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**SHAPING JUDICIAL COUNCILS TO MEET CONTEMPORARY
CHALLENGES**

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**Extracts from the opinions and reports of the Venice
Commission on the organisation and mandate of the
judicial councils**

**NOTE: The extracts are prepared by the Secretariat for information
purposes only. For references please see the original text of the
opinions.**



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I. FUNCTIONS, REMIT, AND DUTIES OF THE COUNCIL

There is no standard model that a democratic country is bound to follow in setting up its judicial system. With the exception of very few countries where the independence of the judiciary is maintained by other checks and balances, most European countries have established an independent judicial council which has the task of ensuring the proper functioning of an independent judiciary within a democratic state.

CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §46. See also CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §5

[...] [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. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §32. See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§46-49; CDL-AD(2016)007, Rule of Law Checklist, §§81 and 82;

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §22; CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §§88-89; CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§24, 25; CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §59

[...] [I]n the previous opinion the Venice Commission recommended not to overburden the Judicial Council with purely administrative tasks, such as 'judicial administration, including salaries, court buildings etc.'

[...] [T]here are different models of distribution of administrative functions [...]. The only important requirement is that the most important administrative functions should belong to a body or bodies enjoying a significant degree of independence.

[...] That solution does not exclude that some specific administrative functions connected to daily operation of the judiciary may be performed by the Ministry of Justice (MoJ). [...]

That being said, all administrative support functions which may have effect on the independence of the judiciary should be performed by a body independent from the MoJ and, as stressed above, accountable to the SJC.

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§98, 100, 102 and 103. See also CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §§66, 71 and 72; CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §26; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §39

[...] The Venice Commission maintains its position that there is no need for two separate bodies [i.e. judicial council and the judges' qualification commission] [...].

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §40

It is thus a positive step that the High Council of Justice be the sole authority to initiate disciplinary proceedings against judges, which would provide for more guarantees compared to a system of plurality of disciplinary authorities competent to initiate those proceedings. [...] The proposed system provides also for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of the disciplinary sanction, i.e. the Disciplinary Board. This is in line with international recommendations. [...].

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §15. See also CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

[...] It is striking that, while the recommendation by the High Qualifications Commission is to be based exclusively on objective criteria, the High Council of Justice can apparently disagree with a recommendation for reasons that are not determined by the law. This opens the door to arbitrary decisions. It is strongly recommended to circumscribe the role of the High Council of Justice in a much more transparent way. Taking into account the characteristics of the decision-making

process before the High Qualifications Commission and the composition of the High Council of Justice, the role of the High Council of Justice should be made of a marginal nature, short of being removed.

CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §50

It is not uncommon in Europe to have some kind of inspection body that supervises judges [...] to some extent, to see if they perform their duties correctly. Some countries have such institutions, others manage without them. However, from a comparative perspective it is clear that the powers of the Turkish HSYK to supervise and control the judges [...] are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial [...] powers, in a politicised manner that has been quite controversial.

The core issue with regard to the future independence, efficiency and legitimacy of the Turkish judiciary is whether the recent institutional reform will lead to a change in the way the substantial powers of the HSYK are used, or whether the tradition for political interference will be continued within the new framework.

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §§50, 51

The system of judicial self-government is too complicated. There are too many institutions: meetings of judges on different levels, conferences of judges, the Congress of judges of Ukraine, council of judges of respective courts and Council of Judges of Ukraine which is a different organ than the High Council of Justice. The structure should be simplified to be effective. This pyramid structure can become an obstacle for building a real self-government and the scope for 'judicial politics' seems enormous. The dispersal of powers through many bodies seems to lead to a potentially confusing situation where different bodies would exercise the same powers.

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §122

[...] [The] [p]rovisions relating to the training of judges and the establishment of a National Institute of Justice [...] should be more detailed and should determine the main action of the Institute. The Institute should be controlled by the Supreme Judicial Council rather than the Ministry of Justice. [...].

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

The amendments to Article 128 [of the Constitution] reflect the proposed competences of the Judicial Council to elect and release from duty the President of the Judicial Council and of the Supreme Court, and are therefore to be welcomed. [...].

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §26

The [High Judicial and Prosecutorial Council] has broad competences [...]: it appoints judges and prosecutors [...], decides on the suspension of judges, determines criteria for the assessment of judges and prosecutors, decides on the appeals in disciplinary proceedings, gives its views on the annual budget for courts and prosecutors' offices, gives its opinions on draft laws and regulations concerning the judiciary etc. [...].

Article 24 of the draft Law gives the HJPC power to require courts, prosecutors' offices and state authorities, as well as judges and prosecutors to provide it with information, documents and other materials in connection with the exercise of its competencies. It can also have access to all premises of courts and prosecutors' offices and their records. Such competences confirm that the HJPC is the central organ within the judiciary.

Under Article 25 of the draft Law, the HJPC prepares a draft annual budget, which is then submitted, through the Ministry of Justice, to the Ministry of Finance and Treasury of BiH for approval. Under Article 23.2 of the draft Law, the HJPC may also make recommendations relating to the annual budgets of courts and prosecutors' offices. The system of financing the judiciary remains, however, highly fragmented, with the budgets determined at several different levels (BiH, the Entities, the FBiH cantons, the District Brčko).

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§65-67

[...] [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. 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.

CDL-AD(2020)001, 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, §23

The structural unit of the High Council of Justice provided for in draft Article 351(1) seems to be an investigative body with very wide and discretionary powers. It is absolutely free to search all possible information on candidates [to judicial positions], without almost any restriction, since these research powers, including those concerning personal details, are covered by the candidate's consent (draft Art. 35(4)). First, it is by no means clear in the draft law how the structural unit of the High Council of Justice will be composed and which working methods will be used. For

dealing with highly confidential information, special requirements for the members of such a unit must be laid down in the legislation and also the conditions for their appointment/selection by the High Council and their responsibilities must be made clear.

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §55

The obligation [of the Council] to provide an annual report to the National Assembly seems reasonable.

The information provided to the public on the activities of the Council will also assist in rendering the judges' work at the Council more transparent. It will notably allow the public to see that there are sanctions against judges that have committed disciplinary offences etc.

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36; See also CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §§63 and 64; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72

The duties of the National Judicial Council are very broad-ranging. It must ensure that the justice system functions properly and respect the independence of the judiciary – which is more of a constitutional requirement than a duty. It would be preferable for the National Judicial Council to be charged with “guaranteeing” the independence of the judiciary. Its functions will be fixed by a law. Here again more details would be desirable, not to say essential. The Constitution should lay down the rules on the composition and the main functions of the National Judicial Council. Under Article 8§2 of the draft law, two members of the Council – a civil society representative and an academic – will be appointed by a two-thirds majority of the Chamber of Deputies. While it should be welcomed that a qualified majority is required, it would seem necessary to include this in the Constitution, in accordance with Article 72, 2nd and 3rd paragraphs.

It would also be worth specifying whether the powers of the National Judicial Council are identical for judges and prosecutors.

CDL-AD(2019)003, Opinion on the proposed revision of the Constitution, Luxembourg §§ 108 and 109.

II. LEVEL OF REGULATIONS

[...] The Constitution should lay down the rules on the composition and the main functions of the National Judicial Council. [...]

CDL-AD(2019)003, Opinion on the proposed revision of the Constitution, Luxembourg, §108

In addition, the Constitution does not define precisely the number of members of the HJC. [...] [I]t is quite unusual for a constitutional body to exist without the number of its members being clearly fixed (or at least without having a clear method of defining

this number). The very idea of an “institution” implies that its composition is defined either in the law or in the Constitution, and is not left to the discretion of one person, even if this is the head of the State. Absence of a fixed composition undermines the legitimacy of the decisions taken by the body.

CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §22

In the Commission’s view, this provision enables the High Council of Justice to determine its own rules of procedure by adopting an appropriate ‘statute’, but does not allow for important matters governing its powers and affecting the rights and duties of magistrates to be so regulated. These matters should rather be regulated by a law adopted by Parliament.

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 3

[...] The Information Note indicates that the number of judges per level will be regulated by law, ensuring the proportionality between the number of first instance courts, courts of appeal and the Supreme Court of Justice. Indeed, the number of judges per level is normally not a matter to be regulated at the constitutional level and can be left to the legislative regulations. However, the legislative provisions should respect the requirement of sufficient representation of lower courts precisely to enhance the pluralistic membership with the judicial cohort.

CDL-AD(2020)007, 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, §22

Another issue is that the draft Amendments hardly regulate anything with regard to the observance of due process requirements by the HJC in its decision-making process (except for the fact that paragraph 2 stipulates that the HJC needs to reason and publish its decisions and paragraph 3 provides for judicial review). As the decisions of the HJC impact judicial careers, European standards call for certain due process safeguards. However, this should be regulated in the Law on the HJC. This is all the more recommended, as the eight-vote-majority could block the work of the HJC and could be more easily regulated in a law if different majorities are called for in respect of different types of decisions taken by the HJC.

Although the national legislative authorities do not need to regulate these issues on a constitutional level, if the constitutional legislator decides to regulate a particular issue then *all* essential features need to be regulated in the constitutional provision, which is not recommended. In this respect, consideration might be given to streamlining the draft Amendments and regulate this in an ordinary law

CDL-AD(2021)032 Opinion on the draft constitutional amendments on the judiciary and the draft constitutional law for the implementation of the constitutional amendments, §§74 and 76.

III. COMPOSITION OF THE JUDICIAL COUNCIL

A. General approach

There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions.

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §28. See also CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §61

[...] Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided. An appropriate balance should be found between judges and lay members. The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary.

CDL-AD(2016)007, Rule of Law Checklist, §82. See also CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§17, 20, 21 and 23; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §9

[...] [P]oliticisation can be avoided if Parliament is solely required to confirm appointments made by the judges.

CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §22. See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §13; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9, 19; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §29

[...] [A] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §29. See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §54; CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §76

Generally speaking, the Venice Commission welcomes the thrust of the reform which 'opens up' the composition of the judicial council involving all court levels in the court system and introducing a non-judicial component in the judicial council. The current composition of the SCJ, in which the judicial component represents 100% of its composition, seems to be unique in Europe.

As some of the Cypriot interlocutors rightfully stress, there should be a strong judicial component in the composition of a judicial council. However, this does not mean that the quality of a judicial council necessarily increases if such a council is composed exclusively of judges. While the main purpose of the very existence of a judicial council is the protection of the independence of judges by insulating them from undue pressures from other powers of the State, involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. Corporatism should be counterbalanced by membership of other legal professions, the 'users' of the judicial system, e.g. attorneys, notaries, academics, civil society.

This representation is justified since the objectives of a judicial council relate not only to the interests of the members of the judiciary, but especially to general interests. Such non-judicial members in a judicial council may provide democratic legitimacy of the judicial council and a fresh perspective on what is needed to become or be 'a good judge'. Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also includes matters such as character, judgment, accessibility, communication skills, efficiency to produce judgements, et cetera. The Venice Commission therefore considers the proposed composition as a step in the right direction.

CDL-AD(2021)043, Cyprus - opinion on three bills reforming the judiciary, §§49, 50 and 51.

B. Judicial members of the Council and lay members: search of appropriate balance

[...] The primary role of judicial councils is to be independent guarantors of judicial independence. However, this does not mean that such councils are bodies of judicial 'self-government'. In order to avoid corporatism and politicisation, there is a need to monitor the judiciary through non-judicial members of the judicial council. Only a balanced method of appointment of the SCM members can guarantee the independence of the judiciary. Corporatism should be counterbalanced by membership of other legal professions, the 'users' of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society.

CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §56. See also CDL-AD(2020)015

The European Charter on the statute for judges [...] states: 'In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary' [...].

The CCEJ commends the standards set by the European Charter ‘in so far as it advocated the intervention [...] of an independent authority with substantial judicial representation chosen democratically by other judges’.

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§19, 20

Under current international standards, there is no uniform model for the composition of judicial and/or prosecutorial councils. [...].

Several international instruments, however, provide that when a judicial council is established, a substantial part of its members should be recruited from among judges. [...]

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§27, 28. See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §55; CDL-AD(2017)031, Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, §17.

It is recommended that a substantial element or a majority of the members of the HJPC be elected by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. [...].

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §45. See also CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

Amendment XIII proposes that the HJC be composed of ten members: five judges elected by their peers and five prominent lawyers elected by the National Assembly. [...] Having an even number of members in the HJC is less usual than having an odd number, which is the current trend in many European states – there are only a few that have an even number of members in their judicial councils. [...]

CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §59. See also CDL-AD(2021)032 Opinion On The Draft Constitutional Amendments On The Judiciary And The Draft Constitutional Law For The Implementation Of The Constitutional Amendments. §64.

[...] [A]mong the judicial members of the Judicial Council there should be a balanced representation of judges from different levels and courts, and this principle should be explicitly added.

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §23. See also CDL-AD(2021)043 Opinion on three bills reforming the judiciary, Cyprus §53; CDL-AD(2020)015, Urgent Joint Opinion on the draft Law On Amending Law No. 947/1996 on Superior Council of Magistracy, Republic Of Moldova, §19; CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §40; CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §20; CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §39

The number of judges in the entire composition of the Council (only 8 out of 24 members) does not seem to be adequate. The limitation of the number of judges to one third falls short of the standards requiring a substantial judicial representation within such institutions. The Venice Commission has stressed that '[i]n all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges'.

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law 'on the status of judges' of Kyrgyzstan, §24

The [High Judicial Council] would thus have 11 judges among its 15 members. This proportion seems even too high and could lead to inefficient disciplinary procedures. While calling for an appeal to a court against disciplinary decisions of judicial councils is required, the Venice Commission insists that the non-judicial component of a judicial council is crucial for the efficient exercise of the disciplinary powers of the council.

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §41. See also CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §§74-76

[...] [A] structure containing only judges with more than 15 years of experience may not be regarded as properly representative.

CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, §89

Article 10.1 provides that members of the Disciplinary Board from among judges shall be elected by the General Assembly of Judges, as follows: 2 judges from the Supreme Court of Justice, 2 judges from the Courts of Appeal and 1 judge from the courts. It is to be welcomed that judges are elected by their peers. However, it is not clear what the rationale is for composing the Disciplinary Board mainly of representatives of the senior judiciary. Why are the judges requested to elect of 4 out of 5 judges from the Supreme and appellate courts? Furthermore, it should be expressly mentioned that election is done by secret ballot.

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §52

Despite positive changes, the composition of the Judicial Council is still not fully in line with some of the Council of Europe standards. Most importantly, judges elected by their peers are still in a minority in the Judicial Council. Article 137 provides for the composition of the Judicial Council which is to consist of the two chief judges *ex officio*, seven judges elected by their peers and six members elected by the NA by two-thirds majority. While judges make up 9 out of 15 members of the Judicial Council, and thus have a majority, only 7 of judicial members are elected *by their peers*. The remaining two judges are members *ex officio*. This composition does not

correspond with the parameters set out in Recommendation CM/Rec(2010)12), which states that “[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary

In order to comply with this Recommendation, the Venice Commission recommends the Bulgarian authorities to review the composition of the Judicial Council so that to give the judges elected by their peers at least half of the number of the seats in this body.

What is also very important is to have a well-balanced council, not only between the judicial and non-judicial members, but also among the judicial members so that they represent different types of judges and levels of the judiciary, while ensuring balance between the regions, gender balance etc. This can be difficult to achieve, particularly on a body which if it is to be effective should not have too many members. Such a balance is more likely secured through elections among the judges rather than *ex officio* membership. It is sufficient that the Constitution expresses the principle, while the specific procedures and criteria for a balanced representation of all levels of courts should be regulated in law (cf. Article 145).

