Strasbourg, 14 October 2019 **CDL-AD(2019)020**

Opinion No. 966 / 2019 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

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

ON THE DRAFT LAW ON THE REFORM OF THE SUPREME COURT OF JUSTICE AND THE PROSECUTOR'S OFFICE

Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019)

on the basis of comments by

Mr Alexander BARAMIDZE (Substitute Member, Georgia)
Mr Richard BARRETT (Member, Ireland)
Ms Nina BETETTO (DGI Expert)
Mr António Henriques GASPAR (Member, Portugal)

Opinion co-funded by the European Union

A Table of Contents

I. Introduction

1. By a letter dated 9 September 2019, the Minister of Justice of the Republic of Moldova requested the opinion of the Venice Commission on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office. In her letter, the Minister of Justice indicated that the opinion of the Venice Commission was sought concerning only the provisions of the draft law regarding the extra-judiciary evaluation mechanism for key judges' position and the amendments regarding the Superior Council of Magistracy.

2. Mr Alexander Baramidze (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 analysed the draft law on behalf of the Directorate of Human Rights ("the Directorate").

3. On 19-20 September 2019, a delegation of the Venice Commission and the Directorate composed of the rapporteurs accompanied by Ms Simona Granata Menghini, deputy director and Deputy Secretary of the Venice Commission and Mr Ziya Caga Tanyar, legal Officer at the Secretariat, visited the Republic of Moldova and held meetings with representatives of the Ministry of Justice, the Superior Council of Magistracy, the Supreme Court of Justice, the Parliament as well as civil society organisations. The Minister of Justice informed the Venice Commission that she intends to revise the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office on the basis of the recommendations in the present opinion and to submit the revised version to the Commission for its final opinion. The Venice Commission and the Directorate welcome this intention and express their gratitude to the Moldovan authorities for their excellent co-operation.

4. This Interim opinion is based on the English translation of the draft law provided by the Moldovan authorities (CDL-REF(2019)031). 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.

5. This Interim opinion was prepared on the basis of the comments by the rapporteurs and the results of the visit to Chisinau. It was examined by the sub-Commission on the judiciary at its meeting on 10 October 2019 and was adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019).

II. The draft law and the context

6. In their letter of 9 September, the authorities provided an "Information Note to the Government decision on approval of the draft Law on the reform of the Supreme Court of Justice and the Prosecutor's Offices". According to the Information Note, "*the raison d'être of the draft law relates, on the one side, to the need for building up a genuine judiciary complying integrity and professionalism requirements, and on the other side – to the intention of reformation of the Supreme Court of Justice, via reducing the competences of the Supreme Court, which implies reducing the number of judges*."

7. The draft law aims in the first place to reform the remit of the Supreme Court of Justice which will include the transformation of the Supreme Court of Justice into a Court of cassation which ensures the consistent interpretation and application of the law by courts[1] and to achieve uniformity in the case-law. Under the draft law, the Supreme Court is not therefore a court of third instance after the appeal courts and other courts and its role is limited to state whether the law

[1] See Title III, Chapter I, Article I of the draft law ("The Supreme Court of Justice is the only supreme court. It ensures the uniform interpretation and application of the law by the courts.")

has been correctly applied on the basis of the facts already definitively assessed in the decisions referred to it. Its new role is thus limited to "*provide the judicial system with a constant case-law and to focus mostly on remediation of the discrepancies in the judicial practice, to create the new practice and to revise its old practice*"[2].

8. This limited scope of competence of the Supreme Court also justifies, according to the authorities, reducing the number of Supreme Court judges from 33 to 17[3]. Article 1 of the draft law states that "*The Supreme Court of Justice is reorganized by changing the remit and reducing the number of judges, starting with January 1, 2020*(1)" and that "*as of January 1, 2020, a number of 17 judge positions shall be established for the Supreme Court of Justice.* (2)" (this number is 33 under the Law no. 514/1995 regarding the judicial organization).

9. In order to identify the judges of the Supreme Court who will continue to hold office at the Supreme Court of Justice after the reorganization, the draft law establishes a special ad-hoc, extra-judiciary body ("the Evaluation Committee") (Art. 3(1) of the draft law) which shall conduct an evaluation and selection of the sitting judges of the Supreme Court of Justice. The evaluation committee is composed of 20 members appointed by the Parliament (2 members), the President of the Republic (2 members), the Government (2 members), the Superior Council of Magistracy (2 members), the Superior Council of Prosecutors (2 members), the National Platform of Moldova of the Eastern Partnership Civil Society Forum (4 members) and the Minister of Justice (6 foreign experts, based on the proposals received from the international organisations and development partners of the Republic of Moldova). It consists of two evaluation boards composed of 10 members each. The evaluation, under art. 6(2) of the draft law, shall be conducted by one of the evaluation boards on the basis of the criteria of integrity and lifestyle (art. 6(2)a) of the draft law) and of professional activity and professional qualities of the candidates (art. 6(2)b of the draft law).

10. If the judge of the Supreme Court of Justice refuses the evaluation or does not participate in the evaluation by the date established by the Evaluation Committee, s/he has the right to resign under the conditions set forth in the Law no. 544/1995 regarding the status of the judge (art. 2(4) of the draft law).

11. Following the evaluation of the judge of the Supreme Court of Justice, which is carried out in two stages including primarily integrity/lifestyle, and professional activity/personal qualities assessments, the Evaluation Board draws up a reasoned report which ascertains whether or not the judge has passed the evaluation. The judges of the Supreme Court who passed the evaluation continue their activity as judge at the Supreme Court of Justice (art. 7(2) of the draft law). However, according to Article 7(7), in case the number of judges of the Supreme Court of Justice who are successful in the evaluation is higher than 17, only 17 of them with the highest seniority as judge of the Supreme Court of Justice will continue their activity in the Supreme Court. The rest who are transferred to other courts will retain their salary as judge of the Supreme Court of Justice.

12. The evaluation report with a negative result drawn up by the first evaluation board can be challenged by the judge concerned, by an appeal filed at the secretariat of the Evaluation Committee (art. 8 of the draft law). The appeal is examined by the other evaluation board which

[2] Information note provided by the authorities.

