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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

**JOINT OPINION
OF THE VENICE COMMISSION
AND
THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF
LAW
(DGI) OF THE COUNCIL OF EUROPE**

**ON THE DRAFT LAW ON AMENDING AND SUPPLEMENTING THE
CONSTITUTION
WITH RESPECT TO THE SUPERIOR COUNCIL OF MAGISTRACY**

**Adopted by the Venice Commission on 20 March 2020
by a written procedure replacing the 122nd plenary session**

on the basis of comments by

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I. Introduction

1. By letter of 6 February 2020, the Minister of Justice of the Republic of Moldova requested an opinion of the Venice Commission on the draft law on amending and supplementing the Constitution of the Republic of Moldova (CDL-REF(2020)017) (hereinafter, “the draft Amendments”).

2. Mr Alexander Baramidze, Mr Richard Barrett, and Mr António Henriques Gaspar acted as rapporteurs on behalf of the Venice Commission. Ms Nina Betetto analysed the draft law on behalf of the Directorate of Human Rights (“the Directorate”).

3. On 19-21 February 2020, a delegation composed of Mr Baramidze, Mr Barrett and Mr Gaspar, accompanied by Mr Ziya Caga Tanyar from the Secretariat travelled to Chisinau at the same time as the President of the Venice Commission, Mr Buquicchio, who attended the 25th anniversary of the Constitutional Court. The delegation had meetings with the Constitutional Court, the Ministry of Justice, the Superior Council of Magistracy, the Legal Committee for immunities and appointments of the Parliament, the Supreme Court of Justice, the Prime Minister, the President of the Republic, the President of Parliament as well as representatives of civil society organisations. The Commission is grateful to the authorities and the Council of Europe Office in Chisinau for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the draft Amendments. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Chisinau. It was adopted by the Venice Commission on 20 March 2020 through a written procedure which replaced the 122nd session of the Venice Commission, due to the COVID-19 disease.

II. Background

6. The Moldovan authorities sent an Information Note providing some explanations on the background and purpose of the draft Amendments. The note explains that similar constitutional amendments had been registered in Parliament in 2018¹ but as the Parliament failed to enact the amendments within a year after their introduction, the proposal expired and was declared void.² Taking into account the importance of the matter, the Ministry of Justice decided to relaunch the procedure.

7. The Note explains that the draft Amendments, as the 2018 ones, have been developed in order to implement the National Action Plan for the Republic of Moldova – European Union Association Agreement for the period of 2017-2019 approved by governmental Decree No. 1472/2016. In addition, the draft Amendments are also reflected in the Legislative Programme for the Implementation of the Association Agreement between the Republic of Moldova and the European Union for 2017, approved by Parliament’s Decree no. 1/2017. Finally, the draft Amendments aim at implementing Pillar I “Judicial System” of the Action Plan for the implementation of the Moldovan Justice Sector Reform Strategy for 2011-2016, approved by the Parliament’s decision no. 6/2012.

¹ Draft No. 10 of 28 January 2018.

² Under Article 143(2) of the Constitution, “*if, within a year from the date when the initiative amending the Constitution has been submitted, the Parliament did not pass the appropriate constitutional law, the proposal shall be deemed null and void.*”

8. In March 2018, the Venice Commission adopted an opinion on the 2018 draft Amendments, in which it welcomed notably the removal of the probationary period for judges, the appointment of judges of the Supreme Court by the President (with a one-time veto) rather than by Parliament; the regulation on functional immunity of judges at the constitutional level and the role of the Superior Council of Magistracy (“SCM”) in the preparation of the budget of the judiciary. It recommended, however, that the part of the judges in the SCM be determined in a clear manner and that the method of selection of the members from civil society be clarified. The Commission also considered that the full effect of the draft amendments would depend on their implementation at the legislative level.

9. In January 2020, following an urgent request by the Minister of Justice³ the Venice Commission issued an urgent Joint Opinion on the draft law on amending the law No. 947/1996 on Superior Council of Magistracy.⁴ The legislative amendments were adopted by the Parliament and entered into force following their promulgation by the President of the Republic on 31 January 2020⁵. As a result of the legislative amendments, three more members have been added to the Superior Council, thereby increasing the number of members from 12 to 15. The additional three members include one judge member and two lay members. Therefore, currently, the Superior Council of Magistracy, is composed of seven judge members elected among judges by the General Assembly of Judges, five lay members appointed by the Parliament among tenured law professors and three *ex officio* members indicated in Article 122(2) of the Constitution, i.e. the president of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General.

10. In October 2019, the Venice Commission also adopted the Interim Joint Opinion on the Draft Law on the reform of the Supreme Court of Justice and the Prosecutor’s Office.⁶ While it focussed on a plan for an extra-judicial evaluation or vetting process,⁷ the opinion also covered draft amendments to the Law on the SCM which had proposed to increase the number of the members of the Superior Council of Magistracy from 12 to 15, by adding three lay members (law professors) appointed by the Government (2 members) and by the President of the Republic (1 member) following a public competition. Due to the change of government on 12 November 2019, this draft law was not pursued.

