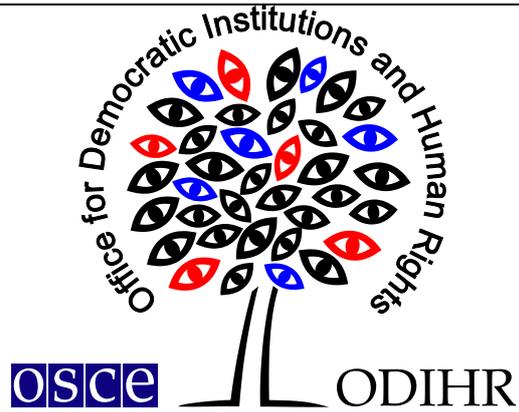


Warsaw, 27 December 2019

Opinion-Nr.: JUD-MNG/363/2019

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**OPINION ON  
THE LAW OF MONGOLIA  
ON THE LEGAL STATUS OF  
CITIZEN REPRESENTATIVES OF COURT TRIALS**

**based on an unofficial English translation of the Law**

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### **Annex:** Law of Mongolia on the Legal Status of Citizen Representatives of Court Trials

#### **I. INTRODUCTION**

1. *On 3 September 2019, the Judicial General Council of Mongolia sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Law on Legal Status of Citizen Representatives of Court Trials (hereinafter “the Citizens Representatives Law”) and four other laws pertaining to the judiciary.*
2. *After consulting with the requestor, it was agreed to provide three separate opinions on the submitted laws, according to the legal aspects they cover. This opinion will only cover the Citizens Representatives Law and should be read together with the Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges and the Opinion on the Law on Mediation.<sup>1</sup>*
3. *On 11 September 2019, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the Law on Citizens Representatives Law and the other laws’ compliance with OSCE human dimension commitments and international human rights standards.*

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<sup>1</sup> All legal reviews on draft and existing laws of Mongolia are available at: <<https://www.legislationline.org/odihr-documents/page/legal-reviews/country/60/Mongolia/show>>.

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4. *This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist OSCE participating States in the implementation of key OSCE commitments in the human dimension.*<sup>2</sup>

### **II. SCOPE OF THE OPINION**

5. The scope of this Opinion focuses on the Law on the Legal Status of Citizen Representatives of Court Trials, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing citizen representatives and court trials in Mongolia.
6. The Opinion raises key issues and indicates areas of possible refinement. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the law. The ensuing recommendations are based on relevant OSCE commitments, and international standards, as well as international and domestic good practices.
7. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women<sup>3</sup> (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Opinion also seeks to analyse the potentially different impact of the Law on women and men.<sup>4</sup>
8. This Opinion is based on an unofficial English translation of the Law. Thus, inaccuracies may occur in this Opinion as a result of incorrect translations. This Opinion is also available in Mongolian. However, the English version remains the only official version of the document.
9. In view of the above, ODIHR would like to make mention that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on the respective law or related legislation of Mongolia that ODIHR may wish to make in the future.

### **III. EXECUTIVE SUMMARY**

10. As in many similar laws across the OSCE area and beyond, the idea of citizen participation in the administration of justice is positive. As also indicated in the Law, the aim of such participation is to enhance openness and transparency of the process, and to ensure greater oversight.
11. ODIHR considers the Law to be a positive feature of the court system and procedures in Mongolia, and notes the attempts of Mongolian lawmakers to ensure a neutral process of

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<sup>2</sup> See [OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area](#) (2008), point 4, where the Ministerial Council “[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention [...]”.

<sup>3</sup> [UN Convention on the Elimination of All Forms of Discrimination against Women](#) (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Mongolia ratified this Convention in 1981.

<sup>4</sup> See par 32 of the [OSCE Action Plan for the Promotion of Gender Equality](#), adopted by Decision No. 14/04, MC.DEC/14/04 (2004).

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selecting citizen representatives, to create training opportunities, and to develop adequate rights and obligations for citizens taking part in court proceedings.

12. At the same time, it is noted that the Law shares the responsibility of regulating this area of law with numerous other pieces of legislation, which causes overlaps and even contradictions in certain fields, without specifying which law shall take precedence in which circumstance. Moreover, or perhaps because of this, the Law lacks detail in a number of key areas, such as the role and scope of authority of citizen representatives, the selection process, procedures on recusal and challenges against citizen representatives, and consequences and liability for wrongdoing, among others.
13. In particular, it is not clear why in the Law, the number of citizen representatives sitting on a case is limited to one (as opposed to laws from other countries on lay judges, where it is usually two or even three lay judges), and whether citizen representatives shall also take part in deliberations and voting of the court, or whether their role is limited to asking questions and reaching conclusions on a case (which the professional judges sitting on the case may accept or reject). Finally, the Law no longer appears to adequately protect the welfare of citizen representatives, or provide firm guarantees in terms of employment protection.
14. For this reason, based on the above findings, OSCE/ODIHR makes the following recommendations to further enhance the purpose and effectiveness of the Law:
  - A. to review the provisions of the Law, and of the other laws mentioned in Article 2 with a view to resolve discrepancies within and between the Law and criminal, civil and administrative procedural legislation; [par 40]
  - B. to ensure that the selection process of the citizen representatives is open and fair, provide more clarity and details on the process of selection citizen representatives; [par 52]
  - C. to clarify the status and functions of citizen representatives during trials, as well as to consider amendments with a view of defining the number of citizen representatives to be equal or more than that of professional judges adjudicating on a given case; [par 56]
  - D. to provide greater clarity on the role of citizen representatives in the Law, by specifying whether they shall also take part in deliberations and decisions on cases; [par 69]
  - E. to list explicitly in the relevant legislation situations in which citizen representatives shall recuse themselves from sitting on a case, along with procedural provisions stating what citizen representatives shall do in case such circumstances are discovered, and what happens if they do not act at all; [par 89] and
  - F. to include in the Law an entire section on liability, which should outline which specific behaviours will lead to which form of liability, along with references to relevant parts of the Criminal Code and the Law on Misdemeanours. [par 95]