[3] The assessment concerning the reduction of the number of judges of the Supreme Court of Justice from 33 to 17 does not strictly fall within the scope of the present joint opinion. However, the justification for the reduced number of judges should be properly grounded, and it should take into account the workload of the Supreme Court with regard the requirement that cases should be dealt with within a reasonable time.

has not conducted the judge's initial evaluation, and which makes its own assessment of the judge, based on the information collected by the initial Evaluation Board.

13. The report issued by the second Evaluation Board following the appeal review may be appealed against by the judge concerned before the Superior Council of Magistracy (art. 9(2) of the draft law). The Superior Council of Magistracy after examining the appeal in public session within 14 days, may reject the evaluation report if it finds that the report contains deficiencies or errors that may change the conclusions of the report and the decision shall be sent back to the Evaluation Committee (art. 9(3) and (4) of the draft law).

14. The final assessment is made by the Evaluation Committee which shall verify the findings in the decision of the Superior Council of Magistracy and decide whether it upholds the report of the Evaluation Board or adopts a new report (art. 9(5) of the draft law). The final report of the Evaluation Committee cannot be rejected by the Superior Council of Magistracy (art. 9(6) of the draft law).

15. In case where the initial report of the Evaluation Board which has found that the judge of the Supreme Court of Justice was not successful in the evaluation was not challenged before the second Evaluation Board and the Supreme Council of Magistracy by the judge concerned or in case where the Evaluation Committee decides in a final decision to uphold the initial evaluation following the appeal examination by the Superior Council of Magistracy, the latter, no later than 14 days after receiving the final report, shall propose to the judge concerned the transfer, with his/her consent, to any vacant positions of judge in other courts, without holding a competition. The judge of the Supreme Court of Justice who refuses the transfer has the right to resign (art. 10(2) of the draft law), in which case s/he cannot run again to be appointed as judge for 10 years (art. 10(9) of the draft law).

16. The Information Note submitted by the authorities explains that the draft law also anticipated the situation when, following the evaluation, the number of 17 seats in the Supreme Court will not be filled. Under Article 11 of the draft law, in case there remains vacant positions at the Supreme Court following the evaluation process, the Evaluation Committee shall announce a competition for their filing. The competition is conducted by the Evaluation Board (art. 11(3) of the draft law which refers to the procedure concerning the evaluation of Supreme Court judges under art. 6(1)). Candidates for the position of judge are selected by the Evaluation Board if they pass the integrity and lifestyle verification. Following the competition, the Evaluation Board draws up a reasoned report regarding each candidate which is presented to the Superior Council of Magistracy. The latter may reject the Evaluation Board's proposal if it finds that the report contains flaws and errors that may change the conclusions of the report (art. 13(2) of the draft law). The final decision is rendered by the Evaluation Committee which verifies the findings in the decision of the Superior Council of Magistracy and decides whether it upholds the report of the Evaluation Board or adopts a new report. This final report of the Evaluation Committee cannot be rejected by the Superior Council of Magistracy which shall adopt a decision on the proposal to appoint the judge to the Supreme Court of Justice and shall submit the decision to the Parliament (art. 13(5) of the draft law). Within 15 days from the date of the receipt of the proposal by the Superior Council of Magistracy, the Parliament shall appoint the candidate in the position of judge at the Supreme Court (art. 13(6) of the draft law).

17. In addition to and after the evaluation of the Supreme Court judges, the same evaluation shall be applied to the presidents of courts of appeal and of the first instance courts; vice presidents of courts of appeal and of the courts of Chisinau, Balti, Cahul and Comrat (art. 16 of the draft law). Moreover, Title II [Evaluation of prosecutors] of the draft law provides for a similar evaluation process concerning the prosecutors acting within the Anticorruption Prosecutor's Office, as well as the Prosecutor General and his deputies, chief prosecutors of the subdivision of the General Prosecutor's Office, the Prosecutor's office for Combatting Organised Crimes and

Special Cases, district prosecutor's office, and regional prosecutor's offices in Chisinau, Balti, Cahul and Comrat.

18. The Information Note submitted by the authorities to the Venice Commission and the request for opinion by the Minister of Justice provide some explanations in particular on the background to the need of establishing an ad-hoc extra-judiciary evaluation mechanism for key judges' and prosecutors' positions in the Republic of Moldova. According to the request and the Information Note, "*[o]n 8 June 2019 a democratically elected Government was appointed by a new parliamentary majority formed with the purpose of deoligarchisation. After a week of political crisis created by the Constitutional Court, the oligarchic regime ceded power and its grip on the law institutions has weakened. This opened an opportunity to implement deep reforms meant to ensure an independent and accountable judiciary and prosecution service. Republic of Moldova has struggled throughout its history to build an independent and impartial justice system. Nonetheless, in the last years the justice system has shown an unprecedented lack of independence and submission to oligarchic interests.*"

19. The request by the Minister of Justice and the Information Note refer notably to the resolutions of 5 July 2018[4] and of 14 November 2018[5] of the European Parliament which underline that "*the ruling political leaders colluding with business interests and unopposed by much of the political class and the judiciary, [results] in the Republic of Moldova being a state captured by oligarchic interests with a concentration of economic and political power in the hands of a small group of people exerting their influence on parliament, the government, political parties, the state administration, the police, the judiciary and the media."*[6] The Information Note adds that the Superior Council of Magistracy "*has shown an established track record in ignoring the scores attributed to candidates by Judicial Evaluation Board during selection and promotion of judges. The Superior Council of Magistracy has also selected and promoted judges with integrity issues and unjustified assets*." These are, according to the Information Note, some examples which show that the judiciary in the Republic of Moldova is not capable to clean itself of corrupt and vulnerable people.

20. The request and the Information Note conclude that the Government and the parliamentary coalition do not have any other option but to facilitate the creation of an extra-judiciary mechanism which would have the difficult and highly responsible job to evaluate all the key persons from the judiciary and the prosecutor's office to establish if their integrity and professionalism fit their position.

III. Disciplinary liability and Performance evaluation of judges under domestic law

21. Law No. 178 of 25 July 2014 regulates the grounds for *disciplinary liability of judges*, the categories of disciplinary offences committed by judges, the duties of the institutions involved in the disciplinary procedure, as well as the procedure for examination, adoption and appeal of decisions in disciplinary cases regarding judges.

22. The disciplinary offences are regulated in a detailed and exhaustive manner in Article 4 of Law No. 178. They include offences concerning the judges' performance, such as for instance, "breach of the completion time of the procedural actions" (art. 4(1)g) or "non-performance, late or inappropriate performance of a job duty (…) without a reasonable justification" (Art. 4(1)j), and concerning their integrity, such as for instance, "the use of a judge's position (…) to seek or accept the settlement of personal or others' interests, or to receive undue advantages."

