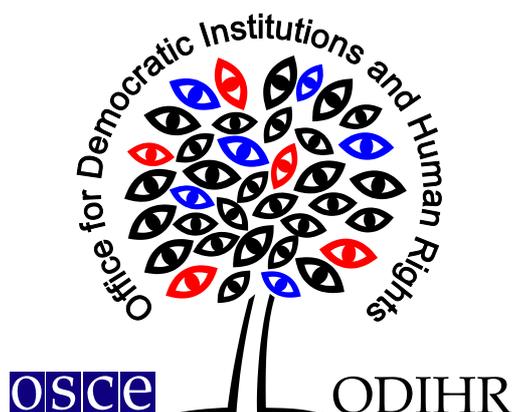


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**INTERIM OPINION**

**ON THE DRAFT LAW ON THE REFORM OF THE**

**SUPREME COURT OF JUSTICE AND THE**

**PROSECUTOR'S OFFICES OF THE REPUBLIC OF**

**MOLDOVA (AS OF SEPTEMBER 2019)**

**based on an unofficial English translation of the Draft Law provided by the Ministry of  
Justice of the Republic of Moldova**

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***The Opinion represents the position of ODIHR only and does not necessarily reflect the position of the experts.***

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*This Opinion is also available in Romanian.  
However, the English version remains the only official version of the document.*

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## **I. INTRODUCTION**

1. *On 18 September 2019, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a request from the Minister of Justice of the Republic of Moldova to review the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices (hereinafter "Draft Law"), with particular focus on the extra-judiciary mechanism for evaluating key judges' and prosecutors' positions and amendments concerning the Superior Council of Magistracy (SCM).*
2. *On 27 September 2019, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on this Draft Law, which will assess its compliance with OSCE human dimension commitments and international human rights and rule of law standards. Considering that ODIHR has been informed that the Draft Law will be amended in the coming weeks, ODIHR decided to publish the present Interim Opinion on the Draft Law as received in September 2019. This will be followed by the publication of a Final Opinion on the revised Draft Law, when it will be received from the Minister of Justice. ODIHR also wishes to express appreciation for the Minister of Justice's commitment to amend the Draft Law to take into account the findings and recommendations from this Interim Opinion.*
3. *On 3 October 2019, ODIHR received a second request from the People's Advocate of the Republic of Moldova to also review the Draft Law from the viewpoint of its compliance with international standards and OSCE commitments*
4. *This Opinion was prepared in response to the above-mentioned requests. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.<sup>1</sup>*

## **II. SCOPE OF REVIEW**

5. The scope of this Opinion covers only the Draft Law submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary and prosecution service in Moldova.
6. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international and regional standards, norms and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
7. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women<sup>2</sup> (hereinafter "CEDAW") and the 2004 OSCE Action Plan for the Promotion of Gender Equality<sup>3</sup> and commitments to mainstream a gender

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<sup>1</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 [...]."

<sup>2</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. The Republic of Moldova acceded to this Convention on 1 July 1994 and to the Optional Protocol to the CEDAW on 28 February 2006.

<sup>3</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).

perspective into OSCE activities, programmes and projects, the analysis seeks to take into account the potentially different impact of the Draft Law on women and men, as judges or as lay persons.

8. The Opinion is based on an unofficial English translation of the Draft Law provided by the Ministry of Justice of the Republic of Moldova, which is attached to this document as an Annex. Errors from translation may result. The Opinion is also available in Romanian. 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 review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation regulating the judiciary and prosecution service in Moldova in the future.

### **III. EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS**

10. Notwithstanding progress in the reform of the legislative and institutional framework regulating the judicial institutions, ODIHR notes that problems of integrity, corruption, political influence, and lack of public trust in the judiciary in Moldova have been widely acknowledged by the international community.<sup>4</sup> It has also been widely reported that excessive hierarchy within the judicial institutions, and non-transparent and arbitrary decisions on the selection, appointment, career, evaluation or dismissal of judges have severely affected the independence and impartiality of the judiciary in Moldova.<sup>5</sup> Recognizing that the independence, impartiality, accountability, transparency and professionalism of the judiciary are key to the rule of law and to engendering public trust in the judiciary, it is essential that authorities address the above-described challenges faced by the judiciary in Moldova. ODIHR therefore welcomes the willingness and efforts undertaken by public authorities to strengthen judicial independence in the country.
11. Though recognizing the right of every state to reform its judicial system, any judicial reform process should not undermine the independence of the judiciary and should be in compliance with applicable international rule of law and human rights standards and OSCE commitments. Especially when it concerns such extensive change of the competence and composition of the highest jurisdiction and the career of key judicial and prosecutorial office-holders, any reform must be based on a proper comprehensive

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<sup>4</sup> See e.g., Parliamentary Assembly of the Council of Europe (PACE), [Resolution 2308 \(2019\) on the Functioning of Democratic Institutions in the Republic of Moldova](#) (3 October 2019); PACE Monitoring Committee, [Report on the Functioning of Democratic Institutions in the Republic of Moldova](#), 16 September 2019, especially Sub-Section 3.4.3 and par 101; European Commission, [Association Implementation Report on Moldova](#), 12 September 2019; ODIHR, [Election Observation Mission Final Report](#) (22 May 2019), page 4; Council of Europe, Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) (CoE DHR-DGI), [Justice Sector Reform Strategy of the Republic of Moldova – Review of Implementation – Assessment and Recommendations](#) (5 December 2017); UN HRC, [Concluding Observations on the 3<sup>rd</sup> Report of the Republic of Moldova](#), CCPR/C/MDA/CO/3, 18 November 2016, pars 29-30, noting that “corruption remains endemic and systemic in the judiciary” and recommending to “[e]nsure prompt, thorough, independent and impartial investigations into any allegations of interference with the independence of the judiciary and prosecute and hold responsible those found guilty, including judicial officers who may be complicit”; Parliamentary Assembly of the Council of Europe, [Resolution 1955 \(2013\) on the Honouring of Obligations and Commitments by the Republic of Moldova](#), 2 October 2013, pars 12-13; International Commission of Jurists, [Report “Only an Empty Shell” – The Undelivered Promise of an Independent Judiciary in Moldova](#)”, 13 March 2019; and Bertelsmann Stiftung’s Transformation Index, [2018 Country Report on the Republic of Moldova](#), pages 11-12. In Moldova, 80 per cent of citizens perceive the judiciary to be corrupt or extremely corrupt; see Transparency International, [The State Of Corruption: Armenia, Azerbaijan, Georgia, Moldova And Ukraine](#), [Transparency International Report](#), 2015, page 9.

<sup>5</sup> See e.g., European Commission, [Association Implementation Report on Moldova](#), 12 September 2019, page 7. See also CoE DHR-DGI, [Justice Sector Reform Strategy of the Republic of Moldova – Review of Implementation – Assessment and Recommendations](#) (5 December 2017), pars 125-132; and ICJ, [Report “Only an Empty Shell” – The Undelivered Promise of an Independent Judiciary in Moldova](#)”, 13 March 2019..

impact assessment to identify structural deficiencies in the existing judicial system, evaluate legislative options before suggesting such an extreme measure as re-evaluation. If the necessity of such a measure is not clearly established, or means applied are disproportionate or unbalanced, the government could risk being seen as instituting a “take-over” of the highest court, which could have grave repercussions for the independence of this institution and may also create a dangerous precedent where future governments may proceed the same way without offering necessary substantiation.

12. Carrying out reforms with such urgency and in the aftermath of elections runs the risk of adopting inherently deficient procedures, which are not conducive to a qualitative assessment of the re-evaluated office-holders, may have long-term negative impact, as the Supreme Court judges are appointed for life, and may even exacerbate the lack of public trust in the judiciary. If such an extensive reform is undertaken, the legal drafters should ensure wide political consensus and provide solid legal grounds for this reform, while ensuring this remains a “one time” measure.
13. As acknowledged by ODIHR in the past, extraordinary measures may be necessary and justified on an exceptional basis, for instance to remedy extremely high level of corruption and incompetence among judges, or where there had been considerable political influence on judicial appointments in previous periods, and where there is a complete lack of public confidence in the judiciary. But even in such cases, the starting point should always be that the ordinary mechanisms and procedures of judicial accountability should continue to apply, except if it is demonstrated that they are themselves so compromised that they cannot play their role. Creating the *ad hoc* temporary mechanism as a parallel structure to circumvent existing mechanisms, especially the Superior Council of Magistracy (SCM), the Superior Council of Prosecutors (SCP) and their specialized bodies, which will continue to exist after the reform, is unlikely to lead to the anticipated results if not accompanied by greater structural reform of these mechanisms (see pars 57-58 and Sub-Section 7).
14. If the authorities nevertheless choose to proceed with such an *ad hoc* mechanism, the Draft Law should in any case be substantially revised in order to ensure that extremely stringent safeguards are in place to limit interferences with judicial independence. Accordingly, the re-evaluation procedure should be conducted according to clear and objective criteria, by entities having all the characteristics of an impartial and independent tribunal, in compliance with basic standards of procedural fairness, and with the possibility for the evaluated judge to challenge the decision before an independent and impartial body, on the basis of both law and procedure, while ensuring transparency and public scrutiny over the process.
15. More specifically, in light of international human rights and rule of law standards and good practices, ODIHR makes the following recommendations to further enhance the Draft Law, especially if the *ad hoc* mechanism of re-evaluation is retained:
  - A. to considerably expand the timeframe for setting up the Evaluation Committee and carrying out the re-evaluation of Supreme Court judges and other key office-holders; [pars 39, 59 and 63-64]
  - B. on the basis of a proper assessment, to undertake in parallel a reform of the SCM, SCP and their specialized bodies, while ensuring the objectivity, transparency, efficiency and effectiveness of these bodies and related procedures and respecting the security of tenure of the SCM members; [pars 53-57 and 131-138]
  - C. to reconsider the composition of the Evaluation Committee and appointment modalities according to the following modalities:

- ensure that a substantial part or a majority of the members of the Evaluation Committee are judges appointed by their peers, while limiting the role and influence of the political branches as appointing authorities; [pars 68 and 70]
  - specify the criteria, procedure and modalities of appointment by each appointing authority, while ensuring the openness, inclusiveness and transparency of the appointment process and introducing a mechanism to ensure a fair representation of women and men within the Evaluation Committee; [pars 67, 71 and 74]
  - consider additional safeguards to enhance the independence and impartiality of the Evaluation Committee, especially in terms of ineligibility, grounds for recusal, members' functional immunity, financial independence, procedure and grounds for removal, and secretariat functions; [pars 75-78]
- D. to specify the basic criteria and main elements for re-evaluation, while ensuring that the types of undesirable conduct that may lead to negative evaluation are clearly defined, and that the assessed criteria are not unduly impacting on the right to private and family life of the evaluated judges, and specifying that aspects related to the content of a judicial decision shall never fall within the purview of the re-evaluation, except in cases of malice and gross negligence or when there is clear and consistent pattern of erroneous judgements that indicates clear lack of professionalism; [pars 80-83]
- E. to clarify the rules concerning the admissibility and evaluation of evidence, while specifying the standard of proof required and ensuring that the burden of proving the case to the required evidentiary standard should remain with the Evaluation Committee, except in strictly defined cases; [pars 87-90]
- F. to ensure the compliance with the basic standards of procedural fairness, including by:
- ensuring that the judge is notified by registered mail or any other ascertainable means, about the date, time and place of the interview; [par 94]
  - providing for the possibility for the evaluated judge to get legal representation during the interview; [par 95]
  - specifying that a record of the hearing should be produced and provide for access of evaluated judges to these records after the interview; [par 97]
  - ensuring that the publication of the evaluation report and the withholding of 50 % of the salary of unsuccessful evaluated judges are suspended pending final appeal and decision of the appellate body; [pars 101 and 104]
- G. to ensure that any re-evaluated office-holder is able to challenge the re-evaluation decision before an independent and impartial tribunal; [pars 109 and 111-114]
- H. to clarify that when there is a suspicion of lack of integrity, the Evaluation Committee should refer the matter for investigation to the appropriate body, rather than drawing a negative conclusion regarding the judge and transferring her/him to a lower court; [par 103]
- I. ensure that gender and diversity considerations are taken into account in the context of appointing new Supreme Court judges, other appointments to key judicial and prosecutorial offices and when reforming the SCM, SCP and their specialized bodies. [pars 102 and 132]