11. The last two opinions were preliminary to an expected proposal to amend the relevant provisions of the Constitution.

III. Latest developments – the procedure of election of 4 lay members of the SCM

12. In the meantime, the procedure of election of four lay members (2 positions remained vacant plus two new positions created by the December amendments) of the SCM was

³ CDL-REF(2020)001.

⁴ CDL-PI(2020)001 Urgent Joint Opinion of the Venice Commission and the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amending the law No. 947/1996 on Superior Council of Magistracy.

⁵ Law No. 193 of 20 December 2019 on amending the SCM Law.

⁶ CDL-AD(2019)020 Interim Joint Opinion of the Venice Commission and the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor’s Office.

⁷ According to the Information Note attached to the previous draft law examined in October 2019, in addition to and after the evaluation of the Supreme Court judges by a special ad-hoc extra-judiciary body, the same evaluation was planned to be applied to the presidents of courts of appeal and of the first instance courts; vice presidents of courts of appeal and of the courts of Chisinau, Balti, Cahul and Comrat. The draft law also provided for a similar evaluation process concerning the prosecutors acting within the Anticorruption Prosecutor’s Office, as well as the Prosecutor General and his deputies, chief prosecutors of the subdivision of the General Prosecutor’s Office, the Prosecutor’s office for Combatting Organised Crimes and Special Cases, district prosecutor’s office, and regional prosecutor’s offices in Chisinau, Balti, Cahul and Comrat.

launched pursuant to the amendments adopted in December. The contest was announced by the Parliamentary Legal Committee for appointments and immunities on 6 February 2020. 18 applicants applied; one candidate was excluded from the contest, apparently because he did not present all requested information, while the other seventeen were invited for an interview on 13 March 2020.

13. In the meantime, on 10 March 2020 parliament adopted another amendment to the SCM Law, introducing the possibility for a non-judge member to be elected as Chair of the SCM. This was in line with a recommendation of the Venice Commission.

14. It seems that on 10 March the composition of the Parliament's standing committees, including the ten-member Legal Committee on appointments and immunities, was also modified.⁸ One opposition member was allegedly replaced by a member of the Democratic Party, which led to a majority of 6 PD-PSRM members. As a consequence, the parliamentary opposition left the Committee and boycotted the interview phase.

15. On 17 March, the Parliament appointed with 55 votes of PSRM and PD MPs four new members of the SCM from among the law professors for a period of 4 years.

IV. Analysis

A. Abolishment of probationary periods for judges

16. According to Article 116(2) of the Constitution currently in force "judges who successfully passed the contest shall be firstly appointed for a 5-year term of office. After the expiration of the 5-year term of office, the judges shall be appointed to this position until reaching the age limit fixed by the law." Draft article 116(2) abolishes the five-year probationary period and provides that "judges of courts of law shall be appointed, according to the law; until age limit has been reached (...)".

17. Recommendation CM/Rec (2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities⁹, provides that "security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists." Opinion No. 1 of the CCJE adds that "European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence".¹⁰

18. This corresponds to the position of the Venice Commission which has always favoured tenure until retirement while allowing for some exceptions in countries with relatively new judicial systems.¹¹ In its Report on Judicial Appointments, the Commission considered that setting

⁸<http://www.parlament.md/StructuraParlamentului/Comisiipermanente/tabid/84/CommissionId/9/langu age/en-US/Default.aspx>. This change does not appear on the website of the parliament (last consulted on 18 March 2020).

⁹ Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

¹⁰ Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, para. 48.

¹¹ In those countries, there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office". (CDL-AD(2007)028 Report on Judicial Appointments, para. 41). The main idea here is to exclude the factors that could challenge the impartiality of judges. Therefore, according to the Commission, despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal.

probationary periods could undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.¹² Moreover, in its Report on the Independence of the Judicial System, the Venice Commission strongly recommended that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence.¹³

19. Consequently, the Venice Commission and the Directorate welcome this amendment as a clear improvement of judicial independence which requires stability and irremovability. They also note in this context that because of this amendment, it has become all the more important that the selection of judges be based on merit, having regard to their qualifications, integrity and ability.

20. In its 2018 Opinion on the Law on amending and supplementing the Constitution of the Republic of Moldova,¹⁴ the Venice Commission also recommended to the Moldovan authorities to consider to introduce at the legislative level, the “judicial candidates” system, as in force for instance in Austria, Czech Republic and Slovakia, where the candidate judges are being evaluated during a fixed period of time during which they assist in the preparation of judgments, but they cannot yet take judicial decisions, which are reserved to permanent judges.¹⁵ The Venice Commission and the Directorate reiterate the same recommendation.