[4] European Parliament resolution of 5 July 2018 on the political crisis in Moldova following the invalidation of the mayoral elections in Chișinău (2018/2783(RSP).
[5] European Parliament resolution of 14 November 2018 on the implementation of the EU Association Agreement with Moldova (2017/2281(INI).
[6] *Ibid.*

23. Chapter II of Law No. 178 establishes an independent body, the Disciplinary Board, entrusted with the task of conducting the disciplinary proceedings and examining the disciplinary cases in respect of judges. It consists of five judges (elected by the general assembly of judges) and four representatives of civil society (art. 9(1)) (appointed by the Minister of Justice) who are elected/appointed for a six-year mandate and cannot be elected or appointed for two consecutive mandates (art. 9(4)).

24. Article 19 provides for a procedure of notification -to the disciplinary board- of acts that may constitute disciplinary offences. Accordingly, this notification can be submitted by the person whose rights have been violated, by a member of the Supreme Council of Magistracy, by the judicial performance evaluation board (regulated under Law No. 154 on the selection, performance evaluation and career of judges – see below), by the judicial inspection (concerning the verification of the Organisational Activity of the Courts in the Administration of Justice – Art. 7^2 of Law No. 947 on the Law on the Superior Council of Magistracy); and by the National Anticorruption Center (entrusted with the preparation of the report on institutional integrity).

25. Disciplinary cases are examined by the Disciplinary Board which adopts a decision on the disciplinary liability of the judge concerned. The Board may decide on 1) finding a disciplinary offence and applying one of the disciplinary sanctions foreseen in art. 6 of the Law (a. warning b. reprimand c. salary reduction d. dismissal); 2) ceasing the disciplinary procedure in case the deadline for disciplinary liability has expired; 3) cessation of the procedure in case no disciplinary offence has been committed; 4)cessation of the procedure in case of revocation of submitted notification (art. 36).

26. The decision of the disciplinary board can be appealed against before the Superior Council of Magistracy (art. 39). After the examination of the appeal, the Superior Council of Magistracy can decide to 1) maintain the decision of the Disciplinary Board without any changes 2) accept the appeal and adopt a new decision. The Law provides for judicial review of the decision of the Superior Council of Magistracy concerning the disciplinary liability of the judge concerned. According to Article 40, the decision taken by the Superior Council can be appealed against before the Supreme Court of Justice.

27. The *performance evaluation of judges* is regulated under Title II, Chapter 1 of Law No. 154 concerning the selection, performance evaluation and career of judges. The aim of the performance evaluation is to determine the knowledge and professional skills of judges, as well as the ability to apply theoretical knowledge and necessary skills in practice of the profession of judge, determining weak and strong aspects in the work of judges etc. (art. 12 of Law No. 154).

28. The performance evaluation is performed by the Evaluation Board (established under art. 12 of Law No. 154) composed of 5 judges of the courts of all levels (2 judges from the Supreme Court of Justice, 2 judges from the courts of appeal and one judge from the ordinary courts) elected by the General Assembly of Judges (3 members) and the Superior Council of Magistracy (2 members) and 2 civil society representatives (appointed by the Superior Council of Magistracy). The evaluation is initiated either by the chair of the court where the judge performs his/her duties, or by the judge requesting the performance evaluation or by the members of the Superior Council of Magistracy (art. 13(6) of Law No. 154).

29. The criteria and indicators used by the Evaluation Board in the performance evaluation of judges are indicated and regulated in a very detailed manner in the Regulation concerning the criteria, indicators and procedure for assessing the performance of judges (adopted by a decision of 5 March 2013 of the Superior Council of Magistracy). Appendix No. 1 to this Regulation also provides detailed criteria, indicators, sources of verification and scores on the basis of which the efficiency and quality of the activity and professional integrity of the judge is evaluated. The evaluation includes first a performance assessment, on the basis of data (obtained from the

Integrated Dossier Management Program) concerning the number of case-files dealt with the judge in a given period of time, the respect by the judge of the reasonable deadlines in the process of justice, concerning the quality of randomly selected judgments issued by the judge, fulfilment of other tasks such as involvement in the drafting of normative acts, participation in training courses and other detailed criteria concerning the knowledge of computer programs such as MS Word or Excel etc. The evaluation conducted by the board also includes the professional integrity assessment on the basis of the criteria concerning compliance with professional ethics including the code of ethics for judges, professional reputation (this indicator is assessed based on the written opinion of the president of the court where the judge concerned performs his/her duties) and on the basis of information received from the disciplinary board concerning disciplinary offences committed by the judge (art. 10 and 11 of the Regulation).[7]

30. After examining the file and interviewing the judge, the evaluation board can decide that the latter is successful in the performance evaluation (granting one of the grades: "insufficient", "good", "very good" and "excellent") or that s/he failed the evaluation (art. 23 of Law no. 154). In case the board, in the course of the evaluation process, identifies certain grounds for disciplinary proceedings, it postpones the evaluation process and notify the Superior Council of Magistracy to examine the opportunity to initiate disciplinary proceedings.

31. Decisions of the Evaluation Board can be appealed against with the Superior Council of Magistracy, through the board, within 10 working days from the date of their adoption (art. 24 of Law No. 154).

32. The judicial performance evaluation results are used in order to organise appropriate professional trainings for judges, to determine the degree of judges' compliance to the position they hold, to ensure an objective comparison between several judges for promotion and to improve court administration (art. 12 of the Law No. 154). The results, under Article 19 of the Law on Disciplinary Liability of Judges, can also be submitted to the Disciplinary Board in case disciplinary offences are identified in the evaluation process.

IV. International standards and previous relevant opinions of the Venice Commission

A. Independence of the Judiciary and Irremovability of Judges

33. In the present analysis, the Venice Commission and the Directorate will take into account the essential safeguards and requirements deriving from Article 6 of the European Convention on Human Rights (hereinafter, "ECHR") and the relevant case-law of the European Court of Human Rights, as well as the principles, requirements and standards for the independence of the judiciary set out in various documents, including the Report of the Venice Commission on the Independence of the Judicial System, Part I: The Independence of Judges (CDL-AD(2010)004)).