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

#### IV. ANALYSIS AND RECOMMENDATIONS

##### 1. Relevant International Standards and OSCE Commitments

###### 1.1. On the Independence of the Judiciary

16. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.<sup>6</sup> The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.<sup>7</sup> This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law. Public confidence in the courts as independent from political influence is vital in a society that respects the rule of law.
17. At the international level, it has long been recognized that litigants in both criminal and civil matters have the right to a fair hearing before an “independent and impartial tribunal”, as stated in Article 14 of the *International Covenant on Civil and Political Rights*<sup>8</sup> (hereinafter “the ICCPR”). The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the [UN Basic Principles on the Independence of the Judiciary](#) (1985),<sup>9</sup> and have been further elaborated in the [Bangalore Principles of Judicial Conduct](#) (2002).<sup>10</sup> International understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee<sup>11</sup> and the UN Special Rapporteur on the Independence of Judges and Lawyers. It is also worth referring to Article 11 of the United Nations Convention against Corruption (UNCAC) whereby State Parties agree to “take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary”.<sup>12</sup>

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<sup>6</sup> See UN Human Rights Council, [Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers](#), A/HRC/29/L.11, 30 June 2015, which stresses “the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards”. As stated in the [OSCE Copenhagen Document 1990](#), “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (par 2).

<sup>7</sup> See e.g., [OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems](#), 6 December 2005.

<sup>8</sup> UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by the Resolution 2200A (XXI) of 16 December 1966. The Republic of Moldova acceded to the ICCPR on 26 January 1993.

<sup>9</sup> [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>10</sup> [Bangalore Principles of Judicial Conduct](#), adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its Resolution 2006/23 of 27 July 2006. See also [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#) (2010), prepared by the Judicial Group on Strengthening Judicial Integrity.

<sup>11</sup> See especially, UN Human Rights Committee, [General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial](#), 23 August 2007, par 19.

<sup>12</sup> UN Convention against Corruption (UNCAC), adopted by the UN General Assembly on 31 October 2003. The Republic of Moldova ratified the UNCAC on 1 October 2007.

18. As a member of the Council of Europe, Moldova is also bound by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>13</sup> (hereinafter “the ECHR”), particularly its Article 6, which provides that everyone is entitled to a fair and public hearing “by an independent and impartial tribunal established by law”. To determine whether a body can be considered “independent” according to Article 6 par 1 of the ECHR, the European Court of Human Rights (hereinafter “ECtHR”) considers various elements, *inter alia*, the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.<sup>14</sup>
19. The Council of Europe’s Committee of Ministers also formulated important and fundamental judicial independence principles in its [\*Recommendation CM/Rec\(2010\)12 on Judges: Independence, Efficiency and Responsibilities\*](#),<sup>15</sup> which among others expressly states that “[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers” (par 46). The Opinion will also make reference to the opinions of the Consultative Council of European Judges (CCJE),<sup>16</sup> an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, and to the opinions and reports of the European Commission for Democracy through Law (Venice Commission).<sup>17</sup>
20. OSCE participating States have also committed to ensure “the independence of judges and the impartial operation of the public judicial service” as one of the elements of justice, “which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings” ([\*1990 Copenhagen Document\*](#)).<sup>18</sup> In the [\*1991 Moscow Document\*](#),<sup>19</sup> participating States further committed to “respect the international standards that relate to the independence of judges [...] and the impartial operation of the public judicial service” and to “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice”. Moreover, in its [\*Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area\*](#) (2008), the OSCE Ministerial Council also called upon OSCE participating States “to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and

<sup>13</sup> The Council of Europe (CoE)’s Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Moldova ratified the ECHR on 12 September 1997.

<sup>14</sup> See European Court of Human Rights (ECtHR), [\*Campbell and Fell v. the United Kingdom\*](#) (Application nos. 7819/77, 7878/77, judgment of 28 June 1984), par 78. See also [\*Olujić v. Croatia\*](#) (Application no. 22330/05, judgment of 5 May 2009), par 38; [\*Oleksandr Volkov v. Ukraine\*](#) (Application no. 21722/11, judgment of 25 May 2013), par 103; [\*Morice v. France\*](#) [GC] (Application no. 29369/10, judgment of 23 April 2015), par 78; on the relation of the judiciary with other branches of power: [\*Baka v. Hungary\*](#) [GC] (Application no. 20261/12, judgment of 23 June 2016), par 165; [\*Ramos Nunes de Carvalho E Sá v. Portugal\*](#) [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 144; [\*Guðmundur Andri Ástráðsson v. Iceland\*](#) (Application no. 26374/18, judgment of 12 March 2019), pars 100-103.

<sup>15</sup> CoE, [\*Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities\*](#), adopted by the Committee of Ministers on 17 November 2010.

<sup>16</sup> Available at [http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis\\_en.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asphttp://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp), particularly CCJE, [\*Opinion no. 1 \(2001\) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges\*](#); [\*Opinion no. 10 \(2007\) on the Council for the Judiciary at the Service of Society\*](#); [\*Opinion no. 17 \(2014\) on the Evaluation of Judges’ Work, the Quality of Justice and Respect for Judicial Independence\*](#); [\*Opinion no. 18 \(2015\) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy\*](#); [\*Opinion no. 19 \(2016\) on the Role of Court Presidents\*](#); [\*Opinion n° 20 \(2017\) on the Role of Courts with respect to the Uniform application of the Law\*](#); and [\*Opinion n° 21 \(2018\) on Preventing Corruption among Judges\*](#).

<sup>17</sup> In particular European Commission for Democracy through Law (Venice Commission), [\*Report on Judicial Appointments\*](#) (2007), CDL-AD(2007)028-e; [\*Report on the Independence of the Judicial System – Part I: The Independence of Judges\*](#) (2010), CDL-AD(2010)004; and [\*Rule of Law Checklist\*](#), CDL-AD(2016)007, 18 March 2016.

<sup>18</sup> CSCE/OSCE, [\*1990 Copenhagen Document\*](#), pars 5 and 5.12.

<sup>19</sup> CSCE/OSCE, [\*1991 Moscow Document\*](#), pars 19.1 and 19.2.

judiciary”, as a key element of strengthening the rule of law in the OSCE area.<sup>20</sup> Further and more detailed guidance is also provided by the [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010) (ODIHR Kyiv Recommendations).<sup>21</sup>

21. Other useful reference documents elaborated in various international and regional fora contain more practical guidance to help ensure the independence of the judiciary.<sup>22</sup>

## **1.2. On the Prosecution Service**

22. There are a series of international documents, which set a framework of standards and recommendations related to the work, status and role of the prosecution service. These instruments include the [1990 UN Guidelines on the Role of Prosecutors](#),<sup>23</sup> which aim to assist UN Member States in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. Other important principles are contained in the [1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors](#).<sup>24</sup> Further standards are outlined in the UN Convention against Corruption, which calls upon State Parties to take measures to strengthen the integrity of the prosecution services and prevent opportunities for their corruption, bearing in mind their crucial role in combating corruption.<sup>25</sup>
23. The Council of Europe's Committee of Ministers also formulated important and fundamental principles concerning the role of the public prosecution service.<sup>26</sup> The Rome Charter, adopted by the Consultative Council of European Prosecutors (CCPE) in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE recommends that the “[i]ndependence of prosecutors [...] be guaranteed by law, at the highest possible level, in a manner similar to that of judges”.<sup>27</sup> Accordingly, “prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard

<sup>20</sup> OSCE, [Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (Helsinki, 4-5 December 2008).

<sup>21</sup> [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence.

<sup>22</sup> These include, among others: the reports of the UN Special Rapporteur on the Independence of Judges and Lawyers (available at <<http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>>); the [Universal Charter of the Judge](#) (1999, as last updated in 2017), adopted by the International Association of Judges; the [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, DAJ/DOC (98)23; the CCJE [Magna Carta of Judges](#), 17 November 2010; the reports and other documents of the European Network of Councils for the Judiciary (ENCJ), available at <<https://www.encj.eu/https://www.encj.eu/>>; and the opinions of ODIHR (available at <<http://www.legislationline.org/search/runSearch/1/type/2/topic/9>>) and of the Venice Commission (available at <<https://www.venice.coe.int/webforms/documents/?topic=27&year=all>>) dealing with issues pertaining to the independence of the judiciary.

<sup>23</sup> Adopted by the 8<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>24</sup> International Association of Prosecutors, [Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors](#), approved by the International Association of Prosecutors on 23 April 1999. These Standards were annexed to resolution 2008/5 of the Commission on Crime Prevention and Criminal Justice of the UN Economic and Social Council on “Strengthening the rule of law through improved integrity and capacity of prosecution services”, which also requested States to take these Standards into consideration when reviewing or developing their own prosecution standards.

<sup>25</sup> See Article 11 of the UNCAC.

<sup>26</sup> [Recommendation Rec\(2000\)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System](#) (6 October 2000); and [Recommendation CM/Rec\(2012\)11 of the Committee of Ministers to Member States on the Role of Public Prosecutors outside the Criminal Justice System](#) (19 September 2012). See also Parliamentary Assembly of the Council of Europe, [Recommendation 1604 \(2003\) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law](#) (27 May 2003).

