessed with "acceptable" should be reassessed<sup>4</sup> within the same year.

The current system of Assessment is regulated by Decision 261/2 date 14/04/2010 of the High Council of Justice, which provides details of the assessment process and criteria to be used during this process.

The aim of assessment system for judges is to highlight professional qualities in the framework of their opportunities for career development, identification of judicial performance with low and high quality, identification of court problems and training needs for judges<sup>5</sup>. According to Article 2(1) of Decision 261/2, there are evaluated all the elements of the judge work. According to Article 2(1) of Decision 261/2, there are evaluated all work elements of the judge. HJC determines annually in November the courts where judges will be evaluated for the coming year (Article 2(6) of Decision 261/2). The assessments are prepared by the Inspectorate of HCJ in form of description and by using statistical tables. The final decision for the assessment of judges is performed by HJC, Article 2(2) of Decision 261/2.

The actual process of Assessment is articulated in three phases<sup>6</sup>:

- Assessment by chairman of the court where the judge subject of assessment exercises his functions (Article 19), followed by a voluntary self-assessment of judge himself/herself (Article 20).
- Ascertained report and assessment project act by the Inspectorate of the HCJ, prepared being based on the criteria set out in Chapter II and in accordance with the procedure provided for in Article 27, 28.
- Final decision of assessment (assessment act) by HJC (Article 32).

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<sup>1</sup> The HCJ Inspectorate Report

<sup>2</sup> Article 13/1 of the Law no. 9877, dated 18.02.2008 "On the organization of the judiciary in the Republic of Albania"

<sup>3</sup> Article 13/2 of the Law no. 9877, dated 18.02.2008 "On the organization of the judiciary in the Republic of Albania"

<sup>4</sup> Article 13/4 of the Law no. 9877, dated 18.02.2008 "On the organization of the judiciary in the Republic of Albania"

<sup>5</sup> Article 1 of Decision 261/2, dated 14/04/2010 of the High Council of Justice

<sup>6</sup> Article 2 and 3 of Decision 261/2, dated 14/04/2010 of the High Council of Justice

According to the decision 261/2, the assessment is based on data collected by the court where the judge performs his/her duties (Article 2(4, 5) of Decision 261/2). For each judge, there is compiled a statistical table, which includes:

the number of cases appraised by a judge within a year;

the number of cases appealed to higher courts and, among them, the number of overturned and confirmed cases. The table includes the percentage of the number of cases rejected, modified, or left in force by higher courts. The table should also include the number of cases for which the judge has exceeded the time limits set by the HJC. This number should be compared with the number of cases appraised by a judge.

Article 23 of Decision 261/2 includes detailed rules on the manner of data collection on the performance of the judge subject of the assessment:

seven files on which the judge has worked are selected by the Inspectorate using the lot system (provided in detail in Section 24).

- Five decisions are selected by the judge himself.
- There are gathered the judge's decision that were rejected or changed by a higher courts. The inspector in question inspects all court file of each case to identify the reasons for the failure.
- The data from 20% of cases for which a decision was made by the judge subject of assessment are selected by lot.
- There are gathered information by complaints made against a judge (the complaints must be verified)
- There are taken into account the data by inspection of the court.
- At the same time there is taken into account also the assessment made by Chairman of the court.

In the assessment process should be used also the self-assessment of the judge if he or she has completed the relevant form.

Chief Inspector of the HCJ Inspectorate drafts project –report of assessment and assesses the judge with “very good”, “good”, “acceptable” or “incompetent”<sup>7</sup>

According to Article 30 of Decision 261/2, the judge subject of Assessment may file a complaint to HJC against the Chief Inspector assessment. In this case, HJC listen the judge subject of assessment and Chief Inspector (Article 31 of Decision 261/2). Despite the complaints, HJC makes a final decision on the assessment of the judge. If HJC considers the assessment as a very positive one, a member of the High Council of Justice, who

<sup>7</sup> Article 28 of Decision 261/2, dated 14/04/2010 of the High Council of Justice

is a judge, prepares a new assessment report within ten days. The Judge subject of assessment is heard before a decision is taken for the assessment in plenary sessions.

The Head of Courts of the courts of first instance and courts of appeal are evaluated based on the same criteria as well as the regular judges (Article 18 of Decision 261/2). Their human and professional abilities are assessed by the Inspectorate of the HCJ.

Later reasoned decision of HCJ becomes part of the judge's personal file subject of assessment (Article 32 of Decision 261/2). In Albania, the opportunity to ask judicial review of the decisions of the High Council of Justice is confirmed by a Supreme Court decision in 2013.<sup>8</sup>

As a result of the assessment, comes out a permanent list ranking judges in the country. According to Article 12(4) and Article 14 of Law no. 9877 date 18. 02. 2008 "On the organization of the judicial power in the Republic of Albania", promotion should be based on the results of the permanent list of ranking. In fact I would like to stop at this point which is contentious. Consultative Council of European Judges (CCJE), has expressly recommended not to introduce a permanent ranking of judges in Albania<sup>9</sup>. CCJE has considered also the detailed list of permanent ranking of judges as a result of their assessment as undesirable. Such a list not only gives the wrong impression of objectivity and certainty, but even worse, it is not flexible and is difficult to be changed without being involved in an exercise that "lists again" all the judges of the same level.

Thus, this system is not practical and, in particular if becomes public, it is unfair. It does nothing to improve efficiency of judges, and neither their independence.

However, CCJE recommends a classification system for specific purposes, such as promotion, as it can be useful. For example, if two or more judges have applied for or are considering the possibility of the appointment to a same position, it is likely that candidates will be put in a kind of "ranking" for this purpose.

Personally I appreciate that public order of the judges devalues the authority of the judge, and directs on the wrong manner the public by shaking confidence to the court.