21. Under draft Article II(1) of the draft Amendments, “judges in regard of whom, at the date the present law takes effect, the initial term of appointment as a judge has not expired, shall be considered appointed until reaching the age limit by the effect of the present law.” This rule is consistent with the above-mentioned stability and irremovability principles.

B. Appointment of judges

22. Under the current Article 116(2) of the Constitution, judges sitting in the courts of law are appointed, according to the law, by the President of the Republic of Moldova upon proposal submitted by the SCM. Draft Article 116(2) provides that the President of the Republic may reject only once the nomination proposed by the SCM. The Commission and the Directorate note that a similar provision already exist, at the legislative level, in Article 11(3) of the Law No. 544-XIII on the Statute of Judges.¹⁶

23. As the Venice Commission considered in its Report on the Independence of the Judicial System, it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges.¹⁷ The role of the President in appointing judges upon nomination by an independent constitutional body such as the SCM is not unusual and in view of the fact that the Constitution will recognise that the SCM is the guarantor of judicial independence (as provided in draft Article 121¹), it is valuable to enshrine the nomination role for all judges in the Constitution as proposed. Restricting the capacity of the President to reject nominations to one opportunity is a valid reflection of the balance of roles between the SCM and the political role of the President and maintains the decisive influence of the SCM.¹⁸

If one must choose between the two, judicial independence is the crucial value (Report on Judicial Appointments, para. 42).

¹² Para. 40.

¹³ CDL-AD(2010)004, Report on the independence of the Judicial System Part I: The Independence of Judges, para. 38. See also, European Charter on the Statute for Judges, point. 3.3 and Montreal Declaration, Universal Declaration on the Independence of Justice, points. 2.19 and 2.20.

¹⁴ CDL-AD(2018)003, para. 16-18.

¹⁵ See, CDL-AD(2018)003, paras. 16-20.

¹⁶ Article 11(3) of the Law on the Statute of Judges provides that “the President of the Republic of Moldova may reject once the candidatureship proposed by the Superior Council of Magistracy (...)”.

¹⁷ CDL-AD(2010)004, Report on the Independence of the Judicial System Part I, para. 32.

¹⁸ See also, CDL-AD(2018)003, para. 22.

C. Appointment of the judges of the Supreme Court

24. According to Article 116(4) of the Constitution currently in force, the judges of the Supreme Court are appointed by Parliament following a proposal submitted by the Superior Council of Magistrates. A similar provision also exists in Article 9(1) of the Law No. 789-XIII on the Supreme Court of Justice, which provides that its judges shall be appointed by the Parliament at the proposal of the SCM, within 30 days from the date of proposal's registration in Parliament.

25. The draft Amendments propose to repeal Article 116(4). The information Note explains that the purpose of this amendment is to harmonise the procedure of judicial appointments in all courts regardless of their level. Consequently, the new Article 116(2) on judicial appointments will regulate, according to the Information Note, the procedure of appointment of the judges in all the courts, including the judges of the Supreme Court of Justice who will thus be appointed by the President of the Republic upon proposal by the SCM, as are the judges of the lower instances.

26. In its 2018 Opinion,¹⁹ the Commission underlined that "the involvement of parliament in the process may result in the politicisation of judicial appointments. In the light of European standards, the selection and career of judges should be 'based on merit, having regard to qualifications, integrity, ability and efficiency'. Elections by parliament are discretionary acts, therefore even if the proposals are made by a judicial council, it cannot be excluded that an elected parliament will not limit itself from rejecting candidates. Consequently, political considerations may prevail over the objective criteria."²⁰

27. Therefore, shifting the competence of appointment of the judges of the Supreme Court to the President is likely to contribute to reducing arbitrariness in these appointments, notably also because the President can veto the nominations by the Superior Council of Magistrates only once. This amendment is therefore welcome. It is recommended nonetheless to specify whether the President may reject only one candidate per selection procedure or whether he/she may reject the whole list.

D. Experience of Judges of the Supreme Court of Justice

28. Under Article 116(4) of the Constitution currently in force, the judges of the Supreme Court should have at least 10 years' experience as a judge. With the deletion of paragraph 4 of Article 116, the draft amendment would remove that requirement. According to the Information Note, this removal aims at allowing admission to the Supreme Court of Justice of legal professionals from different backgrounds, in order to exclude a corporate attitude at the Supreme Court of Justice. The information Note also specifies that the selection criteria of the Supreme Court judges including work tenure are to be detailed in the law.