***Additional Recommendations, highlighted in bold, are also included in the text of the Opinion.***

#### IV. ANALYSIS AND RECOMMENDATIONS

##### 1. *International Standards and State Practice on Citizens' Participation in Court Trials*

15. Numerous states have sought to enhance citizens' participation in the administration of justice through courts. This participation in some countries may take a form of a trial by jury, where laymen make a decision on a case (e.g. in the United States, United Kingdom, Russian Federation, Spain, Georgia) and in others is limited of a lay judges, participating in so-called mixed tribunals, where the bench is composed of both professional judges and laymen (e.g. Germany, Croatia, Japan).<sup>5</sup>
16. The reasons for including laymen in court proceedings are manifold, and differ depending on the respective state – while some aim to strengthen the role of the defendant, others seek to enhance transparency in administering justice, fight corruption and incompetence within the judiciary, enhance popular support for the justice system, and reduce bureaucracy. Often, jury or lay judges are seen as more independent than professional judges, as they are not part of the state system, and thus less susceptible to the state's direct influence. They also act as a check on public authority;<sup>6</sup> involving citizens in judicial decision-making legitimizes the judicial decisions, and ultimately the whole judicial system.<sup>7</sup> Additionally, lay judges draw on their own experiences when participating in judicial deliberations and findings, and thus allow trial decisions to more accurately reflect the respective society; they thereby enhance democratic participation and “bring the voice of the people to the law”.<sup>8</sup> The presence of laymen during a court trial may help deter judges from unethical behaviour and biased decision-making, or may at least ensure that the reasoning of judgments is more explicit and transparent, thereby making the court procedure more accessible to the public at large.<sup>9</sup>
17. At the international level, there are not many standards pertaining to the role of lay judges. The United Nations Basic Principles on the Independence of the Judiciary, in its Preamble focus largely on professional judges, but state, in their Preamble, that they apply equally, as appropriate, to lay judges, where they exist.<sup>10</sup> Also, the UN Human Rights Committee has stressed, in its recommendations, that lay judges underlie the same requirements of independence and impartiality as professional judges.<sup>11</sup> The European

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<sup>5</sup> See Sanja Kuntjak Ivkovic : *Ears of the Deaf: The Theory and Reality of Lay Judges in Mixed Tribunals*, Chicago-Kent Law Review, Volume 90, Issue 3 (Juries and Lay Participation : American Perspectives and Global Trends), 6 June 2015, p. 1031.

<sup>6</sup> See Toby S. Goldbach and Valerie P. Hans : *Juries, Lay Judges, and Trials* (2014). Cornell Law Faculty Working Papers. Paper 122, p. 1.

<sup>7</sup> *Op. cit.* footnote 5, pp. 1037-1038.

<sup>8</sup> *Op. cit.* footnote 6

<sup>9</sup> *Op. cit.* footnote 5, , p. 1039.

<sup>10</sup> See the *UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>11</sup> See *Karttunen v Finland*, communication no. 387/1989, Views of the Human Rights Committee of 23 October 1992, par 7.2, where the Committee found that the failure of the competent courts to *ex officio* disqualify and replace lay judges found to be partial to one of the parties constituted a violation of Article 14 of the International Covenant on Civil and Political Rights (ICCPR), as such lack of impartiality flawed a trial cannot be considered to be fair or impartial. See similar findings of the Human Rights Committee with regard to jurors in *Rookmin Mulai, Lallman Mulai and Bharatraj Mulai v Guyana*, communication no. 811/1998, Views of the Human Rights Committee of 20 July 2004, pars 6.1-6.2. See also Ministerial Council Decision MC.DEC/7/09 which calls all participating States to “Consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies, including security services, such as police services;” and the OSCE Moscow Document 1991 on the Human Dimension in which participating States will ensure “that judges are properly qualified, trained and selected on a non-discriminatory basis;” (19.2)

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Court of Human Rights (hereinafter “ECtHR”) has confirmed this in its case law as well.<sup>12</sup>

18. The ECtHR also noted, however, that a court does not constitute a “tribunal” according to the fair trial principles set out in Article 6 of the European Convention on Human Rights and Fundamental Freedoms, if a court is not established and composed according to law.<sup>13</sup> With respect to lay judges, the Court found this to be the case where judges sitting on a case had not been selected according to the law, and had exceeded the maximum time of service for that year,<sup>14</sup> or where lay judges continued to sit on cases even though the relevant legislation on lay judges had been repealed, and no new legislation had been enacted.<sup>15</sup>
19. When focusing on lay judges, or so-called mixed tribunals, those countries that have introduced this concept into their legislation have regulated it somewhat differently as regards the size, composition, qualifications, types of cases and potential decisions taken by such courts.<sup>16</sup>
20. One common factor in the vast majority of countries is that lay judges shall be “average citizens”. Usually, they need to be citizens of the respective country,<sup>17</sup> often within a certain age range,<sup>18</sup> and need to speak and understand the state language.<sup>19</sup> Some countries, such as Germany and Norway, do not allow lay judges to have legal or law enforcement professions such as those of judge, prosecutor, attorney or police officer.<sup>20</sup> At the same time, German and Croatian legislation may expect lay judges to have specific non-legal skills or knowledge in areas not familiar to professional judges, e.g. when sitting on juvenile cases, where degrees in education or parenting experience will be required.<sup>21</sup> The same may apply in other fields where special expertise is needed.
21. The procedure for selecting lay judges varies from country to country. It usually takes place via the presiding judge of the court, municipal councils, or a special court commission, which review lists of nominated or randomly selected candidates.<sup>22</sup> Once selected, the lay judge will be appointed or elected for a specified period of time.<sup>23</sup>
22. The majority of countries have jury or lay judges sit on criminal cases,<sup>24</sup> and some allow them to sit on both criminal and civil cases.<sup>25</sup> Some countries have lay judges sitting on

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<sup>12</sup> ECtHR, *Langborger v Sweden*, application no. 11179/84, judgment of 22 June 1989, pars 34-35. See also *Cooper v United Kingdom*, application no. 48843/99, [GC] judgment of 16 December 2003, par 123 (in this judgment, however, the Court found that due to extensive instructions and training of ‘ordinary members’ (laymen) sitting on court martial on how to react in cases where there was a threat of independence and impartiality of them or their behaviour, there had been sufficient safeguards in place to guarantee the independence of such ‘ordinary members’).

<sup>13</sup> ECtHR, *Posokhov v Russia*, application no. 63486/00, judgment of 4 March 2003, pars 39-44.

<sup>14</sup> *Ibid.*, pars 39-44.

<sup>15</sup> ECtHR, *Pandjikidze v Georgia*, application no. 30323/02, judgment of 21 October 2009, pars 104-111.

<sup>16</sup> *Op. cit.* footnote 5, p. 1031.

<sup>17</sup> See Section 31 of the German Courts Constitution Act of 1975, last amended in 2019.

<sup>18</sup> In Croatia, they need to be at least eighteen, Article 131 of the Croatian Courts Act of 2005, and *Ibid.* In Germany, the permissible age is between 25 and 70 years of age

<sup>19</sup> See Section 91 of the Norwegian Act Relating to the Courts of Justice of 1915, last amended in 2016.

<sup>20</sup> *Op. cit.* footnote 17 (German Courts Constitution Act of 1975, last amended in 2019), Section 34 and *op. cit.* footnote 19 (Norwegian Act Relating to the Courts of Justice of 1915, last amended in 2016), Section 71.

<sup>21</sup> See Section 35 of the German Youth Courts’ Law of 1974, last amended in 2019, and Article 40 of the Croatian Juvenile Courts Act of 1997.

