



Strasbourg, 20 June 2022

CDL-AD(2022)019

Opinion No. 1082 / 2022

Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
(VENICE COMMISSION)

**REPUBLIC OF MOLDOVA**

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

**ON THE DRAFT LAW ON AMENDING  
SOME NORMATIVE ACTS (JUDICIARY)**

**Adopted by the Venice Commission  
at its 131<sup>st</sup> Plenary Session  
(Venice, 17-18 June 2022)**

**On the basis of comments by**

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Opinion co-funded  
by the European Union



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## I. Introduction

1. By letter of 7 March 2022, the Minister of Justice of the Republic of Moldova, Mr Sergiu Litvinenco, requested an opinion of the Venice Commission on the draft Law “on Amending Some Normative Acts” (Judiciary) ([CDL-REF \(2022\)019](#), hereinafter, “the draft Law”).

2. Mr A. Baramidze (Georgia), Mr R. Barrett (Ireland), and Mr A.H. Gaspar (Portugal) acted as rapporteurs on behalf of the Venice Commission. Ms N. Betetto (Slovenia) acted as a rapporteur on behalf of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe (“the Directorate”).

3. On 16 and 17 May 2022, the rapporteurs assisted by Taras Pashuk and Grigory Dikov from the Secretariat had a series of online meetings with the Ministry of Justice, the Parliamentary Legal Committee on Appointments and Immunities, the Superior Council of Magistracy, the Supreme Court of Justice, the Association of Judges, political groups in Parliament, as well as representatives of international partners of Moldova and civil society working in the field of judiciary.

4. By letter of 23 May 2022 the Minister of Justice of the Republic of Moldova requested the Venice Commission to answer additional questions which may result in further possible changes to the draft Law. In response to that supplementary request, on 6 June 2022 the delegation of the Venice Commission had another series of online meetings with the stakeholders in order to discuss the issues additionally raised by the Minister of Justice. The Commission is grateful to the authorities and to the Council of Europe’s office in Chisinau for their help in organising the virtual meetings.

5. This Opinion was prepared in reliance on the English translation of the draft Law, prepared by the authorities. The translation may not accurately reflect the original version on all points.

6. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings. The draft opinion was examined at the joint meeting of the Sub-Commissions on the Rule of Law, the Judiciary and the Mediterranean Basin on 16 June 2022. Following an exchange of views with Ms Veronica Mihailov-Moraru, Secretary of State, Ministry of Justice of the Republic of Moldova, it was adopted by the Venice Commission at its 131<sup>st</sup> Plenary Session (Venice 17-18 June 2022).

## II. Background

7. In 2020 the Commission assessed the draft constitutional amendments in the field of judiciary and issued, jointly with the Directorate, two Opinions: “On the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy” ([CDL-AD\(2020\)001](#)) (“the March 2020 Opinion”) and “On the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy” ([CDL-AD\(2020\)007](#)) (“the June 2020 Opinion”). These opinions welcomed the proposed constitutional amendments and in particular:

- the removal of the probationary periods for judges;
- the appointment of judges of the Supreme Court of Justice by the President upon the proposal of the Superior Council of Magistracy (“the SCM”);
- the regulation on functional immunity at the constitutional level;
- the new constitutional rule that half of the members of the SCM would be judges elected by their peers and that the judge members of the SCM should represent courts of all levels;

- the consultative role of the SCM in the preparation of the budget of the judiciary;<sup>1</sup>
- the indication of exact number of the SCM members at the constitutional level;
- the introduction of constitutional requirement for a qualified majority of MPs for the election of lay members of the SCM, and
- the reference in the Constitution to the anti-deadlock mechanism in case Parliament fails to reach the qualified majority.<sup>2</sup>

8. The above constitutional amendments took effect on 1 April 2022 (“the 2022 constitutional amendments”).

9. The present draft Law, which has been elaborated by the Ministry of Justice, is intended to bring the legislation on the judiciary in line with the 2022 constitutional amendments. The draft Law would amend five existing laws: (1) Law no. 514/1995 “on the Organisation of Judiciary”; (2) Law no. 544/1995 “on the Status of Judges”; (3) Law no. 947/1996 “on the Superior Council of Magistracy”; (4) Law no. 789/1996 “on the Supreme Court of Justice”; (5) Law no. 178/2014 “on the Disciplinary Liability of Judges”.