In Albania there is a problem regarding the time of the assessment process, since it is carried out the judge's assessment on his work performed long ago. So there is a lack of actuality on this assessment. Currently, in 2014, are being assessed the year 2007-2009. For the year 2007-2009, statistical data are reflected with an old methodology, such as keeping the statistical records in handwriting. In conditions where for these years, there has not been an electronic system of coverage and processing of the data, it has causes objective inaccuracies in the assessment process because the assessment must

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<sup>8</sup> Decision no. 357, dated 06.07.2013

<sup>9</sup> Opinion of the Consultative Council of European Judges (CCJE no. 17 (2014), paragraph 42 and 43:

be based on objective criteria<sup>10</sup>. These criteria can include qualitative indicators, but also quantitative indicators, although not exclusively. They should enable evaluators all aspects that constitute good judicial performance.

Another problem is related to the fact that who makes individual assessment of the judge. Having regard to the recommendation of the CCJE<sup>11</sup> in Opinion no. 17 (2014), paragraph 37 in order to protect the independence of the judiciary, individual assessments must be carried out mainly by the judges. Judicial Councils (where they exist) may play a role in this process. Currently in Albania this recommendation does not find a reflection. Due to the higher category of judges of the Court of Appeal, this assessment can not be made by officials who have not worked as appeal judges or have over five years of work as a judge. This assessment should be first neutral, straight and true, thus becoming full transparency of the activity of the judge.

*The Assessment procedure according to the project law "On the system of Assessment of the activity of judges in RA".*

In April 2014, the Ministry of Justice launched an initiative to reform the judicial Assessment system in order to address problems that have resulted, and to approaching it with international units recommendations and best practices of EU countries in this field. Ministry presented a legislative package of Assessment system of judges, which in itself contained many components by the Decision of HCJ No. 261/2 date 14.04.2010,

*Assessment system of judges.*

In addition, it seems that MJ was withdrawn from this version of the draft law, perhaps due to the opinions of interested institutions so it undertook a second initiative, in which the Ministry of Justice has cooperated closely with the actors involved in the Assessment process. For this purpose there was created a joint working group with representatives by Ministry of Justice, the High Council of Justice, the Union of Judges, the chairman of the court, judges and representatives of the EU mission "Consolidation of the Justice System in Albania (EURALIUS IV). The draft law was subject to phase of consultation with all stakeholders of the justice system, groups of interest, as well as with national and foreign experts. Currently, this draft law was sent for an opinion to several institutions of the justice system.

Further implementation of the current system of Assessment in my opinion constitutes a valuable deal for the organization of a system which will be a more clear and periodically measurable one concerning professional assessment of judges. The use of primary legislation represents a concrete opportunity to continuously improve the

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<sup>10</sup> Under Opinion no. 17 (2014) of CCEJ

<sup>11</sup> Opinion 17 (2014) par. 37 of CCJE

skills and capacity of judges, by defining standards sustainable for the quality and quantity of judges activity.

In the analysis of this draft law, we will be mainly focused on establishment of procedures, principles and criteria for professional and ethical assessment of the judges of courts of first instance and courts of appeals foreseen by the draft law. With the new draft law on the assessment of judges Albania as well as Italy are disconnected from previous practice, by making regulation of the assessment process through primary legislation and by giving to the High Council of Justice the opportunity through decisions to detail this process pursuant to the law.

This approach is consistent with the recommendations of international acts, according to which basic criteria of Assessment should be defined in law, whereas accurate criteria used in periodic Assessments, terms and the assessment mechanisms should be determined in the bylaws approved by the Council of the Judiciary (in the case of our country by the High Council of Justice), and at the same time also with different practices of European countries where there is a formal system of evaluating judges, defined in the normative acts with legal force (eg Italy, Belgium and France).

Regarding the assessment period under the new draft law, each judge will be evaluated at least once in the 2 years. So as we notice we have a divergence if we compare this with the deadlines foreseen in the foreign legislations. In this optical in my opinion, this is insufficient time to perform an objective assessment of the work of a judge and an optimal period would be of three or four years. We can find this approach in the Italian legislation, where the judge is evaluated over a of four years.

The new draft law has regulated also notification on the commencement of assessment procedure by the High Council of Justice, which no later than November of each year determines the list of judges and of Chairmen of courts who will be evaluated during the following year and the assessment period. I think that the procedure of notification and setting up lists of judges evaluated as defined in the new draft law, leaves spaces for abuses or improper interference, therefore it becomes necessary forecasting of several mechanisms that guarantee to the judge that require to be promoted the right to demand his inclusion in the the list of judges which will be evaluated by the High Council of Justice and the obligation of this latter to be more transparent in drafting and approving the list of judges to be evaluated.

Specifically I would suggest that in the new draft law there must be explicitly provided the manner of designation of methodology concerning the selection of judges which will be included in the list of judges which will experience the assessment.

It is noticed also that one of the changes made by the lawmaker in the process of evaluating with the new draft law on of the judges assessment, is exactly the greatest weight which is given to the moment of self-assessment of the judge.

Lawmaker seems to have taken into account the practical problems encountered by the system, specifically with the level of complexity of the assessment process. This process offers a high degree of difficulty, especially in the collection and processing of data, which directly affects even in excessive duration in time of process development.

With the new draft law, the responsibility of collecting and processing data initially goes to the Judge who must perform a self-assessment by analyzing the relevant statistical data.

Besides self-assessment of the judge in the new draft law there are defined two levels of in court and in the commission. According to the draft law the judge performs professional and ethical self-assessment of his work within 3 weeks of receiving the notification, by completing the form and statistical tables, which submits later to the Chairman of the Court in which operates, by 31 January of each year.