<sup>22</sup> See, e.g. *Op. cit.* footnote 18, (Croatian Courts Act of 2005), Article 133, and *op. cit.* footnote 19 (Norwegian Act Relating to the Courts of Justice of 1915, last amended in 2016), Section 86.

<sup>23</sup> In Croatia, Denmark and Norway, lay judges are appointed for four years, in Croatia with the option of reappointment, see *op. cit.* footnote 18, Croatian Courts Act of 2005, Article 132, and *Op. cit.* footnote 19 ((Norwegian Act Relating to the Courts of Justice of 1915, last amended in 2016), Section 66, and an overview of the Danish system of lay judges and jurors, at <http://www.domstol.dk/om/publikationer/HtmlPublikationer/Profil/Profilbrochure%20-%20UK/kap08.html>. See also *op.cit* footnote 17, Section 36 In Germany, lay judges are appointed for five years).

<sup>24</sup> *Op. cit.* footnote 17, section 28.

<sup>25</sup> *Op. cit.* footnote 19 (Norwegian Act Relating to the Courts of Justice of 1915, last amended in 2016), Section 14

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cases relating to areas of law dealing with commercial,<sup>26</sup> juvenile,<sup>27</sup> or other specialized areas of law. While certain countries have lay judges sitting on first-instance cases, others appoint lay judges only for appellate proceedings, and/or serious cases. The number of judges sitting on mixed tribunals, as well as the composition of such tribunals varies from country to country: in Germany and Croatia, the bench for first-instance proceedings is composed of one professional judge and two lay judges,<sup>28</sup> while in Finland and Sweden, one professional judge is complemented by three lay judges.<sup>29</sup> At the appellate level in Germany, the composition is two to three professional judges, and two lay judges.<sup>30</sup> In Denmark, at the district court level, panels are composed of one professional judge and two lay judges; three professional and three lay judges sit at the level of the high court.<sup>31</sup> In Croatia, at the regional court level, the ratio of professional versus lay judges will depend on the seriousness of the crime and respective punishment.<sup>32</sup> In Italy, two professional judges sit with six lay judges on high-level cases only (i.e. cases involving at least 24 years' or life imprisonment, or concern crimes against the state).<sup>33</sup>

23. In some jurisdictions, e.g. in Sweden, less lay judges sit on trials as cases progress<sup>34</sup> (e.g. at the appellate level, three professional judges sit with two lay judges, while no lay judges sit on the Supreme Court<sup>35</sup>).
24. Before trial, while it is seen as essential that lay judges are prepared well for the trial, some country legislations, e.g. in Germany, do not allow the lay judge to read the case file beforehand, so as to avoid potential bias against a criminal defendant. In other countries, e.g. Croatia and Poland, lay judges have the option of reading the case file, and in Denmark, lay judges even have their own copies of the case file.<sup>36</sup>
25. During deliberations on a case, professional and lay judges are largely seen as equal. Lay judges participate in the deliberations on a case,<sup>37</sup> as well as in decision-making and may usually decide on all factual and legal issues of relevance in the main hearing, in conjunction with professional judges.<sup>38</sup> In Japan, however, only professional judges may determine questions of law and procedure; at the same time, judgments need to be agreed upon by the majority of the panel, with at least one lay judge and one professional judge in the majority.<sup>39</sup> In Norway, on the other hand, lay judges must consent to decisions written by the professional judge.<sup>40</sup> In some laws, there is a special voting order (e.g. in Germany, lay judges vote first).<sup>41</sup>

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<sup>26</sup> *Op. cit.* footnote 17 the Seventh Title.

<sup>27</sup> *Op. cit.* footnote 21 (German Youth Courts' Law of 1974, last amended in 2019), Section 35.

<sup>28</sup> *Op. cit.* footnote 17, section 29.

<sup>29</sup> See Section 1, Chapter 2 of the Finnish Code of Judicial Procedure and Section 3b, Chapter 1 of the Swedish Code of Judicial Procedure of 1998.

<sup>30</sup> *Op. cit.* footnote 17, section 76.

<sup>31</sup> *Op. cit.* footnote 23 (overview of the Danish system of lay judges and jurors).

<sup>32</sup> Thus, if the punishment for the respective crime is 10-15 years of imprisonment, then one professional judge will sit with two lay judges. For anything over 15 years' imprisonment, the ratio is two professional judges and three lay judges. And for crimes punishable by 20-40 years' imprisonment, the ratio is three professional judges and four lay judges.

<sup>33</sup> *Op. cit.* footnote 6, p. 9.

<sup>34</sup> *Op. cit.* footnote 5, p. 1036.

<sup>35</sup> *Op. cit.* footnote 29 (Swedish Code of Judicial Procedure of 1998) Section 4, Chapter 3.

<sup>36</sup> *Op. cit.* footnote 5, p. 1055.

<sup>37</sup> See *op. cit.* footnote 18 of the (Croatian Courts Act of 2005), last amended in 2010, Article 7.

<sup>38</sup> *Op. cit.* footnote 17, section 30.

<sup>39</sup> *Op. cit.* footnote 6, pp. 11-12.

<sup>40</sup> *Op. cit.* footnote 6p. 12.

<sup>41</sup> *Op. cit.* footnote 17, Section 197.

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### ***2. Citizen Representatives as Regulated in the Law and in Other Relevant Legislation in Mongolia***

#### *2.1 Overview of the Different Pieces of Legislation*

26. While the title of the Law on the Legal Status of Citizen Representatives of Court Trials (hereinafter “the Law”) seems to indicate that the Law is the main piece of legislation on citizen representatives (i.e. lay judges) during court trials, Article 2 of the Law already suggests otherwise. According to this provision, legislation on the legal status of citizen representatives of court trials shall consist of the Constitution of Mongolia, the Law on Courts, the Law on Judicial Administration, the Code of Civil Procedure, the Code of Administrative Procedure, the Code of Criminal Procedure, the Law, and other legislative acts enacted in conformity therewith.
27. Thus, Article 52 par 2 of the Constitution states that in passing collective decisions on cases and disputes, courts of first instance allow representatives of citizens to participate in judicial proceedings as prescribed in the law.
28. Following this, the Law outlines general rights and obligations of citizen representatives during trial, eligibility and selection procedures, and basic principles of withdrawing citizen representatives from trials. Working conditions and reimbursement are also specified, and the Law likewise contains a provision on liability.
29. The Law on Courts, on the other hand, mentions citizen representatives in Article 8 on openness and transparency of court operations. Here, par 4 states that, among others, citizen representatives shall participate in the joint adjudication of cases and disputes to ensure transparency, justice and public oversight pursuant to regulations in the law.
30. The Criminal Procedure Code of 2001<sup>42</sup> (Article 34.2) envisaged involvement of three citizen representatives for reviewing and resolving grave and extremely grave crimes in the first instance, and for complicated cases considered by a bench of several judges and two citizen representatives (Article 32.2). For all other cases, a court shall involve one citizen representative. The previous Code also defined the rights and duties of citizen representatives, their right to ask questions during court litigation (Article 34.1) as well as submit, in writing, opinions regarding the guilt of the defendant and which sentences shall be imposed on him/her based on the examination of evidence Where opinions vary, they shall be submitted separately (Article 34.3). However, since 2017 the new Criminal Procedure Code has been adopted, which allegedly redefined right and duties of the citizen representative in a different manner. As the English translation of the Code is not available, evaluation of these new provisions remains beyond the scope of this opinion. ODIHR may provide additional review of the Law in light of these changes in future. Under the Civil Procedure Code, up to three citizen representatives shall attend court sessions presided by a panel of judges in the first instance (Article 86.1); citizen representatives are considered to be “participants in court sessions”, same as litigants, experts, or witnesses (Article 85). Article 79.2 states that the citizen representative shall be appointed in accordance with a schedule determined by the conference of judges under Article 78.
31. The rights and duties of citizen representatives are listed in Article 86 of the Civil Procedure Code. In hearings, citizen representatives may study materials and take notes, take part in the examination of evidence, and ask questions after the judges (Article