34. One of the key aspects of the judicial independence is the principle of irremovability of judges.[8] It requires that "[j]u*dges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of the term of office.*"[9] Similar principles are upheld in other authoritative international texts that have set forth international standards on the independence of the judiciary such as the Opinion No. 1 of the Consultative Council of European

[7] See, para. 50 of the present Opinion.
[8] See, the judgment of 24 June 2019 of the European Court of Justice (Grand Chamber) in case C-619/18 (Poland).
[9] Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies), Principle I – General Principles on the independence of judges, point 3.

Judges (CCJE)[10]. No consent may be necessary where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court.[11]

35. The Venice Commission has "*always favoured tenure until retirement*"[12] and "*has consistently supported the principle of irremovability in constitutions*" and has indicated that "*[t]ransfers against the will of the judge may be permissible only in exceptional cases.*"[13]

36. In some post-Communist states, there have been attempts to remove sitting judges by way of "qualification test". In principle, the Venice Commission has been critical of such dismissals. According to the Commission, instead of conducting qualification tests it would be advisable to settle problems with the qualification of judges through efficient disciplinary proceedings in individual cases.[14]

B. Justification of Temporary Radical Measures

37. Despite the foregoing established principles, the Venice Commission has observed that in some post-communist countries, the standards on the judicial independence may result in a paradox. In its Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, the Commission considered that: "(…) *in Albania, as well as in some other post-communist countries, the constitutionalisation of the standards on the independence of the judiciary resulted in a paradox: constitutional guarantees have been bestowed upon judges who were not yet independent and impartial in practice. As a result, in the opinion of the Albanian politicians and of the general public, many members of the judiciary developed corporatist attitudes which led to wide-spread corruption and lack of professionalism and efficiency. In these circumstances the initiative to revise the constitutional provisions on the judiciary is perfectly understandable."*[15]

38. Under such circumstances, a *temporary* mechanism supposed "*to cleanse the ranks of the judiciary/prosecution and 'reboot' the whole system*" was found to be commendable.[16] The Venice Commission shared the views of nearly all interlocutors in Albania that the level of corruption in the Albanian judiciary was extremely high and that the situation required "*urgent and radical measures*", such as the vetting of all sitting judges.[17] According to the Venice Commission, the question whether the wide consensus in the country creates a sufficient basis for subjecting all the sitting judges (including the honest ones) to re-evaluation, irrespective of the specific circumstances of each individual judge was a question of political necessity and the Venice Commission was not in a position to pronounce itself on it.[18] The Commission warned, however, "*that such radical solution would be ill-advised in normal conditions, since it creates enormous tensions within the judiciary, destabilises its work, augments public distrust in the judiciary, diverts the judges' attention from their normal tasks, and, as every extraordinary measure, creates a risk of the capture of the judiciary by the political force which controls the process.*"[19]

---

[10] Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges.
[11] European Charter on the Statute of Judges, Strasbourg, 8-10 July 1998, para. 3.4.
[12] CDL-AD(2010)004, Report on the Independence of the Judicial System, Part I: The Independence of Judges, para. 35.
[13] *Ibid*., para. 43.
[14] 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, para. 48.
[15] CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, para. 8.
[16] *Ibid*., paras. 9-10.
[17] *Ibid*., para. 98.
[18] *Ibid.*
[19] *Ibid.*

39. In the final opinion on the revised draft constitutional amendments on the judiciary of Albania, the Venice Commission noted that the extraordinary measures to vet judges and prosecutors were "*not only justified*" but were "*necessary* (…) *to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system*".[20]

40. Earlier, a similar solution was found to be acceptable in the Ukrainian context. There too the Venice Commission took into account existing major problems with corruption and incompetence among the judiciary, political influence on judges' appointment in the previous period, and almost complete lack of public confidence in either the honesty or the competence of the judiciary.[21] It considered that "*If the situation is as described by the representatives of the authorities, it may be both necessary and justified to take extraordinary measures to remedy those shortcomings*."[22] The Commission warned, however, that "*such measure as the qualification assessment as provided for in transitional Article (…) should be regarded as wholly exceptional and be made subject to extremely stringent safeguards to protect those judges who are fit to occupy their positions*."[23]

V. Analysis

A. Preliminary Remarks

41. Every sovereign law maker can introduce laws about courts and judges which can, subject to the applicable constitutional rules, distribute jurisdictions and functions across different courts. Over time new courts can be created and existing courts can be removed or amalgamated with other jurisdictions. Such changes will have implications for sitting judges. Once a court system is in place, all such reforms are subject to the overall protection of the independence of the judiciary. Current judges cannot be dismissed from office as part of a reform plan unless there is a scheme to transfer such judges to equivalent judicial posts with their consent. In its report on the independence of the judicial system, the Commission considered that transfers against the will of the judge may be permissible only in exceptional cases.[24]

42. If the effect of the draft law were that the Supreme Court would change its nature and be replaced by a different court with a different function, then ideally all the current judges would transfer unless they fail to satisfy the criteria about the new functions of the Supreme Court which required specific professional expertise. If some judges did not satisfy those professional criteria, then they would be transferred to an other court at the same judicial salary. If the nature of the new court requires a lesser number of judges, then that can be achieved by natural wastage over time.

43. It appears that the current draft law is not focused exclusively on implementing the reform of the Supreme Court, but rather it combines such a reform plan aimed at replacing the existing Supreme Court by a new court having a different jurisdiction/function and fewer judges, with a *vetting process*. This amalgamation between the reform of the Supreme Court and the vetting process is particularly evident as the criteria which shall be used by the Evaluation

[20] CDL-AD(2016)009, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, para. 52.
[21] 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, paras. 72-74.
[22] *Ibid.,* para. 73.
[23] *Ibid.,* para. 74.
[24] CDL-AD(2010)004 Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 43.

Board/Committee are not only aimed at evaluating the skills of sitting judges in view of the new jurisdiction/function of the Supreme Court, but they also concern an "integrity" and "lifestyle" assessment (art. 6 of the draft law). It is noteworthy in this context that those judges of the Supreme Court who are not successful in the evaluation process including the integrity test, are not automatically dismissed, but are proposed to be transferred to any of the vacant positions of judge in other courts, without holding a competition (art. 10(2) of the draft law).[25]

44. This is a problematic combination as it is unclear what the real justification for the interference with the principle of irremovability of the judges is. As the draft law is focused on the method of evaluation of existing judges by reference to integrity and performance and not primarily on the new role of the Supreme Court of Justice, the scheme is essentially a vetting process to vet all existing judges of the Supreme Court.