[CDL-AD\(2020\)035](#) Urgent Interim Opinion on the draft new Constitution, Bulgaria §44-46.

C. Representation of the executive in the Council; *ex officio* members

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...] Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, **the Minister of Justice should not participate** in all the council’s **decisions**, for example, the ones **relating to disciplinary measures**.

[CDL-AD\(2007\)028](#), Report on Judicial Appointments by the Venice Commission, §33. See also [CDL-AD\(2020\)015](#), urgent joint opinion on the draft law on amending Law No. 947/1996 on the Superior Council of Magistracy, Republic Of Moldova, §21; [CDL-AD\(2010\)026](#), Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §97; [CDL-INF\(1998\)009](#), Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §16

It would also be possible to include *ex-officio* members in the HJC, such as the Minister of Justice or the President of the Supreme Court. This can be useful to facilitate dialogue among the various actors in the system. However, care must be taken that including *ex officio* members does not increase the risk of domination of the HJC by the political majority. If the Minister of Justice were to be included as an *ex-officio* member, he or she should not have the right to vote or participate in the decision-making process if it is a decision concerning the transfer of judges and disciplinary measures against judges.

[CDL-AD\(2018\)011](#), Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §63. See also [CDL-AD\(2018\)003](#), Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§58-60

[...] The Proposal [...] removes all participation of prosecutors from the HJC but retains powers of the HJC in respect of prosecutors (incompatibility requirements and discipline). However, the HJC should have no such powers if there is a separate prosecutorial council.

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §42

[...] It seems that the *Volkov* judgment does not rule out *ex officio* members. They could be members of the HCJ without a right to vote.

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §57

The presence of the Minister of Justice on the councils, even on a non-voting basis, which has been retained in the Draft is a source of concern for the Venice Commission. While there may be occasions where the presence of the Minister of Justice in the councils is required, for example in budgetary matters, a general right for the Minister of Justice to participate on the work of the councils may be regarded by the judiciary as a form of pressure from the executive power, especially when the councils decide on disciplinary or career matters. It would therefore be preferable that the presence of the Minister of Justice be limited to some specific issues or excluded for some specific issues

CDL-AD(2020)035 Urgent Interim Opinion on the draft new Constitution, Bulgaria §43.

While including non-judicial members in the Advisory Judicial Council is justifiable, the inclusion of the Attorney General who holds this double role [of the highest prosecutor and the legal adviser to the President and the Government], including the position of legal adviser to the executive, is not desirable. Instead of the Attorney General, other persons could be included in the Advisory Judicial Council (and the Supreme Council of Judicature, see below), e.g. academics from the university law departments.

However, as concerns the participation of the Attorney General [...] his or her participation without the right to vote might however alleviate these concerns.

CDL-AD(2021)043 Opinion on three bills reforming the judiciary, Cyprus §38 and 52.

D. Lay members: importance of having the civil society represented

[...] The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the

interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised. Furthermore, in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...] [A] basic rule appears to be that a large proportion of the membership [of the Supreme Council of Justice] should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other *ex officio* or elected members. [...]

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9-12. See also CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§27 and 30

[...] It is common practice that 'judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sector' and the Venice Commission even recommends that a substantial part of the members be non-judicial. [...]

[...] [I]nstead of excluding legal professionals altogether, consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§30,31

Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches).

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §66. See also CDL-AD(2020)015, Urgent Joint Opinion on the draft law on amending law No. 947/1996 on the Superior Council of Magistracy, Republic of Moldova, §21. CDL-AD(2018)017, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy of Romania, §§138, 139; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §89; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §24; CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §179; CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §45; CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§33, 34; CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §45; CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ ODIHR, §102; CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §§21, 22

[...] It is advisable for judicial councils to include members who are not themselves representatives of the judicial branch. But, such members should preferably be appointed by the legislative branch instead of by the executive.

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §34

In the Venice Commission's view, this composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicisation and autocratic government.

A crucial additional element of this balance would be that the President of the Judicial Council should be elected by the Judicial Council from among its lay members (with the exception of the Minister of Justice) by a majority of two thirds, and should have a casting vote. [...]

[...] Like for the Plenary, among the judicial members of the disciplinary panel there should be a balanced representation of judges from all different levels and courts (see infra the comments on the amendments to the laws).

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §§20-22

With the proposed new composition of the Judicial Council, a parity between judicial and lay members is sought to be achieved. The Venice Commission welcomes this new composition, which would avoid both the risk of politicisation and the risk of self-perpetuating government of judges.

However, the parity of judicial and lay members would not pertain in disciplinary proceedings, as the Minister of Justice could not sit and vote in such cases and, as a consequence, the judges would have a majority [...]. Therefore [...] a crucial additional element of this balance would be to add a provision in Article 127 of the Constitution on a smaller disciplinary panel within the Judicial Council with a parity of judicial and lay members (with the exclusion of the Minister of Justice). The details concerning this disciplinary panel could be regulated by the Law, taking into account the importance of reconciling the independence of the judiciary and at the same time ensuring accountability.

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §§20, 21

[...] [T]he organisation of a competition to choose the civil society representatives on the Disciplinary Board is to be welcomed. However, it would be desirable that the criteria for selection of candidates as well as the mechanism for the appointment and functioning of the Commission which is intended to select candidates be specified in the law itself rather than in a regulation. Furthermore, it should be made clear that the Minister's function in appointing these persons is a formal one and that the appointment is carried out in accordance with the recommendations of the Commission which selects candidates.

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §54

[...] [T]he Venice Commission has never been in favor of systems where *all* members of the body were elected by the judges. Given that now the CDF [The Council for Determination of Facts] has obtained very important powers in the sphere of the judges' discipline, it is recommended that a significant proportion of its members are appointed by democratically elected bodies, most preferably by the Parliament with a qualified majority of votes. [...]

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §77

In the urgent opinion issued in January 2020, the Commission and the Directorate criticized the legislative [...] 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.

CDL-AD(2020)001, Joint Opinion on the draft law on Amending and Supplementing the Constitution with respect to the Superior Council of Magistracy, §48. See also CDL-PI(2020)001, Urgent Joint Opinion, Republic Of Moldova §22.

As concerns the personal qualification of lay members, the Venice Commission and the Directorate had recommended not to limit the areas of specialisation of lay members to "law" only; the current version has removed any reference to the kind of expertise lay members should have. The Commission and the Directorate recommend reintroducing a qualification, but in broader terms (for example "with experience in the area of law *or in other relevant areas*"). The Commission and the Directorate had further expressed the view that while the formula "not politically affiliated" was acceptable, it would be preferable to replace it with the clearer formula "not member of political parties". The Moldovan authorities have maintained the original formula. The clarification could be put in the explanatory note.

CDL-AD(2020)007, Joint on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, Republic of Moldova, §23

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 which requires that the lay members are "persons who enjoy a high professional reputation and integrity, with experience in the area of law (...)" might remain declaratory without real impact.

CDL-AD(2020)007, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, Republic of Moldova. §24

The Draft does not describe the process of nomination or filtering of candidates to the lay members' positions. There is a risk that the lay members will be persons with strong political connections. To avoid that, it is important to provide a system of pre-selection or nomination of candidates which ensures that the lay component of both

councils consists of experienced persons who have no personal interest in the outcome of the decisions they make and who are not permeable to political influence. Where lay members of the judicial councils are to be elected by Parliament, it is common to find a provision that they are selected from amongst persons nominated by expert bodies such as the law faculties of the universities and the professional associations of lawyers and perhaps from some other categories such as retired judges. These matters, however, may be left to the legislator (cf. Article 145)

CDL-AD(2020)035 Urgent Interim Opinion On The Draft New Constitution, Bulgaria §55.