### III. Analysis

#### A. Probationary period, appointments and transfers, functional immunity

10. In line with the 2022 constitutional amendments, the draft Law intends to introduce the following key amendments in the Law “on the Status of Judges”: (a) removal of the 5-year probationary term and the appointment of judges until the retirement age; (b) amendments to the judicial appointment procedure with the aim of removing political influence: the draft Law provides that judges will be appointed by the President of the Republic upon the proposal of the SCM; (c) restating the principle of functional immunity of judges.

11. These amendments are positive. In its Report on Judicial Appointments, the Commission stated that setting probationary periods can undermine the independence of judges.<sup>3</sup> As regards the Republic of Moldova, the Venice Commission has earlier expressed a clear preference for the abolishment of probationary periods and strongly recommended that judges be appointed permanently until retirement.<sup>4</sup> On the other hand, when new judges are being appointed, no one can guarantee that they will live up to the high standards that the profession requires. This is why some countries established a special system of training period of candidate judges who aspire to become judges and this experience could be taken into account by the Moldovan authorities.<sup>5</sup>

12. Further to the constitutional amendments, draft Article 9(1) of the Law “on the Supreme Court of Justice” provides that judges of the Supreme Court of Justice will be appointed by the President of the Republic following a proposal submitted by the SCM.

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<sup>1</sup> Venice Commission, [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. 67.

<sup>2</sup> Venice Commission, [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, paras. 43 and 44.

<sup>3</sup> Venice Commission, [CDL-AD\(2007\)028](#), Report on Judicial Appointments, para. 40.

<sup>4</sup> Venice Commission, [CDL-AD\(2018\)003](#), Opinion on the Law on Amending and Supplementing the Constitution of the Republic of Moldova (judiciary), para. 19.

<sup>5</sup> Venice Commission, [CDL-AD\(2018\)003](#), Opinion on the Law on Amending and Supplementing the Constitution of the Republic of Moldova (judiciary), paras. 16-18; [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. 20.

13. The procedures for appointing judges in courts of all levels will therefore be unified and exclude involvement of Parliament. These amendments go in line with the earlier opinions of the Commission that involvement of Parliament may result in politicisation of judicial appointments.<sup>6</sup> The democratic legitimacy of the process is guaranteed by the fact that Parliament appoints half of the members of the SCM (see Article 122 of the Constitution, see also the analysis below).

14. Article 20 of the Law “on the Status of Judges” is to be amended to stipulate, in particular, that the transfer of a judge to a court of the same level or to a lower court shall be made only with his/her consent, upon proposal of the SCM, by the President of Moldova. It will remain therefore the case that transfer of judges will require a decree from the President; however, the added value of the involvement of the President in this process is unclear and may cause unjustified delays.

15. Finally, the draft Article 19 (3) of the Law “on the Status of Judges” further provides that the judge will enjoy only functional immunity. This is a restatement of the constitutional principle which has been endorsed by the Commission.<sup>7</sup> It is recalled that the functional immunity is understood as immunity from prosecution for certain acts performed in the exercise of their functions (with the exception of intentional crimes, e.g. taking bribes), but this immunity does not protect from criminal prosecution in general.<sup>8</sup>

## **B. Appointment of court presidents and vice-presidents**

16. According to the draft Article 16(3) of the Law “on the Organisation of the Judiciary”, court presidents and vice-presidents will be appointed by the SCM and not by the President of the Republic. Relevant amendments are also proposed to Article 20 (4-1) of the Law “on the Status of Judges”.

