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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

URGENT JOINT *AMICUS CURIAE* BRIEF OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON

THREE LEGAL QUESTIONS CONCERNING THE MANDATE OF MEMBERS OF CONSTITUTIONAL BODIES

Endorsed by the Venice Commission at its 125th online Plenary Session (11-12 December 2020)

on the basis of comments by:

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

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I. Introduction

1. By a letter of 9 October 2020, the President of the Constitutional Court of the Republic of Moldova, Ms Domnica Manole, requested an amicus curiae opinion of the Venice Commission on three legal questions concerning the mandate of members of constitutional bodies. This request by the President of the Constitutional Court was introduced in the context of proceedings according to Article 141(2) of the Constitution[1] relating to the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy.[2]

2. Mr Alexander Baramidze (expert, former substitute member, Georgia), Mr Richard Barrett (member, Ireland) and Mr António Henriques Gaspar (member, Portugal) acted as rapporteurs on behalf of the Venice Commission. Ms Nina Betetto (DGI expert, President of the CCJE) analysed the draft law on behalf of the Directorate of Human Rights ("the Directorate").

3. By a letter of 19 October 2020, the Prime Minister of the Republic of Moldova, Mr Ion Chicu, and the Minister of Justice, Mr Fadei Nagacevschi, requested that the present amicus curiae opinion be prepared under urgent procedure. They considered that the proposed amendments' purpose is to strengthen the judicial system, to ensure the promotion of accountable professionals within the Superior Council of Magistracy and to fortify the constitutional provisions that would contribute to the improvement of the situation in the justice system and they underlined that the draft law also represents one of the binding conditionalities of the Memorandum of Understanding between the Republic of Moldova and the European Union on Macro-Financial Assistance, signed in July 2020 and ratified by the Parliament on 10 September 2020.

4. Against this background, on 21 October 2020, the Bureau of the Venice Commission authorised the preparation of an urgent opinion.[3]

5. This urgent joint opinion was prepared on the basis of contributions by the rapporteurs and on the basis of the English translation of the draft law provided by the Moldovan authorities (CDL-REF(2020)071). 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. As the Venice Commission and the Directorate were participants in the discussion in Moldova leading to the preparation of the draft amendments under consideration by the Constitutional Court, they also make use of information obtained in that capacity.

6. This urgent joint opinion was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 16 November 2020. It was endorsed by the Venice Commission at its 125th online Plenary Session (11-12 December 2020).

II. Background

7. Article 122 of the Constitution of the Republic of Moldova provides that the Superior Council of Magistracy (SCM) consists of judges and university lecturers elected for tenure of four years and

[1] Article 141(2) of the Constitution, "Draft Constitutional laws shall be submitted to Parliament only alongside with the advisory opinion of the Constitutional Court adopted by a vote of at least 4 judges."
[2] CDL-REF(2020)071.
[3] According to Article 14 a) of the Rules of Procedure of the Venice Commission:
"1. In urgent cases, with the authorization of the Bureau in consultation with the rapporteurs, an urgent opinion may be issued and published prior to its consideration by the Commission at a Plenary session.
2. Prior to its issuing and publication, the urgent opinion shall be submitted to the Bureau and the Chairs and Vice-Chairs of the Sub-Commissions. On occasion, the Commission may at a Plenary session give specific directions for a planned urgent opinion.
3. Such urgent opinion shall be submitted to the Commission at its next session. The Commission may, depending on the circumstances, - take note of the urgent opinion; - endorse the urgent opinion; - adopt an (ordinary) opinion based on the urgent opinion; or - decide to postpone consideration of the opinion to a forthcoming session."

that the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor general are *ex officio* members of the Superior Council. According to Article 123(2), the procedure of organisation and functioning of the Superior Council of Magistrates is laid down by organic law.

8. Prior to the amendments introduced to the Law No. 947 on the Superior Council of Magistracy, which entered into force on 31 January 2020, the SCM was made up of 12 members: in addition to three *ex officio* members, three members were full law professors selected by the Parliament by majority vote of the deputies; and six members were judges elected by secret ballot by the General Assembly of Judges, representing all levels of courts. As a result of the legislative amendments, three more members have been added to the SCM, thereby increasing the number of members from 12 to 15. The additional three members include one judge member and two lay members. Therefore, with the legislative amendments, the SCM is composed of 7 judge members, 5 lay members appointed by the Parliament and three ex-officio members.[4]

9. Following these legislative amendments, the procedure for election of four lay members (2 positions remained vacant plus two new positions created by the legislative amendments) was immediately launched and the Parliament appointed, with the votes of the ruling majority only, the four new lay members of the SCM for a period of 4 years.