E. Eligibility requirements for council candidates; incompatibilities and quotas

It is vital that the members of the Council have sufficient practical experience to carry out their work. Therefore, the requirement of seven years' experience provided [...] seems adequate.

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §51; See also CDL-AD(2020)015, Urgent Joint Opinion on the draft law on amending Law No. 947/1996 on Superior Council of Magistracy, Republic of Moldova §30.

The requirement of 10 years of experience for judges [to be eligible at the Council] should be reconsidered because it will make the election of qualified candidates from all levels of the judiciary, especially from first level courts, very difficult.

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §36

[...] As regards members elected by the National Assembly, the criteria raise the question as to why only those who have passed the Bar exam fall within the category of 'prominent lawyers'. This would exclude law professors, for instance [...]

CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §60

[...] [T]he amendments could provide that should a chairman of a court be elected in the Council, he or she would have to resign from his or her position as chairman while of course retaining his or her position as an ordinary judge.

CDL-AD(2013)007, Opinion on the draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §50

[...] [I]n order to insulate the judicial council from politics its members should not be active members of parliament.

CDL-AD(2007)028, Report on Judicial Appointments, §32

[...] Out of 15 members [of the Judicial Council] 4 must belong to the non-majority communities, and, in addition, three more must be elected by the double majority vote by the Parliament. In its 2005 Opinion, the Venice Commission stated that the provisions concerning representatives of the non-majority communities 'are to be

welcomed' (§ 40). The question is whether the direct ethnic quota for selecting candidates is still an acceptable solution in the present-day condition.

[...] Mechanisms of power-sharing between different ethnic communities are to be assessed in the light of the country's recent history; ethnic criterion for eligibility to political posts may be defensible in the aftermath of a civil war but must be reconsidered after a passage of time - see, in particular, the 2005 opinion on the constitutional situation in Bosnia and Herzegovina. [...]

In the Macedonian context the proposed Amendment serves to protect non-majority communities. Furthermore, ethnic quotas do not close access to the JC for the candidates from the majority communities. Consequently, the case of *Sejdić and Finci* cannot serve as a precedent. That being said, the method of the Court's reasoning, namely the 'dynamic' approach to the analysis of the ethnic-based election criteria, still applies.

The Venice Commission recalls in this respect that Point 10 of the UN Basic Principles on the Independence of the Judiciary requires that judges are appointed without discrimination based on the ground of 'national origin'. Recommendation of the Committee of Ministers of the Council of Europe no. R(94)1224 calls for merit-based appointment of judges with regard to 'qualifications, integrity, ability and efficiency' (see Principle 1, point 1(2)-c). Similar principles are proclaimed by the European Charter on the statute for judges [...]. The principle of 'merit-based' appointment is cited with approval by the Venice Commission in its Report on Judicial Appointments, §§ 10 and 36-37.

[...] The 'double majority' principle can hardly be applied in the context of election of judicial members of the JC. Further, the Commission reiterates that the ethnic quota in the specific context of the country is supposed to protect minorities and may thus be regarded as a sort of a 'positive discrimination'. Therefore, direct ethnic quotas remain another possible mechanism securing adequate representation of non-majority communities. The authorities must consider, however, whether ethnic quotas should exist in relation to the lay members of the JC elected by the Parliament."

CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §§58, 60-63, 65. See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §19

[...] The draft Law indicates that the composition of the [High Judicial and Prosecutorial Council] needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. [...]

[...] [I]n a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public

institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, **an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country's size and population into account - may undermine the effective functioning of the system.**

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32 and 35

[...] [T]he 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.

CDL-AD(2020)001, 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, § 26

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.

CDL-AD(2020)001, Joint Opinion on the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, § 52

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.

CDL-AD(2020)001, Joint Opinion on the draft Law on Amending and Supplementing the Constitution with respect to the Superior Council of Magistracy, §5

F. Procedural aspects of appointment/elections of the members of the council

The National Assembly should not be given a real choice of candidates and the ‘authorised nominators’ should only propose one candidate per vacant position. In this way, the National Assembly will have a right of veto. This seems to be the only solution which would avoid political considerations being taken into account in the nomination of the Council members.

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §48

[The Commission] considers however that the non-judge members should rather be elected by Parliament than by the President of the Republic.

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

[...] [T]he delegation reiterated the proposal of the Commission to have the parliamentary component of the Council elected with a qualified majority. This would make sure that this component reflected the composition of the political forces in Parliament and would effectively make it impossible that the majority in Parliament fills all positions with its own candidates as it had been the case in the past.

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15. See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§19, 21; CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, §25; CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §25

The Venice Commission is of the opinion that elections 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.

It is a matter for the Georgian authorities to decide which solution is appropriate, but the anti- deadlock mechanism should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance.

CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§52-53. See also CDL-AD(2020)007, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, Republic of Moldova §25; CDL-AD(2018)015, Opinion on the draft law on amendments to the law on the Judicial Council and Judges of Montenegro, §§11, 15 and 19; CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §§61-62; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §16; CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §87; CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §§54, 55, 57-59 and 61; CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §180; CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §§37 and 38; CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §48-51; CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of “the former Yugoslav Republic of Macedonia” concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §67; CDL-AD(2013)028, Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, §12; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §19

As to the lay members, the process of their *nomination* is as important as the method of their election. Their detachment from politics may be ensured through a transparent and open nomination process, at the initiative of autonomous nominating bodies (universities, NGOs, bar associations, etc.) and completed by the Judicial Appointments Council, which is composed of the members of the judiciary. Such nomination process should ensure that the Parliament has to make a selection amongst the most qualified candidates, and not political appointees.

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §16

The provision in draft Article 127 that the candidates for lay members should be selected on the basis of a public call for candidatures is welcome, as it enhances the transparency of the procedure, hence the public trust in the High Judicial Council.

CDL-AD(2013)028, Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, §13

The very idea of a 'joint term of office' is open to criticism. De-synchronised terms of office are a common feature in collegiate bodies in Europe. They help to preserve institutional memory and continuity of such bodies. Moreover, they contribute the internal pluralism and hence to the independence of these bodies: where members elected by different terms of Parliament work alongside each other, there are better chances that they would be of different political orientation. By contrast, simultaneous replacement of all members may lead to a politically uniform NCJ.

CDL-AD(2017)031, Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, §29

[...] Quasi-total (excluding ex officio members) renewal of the composition of the HJC every three years may affect the institutional continuity of this body. The Concept Paper proposes a mid-term renewal of a part of the composition of the HJC [High Judicial Council]; the Venice Commission is in favour of this proposal but recommends also to extend the duration of the mandate of the HJC members.

CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §23

The Commission recalls that an important function of judicial councils is to shield judges from political influence. For this reason, it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections. [...]

The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council.

Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and

replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. [...]

CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§69-72. See also CDL-AD(2020)015, Urgent Joint Opinion on the draft law on amending Law No. 947/1996 on the Superior Council of Magistracy, Republic Of Moldova, §23.

[...] [W]ell-established professional association of lawyers, law schools, etc. should be formally involved in the process of nomination of lay members of the SJC; [...]

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §113

The exclusion of direct reappointment / re-election while prolonging the mandate [six-year term] is aimed at creating more independence for the SCM [Superior Council of the Magistracy] members. This is positive.

CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§52 and 53

It is not necessary to create an electoral register or directory for the judges who are allowed to vote in the Council elections. It is difficult to see how a president of a court could ignore a colleague in the distribution of ballot papers or how an individual who is not a judge would obtain such a ballot.