17. The Commission agrees that this method of appointment of presidents is preferable to the appointment by the executive. However, previously it recommended, as an alternative, to consider the election of court presidents by their fellow judges.<sup>9</sup> Also the CCJE has suggested that the judges of the court in question should be involved in the process of election/appointment of court presidents. This involvement may take the form of a binding or advisory vote.<sup>10</sup> In the Moldovan context the Commission notes that this model could be given further consideration, especially with regard to the higher courts, for example, by providing that judges of a court may vote for the candidates to the respective positions, but this vote will be advisory only, and the final decision will belong to the SCM.

18. As explained to the rapporteurs, under the national law the process of selection of candidates to the positions of court presidents or vice-presidents consists of two stages: first, a preliminary competition is organised by the Board for the Selection and Career of Judges (the Board), and then the winning candidates are submitted to the SCM for approval. The Board consists of four judicial members elected by the General Assembly of Judges and three civil society members

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<sup>6</sup> Venice Commission, [CDL-AD\(2018\)003](#), Opinion on the Law on Amending and Supplementing the Constitution of the Republic of Moldova (judiciary), para. 25-27; [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. 26.

<sup>7</sup> Venice Commission, [CDL-AD\(2020\)001](#), Joint Opinion on the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, paras. 36-37.

<sup>8</sup> Venice Commission, [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 61.

<sup>9</sup> Venice Commission, [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. 42.

<sup>10</sup> CCJE, [CCJE\(2016\)2](#), Opinion no. 19 (2016): the role of court presidents, para. 39.

appointed by the SCM.<sup>11</sup> The draft amendment to Article 16(4) of the Law “on the Organisation of the Judiciary” reads as follows: “[t]he Superior Council of Magistracy may reject the candidature for appointment as president or vice-president of the court or court of appeal only in case of the candidate's incompatibility with that position, the existence of one or more unextinguished disciplinary sanctions, or violation of legal selection and promotion procedures of the candidate”. Thus, once a candidate for a position of a president or vice president has been selected by the Board following a competition, that candidate can only be rejected by the SCM for very specific and limited reasons.

19. In this regard a question may arise if such a limited role of the SCM in the two-tier appointment procedure fits the SCM's constitutional mandate. The Venice Commission recalls that under Article 121-1 of the Constitution, the role of the SCM is to be a guarantor of the independence of the judicial authority. In accordance with Article 123 (1) of the Constitution, the SCM is empowered to appoint, transfer, second and promote judges; however, the SCM may exercise its powers either directly or “through its specialised bodies”. Within that constitutional framework, it appears that selection of court presidents and vice-presidents by the Board, the latter being a specialised body composed of judges (in majority) and representatives of civil society, should not raise concerns. However, given the constitutional role of the SCM, the proposed limitation of its role in draft Article 16(4) of the Law “on the Organisation of the Judiciary” seems excessively rigid. Alternatively, the Law might stipulate that in appropriate cases the SCM may depart from the recommendations of the Board even on the grounds not related to formal incompatibilities, provided that such departure is explained in the decision of the SCM. That would preserve the function of the Board in this process and keep the final decisional power in the hands of the SCM.<sup>12</sup>

20. During the meetings with various interlocutors, the delegation learned that a transitional period was being considered during which the President of the Republic would retain the power to approve court presidents and vice-presidents appointed by the SCM. In principle, the appointment of court presidents by the SCM with the approval of the President is not against the standards; however, in the Moldovan context, no compelling arguments were offered in support of such transitional solution. On the contrary, it appears that switching to the model proposed in the draft Law should speed up the appointment procedures and make these roles less political.

### **C. The Superior Council of Magistracy**

21. Under the new Article 122 (1) of the Constitution, the SCM is composed of twelve members: “six judges elected by the General Assembly of Judges, representing all levels of courts, and six persons of high professional standing and personal integrity, with experience in law or other relevant field, who are not active in the legislative, executive or judicial branch and are not politically affiliated”. As the Commission has stated, this provision meets the international standards.<sup>13</sup> The corresponding amendment to Article 3 (2) of the Law “on the Superior Council of Magistracy” following the above constitutional provision is therefore welcome.