In this assessment the judge describes his activity, makes an overall assessment of this activity and declares on its activities relating with the Assessment criteria, and also presents an analyze of statistical data on his judicial activity, determines the need for training as well as the objectives for his professional improvement realized and them to be implemented.

At the same time it must select eight decisions and other documents that show commitment in professional activities during the assessment period. From the procedural point of view within 3 weeks since receiving the notification the Judge makes professional and ethical self-assessment of his work and submits it to the Chairman of the Court.

Regarding the first assessment the new draft law defines in the this role the Chairman of the Court in which the judge who will be assessed carry out his job. The Chairman of the Court is exactly the person who makes the first assessment of the judge in the form of a written act, being based on self-assessment form of the judge, taking into account the respect of labor discipline, of solemnity of the judgment and ethics too. The assessment of the Chairman of the Court is notified to the judge and this latter one has the right, to be heard and to present his comments regarding the assessment.

In addition the opinion of Chairman of the Court describes the activity of the judge, by providing his assessment of the judge's activities in relation to the Assessment criteria specified in the law, especially for those criteria where chairman of the court has a different assessment from self assessment of a judge. Furthermore, the opinion of

Chairman of the Court includes an analysis of statistical data of the activity of the judge.

So it is clear that the Chairman of the Court's opinion contains an assessment of technical, fact and legal character. In my point of view such an assessment should never be based only on statistical-quantitative data, nor focused only on productivity of the judge since the latter one can be influenced by various factors such as working conditions in the which the judge is obliged to work and on which he has no direct responsibility but State and resources available.

The first guarantee for the judge is the opportunity to be heard by Chairman of the court within two weeks from the submission of the request. Chairman of the Court documents hearing session with a minute, which is attached to the opinion of the Chairman. Not later than 2 months from the date of notification under Article 20 of this Law, the Chairman of the court gives a final opinion on the activity of the judge, which includes the Assessment of potential objections of the judge.

Considering the manner on how is regulated the development of the procedure concerning the Chairman opinion for the assessment of judge, in the new draft law is noticed that the judge enjoys the guarantee of contradiction and therefore I think that the assessment process would be more convenient to be closed with the a Decision by the Chairman of the Court.

At this point I think it is necessary that in the new draft law of the Assessment system for judges, Chairman of the court must be expressed with a Decision, or at least to predict *partial obligation of the Chairman opinion*.

If we take a look at system of judges Assessment in the Republic of Italy, is noticed that within the Courts of Appeal operate Judicial Councils which gives to the High Council of Magistrates essential elements to exercise its functions of the final Assessment of judges.

Specifically Judicial Council drafts an opinion on the assessment of the judge and it is equivalent with the opinion of the Chairman of the Court, in the case of our country.

Formally if we'll analyze the legal nature of the Italian Judicial Council opinion it is a consultative opinion which must be given by the Judicial Council but that is not mandatory to be implemented by the Supreme Council of Magistracy.

However basically the opinion of the Italian Judicial Council is based on quantitative and qualitative resources which are collected during the Assessment phase of the judge and the attached opinion. If the Italian Supreme Council of Magistracy during the Assessment of judge does not take into account the opinion of the judicial council,

then it will be necessary to gather information from other reliable sources which contradict the opinion of the Judicial Council.

Even the jurisprudence of the Italian State Council has confirmed this orientation with the decision of the State Council sez. IV, date 11 July 1985, stating that “the opinion of Judicial Council... although it is not mandatory (for the High Council of Magistrates), represents the starting point for the Assessment; It is therefore not in the accordance with the law assessment of the Supreme Council of Magistrates when considering the aforementioned opinion only marginally, by not giving them central role determined by the law. “

So in the analogy, the system of Assessment of judges in our country, as proposed by the new draft law, must have a compliance between the central role which take the opinion of the Chairman of the Court and its legal nature given by the law. So in this case I think we should talk on an opinion which is partly mandatory for the High Council of Magistrates, because as we can notice more than a the decision making function in exclusively meaning the latter one has a control role or in other words has the function to approve or reject the opinion of Chairman of the Court, which may refuse only if it has other information from reliable sources that are contrary to the opinion of the President of the Court

Another key procedural point of this draft law where we have to stop is exactly the role that the High Council of Magistrates on the system of Assessment.

Following the Assessment procedure Chairman of the court transmits to the High Council of Justice assessment acts of the judge within 2 months from the date of notification including: the act of self-Assessment of judge, 8 of his selected decisions and any other date represented by the judge; the opinion of the chairman of the court and eventual objections of the judge on the opinion of the chairman as well as the minute of the hearing session.

#### *Inspector and Chief Inspector of the HCJ.*

In terms of the Assessment of the real process first of all Chief Inspector of the HCJ, after receiving acts of Assessment sent by the Chairman of the Court, appoints the inspector responsible for the assessment and notify in writing the judge for the appointment of a responsible inspector. In my opinion at this point the draft law should have provided an additional guarantee for the judge, such as the possibility of this latter one to make the exclusion of the inspector if the judge perceives any partiality<sup>12</sup>

CCJE foresee that evaluators should be mostly judges in order to ensure the independence of the judiciary and furthermore the judge subject of assessment

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<sup>12</sup> This proposal is also consistent with the recommendation of the CCJE, paragraph 37, Opinion 17

should be informed who are the assessor and should have the right to request the replacement of any evaluator, which can be objectively perceived as biased.

Following the Assessment procedure, the inspector in charge creates the file of the assessment, which contains on one hand acts of assessment submitted by the Chairman of the Court and on the other hand a collection of statistical data on: the number of cases judged by judge categorized according to the nature of the cases, the period of cases judgment in relation to minimal time standards and the number of cases tried beyond minimum standards; number of court sessions for each case, efficiency of termination of Judge cases and the reasoning time of each decision.