29. At the legislative level, according to Article 11 of the Law No. 789-XIII on the Supreme Court of Justice, in order to be appointed a judge has to meet the requirements provided for by Law No. 544-XIII on the Status of Judge and have a judicial professional experience of no less than 10 years. Under Article 6(5) of Law No. 544-XIII, a candidate to the position of judge of the court of appeal or the Supreme Court of Justice should have an experience as a judge of at least 6 years and 10 years respectively. Moreover, under Article 19(2) and (3) of the Law on Superior Council of Magistracy, the selection of candidates for appointment as judges (...) is made by the Superior Council, based on the decision of the Board for selection and career of judges and this decision should be reasoned and adopted by open vote of the members (para. 2); the decision

¹⁹ CDL-AD(2018)003 Opinion on the law on amending and supplementing the Constitution of the Republic of Moldova (Judiciary), paras. 25-27.

²⁰ See, also, CDL-AD(2007)028, Report on Judicial Appointments, para. 10.

of the Superior Council of Magistracy, along with the highest performance on the appointment to the position of judge (...) the personal file records of the candidate with the curriculum vitae on his/her activity and draft decree or draft decision on the appointment to the position, shall be submitted by the President of the Council (para. 3).

30. During the visit in Chisinau, the representatives of the Supreme Court of Justice questioned the removal of the requirement of 10 years' experience for judges for the Supreme Court of Justice claiming that this might diminish the quality of their professional skills. They considered that the Supreme Court judge candidates should be chosen from among the judges of the appellate courts, as the first instance court judges do not have the required experience to work in panels.

31. As the Venice Commission considered in its 2018 Opinion,²¹ strictly limiting access to the Supreme Court to candidates from lower courts could lead to the isolation of the judiciary and promote conservative and rigid opinions, as opposed to being open to new thoughts and concepts, which could be brought in by legal professional from different backgrounds. However, taking also into account the criticism by the representatives of the Supreme Court of Justice during the meetings in Chisinau, the Venice Commission and the Directorate reiterate that the removal of this condition should go hand-in-hand with a better legislative regulation of the selection of the judges of the Supreme Court. The selection process should guarantee the judges' expertise, independence, and acceptance by the community of legal professionals. Due consideration should therefore be given to the objectivity of the selection procedure²² especially when this appointment procedure is applied in parallel with appointments based on the results of a competitive examination.

E. Criteria for the appointment of judges

32. The draft law proposes that Article 116(5) shall have the following content: “[d]ecisions on the appointment of judges and their career shall be adopted on the basis of objective and merit-based criteria, and in a transparent procedure, according to the law. The promotion or transfer of judges shall be done only with their consent.”²³

33. The Venice Commission²⁴ as well as the CCJE²⁵ previously underlined that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law. This is a fundamental principle of judicial independence which deserves to be included in the Constitution. As the Commission considered in its 2018 Opinion, while these provisions on the appointment of judges are rather declarative, they give valuable guidelines for the career development procedures that are to be specified by the law²⁶ and are welcome.

F. Functional immunity for judges

34. New paragraph 5¹ of Article 116 provides that “[j]udges shall have only functional immunity under the law”.

²¹ CDL-AD(2018)003, para. 31.

²² CDL-AD(2007)028, Report on Judicial Appointments, para. 36.

²³ The statement that judges may be promoted and transferred only with their consent is already part of the current version of Article 116(5).

²⁴ CDL-AD(2007)004, para. 27.

²⁵ Opinion No. 1, para. 25.

²⁶ CDL-AD(2018)003, para. 35.

35. Referring to the Amicus curiae brief on the Immunity of Judges for the Constitutional Court of Moldova,²⁷ the Information Note states that magistrates shall not enjoy general immunity; although they should be protected against civil actions, for actions carried out in good faith during the exercise of their duties, they should not benefit of general immunity that would protect them from the consequences of their criminal actions for which they have to be held liable by courts of law. According to the Information Note, judges can only enjoy functional immunity, more specifically immunity in case of criminal investigation only for actions or inactions carried out in the exercise of their duties. It is therefore obvious that passive corruption, trading of influence, bribery, as well as other similar crime cannot be considered as actions committed in the legal exercise of their duties.

36. Indeed, the Venice Commission and the Directorate endorse the general rule that judges must not enjoy any form of criminal immunity for ordinary crimes committed out of the exercise of their functions. As the Venice Commission considered in its Report on the Independence of the Judicial System,²⁸ it is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional (but only functional) immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crime, e. g. taking bribes) which does not exclude disciplinary proceedings against judges for professional misconduct.

37. Consequently, as in the 2018 Opinion, the Commission and the Directorate consider that raising functional immunity to the level of the Constitution is welcome.²⁹

38. The Commission and the Directorate recall on this point that the existence of corruption in different branches of the state power in Moldova, including the judiciary, has been recognised at both national and international levels. In this respect, although the principle of “irremovability” of judges is clearly stipulated in Article 116(1) of the Constitution, it is also important to indicate in the constitutional provision that the principle of “irremovability” is indeed accompanied with exceptions. For instance, Article 216(1) of the Constitution of the Republic of Portugal stipulates that “[j]udges enjoy security of tenure and may not be transferred, suspended, retired or removed from office *except in the cases provided for by law*”. However, the Commission and the Directorate consider that, in the particular circumstances of Moldova, it might be advisable to mention explicitly that the exceptional cases where the law may provide for judges to be suspended or removed include corrupt conduct.