<sup>27</sup> Consultative Council of European Prosecutors (CCPE), [Rome Charter – Opinion no. 9 \(2014\) on European Norms and Principles concerning Prosecutors](#), par 33.

to the principles of separation of powers and accountability”.<sup>28</sup> Certain principles related to the prosecution service are also contained in OSCE commitments, such as the [1990 Copenhagen Document](#), which provides that “the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution”.<sup>29</sup> More recently, through the [2006 Brussels Declaration on Criminal Justice Systems](#), members of the OSCE Ministerial Council stated that “[p]rosecutors should be individuals of integrity and ability, with appropriate training and qualifications; prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law” and that “[t]he office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges”.<sup>30</sup>

24. Some important principles can also be found in other various documents of a non-binding nature, elaborated at the regional and international levels, especially by the Venice Commission, the CCPE and UNODC, which provide more detailed and elaborated guidance.<sup>31</sup>

## **2. National Legal Framework**

25. Article 116 par 1 of the Constitution of Moldova provides that “[j]udges sitting in the courts of law shall be independent, impartial and irremovable according to the law”. Article 116 further sets out that “[j]udges are promoted and transferred only at their own consent” (par 5) and that “[s]anctioning of the judges is carried out pursuant to the law” (par 6). As to the status of judges, Article 123 par 1 states that “[t]he Superior Council of Magistracy shall ensure the appointment, transfer, removal from office, upgrading and imposing of the disciplinary sentences against judges”. Pursuant to Article 72 par 3 (e) of the Constitution, the organisation and functioning of the Superior Council of Magistracy (SCM) and of courts of general jurisdiction shall be governed by organic laws.
26. Several other laws, which have been last amended in 2018, deal with the organization and exercise of the judicial profession, including the [Law no. 544 on the Status of Judges](#), the [Law no. 514 on the Organization of the Judiciary](#), [Law no. 789 on the Supreme Court of Justice](#), the [Law no. 947 on the Superior Council of Magistracy](#), the [Law no. 154 on the Selection, Performance Evaluation and Career of Judges](#) and the [Law no. 178 on Disciplinary Liability of Judges](#).

## **3. Rationale for the Reform**

27. At the outset, while ODIHR recognizes the right of every state to reform its judicial system, any judicial reform process should not undermine the independence of the

<sup>28</sup> *ibid.* par 34 (2014 CCPE Rome Charter).

<sup>29</sup> OSCE, [OSCE Copenhagen Document 1990](#), par 5.14.

<sup>30</sup> OSCE, [2006 Brussels Declaration on Criminal Justice Systems](#) (MC.DOC/4/06).

<sup>31</sup> This includes e.g., the Venice Commission's [Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service](#), CDL-AD(2010)040, Venice, 17-18 December 2010 and related Venice Commission opinions; the [European Guidelines on Ethics and Conduct for Public Prosecutors](#), CPGE (2005)05, adopted by the Conference of Prosecutors General of Europe on 31 May 2005; the opinions of the Consultative Council of European Prosecutors (CCEP) available at <https://www.coe.int/en/web/ccpe/opinions/adopted-opinions>, especially, *Opinion no. 3 (2008) on the "Role of prosecution services outside the Criminal Law Field"*; *Opinion no. 9 (2014) on "European norms and principles concerning prosecutors"*; *Opinion no. 11 (2016) on the "Quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime"*; and *Opinion no. 13 (2018) on "Independence, accountability and ethics of prosecutors"*; and the [Guide on the Status and Role of Prosecutors](#) (2014) of UNODC and the International Association of Prosecutors.

judiciary and should be in compliance with applicable international rule of law and human rights standards and OSCE commitments. Especially when it concerns such extensive change of the competence and composition of the highest jurisdiction and the career of key judicial and prosecutorial office-holders, the legal drafters should carry out a proper impact assessment to identify structural deficiencies in the existing judicial system, evaluate legislative options before suggesting such an extreme measure as re-evaluation. Moreover, the legislator should provide adequate time for ensuring the openness, inclusiveness, effectiveness and transparency of the law-making process and for implementation of the reform (see Sub-Sections 4.1. and 8. *infra*). Carrying out reforms with such urgency and in the aftermath of elections runs the risk of adopting inherently deficient procedures, which are not conducive to a qualitative assessment of the re-evaluated office-holders, may have long-term negative impact, as the Supreme Court judges are appointed for life, and may even more exacerbate the lack of public trust in the judiciary.

28. The Informative Note to the Draft Law states that the *rationale* for the reform is two-fold: to enhance the integrity and professionalism of the judiciary and to reduce the competences of the highest court to become a cassation court, tasked with the standardization of judicial practice, thus justifying a decrease of a number of its judges. At the same time, the two objectives are clearly distinct and subject to different sets of principles, though both should ultimately respect the principles of security of tenure of judges and be in accordance with all prerequisites for independence (see Sub-Section 3.2. *infra*).
29. At the same time, the Preamble of the Draft Law specifies broader aims of the reform i.e., ensuring impartiality of the Supreme Court judges and quality of their judicial acts, restoring confidence in justice, ensuring uniform application of law and good functioning of the judicial system and of the Prosecutor's Office. Such language, coupled with the title of the Draft, appears somewhat at odds with the content of the Informative Note and of the Draft Law, which primarily deals with the re-evaluation procedure of key judicial and prosecutorial office-holders, which is temporary in nature. This creates some confusion as to the main aims, scope and expected final result of the contemplated reform. It is also surprising that the Preamble does not mention the objective of strengthening the independence of the judiciary and of individual judges, which appears to be a key concern in the Informative Note. **The Preamble should therefore be amended to better reflect the intended aim(s) and the extraordinary and temporary nature of the re-evaluation process. The title of the Draft Act should also be modified to reflect such a change of competence**, in order to ensure better clarity regarding judicial re-organization, though the modification of the name of the highest court would also require a constitutional amendment.
30. Also, it is not clear why the legal drafters did not undertake a more substantive reform of the institutions that will continue to be, in the future, key guarantors of the integrity, professionalism and independence of judges and of prosecutors, i.e., the SCM, the SCP and their specialized bodies (such as the performance and disciplinary boards). It is worth emphasizing that in its latest 2019 report on Moldova, the CoE Group of States against Corruption (GRECO) reiterated the need for substantial reform of the composition, appointment modalities and functioning of the SCM and of the SCP.<sup>32</sup> These aspects remain largely unaddressed in the contemplated reform, though it must

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<sup>32</sup> GRECO, Council of Europe's Group of States against Corruption (GRECO), [Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for the Republic of Moldova](#), GrecoRC4(2018)10, 24 July 2019, pars 40, 45-46, 48, 51, 53, 58-59, 79 and 80.

be acknowledged that some of GRECO's recommendations would actually require constitutional amendments (see also Sub-Sections 5. and 7. *infra*).

31. The proposed reform will consist of putting in place an *ad hoc*, extra-judiciary body<sup>33</sup> in charge of re-evaluating all Supreme Court judges, and as a second step, the presidents of courts of appeal and of the first instance courts, as well as vice-presidents of courts of appeal and certain first instance courts (Article 16 of the Draft Law). The evaluation shall assess, during the first stage, the “*integrity and lifestyle*” of the judges before evaluating their “*professional activity*” during the last ten years and their “*personal qualities*” relevant to the position of judge (Article 2 (2) of the Draft Law) – see below for further details regarding the re-evaluation procedure. The outcome of such evaluation can ultimately result in having the judges being maintained in their position if they are successful, or, if unsuccessful, being transferred to another court with their consent, or resigning if they refuse the transfer (Article 10 (2) of the Draft Law).
32. The Prosecutor General and deputies as well as other key positions of the prosecution service will be re-evaluated according to the same procedure, which may lead to their dismissal if they are unsuccessful (Article 21 of the Draft Law).

### ***3.1. Change of Competence of the Supreme Court of Justice and Reduction of the Number of Supreme Court Judges***

33. According to the Informative Note, the Supreme Court of Justice (SCJ) will be transformed into a Court of Cassation in charge of ensuring the uniform interpretation and application of the law by the courts and which should only analyse whether the law has been correctly applied by lower courts, and not review the facts. According to the Informative Note, such a reduced competence justifies the decrease of the number of SCJ judges from 33 to 17 (Article 1 (2) of the Draft Law).
34. There should always be important and clearly defined reasons for a state to justify a comprehensive reform of its justice system. However, when such a reform affects existing rights or legitimate expectations of judges based on applicable legislation, as is the case here, it may only be justified by compelling reasons,<sup>34</sup> such as to improve the independence and efficiency of a judiciary and only if less intrusive alternatives are unavailable. International standards regarding security of tenure cannot be circumvented by reforming the structure of the courts to abolish certain judicial positions and thus remove judges from office or transfer them.<sup>35</sup> Compelling justification is all the more necessary to avoid undue interference of the executive or legislative branches in matters that are directly and immediately relevant to the adjudicative function, with the potential to negatively impact the institutional independence of the judiciary.<sup>36</sup>

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<sup>33</sup> Pursuant to Article 3 (2) of the Draft Law, this body, the “Evaluation Committee”, will be composed of a total of 20 members, including two appointed by the Parliament, two by the President, two by the Government, two by the SCM, two by the Superior Council of Prosecutors (SCP), four by the National Platform of Moldova of the Eastern Partnership Civil Society Forum and six (foreign experts) by the Minister of Justice. The Evaluation Committee will be divided into two Evaluation Boards. According to Article 4 (1) of the Draft Law, each evaluation board will be composed of a member appointed by the President, one by the Parliament, one by the Government, one by the Superior Council of Magistracy, one by the Superior Council of Prosecutors, two by the National Platform of Moldova of Eastern Partnership Civil Society Forum and three by the Minister of Justice, with the precise composition of the Evaluation Boards being decided by the Evaluation Committee.

<sup>34</sup> See e.g., Venice Commission, *Opinion on the Draft Law on Introducing Amendments and Addenda to the Judicial Code of Armenia*, CDL-AD(2014)021-e, 16 June 2014, para 46-54.

<sup>35</sup> *Op. cit.* footnote 38, para 39 (August 2017 *ODIHR Opinion on the Supreme Court of Poland*). See also e.g., J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), para 2.2.8. a.

<sup>36</sup> UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007), para 26.

35. Reform of the organization of the judicial system is contemplated by international and regional standards, and may justify that a judge receives a new appointment or is moved to another judicial office without consenting to it.<sup>37</sup> This should however be limited to exceptional cases of necessary and *legitimate* institutional re-organization,<sup>38</sup> for instance where a court is abolished or its competence or territorial jurisdiction is considerably reduced to such an extent that the employment of a judge is no longer possible or justifiable.<sup>39</sup> Moreover, all existing members of that court should in principle be re-appointed to the replacement court (if applicable), or being offered opportunities for transfer, based on clear criteria, to another judicial office of approximately the same type and instance if the abolition of certain positions of judges is unavoidable.<sup>40</sup> In case of transfer, there should be no reduction in the remuneration of the judge.<sup>41</sup> Where such an equivalent judicial office does not exist, the judge concerned should be provided with full compensation for the loss of office.<sup>42</sup> The possibility of an unjustified/unsubstantiated transfer of a judge from one court to another may undermine the individual independence of a judge as well as the institutional independence of a court and as such, safeguards against arbitrary transfer should be provided. Consequently, an appointment to another post should be based on clear and objective criteria and guided by proper safeguards,<sup>43</sup> including the possibility of review by an independent authority, which should investigate the legitimacy of the transfer and whether such a measure is really justified.<sup>44</sup>
36. Regarding the determination of the total number of judicial positions in a court, in principle, the judiciary or the SCM should at a minimum be consulted, as such decision will have an impact on the practice of judicial functions<sup>45</sup> and the judiciary is probably the most appropriate body to be able to determine the required number of judges to adjudicate within a reasonable time.<sup>46</sup>

<sup>37</sup> *Op. cit.* footnote 15, par 52 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); and *op. cit.* footnote 22, par 3.4. (1998 [European Charter](#)).

<sup>38</sup> See ODIHR, [Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland](#), 30 August 2017, par 70. See Venice Commission, [Rule of Law Checklist](#), 18 March 2016, par 80.