45. The draft law must therefore be assessed against the principles developed through the examination of other vetting processes in member states. The draft law under consideration in effect removes the competence of the existing specialized bodies entrusted with the evaluation of integrity and professionalism and confers it to a new specialized body.

46. As regards the justification for such vetting procedure, the Venice Commission and the Directorate take note of the assessment made by the authorities in particular on the basis of two above-mentioned resolutions of the European Parliament[26] that *"in the last years the justice system has shown an unprecedented lack of independence and submission to oligarchic interests"* and that *"national and international institutions have declared the Republic of Moldova a captured state."* In the end, it falls ultimately within the competence of the Moldovan authorities to decide whether or not the high level of corruption in the Moldovan judiciary creates sufficient basis for subjecting all the sitting Supreme Court judges to extraordinary re-evaluation as provided by the draft law.

47. However, firstly, it must be borne in mind that vetting is not a default remedy. All the other elements of the legislative framework should be taken into account. Disciplinary procedures, regular evaluation and in extreme cases criminal investigation and prosecution are the regular methods of judicial accountability. It must be clear why those avenues are not available before the vetting option can be considered. The fact that there might be a very low level of confidence in the judiciary requires that the problems be examined but it of itself does not require considering a vetting process as a solution until all other avenues are excluded.

48. Secondly, the current judicial reform process in the Republic of Moldova does not involve any constitutional amendments and the proposed amendments are of legislative level only. Therefore, any vetting scheme laid down by the draft law and its implementation should respect the current Constitution and in particular the constitutional provisions regarding the independence of the judiciary, including those related to the Superior Council of Magistracy.

49. Finally, the Venice Commission and the Directorate recall that pursuant to Article 72 of the Moldovan Constitution, laws on the organisation and functioning of the Superior Council of Magistracy and the courts of general and administrative jurisdiction should be governed by organic law. This draft law should therefore be adopted as an organic one. This would also legitimate its nature of derogation from the existing ordinary procedures of evaluation of integrity and professionalism.

---

[25] See, paragraph 76 of the present Opinion.

[26] Resolution of 5 July 2018 on the political crisis in Moldova following the invalidation of the mayoral elections in Chișinău (2018/2783(RSP) and the resolution of 14 November 2018 on the implementation of the EU Association Agreement with Moldova (2017/2281(INI)).

B. Criteria for evaluation

50. While Title I of the draft law consists of Chapters I-VII on organisation and procedure of the evaluation, it fails to specify substantive rules on evaluation of integrity, professional activity and personal qualities. As the Venice Commission delegation was informed during the meetings in Chisinau and as outlined under Section III (Disciplinary liability and Performance evaluation of judges under domestic law) of the present opinion, the existing legislation already sets out such criteria. In order to avoid arbitrariness the main criteria with respect to the elements stipulated under Article 2(2), i.e. integrity, lifestyle, professional activity and personal qualities, should be set out clearly and exhaustively by the primary legislation and should not be left, as is the case under the draft law, to regulations to be used by the Evaluation Committee. These criteria should be the same as those already in force concerning the disciplinary liability and performance evaluation of judges. Details can be regulated by secondary legislation. Alternatively, the Draft Law might refer to the existing provisions in the relevant laws.

C. Evaluation Committee

51. In its amicus curiae brief for the Constitutional Court of Albania concerning the law on the transitional re-evaluation of judges and prosecutors (the vetting law)[27], the Venice Commission considered that if the process of vetting is conducted or controlled by the executive, the entire process of vetting may be compromised. The Commission paid particular attention to the fact that the vetting bodies (i.e. the Independent Commission and the Appeal Chamber) possess both the characteristics of judicial bodies which decide independently and impartially, and that their members during their mandates shall have the status of judge at the High Court.

52. According to Article 3 of the draft law the Evaluation Committee is composed of 20 members appointed by the Parliament (2 members), the President of the Republic (2 members), the Government (2 members), the Superior Council of Magistracy (2 members), the Superior Council of Magistracy (2 members), the National Platform of Moldova of the Eastern Partnership Civil Society Forum (4 members) and the Minister of Justice (6 foreign experts who have at least 10 years of experience in the field of laws – preferably in the field of the judiciary and the prosecutor's office). At least one member appointed by the Parliament, one by the President, one by the Government and one by the Superior Council and 2 members appointed by the National Platform must be former judges who have worked for at least 10 years or who are former constitutional judges.

53. It is positive that the draft law provides a number of guarantees for the members of the committee in order to ensure their independence and impartiality. Under Article 3(4), members of a political party in the last three years, holders of public office, public office with special status, public dignitaries or persons employed in the office of public dignitaries, persons whose spouse, parents, children or children's spouses are judges or prosecutors cannot be appointed as members of the evaluation committee. Moreover, any interference with the work and decision-making process of the Evaluation Committee shall be prohibited (art. 3(6)). The members of the evaluation committee are obliged to respect the provisions of the Law on declaration of assets and personal interest; and should report to the evaluation committee any attempt to influence them (draft art. 3(7)). They are remunerated for the period of their service in the Committee with the salary of a judge at the Supreme Court with 16 years of seniority (draft art. 3(12).

54. Concerning the composition of the evaluation committee, it seems that the draft law establishes a certain balance between members appointed by political organs (the Parliament, the Government, and the President), judicial bodies, civil society and foreign experts.

[27] CDL-AD(2016)036 Amicus Curiae Brief for the Constitutional Court of Albania on the Law on the Transitional Re-Evaluation of Judges and Prosecutors (the vetting law), para. 27 et seq.