Also receives data and analyzes complaints represented against judge in the assessment period, on the inspection of the activity of the judge or of the court, as well as final decisions for disciplinary measures against the judge.

Number of cases in which the judge is excluded due to conflict of interest, at the request of the parties. Likewise the inspector proceeds with the selection by lot of no more than 22 total court cases, judged by judge during the Assessment period. 16 files are selected for overall assessment from which 8 files for each calendar year of Assessment period. The rest of the files are selected for crawling, from which 5% but not more than 6 issue in total form overall number of cases judged beyond the standard limits.

After selection of the issues, the inspector evaluates them without delay in relation to the Assessment criteria. The inspector in charge, within one month from the receipt of assessment acts by the Chairman of the Court, designs the assessment-project.

Analysis of statistical data on the productivity of termination of cases, the duration of the trials and time of decisions reasoning, among other things, are based on the complexity of the issues, the volume of issues and unexpected increase in the volume of cases.

In my opinion on these data must be added also the circumstance relating to judge himself such as the state of his health or of his family or the conditions under which he works. That's because even CCJE encourages member states to use material gathered during the individual Assessment process of the judge to improve the organizational structure of the courts and judges' working conditions.

The draft assessment model provided by draft law contains data resulting from gathered resources assessment and their analysis for Assessment of the judge activity under Assessment criteria as well as the proposal of the Assessment level referring to each Assessment criterion and the overall Assessment level, training proposals or recommendations on steps to be taken to improve the activity of the judge.

The draft assessment is accompanied by a report that describes and analyzes in detail the data collected by the inspector; and is reviewed and approved from by signing it. The draft assessment is included in the assessment file.

Draft assessment is notified to the judge, making him aware on the right of access to the file of the assessment. The presentation of new evidence is allowed only if his right to have access to the Assessment file is violated.

*Termination of the assessment procedure. The decision of the High Council of Justice.*

Following the procedure provided from draft law, the High Council of Justice invites concerned Judge, chief inspector and, where applicable, other persons in a hearing at the request of the judge and if it is necessary to clarify the facts.

In the draft law there is highlighted the possibility of the judge asked to be heard and to present his objections during the hearing in the High Council of Justice. I think the judge should definitely be present at the Assessment session. It should not be limited in any way the right of a judge to dispute project Assessment because its restriction means not only a violation of the guarantee of contradiction but also leaves spaces for abuse.

At the conclusion of the Assessment process draft law provides that the High Council of Justice approves the final assessment. In the case that the Council assess the judge at a level different from the one proposed, then he should explain the reasons for the change.

One of the predictions that meets debate is the case when a judge who was assessed twice successively with "insufficient" then is discharged from duty for "professional insufficiency". High Council of Justice, primarily handles the decision of discharge from the duty when the decision of professional and ethical assessment becomes definitive and when the Council concludes sure that the judge is unable or unwilling to perform his duties under the minimum acceptable standards of judicial activity;

In my opinion this legal provision has not any place referring to the intention that the law has itself for Assessment of judges, and secondly this measure constitutes an extrema ratio which should be taken only for serious breaches of discipline under the provisions of 32 of the law "On the organization of the judicial power" or of committing any criminal offense which satisfies the Council that the judge is incapable.

According to this clause, the judge is discharged mainly by the HCJ, when cumulatively fulfilled two conditions, namely: (1) when the decision of professional and ethical assessment becomes final, and (2) when the Council concludes sure that the judge is unable or unwilling to perform his duties under the minimum acceptable standards of judicial activity. So as can be ascertained the first condition is of objective nature

(assessment becomes final) and the second condition is with subjective nature. The second condition on the way it is formulated leaves space for discretion of HCJ decision making, but it does not show the solution if HCJ fails to conclude safe to judge performance, a fact which would entail legal indefinable consequences either in terms of the position of judge or in terms of the institutional position of the Supreme Judicial Council. Moreover the conclusion that reaches HJC, alternatively with the condition of disability, that the judge “does not wish to perform his duties according to standards” is not a sufficient judgment to lead HCJ to a safe conclusion, because the judge may wish to carry out his tasks, and it is highly rational and that is expected by every judge, but he fails or can not carry them out.

The proving fact from HCJ that the judge does not want to perform tasks, obviously is difficult to be proven in practice, by putting in this way to HCJ a heavy responsibility, and which certainly can not be excluded subjective judgments of HCJ members regarding this fact.

In this context, we think that the discharge of a judge can be done only on objective criteria, leaving less at the discretion HCJ to decide for this purpose, based on subjective criteria, not well defined and which are open to different interpretations.

So in my opinion draft law at this point contains predictions that can lead to inconsistent interpretations and creating improper legal situations. This orientation is confirmed in paragraph 29 of the Opinion no. 17 recommendation 12 of the CCJE, stating that the judge may be discharged from the duty if the Assessment shows that he/she is not able or willing to perform tasks up to a reasonable standard, after an objective judgment, in exceptional circumstances and only when there exist and rigorously respected the procedural guarantees<sup>13</sup>.

Furthermore CCJE in Opinion 17 states that individual assessment of judges should be separated from the inspections that evaluate the work of the court as a whole, and from disciplinary procedures.

In addition to the above arguments I think that it is impossible to give new powers to the Supreme Council of Magistracy without changing earlier the framework law that regulates it. If we compare with Italian system the latter provides various professional consequences and economic ones as a result of the estimates “not positive” and “negative”. If the magistrate is positively assessed an increase in duty and reward. In the event he is negatively evaluated then he have to perform vocational training In the event that negatively evaluated then have to perform vocational training and only if a second judge “negative” is scheduled for initiation of proceedings of dismissal of a judge.