22. According to the proposed amendments to Article 3(3) of the Law “on the Superior Council of Magistracy”, the six lay members of the SCM shall be “openly and transparently” selected by the Legal Committee on Appointments and Immunities (“the Committee”) based on a “public competition” and shall be appointed by a decision of the Parliament with the vote of three-fifths

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<sup>11</sup> Articles 2, 3 and 4 of the [Law No. 154](#) “On the Selection, Performance Evaluation and Career Development of Judges” of 5 July 2012.

<sup>12</sup> For similar considerations see: Venice Commission, [CDL-AD\(2019\)034](#), Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Amendments to the Law on the Prosecutor's Office, paras. 27-28.

<sup>13</sup> Venice Commission, [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. 21.

of the elected members. The competition shall be organised before the expiration of the term of office of the previously appointed members and consists of examining the files and hearing the candidates. Draft Article 3(3) further reads that the Committee shall draw up reasoned opinion for each successful candidate and shall propose that Parliament appoints them.

## 1. Election of the lay members of the SCM

### a. Pre-selection of candidates through a competition

23. Although the draft amendment states that the six lay members of the SCM shall be “openly and transparently” selected by the Committee, it remains unclear how to achieve such transparency in practice. With the positive exception of the obligation of the Committee to draw up a reasoned opinion for each successful candidate, the draft is silent on the procedure for this selection. The rapporteurs understand that while some procedural rules could be found in the Parliament’s Rules of Procedure, this law does not describe specifically the process of selection of the SCM members.<sup>14</sup> These matters are described in the Committee’s Regulations on the organisation and conduct of competition for the selection of the candidate for the post of a member of the SCM on behalf of the Parliament.<sup>15</sup> The Regulations provide in particular that the experts in law, public institutions, international organisations working in the field of law and representatives of civil society or any other interested party may take part in the interviews of candidates as observers. It is positive that the Committee’s Regulations describe the process of competition in detail, but given the importance of the election of the SCM members and the need to ensure a higher degree of legitimacy and stability of this process, the relevant procedural framework could be established at the statutory level.

### b. Anti-deadlock mechanism

24. Article 122(3) and (4) of the Constitution read as follows: “(3) *Candidates for membership of the SCM who are not judges are selected by a competition, based on a transparent procedure, on the basis of merit, and are appointed by Parliament with the vote of three-fifths of the elected deputies. (4) If the appointment of candidates who are not judges to the office of member of the Superior Council of Magistracy under the conditions of paragraph 3 has failed, the procedure and conditions for their appointment shall be laid down by law.*”

25. It is remarkable that these constitutional provisions declare the principles of transparent and the merit-based competition as well as the mechanism for overcoming deadlock in the election process. Indeed, both the March 2020 Opinion<sup>16</sup> and the June 2020 Opinion<sup>17</sup> recommended that in case of the election of lay members of the SCM by the Parliament, an anti-deadlock mechanism should be envisaged. It is therefore welcome that such anti-deadlock mechanism is now mentioned in the Constitution. However, the efficiency of the mechanism proposed in the draft Law needs to be examined further.

26. Pursuant to the proposed amendments, if Parliament fails to elect a lay member of the SCM by three-fifths of all elected members of Parliament, consultations should take place between the parliamentary fractions, following which, within 15 working days, Parliament will hold another round of voting. The same majority of three-fifths of elected MPs shall be necessary to elect a member at this point (draft Article 3 (3-1) of the Law “on the Superior Council of Magistracy”). In

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<sup>14</sup> Parliament’s Rules of Procedure approved by [Law No. 797](#), 2 April 1996.

<sup>15</sup> The Regulations have been approved by the Decision of the Committee, CJ - 06 No. 43 of 24 March 2022.