<sup>39</sup> *ibid.* par 70 (August 2017 [ODIHR Opinion on the Supreme Court of Poland](#)). See also Venice Commission, [Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary](#), CDL-AD(2012)001, 19 March 2012, par 77.

<sup>40</sup> See e.g., *op. cit.* footnote 10, par 16.3 (2010 [Measures for the Effective Implementation of the Bangalore Principles](#)). See also [IBA Code of Minimum Standards of Judicial Independence](#) (1982), Principle 20, which specifically provides that “[i]n case of legislation reorganising courts, judges serving in these courts shall not be affected except for their transfer to another court of the same status”. See also [1995 Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region](#), par 29: “Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure”. See also Venice Commission, [Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia](#), CDL-AD(2008)007, 19 March 2008, par 23; and Venice Commission, [Opinion on the Draft Laws on Courts and on Rights and Duties of Judges and on the Judicial Council of Montenegro](#), CDL-AD(2014)038, 15 December 2014, par 58.

<sup>41</sup> See e.g., European Network of Councils for the Judiciary (ENCJ), [Report- Funding of the Judiciary \(2015-2016\)](#), 3 June 2016, Recommendation 10, which provides that “save in times of economic emergency, [...] there should be no reduction in judicial remuneration”; [IBA Code of Minimum Standards of Judicial Independence](#) (1982), Principle 15 (b) which states that “[j]udicial salaries cannot be decreased during the judges’ services”. See also *op. cit.* footnote 15, par 55 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)), which states that “systems making judges’ core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges”; and *op. cit.* footnote 16, par 62 (CCJE [Opinion no. 1 \(2001\)](#)).

<sup>42</sup> See e.g., *op. cit.* footnote 10, par 16.3 (2010 [Measures for the Effective Implementation of the Bangalore Principles](#)), which states that “[w]here there is no such judicial office of equivalent status or tenure, the judge concerned should be provided with full compensation for loss of office”. See also [1995 Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region](#), par 29: “Members of the court for whom no alternative position can be found must be fully compensated”.

<sup>43</sup> *ibid.*

<sup>44</sup> *Op. cit.* footnote 15, par 50 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); and *op. cit.* footnote 22, par 3.4. (1998 [European Charter](#)).

<sup>45</sup> *Op. cit.* footnote 22, par 9 (2010 CCJE [Magna Carta of Judges](#)).

<sup>46</sup> *Op. cit.* footnote 38, pars 36-39 (August 2017 [ODIHR Opinion on the Supreme Court of Poland](#)). See also e.g., Venice Commission and CoE DHR-DGI, [Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia](#), CDL-AD(2014)031, 14 October 2014, par 19, where the Venice Commission state that: “the appropriate body to make the ultimate assessment on the number of Supreme Court judges and of the need for more judges is usually the legislator or the High Council of Justice, given that the choice depends, inter alia, on the available budgetary means, which cannot be determined by the Supreme Court judges. It is nevertheless highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process [...]”.

37. Overall, the legitimacy of a reform depends on the presence of a demonstrable pressing social need for the change and the measures chosen have to be genuinely related to the aim. The Informative Note to the Draft Law explains the *rationale* for reducing the competences of the SCJ to become a cassation court by the need to ensure the uniformity of the judicial practice, which is a legitimate purpose.
38. At the same time, the SCJ is already defined as a court of cassation in Article 2 (a) of the Law on the SCJ. Moreover, the grounds for appeal mentioned in the draft amendments to the Criminal and Civil Procedure Codes and the Administrative Code suggest some form of assessment of the facts, especially when considering whether “*the decision is arbitrary or based decisively on the manifestly unreasonable assessment of the evidence*”. It is also not clear whether the new SCJ will in principle be sending back the cases to other courts for *de novo* process. It is therefore not undoubtedly established that the SCJ’s competences are indeed substantially reformed.
39. The 17 judges of the reorganized SCJ shall start their new office on 1 January 2020, which appears extremely fast. Also, the Draft Law is silent as to the modalities for handling within a reasonable time the pending cases before the SCJ, which should be tried on their merits according to previous rules and procedures by a reduced number of judges (Article I of the Final and Transitory Provisions). Additionally, it is not clear if and how re-evaluation will affect cases already being heard or considered by a judge, when s/he is already deliberating on the case, and whether a case will be re-heard for a second time by a new composition. Additionally, the situation of cases adjudicated by judges who are not successfully re-evaluated is unaddressed. Should this amount to “manifest error of judgment”, “grossly arbitrary” judgments or “denial of justice”, this would constitute a violation of Article 6 par 1 of the ECHR,<sup>47</sup> and this should be taken into account. **These aspects should be clarified by the legal drafters, while ensuring that the SCJ remains operational** in the meantime, e.g., by stipulating that it can render judgment even if it has three vetted judges only.
40. In light of the foregoing, it does not appear that the contemplated reform is based on a thorough regulatory impact assessment of the proposed Draft Law, including human rights implications. If the legitimacy of such a reform is not clearly established, the new government could risk being seen as instituting a “take-over” of the highest court in Moldova, which could have grave repercussions for the objective independence of this court, and could ultimately further undermine public trust in this institution and in the judiciary in general.<sup>48</sup> This may also create a dangerous precedent when future governments may choose to intervene in judicial matters, revising substantially the number of judges or competences of the SCJ, without offering necessary substantiation for such changes.
41. In any case, an individualized approach should be followed whereby, if the number of judicial positions at the SCJ is indeed considerably reduced due to duly justified court re-structuring, **a transfer to judicial posts at the highest possible level should be offered to the judges concerned,**<sup>49</sup> unless there are objective reasons precluding such a transfer (e.g., in case of gross incompetence established by an independent body). Moreover, **the transfer decision should be subject to review by an independent**

<sup>47</sup> See for example, ECtHR, *Dulaurans v. France* (Application no. 34553/97, judgment of 21 March 2000), par 38; *Khamidov v. Russia* (Application no. 72118/01, judgment of 15 November 2007), par 170; *Andelković v. Serbia* (Application no. 1401/08, judgment of 9 April 2013), par 24; *Bochan v. Ukraine* (no. 2) [GC] (Application no. 22251/08, judgment of 5 February 2015), pars 63-65.

<sup>48</sup> See e.g., *op. cit.* footnote 46, pars 95-99 (2014 Venice Commission-CoE DHR-DGI Joint Opinion on the draft Amendments to the Organic Law on General Courts of Georgia).

<sup>49</sup> *Op. cit.* footnote 38, par 71 (August 2017 *ODIHR Opinion on the Supreme Court of Poland*). See also *IBA Code of Minimum Standards of Judicial Independence* (1982), Principle 12, which provides: “*The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge’s consent, such consent not to be unreasonably withheld*”.

**authority** (see Sub-Section 4.7. *infra*). **These safeguards should be reflected in the Draft Law.**

42. It is noted that, according to Article III of the Final and Transitional Provisions, the Law no. 789 on the SCJ will be abrogated as of 1 January 2020, which appears rather expeditious in light of the important systemic change brought by the contemplated reform. **The legal drafters should discuss whether to extend the *vacatio legis*, meaning the deferment of the entry into force of a new law, to ensure that there will be enough time to prepare for its implementation.**

### **3.2. Principles of Security of Tenure and Irremovability of Judges**

43. Security of tenure and irremovability of judges are integral parts of the guarantee of judicial independence.<sup>50</sup> Judges must have guaranteed tenure until they reach the retirement age or the expiry of their term of office, where this exists.<sup>51</sup> Exceptions to this rule need to be limited to specific cases that are clearly set out in law, and decisions to remove judges should not be taken lightly, or in a summary manner.<sup>52</sup> Rather, judges may only be removed in exceptional cases involving, e.g., incapacity,<sup>53</sup> misbehavior that renders them unfit to discharge their duties,<sup>54</sup> serious grounds of misconduct or incompetence,<sup>55</sup> where the inevitable conclusion is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard (objectively judged) bringing the administration of justice into disrepute,<sup>56</sup> and serious breaches of disciplinary or criminal provisions established by law.<sup>57</sup>
44. In any case, security of tenure should be guaranteed by legislation and the basis for judge's removal should be clearly provided (in the above-mentioned cases), while ensuring that any removal is decided according to a fair process, with the possibility to challenge the decision before a tribunal having full jurisdiction.<sup>58</sup> In general, when designing the organization and functioning of the judiciary, the legislative and executive powers should refrain from adopting measures, which would jeopardise the security of tenure and irremovability of judges, and thus the independence of the judiciary.<sup>59</sup> Accordingly, a new parliamentary majority and government should not question the tenure of judges who were previously appointed in a lawful manner,<sup>60</sup> in conformity with the applicable norms related to the independence of judiciary as previously defined.
45. While some form of evaluation of individual judges is necessary to fulfil two key requirements of any judicial system, namely justice of the highest quality and proper

<sup>50</sup> *Op. cit.* footnote 15, par 49 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).

<sup>51</sup> *ibid.* See also *op. cit.* footnote 9, Principle 12 (1985 [UN Basic Principles on the Independence of the Judiciary](#)). See also *op. cit.* footnote 16, pars 57 and 60 (CCJE [Opinion no. 1 \(2001\)](#)). The 1998 European Charter on the Statute for Judges affirms that this principle extends to the appointment or assignment to a different office or location without consent (other than in cases of court re-organisation or where such actions are only temporary). See also *op. cit.* footnote 24, par 19.2 (v) (OSCE [1991 Moscow Document](#)), which includes a specific commitment to guarantee the tenure of judges.

<sup>52</sup> See e.g., *op. cit.* footnote 38, par 67 (August 2017 [ODIHR Opinion on the Supreme Court of Poland](#)).

<sup>53</sup> *Op. cit.* footnote 9, Principle 18 (1985 [UN Basic Principles on the Independence of the Judiciary](#)).

<sup>54</sup> *ibid.*

<sup>55</sup> *Op. cit.* footnote 11, par 20 (UNHRC [General Comment no. 32](#)).

<sup>56</sup> See e.g., *op. cit.* footnote 16, par 62 (CCJE [Opinion no. 1 \(2001\)](#)); and par 29 (CCJE [Opinion no. 17 \(2014\)](#)).

<sup>57</sup> *Op. cit.* footnote 15, par 50 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).

<sup>58</sup> The ECtHR has expressly recognized that Article 6 par 1 of the ECHR, on its civil limb, is applicable to disciplinary proceedings against judges; see [Oleksandr Volkov v. Ukraine](#) (Application No. 21722/11, judgment of 25 May 2013), pars 91 and 95. See also *op. cit.* footnote 14, Principle 17 (1985 [UN Basic Principles on the Independence of the Judiciary](#)), which states that “[t]he judge shall have the right to a fair hearing”.

<sup>59</sup> *Op. cit.* footnote 16, par 43 (CCJE [Opinion no. 18 \(2015\)](#)). See also Venice Commission, [Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia](#), CDL-AD(2013)007, 11 March 2013, par 71.

