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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

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

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

on the basis of comments by

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I. Introduction

1. By letter of 5 June 2020, the Minister of Justice of the Republic of Moldova requested an opinion of the Venice Commission on the revised draft law on amending and supplementing the Constitution of the Republic of Moldova (CDL-REF(2020)028) (hereinafter, “the revised draft amendments”).

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

3. On 6 and 26 May 2020, the Venice Commission, represented by Mr Richard Barrett and joined by the Secretariat, participated in a series of videoconference meetings with the Ministry of Justice and the Superior Council of Magistracy, organised by the Working Group of the Directorate on the justice reform in the Republic of Moldova.

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

5. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the video-conference meetings. It was adopted by the Venice Commission on....., through a written procedure which replaced the ... Plenary session in Venice, due to the COVID-19 disease.*

II. Background and previous opinions

6. On 20 March 2020, the Venice Commission adopted, through a written procedure, the joint opinion on the draft law on amending and supplementing the Constitution of the Republic of Moldova with respect to the Superior Council of Magistracy (hereinafter, “the SCM”).¹ In his letter of 5 June 2020, the Minister of Justice explained that the earlier draft amendments² have been revised as a result of recent consultations with the members of the SCM, representatives of political parties from parliament and civil society organisations. This follow-up opinion of the Commission and the Directorate is sought prior to furthering the procedural steps before the final adoption of the revised draft amendments.

7. According to the timetable provided by the authorities, the draft amendments will be submitted to the Constitutional Court for opinion by the end of June or early July and to Parliament in July. In this case, the amendments could be adopted after three readings by the Parliament in early 2021.

8. Previously, in January 2020, following an urgent request by the Minister of Justice,³ the Venice Commission and the Directorate issued an urgent Joint Opinion on the draft law on amending the law No. 947/1996 on Superior Council of Magistracy.⁴ The legislative amendments were adopted by the Parliament and entered into force following their promulgation by the President of the Republic on 31 January 2020.⁵ As a result of the legislative amendments, three more members have been added to the Superior Council, thereby increasing the number of members

¹ CDL-AD(2020)001 Joint Opinion on the draft law on amending and supplementing the Constitution with respect to the superior council of magistracy, adopted by the Venice Commission on 20 March 2020 by a written procedure replacing the 122nd plenary session.

² See, CDL-REF(2020)017.

³ CDL-REF(2020)001.

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

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

from 12 to 15. The additional three members include one judge member and two lay members. Therefore, currently, the SCM is composed of seven judge members elected among judges by the General Assembly of Judges, five lay members appointed by the Parliament among tenured law professors and three ex officio members indicated in Article 122(2) of the Constitution, i.e. the president of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General.

9. The March 2020 Joint Opinion had welcomed several positive features of the draft amendments (notably the removal of the probationary periods for judges, the limitations on the possibility for the President to reject proposals by the SCM in judicial appointments, provision of only functional immunity for judges, provision that at least half of the members of the SCM must be judges elected by their peers from among all court levels, the consultative role of the SCM in the preparation of the budget of the judiciary and the statement at the constitutional level that the SCM is the guarantor of independence of judicial authority).

10. Nonetheless, the Joint Opinion made a number of recommendations which included in particular that:

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

11. In the meantime, the procedure of election of four lay members (2 positions remained vacant plus two new positions created by the legislative amendments examined by the Commission in the January 2020 Urgent Opinion)⁶ of the SCM was launched in parliament in February 2020. It appears that on 10 March the composition of the Parliament’s standing committees, including the ten-members Legal Committee on appointments and immunities, was also modified.⁷ The parliamentary opposition left the Committee and boycotted the interview phase of the election of the lay members. On 17 March, the parliament appointed four new members of the SCM from among law professors for a period of 4 years, without the votes of the MPs from the opposition.

12. Following these developments, the March 2020 Joint opinion expressed concern about the manner in which the four lay members had been elected, considering that restoring trust of the public and of the judges in the SCM, which is the proclaimed aim of the legislative amendments which entered into force in January, can only be possible if the procedure of election of the lay members is carried out in such a manner as to include the opposition and thus reassure the public and the judges about the non-political or at least consensual nature of the nominations.

⁶ CDL-PI(2020)001.

⁷ See, CDL-AD(2020)001, para. 14, footnote 8.

The opinion concluded that the transitional provision contained in the draft constitutional amendments to the effect that the sitting members of the SCM should maintain their mandates until the expiration of the term for which they had been elected, acquired a totally different perspective against this background and recommended the suspension of the implementation of the legislative amendments and of the nomination of four lay members pending the constitutional reform, which should take place after the adoption of the constitutional amendments and in a transparent and depoliticised procedure.

