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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

**URGENT JOINT OPINION
OF THE VENICE COMMISSION
AND**

**THE DIRECTORATE OF HUMAN RIGHTS (DHR) OF THE
DIRECTORATE GENERALE OF HUMAN RIGHTS AND RULE OF LAW
(DG I) OF THE COUNCIL OF EUROPE**

**ON THE DRAFT LAW ON AMENDING THE LAW No. 947/1996 ON
SUPERIOR COUNCIL OF MAGISTRACY**

**Issued pursuant to Article 14 a
of the Venice Commission's Rules of Procedure**

on the basis of comments by

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I. Introduction

1. By letter of 20 December 2019, the Minister of Justice of the Republic of Moldova requested an urgent opinion of the Venice Commission on the draft Law on amending the Law No. 947/196 on Superior Council of Magistracy (SCM) (CDL-REF(2020)001, hereinafter “the draft Law”).
2. The draft Law passed the first reading of the Parliament on 5 December 2019 and the second and final reading on 20 December 2019. Considering the tight timeframe for the promulgation of the laws,¹ the Minister of Justice requested the Venice Commission to review the draft Law on an urgent basis.
3. On 19-20 December 2019, the President of the Venice Commission, accompanied by the Deputy Secretary of the Commission, paid a visit to Chisinau following the invitation of the Speaker of the Parliament of the Republic of Moldova. He was told that an opinion of the Venice Commission on the draft Law, even if parliament had not waited for it, would be helpful in the promulgation process by the President of the Republic.
4. Against this background, the Bureau of the Venice Commission authorised the preparation of an urgent opinion.²
5. Mr Alexander Baramidze (expert, former substitute member, Georgia), Mr Richard Barrett (member, Ireland) and Mr António Henriques Gaspar (member, Portugal) acted as rapporteurs on behalf of the Venice Commission. Ms Nina Betetto (DGI expert, President of the CCJE) analysed the draft law on behalf of the Directorate of Human Rights (“the Directorate”). They had all acted as rapporteurs in the preparation of the Joint Interim Opinion on the draft Law on the reform of the Supreme Court of Justice and the Prosecutor’s Office, which also related to proposed amendments to the Law on the SCM (see CDL-AD(2019)020).
6. On 24 December 2019 the President of the Republic applied to the Constitutional Court raising four questions of constitutionality: a) Is there a need for a qualified majority voting in the Legislative Decree for the election of members of the Superior Council of the Magistracy from law professors; b) Should the establishment of an obligation to elect the President of the Superior Council of the Magistracy only from among the judge members be of a constitutional nature; c) Does the mechanism of election as a member of the Superior Council of the Magistracy of judges who have served as a judge for at least three years, but who had not been appointed to the upper ceiling, comply with Article 122 of the Constitution; d) Within the meaning of Article 16 of the

¹ Under Article 93 of the Constitution of the Republic of Moldova, the President of the Republic of Moldova promulgates the laws (1). The President of the Republic is entitled, whenever he has certain objections regarding a law, to submit it within two weeks at the most to the Parliament for reconsideration. Should the Parliament abide by its previously adopted decision, the President promulgates the law. (2)

² According to Article 14 a) of the Rules of Procedure of the Venice Commission:

“1. In urgent cases, with the authorisation of the Bureau in consultation with the rapporteurs, an urgent opinion may be issued and published prior to its consideration by the Commission at a Plenary session.

2. Prior to its issuing and publication, the urgent opinion shall be submitted to the Bureau and the Chairs and Vice-Chairs of the Sub-Commissions. On occasion, the Commission may at a Plenary session give specific directions for a planned urgent opinion.

3. Such urgent opinion shall be submitted to the Commission at its next session. The Commission may, depending on the circumstances, - take note of the urgent opinion; - endorse the urgent opinion; - adopt an (ordinary) opinion based on the urgent opinion; or - decide to postpone consideration of the opinion to a forthcoming session.”