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<sup>13</sup> Paragraph 29 of the Opinion no. 17 of the recommendation 12 of the CCJE

So it is essential to have a fair procedure in all elements of individual assessments. In particular judges should be able to express their views on the proposed process and outcomes of the assessment. They should also be able to challenge an assessment, especially when it affects the “civil rights” to the judge within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>14</sup>.

At the end of the evaluation process provided by the new draft law, the Judge has the right to appeal the decision of the High Council of Justice for assessing to the High Court within 15 days from the date of notification of the decision.

*Comparative Overview. The assessment procedure in the Italian model.*

I think that the analysis of Italian system of individual assessment of judges may highlight on the practical aspects of the most appropriate assessment model to be implement in Albania.

The current system of assessing the professionalism of magistrates in Italy provides for Judges and Prosecutors (magistrates) must be assessed every four years up to overcoming of the “seventh assessment “ which coincides with the arrival of the 20th anniversary of working in the position of judge or prosecutor. In the Italian model, assessment of professionalism is based on on four criteria professional, productivity, diligence and commitment Ability.

What is observed is the effort of the Italian legislator to ensure special protection for the autonomy and independence of judges and prosecutors, ensuring that the professional assessment should not express judgments on the right of the judge applied in concrete cases.

In the Italian model of assessment a central role is taken by the report compiled by the Head of the judicial office and the Opinion of the Judicial Council who are the main sources on forming an assessment on the judge.

Judicial Council has an important role, as a body established in the Courts of Appeal, which is independent of the Supreme Council of Magistracy and in its composition are: Chairman of the Court of Appeal who heads and the Chief Prosecutor of the Republic at the Court of Appeal.

These last with their appointment to the respective functions, automatically enjoy the right of being members of the Judicial Council, as their participation is determined by law.

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<sup>14</sup> Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

While other ordinary members are five members elected among judges or prosecutors of judicial district of the Court of Appeal as well as for special occasions three alternate member. The difference lies in the fact that ordinary members are not appointed but elected by other judges of the district court and have two-year term on the Judicial Council.

In the Italian legislation the highest body of self-government of judicial system is exactly the Supreme Council of Magistracy. This body has exclusive competence in the organization and operation of services related to the Italian justice system. Also among its main functions are guaranteeing of a full autonomy and independence of judges from other powers as well as the assessment of their professionalism.

In this context, the Supreme Council of Magistracy, conducts professional assessment based on the Opinion of the Judicial Council. The latter, as I mentioned above is formed at each Court of Appeal, and it has an organizational structure which allows to fulfill the task of editing the Opinion on the evaluation of judges and prosecutors. Judicial Council supports its work on the administrative activity of several permanent committees, among which is the permanent Commission for the assessment of judges and prosecutors.

On his part, permanent Commission is a consultative body which supports the judicial administration and on the domain experts in collecting and processing information, aiming to make this information available to the Judicial Council.

Analyzing Italian primary legislation the law no. 111/2007 and the Circular no. 20691 dated 4 October 2007 of the High Council of Magistrates, I think that there are two moments from which emerge the main features of this system on judges assessment, therefore in the continuation of the analysis I will focus precisely on these two moments which are:

#### *Proceedings assessment and Assessment criteria.*

In terms of assessment procedure, the initiative belongs to the Judicial Council ex officio who performs professional assessment of all judges and prosecutors every four years, the procedure for “the seventh levels of assessment” is a feature of the Italian system, which combines best the qualitative and quantitative elements of assessment. In a second moment it is Supreme Council of Magistracy, the body that conducts the proper assessment of professionalism based the Opinion expressed by the Judicial Council and the documents attached to this Opinion.

Also it is interesting to note that the Supreme Council of Magistracy should proceed with the evaluation of additional documentation such as information which comes

from the results of previous inspections and all additional sources of information that are needed.

Regarding the relationship between the Judicial Council Opinion on the one hand and the Supreme Council of Magistrates, there is a debate in the the Italian doctrine to determine its legal nature. At first glance it is a technical opinion which is not mandatory for the High Council of Magistrates as the latter one may be expressed differently with the outcome of the Opinion assessment, since the final assessment remains an exclusive competence of this self government body of judges and prosecutors ie Supreme Council of Magistrates.

I think that such a debate should be developed also in Albanian doctrine and in particular on compulsory character of the Chairman of the Court's Opinion in relation with the assessment of the judge and this because otherwise we would not have a technical opinion whose content is mandatory, but just a transfer of information to the High Council of Justice.

In my opinion, analyzing the characteristics of the Judicial Council Opinion to the Court of Appeal, how it is formed, and in particular contradiction guarantees given to judge at this stage, I think the Opinion should be partially binding with regard to the Assessment expressed to the judge. In my opinion findings of the statistical documentation and information that are received by the Judicial Council from different sources are compulsory to the High Council of Magistrates since the latter may request additional information from different sources but it can not possibly disregard them.

Herein, it is worth to mention that the judge enjoys big guarantees in the this assessment system. Here we can mention the fact that he can be heard by the Judicial Council during the drafting of the Opinion and the fact that there is a further guarantee of appeal to the High Council of Magistrates, within ten days of notification Opinion of the Judicial Council. In the complain, the judge may submit his arguments by asking to be heard personally by the Supreme Council of Magistracy and thus initiating a meaningful procedural stage with the right to protection.

If we consider the procedural aspects of the Italian evaluation system it is noted that the law regulates the decision making of the Superior Council of Magistrates<sup>15</sup>. According to this article the assessment procedure of the judge or of the prosecutor can be closed with the three possible outcomes:

- Positive assessment. If the assessment is positive on all the criteria taken into consideration. In this case the effect of such an assessment is associated with a wage increase and the promotion in the duty for the Judge or Prosecutor.