<sup>16</sup> Venice Commission, [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. 68.

<sup>17</sup> Venice Commission, [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. 44.

case of another failure to elect a lay member of the SCM, Parliament shall hold one more round of voting in which the majority of all elected members of Parliament shall be sufficient to elect a lay member (draft Article 3 (3-2) of the same Law). Finally, if the candidate has not been elected again, the Committee shall, within a maximum period of two months, hold a new public competition, based on the same procedure, in which candidates rejected by the Parliament may not participate (Article 3 (3-3) of the same Law).

27. As it has been noted in the June 2020 Opinion,<sup>18</sup> the primary function of the anti-deadlock mechanism is that of making the original procedure work, by pushing both the majority and the minority to find a compromise. 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 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. As previously stated by the Venice Commission, reduced majority in subsequent rounds of voting undermines the very purpose of the qualified majority rule which is to incite political parties across the political spectrum to find a compromise on the candidates. The CCJE also advises against lowering the necessary majority as this may reduce any incentive for the majority to reach a compromise. Rather, such a mechanism must ensure an independent selection and might involve the opposition or call for the selection by other institutions from a list of shortlisted candidates.<sup>19</sup>

28. The anti-deadlock mechanism proposed in the draft Law amounts to decreasing the threshold for parliamentary approval of candidate. Knowing that it can achieve a decreased majority or eliminate an undesirable candidate, the majority may be discouraged from seeking a compromise with the minority. Consequently, it is difficult to expect the majority and the minority to find a compromise in consultations within a 15-day period.

29. Previously, the Commission proposed other possible solutions to avoid a deadlock: a proportional methods of voting, or involving external institutional actors in the appointment process.<sup>20</sup> During the online meetings some of the interlocutors maintained that it would be incompatible with the Constitution to divest the Parliament of the power to appoint candidates and devolve such power to another institution(s). Other interlocutors argued that Article 122 (4) of the Constitution should be read as permitting shifting this power to another institution(s) in such cases, provided that it is enacted by law. Taking into account the purpose of the participation of lay members in the SCM as well as the need to ensure democratic legitimacy of the process, the prevailing view amongst interlocutors during the discussions with the rapporteurs was that the appointing power should remain within the Parliament at all stages of the procedure.

30. That reading of the Constitution does not exclude some form of an input from the external institutional actors in the third round of parliamentary voting. More specifically, when a simple majority of MPs becomes sufficient to elect a lay SCM member, another condition could be introduced that such a candidate should obtain support from an institution which has not clear political affiliation. Again, there was no clear vision amongst the interlocutors as to which institution(s) would be the most appropriate to take over this important function. Tentatively, the Bar and the Ombudsperson were mentioned as being capable of playing this role. It is for the national authorities to discuss and devise the most appropriate model, given the political and

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<sup>18</sup> Venice Commission, [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, paras. 30-31 and 44.

<sup>19</sup> CCJE, [CCJE\(2021\)11](#), Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, para. 33.

<sup>20</sup> Venice Commission, [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, paras. 30-31 and 30.



institutional realities of the Republic of Moldova. Whatever institution is chosen to play this role, the Commission considers that a limited intervention of an independent institutions might enhance the overall mechanism and help counterbalancing the lack of a larger consensus at earlier stages of appointing process.

## 2. Security of tenure of the SCM members

31. The March 2020 Opinion recommended that the authorities could consider affirming the principle of security of tenure of the SCM members in the Constitution.<sup>21</sup> Moreover, the June 2020 Opinion recommended enhancing the security of tenure of the SCM members by stating in the Constitution that they can only be removed on the grounds of serious disciplinary sanctions or final criminal convictions, or of objective impossibility to exercise their functions as provided in the organic law.<sup>22</sup> Indeed, the Commission has insisted that criteria for dismissal and procedures should be laid down in the Constitution and not just left to legislation.<sup>23</sup> Regrettably, this has not been followed in the amended Constitution,<sup>24</sup> nor is it expressly stated at the statutory level.