10. In their March 2020 joint opinion on the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy,[5] the Commission and the Directorate expressed their concern about the manner in which the four lay members of the SCM have just been elected.[6] They called on the authorities in particular to suspend the nomination of the four lay members pending the already announced thorough constitutional reform. They considered that these nominations should take place after the adoption of the constitutional amendments, in a procedure which ensures transparency and sufficient safeguards against politicisation.[7] In their subsequent Joint Opinion of June 2020, the Commission and the Directorate reiterated the same recommendation and underlined that in the present context, renewing the whole lay composition of the SCM after the entry into force of the constitutional amendments would oblige the ruling majority to associate the opposition to this decision, thus contributing to the aim of depoliticization of the SCM which is an essential first step towards a successful judicial reform in the Republic of Moldova.[8] The four lay members elected in March 2020 could be allowed to run again, for a mandate of six years minus the years already served.[9]

11. Following this recommendation, which also became one of the conditionalities of the Memorandum of Understanding between the Republic of Moldova and the European Union on Macro-Financial Assistance and for the disbursement of the second instalment of the Macro Financial Assistance to the Republic of Moldova, the Government introduced a new draft Article II(3) which provided that “Members of the SCM from among judges in office on the date the present law enters into force shall exercise their mandate until the expiration of the term for which

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[4] See, CDL-AD(2020)015, Urgent joint opinion on the draft law on amending the law on Superior Council of Magistracy.
[5] CDL-AD(2020)001, para. 14.
[6] Concerning the election of four lay members of the SCM in March 2020, see, CDL-AD(2020)001, Joint Opinion on the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, para. 14. See also, GRECO, Second Compliance Report, Republic of Moldova, 21-25 September 2020, paras. 43-49.
[7] CDL-AD(2020)001, Joint Opinion on the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, para. 70. See also the statement published by the High-Level Working Group of the Council of Europe following its meeting with the Moldovan authorities on 26 May: https://www.coe.int/en/web/human-rights-rule-of-law/-/consultations-on-the-judicial-reform-in-the-republic-of-moldova
[8] CDL-AD(2020)007, para. 39.
[9] CDL-AD(2020)007, para. 41.

they have been elected, save for the ex officio members *and tenured professors whose office shall cease on the date the present law enters into force. The tenured professors shall exercise their mandate until the appointment of the new members of the SCM* (…)." These revised draft amendments were sent to the Constitutional Court for Opinion.[10] The Memorandum of Understanding between the Republic of Moldova and the European Union on Macro-Financial Assistance, signed in Chisinau on 21 July 2020 and in Brussels on 23 July 2020, was ratified by the Parliament of the Republic of Moldova on 10 September 2020.

12. On 22 September 2020, the Constitutional Court issued its opinion.[11] It considered that the Government sought to ensure that the lay members of the Council meet the new conditions for the selection of candidates for this position. While this was compatible with ensuring "public order" which is a legitimate aim withing the meaning of Article 54(2) of the Constitution,[12] the Court also noted that the essence of the case was whether the Government ensured a fair balance between the security of the term of office, on the one hand, and the public order, on the other.

13. The Court considered first that the reasons for the termination of the mandate of the members of the Council are expressly provided for in Article 12 of the Law on the SCM and nothing in the Law authorises the Parliament to terminate the mandate of the members of the Council in the context of change in the conditions of election. Secondly, the Court noted that on the date on which they were appointed, the lay members of the SCM met the requirements imposed by the Constitution and the law. Accordingly, the fact that the Government was now proposing to change the selection conditions did not automatically lead to the conclusion that the lay members should be dismissed. The Court therefore concluded that the termination of the mandate of the lay members upon the entry into force of the draft law was a disproportionate measure, contrary to the provisions of Article 122(1) of the Constitution.