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §53

[...] [D]ecisions on appointments of judges and prosecutors cannot be delegated to commissions. The election of judges and prosecutors is by a majority vote of all members, but for the election of judges the decision must be supported by at least seven judges, and likewise for prosecutors. This prevents either judges or prosecutors from imposing their will on the other profession.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §57

[...] The draft Law therefore leaves the entire process of the election of two members of the HJC to the discretion of the Bar Association and the joint session of deans of law faculties. This approach is questionable because – although the respect for the autonomy of these institutions is relevant in the context of self-governance or other internal matters – the election of the HJC member is clearly not an internal matter of the university or the Bar Association. [...] The procedures for the election of the HJC candidates as well as detailed requirements for the candidates should be set out in this Law.

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §48

[...] [T]he procedure of selecting the HJPC members could be regarded as deficient in some respects. Of the 15 members, two are selected by members of the House of Representatives, of the Parliamentary Assembly of BiH and of the Council of Ministers of BiH; two are selected by the Bar Chambers of the Entities; five or six by

prosecutors, and five or six by judges. Due to this procedure, the selection could be vulnerable to inter-institutional and inter-personal rivalries in the judiciary.

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §88

[...] It should be expressly mentioned that election [of members of the Disciplinary Board] is done by secret ballot.

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §52

The Venice Commission has continuously objected against the use of psychological tests for the recruitment of judges, and entrusting those tests to external experts in psychology. In addition, it is quite unusual to see these tests as a pre-condition for the election of a judicial member of the JC [Judicial Council]. This mechanism gives the JC the possibility of screening the candidates, who should, normally, be elected by and represent the judiciary. The Venice Commission recalls that all candidates to the positions of judicial members are already active judges, so they normally should have already at least minimal social skills and integrity. This mechanism is likely to replace the free election of the judicial members with a system of co-optation, which does not fit well to the idea of 'judicial members elected by their peers'. While it is perfectly reasonable to have formal eligibility requirements, and for the JC to control the process of elections, the rationale for the idea of the JC selecting or even shortlisting candidates is not clear nor seems acceptable. The Venice Commission invites the authorities to reconsider this provision.

CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §16

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, due regard being had to the need for a sufficiently substantial electoral basis

CDL-AD(2020)001, 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, §42

[...] [F]or 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, 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. 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. 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.

CDL-AD(2020)001, 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, § 51

As recommended in the 2017 opinion (§ 21), the relative weight of the scoring from the Academy and the results of the tests conducted by the JC (or any other examination of the candidates) should be indicated by the law. The Venice Commission notes in addition that when the JC votes for or against a candidate, it is a discretionary decision. However, if the ranking from the Academy is binding [...], it is unclear what is the importance of the voting/any tests which may be conducted. [...]

CDL-AD(2019)008, Opinion on the draft law on the Judicial Council, North Macedonia. § 17

In their 2020 Urgent Joint Opinion and March 2020 Joint Opinion, the Commission and the Directorate expressed their general preference for a two-thirds qualified majority. At the same time, they consider that the authorities have some margin of appreciation in this respect and are best placed to find the right balance in order to prevent that a high majority (as two-thirds), despite the existence of an anti-deadlock mechanism, blocks the election procedure of lay members because of the failure to achieve such majority in the Moldovan context. An anti-deadlock mechanism is of course the ultimate guarantee against such blocking. However, as the election by a qualified majority ensures that the majority has not the decisive authority on the election of lay members, it is essential that the proportion of the qualified majority presents some reasonable prospect of success, in the concrete political circumstances, in achieving such majority in the election procedure. The provision for a qualified majority of three fifths is therefore acceptable.

CDL-AD(2020)007, 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, §28.

Qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original

procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority. The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula.

CDL-AD(2013)028, Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, §7-8. See also CDL-AD(2020)007, 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, §30.

In general, the proposal of a qualified majority is needed in the parliamentary vote and the provision envisages an adequate anti-deadlock mechanism. The Venice Commission does *not* object to a qualified majority vote of two-thirds, on the contrary, as it objected to the 3/5th majority in its 2018 Opinion of the Venice Commission (paragraph 61). However, the Venice Commission is aware of the factual backdrop against which these theoretical proposals will operate in practice. As the current National Assembly is dominated by one political party, obtaining a qualified majority vote is not a problem. In order to reinforce depoliticization, while the two-thirds majority requirement should be kept, the Venice Commission recommends that (in)eligibility requirements be added. These could create a certain distance between the members elected by the National Assembly (the “prominent lawyers”) and party politics, which could make the HJC (and the HPC) more politically neutral and avoid conflict of interest, even if it may be difficult to completely insulate these members from any political influence. The Venice Commission has shown its appreciation of such criteria in its Urgent Opinion for Montenegro on the revised draft Amendments to the Law on the State Prosecution Service

CDL-AD(2021)032, Opinion on the draft Constitutional Amendments on the judiciary and the draft constitutional Law for the implementation of the constitutional amendments, §68.

What should be mentioned in the constitutional text is what to do if the 2/3 majority in the NA required to elect lay members is not reached. Without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. To address this, the Constitution might provide, for example, that the power to choose a certain minimal number of lay members in this case is temporarily transferred to the President or another independent officeholder (like the Ombudsman, for example), if Parliament is incapable on

agreeing on the candidates and reaching the necessary majority. Other anti-deadlock mechanisms can be considered as well.

CDL-AD(2020)035 Urgent Interim Opinion On The Draft New Constitution, Bulgaria, §56

Draft law no. 5068 establishes an Ethics Council for a period of six years to assist the bodies that elect (appoint) the members of the HCJ in determining whether an applicant for the position of member of the HCJ meets the criteria of professional ethics and integrity (new Article 9-1).

The establishment of such an Ethics Council is very welcome in light of the memorandum of understanding which the Ukrainian Government and the European Union concluded on 23 July 2020 and a separate memorandum with the International Monetary Fund, as well as in view of previous recommendations of the Venice Commission to deal as a matter of urgency with the issue of integrity and ethics of the HCJ. Given this urgency, it is welcome that the proposed solution does not require amendment of the Constitution.

The Venice Commission and the Directorate make the following main recommendations:

1. the law should set out the “criteria of professional ethics and integrity”; this can be done in the text or by reference to national and/or international sources, such as the UN Bangalore Principles of Judicial Conduct;
2. the President of the Supreme Court or the President of the High-Anti-corruption Court could declare the Ethics Council as established and a default mechanism should be introduced for the case when the Council of Judges has failed to appoint its members;
3. the candidacies for the position of national members of the Ethics Council should be announced on the web-site of the Council of Judges and only judges already evaluated (vetted) should be eligible for appointment;
4. the international participation in the Ethics Council should expressly be limited to a single mandate of six years;
5. the law should provide sufficient investigative powers to the Ethics Council for its work;
6. in order to facilitate the adoption of Rules of Procedure, the law could enable the Ethics Council to apply the rules for the HQCJ by analogy; at least the applicable rules in the Law on the Organisation of Courts and the Status of Judges could be used also for the procedure of the Ethics Council;
7. the provision that the Ethics Council needs to complete its assessment of the current members of the HCJ within 3 months is unrealistic; this deadline should be extended;
8. the Ethics Council should establish a pool of candidates from which the appointing bodies can choose (i.e. filtering of candidates) and the Ethics Council should not be (*de facto*) empowered to *rank* candidates; only the Ethics Council and not the Rada Committee in charge of justice issues should decide on ethics and integrity of candidates.
9. the decisions of the Ethics Council should be deemed as adopted if four members vote in favour and if at least two international experts are among those four

members; in case of a split vote, the vote should be repeated, but if the tie vote is not overcome within a fixed timeframe indicated in the law, the vote of the group of members that includes at least two international experts should prevail;

10. an appeal against the decisions of the Ethics Council should lie with the Supreme Court;

11. the Ethics Council should be obliged to transmit its findings of non-compliance to the NACP and the NABU for further action.

CDL-AD(2021)018 Urgent Joint Opinion on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council Of Justice (HCJ) and the activities of disciplinary Inspectors of the HCJ (Draft Law No. 5068) §§19, 20 and 75.