32. The Commission considers that the proposed amendments to Article 12(1)d of the Law “on the Superior Council of Magistracy”<sup>25</sup> are not substantial in nature and do not change the fact that the grounds that may lead to removal of the SCM members from office remain too broad. Moreover, neither Article 12, nor the other provisions of that Law contain adequate safeguards to ensure fairness of proceedings concerning removal of the SCM member. The lack of substantive and procedural safeguards increases the risk that such procedures may be misused to put pressure on the SCM members.

33. Similar considerations have been expressed by the CCJE in Opinion no. 24 which reaffirmed the importance of the principle of security of tenure of Council members as a crucial precondition for the independence of the Council: *“Judges appointed to the council for the judiciary should be protected with the same guarantees as those granted to judges exercising jurisdictional functions, including the conditions of service and tenure and the right to a fair hearing in case of discipline, suspension, and removal. Non-judicial members should have equivalent protection. ...”*<sup>26</sup>

34. In the context of the Republic of Moldova, it is all the more important that members of the SCM enjoy adequate legal protection for their impartiality and independence. As a result, Article 12 of the Law “on the Superior Council of Magistracy” should undergo systemic revision in the light of the principle of security of tenure. It is essential to specify the substantive grounds for termination of office and introduce adequate procedural safeguards in the relevant proceedings against the SCM member.

35. The Venice Commission also recalls that in the 2019 Interim Opinion on the Republic of Moldova<sup>27</sup> it expressed strong reservations against the idea of “revocation” of the members of

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<sup>21</sup> Venice Commission, [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 68.

<sup>22</sup> Venice Commission, [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. 34.

<sup>23</sup> Venice Commission, [CDL-AD\(2018\)011](#), Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, para. 68.

<sup>24</sup> Article 122(2) of the Constitution reads: “The procedure and conditions for the election, appointment and termination of the mandate of the members of the SCM are established by law. Members of the SCM may be dismissed, under the conditions provided by law.”

<sup>25</sup> The draft amendment provides that the term of office of a member of the SCM shall cease, inter alia, in case of “revocation, transfer to another job, dismissal”.

<sup>26</sup> CCJE, [CCJE\(2021\)11](#), Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, para. 37.

<sup>27</sup> Venice Commission, CDL-AD(2019)020, Moldova, Republic of - Joint Interim Opinion of the Venice Commission and the Directorate of Human Rights (DHR) and Rule of Law (DGI) of the Council of

the SCM by the bodies which have elected them. It stressed that “members should only be removed on disciplinary grounds and not for loss of confidence by the judges who participated in their election” – or any other body which elected lay members, it should be added. As regards the particular mode of removal procedures, the Law could specify the decisional role of the SCM itself.

### **3. Budget of the judiciary**

36. Draft Article 22(3) of the Law “on the Organisation of the Judiciary” states that “[i]n the process of elaboration, approval and amendment of the budget of the courts, the consultative opinion of the Superior Council of Magistracy is requested”. This is another amendment intended to bring the legislation in line with the relevant amendment to the Constitution which has been welcomed by the Commission.<sup>28</sup>

37. The Commission reiterates that the involvement of the SCM in the budgetary process regarding judiciary (in the form of an advisory opinion) increases the financial independence of the judiciary and is in line with well-established position of the Commission.<sup>29</sup> The draft amendment is welcome.

### **D. Further possible amendments**

38. In his supplementary request of 23 May 2022, the Minister of Justice informed the Commission that the authorities were contemplating further amendments to be included in the draft Law. The Minister provided a brief description of the proposed amendments which the Commission clarified during the online meetings with the authorities. Some of the questions raised by the Minister have already been addressed above. Given that these issues have been formulated *in abstracto*, without the relevant legal texts, the responses of the Commission do not exclude further comments on such texts as might later be presented.