13. On 21 May, the SCM law was further amended, introducing the possibility of filling vacancies for judge members of the SCM with already elected substitute members pending the convocation of the General Assembly of Judges. Subsequently, the SCM decided to detach a judge of the Court of Appeal (who had been elected as substitute member of the SCM in 2017) as member of the SCM. Being the oldest member, he was also elected as Interim chairperson.

14. During the videoconference meetings held on 6 and 26 May, the Council of Europe delegation insisted that a constitutional reform in the field of judiciary and appropriate measures in order to depoliticise the SCM are the essential pre-conditions of any substantial reform concerning the justice sector in Moldova. Such constitutional reform should precede all legislative amendments to the SCM law. The delegation reiterated that, in accordance with the recommendation concerning the suspension of the recent nomination of four lay members (para. 12 above), the lay members should be renewed upon adoption of the new constitutional rules for their election, requiring qualified majority or equivalent system.

15. Following the videoconference meeting of 26 May, the Directorate General issued a statement and insisted on the necessity of a comprehensive, profound and transparent reform which should start with the Constitution, including the rules on the composition of the Supreme Council of Magistracy, which are of particular importance. The statement further expressed “the firm view that proceeding hastily with legislative changes and implementing these changes before the adoption of the constitutional amendments may pre-empt the composition of key judicial institutions in a manner that is not in line with the envisaged constitutional reform and is not conducive to achieving a sustainable and successful judicial reform. On the contrary, legislative work should adjust to the constitutional amendments, and should only be prepared on the basis of the agreed features of the new constitutional design.”⁸

III. Analysis

A. Preliminary remarks

16. According to the authorities, the draft constitutional amendments under examination have been revised with a view to addressing the previous recommendations of the March Joint Opinion.

17. Several provisions examined in the March 2020 Joint Opinion have not been altered in the new revised draft: in regard to those, the Commission will not repeat its relevant recommendations from the March 2020 Joint Opinion, which are still valid. The present opinion will therefore only cover the provisions which have been amended (the composition of the SCM and the method of election of its lay members) as well as the issue of security of tenure of the current members of the SCM.

⁸ <https://www.coe.int/en/web/human-rights-rule-of-law/-/consultations-on-the-judicial-reform-in-the-republic-of-moldova> (consulted on 6 June).

B. Consultation

18. The Information note explains that in order to observe the provisions of Law No 239/2008 on the Transparency in the Decision-Making Process, the revised draft amendments are placed on the official webpage of the Ministry of Justice (www.justice.gov.md) and has been registered at the State Chancellery and received the opinions of all interested parties. The draft and the information note was sent to all the courts in the country, including first instance courts, Appellate Courts and the Supreme Court of Justice and to the civil society organisations, for opinion, whose areas of activity relate to the functioning of the judiciary. According to the Information Note, all proposals and objections have been included in the Synthesis of objections and proposals attached to the draft (The Commission and the Directorate do not have at their disposal the said Synthesis of objections and proposals). In this regard, the objections/proposals have been analysed in order to accept or reject it, providing justifications for each case.

19. The Commission and the Directorate welcome the inclusive consultation process as indicated in the Information Note. They recommend that this consultation with all the stakeholders including the Supreme Council of Magistrates and the relevant civil society organisations continues in the advanced stages of the reform process.

C. Composition of the SCM

20. In their March 2020 Joint Opinion, the Commission and the Directorate welcomed the proposed statement at the constitutional level that judges should represent at least half of the members of the SCM,⁹ but recommended to indicate in the Constitution the exact number of SCM members.

21. Revised draft Article 122 provides that “[t]he Superior Council of Magistracy consists of 12 members, six judges elected by the General Assembly of Judges, representing all levels of courts of law and six persons who enjoy a high professional reputation and personal integrity, who do not work within the bodies of legislative, executive or judicial power, and are not politically affiliated.” As in the previous draft, the revised draft amendments do not provide for *de jure* members of the SCM. The new draft provision therefore follows the recommendation. Moreover, with the exclusion of the 3 *de jure* members as in the previous draft, the SCM will consist in total of 12 members, half of which will be judges elected by their peers. The new provision is in line with international standards and is welcome.

22. The Commission and the Directorate also welcome, as they did in the March Joint Opinion, the statement at the constitutional level, that the judge members of the SCM should represent all levels courts of law, as this means increased representation of lower courts in terms of enhancing the pluralistic membership within the judicial cohort. The Information Note indicates that the number of judges per level will be regulated by law, ensuring the proportionality between the number of first instance courts, courts of appeal and the Supreme Court of Justice. Indeed, the number of judges per level is normally not a matter to be regulated at the constitutional level and can be left to the legislative regulations. However, the legislative provisions should respect the requirement of sufficient representation of lower courts precisely to enhance the pluralistic membership with the judicial cohort.