- Non Positive assessment. If the assessment identifies deficiencies in relation to one or more criteria the Supreme Council of Magistracy proceed with the a new assessment within a period of one year, asking a new Opinion by the Judicial Council.
- Negative assessment. If the assessment identifies serious shortcomings in relation to two or more criteria. The decision of the Supreme Council of Magistracy, elaborates clearly the areas in which have been observed deficiencies, and also determines whether the magistrate should take part in training professional qualification, by determining which training and their number, if the magistrate is able to exercise specific tasks or if it should be transferred to perform other tasks.

What differs in the Italian system is the prediction of various professional and economical consequences as a result of the assesemnt “not positive” and “negative”, thus anticipating the discharge from the duty of the judge or prosecutor, in the case of a second trial “negative”.

### **Professional Assessment Criteria of Judges.**

#### *Assessment criteria under the current system*

Currently in Chapter II of Decision 261/2, are foreseen these assesemt criteria which are classified into three groups as follows:

- Group of general professional skills, organizational and implementation ones (as defined in Section I, Article 4-8) under which is assessed the effectiveness and productivity of the judge, methodology, speed, and planning of court hearings;
- Group of professional legal and technical skills (provided for in Section II, Articles 9-12), according to which there is assessed whether the judge is able to write clear decisions, with judge’s ability to manage a judicial process, as well as the judge’s competence to create and organize a judicial files in a way that makes it ready for use.
- Group of human and professional commitment skills (as defined in Section III, Articles 13-17), according to which is measured the sense of ethics of the judge during and outside judicial process, solemnity and discipline of the judge in work, attendance and involvement of a judge in professional and training activities as weel as the work of the judge as a legal researcher.

Quantitative and qualitative approaches are used to evaluate the criteria in Section I, while for Section II and III are used quantitative criteria.

*In Section I, should be evaluated: - the effectiveness and productivity of the judge, methodology, - speed and – planning of the courts hearings.*

In the current system of assessment, evaluation of effectiveness to judge is estimated according to some statistics. The effectiveness of the judge is controlled by the guiding standards of judicial performance in terms of quality, quantity and precision in time which are set out in Appendix 1.

For this purpose there are used some quantitative criteria, such as number of cases for which the judge is expressed with the decision and the number of decisions returned by the appeal. These quality standards require the judge to withstand a minimum load of work during a judicial year. Minimum working loads is measured on the basis of court and section in which belongs each judge. In the case of a judge which exerts his functions in the penal section of the court of first instance he must meet the obligation of examining 100 penal cases annually as a relator, while an appeal court judge who exercises his functions in civil section, should examine not less than 200 cases as rapporteur.

Quality standard is measured by considering that the number of the fallen decisions mus not be more than 30% of decisions that are appealed.

Whereas the speed standard requires that the judge subject of assessment must realize judicial processes within maximum deadline which are different according to the nature of the case.

In Article 6 of Decision 261/2 is expressly provided criterion on judge methodology, which serves to assess the ability to plan and to take the necessary procedural and administrative measures inside or outside the court.

In Article 7 of Decision 261/2, is projected speed criterion which serves to assess the ability of judges to adjudicate cases within reasonable limits.

In Article 8 of Decision 261/2 is provided the assessment of the judge ability to schedule court sessions in a fair and timely manner.

*In Section II* are provided rules for the assessment of professional and technical judicial skills of the judge. In this section is assess whether the judge is able: - to develop clear decisions.

The criterion of “drafting clear decisions” evaluates the capabilities of a judge for the preparation of court decisions in a clearly and simply manner, in order to make the solution simple to understand by all, serves to assess the ability of a judge to manage a judicial process, to orient and run in the right way the legal debate, and to express themselves clearly in accordance with the requirements of the law and legal ethics.

In Article 9 of Decision 261/2 is provided assessment of the judge’s ability to create and organize a judicial file.

*In Section III*, is assessed the human capacity of the judge subject of assessment and his/her professional commitment. Specifically is estimated: - sense of ethics of the judge during and outside court proceedings.

This criterion evaluates the communication skills of the judge during the proceedings, respect of the solemnity and discipline of judges at work in accordance with the law.

Finally is estimated participation and involvement of the judge in professional activities. With this criterion is assessed the judge's commitment to deepening legal studies by giving his contribution in this regard.

*Assessment criteria according to law "On assessment system of judicial activity in RA".*

Assessment of professionalism is a useful tool to ensure continuous training of Judges as well as to create a clear and consolidated career based on merit criteria. International principles define as the main criterion the system objectivity and independence of the body that conducts it.

European Charter on the Statute for Judges provides three systems of promotion of judges, on the one hand, a system based on years of service, under which judges have advanced after passing a certain time in a position (Quantitative Systems); a typology of career advancement system based on merit, (Quality Systems) and a combined system where we find elements of Quantitative System and elements of qualitative systems<sup>16</sup>.

The Ministry of the Justice has taken the initiative to reform the current evaluation system of judges which has led to the drafting of the law for judicial evaluation system.

Chapter II of the aforementioned draft sets in Articles 7 to 11 evaluation criteria on which is based the performance of professional and ethical evaluation of judges such as: judicial ability, organizational skills, ethics and commitment to judicial values and human ability and professional commitment. CCJE in the opinion 17 emphasized the importance of supporting assessments on objective criteria, which should be published. Setting of objective standards I not required only to exclude political influence, but also to avoid the risk of possible impression that there are favors which is present if appointments/assessments are conducted in an unstructured manner, or based on personal recommendations. So these objective standards should be based on merits, taking into account the qualifications, integrity, ability and efficiency and by examining all aspects that constitute a good judicial performance.

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<sup>16</sup> European Charter on the Statute of the Judges

In Articles 8, 9, 10 and 11 of Chapter II of the draft law, in which are listed the criteria based on which an assessment of the judge, specifically in Article 8 of the draft law is assessed professional ability of the judge in terms of legal knowledge and in terms of legal reasoning.