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<sup>42</sup> It appears that the Criminal Procedure Code has undergone some changes since 2001, which could, however, not be reviewed within the requisite time. Depending on their contents, and on how much they change the analysis of this Opinion, ODIHR may provide additional review of the Law in light of these changes in future.

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108.2)) to litigants and their representatives, defence attorneys, third parties, witnesses and experts (Article 86.2.1-3). They may also challenge judges or other participants in proceedings such as experts, translators, interpreters, and the secretary of the court session (Article 86.2.2). Once evidence has been heard, the citizen representatives may issue and present conclusions with respect to the evidence heard and the “guilt of litigants” (Articles 86.2.4, 86.3 and 113). Article 100.8 describes situations where court representatives do not appear at a court session; in such situations, the court may hear the case in their absence, with the litigants’ consent. If one of the litigants disagrees, then the court session is adjourned.

32. Citizen representatives may not miss court sessions and shall not disclose the “secrecy of individuals, organizations, and the state” disclosed to them in confidence (Article 86.2.5-6). They are also obliged to observe the order of court session as specified in the law (Article 86.2.7).
33. As stipulated by Article 91.3 in combination with Article 91.1.1, citizen representatives may not take part in court proceedings on cases if they have already taken part in previous trials of the same case as litigant or his/her attorney or representative, third party, mediator, citizen representative, secretary of court sessions, witness, expert, translator or interpreter. A citizen representative may also not take part in proceedings if he/she is related to the parties or other persons taking part in the case, or if a judge on the panel is a relative (Article 91.1.2). Similarly, citizen representatives may not take part in a case if they have a personal relationship with the parties of the case, if there is any other reasonable doubt as to their impartiality (Article 91.1.3), or if there is a situation that may lead to a conflict of interest (Article 91.1.4).
34. In circumstances described under Article 91, citizen representatives are obliged to make “statements of self-challenge” prior to the court sessions or, if the grounds are discovered during the session, at that time, and shall then withdraw from the case (Article 92.1). Based on Article 92.2, litigants, their representative, defence lawyers, (other) citizen representatives, or third parties may challenge citizen representatives on the grounds outlined in Article 91, either prior to or during the session. The court shall then hear the views of persons taking part in the case, and explanations of the people challenged (if they so wish) (Article 92.3), and the panel of judges/a judge shall then determine whether or not to accept the challenge (Article 92.4).

### *2.2 Comparing the Different Laws*

35. The regulations of one legislative provisions described above are not always in line with the relevant provisions of the Law. Furthermore, Article 2 of the Law also mentions the Code of Administrative Procedure as a law governing citizen representatives, while Article 3.1 of the Law limits the participation of citizen representatives to civil and criminal cases. It should also be noted that Article 52 of the Constitution states that “the courts of first instance shall allow the representatives of citizens to participate in accordance with the procedure as prescribed by law”. Thus it appears that the Constitution does not differentiates between criminal, civil or administrative courts in this respect.
36. As regards to the number of citizen representatives for each court case, Article 9.3 of the Law specifies that for each court case, one citizen representative shall be selected, along with two back-up citizen representatives. This would, however, not appear to coincide with Article 86 of the Civil Procedure Code, which states that “[u]p to three citizen

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representatives shall be allowed to attend court sessions that hear cases by a panel of judges”.

37. **This disparity within the Law and between the Law and the procedural legislation needs to be resolved. To avoid inconsistencies, the wording of the Law should be aligned with the other relevant legislation, either by amending Article 9 of the Law, or by including a reference to the relevant parts of the codes. The Law should then also adapt Article 12 accordingly, which states that only one citizen representative at a time may enjoy the rights set forth in Article 3.3 (on participation in court sessions).**
38. Generally, it may be helpful to review once more the provisions of the Law, and of the other laws mentioned in Article 2 of the Law. **In matters pertaining to procedural issues, the provisions of the relevant procedural codes may take precedence, however, this should be mentioned explicitly in the Law.**

### *3. Selection of Citizen Representatives and Composition of Court Panels*

39. The selection of citizen representatives is set out in Articles 8 and 9 of the Law. According to Article 8.1 of the Law, the Judicial General Council<sup>43</sup> is responsible for drafting the relevant selection procedure. The selection of citizen representatives is based on a list of citizen representatives prepared by the office of the competent local court in cooperation with the respective local government; the list itself is “based on the number of the local population approved by the Judicial General Council” (Article 8.2) and is valid for one year (Article 8.3).
40. Article 5 contains a list of eligibility criteria, which focus on the minimum age requirement, citizenship, residence in the area of the local court, lack of a criminal record, and the fact that candidates should not be party to any pending court procedures. Fluency in Mongolian (written and oral) is also an eligibility criterion, and candidates may not have been citizen representatives during a period of one year before the new selection.
41. While these eligibility criteria are welcome, and largely coincide with those set out in laws of other OSCE participating States (see par 18 *supra*), it may be considered adding other eligibility criteria. Thus, citizen representatives should also be able to follow proceedings both visually and orally. Generally, such provisions need, however, to be drafted and implemented with care, to avoid discriminating against persons with disabilities, and ensure that, if at all possible, they can fulfil their responsibilities as citizens. Authorities should consider developing policies on reasonable accommodation, recruitment and retention of persons with disabilities in the workforce of the justice sector.
42. The office of the local court is responsible for examining whether a citizen is eligible for the task of citizen representative under Article 5 of the Law, and for creating a database with names of the selected citizen representatives for the respective year under Article

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<sup>43</sup> The General Council of the Judiciary consists of five members serving on a full-time basis, with three members respectively nominated by the first instance courts, appellate courts, and the Supreme Court, one member by the Bar Association of Mongolia, and one member by the Ministry of Justice, subject to appointment by the President of Mongolia. Its structure includes committees on judicial ethics and judicial qualifications and a mediation council, as well as various departments and directorates, and secretariats of courts of all instances. For more information, see <https://eng.judcouncil.mn/>.