Constitution, does the existence of disciplinary sanctions over the last three years constitute a discriminatory condition for applying for membership of the Council.

7. This urgent joint opinion was prepared on the basis of contributions by the rapporteurs and on the basis of the English translation of the draft Law provided by the Moldovan authorities (CDL-REF(2020)001). The translation may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

8. This urgent opinion was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) and will be presented to the Venice Commission for endorsement at its 122th Plenary Session in Venice on 20-21 March 2020.

II. Background

9. Article 122 of the Constitution of the Republic of Moldova provides that the Superior Council of Magistracy (SCM) consists of judges and university lecturers elected for tenure of four years and that the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor general are *ex officio* members of the Superior Council. According to Article 123(2), the procedure of organisation and functioning of the Superior Council of Magistrates is laid down by organic law.

10. Article 3 of the Law No. 947 on the Superior Council of Magistracy which regulates the composition of the Superior Council provides that the SCM shall be made up of 12 members: In addition to three *ex officio* members, three members shall be full law professors selected by the Parliament by majority votes of the deputies; and six members are judges elected, by secret ballot by the General Assembly of Judges, representing all levels of courts.

11. A previous draft Law aiming to reform the SCM (see CDL-REF(2019)031, hereafter "the previous draft Law") proposed an increase in the number of members of the SCM from 12 to 15. Three additional members would be law professors appointed by the Government (2 members) and by the President of the Republic (1 member) following a public competition.

12. In the letter of 20 December 2019, the Minister of Justice provided an Information note according to which the previous draft Law had been approved by the previous Government on 18 October 2019 and registered in the Parliament (draft no. 235). One of the priorities of the new government vested on 14 November 2019 (headed by Prime Minister Chicu) is to carry out the reform in the justice sector initiated by the previous government, but with a more transparent and inclusive approach. Therefore, following new consultations conducted by the new government on 19 November, 29 November and 13 December concerning draft no. 235, in particular with the members of the SCM, judges from district courts, courts of appeal and the Supreme Court of Justice, representatives of political parties and civil society, such draft was further amended.

13. The new draft Law was registered in parliament on 5 December 2019. On 18 December, it was reviewed by the Legal Committee on Appointments and Immunities which received amendment proposals both from the deputies, the Legal Directorate of the Parliament and civil society organisations.

14. As a result of this process, the draft Law proposes to add three more members to the SCM, thereby increasing them from 12 to 15. The additional three members will include one judge member and two lay members. Therefore, the SCM will be composed of seven judge members (and seven substitutes) elected among judges by the General Assembly of Judges, five lay members appointed by Parliament among tenured law professors in addition to three *ex officio* members indicated in Article 122(2) of the Constitution.

III. Preliminary general remarks

15. The Moldovan authorities requested the assistance of the Venice Commission in addressing the complex problems relating to the reform of the judiciary which they are facing. The Commission expressed its availability and readiness to assist, including by assessing the draft Law amending the Law on the Superior Council of Magistracy; on 19-20 December, the President of the Commission travelled to Chisinau at the request of the authorities. He learned however that the draft Law was about to be adopted without waiting for the Commission's opinion. It was argued that an urgent opinion would be useful prior to the promulgation by the President of the Republic. In the meantime, the President has applied to the Constitutional Court without awaiting the urgent opinion which was in preparation.

16. For the Venice Commission and the Directorate, it is regrettable that the Moldovan Parliament did not wait for the present urgent opinion before the adoption of the draft Law. The Commission and the Directorate hope that the future cooperation with the Republic of Moldova will be more constructive and substantive.

17. During his visit to Chisinau on 19-20 December 2019, the President of the Venice Commission was also informed that constitutional amendments relating to the Supreme Council of Magistracy were being prepared and that the Commission's assistance will be sought in that respect. According to the information note submitted by the Government, the draft constitutional amendments prepared by the Ministry of Justice and submitted to the Government for consideration, provide, among other things, for the removal of "ex-officio" members;³ the ratio of judges elected by their peers to non-judges will then be 7 (judges) to 5 (full-time law professors). The Venice Commission and the Directorate express their readiness for cooperation in this framework as this might be an opportunity to address more structural problems at the constitutional level,⁴ including the requirement of a qualified majority for the election of the lay members.