14. On 24 September 2020, the High-Level Working Group of the Council of Europe met with the Minister of Justice to discuss how to take into account the advisory opinion while at the same time meeting the recommendations formulated by the Venice Commission and the Directorate. The High-Level Working Group considered that it was important to proceed with the constitutional reform in full respect of the constitutional rules, the institutions of the Republic of Moldova and European standards.[13]

15. On 30 September 2020, the Government approved new draft constitutional amendments. The new draft Article II(3) provides that "[m]embers of the SCM on behalf of judges who are in office at the date of entry into force of the present law, shall exercise the term of office until the expiration of the term they have been elected for. Ex-officio members will cease their functions on the date of entry into force of the present law. *The mandate of the lay members who are in office on the date of entry into force of the present law, is to be confirmed, for a term of office of 6 years in total, with the vote of three-fifths of elected MPs."*

16. The information note explains that the drafting and the need of this draft law is determined by the current situation in the justice area in the Republic of Moldova. The purpose of the draft amendments is to strengthen the judicial system, to ensure the promotion of accountable professionals within the SCM, to fortify the constitutional provisions that would contribute to the

[10] According to Article 141(2) of the Constitution, "Draft Constitutional laws shall be submitted to Parliament only alongside with the advisory opinion of the Constitutional Court adopted by a vote of at least 4 judges."
[11] Constitutional Court, Advisory Opinion on the Draft Law on amending and supplementing the Constitution (application no. 105c/2020), 22 September 2020.
[12] Article 54(2) provides that "[t]he exercise of the rights and freedoms may not be subdued to other restrictions unless for those provided by the law, which are in compliance with the unanimously recognised norms of the international law and are requested in such cases as: the defence of national security, territorial integrity, economic welfare of the country, public order aiming at preventing mass riots and crimes, protection of the rights, freedoms and dignity of other persons, prevention of disclosing confidential information or the guarantee of the power and impartiality of justice."
[13] https://www.coe.int/en/web/human-rights-rule-of-law/-/consultations-between-the-minister-of-justice-of-the-republic-of-moldova-and-the-council-of-europe-high-level-working-group

improvement of the situation in the justice system and reforming the judicial system in order to ensure the observance of fairness and human rights. It is also indicated that the draft law ensures that lay members of SCM are selected in accordance with the options approved by the Venice Commission and revised the transitory provision regarding the mandate of the SCM members in order to ensure that lay members are appointed at the SCM through a pre-selection procedure, after the adoption of the constitutional amendments.

17. In a public statement of 30 September 2020 following a series of meetings with the Minister of Justice, the High-Level Working Group of the Council of Europe confirmed that the revised draft constitutional amendments were in conformity with recent Opinions of the Venice Commission and the Directorate. The Council of Europe expressed its willingness to continue to work closely with the Republic of Moldova to facilitate the full and effective implementation of the reforms in the justice sector.[14]

18. The new draft amendments were sent to the Constitutional Court for Opinion, according to Article 141(2) of the Constitution.

III. Analysis

The Constitutional Court raised three questions.

A. First question

"To what extent does the obligation to confirm the mandate of member of a constitutional ranked authority (the Constitutional Court, the Superior Council of Magistracy, the Superior Council of Prosecutors, the Prosecutor General, the Ombudsman, the Court of Accounts), previously acquired in accordance with the constitutional provisions, ensure the independence of that authority from politics?"

19. The Venice Commission and the Directorate consider that as a matter of principle, the security of the fixed term of the mandates of members of constitutional bodies serves the purpose of ensuring their independence from external pressure. Therefore, measures which would jeopardise the continuity in membership and interfere with the security of tenure of the members of this authority would raise a suspicion that the intention behind those measures was to influence its decisions.[15]

20. The Commission and the Directorate recall the context in which the four lay members of the SCM were elected in March 2020. While a thorough constitutional reform aimed at improving the independence and accountability of the judiciary and substantially amending the provisions regarding the SCM was pending, the ruling majority in Parliament elected the four lay members in a non-consensual and politicised procedure boycotted by the parliamentary opposition.[16] This election procedure had the effect of pre-empting the effect of the constitutional amendments, hampering the positive impact which they ought to have brought. Moreover, at the time of the election of the four lay members, the new rules concerning the SCM, including the election of lay members by qualified majority in parliament, were already being discussed publicly in Moldova in the framework of the constitutional amendments and must therefore have been known not only to the general public but also to those newly elected lay members.

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[14] https://www.coe.int/en/web/portal/-/moldova-draft-constitutional-amendments-meet-venice-commission-requirements

[15] CDL-AD(2013)007 Opinion on the draft amendments to the organic law on courts of general jurisdiction of Georgia, paras. 69-72. See also, para. 29 below.