23. As concerns the personal qualification of lay members, the Venice Commission and the Directorate had recommended not to limit the areas of specialisation of lay members to “law” only; the current version has removed any reference to the kind of expertise lay members should have. The Commission and the Directorate recommend reintroducing a qualification, but in broader terms (for example “with experience in the area of law *or in other relevant areas*”). The

⁹ CDL-AD(2020)001, para. 46.

Commission and the Directorate had further expressed the view that while the formula “not politically affiliated” was acceptable, it would be preferable to replace it with the clearer formula “not member of political parties”. The Moldovan authorities have maintained the original formula. The clarification could be put in the explanatory note.

D. Method of election of lay members

24. Draft Article 122(3) introduces at the constitutional level that the candidates for lay member will be elected “through a competition, based on a transparent procedure based on merits”. This provision is to be welcomed in that it will enhance public trust in the SCM.¹⁰ It is crucial that the organic law provides for a detailed and solid mechanism to check the integrity and professional reputation of lay members, failing which the constitutional provision which requires that the lay members are “persons who enjoy a high professional reputation and integrity, with experience in the area of law (...)” might remain declaratory without real impact.

25. Further, the Venice Commission has previously stated in relation to High Councils of the Judiciary that “[i]n order to ensure democratic legitimacy but avoid politicisation, when lay members are appointed by parliament, they should be voted with a qualified majority in order to ensure that a broad agreement is found, with the majority seeking a compromise with the minority. In order to avoid stalemates, appropriate anti-deadlock mechanisms should be devised.”¹¹

26. In their exchanges with the Moldovan authorities and in their March 2020 Joint Opinion, the Commission and the Directorate underlined that it was important, in particular in the Moldovan context, to avoid the possibility or risk that lay members would be a coherent and like-minded group in line with the wishes of the government of the day. They therefore strongly recommended introducing in the Constitution the requirement of a qualified majority (coupled with an anti-deadlock mechanism) or a proportional method of election of the lay members. In addition, they recommended that the authorities consider giving outside bodies not under governmental control, such as the Bar or the law faculties, the possibility to propose candidates.

27. The current draft article 122(3) provides that “[t]he candidates to the position of members of the Superior Council of Magistracy who are not judges, are elected through a competition, based on a transparent procedure, based on merits and appointed by Parliament with the votes of *three fifths of elected deputies*.”

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

¹⁰ Consultative Council of European Judges, Opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges. CDL-AD(2013)028, Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, para. 13.

¹¹ CDL-AD(2018)015, Opinion on the draft law on amendments to the law on the Judicial Council and Judges of Montenegro, paras. 36 and 37.

29. As regards the anti-deadlock mechanism, draft article 122(4) provides: “[i]f the procedure of appointment, within the requirements of paragraph 3, failed, the candidates to the position of members of the Superior Council of Magistracy who are not judges, are appointed by Parliament with the vote of majority of elected deputies, but not earlier than 15 days.”

30. The Venice Commission has previously underscored that “qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority. The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula.”¹²

31. The Commission and the Directorate welcome that the Moldovan authorities are willing to provide for an antideadlock mechanism as recommended. They are of the view nevertheless that they should consider different options in this respect, as a mere decreased majority after a time-lapse of fifteen days does not appear to represent a sufficiently strong incentive to reaching agreement on the basis of the qualified majority in the first round.¹³ The establishment of an independent non-political commission could be considered.¹⁴ The Commission and the Directorate are aware that devising an appropriate and specific anti-deadlock mechanism requires more time than is available in the current context; they would therefore recommend to put in Article 122(4) the more general indication that the organic law on the SCM will provide for a mechanism of election of lay members to be used in case the procedure of appointment provided under article 122(3) failed. Reflection on the appropriate mechanism may then be pursued in due course. The Venice Commission and the Directorate are ready to assist.

32. Revised Article 122(5) tightens the limitation of mandates of lay members: it is now prohibited to hold two mandates, while previously it was prohibited to hold two *consecutive* ones. The Commission and the Directorate do not have any objections to this change, including in the light of the rather long term of office (which would be extended from the current four to six years).¹⁵

33. Revised Article 122(5) also provides that “[t]he members of the SCM cannot be revoked”. This provision follows a previous recommendation of the Commission and the Directorate in the interim joint opinion on the draft law on the reform of the Supreme Court of Justice and the

¹² CDL-AD(2013)028, paras. 7-8

¹³ CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, paras. 52-53.

¹⁴ CDL-AD(2020)001, para. 51.

¹⁵ See, *mutatis mutandis*, CDL-AD(2011)019, Opinion on the draft law on the council for the selection of judges of Kyrgyzstan, paras. 26-27.

Prosecutor's Office. Indeed, taking note of an initiative, in September 2019, to convene the general assembly of judges in order to replace all the 6 judge members (at the time) of the Superior Council with newly elected judges, the Commission and the Directorate expressed very serious concern and considered that the constitutional reform process should serve as an opportunity to state the principle of security of tenure for the members of the SCM at the constitutional level.