However, the Venice Commission and the Directorate observe that under Article 3(1)-(3), only six out of 20 members of the Evaluation Committee (in the worst-case scenario) must be former judges or former constitutional judges. The rest of the members are not required to have any judicial background as the professional experience requirement for foreign experts is not limited only to the field of judiciary (art. 3(g)). According to Opinion No. 17(2014) on the evaluation of judges, the quality of justice and respect for judicial independence[28], "(…) *in order to protect judicial independence, evaluation should be undertaken mainly by judges. The Council for the Judiciary (where they exist) may play a role in this exercise. However, other means of evaluation could be used, for example, by members of the judiciary appointed or elected for the specific purpose of evaluation (…) In addition, other professionals who can make useful contribution to the evaluation process might participate in it. However, it is essential that such assessors are able to draw on sufficient knowledge and experience of the judicial system to be capable of properly evaluating the work of judges (…)".*

55. Therefore, the Venice Commission and the Directorate recommend that the number of members of the Evaluation Committee with a judicial background (i.e. former judges or former constitutional court judges) should be increased to the extent that a substantial number of members (if not half) has judicial background. In order to ensure their independence of all external pressures and impartiality, members of the Evaluation Committee should be given immunity for any acts they carry out in the performance of their functions (functional immunity).

56. Under Article 3(13) of the draft law, the secretariat of the Committee is provided by the Ministry of Justice. For the sake of independence and impartiality, it is recommended that the secretariat is provided by the Superior Council of Magistracy.

57. Under Article 3(8) of the draft law, the relevant entities should appoint the members of the Evaluation Committee within 15 days from the date of entry into force of the present law. The Committee shall start functioning when at least 14 members are appointed. The evaluation process may be a painful exercise for the sitting judges and the entire judiciary and too important for the Moldovan State and the society to implement it in such a quick manner. It is hardly possible to select the relevant Committee members in just 15 days, especially when it comes to the international experts. The Venice Commission and the Directorate therefore recommend that the 14-member minimum quorum be removed and be replaced with a requirement that the Committee starts its operations when all the 20 members of the Committee have been appointed.

58. Lastly, candidates to the Evaluation Committee should pass an evaluation of their assets and background.

D. Decision-making power

59. The draft law puts the decision-making power on disciplinary issues in the exclusive hands of the Evaluation Committee (first one board, then possibly the other board and finally the whole Committee).

60. The Venice Commission and the Directorate strongly reiterate the need for this reform to comply fully with the Constitution in force. It is the Constitutional Court of the Republic of Moldova that has the final say on the binding interpretation of the Constitution and the compatibility of national laws with this text.

61. According to Article 123 of the Constitution, *"[t]he Superior Council of Magistracy shall ensure the appointment, transfer, removal from office, upgrading and imposing of disciplinary sentences against judges".* It therefore clearly belongs to the Superior Council of Magistracy

[28] Opinion n°17 of the Consultative Council of European Judges on the evaluation of judges' work, the quality of justice and respect for judicial independence, paras. 37 and 38.

to decide on disciplinary matters. Until and unless Article 123.1 is amended as was planned in 2018,[29] the Venice Commission and the Directorate do not find that the decision may be delegated to other specialized bodies such as the Evaluation Committee.

62. Not only does the draft law instead confer decision-making power to the Evaluation Committee, it also removes the decision-making power of the Superior Council of Magistracy on appeal, as is currently the case as concerns the disciplinary board, the performance evaluation board and the National Integrity Center. The Superior Council is only consulted in a non-binding manner. This procedure appears to be at odds with Article 123 of the Constitution.

63. The Venice Commission and the Directorate consider that the actual decision on the disciplinary liability of the Supreme Court judges should be left to the Superior Council of Magistracy, based on the recommendation contained in the report issued by the Evaluation Committee. The Superior Council should be entitled to send the report back to the Evaluation Committee for a supplement of investigation, before it takes its decision. There does not appear to be a need for a review of the report by the other board of the Evaluation Committee at the request of the concerned judge. This would add a layer and unnecessarily complicate the procedure. Instead, there needs to be a form of judicial appeal against the decision by the Superior Council.

64. The international standards on this matter are rather clear. Article 6 of the European Convention on Human Rights (ECHR) guarantees, implicitly, the right of access to court which also applies to judges subjected to disciplinary sanctions.[30]

65. Even if no question arises under Article 6 ECHR, the need to have an appeal to a court of law in disciplinary matters stems from a number of European documents, such as, for example, Opinion no. 10 by the CCJE.[31] Paragraph 39 of Opinion no. 10 says that "some decisions" of the Judicial Council such as "the decisions in relation to […] discipline and dismissal of judges" should be "subject to the possibility of a judicial review". The standards of the Committee of Ministers are more flexible: Recommendation CM(2010)12, in paragraph 69, considers that disciplinary proceedings "should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction." The Committee of Ministers Recommendation therefore requires a second degree of jurisdiction to challenge the sanction, although it does not specify whether the body hearing an appeal needs to be a court of law.

66. Finally, the Venice Commission itself has on several occasions recommended having an appeal against the decisions of the judicial councils in disciplinary matters,[32] though acknowledging that this appeal may be of a limited scope.[33]

67. In Moldova, the law provides for judicial review of the disciplinary decisions issued by the Superior Council of Magistracy. Article 25(1) of Law No. 947 on the Superior Council of

[29] Opinion on the law on amending and supplementing the Constitution of the Republic Of Moldova (Judiciary), CDL-AD(2018)003-e, §§ 63-65.
[30] ECtHR, Ramos Nunes de Carvalho e Sa v. Portugal, Applications nos. 55391/13, 57728/13 and 74041/13, 6 November 2018.
[31] Which is a pan-European body composed of the representative of the national judiciaries.
[32] Including in the first opinion on the new Armenian Constitution, see CDL-AD(2015)037, § 153.
[33] Thus, in an opinion on North Macedonia the Venice Commission recommended that "the Appeal Council should be able to annul decisions of the Judicial Council only in cases of gross errors in the application of procedural and substantive law", and in an opinion concerning Bosnia and Herzegovina, it noted that the appeal to a court of law against the decisions of the HJPC was required "at least for cases where a serious penalty was imposed" (CDL-AD(2014)008, § 110).

Magistracy indeed provides that the decisions of the Superior Council can be appealed before the Supreme Court of Justice. However, as the draft law under consideration aims at conducting a screening process of the Supreme Court of Justice, it would defeat such purpose to give the Supreme Court of Justice the power to review the relevant decisions. Therefore, the appeal against the decision of the Superior Council in the evaluation procedure before the Supreme Court of Justice could only be possible in respect of prosecutors. As to the evaluation procedure of Supreme Court judges, the draft law should provide for an appeal before a judicial body which will have to be designed outside the cohort of judges of the Supreme Court of Justice (if this is possible under Chapter IX of the Constitution concerning the judiciary). The law could give to the Superior Council of Magistracy the task of setting up such judicial body, but should define the criteria and the procedure. The members of this judicial body will need to pass an evaluation of their assets and their background. The currently proposed three-day time-limit for the judge to lodge an appeal is definitely too short.