<sup>60</sup> *ibid.* par 44 (CCJE [Opinion no. 18 \(2015\)](#)).

accountability in a democratic society,<sup>61</sup> an unfavourable evaluation *per se* should not lead to a judge's removal from office.<sup>62</sup> However, as mentioned in par 43 *supra*, this does not exclude potential removal from office in cases of serious incompetence where the inevitable conclusion is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard (objectively judged) bringing the administration of justice into disrepute.<sup>63</sup> In principle, an evaluation process should primarily aim to improve the work of the judiciary, and as such should be kept clearly separate from the question of removal from office following disciplinary procedures in case of concrete cases of wrongdoing.<sup>64</sup> In any case, the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence.<sup>65</sup> Therefore, any evaluation of judges by members of the legislative or executive arms of the state, or under their decisive influence, is especially problematic.<sup>66</sup>

46. The principle of security of tenure also applies where circumstances would seem to require the replacement of large numbers of judges or some forms of vetting process, to improve the integrity and quality of the judicial system.<sup>67</sup> According to the *UN Basic Principles on the Independence of the Judiciary*, also in these cases, the removal of judges may only occur based on grounds of incompetence or serious misconduct established through fair procedures.<sup>68</sup> The Consultative Council of European Judges (CCJE) has explicitly noted the risk that vetting of judges for corruption “*be instrumentalised and thus misused to eliminate politically ‘undesirable’ judges*”.<sup>69</sup> It has also urged that individual examination “*be conducted with great care, observing the principle that, as a rule, judges should not be held liable for their decisions*” while ensuring that “*only exceptional cases of intentional violations of the law and of human rights principles should result in the termination of office*”.<sup>70</sup> When some forms of vetting are contemplated during times of transition, such process should aim primarily at removing those individuals who have committed the most serious violations.<sup>71</sup>
47. As acknowledged by ODIHR and the Venice Commission in relevant opinions, extraordinary measures may be necessary and justified on a wholly exceptional basis, for instance to remedy extremely high level of corruption and incompetence among judges, or where there had been considerable political influence on judicial appointments in previous periods, and where there is a complete lack of public confidence in either the honesty or the competence of the judiciary.<sup>72</sup> However, such cases should be made subject to extremely stringent safeguards to protect judges fit to

<sup>61</sup> See e.g., *op. cit.* footnote 16, par 49 (1) (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>62</sup> See e.g., *ibid.* par 29 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)). See also ODIHR, [Opinion on the Procedure for Qualification Assessment of Judges of Ukraine](#), 12 November 2015, par 53.

<sup>63</sup> See e.g., *op. cit.* footnote 16, par 62 (CCJE [Opinion no. 1 \(2001\)](#)); and par 29 (CCJE [Opinion no. 17 \(2014\)](#)).

<sup>64</sup> See e.g., *ibid.*, par 29 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)); and par 53 (2015 ODIHR [Opinion on the Procedure for Qualification Assessment of Judges of Ukraine](#)).

<sup>65</sup> *Op. cit.* footnote 16, especially par 45 (CCJE [Opinion no. 1 \(2001\)](#)); and par 34 ([CCJE Opinion No. 6\(2004\)](#)).

<sup>66</sup> See *ibid.* par 6 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>67</sup> See UN Special Rapporteur on the Independence of Judges and Lawyers (UN SRIJL), [Leandro Despouy, 2009 Report](#), UN Doc A/HRC/11/41, 24 March 2009, par 64, emphasizing that this type of removal of judges may only occur in accordance with the UN Basic Principles on the Independence of the Judiciary, that is to say based on grounds of incapacity or serious misconduct established through fair procedures. See also UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, [Report on Guarantees of Non-Recurrence](#), UN Doc A/HRC/30/42, 7 September 2015, pars 55 and 107.

<sup>68</sup> *Op. cit.* footnote 14, Principles 17-20 ([UN Basic Principles on the Independence of the Judiciary](#)).

<sup>69</sup> See e.g., *op. cit.* footnote 16, par 28 (CCJE [Opinion no. 21 \(2018\) on Preventing Corruption](#)).

<sup>70</sup> CCJE Bureau and CCPE Bureau, [Report on Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe](#), 24 March 2016, par 20.

<sup>71</sup> UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, [Report on Vetting](#), UN doc A/70/438 (21 October 2015), par 62.

<sup>72</sup> ODIHR, [Opinion on the Law of Ukraine on the Judiciary and Status of Judges](#), 30 June 2017, par 50. See also See e.g., Venice Commission, [Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania](#), CDL-AD(2015)045, 21 December 2015, pars 98-99; and Venice Commission and CoE DHR-DGI, [Joint Opinion on the Law on the Judiciary and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine](#), CDL-AD(2015)007, pars 72-74.

occupy their positions (see par 62 *infra*).<sup>73</sup> Providing that such an exceptional process may be considered legitimate under the specific country circumstances, to protect the independence of the judiciary, any decisions on re-assessment and removal must be adopted based on clear and objective criteria, by an independent and impartial authority or a court through procedures containing all the guarantees of a fair trial and providing the judge with the right to challenge the decision and ensuing sanction before an independent and impartial body.<sup>74</sup> Indeed, as noted by the UN Special Rapporteur on the Independence of the Judiciary, “[c]leaning up without observing international standards for a fair trial or the basic principles for the independence of the judiciary may, far from strengthening the judicial system, undermine it”.<sup>75</sup>

### **3.3. Existing Mechanisms for Assessing the Integrity and Performance of the Judiciary and Legitimacy of the Re-evaluation Process**

48. In principle, in cases of lack of so-called “integrity” or professional underperformance, the starting point should always be the application of the ordinary mechanisms and procedures of judicial accountability.<sup>76</sup> Indeed, as noted by the UN Special Rapporteur on the Independence of Judges and Lawyers, the use of re-evaluation or vetting processes instead of the normally-applicable mechanisms inherently carries a risk of “*abuse and settlement of scores*” when a change of regime occurs, care should be taken “*to avoid reproducing the previous situation and to ensure that the judicial system gains in authority and credibility*”.<sup>77</sup> Accordingly, a State must demonstrate that the existing mechanisms and the judiciary in general are compromised to such an extreme scale and depth that the ordinary mechanisms of judicial accountability cannot possibly secure the independence, impartiality and integrity of judges.<sup>78</sup> A particularly high threshold must be applied in order to respect the fundamental principle of the independence of the judiciary, and the specific measures adopted must be strictly necessary and proportionate to the specific factual situation in the country concerned, and appropriately limited in time.<sup>79</sup>
49. The Informative Note provides explanations as to the necessary reform of the judiciary, referring to several international reports or documents acknowledging that the Republic of Moldova is “*a state captured by oligarchic interests*”,<sup>80</sup> noting in particular the influence over the judiciary, while emphasizing that the SCM and the SCP are “*corrupt and servile to oligarchic interests*”. Notwithstanding progress in the reform of the judiciary, a number of international and regional organizations and entities, have acknowledged the problems of integrity, corruption and political influence, particularly as it concerns the SCJ, the Constitutional Court, the SCM, and the Prosecutor General, the need to de-politicize the institutions as well as the lack of public trust in the judiciary in Moldova and high level of perceived corruption.<sup>81</sup>
50. While welcoming the willingness and efforts undertaken by public authorities to strengthen judicial independence in Moldova, ODIHR notes that the justification laid

<sup>73</sup> *ibid.* par 50 (2017 ODIHR [Opinion on the Law of Ukraine on the Judiciary and Status of Judges](#)); and par 74 (2015 Venice Commission-CoE DHR-DGI [Joint Opinion on the Judiciary of Ukraine](#)).

<sup>74</sup> *Op. cit.* footnote 9, Principles 17-20 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); *op. cit.* footnote 16, pars 59-60 (CCJE [Opinion no. 1 \(2001\)](#)); and *op. cit.* footnote 16, par 20 (UNHRC [General Comment no. 32](#)).

<sup>75</sup> UN SRIJL, [2005 Annual Report](#), UN Doc E/CN.4/2005/60 (2005), par 45.

<sup>76</sup> See e.g., International Commission of Jurists, [Judicial Accountability - A Practitioner's Guide](#) (2016), pages 83-84.

<sup>77</sup> UN SRIJL, [2005 Annual Report](#), UN Doc E/CN.4/2005/60 (2005), par 45.

<sup>78</sup> See e.g., International Commission of Jurists, [Judicial Accountability - A Practitioner's Guide](#) (2016), pages 83-84.

<sup>79</sup> See e.g., *ibid.* pages 83-84, [Judicial Accountability - A Practitioner's Guide](#) (2016).

<sup>80</sup> See e.g., European Parliament, [Resolution of 14 November 2018 on the implementation of the EU Association Agreement with Moldova](#), par 3.

<sup>81</sup> See reports and documents cited in *op. cit.* footnote 4.

down by the authorities seems to not provide sufficient explanation as to why the introduction of the *ad hoc* extraordinary mechanism in parallel to the SCM and SCP is appropriate or the only available option. Especially, the assessment presented in the Informative Note does not demonstrate why it is not possible to reform the existing accountability mechanisms for judges and prosecutors first, without establishing an *ad hoc* mechanism, and thus allow constitutional organs, albeit reformed, to remain in charge of the judicial and prosecutorial administration in compliance with Articles 123 and 125<sup>1</sup> of the Constitution. Further the reform does not seem to address some of the shortcomings that have been identified by various regional bodies,<sup>82</sup> and that were being addressed to some extent in a past proposal to amend the Constitution.<sup>83</sup>

51. The Informative Note states that “*the judiciary is incapable of cleaning itself*”, noting in particular that the people serving in the existing institutions are compromised. At the same time, apart from vetting key judicial and prosecutorial office-holders, the Draft Law does not address the issue of the alleged lack of integrity and professionalism of the members of existing judicial and prosecutorial accountability mechanisms, i.e., the SCM, the SCP and their specialized bodies, and especially the Performance Evaluation and Disciplinary Boards. This is problematic, especially as such bodies will remain in place as guarantors of judicial and prosecutorial independence and accountability even after the Evaluation Committee will cease its activities.
52. All the more, it is worth emphasizing that changes in personnel are generally insufficient to turn ineffective or “complicit” judiciaries into trustworthy arbiters and reliable guarantors of rights, if not accompanied by necessary structural changes, including means to strengthen judicial independence,<sup>84</sup> proper judicial training<sup>85</sup> and measures to promote a change of culture within the judiciary. Creating the *ad hoc* temporary mechanism as a parallel structure to circumvent existing mechanisms, which will continue to exist after the reform, is thus unlikely to lead to the anticipated results if not accompanied by greater structural reform of ordinary mechanisms and procedures of judicial and prosecutorial accountability, based on proper in-depth research and regulatory impact assessment (see par 56 *infra*).
53. The [Law no. 947 on the Superior Council of Magistracy](#) stipulates the specifics regarding the status, role and competence of the SCM, as guarantor of judicial independence and body of self-administration. It plays a key role in terms of proposing candidates for judicial appointments and for president and deputy president of courts, on the basis of the decisions of the Board for Selection and Career of Judges, as well as regarding promotion, suspension, resignation and dismissal of judges. It also examines appeals filed against the decisions of the various boards. The Draft Law aims at reforming the SCM, though in a minimal way (see Sub-Section 7 *infra*),<sup>86</sup> whereas

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<sup>82</sup> See e.g., Venice Commission, [Opinion on the law on amending and supplementing the Constitution \(Judiciary\)](#), CDL-AD(2018)003-e, pars 51-65; *Op. cit.* footnote 32, pars 40, 45-46, 48, 51, 53, 58-59, 79 and 80 (2019 GRECO Report on Moldova); and Parliamentary Assembly of the Council of Europe (PACE) Monitoring Committee, [Report on the Functioning of Democratic Institutions in the Republic of Moldova](#), 16 September 2019.