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

E. Mandate of the current lay members

35. The revised draft amendments have maintained Article II(2), which provides that "[M]embers of the Superior Council of Magistracy in office at the date the present law enters into force shall exercise their mandate until the expiration of the term for which they have been elected or appointed, save for the ex officio members whose office shall cease at the date the present law enters into force." This provision had been welcomed by the Commission and the Directorate in their interim joint opinion against the background of the aforementioned, aborted initiative to dismiss all the judge-members of the SCM, as the possible subsequent lack of support by the appointing body should not put the members' mandate in jeopardy, lest their independence were threatened.¹⁶

36. The Moldovan authorities intend to maintain the mandate of all the sitting members, both the judge members and the lay members. The Commission and the Directorate, however, in their Joint March opinion, had called on them to suspend the taking up of functions of the 4 lay members elected in March 2020. In subsequent discussions, the Council of Europe delegation had accepted that these four lay members exercise their functions but recommended to renew the elections of the lay members after the adoption of the new constitutional rules providing for election by qualified majority. The Moldovan authorities invoke the principle of security of tenure of SCM members to reject this recommendation.

37. In a previous opinion concerning the intention of the legislator to provide for a complete renewal of the composition of the High Judicial Council following the adoption of legislative amendments changing the manner of election of its members, the Venice Commission said the following:

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

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

72. 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

¹⁶ CDL-AD(2019)020, Joint Interim Opinion on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office of Moldova, para. 82.

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

38. However, several significant considerations distinguish the present situation from the above: in the Moldovan context, the change in the composition of the SCM would not lead to the replacement of the members elected by the previous majority, but of members elected only two months ago by this majority, without the participation of the opposition. At the time of their election, the new rules on election by qualified majority were already being discussed in Moldova in the framework of the constitutional amendments. In addition, if the members elected in March served their four-year mandate, the rules on depoliticization of the SCM would only enter into force in 2024, while an important judicial reform is under way which assigns a key role to the SCM.

39. Thus, in the present context, renewing the whole lay composition of the SCM after the entry into force of the constitutional amendments would not allow the current ruling majority to dismiss members they might not like as having been elected by the previous majority with members of their own choice: to the contrary, it would oblige them to associate the opposition to this decision, thus contributing to the aim of depoliticization of the SCM which is admittedly an essential first step towards a successful judicial reform in the Republic of Moldova.

40. The recent election of the lay members in a controversial and non-consensual manner, coupled with the hasty adoption and implementation of legislative amendments concerning the composition and functioning of the SCM before the adoption of the constitutional amendments, will have negative consequences in terms of independence of this institution and the public trust towards it.

41. Under these circumstances, the Commission and the Directorate strongly recommend that after the entry into force of the constitutional amendments, the lay composition of the SCM be renewed according to the new rules requiring a qualified majority. The four members elected in March 2020 could be allowed to run again, for a mandate of six years minus the years already served. This possibility should be indicated in Article II(2).

IV. Conclusions

42. The Venice Commission and the Directorate reiterate their previous positive assessment that the draft amendments to the Constitution of the Republic of Moldova could improve the independence, accountability and efficiency of the judiciary. The amendments are generally positive and in line with the applicable international standards. The revised draft amendments follow to a large extent the previous recommendations of the Venice Commission and the Directorate concerning the composition of the SCM and the method of election of the lay members of the SCM.

43. It is therefore welcome that the revised amendments indicate the exact number of SCM members at the constitutional level. Moreover, with the exclusion of the 3 *de jure* members as in the previous draft, the SCM will consist in total of 12 members, half of which will be judges elected by their peers from all court levels. The new composition is in line with international standards and is welcome.

44. It is further welcome that the revised draft provisions provide for a requirement of a qualified majority of MPs (three-fifths) for the election of the lay members. It is recommended to indicate in the Constitution that the organic law will provide for an anti-deadlock mechanism in case parliament fails to reach a qualified majority of three fifths, without specifying which mechanism. Indeed, provision for a decreased majority after a reflexion period of fifteen days might not suffice

as an incentive for the first round of voting to be successful, but devising an appropriate alternative requires more time than is available at this stage.

45. It is further recommended to replace the sentence “The members of the SCM cannot be revoked” in Article 122(5) with provision that they may only be revoked on the ground of serious disciplinary sanctions or final criminal convictions, or of objective impossibility to exercise their functions as provided in the organic law.

46. Finally, it is recommended that Article II be amended to provide that the lay composition of the SCM is renewed upon the entry into force of the constitutional amendments, according to the new rules requiring a 3/5 qualified majority in parliament for their election. The four members elected in March 2020 could be allowed to run again and this should be indicated in the transitional provision.

47. The Venice Commission and the Directorate remain at the disposal of the Moldovan authorities.

Draft-restricted