G. Court Presidents and Vice-Presidents

39. Article 116(3) of the Constitution currently in force provides that the presidents and vice-presidents of the courts of law are appointed by the President of the Republic of Moldova following a proposal submitted by the SCM, for a 4-year term. The draft Amendments have removed this paragraph.

40. Current Article 116(3) is reflected in Article 16(3) of Law No. 514-XIII on the Organisation of the Judiciary³⁰ and Article 9(2) of Law No. 544-XIII on the Status of Judge (Contest to fill vacancies of judges, court deputy chair and chair), which lays down the procedure for the contest

²⁷ CDL-AD(2013)008, Amicus curiae brief on the immunity of judges for the constitutional court of Moldova, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).

²⁸ CDL-AD(2010)004, para. 61.

²⁹ CDL-AD(2018)003, para. 40.

³⁰ Article 16(3) “The Presidents and Deputy Presidents of the courts and courts of appeal are appointed by the President of Moldova, at the proposal of the Superior Council of Magistracy, for a term of 4 years. They can hold the respective positions for not more than two successive terms.”

for the position of court deputy chairs and chairs, organised by the Superior Council of Magistracy.³¹

41. As the Commission considered in its 2018 Opinion,³² there are no standards on whether the appointment of court presidents should be explicitly regulated at the constitutional or legislative level.

42. During the meetings in Chisinau, the authorities indicated that the court presidents will be appointed by the SCM. For the Venice Commission and the Directorate, this solution is preferable to the existing system set out in Article 16(3) of Law No. 514-XIII on the organisation of the judiciary which provides for the appointment of court presidents by the President of the Republic following a proposal by the SCM. As an alternative to nominations by the SCM, the election of court presidents by their fellow judges could also be considered,³³ due regard being had to the need for a sufficiently substantial electoral basis.

H. Superior Council of Magistracy

1. Composition (Article 122)

43. Article 122 of the current version of the Constitution provides that the Superior Council of Magistracy consists of judges and university lecturers elected for tenure of four years (para 1) and the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General are members *de jure* of the SCM (para. 2).

44. The draft Amendments to Article 122 provide that the SCM shall consist of judges, elected by the General Assembly of Judges, representing all levels of courts of law and from persons who enjoy a high professional reputation and integrity, with experience in the area of law, who do not work within the bodies of legislative, executive or judicial power, and are not politically affiliated (para. 1). The procedure and requirements of electing or appointing the members of the Superior Council of Magistracy are delegated to the law, which has to ensure that judges represent at least half of the members of the Superior Council of Magistracy (para. 2). The members of the SCM shall be elected or appointed for a term of six years, without the possibility to hold two consecutive terms of mandates (para. 3). The draft Amendments do not provide for *de jure* members.

45. The Venice Commission and the Directorate recall that with the recent amendments introduced to Article 3, paras. 3 and 4, of the Law on the Superior Council of Magistracy,³⁴ the SCM is currently composed of fifteen members: seven judge members elected among judges by the General Assembly of Judges, five lay members elected by Parliament among tenured law professors and three *de jure* members. In the urgent opinion of January 2020, the Commission and the Directorate considered that the constitutional framework (i.e. the current version of Article 122) makes it difficult to ensure that at least half of the members of the Superior Council are judges elected by their peers, as the presence of three *de jure* members limits the scope of legislative change.

46. As opposed to the existing constitutional framework, the proposed exclusion of three *de jure* members from the composition of the Council will enable that at least half of the members of the

³¹ Article 9(2): "The contest for the position of judge, court deputy chair and chair shall be organized by the Superior Council of Magistracy under the regulation approved by it. (...)."

³² CDL-AD(2018)003, para. 24.

³³ See, CDL-AD(2018)003, para. 24.

³⁴ Examined by the Commission and the Directorate in the Urgent Joint Opinion on the draft law on amending the law No. 947/1996 on Superior Council of Magistracy (CDL-PI(2020)001).

Council would be judges elected by their peers, which rule is also raised at the constitutional level with the proposed amendments (para. 2 of draft Article 122). This is welcome.