[16] CDL-AD(2020)001, paras. 57 *et seq.*

21. Under these circumstances, the Commission and the Directorate consider firstly that although an expectation of a regular mandate for those lay members can be justified at a subjective level, a legitimate expectation cannot be grounded on such appointment. From an institutional point of view, as the Commission and the Directorate previously considered, 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.[17] Therefore, the independence of the SCM is not jeopardised in case of replacement of the lay members in order to give effect to the constitutional amendments aimed at depoliticization of the SCM. On the contrary, the fast track election of the lay members under the rules which were being discussed to be amended, before new rules come into force, was itself dangerous for the independence of the SCM and requires to be rectified. If it were accepted that pending a constitutional reform which aims at meeting the international standards of independence, appointments in breach of such standards could be made which would delay the entry into force of the constitutional reform for four years, the co-operation with the Council of Europe and the Venice Commission which recommend and accompany the reform would become meaningless as would the entire constitutional process.

22. Two influencing and decisive factors need to be mentioned in the Moldovan context. First, the current, revised draft Article 122(3) provides that the candidates to the position of lay members of the SCM will be elected and appointed by Parliament with the votes of three fifths of the elected deputies. The qualified majority is an important requirement to ensure democratic legitimacy and to avoid politicisation. Secondly, draft Article 122(3) introduces, at the constitutional level, the rule that the candidates for lay member will be elected "*through a competition, based on a transparent procedure based on merits*." This sends a clear signal to society as to the overwhelming desire of the judiciary to ensure the transparent and open administration of justice, free from external pressure.

23. As to the specific question raised by the Constitutional Court, the Commission and the Directorate observe that in its Advisory Opinion of 22 September 2020,[18] the Constitutional Court acknowledged that the termination of the mandates of the members of the SCM among tenured professors from the moment the law enters into force (the previous version of the draft Article II(3)) could be considered as pursuing the legitimate aim of ensuring the "public order".[19] What the Constitutional Court found problematic is the proportionality of the proposed measure. The Court considered that the essence of the question was "*whether in adopting the measure concerning the* [automatic] *termination of the mandate of lay members of the Superior Council of Magistracy the Government ensured a fair balance between the security of the term of office, on the one hand, and public order, on the other*".[20] Consequently, the Court found that the [automatic] termination was a disproportionate measure and in breach of the principle of legal certainty and would affect the independence of the members of the Council.[21] In other words, the measure in question could have been justified had it been proportionate to the implied or stated legitimate aim and had a fair balance been struck between the conflicting interests.

24. The present wording of draft Article II(3) evidently differs from that of the previous draft on which the Constitutional Court has delivered its Advisory Opinion. If in the previous edition, draft Article II(3) provided for an automatic removal of the incumbent lay members from office at the time of entry into force of the constitutional amendments (with the possibility of applying again for

[17] CDL-AD(2020)007, para. 39.
[18] Advisory Opinion on the draft law on amending and supplementing the Constitution (application no. 105/2020).
[19] *Ibid.*, para. 194.
[20] *Ibid.,* para. 195.
[21] *Ibid.,* para. 199.

the position under the new rules), the present one does not provide for such automatic termination, but instead prescribes that the mandate should be reconfirmed by the majority of three-fifths of the elected MPs. While both procedures in the two different editions of draft article II(3) may actually result in the removal, the chances that this outcome will occur are obviously different. In addition, under the new rule, the incumbent member will not have to go through a new competition, which he/she would have to do if he/she was removed from the office, but will need to wait and see if there is a sufficiently high number of MPs (not all from the ruling majority who elected him/her) who may be willing to vote in his/her favour.

25. The design of the confirmation on a one-off basis with a high level of support may itself help ensure a transition to an authority with a more authoritative mandate and more independence from politics in the future. The confirmation process may therefore be justified by the context and the change in role, specifically as it is provided in the draft amendments that in the future the SCM will have a specific role as "guarantor of independence of judicial authority".[22] In addition, the role of the non-judicial members is to bring an independent non-judicial perspective to the SCM. For this, they require a public mandate. A renewed mandate and renewed political confirmation for those members may restore a tarnished independence.