#### **1. Suspension of court presidents and vice-presidents**

39. The authorities consider giving the SCM power to suspend the court presidents or vice-presidents “in case of suspicions of major irregularities”.

40. The Commission accepts that it should be possible to suspend a court president or vice-president in certain circumstances. It is a reasonable approach to give this power to the SCM. However, the reference to the “suspicions of major irregularities” is too vague, and the law should provide the grounds for suspension using narrower criteria. The suspension of a court president or vice-president should not affect his/her position of a judge but only the managerial role – provided that the “irregularities” detected related to the performance by him/her of the managerial functions. In parallel, a president or a vice-president may be suspended both as a president and as a judge in appropriate cases and following the regular procedure prescribed in the law. As concerns the new procedure, in any event it must aim at striking a balance between the need for efficiency on the one hand, and the rights of the suspended person on the other. The law should specify the authorities (notably, the judicial inspectorate and the court of auditors) that would be entitled to initiate the procedure. Likewise, the law must provide for the conditions under which

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Europe on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office, para. 82.

<sup>28</sup> Venice Commission, [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. 63.

<sup>29</sup> Venice Commission, [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 55; Venice Commission, [CDL-AD\(2020\)001](#), Joint Opinion on the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy, paras.61-63.

the SCM may order the suspension as well as the effective remedy for the judge concerned in case of his/her unfounded suspension from administrative position.

## **2. Presidential decree for dismissal of a judge**

41. According to draft Article 25 (2) of the Law “on the Status of Judges”, the proposal to dismiss a judge from office would be submitted by the SCM to the President of the Republic of Moldova for final decision. The authorities are considering the idea of giving the power of dismissal to the SCM, without a need to confirm it by a presidential decree.

42. The Commission recalls that in the context of the amendments to the Constitution of Ukraine, it took the view that the dismissal of judge by a presidential act based on the relevant decision of the judicial council was not an appropriate solution, given the risks of delaying and complicating the process of dismissal.<sup>30</sup> If the Moldovan authorities wish to underline the importance of the judicial position and the high public significance of a dismissal, the legislation could validly maintain the symbolic role of the President in this process unless it is shown that this step leads to excessive delays and risks of deadlocks in practice. In that case safeguards should be provided to prevent such complications.

## **3. Reduction of the term of office of the SCM President**

43. According to draft Article 5 of the Law “on the Superior Council of Magistracy”, the President of the SCM would be elected for a period of three years and the mandate could be renewed only once. Further changes to this draft provision are considered by the authorities, in order to reduce the term of office to one non-renewable period of two years. During the meetings the authorities argued that this reduction of term was aimed to ensure more independence to the SCM as a collegial body and limit the “weight” of the SCM President.

44. The Commission considers that such a change could have significant consequences for how the SCM operates. However, there are no specific European standards regarding this particular issue and both options are acceptable. To find an optimal solution in Moldovan circumstances, it is essential that their possible implications are carefully examined involving the consultations with the domestic stakeholders.

## **4. Extension of the SCM members’ term of office**

45. The authorities consider an amendment whereby a member of the SCM whose mandate has expired would continue to perform his/her duties until a new member is elected.

46. It is essential to ensure the continuity of the SCM and to make it fully operational despite the vacancies so that the SCM can carry out its tasks effectively. However, it cannot be overlooked that Article 122(5) of the Constitution limits the term of office of the SCM members to a single six-year period. The Constitution does not provide for the possibility of prolonging this term and using a statutory provision for that purpose may raise the issue of constitutionality of such prolongation. In some situations, however, a short-term technical prolongation of the mandate of a constitutional body may be inevitable, but, as stressed in the opinion on Montenegro, it should not become a rule: “extending the mandate of the outgoing PG as an acting one is the most evident solution in [cases where the new one cannot be appointed in time] on the basis of the