The aspect of legal knowledge is measured by the assessment of the judge's decisions using as a indicator the general ability to interpret the law, to identify conflicts of norms, to use the general principles of the theory of right and ability to analyze jurisprudence. Through the aspect of legal reasoning is assessed the ability of the judge in giving court decision by measuring it with indicators such as the clarity of the decision, of the parties inclusion from a structure developed steadily of the decision, the quality of analysis and logical argument. During the assessment the inspector should not judge the correctness of the decision and the merits of the the case, and without replacing interpretation or the logic of the judge which is being assessed. So in paragraph 4 of this Article, is expressly provided that evaluators should not be replaced and act as judges. In my opinion in any case the assessment of court capabilities defined in Article 8 paragraph 4 of the this law, should avoid interference in the independence of judges in relation to resolving the case as it is a prerequisite to protect the judge from improper interference. In the current model inspector evaluates the logical structure and the quality of the decision. However, assessment of the quality of the decision reasoning should be such as not to influence at all on the judge's decision making process and the substance of judicial decisions should not be assessed by the inspector.

For this I have emphasized several times that the assessors inspectors need to be elected between those practicing the profession of the judge, because only them can perform an overall assessment of legal knowledge and ability to make legal reasoning and to distinguish realistically if the judge generally has not judged pursuant to appropriate legal and procedural knowledge<sup>17</sup>.

As a result of this reasoning I think that judicial decisions returned should be removed as individual evaluation criteria of the judges. It would be impossible evaluation of these data without considering first the essence of any court cases returned, an analyse which is not allowed to inspectors. "In order to protect judicial independence, individual assessments should be undertaken mainly by the judges<sup>18</sup>. Judicial Councils (where they exist) may play a role in this process. Assessment by the Ministry of Justice or other external bodies should be avoided "(paragraph 37). In Article 9 of the draft law generally is estimated organizational ability of the judge. Specifically there is assessed the ability of a judge to handle the workload, to conduct court proceedings and the ability to administer the judicial records. Ability to face the workload is measured by

<sup>17</sup> This orientation is in line with the recommendations of Kiev, no. 28 which states that: "Judges not be evaluated under any circumstances for the content of their decisions (either directly, or through counting the number of decisions returned).

<sup>18</sup> Also this orientation is in accordance with Opinion 17 of CCEJ

indicators to respect legal deadlines to meet minimum standards of time, the yield of court case termination and the average time for making a decision. Ability to perform judicial proceedings is measured by indicators for the average number of court session for each case, for conducting procedural actions necessary for the organization of the judicial process, to avoid unproductive court sessions, including also monitoring of the delivery without delay of the required acts of notification. The ability to administer court files is measured by indicators for the regularity of the acts in the court file and creation of them without absence.

The main source of evaluation in this regard are the statistics regarding the capture of legal deadlines and minimum standards of time, the efficiency of the judge and the average time for a decision. I think that at this point the draft law it is not clear as statistical data to be analyzed in context, consider the circumstances that do not depend on the judge as for example the case of monitoring reports which is part of the duties of the chancellor and not of the judge. The same reasoning goes also for the analyse of the ability to perform judicial procedures which is measured by indicators for the average number of court sessions for each case. In this occasion the above capability can not be measured with this indicator because the average number varies according to the nature of the cases and the nature of a court investigation or to the quality and completeness of expert acts performance for eg or of immediate increase in workload. In Article 10 of the draft law is foreseen the criterion of ethics and commitment towards the values of the judiciary. With this criterion is assessed the ability of a judge for the work ethics, integrity and impartiality.

Ethics in the judge's job in relation to the commitment and accountability to the task, is measured by indicators drawn from estimation resources as the result of complaints and their verification, Chairman of the court's opinion and final decisions on disciplinary measures within the evaluation period. The integrity of the judge in relation to his attitude toward any external influence or pressure, is measured by indicators on the number of requests of the judge to give up from judgment in relation to the number of the approved applications, as well as other indicators derived from other sources evaluation. The impartiality of the judge is related to the care of a judge against conflict of interest and respect for issues of vulnerable groups, including gender equality and minority rights.

In relation to Articles 8, 9, 10, 11 of Chapter II of the draft law in general and in particular in Article 10 is noted that the latter have a common problem regarding the lack of clarity of the criteria for evaluation and general nature of the them. So it is not clear precisely how this evaluation will be carried out in the absence of a standard gauge.

For example in Article 10 for the assessment of ethics and commitment to the values of the judiciary, a criterion are also "other sources the assessment", without indicating

precisely what they are etc. Thus I am of the opinion that it is necessary to define more precisely the indicators of the criteria that should be identified and evaluated by the Inspectorate of the High Council of Justice, in order to fill and satisfy the contents of the criteria stipulated in this Law, in more laxative manners and more detailed ones. So, these indicators would dismantle in analytical manner the criteria set out in the law. If we look at comparative with Italian model we conclude that for each of the evaluation criteria should be provided also the use of some “objective parameters” so that their assessment be more analytical<sup>19</sup>.

It is also in line with the recommendations of Kiev stating that professional evaluations of judges, should not be used to undermine independent judgment. Evaluations of judges’ work should be primarily qualitative and focused on their skills, including professional skills (knowledge of the law, the ability to run trials, the ability to write reasoned decisions), personal skills (ability to face load of the work, the ability to make decisions, adaptation to new technologies), social skills (ability to mediate, respect for parties) and for a potential advancement in the administrative position, ability to manage. But these skills need to be cultivated in judicial training programs and to work. However, one must take into account the fact that more objective criteria should serve as a benchmark measure related to the assessment of a judge. Even CCJE recommends that key elements of the formal evaluation must be provided in evident manner and thoroughly from primary legislation. Details can be regulated with a special bylaw which shall also be published.