Integrity checks targeted at the candidates to the position of SCM, SCP and their specialized bodies represent a filtering process and not a judicial vetting process, and as such may be considered, if implemented properly, as striking a balance between the benefits of the measure, in terms of contributing to the confidence of judiciary, and its possible negative effects.

The Venice Commission and the Directorate General find that in general the revised draft law sets out a balanced procedure; they wish however to formulate the following key recommendations aimed at improving the revised draft law:

- The indication of who the “development partners” are and how they will select their candidates and the criteria for this selection (insofar as it may be different from the criteria for the other candidates, for instance as concerns the Moldovan nationality) should be added in the law; the criterion of not having been a judge or prosecutor in the past three years should be reconsidered.
- Clearer indications as to the assessment criteria are necessary; minor breaches of professional conduct should not provide a valid ground to reject a candidate.
- The law should provide adequate guarantees for the protection of the right to private and family life of judges, prosecutors and third persons involved in the procedure.
- Candidates should have the right to appear before the Evaluation Committee and to participate in the procedure before it, if they so wish. If they waive their right to be present, the Evaluation Committee should proceed in their absence. Hearings with candidates should not be in public. The decision to reject a candidate should not be made public.
- In case of negative assessment, an obligation for the Evaluation Committee to transmit its findings to the competent authorities (the future Councils, the anti-corruption authorities, the public prosecutor) could be provided in the law.
- The duration of the mandate of the Evaluation Committee should be indicated more clearly in the law.

CDL-AD(2021)046 Joint Opinion on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, Republic of Moldova, §§43-44.

IV. INTERNAL STRUCTURE OF THE COUNCIL AND ITS DECISION-MAKING PROCEDURES

A. Chairperson and vice-chairperson of the Council

1. Appointment/election of the chairperson

It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, **the chair of the council could be elected by the Council itself from among the non-judicial members of the council.** Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council.

CDL-AD(2007)028, Report on Judicial Appointments, §35. See also CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", § 66; CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §58

[...] [T]he President should be elected from among the lay members with the 2/3 majority of all the members, in order to give the JC more democratic legitimation and credibility before the public and to remove the impression of a corporatist management of the judiciary. [...]

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §66. See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §12; CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §63; CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §71; CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §22.

[...] It is true that the Venice Commission has stated that '*the chair of the council could be elected by the council itself from among the non-judicial members of the council.*' However, this recommendation by the Commission is primarily aimed at situations where judges elected by their peers have the majority in a council and is not applicable if it increases the risk of domination of the HJC by the current majority in parliament.

CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §66

It is welcome that the chairpersons of the SJC are elected by rotation from amongst judge members and lay members, for a term of two and half years (Article 81). This method gives a democratic legitimation to the SJC before the public.

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §90

There may be different approaches with regard to the role of presidents of supreme courts within judicial councils. Some countries choose not to impose any restrictions and allow the President of the Supreme Court to be elected/appointed President of the Council and hold both positions simultaneously (as still is the case in Serbia, but

is now proposed to be abandoned). In view of enhancing the independence of the judiciary others may prefer to separate the administrative positions within the judiciary and the membership in the Council; and therefore, should the president of the court be appointed President of the Council, this person should then resign from his or her position at the Supreme Court [...].

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §23

It is to be welcomed that under new Article 47(2) of the Law, the chairperson of the Supreme Court will no longer be the ex officio chairperson of the HCJ. The election of the chairperson by the members of the HCJ is in line with international standards.

CDL-AD(2018)029, Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts of Georgia, §48

[...] Entrusting the Minister [of Justice] with the presidency of the SJC Plenum (and perhaps also the mere participation to the meeting of the two Chambers) is likely to interfere with the autonomy and independence of the judiciary from the political power. Even the appearance of such influence has to be avoided in order to ensure public trust in the judiciary.

CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §§69 and 71. See also CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria §§34-35

The election of the Chairman of the Board by its members, by secret ballot [...] is to be welcomed. However, it would be desirable for the Board also to elect a Vice-Chairman to act in the absence of the Chairman rather than the arrangement provided for in Article 12.3 that in the absence of the Chairman the oldest member present should take the chair.

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §58

[...] [I]t is not appropriate for the President and the Vice Presidents of the [High Judicial and Prosecutorial Council] to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §47

[...] [T]he 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.

CDL-AD(2020)001, Joint opinion on the draft Law on Amending and Supplementing the Constitution with respect to the Superior Council of Magistracy, §58

2. Removal of the chairperson

With regard to the provision for the removal of the Chairman, as well as a reasoned proposal from three members (Article 12.4) there also needs to be a vote of the members of the Board, who should not have to wait for three months of inaction before taking action themselves. A 2/3 majority could also apply as in the case of the removal of ordinary members.

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §59

[...] [I]t is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president [of the High Judicial and Prosecutorial Council]. [...] **There should be input from an expert body before Parliament takes a decision.** In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, **in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own.** This is inappropriate and needs to be reconsidered.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §48

B. Structure and working methods of the Council

[...] Taking into account the powers granted to the HCJ, it should work as a full time body and the elected members, unlike the ex officio members, should not be able to exercise any other public or private activity while sitting in the HCJ.

CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §30

The work of the [High Judicial and Prosecutorial Council] should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly 'may remove the Presidency or a member of the Presidency from the Council'. [...].

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72. See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36

The 2004 Law created the [High Judicial and Prosecutorial Council] as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges

and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. The Venice Commission's requirement is that: 'If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's appointment and disciplinary proceedings because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings'.

The Venice Commission therefore welcomes the establishment by the draft Law of two sub- councils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§58-59 and 61. See also CDL-AD(2018)017, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy of Romania, §§133-136; CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §28

Since the Government draws up the State budget (Article 87 (2) of the present Constitution and Article 93 (2) of the Draft), and since the Draft provides that the Minister of Justice manages the immovable property of the judiciary and participates in its organisation, it appears reasonable that he/she also proposes the budget for the judiciary. In terms of independence, there is no international standard that requires budgetary autonomy for courts, but the views of the judiciary should be taken into account when deciding the budget. The process of approval of the draft budget by the Judicial Council/Prosecutorial Council (or the Plenary SJC in the current system), following a proposal of the Minister, is in line with this recommendation. In order to ensure that the position of the judiciary in budgetary matters is made known to the NA, the Constitution could require that the views of the Judicial Council/Prosecutorial Council on the budget proposal be made public and included as an attachment to the Government's proposal for the State budget.

The Constitution should clarify that the two councils give their opinion on the proposed budget of the judicial system, and that they participate in deciding organisational matters, and are required to submit general reports to the NA. The details may be left to the law to regulate.

CDL-AD(2020)035 Urgent Interim Opinion On The Draft New Constitution, Bulgaria, §§60 and 64

In the 2017 opinion the Venice Commission also expressed doubts [...] about the obligation of every member of the JC to state publicly his/her opinion in respect of each candidate [...]. Indeed, individual members of the JC should have a right to

state their opinion, but it should not be an obligation. If the objective of the draft law is to make the decision-making process more transparent for public scrutiny, the duty of each member to give reasons for his/her vote may be replaced with a requirement of a collective reasoned decision on appointment/promotion, reflecting the position of the majority of the JC, accompanied by dissenting opinions of members who voted against, if they wish to give their reasons.