IV. Analysis

A. Composition of the Superior Council of Magistracy

18. Amendment to Article 3, paras. 3 and 4, proposes that the SCM be composed of fifteen members: seven judge members (and seven substitutes) elected among judges by the General Assembly of Judges, five lay members elected by Parliament among tenured law professors in addition to three *ex officio* members.

19. As regards the relationship between judges and non-judge members of the Council, the Venice Commission has previously stated that: *"A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members."*⁵ There are other European standards on the issue of the composition of a judicial council, notably **Recommendation CM/Rec(2010)12** which **states in its paragraph 27 that: "Not less than half**

³ i.e., according to, Article 122 of the Constitution, the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General.

⁴ See, [CDL\(AD\(2018\)003](#) Opinion on the law on amending and supplementing the Constitution of the Republic of Moldova (Judiciary), adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018).

⁵ [CDL-AD\(2007\)008](#), Report on judicial appointments, para. 27.

the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.”

20. For the Venice Commission and the Directorate, the result of the proposed amendments, as with the previous draft Law,⁶ would be to bring a better balance within the SCM between judges and lay members.

21. It is true that the constitutional framework makes it difficult to ensure that at least half of the members of the SCM are judges elected by their peers, as the presence of three *ex officio* members limits the scope for legislative change. As the Commission considered in its 2018 Opinion on the law on amending and supplementing the Constitution of the Republic of Moldova, there are no common standards on the membership of *ex officio* members in the judicial councils.⁷ It should nevertheless be reiterated that the Minister of Justice should be without the right to vote in matters concerning the career and discipline of judges.⁸ Moreover, as the Venice Commission considered in the 2018 Opinion, in order to avoid corporatism and politicisation, there is a need to monitor the judiciary through non-judicial members of the judicial council. Corporatism should be counterbalanced by membership of other legal professions, the “users” of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society.⁹ Although the mixed composition of the SCM, as is proposed in the draft amendments, better ensures the legitimacy of its work, under Article 122 of the Constitution, only university lecturers fall within the category of “non-judicial members”.¹⁰

22. In order to ensure pluralism within the Superior Council, it would be a better solution to include other lawyers, not exclusively from academia, but also practitioners, especially members of the Bar. However, the constitutional provision is outside the scope of amendments proposed to be introduced by the current draft law. Pending a constitutional amendment, a practical solution could be to prioritise the election of university lecturers who are also members of the Bar.

23. The Commission and the Directorate welcome that the draft law does not propose to remove the current members of the Superior Council and to replace them with new members. As the Commission previously considered “(...) *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.*”

⁶ CDL-AD(2019)020, paras. 77-82.

⁷ See, however, Opinion No. 10 (2007) of the Consultative Council of European Judges (23 November 2007) which states that the members of the Council for the Judiciary should not be active politicians, members of Parliament, the executive or the administration. According to Opinion No. 10, neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary.

⁸ Opinion on the law on amending and supplementing the Constitution of the Republic of Moldova (Judiciary), [CDL-AD\(2018\)003](#), para. 59; Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania ([CDL-INF\(1998\)009](#)), para. 16; Report on Judicial Appointments by the Venice Commission ([CDL-AD\(2007\)028](#)), para. 34; *mutatis mutandis* Interim Opinion on Constitutional Reforms in the Republic of Armenia ([CDL-AD\(2004\)044](#)), para. 58.

⁹ See, para. 56 with reference to CDL-AD(2002)021 Supplementary Opinion on the Revision of the Constitution of Romania, para. 21 and 22; CDL-AD(2002)012, Opinion on the draft revision of the Romanian Constitution, para. 66; CDL-AD(2010)004, Report on the Independence of the Judicial System – Part I: the independence of Judges, para. 30.