68. During the meetings in Chisinau, some interlocutors met by the delegation spoke of the low or lack of trust in the Superior Council of Magistracy, in order to justify the procedure, set forth by the draft law which confers the power to give final decisions to the Evaluation Committee but not to the Superior Council. The Venice Commission and the Directorate understand those concerns; however, the constitutional strength of Article 123 of the Constitution prevails. In order to meet these concerns, the draft law could provide some guarantees in order to ensure the efficient implementation of the -negative- evaluation report adopted by the evaluation committee. In this respect, the draft law should provide that a-negative- evaluation report triggers automatically the need for a fully reasoned and public decision by the Superior Council of Magistracy. It should also be noted that, as will be analysed below, the draft law proposes to increase the number of the members of the Superior Council from 12 to 15 and the new three members who shall be law professors will be appointed by the Government (2 members) and the President of the Republic (1 member). Therefore, in view of the new composition of the Superior Council, the concerns expressed by the interlocutors in Chisinau might be to a certain extent alleviated, although not completely addressed. A further provision to this end could concern a special evaluation of the members of the Superior Council of Magistracy.

E. Procedural guarantees in the evaluation procedure

69. Article 5(4) of the draft law provides that the evaluated judge has a burden “to submit information that will remove the Committee’s suspicion about integrity and lifestyle.” The Venice Commission and the Directorate find problematic to put exclusively on the judge the burden to prove his or her integrity in the absence of specific elements of suspicion. A fair approach would be the requirement that the judge concerned present any information or evidence to rebut the primary evidence available in the case file which may raise questions about his/her integrity or lifestyle. The Commission therefore recommends to remove the reversed burden of proof.

70. Under draft article 5, the evaluation committee is granted access to any information deemed necessary for the fulfilment of its task. The only limitation to the information which might be gathered by the Committee is the rule that anonymous or state secrecy information is not considered (art. 5(5). Considering that the evaluation process also implies an evaluation on the “lifestyle” of judges, draft article 5 and following draft provisions under Chapter III (Evaluation procedure) should set out that the right to private and family life of judges, under Article 28 of the Constitution and article 8 ECHR should be respected. As the Commission considered in the amicus curiae brief for the Constitutional Court of Albania[34], while the background assessment of persons subjected to the evaluation process might be obtrusive, it could be considered as not representing an unjustifiable interference with the private life, in

[34] CDL-AD(2016)036, para. 51.

particular in a context where the judge concerned has extensive contacts with organised criminals.

71. Under draft article 5(5), any person may provide to the Evaluation Committee information about the judge under evaluation. The provision is unclear and vague, especially taking into account that judges often have to make unpopular decisions. It is therefore necessary to set out more precisely what is the relevance and probative value of such information in determining facts.

72. It is positive that under draft Article 6(1) the hearing held by the evaluation board during which the judge under evaluation may present any information in defense of his position, is a public hearing. The Commission considers in the first place that the draft should provide for the right of the judge concerned to appear before the Committee and to participate in the procedure before it. The draft law should specify that the evaluation committee can refuse a public hearing or part of it for reasons of personal information about third parties or on the basis of national security considerations. However, these considerations should not jeopardise the right of the judge to be present.

73. Lastly, in view of the above recommendation that the Superior Council of Magistracy should be entrusted with the power to take the decisions in the extra-judicial evaluation procedure, it should also be added that the -negative- report drawn up by the Evaluation Committee should not be made public until the Superior Council of Magistracy takes its decision, or the appellate judicial body confirms it if there is an appeal, lest the reputation of the judge be jeopardised before a final decision is taken. The Venice Commission has previously stated that "publication prior to the court's decision is problematic in respect of Article 8 ECHR. The adverse effects of such publication on the person's reputation may hardly be removed by a later rectification, and the affected person has no means to defend himself against such adverse effects. The latter may only appear to be a proportionate measure necessary in a democratic society when the collaboration is finally verified, not before. Publication should therefore only occur after the court's decision."[35]

F. Some consequences of the evaluation procedure

74. According to Article 11(1) of the draft law in case there remain vacant positions in the Supreme Court of Justice following the evaluation process, the Evaluation Committee shall announce a competition to fill them. Following the competition, the Evaluation Board draws up a reasoned report regarding each candidate, stating whether or nor s/he is selected for promotion to the Supreme Court of Justice (art. 12). However, although this reasoned report is presented to the Superior Council of Magistracy which may reject it for containing flows or error, the final decision on the selection of candidates is adopted by the Evaluation Committee. According to Article 13(4), the final report of the Evaluation Committee cannot be rejected by the Superior Council of Magistracy. Based on this report, the Superior Council shall adopt a decision on the proposal to appoint the judge to the Supreme Court of Justice and shall submit the decision to Parliament.

75. The Venice Commission and the Directorate recall that according to Article 116(4) of the Constitution, judges of the Supreme Court of Justice are appointed by Parliament following a proposal submitted by the Superior Council. Article 13(4) of the draft law is at odds with Article 116(4) of the Constitution. The Commission therefore recommends that the Superior Council of Magistracy should be entrusted with the power to accept or reject the proposal made by the Evaluation Committee and to give a final decision on the selection of candidates to be presented to Parliament for their appointment as judge of the Supreme Court of Justice.

[35] Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, CDL-AD(2014)044-e, § 99.

76. Article 10(2) of the draft law provides that the Superior Council of Magistrates will propose to those judges who failed the evaluation to be transferred, with their consent, to any of the vacant positions of judge in other courts without holding a competition. This provision, read in particular in conjunction with Article 6(2) and (3) of the draft law, is rather vague. In its current reading, it appears that a judge who fails the integrity part of the evaluation process is offered a different judicial office, despite the fact that he or she has failed to overcome the suspicion of lack of integrity and this failure has been made public. The text should be clearer on this point. It should be stressed that under the normal procedures, a failure to meet the integrity requirements leads to a disciplinary sanction, not to a transfer. Given that Moldova is one of the countries where actual and/or perceived corruption in the judiciary is a matter of major concern among the public, this rather vague provision sends out the wrong signal with regard to the political will to take all necessary steps to guarantee and foster a culture of judicial integrity concerning all levels of the court system. The Venice Commission and the Directorate thus are of the view that the negative report by the Evaluation Committee regarding the judge's integrity should trigger a disciplinary sanction by the Superior Council. The gravity of the sanction should depend on the gravity of the disciplinary offence. Transfer should not be offered when breaches of integrity are at issue. The situation is clearly different for failure to meet the evaluation of professionalism.