CDL-AD(2019)008, Opinion On the draft Law on the Judicial Council, North Macedonia. § 18

As regards the selection of a judge/court president for a first instance court and appellate court in the region where 20% of the citizens speak “an official language other than the Macedonian language” or a judge/court president for the Administrative Court, the Higher Administrative Court and the Supreme Court, Article 50 requires not only a two-thirds majority of all the members with a voting right, but also a majority of the *attending members* belonging to the non-majority communities. The Venice Commission understands the necessity to ensure that non-majority communities in North Macedonia play an important role in the process of appointment of judges. Nevertheless, the Commission would like to draw the attention of the legislator to the complications which the special majority rule of Article 50 might create. According to the draft law, in the composition of the JC there must be at least four members belonging to the non-majority communities (in practice there may be more). If two of them vote against a candidate and two vote for him/her, it is unclear how such a deadlock will be solved. Any two members belonging to the non-majority communities would be able to block the decision-making process. The Venice Commission has already expressed its reserves about the appointments to State positions along the ethnic lines (see the 2014 opinion, § 61). Therefore, the legislator is invited to reconsider this rule, or, at least, to ease this requirement.

CDL-AD(2019)008, Opinion On The Draft Law On The Judicial Council, North Macedonia. § 19

V. STATUS OF MEMBERS

Granting immunity to members of the Council guarantees their independence and allows them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations.

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §26

[...] [I]t seems to go very far indeed to provide, as Article 38.1 does, that the Plenary of the HSYK must authorise an investigation and prosecution for an offence committed by an elected council member even in the case of personal offences which are nothing to do with the performance of their duties as members of the HSYK. In other opinions, the Venice Commission has been critical of overbroad immunities being granted to judges. In this case, it is difficult to see why members of the HSYK should have an immunity from investigation and prosecution unless this immunity is waived by the HSYK. The only exception to this provision seems to relate to flagrante delicto cases (Article 38.9).

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §68

[...] [T]he members of the HJC should exercise their functions as a full-time profession.

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §43

Under the draft Law, members of the [High Judicial and Prosecutorial Council] shall serve a term of four years and may be re-elected once (Article 9). No one may be elected for more than two consecutive terms (Article 3.7). The length of the term of office is a standard one, as in most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in 'the former Yugoslav Republic of Macedonia' etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §49. See also CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §33; CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law 'on the status of judges' of Kyrgyzstan, §§26, 27

Councillors who are not *ex officio* members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the [...] members [of the High Council of Justice].

Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the ex-officio members. The influence of the ex-officio members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Council's work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten.

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§20, 21. See also CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §65

Members [of the Disciplinary Board as a body which examines disciplinary cases and applies disciplinary sanctions to judges] will be selected for a fixed term of six years (Article 9.4) and this is to be welcomed, as well.

According to Article 9.5 'the term of office of a member of the Disciplinary Board is extended *de jure* until the establishment of a college in a new composition'. It is recommended to extend the term of the member until the examination of the cases, in which the member is involved, is completed.

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office

for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§50-51

[...] Indeed, conviction of a member of the Council for the criminal offence itself renders him/her dishonourable to exercise the function.

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §53

[...] Decisions on suspending a member should be linked to the gravity of the charges against him or her and/or be based on the reasoning that suspending the member is necessary for the effective functioning of the HJC. [...]

Although according to Article 43, any member of the HJC has the right to initiate the dismissal of any other member, there are no mechanisms in the draft Law which would provide for the suspension or dismissal of the *ex officio* (non-elected) members if they act in violation of the Constitution or the law. [...].

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§30 and 32

[...] It would [...] be more appropriate to deal with ‘breach of duty’ cases through the usual disciplinary procedure, which should be clearly set out by the draft Law and an appeal to a court of law should be provided [...]. The proportionality principle should be adequately taken into account and the dismissal [of a member of the Judicial Council] should only be applied as a measure of last resort.

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §58

According to Article 11.2 the reasoned proposal of the Disciplinary Board to revoke the term of office of a member of the Disciplinary Board shall be submitted to the body that appointed or elected that member in order to revoke and replace him/her with another member. The Board should itself be able to dismiss the member rather than simply remitting the matter to the body which elected the member to revoke the appointment. The credibility of the Disciplinary Board would be undermined if this body failed to do so. However, there needs to be a very clear provision to invoke the procedure where a member fails to attend to duties to ensure that proper notice is given.

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §56

[...] [The law] seems to mean that a person can be removed from the [High Judicial and Prosecutorial Council] for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member’s status as a judge or prosecutor is

suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

In particular, [...] the Parliamentary Assembly is empowered to dismiss the member of the HJPC where ‘the member fails to perform his/her duties in a proper, effective or impartial manner’ [...]. However, it is not clear how the effective and proper performance of the HJPC member will be evaluated and what the procedures for such an evaluation are. This needs to be reconsidered.

Article 10.1.e sets out that dismissal may arise ‘if the member fails to fulfil the obligations arising from the function he/she performs due to illness or for other reasons’. The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought.

All these provisions should be much more precise and decisions on cessation/dismissal should not be left to the Parliamentary Assembly.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§51-56

Article 18 of the Draft law deals with the dismissal of a Judicial Council member. According to Article 18, para. 1 the grounds for dismissal are: ‘1) he/she discharges his/her duties unconscientiously and unprofessionally; 2) he/she is convicted of an offence which makes him/her unworthy of discharging duties of the Judicial Council member’.

The notions ‘unconscientiously and unprofessionally’ and ‘unworthy of discharging duties’ are too vague, and can lead to an arbitrary application of the power to dismiss members of the Judicial Council. It is strongly recommended to define these dismissal grounds more closely.

Council’s members are also dismissed if a disciplinary sanction is imposed (Article 18, para. 2). However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure.

It is important to make it clear in the law that the Council’s motion concluding that a Council member has to be dismissed should not be based on the substance of the

position/decision of the concerned member in respect of individual files. This is essential for ensuring the independence and autonomy of the Judicial Council.

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§45-48

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 [High 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, on resignation or death, or on their dismissal for disciplinary reasons.

A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of ‘lack of confidence’. Article 41 clearly defines the reasons that can lead to a dismissal of the HJC members. The disciplinary procedure must only focus on the question whether the HJC member failed to perform his or her duties ‘in compliance with the constitution and law’. This question must not be confused with the question whether said member still enjoys the confidence of the judges who participated in his or her election. In addition, the disciplinary procedure has to guarantee the HJC member a fair trial. It is noted that a general reference to a fair trial is made under Article 46a, but further details on related guarantees would be needed.

[...] Members of judicial councils are independent and often have to make decisions that are unpopular or will not please judges. In subjecting them to a vote of no confidence, their independence will be reduced, making them too dependent on the wishes of the judges and removing them from their role of pursuing the goals of an independent and efficient judiciary for the state as a whole. Furthermore, such a vote is difficult to reconcile with the disciplinary functions of a judicial council. The Venice Commission therefore strongly recommends for such a procedure not to be introduced.

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§66, 67 and 70. See also CDL-AD(2018)017, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy of Romania, §§143-145

[...] [T]he members of the HJC elected by the National Assembly may be dismissed by the Assembly by a 5/9th majority regardless of the majority with which they were elected. This should be revised, the majority required for dismissal should be higher, or at least equal to, the majority required for election. It is important that criteria for dismissal (and procedures) be laid down in the Constitution and not just left to legislation.

CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §68

In its 2018 Opinion on the Law on amending and supplementing the Constitution of the Republic of Moldova, 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. The Venice Commission and the Directorate reiterate the same recommendation.

CDL-AD(2020)001, 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, §20

[...] [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.

CDL-AD(2020)001, 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, §49

The Commission and the Directorate therefore welcome the intention to entrench the security of tenure of SCM members. The relevant formula however is too absolute and should be replaced by the statement that members of the SCM may only be removed on the grounds of grave misconduct such as serious disciplinary sanctions, final criminal convictions and other cases of objective impossibility to exercise the functions as established by the organic law.

CDL-AD(2020)007, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, Republic of Moldova, §34.

The proposed law aims to establish an ad-hoc evaluation committee which will be responsible for checking the integrity of the candidates for administrative positions in the Superior Council of Magistracy, the Superior Council of Prosecutors and their specialized bodies (Article 1). In the Information Note it is pointed out that this “is an essential condition for increasing the confidence of society in the judicial system, as well as for the proper functioning of these institutions.