<sup>83</sup> Available at <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2018\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2018)008-e)>.

<sup>84</sup> See also UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, [Report on Guarantees of Non-Recurrence](#), UN Doc A/HRC/30/42, 7 September 2015, par 57. See also Parliamentary Assembly of the Council of Europe (PACE) Monitoring Committee, [Report on the Functioning of Democratic Institutions in the Republic of Moldova](#), 16 September 2019, par 102, where it is noted that “[c]hanging officials and staff members might be relevant if duly justified”, but also emphasizing that “[i]t is, however, all the more important to ensure that legal changes are implemented with a view to consolidating institutions and independent bodies: reversing legal systems should not be done at the detriment of due respect of predictable procedures, based on clear and objective criteria and should not lead to a ‘witch hunt’”.

<sup>85</sup> *Op. cit.* footnote 21, par 19 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>86</sup> Mainly by changing its composition through adding three new lay members, two to be appointed by the Government and one by the President (new draft Article 3 par 3<sup>1</sup> of the Law on the SCM), and changing the modalities of appointment of the three law professors appointed by the Parliament. The Draft Law also seeks to ensure a more proportionate representativeness of judges from all levels, which is much welcome and in line with international recommendations; see *op. cit.* footnote 30, par 7 (2010 ODIHR Kyiv

several regional bodies have recommended more in-depth reform of the composition and operation of the SCM.<sup>87</sup> The Informative Note refers to some alleged cases where some judicial selections and promotions of “*judges with integrity issues and unjustified assets*” were made, which may put into question the own integrity, independence and impartiality of the SCM members. It has also been reported that “*a prevalent mentality of excessive hierarchy and a culture of obedience and deference to the Supreme Council of Magistracy and the Supreme Court*” exists in Moldova, while also noting “*non-transparent decisions ,by the Superior Council of Magistracy*”.<sup>88</sup> If this is indeed the case, **the legal drafters should seek to address this issue and carry out a proper assessment to identify options for additional reform, while duly respecting the SCM members’ security of tenure and noting that this may require constitutional amendments.** There are a number of options, which could be considered, as detailed in Sub-Section 7. *infra*. If properly reformed, the SCM should probably also be conferred a greater role in the implementation of the reform.

54. The [Law no. 178 on Disciplinary Liability of Judges](#) regulates the details concerning disciplinary offences, sanctions, competencies and proceedings against judges.<sup>89</sup> The full review and analysis of the disciplinary liability legal framework goes beyond the scope of this Opinion but following the 2018 reform, the disciplinary mechanism appears, for the most part, overall in line with international standards and recommendations,<sup>90</sup> though the objectivity, efficiency and transparency of disciplinary proceedings in respect of judges remains to be checked. It is not clear from the Informative Note or other available sources whether the existing mechanism has some shortcomings or has been completely ineffective in practice to address disciplinary offences or issues pertaining to the so-called “integrity” of judges. If not the case, as mentioned in pars 50-52 *supra*, it may be a better legislative option to try to improve this mechanism or address any shortcoming that may have been identified rather than completely circumvent the existing structure.
55. The [Law no. 154 on the Selection, Performance Evaluation and Career of Judges](#) deals with the performance evaluation of judges, which is carried out by an Evaluation Board under the auspices of the SCM, and lays out the system for the appointment of board members as well as their decision-making processes and operational modalities. While the scope of this review does not entail an in-depth assessment of this Law, in a previous opinion on an earlier version of the law, ODIHR overall viewed favourably the proposed scheme, despite some shortcomings that remain, especially the possibility for the evaluation to ultimately lead to dismissal and the too frequent evaluation of

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Recommendations on Judicial Independence), which states that “[the] judge members [of the judicial council] shall [...] represent the judiciary at large, including judges from first level courts”.

<sup>87</sup> *Op. cit.* footnote 32 (2019 GRECO Report on Moldova).

<sup>88</sup> See reports and documents cited in *op. cit.* footnote 5.

<sup>89</sup> Among others, Article 4 of the Law no. 178 provides a list of 14 disciplinary offences; Articles 8 to 17 set up a Disciplinary Board with five judges elected by their peers and four selected persons of civil society as a first instance disciplinary jurisdiction, for 6 years, without the possibility of two consecutive mandates. Articles 18 to 29 govern the examination procedure of disciplinary cases before the main hearing by the Disciplinary Board. It is mainly in the hands of the so-called Judicial Inspection, i.e. five independent investigator-judges who fulfil specific professional requirements and who have been selected by the SCM through a transparent procedure. See also Venice Commission, [Amicus Curiae Brief for the Constitutional Court of Moldova on Certain Provisions of the Law on Professional Integrity Testing](#), CDL-AD(2014)039, 15 December 2014, par 22, where the Venice Commission considered that there were strong safeguards against undue or illegitimate influence by the executive branch in disciplinary proceedings against judges, though in relation with an earlier version of the legislation.

<sup>90</sup> The Venice Commission has considered, though concerning an earlier version of the legislation, that the Disciplinary Board is an “independent and impartial tribunal (established by law)” within the meaning of Article 6 of the ECHR, and that it seemed to respect key fair trial guarantees, and that “*the rules concerning the disciplinary liability of judges [...] seem[ed] to be, for the most part, in line with European and international standards, notably those on the principles of judicial independence and the separation of powers*”; see *ibid.* par 21 (2014 [Venice Commission’s Amicus Curiae Brief on Professional Integrity Testing in Moldova](#)).

judges,<sup>91</sup> which may actually limit their independence.<sup>92</sup> The Informative Note does not actually evaluate this existing mechanism to conclude that it is not operational.

56. In light of the above, the demonstration of convincing evidence of inherent shortcomings of the existing system is needed to justify why ordinary mechanisms and procedures of judicial accountability i.e., performance evaluation, disciplinary liability and in most serious cases, criminal liability, cannot be used in their ordinary form. Accordingly, **the legal drafters should carry out a proper evaluation of existing ordinary mechanisms and procedures of judicial accountability to seek to address shortcomings or structural deficiencies in existing bodies of judicial administration, since they will in any case stay in place when the Evaluation Committee ceases its activities.**
57. In order to reform the SCM, SCP and their specialized bodies, the legal drafters could consider some of the positive elements or modalities included in the Draft Law, which aim at enhancing the legitimacy of the process, though some of them may require constitutional amendment e.g.,:
- enhanced public oversight over judicial administration, by providing for greater transparency and publicity of the work of the bodies in charge of evaluation and/or disciplinary proceedings (e.g., public sessions of the said bodies, public hearings, publications of supportive documents, publications of reasoned motivations, etc.) though with due respect of the right to respect for private and family life of the judges (see pars 100 and 118 *infra*);
  - greater involvement of international experts (though only temporarily and not necessarily with voting rights - see par 72 *infra*) and/or civil society in the work of these bodies – providing that their selections are carried out according to an open, transparent and inclusive process and in conformity with the principle of equality; and
  - more diversified appointing authorities for the SCM and its specialized bodies – with the caveat that a majority or substantial number of judge members should still be appointed by their peers and that the appointment process should not be influenced by the executive and legislative branches.
58. Some additional considerations could also be contemplated in that respect, such as:
- defining in a more detailed manner the process of nominating the candidates to become members of the SCM and its specialized bodies, while ensuring that such process is open, transparent and inclusive, for instance by considering the involvement of external autonomous entities/bodies (e.g., universities, non-governmental organizations, bar associations, etc.);<sup>93</sup>
  - introducing accountability mechanisms for these bodies and proper mechanism for removal of their members in serious cases of misconduct; and

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<sup>91</sup> See ODIHR, *Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova*, 13 June 2014, pars 9 and 13-14, noting in particular that the periodic evaluation process should not lead to the dismissal of judges, while recommending to remove the quantitative indicators and that the content of the decisions of the Board should be more detailed regarding the scores and rating.

<sup>92</sup> See e.g., *op. cit.* footnote 16, par 6 (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*); and Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), par 72.

<sup>93</sup> See e.g., Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania*, CDL-AD(2016)009, 14 March 2016, pars 15-16.

- considering new provisions to ensure gender balance and greater diversity in the judiciary, including bodies of judicial self-administration.<sup>94</sup>
59. In any case, the following concerns need to be taken into account if and when considering *ad hoc* re-evaluation mechanisms:
- an *ad hoc* re-evaluation or vetting mechanism should remain an wholly exceptional, one time, strictly temporary measure not used under normal conditions,<sup>95</sup> or this would otherwise run the risk of setting a precedent where a changing political majority is tempted to proceed the same way;<sup>96</sup>
  - it should only be used if the existing ordinary mechanisms and procedures of judicial accountability have proven to be completely ineffective, inadequate and/or malfunctioning;<sup>97</sup>
  - it should be based on a proper in-depth regulatory impact assessment and strictly justified by duly demonstrated compelling reasons, in light of the specific circumstances in the country where the deficiencies in the judiciary are of such a magnitude that they require extraordinary measures and that they have paralyzed all other existing mechanisms for judicial accountability; otherwise this may impact negatively public trust in the judiciary and in the public institutions in general;<sup>98</sup>
  - there should be demonstrated broad political consensus and public support within the country about such a procedure<sup>99</sup>;
  - due consideration should always be given to the potential impact of this extraordinary process on the judiciary, and potential destabilization of its work;<sup>100</sup>
  - adequate time should be allowed to ensure objective and qualitative assessment while ensuring the openness and transparency of the process (see Sub-Sections 4.1. and 4.8. *infra*);
  - it should be accompanied by greater structural reform of ordinary mechanisms and procedures of judicial accountability (see pars 50-52 *supra*);
  - it should be carried out on an individualized case-by-case basis, analysing whether a judge was appointed unlawfully (or derived judicial power from an act of allegiance)<sup>101</sup> and/or whether s/he committed a gross violation of human rights, a serious misconduct amounting to a disciplinary offence that may lead to dismissal from office and/or a criminal offence, which should be the only reasons leading to removal; and
  - to avoid a risk of the capture of the judiciary in future by the political force which controls the process,<sup>102</sup> such a re-evaluation should always be carried out by an independent and impartial body and be subject to extremely stringent safeguards (see par 62 and Sub-Section 4 *infra*).

<sup>94</sup> See e.g., ODIHR, [Gender, Diversity and Justice: Overview and Recommendations](#) (23 May 2019).

<sup>95</sup> *Op. cit.* footnote 72, par 100 (2015 Venice Commission [Interim Opinion on the Judiciary of Albania](#)).

<sup>96</sup> UNSRIJL, [2005 Annual Report](#), UN Doc E/CN.4/2005/60 (2005), par 45.

<sup>97</sup> See e.g., International Commission of Jurists, [Judicial Accountability - A Practitioner's Guide](#) (2016), pages 83-84.

<sup>98</sup> *Op. cit.* footnote 72, par 98 (2015 Venice Commission [Interim Opinion on the Judiciary of Albania](#)).

<sup>99</sup> *ibid.* par 100 (2015 Venice Commission [Interim Opinion on the Judiciary of Albania](#)).

<sup>100</sup> *ibid.* par 98 (2015 Venice Commission [Interim Opinion on the Judiciary of Albania](#)).