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<sup>30</sup> The Venice Commission stated: “[...] [T]he High Council of Justice is empowered to ‘decide on the termination of powers’ of the judges. In addition, the need for a Presidential act after the decision of the HCJ to dismiss a judge would complicate and delay the process of dismissal and raise potential risks of deadlocks if the President fails to act. [...]” See [CDL-AD\(2015\)026](#), Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 28.

law of necessity and since the outgoing PG has at least some residual legitimacy [...]. However, such temporary arrangement should not be prolonged *ad infinitum* – otherwise the constitutional provisions giving the power to elect the PG to Parliament and fixing a limited term of the PG's mandate would be deprived of any meaning".<sup>31</sup>

47. The Commission further notes that a statutory provision allowing for an extension could lead to a proliferation of SCM members in an acting or interim capacity which undermines the credibility of the institution. Finally, such extensions might play a role of disincentive for the relevant bodies – the General Assembly of Judges and Parliament – to seek compromises concerning the SCM candidates and to fill in the existing vacancies within the Constitutional and statutory terms. For these reasons, the focus should be rather on facilitating the identification of new members before terms end.

## 5. Quorum and deciding majorities for the SCM

48. According to Article 15(2) of the Law "on the Superior Council of Magistracy", a meeting of the SCM shall be valid if at least two thirds of its members participate. According to Article 24(1) of the same Law, the SCM shall adopt decisions by the majority of its members, except in the case provided for in Article 19(4). The authorities consider the possibility of lowering these thresholds, seeking to enhance the functionality of the SCM. One of the options being explored is that the quorum for a valid meeting should be determined based on the actual number of the SCM members who have taken the office.

49. The Commission notes that the Constitution of Moldova provides that the SCM has twelve members – six judges and six lay members. Any quorum should be determined on the basis of the number of SCM members as defined by the Constitution. Assuming that Article 15 (2) of the Law "on the Superior Council of Magistracy" establishes the quorum at the level of eight members (two thirds of twelve), the Commission considers that this threshold is within the range of acceptable solutions. Moreover, to respect the constitutional design of the SCM, notably the idea of representation of judges and lay members in this body, it is important that the decision-making majorities cannot be secured exclusively by votes of one of those groups.

## IV. Conclusions

50. On 7 March 2022 the Minister of Justice of the Republic of Moldova, Mr S. Litvinenco, requested an opinion of the Venice Commission on the draft Law "on Amending Some Normative Acts" (Judiciary) ("the draft Law"). On 23 May 2022 the Minister submitted a supplementary request putting additional questions with regard to further possible amendments to the draft Law. In the overall, the draft Law is to be assessed positively and in line with the applicable European standards. With the adoption of the draft Law, the 2022 constitutional amendments will find their development in the legislation strengthening the independence, accountability, and efficiency of the judiciary.

51. The Venice Commission welcomes notably the following amendments to the legislation:

- removal of the probationary periods for judges;
- unification of judicial appointment procedure which excludes involvement of Parliament;
- shifting the power of appointment of court presidents and vice-presidents to the Superior Council for Magistracy (the SCM);
- implementing new model on the composition of the SCM and election of its members;
- consultative role of the SCM in the preparation of the budget for the judiciary.

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<sup>31</sup> CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, para. 50.

52. To improve the draft Law even further, the Venice Commission makes the following main recommendations:

- voluntary transfer of a judge to a court of the same level or to a lower court could be made without involvement of the President of the Republic;
- the SCM should be able, by a reasoned decision, to disagree with the proposal made by the Board for the Selection and Career of Judges (the Board) regarding the appointment of court presidents and vice-presidents;
- the law should provide more details on the procedural aspects of the competition which precedes the election of the SCM lay members by Parliament;
- as regards the election of the SCM lay members, the anti-deadlock mechanism may be amended in line with the analysis mentioned in para. 30 of the present Opinion;
- the principle of security of tenure should be elaborated in legislation to ensure adequate substantive and procedural safeguards in the proceedings concerning the SCM members.

53. The Venice Commission remains at the disposal of the authorities of the Republic of Moldova for further assistance in this matter.