47. Moreover, the statement at the constitutional level, in paragraph 1 of draft Article 122, that the judge members of the SCM should represent all levels courts of law is also welcome as this means increased representation of lower courts in terms of enhancing the pluralistic membership within the judicial cohort.³⁵

48. In the urgent opinion issued in January 2020,³⁶ the Commission and the Directorate criticised the legislative (art. 3 of the Law on Superior Council of Magistracy) and constitutional provision (art. 122) that the lay members are elected only among tenured law professors. They considered that in order to ensure pluralism within the Superior Council, it would be better solution to include other lawyers; not exclusively from academia, but also practitioners, especially members of the Bar. Therefore, the broader definition of non-judge or lay members as “persons who enjoy a high professional reputation and integrity, with experience in the area of law (...)” in draft Article 122 follows this recommendation in the urgent opinion.

49. Also, the exclusion of re-election of the SCM members (“without the possibility to hold two consecutive terms of mandates”) while prolonging the mandate to six years is aimed at increasing the independence for the Superior Council’s members and is positive.³⁷ Finally, the proposal to supplement the Constitution with a new Article 121¹ which provides explicitly that the Superior Council of Magistracy is the guarantor of independence of judicial authority should be endorsed.

50. Despite these positive developments, there is still scope for improvement. It should be noted, first, that the law avoids indicating the exact number of the SCM members. The alleged flexibility of the parliament mentioned in the Information Note does not seem a compelling reason for not regulating this key issue at the constitutional level.³⁸ It is therefore recommended that the constitutional provision specifies the number of members of the Superior Council of Magistracy.

51. Secondly, although draft article 122 provides that the judge members of the Superior Council are elected by the General Assembly of Judges, this draft provision is completely silent on the manner of appointment of the non-judge, or lay members of the Council. Instead, for the Venice Commission and the Directorate, it is important, in particular in the Moldovan context, that the possibility or risk that lay members of the Council would be a coherent and like-minded group in line with the wishes of the government of the day is avoided at the constitutional level. In the 2020 Urgent Opinion,³⁹ the Commission and the Directorate expressed their general preference that the election of the lay members from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council.⁴⁰ The

³⁵ See, also, CDL-PI(2020)001 Urgent Joint Opinion on the draft law on amending the law no. 947/1996 on Superior Council of Magistracy, para. 24. In this urgent opinion, the Commission and the Directorate particularly welcomed the legislative provision in draft article 3, para. 4, of the law that the judge members of the Superior Council should be elected -by the General Assembly of Judges, as follows: four members from lower courts, two from appellate courts and one from the Supreme Court of Justice. The principle of increased representation of the judge members of the Council is now raised at the constitutional level. See, also, for a similar consideration, CDL-AD(2018)003, para. 54.

³⁶ CDL-PI(2020)001, para. 22.

³⁷ See, CDL-AD(2018)003, para. 53.

³⁸ The Constitution of the Portuguese Republic, for instance, clearly specifies the number of members of the Supreme Judicial Council (art. 218), along with the number of members of the Parliament (Assembly of the Republic) (art. 148) and the Council of State (art. 142).

³⁹ CDL-PI(2020)001, para. 26 and 27.

⁴⁰ In the meantime, the Constitutional Court of the Republic of Moldova, in its inadmissibility decision of 24 January 2020 concerning the constitutionality of the draft law on amending the law no. 947/1996 on the Superior Council of Magistracy (examined in the CDL-PI(2020)001 Urgent Opinion), found that the

Commission and the Directorate had in addition proposed, in the urgent opinion, that outside bodies, not under governmental control, such as the Bar or the law faculties, could be given the power to propose candidates. The establishment of an independent non-political commission could also be considered.⁴¹ In any case, the Commission and the Directorate recommend that the issue of the method of appointment of the lay members of the Superior Council is dealt with in the Constitution. It is also recommendable that the number of lay member candidates proposed to the Parliament be somehow limited, as for instance, by presenting a shortlist of candidates.

52. Thirdly, as mentioned above, the broader definition of non-judge or lay members as “persons who enjoy a high professional reputation and integrity, with experience in the area of law (...)” in draft Article 122 follows the previous recommendation in the urgent opinion which criticised the legislative and constitutional provisions for limiting the lay members to university lecturers. At the same time, as the current draft limits the lay members to persons who have experience in the area of law, it has the effect of excluding persons with valuable expertise in other disciplines or from civil society who do not have experience in the area of law. This restriction could be reconsidered by the authorities as the current trend in other states has been to include persons with experience in other relevant areas of expertise. Such inclusion reduces the perception that such councils are a lawyers’ monopoly. Moreover, it is crucial that the organic law provides for a detailed and solid mechanism to check the integrity and professional reputation of lay members, failing which the constitutional provision might remain declaratory without real impact.

53. Fourth, under draft Article 122, the lay members must “not work within the bodies of legislative, executive or judicial power”. This is a valid proposal but might lead to difficulties as this provision is rather vague: if the idea is that a non-judicial member of the SCM should not be a public official, the proposed language will not prevent persons working in some public offices, not falling into any of the above three categories (e.g. President’s staff, local self-governments, central regulatory agencies, etc.), from being nominated.