The Judicial General Council is a body of the judiciary, tasked to administer matters pertaining to the judiciary (Article 6.5 of the Law on Courts); thus, the Council deals with the organization and standards of courtrooms (Article 8.3 of the Law on Courts), approves regulations on the assignment of judges, and prepares the overall budget of the judiciary (Articles 12.7 and 28.4 of the Law on Courts respectively). The Council also makes proposals pertaining to the number of judges and salaries, the establishment, modification and dissolution of courts, and the appointment of chief judges, among others (Articles 6.5, 11.3, and 12.4 of the Law on Courts respectively).

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- 13 (Article 8.5), pursuant to the procedure adopted by the Judicial General Council. The consolidated list of citizen representatives is approved by the Judicial General Council (Article 8.6). In this context, it is noted that Article 8, when talking of the eligibility check conducted by the offices of local courts, only refers to Article 5, but not to Article 6.1 (which also contains certain eligibility requirements). It is recommended to add such reference to Article 8.
43. According to Article 9.1, the officer of the respective local court shall select a citizen representative from the consolidated name list mentioned in Article 8.6. The court shall make a sub-list every week from the name list specified in Article 8.6 in electronic form in a random manner, which is then approved by the head of the court (Article 9.2).
44. When looking at Article 9, it is noted that this provision is somewhat confusing, as it appears to suggest in par 1 that a citizen representative is selected from the consolidated list mentioned in Article 8.6, rather than from the shortlist described in Article 9.2. It would be more logical if it were the other way around, namely if first the shortlist would be created, and then the citizen representatives were selected based on that. **This should be clarified in Article 9.**
45. Generally, to enhance transparency of the selection process, it would be welcome if the Law outlines some key criteria, procedures and standards for selecting citizen representatives, in addition to what is already described in Article 8. Thus, the Law could provide more detail on how those bodies responsible for the selection process will ensure a wide representation on the list of different parts of the local population; while Article 6.2 of the Law states that there shall be no bias during the selection process based on the origin, race, gender, social status, wealth and education of potential candidates, **more information as to how an unbiased and inclusive process will be ensured in practice would be welcome, and which criteria the respective bodies will apply in this context.**
46. **In relation to Article 6.2 itself, it is recommended to include some other grounds in this provision, such as religion or belief, ethnicity, or political views.** Article 14 of the Constitution, by contrast, does mention, among others, ethnic origin, religion, opinion, or education. It is recommended to adapt the wording of Article 6.2 accordingly.
47. The Law should also strive to ensure wide representation on each list of potential candidates for citizen representatives. **Ideally, this list should include people from all backgrounds, ethnicities, gender, ages, and professions living in the respective area.** It would be helpful if the principles on the basis of which the list is compiled (e.g. demographic, geographical, or randomized from the election register) could be enunciated in the Law, along with certain safeguards ensure a maximum level of plurality and equal gender representation.<sup>44</sup>
48. Article 9.3 states that once trial dates have been set, one citizen representative and two back-up citizen representatives, whose names are on the shortlist described in Article 9.2, shall be allocated to each court meeting (presumably this refers to each court case) by lot. In this context, it should be noted that random selection processes are not self-evident – it is not clear how the selection “by lot” referred to in Article 9.3 differs from the “random manner” in which the shortlist is created under Article 9.2.

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<sup>44</sup> *Op. cit.* footnote 17, section 36, stating that the list of nominees for prospective lay judges should adequately reflect all groups within the population in terms of sex, age, occupation and social status. See also *op. cit.* footnote 19 (Norwegian Act Relating to the Courts of Justice of 1915, last amended in 2016) the selection procedure in Norway (Sections 64-65, where lay judges are selected from two pools, one for women and one for men).

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49. **The Law should provide more detailed description of the selection process, ensure that the process is open and fair.** Selection mechanisms need to be consistent and constant, and all citizen representatives need to be selected in the same manner; a clear procedure outlined in the Law will help ensure that. Public outreach mechanisms should also inform the wider public about the criteria, standards and process of selecting citizen representatives.
50. Also, selecting only one citizen representative per case is quite untypical, and would appear to be at odds with the practice of most other states. While the inconsistency with respect to how many citizen representatives shall sit on a given case between the Law and other relevant laws, has already been discussed under Section 2, the composition of panels composed of professional judges and citizen representatives needs to be addressed separately. In this context, it should be borne in mind that many other countries in the OSCE region (and beyond) have a concept similar to that of citizen representatives, namely lay judges (though it is not clear from the legislation under review how similar these two concepts are).
51. In the majority of countries with so-called mixed tribunals (meaning tribunals or panels composed of professional judges and lay judges), the number of lay judges selected to sit on a tribunal or panel is usually more than one (see par 17 *supra*). In Mongolia however, the legislation allows for the composition of panel three professional judges and one civil representative.
52. In the countries where, on judicial panels, lay judges exceed the number of professional judges, this is explained with the need to provide true oversight, based on the hope that panels with more lay than professional judges will be more transparent in their decision-making, and will prevent corruption or faulty administration of justice. Also, more lay judges on a panel can help ensure their effectiveness, as they may then not be as intimidated by their professional colleagues on the panels. In this light, there is a real danger that a single citizen representative amongst three professional judges will feel isolated and dominated, which will greatly affect his/her ability to play a meaningful role during trial.
53. **It is thus recommended that the decision-makers in Mongolia review the status and purpose of citizen representatives during trials, and consider to increasing number of citizen representatives in those cases where one or two citizen representatives sit on a panel with greater number of professional judges.** This will, of course, depend on the status and role that citizen representatives are meant to play (for further discussion on this, see pars 62-66 *infra*).
54. According to Article 8.3 of the Law, the list of names of citizen representatives is compiled for one year, which is shorter than in many other countries.<sup>45</sup> It appears that in comparison with other countries, administrative and organizational effort of compiling the list in Mongolia is more frequent. Unless there are valid reasons for doing so, **it may be worth considering to review the process with a view to reducing the administrative burden on courts and municipalities with respect to the selection of citizen representatives, but also as relates to training and other aspects of this process.**
55. Article 9 also contains some provisions outlining what happens once a citizen representative has been selected to sit on a particular case. Under Article 9.4, he/she shall receive a notice inviting him/her to take part in a court session at least five working days

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<sup>45</sup> See *op cit* footnote 18 (German Courts Constitution), Section 36.

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before the trial. The office of the respective court then notifies the selected citizen representative's employer (Article 9.6), who is obliged, under Article 9.7, to give time off to the respective employee, without any hindrance.