<sup>101</sup> UNSRIJL, [Report on Guarantees of Judicial Independence](#), UN Doc A/HRC/11/41 (2009), par 64. See also [UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity](#) (2005), which states that “judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement”.

<sup>102</sup> *ibid.* par 98 (2015 Venice Commission [Interim Opinion on the Judiciary of Albania](#)).

### **3.4. Issue of Compliance with the Constitution**

60. While an assessment of the constitutionality of the proposed re-evaluation scheme goes beyond the scope of this Opinion, it is worth noting that the constitutionality of the Draft Law is questionable. The *ad hoc* mechanism seems to be circumventing and limiting the constitutional role of the SCM in terms of judicial appointment, transfer and removal from office (Article 123 of the Constitution). Since the SCM is bound by the Evaluation Committee's decision (Article 9 (6) of the Draft Law), this may raise issues of compatibility with the Constitution.

## **4. Re-evaluation of SCJ Judges by the Ad Hoc Mechanism**

61. Without prejudice to the legitimacy of and need for the extraordinary re-evaluation procedure, ODIHR considers it necessary to provide recommendations to limit, to the extent possible, the negative impact that such a procedure is likely to have and to ensure respect for rule of law principles during the reform process.
62. In any case, such an extraordinary and far-reaching process of re-assessment of judges, which may ultimately lead to their removal, **should be substantially revised in order to ensure that extremely stringent safeguards are in place to limit interferences with judicial independence.**<sup>103</sup> Accordingly, re-evaluation should be **conducted according to clear and objective criteria, by entities having all the characteristics of an impartial and independent tribunal.**<sup>104</sup> Also, in light of the serious consequences of the process on judges,<sup>105</sup> which may be comparable to those in disciplinary proceedings, especially if the re-evaluation is unsuccessful,<sup>106</sup> the procedure is likely to fall within the ambit of Article 14 par 1 of the ICCPR and Article 6 par 1 of the ECHR, on its civil limb.<sup>107</sup> Hence, **the re-evaluation procedure should be compliant with basic standards of procedural fairness, with the possibility to challenge the decision before an independent and impartial tribunal to review both law and procedure, while ensuring transparency and public scrutiny over the process.** Consequently, this will demand from the legal drafters to be extremely diligent when reviewing the Draft Law to ensure that all such components and stringent safeguards are in place and **to amend the Draft Law accordingly.**

<sup>103</sup> See e.g., *op cit.* footnote 72, pars 50 and 53 (2017 ODIHR *Opinion on the Law of Ukraine on the Judiciary and Status of Judges*); and par 74 (2015 Venice Commission- CoE DHR-DGI *Joint Opinion on Judiciary of Ukraine*). See also *op. cit.* footnote 16, par 29 (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*).

<sup>104</sup> See e.g., Venice Commission, *Amicus Curiae for the Constitutional Court of Albania on the Law on the Transitional Re-evaluation of Judges and Prosecutors (the Vetting Law)*, CDL-AD(2016)036, 12 December 2016, par 32.

<sup>105</sup> See e.g., ECtHR, *Ramos Nunes de Carvalho E Sá v. Portugal* [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 196, noting that when the measure may result in removal from office or suspension from duty, this constitutes "very serious penalties which carried a significant degree of stigma".

<sup>106</sup> Even in the context of performance evaluation, which in principle should trigger less serious consequences as stated in par ... of this Opinion, the CCJE emphasizes that "it is important that procedural safeguards are in place for judges participating in the evaluation procedure", see *op. cit.* footnote 16, par 44 (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*).

<sup>107</sup> Of note, the pending cases before the ECtHR concerning the vetting process in Albania, e.g., *Xhoxhaj vs. Albania* (Application no. 15227/19, communicated on 18 June 2019). See also e.g., *op. cit.* footnote 72, par 110 (2015 Venice Commission *Interim Opinion on the Judiciary of Albania*), where the Venice Commission expressly stated that "[a]pplicability of the 'civil' limb of Article 6 to the vetting process is also open to doubt but is probable". Regarding disciplinary proceedings against judges, see *op. cit.* footnote 11, par 20 (UNHRC *General Comment no. 32*); Report of the UN SRJL, par 61; Recommendation CM/Rec (2010)12, par 69; and UN HRC, *Casanovas v. France*, Communication no. 441/1990, UN Doc CCPR/C/51/D/441/1990 (1994), par 5.2; and *Perterer v. Austria*, Communication no. 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), par 9.2. See also *op. cit.* footnote 9, Principle 17 (1985 *UN Basic Principles on the Independence of the Judiciary*), which states that "[t]he judge shall have the right to a fair hearing". The ECtHR has also considered that Article 6 par 1 of the ECHR, on its civil limb, was applicable to disciplinary proceedings against judges, see e.g., *Oleksandr Volkov v. Ukraine* (Application No. 21722/11, judgment of 25 May 2013), pars 91 and 95.

#### **4.1. Time-line**

63. The Evaluation Committee shall begin its activities no later than 15 days from the entry into force of the Draft Law (Article VII of the Final and Transitory Provisions). This timeline is extremely tight and even unrealistic for selecting the members of such a body, let alone through an open, inclusive and transparent process that will secure the trust of the public (see Sub-Sections 4.2 and 4.10). Moreover, it is worrying that the evaluation of the SCJ judges will be carried out according to a very hasty timeframe, since on 1 December 2019, the SCM is supposed to have completed the evaluation process and to transfer 16 SCJ judges to lower courts (Article I (3) of the Final and Transitory Provisions). New (re-evaluated) SCJ judges shall start their activity on 1 January 2020 (Article I (4) of the Final and Transitory Provisions).
64. At the international and regional levels, it is recommended that adequate time be provided for the assessment of judicial candidates or for the performance evaluation of sitting judges.<sup>108</sup> The short time periods for the re-evaluation of 33 SCJ judges runs the risk of rushed evaluation that is not conducive to a fair and professional interview of the re-evaluated judges and to an objective and qualitative assessment of the competences and qualities of such judges.<sup>109</sup> While appreciating the urgency of reforms in the given context, this cannot justify inherently deficient procedures, which may risk having long-term negative impact, as the SCJ judges are appointed for life.<sup>110</sup> Further, such a short timeframe may not enable a transparent appointment process (see Sub-Section 4.1 *infra*), which will not contribute to ensuring public trust in the procedure. **The drafters should reconsider the contemplated timeline.**

#### **4.2. Composition of the Evaluation Committee, Appointment Modalities and Status of Committee Members**

65. Pursuant to Article 3 (2) of the Draft Law, the Evaluation Committee will be composed of a total of 20 members, including two appointed by the Parliament, two by the President, two by the Government, two by the SCM, two by the Superior Council of Prosecutors, four by the National Platform of Moldova of the Eastern Partnership Civil Society Forum and six (international experts who have at least 10 years of experience in the field of laws – preferably in the field of the judiciary and the prosecutor's office) by the Minister of Justice. At least six members of the Evaluation Committee must be former judges who have worked for at least 10 years or who are judges (at least one appointee by the Parliament, President, Government and Superior Council of Magistracy and two appointees of the National Platform). Otherwise, the committee members must have an “*irreproachable reputation and have at least 10 years of experience in their field of activity*”.
66. In principle, if considered necessary, at a minimum, the re-evaluation process needs to be conducted by a competent body,<sup>111</sup> having the characteristics of an independent and

<sup>108</sup> See e.g., *op. cit.* footnote 16, par 36 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)), which states that “[e]valuators should have sufficient time and resources to permit a comprehensive assessment of every judge's individual skills and performance”; and Principles 9-11 of the [Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges](#) (February 2016), which are the outcome of an international research project led by Professor Hugh Corder of the University of Cape Town, carried out in collaboration with the Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative Law.

<sup>109</sup> See e.g., ODIHR, [Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia](#), 17 April 2019, pars 69-70.

<sup>110</sup> *ibid.* par 70 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)).

<sup>111</sup> See e.g., *op. cit.* footnote 16, par 28 (CCJE [Opinion no. 21 \(2018\) on Preventing Corruption](#)); and *op. cit.* footnote 104, par 8 (2016 Venice Commission's [Amicus Curiae for the Constitutional Court of Albania on the Vetting Law](#)).

impartial tribunal.<sup>112</sup> Indeed, if the process were conducted or unduly influenced by the executive or legislative branches, the entire reform may be severely compromised.<sup>113</sup> In that respect, to determine whether a body can be considered “independent” according to Article 6 par 1 of the ECHR, the ECtHR generally considers various elements, *inter alia*, the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.<sup>114</sup> In that respect, it is welcome that the Draft Law contains a number of safeguards seeking to ensure the independence and impartiality of the Evaluation Committee members, such as concerning their ineligibility,<sup>115</sup> high remuneration for sitting as a committee member (though the modalities of remuneration of international experts should be clarified)<sup>116</sup> and protection against external interference, influence or potential threats.<sup>117</sup> The Draft Law also provides that committee members should provide declaration of assets and personal interests (Article 3 par 7), which has proven to be a useful tool to prevent corruption, detect illicit enrichment and conflicts of interests.

67. At the same time, the Draft Law is completely silent as to the manner of appointment of the Evaluation Committee members by each appointing authority, whereas this is a key element that should be considered to determine whether the committee is indeed independent. If such an *ad hoc* mechanism is set up, **the procedure and modalities of appointment by each appointing authority should be further detailed, while ensuring that the appointment process is open, inclusive and transparent.**
68. The overall composition seems to establish a certain balance between the members appointed by the executive and legislative branches, the SCM, the SCP, civil society and international legal experts. It is also welcome that Article 3 (4) prevents members of political party and public office holders to sit as members of the Evaluation Committee. However, these elements are not necessarily a guarantee of independence and impartiality of the Evaluation Committee. Indeed, all in all, ten members will be appointed by the executive (two by the President, two by the Government and six by the Minister of Justice), and two members appointed by the legislative branch. As noted in pars 45 and 66 *supra*, re-evaluation of judges by members of the legislative or executive branches of the state, or under their decisive influence, is especially problematic and may lead to potential political interference in the re-evaluation process, thus risking to undermine judicial independence as well as credibility of the reform. The involvement of the prosecution in that process is similarly problematic. To avoid any risk of politicization or bias in the re-evaluation and eventual new appointments and ensure the independence of the Evaluation Committee, it is necessary **to limit the role and influence of the political branches as appointing authorities.**<sup>118</sup>
69. At least six out of 20 members of the Evaluation Committee are required to be former judges or former constitutional judges. According to international standards, in order to

<sup>112</sup> See e.g., *ibid.* par 32 (2016 Venice Commission's [Amicus Curiae for the Constitutional Court of Albania on the Vetting Law](#)).

<sup>113</sup> See e.g., *ibid.* par 28 (2016 Venice Commission's [Amicus Curiae for the Constitutional Court of Albania on the Vetting Law](#)).

<sup>114</sup> See European Court of Human Rights (ECtHR), [Campbell and Fell v. the United Kingdom](#) (Application no. 7819/77, 7878/77, judgment of 28 June 1984), par 78. See also [Olujic v. Croatia](#) (Application no. 22330/05, judgment of 5 May 2009), par 38; and [Oleksandr Volkov v. Ukraine](#) (Application no. 21722/11, judgment of 25 May 2013), par 103.