26. For the above reasons, the new version of Article II(3) does not seem disproportionate in the sense that it may be reasonably considered as striking a fair balance between the two conflicting interests – the security of the mandate of the lay members of the SCM and the need of maintaining public order. Thus, as opposed to the automatic removal of the lay members from the office, the Constitutional Court may be willing to find the new approach justified in view of the legitimate aim of maintaining public order. The Commission and the Directorate consider that the proposed amendments are justified to the extent that they were designed to remove the negative consequences that followed the Parliament's regrettable decision to preempt the then already announced constitutional amendments and to elect four lay members of the SCM based on the old rules which are planned to be replaced by the proposed amendments (see, paras. 9 and 10 above). The principle of proportionality allows and justifies the transitional rule, with the public interest prevailing in strengthening the legitimacy and independence of lay members with regard to the security of the SCM members' mandate.

27. Lastly, the Venice Commission and the Directorate concur with the Constitutional Court's consideration at paragraph 194 of its Advisory Opinion of 22 September that in the Information Note to the draft constitutional amendments, the Government should present clear arguments regarding the legitimate aim of the interference caused by the measure proposed by the current Article II(3) of the draft amendments. In addition, they consider that the information note should also lay down the legal arguments on how the current draft proposal address the issues raised by the Constitutional Court in its Advisory Opinion regarding the previous version of the draft.

B. Second question

"Does the obligation to confirm the mandate of member of a constitutional ranked authority (the Constitutional Court, the Superior Council of Magistracy, the Superior Council of Prosecutors, the Prosecutor General, the Ombudsman, the Court of Accounts), previously acquired in accordance with the constitutional provisions meet the European good practices in the event of the Constitution's amendment concerning the changing of that authority's name, of the tenure, of the number of members or of the appointment procedure of the members?"

28. A complete constitutional review, or a review of some institutions only, may often entail the redesign of the mandate of constitutionally independent bodies. An authority might be abolished or have its functions redistributed to existing or new bodies. In some situations, however, it may be that a mere relabelling is a pretext for the removal of existing officeholders. Therefore, the

[22] Draft Article 121[1].

purpose of the redesign will be crucial in evaluating whether the interference with constitutional independence is justified.

29. In its previous opinions, the Venice Commission examined the intention of legislators to provide for a complete renewal of the composition of the High Judicial Councils following the adoption of legislative amendments changing the method of election of its members. In this respect, the Constitutional Court, in its opinion of 22 September 2020,[23] draws attention to Venice Commission Opinion on the draft amendments to the organic law on courts of general jurisdiction of Georgia,[24] where the Commission considered that "*when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council".*[25]

30. It is true that the new draft law on amending the Constitution is retrospective, because it makes the mandates of the lay members obtained legally under the current law subject to re-confirmation in Parliament. In principle, international standards preclude any interference by the legislature with the administration of justice designed to influence cases pending before the Council. However, as pointed out by the Commission in its June 2020 Opinion, due regard needs to be given to the circumstances of the specific situation in Moldova: "(…) *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;"*[26] and *"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."*[27]

31. In the Moldovan context, the Government's policy choice does not appear as "manifestly without reasonable foundation" but rather seeks to contribute to the aim of depolitization of the SCM which is an essential first step towards a successful judicial reform. The transitional solution makes it possible to ensure the independence of the SCM from politics and this is in accordance with European good practices. At the same time, the situation that currently exists in Moldova is very distinctive and has been caused by the regrettable decision of the parliamentary majority to elect the four lay members without waiting for the adoption of the pending constitutional amendments.

[23] Para. 196.
[24] CDL-AD(2013)007 Opinion on the draft amendments to the organic law on courts of general jurisdiction of Georgia.
[25] CDL-AD(2013)007 Opinion on the draft amendments to the organic law on courts of general jurisdiction of Georgia, paras. 69-72.
[26] CDL-AD(2020)007 Joint Opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, para. 38.
[27] *Ibid.,* para. 40.

C. Third question

"Does the premature termination of the mandate of the SCM members elected from among Law professors, by means of an ad hominem legislative measure, interfere with the right to respect for private life guaranteed by Article 8 of the European Convention on Human Rights? If so, is this interference justified?"