56. Generally, five working days would not appear to give the selected citizen representative much time to put his/her affairs in order before the trial starts; **it is recommended to extend this period significantly, ideally to several weeks at least. Moreover, it is not clear whether this time period also applies to the back-up citizen representative selected. Article 9.4 should be amended to clarify this.**
57. As for the notification of the citizen representative's employer under Article 9.6 of the Law, it is quite unusual to have the court do this; normally, it is up to the selected citizen to inform his/her employer, and to provide him/her with the respective court notice. It is thus up to the courts to identify and contact or locate the employer, which means that the provision may be unnecessarily onerous on the respective court. **It is recommended to review this provision, and to see what solution is easiest and least burdensome for all involved in practice.**
58. The formulation of Article 9.7, referring to the employer's obligation to grant the selected citizen representative time off "without any hindrance", is somewhat limited in scope and should be expanded. **It would be preferable if this provision would clearly state that the employment of the citizen representative should not be prejudiced by his/her attendance in court in any way.**

### **4. Rights of Citizen Representatives**

59. The rights of citizen representatives are set out in Article 3 of the Law. Article 3.2 states that civil representatives shall not participate in court hearings resolved by a judge solely – presumably, this means that they shall only participate in court cases heard by a panel of judges. According to Article 3.3.1, citizen representatives shall participate in the court's verdict.
60. Here, it is unclear what the term "participate" means. Article 3.3.1 of the Law speaks of "participation in the court's verdict", and Article 12.1 of the Law states that citizen representatives shall participate in investigating and resolving a case or dispute. Similar references can be found in Article 8.4 of the Law on Courts which stipulates that citizen representatives shall take part in the joint adjudication of cases.
61. At the same time, the relevant provisions of the Civil Procedure Code outlining the roles of citizen representatives in these procedures merely state that during trial, citizen representatives have the right to ask questions, and that, in the end, they may present their conclusions. It is not specified if citizen representatives also take part in the deliberation of a case, or in the decision-making process of the court. Unless this is due to an error in translation, the wording of the codes thus seems to indicate that the status of citizen representatives is closer to that of parties, witnesses or experts than to that of the judges.
62. This sets citizen representatives apart from the lay judges found in other jurisdictions (see above par 23 *supra*), where lay judges are considered equal to judges. It also raises the question of what, in that case, sets them apart from other participants in a court hearing, such as parties, legal representatives, attorneys/defence counsel, witnesses, third parties and experts, who take part in proceedings without having a special oversight mandate. The approach taken in the Law also does not coincide with the internationally understood function of citizens in criminal and other fields of justice, which involves a

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clear and determined role in decision-making, as evidenced in most systems of citizen participation in trials across the globe.

63. In this context, Article 1 of the Law notes that the purpose of the Law is to “promote open judicial procedure and transparency by creating a system for the public to participate in court trial”. Similarly, Article 8 of the Law on Courts states that citizen representatives shall ensure “transparency, justice and public oversight”. This goal can only be achieved if the citizen representatives are able to participate not only in open court hearings, but also in *in camera* deliberations on a case. **Although there is no obligation on states to introduce systems of lay judges or jury trial, the entire concept of citizen participation in court proceedings will only be effective if citizens have the possibility to actually impact deliberations and decision-making processes of the court; this means that their opinions and conclusions should be something that panels are obliged to take into account, and not mere recommendations, to take or to leave.**
64. Presumably, this lack of clarity in the terminology of the Law, and in the above-mentioned codes derive from the fact that the Constitutional Court, in its Resolution 1 of 2014, had declared the previous wording of certain articles of the Law (notably Articles 3.3.1, 3.4, 9.3, 12.1, and 12.2) unconstitutional insofar as they related to the participation of citizen representatives in trials as members of a “judicial team”. Thus, in an ensuing amendment to the Law, all references to citizen representatives’ membership in judicial teams were deleted, with no further description added as to the nature of citizen representatives’ participation in trials.
65. At the same time, it is possible that in practice, citizen representatives do have a more effective oversight role to play than the relevant legislation may indicate, but then this role should also be set out more explicitly in law. In that case, the rights and obligations of the citizen representatives should, in the codes of procedure, be likened to those of judges, and not to those of parties to proceedings, their representatives or defence counsel/attorneys, or witnesses and experts.
66. **It is thus recommended to clarify the role of citizen representatives in the Law, by specifying whether they shall take part in deliberations and decisions on cases. Such amendments to the Law, if considered, should also be reflected in the relevant parts of the Criminal Procedure Code (unless introduced already) and of the Civil Procedure Code. Only by clearly defining and enhancing the role of citizen representatives during court proceedings will these citizens truly be able to help augment transparency in court proceedings, as envisaged by the Law.**
67. Generally, Article 3.3 should outline the rights of citizen representatives in greater detail, and not only by mentioning their participation in court sessions, and by referring to laws for dispute resolution (which is in itself quite a vague term). It should be clear, for instance, whether citizen representatives have the right to see a file before trial or not (some countries do not provide lay judges with this right, at least in criminal cases, so as not to prejudice them against the defendant, as the files are created by the prosecution service (see par 22 *supra*). Article 261.3 of the 2001 Criminal Procedure Code and Article 86 of the Civil Procedure Code both state that citizen representatives may examine relevant materials and evidence, but this seems to only relate to those submitted during court hearings; it would be helpful if both Article 3 of the Law, and the relevant procedural laws, could provide more detail in this matter.

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68. According to Article 3.4 of the Law, citizen representatives shall swear before court to render a decision with respect to human rights, justice and law without prejudice. Article 3.5 stipulates that the Judicial General Council shall determine the provisions of this oath. In addition to referring to this in the oath, consideration should be given to including in the Law of **the text of oath to be included in the Law itself, for the sake of clarity.**<sup>46</sup>
69. Other provisions of the Law also contain rights of citizen representatives. Article 7, for example, prohibits judges, prosecutors, advocates, parties to a case, and other persons from influencing citizen representatives in any form, which strengthens the position of the latter and helps them in their oversight role. While it is certainly important to safeguard the independence of citizen representatives, the formulation used in Article 7 is too broad in that it prohibits influencing “in any form”, which could conceivably include pleadings by parties before court, as these also seek to influence the panel (including citizen representatives) so that the final decision taken will be in their favour. Judges may also seek to influence citizen representatives so that they will uphold the law. **It would thus be better to reformulate Article 7, so that it refers, for instance, to unlawful communication outside judicial proceedings and other forms of undue influence, which may jeopardize the independence of the citizen representatives and of the court procedure in general.**
70. Article 7.2 states that in cases involving violations of Article 7.1, citizen representatives shall make a written statement pursuant to Article 3.1.2 of the Law on the Legal Status of Judges. It does not, however, make reference to the consequences and procedural outcome of such a statement. **Presumably, the procedure in such cases is the same as that set out in Article 22 of the Law on Legal Status of Judges for similar cases involving judges, but it is recommended that these procedures for non-compliance be clarified.**
71. Article 21.2 of the Law on Legal Status of Judges states that any person who violates Article 21.1 shall be subject to legal liability. Pursuant to further changes to the wording of Article 7.1, as recommended above, it would be advisable for the Law to contain a similar provision, as influencing citizen representatives may likewise have negative consequences on the fairness of any trial or court procedure.
72. Another issue for lawmakers and decision-makers to debate is whether to include in the Law additional rights and safeguards for citizen representatives. In this context, it is noted that the former Article 7.3 of the Law, stating that the office of the competent court shall ensure the safety of citizen representatives, was deleted when the Law was amended in 2013. This is at odds with the practice in most other countries, which provide some form of statutory protection in similar cases. The role of a citizen representative may, by its very nature, expose individuals to a range of different threats, which in some cases may even involve harassment or physical violence. **While it is possible that the contents of Article 7.3 have been moved to another piece of legislation, it would still be preferable to have such a provision in the Law or to at least include a cross-**