¹⁰ Article 122(1) provides that « The Superior Council of Magistrates consists of judges and university lecturers elected for tenure for 4 years”.

*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. [...]*¹¹

B. The manner of appointment of judge and non-judge members of the Superior Council of Magistracy

24. As concerns the appointment of judge members, according to draft Article 3, para. 4., seven members, as well as seven substitutes, shall be elected among judges by the General Assembly of Judges by secret vote, as follows: four members from lower courts, two from appellate courts and one from the Supreme Court of Justice. The Venice Commission and the Directorate welcome this increased representation of lower courts in terms of enhancing the pluralistic membership within the judicial cohort.¹²

25. As regards the manner of appointment of the five non-judge members, amendment to Article 3 (3), provides that they shall be appointed by Parliament, with the vote of the *majority of the elected deputies*, on the basis of the proposals of the Legal Committee on Appointments and Immunities of the Parliament. Compared to the current version of Article 3(3) of the Law No. 947 on the SCM (“the majority of the deputies who are present”), the new majority better reflects the goal that the lay members be elected with a wide support of the parliament. Indeed, as the CCJE considered “*the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.*”¹³

26. Nevertheless, it might be considered that “the majority of the elected MPs” is a low threshold and it seems likely that a government will normally dispose of such a majority. This draft provision may therefore create the possibility that non-judge members of the Council would be a coherent and like-minded group in line with the wishes of the acting government. This is the reason why the Venice Commission has in the past and in other contexts recommended that “*the elections of judicial council 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.*”¹⁴ Nevertheless, it is unclear whether the current Constitution allows for election with an absolute or qualified majority (this question is pending before the Constitutional Court). It should also be stressed that the requirement of a higher majority (for instance two-thirds) could block the appointment procedure of lay members because of the failure to achieve such majority in the Moldovan context.¹⁵

27. The authorities might consider different options in this respect. One solution, for instance, could be to give to outside bodies, not under government control, such as the Bar or the law faculties, the possibility to propose candidates.¹⁶ The establishment of an independent non-

¹¹ CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, paras. 71-72.

¹² See, CDL-AD(2018)003, para. 54. It was particularly welcomed by the Commission that the requirement that the judge members of the Superior Council represent all court levels was provided at the constitutional level (in the draft constitutional amendments).

¹³ CCJE Opinion No. 10 (2007), on the Council for the Judiciary at the service of society, para. 19, *in* <https://rm.coe.int/168074779b> (consulted on 10 January 2020).

¹⁴ CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, paras. 52-53.

¹⁵ See, CDL-AD(2019)003, para. 78.

¹⁶ For instance, in Belgium, if the non-judicial members are selected and appointed by the Senate with a 2/3 majority of votes, the bar associations and the universities can also propose candidates. In Serbia, the elected members of High Judicial Council, including non-judicial ones, are elected by the National Assembly at the proposal of authorised nominators. Authorized proponent for the election of a Council

political commission could also be considered. This matter should be addressed in the context of the constitutional amendments in preparation.

C. President of the Superior Council of Magistracy

28. According to the draft amendment to Article 5(1), the President of the SCM shall be elected only from among the judge members of the Council. In its 2017 Opinion on the Draft Judicial Code of Armenia,¹⁷ the Venice Commission welcomed the initiative that the chairpersons of the Supreme Judicial Council of Armenia would be elected by rotation from amongst judge members and lay members of the Council. The Commission considered that this method would give “a democratic legitimation to the Council before the public”.¹⁸

29. The Constitution is silent about how the President of the SCM should be elected. The existing Moldovan law allows the election from both judge and lay members and, rightly, bans the election of the chairperson from among the ex-officio members (Article 5(3)). The draft Law instead reserves the Presidency for judge members. Whether this limitation is compatible with the Constitution is a matter pending before the Constitutional Court. In any case, a ban on lay members can be seen as a regrettable step back.