32. The obligation in Article 8 ECHR protects individual autonomy in private life, a person's need to live and develop in a social environment and to maintain relationships with others. The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person and it can therefore embrace multiple aspects of the person's physical and social identity. Moreover, professional life is also a part of the zone of interaction between a person and others which may, under certain circumstances, fall within the scope of "private life" under Article 8 ECHR.[28] Within the public service-related scenarios involving Article 8, the Court has dealt with cases concerning the discharge from military service,[29] dismissal from judicial office,[30] removal from administrative functions in the judiciary,[31] and transfers between posts in the public service.[32]

33. The ECtHR applies the concept of "private life" on the basis of two different approaches: (a) identification of the "private life" issue as the reason for the dispute (reason-based approach) and (b) deriving the "private life" issue from the consequences of the impugned measure (consequence-based approach).[33] Complaints concerning the exercise of professional functions have been found to fall within the ambit of "private life" when factors relating to private life were regarded as "qualifying criteria" for the function in question and when the impugned measure was based on reasons encroaching upon the individual's freedom of choice in the sphere of private life.[34]

34. As to the "consequence-based approach", when the reasons for imposing a measure affecting an individual's professional life are not linked to the individual's private life, an issue under Article 8 may still arise in so far as the impugned measure has or may have serious negative effects on the individual's private life. In this connection the ECtHR has taken into account negative consequences as regards (i) impact on the individual's "inner circle", in particular where there are serious material consequences, (ii) the individual's opportunities "to establish and develop relationships with others", and (iii) the impact on the individual's reputation.[35]

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[28] ECtHR, *Fernández Martínez v. Spain,* No. 56030/07, 12 June 2014, para. 110.
[29] ECtHR, *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96, 27 September 1999.
[30] ECtHR, *Özpınar v. Turkey*, no. 20999/04, 19 October 2010; *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013 and *Kulykov and others v. Ukraine*, no. 5114/09, 19 January 2017.
[31] ECtHR, *Erményi v. Hungary*, no. 22254/14, 22 November 2016.
[32] ECtHR, *Sodan v. Turkey,* no. 18650/05, 2 February 2016.
[33] See, ECtHR, *Denisov v. Ukraine,* no. 76639/11, 25 September 2018, para. 102.
[34] Such as investigations by the military police and consequent administrative discharge of applicants on the sole ground of their sexual orientation (*Smith and Grady v. the United Kingdom*); proceedings for the applicant's dismissal as a judge concerning not only her professional performance but also aspects of her private life, in particular her close private relationships, the clothes and make-up she wore and the fact that she lived separately from her mother (*Özpınar v. Turkey*); the applicant's transfer to a less important post within the public service amounting to a disguised penalty and having been prompted by reasons relating to his beliefs and wife's clothing (*Sodan v. Turkey*).
[35] *Denisov v. Ukraine*, para. 107. On the basis of that approach, the ECtHR has found that the dismissal of a judge on the grounds of a violation of his professional duties amounting to a breach of the judicial oath affected a wide range of his professional and other relationships. The dismissal also had a negative impact on the applicant's "inner circle" in view of his loss of earnings, and it also affected his reputation (*Oleksandr Volkov v. Ukraine*). The refusal to allow an applicant who was a foreigner to sit for the Bar examinations in Greece fell within the scope of Article 8 because it affected her personal choice as to the way she wished to pursue her professional and private life (see *Bigaeva v. Greece,* no. 26713/05, 28 May 2009). The entry of an applicant's name in the bankruptcy register entailed a series of legal restrictions on the exercise of her professional activities and civil rights. It therefore affected the applicant's opportunities to develop relationships with the outside world and fell within the sphere of her private life (see *Campagnano v. Italy,* no. 77955/01, 23 March 2006).

35. If the consequence-based approach is at stake, the threshold of severity assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The ECtHR will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree.[36]

36. The Commission has pointed out that the laws whose effects are directed against a specific person (so called "*ad hominem* laws") are contrary to the rule of law.[37] A similar approach has been maintained by the ECtHR.[38] Indeed, *ad hominem* means related to a person, addressed directly to a person, related to or associate with or against a particular person. Turning to the current context and the question raised by the Constitutional Court, it appears that the proposed amendment is not directed against a specific person (A or B), but only deal with the members who are in office in the circumstances of the transition, regardless of their individual personality; it does not refer to a reason connected to a specific person. This is confirmed by the fact that the possibility for the current lay members to remain in office is explicitly provided, subject to their endorsement by a larger majority than the ruling one.