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<sup>46</sup> Forms of oath in international practice are diverse and usually more specific and detailed and administered with more elaborate process than the model set out in Article 3.4. In France, for example, the citizen juror in criminal proceedings is required to: “swear and promise to examine with the most scrupulous attention the charges which will be brought against X ....; to betray neither the interests of the accused nor those of society which accuses him, nor those of the victim; to refrain from communicating with anyone until after your finding; to heed neither hatred nor malice, nor fear nor affection; to remember that the accused is presumed innocent and that he has the benefit of the doubt; to decide according to the charges and defence arguments following your conscience and your innermost conviction, with the impartiality and resolution that befit a free man of integrity, and to preserve the secrecy of deliberations, even after the end of your service.”

Each juror is called individually by the president and answers, raising his hand: “I swear it”.

In the United Kingdom+, the juror is asked to swear:

““I swear [by almighty God/by Allah/by Waheguru/on the Gita/ or by simple affirmation] that I will faithfully try the defendant and give a true verdict according to the evidence.”

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**reference to the relevant legislation**, as this is an essential element pertaining to the role and status of citizen representatives. Moreover, a citizen giving his/her time to public service is undoubtedly entitled to protection by the state.

73. The relevant stakeholders could even envisage further protective rights of citizen representatives, notably a certain immunity while sitting on a case. **It would be sufficient if citizen representatives would be immune from court proceedings related to their roles as citizen representatives, to ensure their unhindered participation in the administration of justice.**<sup>47</sup> The extent of such immunity would again depend on the role envisaged by stakeholders for citizen representatives – the closer this role is to that of judges, the stronger such an immunity provision should be.
74. Given their laymen’s status, and the fact that they are selected at random for a period of one year, **it is essential that citizen representatives are properly informed about and adequately prepared for their role.** According to Articles 11.4, the office of the respective court shall organize joint training sessions for the selected citizen representatives of the year. It is important that these training sessions are organized at a time when all citizen representatives, including those whose cases are heard and deliberated at the beginning of the year, will have equal access to sufficient training. While it is welcome that Article 11.5 describes general public education on the role of citizen representatives, this will not replace more specialized training for those selected as citizen representatives. In this context, it is also noted that the Law does not require citizen representatives to undergo the requisite training. **It may be useful to include such an obligation in the Law, to ensure that all citizen representatives have the same level of knowledge regarding their purpose and tasks.**

### **5. Obligations of Citizen Representatives, Removal, and Liability for Wrongdoing**

#### *5.1 Obligations of Citizen Representative*

75. Under Article 4 of the Law, certain conduct of citizen representatives is prohibited. Thus, citizen representatives may not leave a court hearing without a legitimate excuse. Under Articles 9.5 and 9.8, legitimate reasons for not attending a court session need to be provided in advance, and include situations where the selected citizen representative has provided a written notice indicating that a medical condition prevents his/her participation, where he/she is on a business trip as confirmed by his/her employer, where he/she needs to take care of an infant or minor, as confirmed by an affidavit of the local governor, or where he/she has other legitimate excuses.
76. **This last part of the list of legitimate reasons is very vague, as it remains unclear what other legitimate excuses could be. It is recommended to clarify this point.** Moreover, the inclusion in the list under Article 9.8 of business trips, as opposed to other essential business activities that may be even more pressing or important, e.g. an emergency health condition, or other activities that cannot be postponed, is not apparent. Perhaps, rather than listing specific activities that may permit a citizen representative to not attend court sessions, it may be preferable to list certain criteria, that would refer to the urgency and importance of the matter preventing the citizen representative from attending, or the inability to perform a certain task at a later time.<sup>48</sup> The competent court

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<sup>47</sup> See, in this context, *Op. cit.* article 18 (Croatian Courts Act of 2005), Article 8, stating that a judge or lay judge “shall not be held responsible, taken into custody or punished for opinion expressed or a vote cast in the course of judicial deliberation”.

<sup>48</sup> *Op. cit.* footnote 17, section 54, speaks of circumstances outside the lay judge’s control, and cases would it would be unreasonable to expect him/her to serve.

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should then evaluate whether the excuse presented is legitimate following these criteria set out in law. In addition, certain professions may be given the right to decline the position of citizen representative.<sup>49</sup>

77. Under Article 4.1, citizen representatives may not meet a party to the case, its advocate or representative or collect evidence concerning the case. Citizen representatives are further prohibited from disclosing confidential and privileged information related to the state, an organization or an individual (presumably this refers to information that comes up in the course of hearings), disclose other information related to the case at hand to the media, or disclose any discussions or opinions that took place in the courtroom outside the courtroom. The Judicial General Council monitors the implementation of the provisions set out under Article 4.1 and shall “deprive the rights of the offender to be elected as a citizens’ representative”. (Article 4.2).
78. **In this context, the term “deprive the rights of the offender to be elected as a citizens’ representative ” is unclear and should (unless this is due to a translation error) be clarified.** It is not apparent how the citizen representatives can be deprived of their rights to be elected as such, as at this stage in proceedings, they are already sitting on a case (and have thus already been selected). Perhaps 4.2 simply means the removal of citizen representatives from the panel sitting on a case, but then this should be clarified.
79. For instance, Article 86 of the Civil Procedure Code contains some obligations that mirror those set out in Article 4 of the Law (although they are formulated somewhat differently, but this may also be due to inconsistent translation), namely that citizen representatives may not miss court sessions, and that they shall not “disclose the secrecy of individuals, organizations or the state” disclosed to them in confidence. The remaining obligations set out in Article 4 of the Law are, however, not mentioned. **It would thus be advisable to ensure that all relevant laws say the same in relation to obligations of citizen representatives, either by ensuring that the same wording is included in all laws, or by including in the procedural codes appropriate references to Article 4 of the Law.**
80. In any event, it is not clear whether there is any form of hearing or other procedure to verify the facts and provide the citizen representative with the right to be heard in the above-mentioned cases, nor whether citizen representatives may appeal against their removal. **It is recommended to clarify these points in the Law, and include pertinent references in the codes.**

### *5.2 Grounds and Procedures for the Withdrawal of Citizen Representatives*

81. While the Law does include a prohibition of attempts to influence citizen representatives (Article 7.1), it does not address situations where outside circumstances call into question the impartiality of a citizen representative with respect to the particular case that he or she is sitting on. Article 91 of the Civil Procedure Code, on the other hand, contains such as list of circumstances, which citizen representatives, once they have become aware of them, need to make known either before or during the court sessions (Article 92.1). Thus, according to Article 91.1 in conjunction with Article 91.3, a citizen representative may not take part in court proceedings if he/she has taken part in previous court hearings of the same case as a litigant, his/her attorney or representative, third party, citizen representative, secretary for court sessions, witness, expert, translator or interpreter.