D. Minimum work experience requirements for judge members

30. Under the draft amendment to Article 8²(1)a of Law No. 947, judge candidates should have at least three years’ experience of judgeship. The Information note submitted by the authorities underlines that this period is enough in order that the judges of the court of first instance be acquainted with the specifics of the position and organisation of the judiciary. The Venice Commission considers that “it is vital that the members of the Council have sufficient practical experience to carry out their work”.¹⁹ For the Venice Commission and the Directorate, the national authorities are in principle better placed to assess whether three years of work experience in the judicial field are sufficient for a candidate to acquire the necessary experience and wisdom to hold such an important position in the judicial branch.

E. Appeal against the decisions of the Superior Council

31. According to current Article 25(1), the decisions of the SCM can be appealed to the Supreme Court of Justice, by any interested person within 15 days from the date of communication. According to the draft Law (draft art. 25), challenges against the decisions of the SCM may instead be lodged with the Chisinau Court of Appeals by any interested person, within 30 days from the date of communication of such decisions.

32. This draft provision follows the amendment of the Code of administrative procedure (Article 191 (3) and (5)) in April 2019 to provide for the general competence of the Chisinau Court of Appeal to decide appeals against decisions of the SCM (with a further appeal to the Supreme Court of Justice).

member from the ranks of lawyers is the Bar Association of Serbia. Candidates for the election of a Council member from the ranks of Faculty of law professors propose joint session of deans of law faculties in the Republic of Serbia. See, European Network for Councils for the Judiciary, Standards VI: Non-Judicial Members in Judicial Governance, Questionnaire and replies Annex to the ENCJ Report 2015-2016. https://www.ency.eu/images/stories/pdf/workinggroups/ency_pt_standards_vi_non_judicial_members_annex.pdf

¹⁷ CDL-AD(2017)019 Opinion on the draft judicial code of Armenia, para. 90.

¹⁸ *Ibid.*

¹⁹ CDL-AD(2008)006, Opinion on the draft law on the High Judicial Council of the Republic of Serbia, para. 51.

V. Conclusion

33. The Venice Commission and the Directorate state that it is regrettable that the Parliament of the Republic of Moldova did not wait for the present urgent opinion before the adoption at the second and final reading of the draft law amending Law no. 947/1996 on Superior Council of Magistracy on 20 December 2019, nor before submitting it to the President for promulgation. They welcome however the information that constitutional amendments relating to the Supreme Council of Magistracy are being prepared and that the Commission's assistance will be sought in that respect. The Venice Commission and the Directorate express their readiness for constructive and substantive co-operation in the framework of the future draft constitutional amendments as this might be an opportunity for the authorities to address more structural problems at the constitutional level. They reiterate the statement of the President of the Venice Commission following his visit to Moldova on 19-20 December 2019 that "*all the institutions of the Republic of Moldova [should] co-operate loyally and productively with each other to find a long-term solution for the independence and integrity of the judiciary (...), in compliance with the Moldovan Constitution and with the international principles of democracy and the rule of law.* "

34. The proposal to increase the number of the members of the SCM from twelve to fifteen may be positive as the functions of the Council concerning evaluation, management, discipline and accountability of judges can be qualitatively strengthened with a broader and more representative composition. The result of the proposed amendments, as with the previous draft amendments to the Law on Superior Council examined by the Commission and the Directorate in the October 2019 Interim Opinion, is to achieve a better balance within the SCM between judges and lay members. It is particularly welcome that the representation of lower courts on the Council is increased.

35. The election of non-judge members by Parliament with the vote of the "majority of the elected deputies", assuming that it is constitutional, is welcome, as a positive step towards a larger support of the candidates by Parliament. A stronger majority would be more appropriate because it would involve the opposition too: this should at any rate be examined in the context of the constitutional reform in preparation. The authorities could also consider other solutions, as, for instance, vesting outside bodies, not under government control, such as the Bar or the law faculties, with the possibility to propose candidates or establishing an independent, non-political commission to fulfil this task.

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