G. Amendments to the Law on Superior Council of Magistracy

77. Article 122 of the Constitution provides that the Superior Council of Magistracy 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 members *de jure* of the Council. The manner and procedure for electing or appointing the Superior Council members is delegated to the law.

78. Article 3 of the Law No. 947 on the Superior Council of Magistracy which regulates the composition of the Superior Council provides that three members of the Superior Council shall be full law professors selected by the Parliament by majority of votes; and six members are judges elected by the general assembly of judges by secret ballot, representing all levels of courts (in addition to three *de jure* members mentioned by the Constitutional provision).

79. Article III of the Title II of the draft law proposes an increase in the number of members of the Superior Council from 12 to 15. Three additional members, under draft Article III, are law professors appointed by the Government (2 members) and by the President of the Republic (1 member) following a public competition. Therefore, with the entry into force of the draft law, 7 out of 15 members will be judges.

80. As the Venice Commission considered in its Report on the Independence of the Judicial System[36], compared to the Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe which requires that not less than half the members of the judicial councils should be judges chosen by their peers from all levels of the judiciary, the position of the Venice Commission is more nuanced. It considers that "*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*."[37]

81. The authorities argue that because of the high level of actual or perceived corruption in the judiciary which is a major concern in the country, there is a need to monitor the judiciary through non-judicial members of the judicial council. The Venice Commission and the Directorate admit

[36] CDL-AD(2010)004 Report on the Independence of the Judicial System Part I: The Independence of Judges, paras. 31 et seq.
[37] *Ibid.* para. 31.

that in order to avoid corporatism which may compromise accountability in the judiciary, monitoring the judiciary through non-judicial members of the Council, such as academics as in the draft law, might be necessary. However, it reminds that the Superior Council should have a decisive influence on decisions on appointment and career of judges. If the new composition of the Superior Council better protects it against corporatist behaviour, as claimed by the authorities, this should be an additional reason to implement the above-mentioned recommendations of the Venice Commission and the Directorate that the Superior Council of Magistrates should have the power to give final decisions (subject to judicial review) in the evaluation process of the Supreme Court judges under the draft law.

82. The Commission welcomes that the draft law does not propose to remove the current members of the Superior Council of Magistracy and to replace them with new members. It only proposes to add three new members to the current composition. In this context, the Venice Commission and the Directorate stress that the Constitution fixes the mandate of the members of the Superior Council for four years. Article 12 of the Law on the Superior Council of Magistracy provides for exceptional and exhaustive circumstances under which the general assembly of judges may revoke the judge members of the Superior Council. The Venice Commission and the Directorate have been informed that there is currently an initiative to convene the general assembly of judges in order to replace the current 6 judge members of the Superior Council with newly elected judges. The Commission finds this initiative very worrying. The security of the fixed term of the members of the Council serves the purpose of the ensuring their independence from external pressure including from the bodies who have elected them. Members should only be removed on disciplinary grounds and not for loss of confidence by the judges who participated in their election.[38] The Commission cannot but stress once again the need to fully respect the Constitution.

VI. Conclusion

83. The Venice Commission and the Directorate understand the effort of the Moldovan authorities aimed at building up a judiciary complying with integrity and professionalism requirements. They note with satisfaction the commitment expressed by the Minister of Justice to follow the recommendations of the Venice Commission in this opinion in the finalisation of the draft law.

84. As the Venice Commission has considered in the past in other contexts, 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 the sitting Supreme Court judges to extraordinary re-evaluation as provided by the draft law.

85. One major concern in the reform process is that the current draft law combines such a vetting process with the reform of the Supreme Court of Justice aimed at replacing the existing Supreme Court by a new court having a different jurisdiction and fewer judges. This combination between two different purposes obstructs the justification for subjecting all the sitting Supreme Court judges to extraordinary re-evaluation and for the interference with the principle of irremovability of judges. This justification is even more important as a vetting scheme may create a dangerous precedent and may lead to an expectation that there will be a vetting scheme after each change of government, which would undermine the motivation of the judiciary and reduce its independence.

[38] CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§66-70.

86. It is important to point out that the current judicial reform process in the Republic of Moldova does not involve any constitutional amendments and the draft amendments are of legislative level only. Therefore, any vetting scheme laid down by the draft law and its implementation should respect the Constitution as it is presently in force.

87. The following main recommendations are made:

- the draft law should be adopted in the form of an organic law;

- for the draft law to be compliant with the Constitution, all decisions concerning the transfer, promotion and removal from office of judges should be taken by the Superior Council of Magistracy. The Superior Council should thus be entrusted with the power to take decisions based on the recommendation contained in the report of the Evaluation Committee. The decision of the Superior Council should be public and fully reasoned and should be triggered automatically by the evaluation committee's report; provision could be made for the previous evaluation of the members of the Superior Council of Magistracy;

- the draft law should not provide for an appeal against the evaluation report from one board of the Evaluation Committee to the other board; instead the draft law should provide for an appeal before a judicial body against the decisions of the Superior Council of Magistracy based on such report. This judicial body should be designed outside the cohort of judges of the Supreme Court of Justice. The criteria for selection of its members and the procedure to be followed should be set out in the law;

- the evaluation criteria that should be used in the course of the extraordinary evaluation process with respect to integrity, professionalism and lifestyle of judges should be indicated clearly and exhaustively in the draft law and they should be the same as those already in force concerning the disciplinary liability and performance evaluation of judges;

- the number of members of the Evaluation Committee with a judicial background (i.e. former judges or former constitutional court judges) should be increased so that a substantial number of the members (if not half) has judicial background;

- the reversed burden of proof on the judge in the evaluation should be removed;

- the judge who failed the integrity evaluation should not be offered any judicial office, even in lower courts but should be subjected to a disciplinary sanction proportional to the gravity of the wrongdoing. The situation is different in case of failure to pass the professional evaluation;

- in accordance with the Constitution, the Superior Council of Magistracy should be entrusted with the power to decide on the Supreme Court candidates to be submitted to parliament on the basis of the proposal made by the evaluation board;

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