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<sup>49</sup> *Op. cit.* footnote 17 section 35, which allows, among others, members of parliament and certain medical professions to decline the office of lay judge.

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Citizen representatives may also not take part in proceedings if they are related to parties or other participants in the case, or to a judge on the panel, or if they have a personal relationship with parties to the case, or if there are any other grounds to doubt their impartiality.

82. In cases where the above incompatibilities exist, the citizen representative in question needs to make a so-called “statement of self-challenge” prior to or during the court session (depending on when the relevant circumstances are discovered) and shall then withdraw from the case (Article 92). Litigants, their representatives, attorneys, or third parties may also challenge citizen representatives on the grounds set out in Article 91. The competent judges shall then hear both sides (the challenger and the citizen representative) and shall then determine whether or not to accept the challenge (Article 92.4).
83. It is noted that the list of individuals who may challenge citizen representatives in Article 92.2 also includes citizen representatives. In cases where only one citizen representative sits on a panel, this would mean that the citizen representative may challenge him/herself. Presumably this is an oversight, which should, for the sake of clarity, be corrected.
84. Furthermore, while Articles 92.5-8 outline in great detail which judges, panels or other constellations of judges shall decide on challenges against one or more judges, panels of judges, experts, translators, interpreters, court secretaries, chief judges or entire court memberships, Article 92 does not regulate who shall decide on challenges against citizen representatives. This will probably again depend on the status of citizen representatives in court trials, namely whether they are seen as being closer to judges (in this case the judges on the panel shall decide (Article 92.5), or whether they are seen as participants in the trial, same as experts, translators, court secretaries and others mentioned above (in this case the matter will be determined by a panel of the court, or by a judge trying the case (Article 92.7)). **In any case, this will need to be clarified in the Civil Procedure Code and in the Law, either expressly, or in one of them, with appropriate references in the other.**
85. Criminal procedure legislation regulates list of circumstances barring judges from participating in the consideration of criminal cases, for example if they are victims, witnesses, civil plaintiffs, or legal representatives in such cases, or where they are related to any of the above. Other grounds for exclusion are prior participation in the case as inquiry officer, investigator, prosecutor, defense counsel, translator, interpreter, expert, third party, witness or secretary of a judicial session, or any other circumstances giving grounds to believe that a judge is personally interested in the case, directly or indirectly.
86. In the interests of fairness and transparency of court proceedings, it is essential that citizen representatives are aware of situations in which they need to recuse themselves from sitting on a case; these situations need to be listed explicitly in the relevant legislation, along with procedural provisions stating what citizen representatives shall do in case such circumstances are discovered, and what happens if they do not act at all. **The Law should thus list these cases where family or other personal circumstances of citizen representatives bar them from sitting on a case.** Unless the revised Criminal Procedure Code now contains such provisions, the two codes should be supplemented by adding such provisions, or else they should refer to the relevant provision of the Law (or vice versa). The Law should likewise specify or include references to the procedure to follow if citizen representatives are challenged, and who shall decide on such cases.

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87. The requirements set out in Article 91 of the Civil Procedure Code would, however, need to be adapted to the Law accordingly, as some of the situations mentioned therein are already unlikely to happen due to the Law's eligibility requirements and selection restrictions under Articles 5 and 6 respectively. Namely, individuals who are party to any court proceedings at the time of selection are not eligible to become citizen representatives, thus they cannot have taken part in previous court hearings of the same case as litigant. Moreover, since Article 6 prohibits the selection of court employees, this may also render redundant any need to include in articles on grounds for withdrawal the participation in previous court hearings of the same case as secretary for court sessions (provided he/she is an employee of the court). The other grounds for withdrawal, however, should be included in a relevant provision of the Law.
88. Such a provision should replace Article 10 of the Law, which merely states that the withdrawal of citizen representatives during litigation shall be determined by the Code of Criminal Procedure, the Code of Civil Procedure and the Code of Administrative Procedure. As it stands, Article 10 does not provide sufficient information on potential reasons for withdrawal, and only seems to refer to withdrawal of citizen representatives during litigation, but not to withdrawal before court sessions have begun. Moreover, as seen above, the relevant codes referenced in Article 10 themselves do not fully regulate all matters pertaining to grounds for withdrawal, the ensuing process and who shall determine cases where the impartiality of citizen representatives is challenged.

### *5.3 Liability for Wrongdoing*

89. Article 9.8 states that citizens refusing to attend trial as citizen representatives and who have no legitimate reason for doing so, shall be deemed liable according to the Law. Article 16 on liability for violation of the Law states that a person or legal entity who violated the Law shall be subject to liability as specified in the Criminal Code or in the Law on Misdemeanours.
90. This provision is extremely vague and general and does not provide much information on which behaviour will lead to which type of liability under the above laws. With the exception of Article 9.8, there are no references to any other examples of wrongdoing in the Law that would trigger any liability in the above sense. For example, while the violations mentioned in Article 4.1 lead to removal of the respective citizen representative, there is no mention of any form of liability. In this situation, it will be virtually impossible for any citizen representatives to know which type of behaviour could lead to liability under the Law, and what potential consequences such liability could have.
91. Moreover, Article 16 refers to persons or legal entities – as the Law deals with citizen representatives, it is unclear which “legal entities” this article is referring to.
92. **Ideally, the Law should include provisions on liability, which would outline specific behaviours leading to liability, and which would provide references to relevant parts of the Criminal Code and the Law on Misdemeanours.** In this way, the Law will be sufficiently foreseeable for both citizens and the competent courts.

### *6. Final Comments*

93. It is worth recalling that OSCE commitments require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their

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elected representatives” (Moscow Document of 1991, par 18.1).<sup>50</sup> Particularly legislation that may have an impact on human rights and fundamental freedoms, as is the case here, should undergo extensive consultation processes throughout the drafting and adoption process, to ensure that human rights organizations and the general public, including marginalized groups, are fully informed and able to submit their views prior to the adoption of the Act. Public discussions and an open and inclusive debate will increase all stakeholders’ understanding of the various factors involved and enhance confidence and trust in the adopted legislation, and in the institutions in general. The Mongolian legislator is encouraged to ensure that the Draft Law is consulted extensively up until its adoption with all interested parties, including, above all, courts, citizens, and municipalities.

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Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

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**ANNEX:**