54. Again, concerning the lay members, the requirement in draft Article 122 of “not being politically affiliated” is valid. At the same time, the term “political affiliation” should not be understood as “conducting advocacy activities”; and the authorities could consider using the phrase “are not member of political parties” instead of “are not politically affiliated” in the draft provision.

55. Further, in their Interim Joint Opinion on the draft law on the reform of the Supreme Court of Justice and the Prosecutor’s Office,⁴² the Commission and the Directorate took note of an initiative, in September 2019, to convene the general assembly of judges in order to replace all the 6 judge members (at the time) of the Superior Council with newly elected judges. In the Interim Opinion, the Commission and the Directorate found this initiative very worrying. They considered that the security of the fixed term of the members of the Council serves the purpose of the ensuring their independence from external pressure including from the bodies who have elected them. As the Commission previously considered “*a procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the Judicial Council whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement,*

Constitution does not establish the procedure of appointment of the members of the Council, including therefore the lay members.

⁴¹ CDL-PI-2020)001, paras. 26 and 27. Concerning the role of independent commissions in the selection and appointment of judges, see, the Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth.

(<https://binghamcentre.biicl.org/publications/cape-town-principles-on-the-role-of-independent-commissions-in-the-selection-and-appointment-of-judges>)

⁴² CDL-AD(2019)020, para. 82.

on resignation or death, or on their dismissal for disciplinary reasons."⁴³ Consequently, the current constitutional reform process should serve as an opportunity to state the principle of security of tenure for the members of the SCM at the constitutional level. During the meetings in Chisinau, the authorities informed the delegation of their readiness to introduce this principle more clearly in the law on the Superior Council. Although this solution is acceptable, the Venice Commission and the Directorate have a preference that this principle is stated in the Constitution.

56. Last but not least, according to transitional draft Article II(2) of the draft law, "members of the SCM in position at the date the present law takes effect shall exercise the mandate until the expiration of the term" for which they were elected or appointed. Taking also into account what has been said in the previous paragraph concerning the security of tenure of the members of the SCM, this draft provision is also welcome to the extent that the continuity in membership of the Superior Council should not be jeopardised and the Council's members must be allowed to complete their term. The draft provision could however make it clear that it does not concern the current ex-officio members. This provision however becomes problematic in the light of the recent appointment of four lay members of the SCM (see below).

2. Recent election of four lay members of the SCM

57. In respect of the election of the lay members, the Venice Commission recalls that in December 2019 its President had criticised the rushed adoption of legislative amendments to the law on the SCM, while a reform of the constitutional provisions on the SCM was in preparation which could address the more fundamental problems such as the need for a two-third majority for the election of the lay members in order to depoliticise this body. The authorities had justified the legislative amendments by referring to the urgent need to restore the trust of the public and of the judges in the SCM. In their view, adding three members would help restoring this trust.

58. The Venice Commission wishes to stress that this explanation can only be meaningful if the procedure of election of the lay members is carried out in such a manner as to include the opposition and thus reassure the public, and the judges, about the non-political or at least consensual nature of the nominations. Further, the possibility to elect a non-judge member as Chair of the SCM is intended to add to the public accountability of the SCM, which is clearly not achievable should the lay members be in reality political appointees of the governing majority.

59. The Venice Commission cannot but express its concern about the manner in which the four lay members of the SCM have just been elected, which seems to defeat the proclaimed aim of the legislative amendments of December 2019. In addition, these four lay members have been elected for a full mandate of four years, which hampers the positive impact which the constitutional amendments ought to have brought. The transitional constitutional provision to the effect that the sitting members of the SCM will terminate their mandate acquires a totally different perspective against this background.

60. The Commission cannot but recall the crucial role of the SCM in ensuring that the Moldovan judiciary be both independent of political influence and not self-serving. The recent legislative reforms and the manner in which they have been implemented do not meet the expectations of either the international community or the Moldovan society. The genuine aim and meaning of the constitutional reform under analysis becomes questionable.

3. Budget of the judiciary (Article 121(11))

61. The draft Amendments propose to supplement Article 121 of the Constitution (Budget of the courts of law, indemnity and other rights) with paragraph 1¹ which provides that "in the process

⁴³ See, for instance, CDL-AD(2014)028, Opinion on the draft amendments to the law on high judicial council of Serbia, paras. 66-70.

of drafting, approving and amending the budget of the courts, the consultative opinion of the Superior Council of Magistracy is required. The Superior Council of Magistracy is entitled to present to Parliament proposals to draft budget of the courts.”

62. There is a strong tendency in favour of taking views of the judiciary into account when preparing the budget. In its Report on the Independence of the Judicial System,⁴⁴ the Venice Commission considered that “decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council.” Similarly, the CCJE in its Opinion No. 2⁴⁵ on the funding and management of courts, states that it is important “that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.”