37. Therefore, in the present case, the reasons for the new draft transitional article which would require confirmation by Parliament for the current lay members are strictly impersonal, thus not related to their conduct in private life. When it comes to the consequences of the impugned measure for the lay members, there are no indications that the enactment of the particular draft amendment, should confirmation by Parliament not take place, may affect the "inner circle" of their private life, their opportunities to establish and maintain relationships, including those of a professional nature, and their interaction with the society:

38. Under Article 3(6) of the Law no. 947-XIII on the Superior Council of Magistracy, "[t]he members of the Superior Council of Magistracy, except for members ex officio members cannot be engaged in any gainful activity except the didactic and scientific ones". This provision, to the knowledge of the Venice Commission and the Directorate, is still in force as the latest amendments to this law examined by the Commission and the Directorate in January 2020,[39] did not affect it. Therefore, the university professors that were elected as SCM lay members in March 2020 did not give up their academic works at the time of their election or at least the law did not require them to do so. This means that in case an incumbent lay member of the SCM fails to obtain required number of votes in Parliament for reconfirmation, his/her "inner circle" will not be impacted to a degree to cause him/her any "serious material consequences" so as to rise an issue under Article 8.

39. As regards their professional reputation, it is true that in case the incumbent lay members lose their current role if they choose not to seek confirmation or fail to secure confirmation, this might be considered as a professional set-back, but appears to have no implication for their reputation or integrity as they will maintain their career as lawyers and academics. At the same time, the successful performance of the function in the SCM is not, strictly speaking, a criterion of the successful performance in the academic profession. Therefore, in objective terms, the academic career constitutes the fundamental professional role of the four lay members. Their position as members of the SCM, however important and prestigious it might be in the legal community and however it might be subjectively perceived and valued by themselves, does not relate to the principal sphere of their professional activity.

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[36] *Denisov v. Ukraine*, para 116.

[37] CDL-AD(2020)001 Opinion on act CLXII of 2011 on the legal status and remuneration of judges and act CLXI of 2011 on the organisation and administration of courts of Hungary, para. 112 *in fine*.

[38] ECtHR, Baka v. Hungary [GC], no. 20261/12, para. 117.

[39] CDL-AD(2020)015 Urgent Joint Opinion on the draft law on amending the Law no. 947/1996 on Superior Council of Magistracy.

IV. Conclusion

40. In the present *Amicus Curiae* opinion prepared at the request of the Constitutional Court of the Republic of Moldova, the Venice Commission and the Directorate have addressed three legal questions raised in the context of draft constitutional amendments with respect to the Superior Council of Magistracy and more specifically, to the mandate of the lay members of the SCM. As such, this opinion does not have the intention to take a final stand on the draft constitutional amendments as they currently stand.

41. The transitional draft Article II(3) provides that the mandate of the lay members who are in office on the date of its entry into force is to be confirmed, for a term of office of 6 years in total, with the vote of three-fifths of elected MPs. The Commission and the Directorate reiterate that, in the specific circumstances in Moldova, the design of the confirmation on a one-off basis with a high level of support may help ensure a transition to an authority with a more authoritative mandate and more independence from politics in the future.

42. For the Commission and the Directorate, as far as it guarantees the continuity of the exercise of the mandates in a balanced way and with the minimum affection of the interests that may be at stake in the transition, the draft transitional Article II(3) does not seem disproportionate in the sense that it may be reasonably considered as striking a fair balance between the two conflicting interests – the security of the mandate of the lay members of the SCM and the need of maintaining the public order, i.e. removing the negative consequences that followed the Parliament's regrettable decision in March 2020 to elect the four lay members of the SCM based on the old rules while important draft constitutional amendments also concerning the election and mandate of the lay members were pending.

43. With regard to the question on whether the transitional measure interferes with the right to private life of the lay members of the SCM, guaranteed by Article 8 ECHR, the Commission and the Directorate consider that although the incumbent lay members' removal, in case they fail to secure confirmation, might be considered as a professional set-back, it appears to have no implication for their reputation or integrity. The lay members, who are tenured university professors will maintain their career as lawyers and academics; their position as members of the SCM, however important and prestigious it might be in the legal community and however it might be subjectively perceived and valued by themselves, does not relate to the principal sphere of their professional activity.

44. Last but not least, the Commission and the Directorate consider that the information note attached to the draft amendments should contain a legal analysis of how the current draft proposals address the issues raised by the Constitutional Court in its Advisory Opinion of 22 September regarding the previous version of the draft amendments.

45. The Venice Commission and the Directorate remain at the disposal of the Moldovan Constitutional Court and authorities for further assistance in this matter.