According to Opinion no. 17 (2014), of the CCJE, the assessment should be based on objective criteria. Criteria can include qualitative indicators, but also quantitative indicators, although not exclusively. They should enable evaluators all aspects that make up the judicial better performance. (paragraphs 31-35).

The draft law also measure professional engagement with indicators such as following from training judges, engagement in consultations within the court or in academic activities. In this context it should be noted that as long as the judge is paid for a particular job as a judge, he invests in updating of the knowledge which serve in this area, is estimated for this job, at a time when his engagement in academic activities, not only affect negatively on the quality or speed on the duty as a judge, but its exercise is related with special trend which should not discriminate that which did not have and which did not need in his daily work.

As for the human capabilities, expressed as communication and cooperation skills, in fact they are a repetition because they are measured on the criterion measure of ethics and commitment toward the values of the judiciary provided by Article 10 of the draft and I think that professional commitment should be a separate criterion.

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<sup>19</sup> Paragraph 35 of Opinion 17 CCJE.

Article 11 of the draft law also stipulates that the judge's participation in continuous formation of the School of Magistrates is measured based on the information sent by the School, referring to the estimation "very good" in the case of fulfilling the legal obligation to participate in no more more than 20 days a year and no more than 60 days past 5 years.

In my opinion the number of training laid down in Article 11 of the draft law is exaggerated. If we do a simple calculation results that in 11 months of work of a judge, by removing annual vacations, the big loads of silence for judgement, makes impossible to follow all these trainings.

Such training should not be in any way an aim in itself but must be linked directly with the judge needs for training.

In the same line is also the Recommendation of Kiev when stresses the statistics on the efficiency of court activity should be used mainly for administrative purposes and should serve only as a factor to assess judges.

Assessments of judges can serve them to identify aspects of their work, which they may want to improve and for the purposes of a possible upgrade. Periodic exams for judges (checks) that may lead to dismissals or other sanctions are not appropriate for judges with life position.

According to the 2014 Progress Report of the European Commission, evaluation criteria should keep in mind the workload of judges at all levels.

In my opinion, this draft law is a bargain in implementing quality evaluation system of judges. The legislator should not miss this opportunity to give a homogeneous form of criteria and evaluation process from conception, presentation and processing of information required as well as their subsequent analysis.

For this purpose should certainly be prepared some measuring standards of valuation models. These models can be designed on the basis of an act adopted by the High Council of Justice, pursuant to this law, on the matters arising during the evaluation process (eg act of estimation model, of the opinion of Chairman of the Court, of the inspector's report, the of the the self assessment of the judge, etc.).

Such act models are provided also in our legislation, eg for assessment of civil servants and prosecutors, but also from other states legislation consulted (eg Italy, of the US, etc).

## Comparative Overview. Assessment criteria in Italian model.

*In terms of evaluation criteria in Italian model*, the Supreme Council of Magistracy with the circular n. 20691 dated 4 October 2007 has implemented the provisions of the law for the assessment of judges, by detailing the criteria and estimation resources.

From the analysis of these criteria is noted that to simplify this assessment activity there are developed from the High Council of Magistrates some valuation models such as the model of the report of managers of the office of judge or prosecutor and the opinion model of the Judicial Council.

Regarding the first group of criterias they are *independence, impartiality and balance*, for which if there are no data or information for violation of any of them during the official duty for the period of the assessment, evaluation body is expressed by the simple formula “nothing to ascertain”.

As for the second group of professional assessment criteria they are conducted based on well-defined criteria and parameters of Article 11. 2 of Law no. 111/2007. Evaluation is expressed individually on each of the criteria while positive overall assessment is positive only if are positive all following criteria:

- *“The criterion of capacity”*, which is estimated taking into consideration: legal training and degree of updating with new legislation, doctrine and jurisprudence; skills and techniques of argument or investigation regarding the outcome of cases in other scales of the judgment; running of hearings and conduct as chairperson of sessions; coordinating of assistance collaborators; attitude to cooperate and coordinate with other judicial offices.
- *“The criterion of productivity at work”* which is estimated taking into account the number and quality of cases considered in relation to the type and organizational and structural conditions of the judge or prosecutor’s office and the time of the performance.
- *“The criterion of diligence”* is assessed taking into account the commitment and appropriateness with their presence in the office and at court sessions; taking into account the respect of deadlines for reasoning and storage of court decisions, or to perform other judicial activities; considering participation in meetings for discussion of legislative innovations and introduction to jurisprudence and its evolution.
- *The criterion of “engagement”* is assessed taking into account the availability for substitutes to the extent that they meet the standards of law and directives of the Supreme Council of the Judiciary; participation in courses and vocational training organized by the School of the Magistrates.

For each of these evaluation criteria is foreseen the use of some “*objective parameters*” in order to assess them in more analytical manner.

For example, in relation to indicators of the capacity, in order to avoid an assessment of the merits of the decision, it was determined that the assessment of professionalism should be focused only on the validity of the methodology used by the judge because otherwise there is compromised an inappropriate interference in the independence of judges.

So a characteristic of this assessment model is the periodicity and detailed analysis of each criterion by performing an overall positive assessment only if all the above criteria is positive.

In conclusion, the Italian legislator has drafted a homogeneous procedure at all stages and levels in which passes the data acquisition and authentic assessment.

Also Italian evaluation system is a system that with recent interventions has taken into account all the practical experience in relation to the evaluation criteria of judges and has reflected them in the drafting of the evaluation, the predictions of the primary legislation and circulars of the the Supreme Council of Magistrates.

In the concrete case the enormous role given to the practical experience has brought new procedural rules that have simplified the work of bodies performing the assessment of judges and at the same time has increased the quality by using simultaneously ensuring the transparency of the process.

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