63. Following recommendations by international experts as outlined in the Information Note, this amendment is aimed to intensify the role of the judiciary’s self-administration in process of creating the budget of courts and is therefore to be welcomed. It will enable the SCM to send budget proposals directly to Parliament, thus creating a relatively high degree of budgetary autonomy. This is a welcome recognition of the balance of roles between the guarantor of judicial independence and the executive control of the state finances.

4. President of the Superior Council

64. The current Constitution and the draft Amendments, are silent about how the president of the SCM should be elected. Following the latest amendments, the Law on the Superior Council of Magistracy (art. 5(1)), reserves the presidency for judge members. In their urgent joint opinion issued in January 2020,⁴⁶ the Venice Commission and the Directorate considered that the ban on lay members can be seen as a regrettable step back. Examining the constitutionality of this provision, the Constitutional Court of the Republic of Moldova, in its inadmissibility decision of 24 January 2020 took note of this assessment of the urgent opinion but considered that the Constitution was silent about this issue and that therefore the referral did not raise a question of constitutionality in this respect.

65. The Commission and the Directorate reiterate that the election of the chairperson of the Superior Council from amongst judge members and lay members of the Council (for instance by rotation) would give a better democratic legitimation to the Council before the public.⁴⁷ However, they accept the explanation given by the authorities that the issue should be dealt with in the organic law and not in the constitutional provision. It must be stressed nonetheless that this recommendation has to be taken jointly with the recommendation to elect the lay members with a qualified majority, in order to minimise the risk that the lay members be chosen by the ruling majority of the day.

V. Conclusion

66. The Venice Commission and the Directorate consider that the draft Amendments to the Constitution of the Republic of Moldova could improve the independence, accountability and efficiency of the judiciary. As such, the amendments are generally positive and in line with the applicable international standards.

⁴⁴ CDL-AD(2010)004, para. 22.

⁴⁵ Consultative Council of European Judges, Opinion No. 2 (2001) on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights, para. 10.

⁴⁶ CDL-PI(2020)001, para. 29.

⁴⁷ See, for instance, CDL-AD(2017)019 Opinion on the draft judicial code of Armenia, para. 90.

67. The Venice Commission and the Directorate welcome notably:

- the removal of the probationary periods for judges;
- the appointment of judges of the Supreme Court of Justice by the president (with a one-time veto).
- the regulation on functional immunity at the constitutional level;
- the statement in the Constitution that at least half of the members of the Council would be judges elected by their peers and that the judge members of the Superior Council should represent all levels courts of law;
- the consultative role of the Superior Council in the preparation of the budget of the judiciary.

68. Nonetheless, the Venice Commission and the Directorate make the following main recommendations:

- the number of members of the Superior Council of Magistracy should be indicated in the Constitution;
- the method of election of lay members by the Parliament either by a qualified majority with an anti-deadlock mechanism or by a proportional method should be specified in the Constitution but should also be provided in the organic law. In addition, the authorities could consider giving outside bodies, not under governmental control, such as the Bar or the law faculties, the possibility to propose candidates;
- the requirement that the lay members should not be “politically affiliated” should not be understood as “conducting advocacy activities”; and the authorities could consider using the phrase “are not member of political parties” instead of “are not politically affiliated” in the draft provision;
- in the particular circumstances of Moldova, it might be advisable to mention explicitly in the Constitution that the exceptional cases where the law may provide for judges to be suspended or removed include corrupt conduct;
- the authorities could consider affirming the principle of security of tenure of the SCM members in the Constitution.

69. However, the Commission and the Directorate express their serious concern about the manner in which four lay members of the SCM have just been elected, which seems to defeat the proclaimed aim of the legislative amendments of December 2019 to restore the public trust in the SCM. These four lay members have been elected in a controversial, non-consensual manner and for a full mandate of four years, which hampers the positive impact which the constitutional amendments ought to have brought. The transitional constitutional provision to the effect that the sitting members of the SCM will terminate their mandate acquires a totally different perspective against this background.

70. The Commission cannot but recall the crucial role of the SCM in ensuring that the Moldovan judiciary be both independent of political influence and not self-serving. The recent legislative reforms and the manner in which they have been implemented do not meet the expectations of both the international community and the Moldovan society. The genuine aim and meaning of the constitutional reform under analysis becomes questionable. The Venice Commission and the Directorate therefore call on the Moldovan authorities to suspend the implementation of the legislative amendments of December 2019 and January 2020 and the nomination of four lay members of the SCM pending a thorough reform of the constitutional provisions on the SCM. These nominations should take place after the adoption of the constitutional amendments, in a procedure which ensures transparency and sufficient safeguards against politicisation.

71. The Venice Commission and the Directorate remain at the disposal of the authorities for further assistance in this matter.