The Venice Commission and the Directorate General observe that the personal integrity of the members that constitute the Superior Councils (of judges and prosecutors) is an essential element to the nature of such bodies; it ensures the confidence of citizens in justice institutions – trust in magistrates and in their integrity. In a society that respects the fundamental values of democracy, the trust of citizens in the action of the Superior Councils depends very much, or essentially, on the personal integrity and competence and credibility of its membership. In a normally functioning regime, the integrity of magistrates to be elected by their peers should, by nature, result from the qualities, personal conditions, integrity and professional competence that allowed for the appointment as judges or prosecutors. Once the status of magistrate has been acquired, the qualities of integrity and competence must be presumed until proven otherwise, which can only result from disciplinary or functional performance assessment through appropriate legal procedures.”

The creation of ad hoc bodies to assess the integrity of judges and prosecutors is based on the assumption that the justice system has extremely serious deficiencies and that there are systemic doubts about the integrity of magistrates. However, based on this assumption, the establishment of the proposed model of ad hoc committees for assessing integrity entails, in itself, a double risk. On the one hand, it assumes, even if it is only in terms of appearances (which in this very sensitive area do matter) that the system is generally affected, which can be extraordinarily unfair for many of its competent and upstanding elements, that are consequently tainted by a general suspicion; on the other hand, such method may prove ineffective, as far as judges and prosecutors are concerned, to remove and eliminate the fatal doubt that the model itself creates or may generate.

The Venice Commission and the Directorate General have previously expressed the view, in other contexts, that critical situations in the field of the judiciary, as extremely high levels of corruption, may justify equally radical solutions, such as a vetting process of the sitting judges. At the end, it falls ultimately within the competence of the Moldovan authorities to decide whether the prevailing situation in the Moldovan judiciary creates sufficient basis for subjecting all judges and prosecutors, as well as members of the SCM and SCP, to extraordinary integrity assessments.

[...] As a matter of principle, the security of the fixed term of the mandates of members of (constitutional) bodies serves the purpose of ensuring their independence from external pressure. Measures which would jeopardise the continuity in membership and interfere with the security of tenure of the members of this authority (vetting) would raise a suspicion that the intention behind those measures was to influence its decisions, and should therefore be seen as a measure of last resort. Integrity checks targeted at the candidates to the position of SCM, SCP and their specialized bodies represent a filtering process and not a judicial vetting process, and as such may be considered, if implemented properly, as striking a balance between the benefits of the measure, in terms of contributing to the confidence of judiciary, and its possible negative effects.

CDL-AD(2021)046, joint opinion on some measures related to the selection of candidates to the positions in the bodies of self-administration of judges and prosecutors and the amendment of some normative acts, Republic of Moldova, §§10-14.

VI. OTHER SELF-REGULATORY BODIES OF THE JUDICIARY

The Law on Bodies of Judicial Self-regulation is relatively short and establishes two bodies of judicial self-regulation: (1) the Congress of Judges and (2) the Council of Judges. [...]

[...] It seems, therefore, that the idea is to provide a framework to form coherent standpoints for the judicial community with respect to all questions concerning judges.

Regulating self-regulation seems to be a contradiction, however, if such a law is deemed necessary its provisions should not be too rigid. Although it is important to provide a solid basis for judges' self-regulation, it is important not to suffocate it.

In this respect, there are a number of provisions that raise doubt. First, Article 4.4 provides that the status of individuals exercising the activities of judicial self-regulation is governed by the Law on civil service. The content of this Law is not known to the Venice Commission, but it might be too rigid if it provides for strict regulations on responsibilities or perhaps even regulations subordinating the representatives to the administration.

Second, it seems unnecessary for the Congress to be convened by the President of the Kyrgyz Republic, as foreseen by Article 6.2. This provision contradicts the very idea of self-regulation.

Third, Article 8.4 sets out that '*The organisational, technical, material, financial and methodological resources for the activity of the Council of Judges shall be provided by the Judicial department of the Kyrgyz Republic.*' This could create a strong dependency that would be incompatible with the idea of self-regulation.

Fourth, the rules for the election of the representatives are also very rigid, for instance, the prohibition of the re-election of members of the Council of Judges for a second consecutive term (Article 8.8). This means a complete turnover in the membership every three years. Some continuity may be desirable, perhaps the terms of office could be staggered (partial renewal).

The Venice Commission would [...] recommend the following: [...] [i]nclude, in this Law, how the Council's various representational and advisory functions are to be carried out. It should also be clarified in which cases binding decisions are adopted and what the legal consequences of those binding decisions are."

CDL-AD(2008)040, Opinion on the Constitutional Law on bodies of Judicial self-regulation of Kyrgyzstan, §§6, 11-16, and 23

[...] Concerning Article 127.5.1 item 1, which refers to meetings of judges of local and appellate courts, these apparently can discuss the performance of specific judges and take decisions on these issues binding for the judges. This does not appear to be an appropriate provision. Judicial independence requires that judges should not be subjected to peer pressure in relation to any specific cases. Article 127.5.2 also provides that the judges' meetings of the Supreme Court and the high specialized courts have the same powers. This should be deleted or at least clarified to make clear that pressure may not be brought on a judge concerning an individual case.

In relation to Article 130, which provides for a number of persons to be present at the Congress of Judges (including the President of Ukraine, the speaker of the *Verkhovna Rada*, and the Minister for Justice), it is not clear why politicians should be present at these meetings. The presence of politicians may well lead to political

pressure being brought. While it is specified that the invited persons may not participate in the voting, it is not clear why their presence is necessary at all.

Draft Article 131 provides for a new system for the election of delegates to the Congress of Judges. The Venice Commission has previously recommended a proportionate representation of the various orders of jurisdiction (CDL-AD(2010)026, para. 96). The same comment could be made here concerning the representation on the basis of the meetings of judges.

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §§69-71

The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

[...] The problems which may be involved accordingly do not relate to the number of institutions as such but mainly to the question whether the overall power vested in the system may be too great.

[...] The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication.”

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§11, 12, and 64

Indeed, some level of institutional complexity is needed in order to avoid conflicts of interest and introduce checks and balances. For example, in disciplinary proceedings a person who initiates the inquiry should not decide on the case and should not sit on an appeal panel. However, this does not always require creating special institutions. The same may be achieved by splitting the functions within the same body or introducing conflict of interest rules. Again, the necessary checks and balances may be achieved by pluralist internal composition of the single body, and not necessarily by creating external controlling institutions. [...]

The Venice Commission understands that the creation of the new constitutional bodies will automatically terminate the mandate of certain already existing bodies with similar functions [...]. In the opinion of the Venice Commission, this is positive, since co-existence of several inspectorates creates parallelism and it is better not to have different bodies with similar or overlapping functions.

CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §§66-67. See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §§75, 80-82

[...] [B]oth the Ethics Commissions and the Disciplinary Commission seem to be composed solely of judges. This may give an impression that the question of

disciplinary liability is decided within the judicial corporation by bodies which have no external elements and no links to the democratically elected bodies or the broader legal community. [...]

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §32. See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §76

Indeed, any kind of control by the executive branch or other external actors over Judicial Councils or bodies entrusted with discipline is to be avoided. As noted in the 2014 Joint Opinion, the composition of a disciplinary body is key to guaranteeing its independence and impartiality. In that context, a composition comprising civil society representatives, thus ensuring community involvement in disciplinary proceedings, was noted by the OSCE/ODIHR and the Venice Commission as a particularly welcome development. The rules pertaining to the composition of the disciplinary commission should be amended to ensure that the legislative and/or executive branches do not have decisive influence over such body, while ensuring an adequate representation of civil society/community and a generally gender balanced composition.

CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §76. See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §§70, 71 and 73