<sup>115</sup> See Article 3 par 4 of the Draft Law according to which “a) members of a political party in the last three years, b) holders of public office, public office with special status, public dignitaries or persons employed in the office of public dignitaries, c) persons whose spouse, parents, children or children's spouses are judges or prosecutors cannot be appointed as members of the evaluation committee”.

<sup>116</sup> See Article 3 par 12 of the Draft Law (salary of a SCJ judge with 16 years of seniority).

<sup>117</sup> See Article 3 par 6 which states that “any interference with the work and decision-making process of the Evaluation Committee shall be prohibited”, par 7 which states that committee members are obliged to report “any attempt to influence him/her” and par 14 which provides that “State protection is granted to members of the Committee at the request of the Committee or the college”.

<sup>118</sup> For instance, by providing that they should only select candidates from non-political sphere or recommended by an *ad hoc* professional a-political committee.

safeguard judicial independence, every decision affecting the selection, recruitment, appointment, evaluation or termination of office of judges should be undertaken by an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers, to prevent outside, possibly undue influence.<sup>119</sup> Regarding evaluation specifically, this also ensures that the evaluators can draw on sufficient knowledge and experience to understand the ins and outs of the judicial profession.<sup>120</sup> Beyond this six judge members, the Draft Law does not provide specific requirements as to the professional experience of other members, except for the international experts who need to account for at least 10 years of *legal* experience, though not necessarily in the judiciary.

70. Also, it is worth emphasizing that when assessing the independence of a judicial council, the ECtHR has considered it a structural deficiency not compatible with the principle of independence, where the great majority of the council members were appointed by the executive and legislative branches, irrespective of the fact that more than half of the council members were from the judiciary.<sup>121</sup> In light of the foregoing, **it is recommended to increase the minimum required number of members with relevant experience as judges within the Evaluation Committee, so that it represents a substantial or a majority of the members.**
71. The Minister of Justice appoints six international experts, based on proposals from international organizations and development partners of the Republic of Moldova involved in the justice sector reform. At the same time, this may not necessarily prevent arbitrary selection in light of the tight timeframe, the lack of details concerning the nomination procedures and appointment criteria, may prevent a transparent and duly publicized selection process, which is also not conducive to enhanced public confidence in the system. **The Draft Law should be clarified in that respect.**
72. Although it may appear unusual to involve international experts in such processes, this may however be a viable alternative to address systemic corruption, as shown for instance in Ukraine for the assessment of integrity, knowledge and practical skills of judicial candidates for the High Anti-Corruption Court. Thus, it may in specific circumstances be considered, providing that such a measure enjoys public support, there is a clear undertaking of international partners to contribute to the process, the selection of international experts is itself transparent and based on clear and objective criteria, and that such a scheme is temporary and ultimately replaced with normal mechanism.<sup>122</sup>
73. In addition, the Draft Law refers to “*irreproachable reputation*” and 10 years of professional experience in their field of activity, which is rather vague, especially since it does not specify **what “fields of activity” are relevant** to be eligible as members of the Evaluation Committee. This is all the more worrying since the highest level of professionalism should be required as they will be evaluating the presumably most

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<sup>119</sup> See *op. cit.* footnote 22, par 1.3. (1998 [European Charter](#)), which states that “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”. See also *op. cit.* footnote 21, par 30 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 16, pars 37 and 49 (8) (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)). See also e.g., as relates the composition of judicial councils, par 50 (2010 Venice Commission's Report on the Independence of the Judicial System), which both state that “[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself”; *op. cit.* footnote 15, par 27 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)) which states that “[n]ot less than half the members of such councils should be judges chosen by their peers”; *op. cit.* footnote 16, pars 17-18 and 25 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)), where it is stated that “[w]hen there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers”.

<sup>120</sup> *ibid.* par 38 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>121</sup> *Op. cit.* footnote 114, pars 112 and 117, particularly par 112 ([Oleksandr Volkov v. Ukraine](#), ECtHR judgment of 9 January 2013).

<sup>122</sup> See e.g., *op. cit.* footnote 72, par 131 (2015 Venice Commission [Interim Opinion on the Judiciary of Albania](#)).

experienced judges of the country. It is also not clear whether anyone could challenge the nomination if the eligibility requirements are not fulfilled. **The Draft Law needs to be supplemented in that respect.**

74. Furthermore, the Draft Law is silent as to the gender-balanced composition of the Evaluation Committee. This is not in line with international recommendations, which urge to seek gender-balanced representation in all appointments made by public authorities to public committees and other public functions.<sup>123</sup> Accordingly, the legal drafters **should consider introducing mechanism(s) to ensure greater gender balance within the Evaluation Committee.**<sup>124</sup>
75. Also, the international standards and recommendations applicable for judicial councils should be at a minimum complied with by the Evaluation Committee, in light of its key role in terms of judicial evaluation and appointment. In principle, judicial councils should ensure that no conflicts of interest arises in the council in carrying out its various tasks,<sup>125</sup> and the same principles should apply with regards to the Evaluation Committee.<sup>126</sup> Article 3 (4) refers to the **ineligibility** of persons whose spouse, parents, children or children's spouses are judges or prosecutors, which is welcome, though **this should probably be expanded to also include siblings and other connected persons (family members - to be defined, partners, dependents).** Moreover, other situations of potential conflicts of interest may arise, e.g., former colleagues (for instance, in the last five years) or close personal relations. **This should be included as grounds for recusal,** thus obliging committee members to recuse themselves in such situations as well as providing the evaluated judge with the right to ask for the replacement of any evaluator who might objectively be perceived as biased.<sup>127</sup>
76. Another essential characteristic that should be included in the Draft Law and would constitute an essential corollary of the independence of the Evaluation Committee members is **to provide them with functional immunity for acts performed in the exercise of their functions,** so that their independence is not being compromised through fear of the initiation of prosecution or civil action, including by state authorities.<sup>128</sup> It is also not clear whether the members **will work for the Evaluation Committee on a full-time basis or continue their normal work and whether they are allowed to receive remuneration from other employers,** which in the latter case

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<sup>123</sup> According to Council of Europe's Recommendation Rec (2003)3, the Member States should provide for gender-balanced representation in all appointments made by a minister or government to public committees and in posts or functions whose holders are nominated by government and other public authorities; see pars 9-10 of the Appendix to the [Recommendation Rec \(2003\)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making](#), adopted on 30 April 2002. Furthermore, in its Resolution 66/130, the UN General Assembly encourages States "to appoint women to posts within all levels of their Governments, including, where applicable, bodies responsible for designing constitutional, electoral, political or institutional reforms"; see par 8 of the [General Assembly Resolution 66/130](#) *General Assembly Resolution 66/130*, adopted on 19 March 2012.

<sup>124</sup> Meaning that the representation of either women or men in any decision-making body in political or public life should not fall below 40%; see Preamble of the [Appendix to Recommendation Rec \(2003\)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making](#), 12 March 2003. For instance, this could consist of requiring that appointees designated by each appointing body should be balanced in terms of gender (see the example in Denmark, where public bodies or organizations are required to propose equal numbers of men and women when nominating committee members, see [Appendix IV to the Explanatory Memorandum on CoE Recommendation CM/Rec\(2003\)3 on Balanced Participation of Women and Men in Political and Public Decision-making](#)). As to the six appointees by the Minister of Justice, the international organizations and development partners could be required to propose two candidates to each position, one woman and one man, and the Minister of Justice should be required to take due account of the objective of ensuring a fair representation of women and men in the Evaluation Committee overall when selecting the international experts.

<sup>125</sup> *Op. cit.* footnote 16, recommendation D(a) (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>126</sup> See e.g., *op. cit.* footnote 104, par 31 (2016 Venice Commission's [Amicus Curiae for the Constitutional Court of Albania on the Vetting Law](#)).

<sup>127</sup> See e.g., in the context of evaluation, *op. cit.* footnote 16, par 36 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>128</sup> See ODIHR-Venice Commission, [Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic](#), 16 June 2014, par 37. See ECtHR, [Ernst v. Belgium](#) (Application no. 33400/96, judgment of 15 October 2003), par 85, holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued.

would inevitably involve potential material, hierarchical and administrative dependence on their primary employers.<sup>129</sup> **The financial independence of this body, with a dedicated budget not depending on other bodies, is also not addressed. These issues should be covered in the Draft Law.**

77. Article 3 (9) of the Draft Law specifies circumstances when members may be revoked by the Evaluation Committee i.e., “*if [their] actions or behaviour seriously disrupt the activity of the Committee, or seriously affect the reputation of the Committee*”. Such **grounds for removal are relatively vague, as is the removal procedure, especially regarding how the initiative to revoke can be triggered, which could be more precisely defined.** Article 3 (10) provides two grounds for replacement of an EC member i.e., resignation and unjustified absence from two consecutive meetings of the EC. It is not clear what an “**unjustified absence**” is and this **should be clarified.** The Draft Law should also provide for the possibility of replacing a member also on any other ground of *impossibility* to serve as EC member, such as illness, based on a decision of the Evaluation Committee and **should be supplemented in that respect**
78. Finally, it is worth noting that according to Article 3 (13) of the Draft Law, the secretariat of the Evaluation Committee is provided by the Ministry of Justice, which may imply that this body is somewhat overseen by or under the influence of the executive branch. It is therefore recommended **to allocate the secretariat functions to another entity, one that is independent of executive and legislative branches, for instance the SCM.** Moreover, the Draft Law is very vague regarding the **organization and functioning of the secretariat and should be clarified in that respect, including by clarifying the composition and management structure, required expertise and selection criteria for secretariat staff, status and remuneration of its staff, sufficient budget etc.**

### **4.3. Criteria and Scope of the Assessment**

79. Article 2 (2) of the Draft Law lists three broad elements that should be evaluated i.e., the integrity and lifestyle, professional activity during the last 10 years and the personal qualities relevant to the position of judge. The same elements are also used for filling vacancies for SCJ judges' positions, if any (see Article 11 (3) of the Draft Law and Sub-Section 6. *infra*).
80. According to international standards, for the selection of judges and ordinary performance evaluations,<sup>130</sup> the evaluation should be based on objective and clearly defined criteria pre-established by law, to avoid possibility for arbitrary application. The wording of the Draft Law in that respect is unclear, broad and vague. It is understood that more detailed guidance regarding criteria, indicators, and scores have been developed by SCM specialized bodies for the purpose of performance evaluation and disciplining judges. The legal drafters should consider using the same criteria for the purpose of re-evaluation. If not the case, **at least the basis and main elements for each criterion (e.g. assets, political contacts, etc.), as well as the standards of information collection (process, evidence, admissibility etc.), should be set out clearly and exhaustively in the Draft Law itself to ensure transparency and reduce**

<sup>129</sup> *Op. cit.* footnote 114, par 113 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013).

<sup>130</sup> See e.g., *op. cit.* footnote 11, par 19 (2007 UN HRC *General Comment no. 32*); *op. cit.* footnote 15, par 44 (2010 CoE *Recommendation CM/Rec(2010)12*); *op. cit.* footnote 21, par 21 (2010 ODIHR *Kyiv Recommendations*); *op. cit.* footnote 22, Articles 4-1 and 5-1 (1999 *Universal Charter of the Judge*); *op. cit.* footnote 22, pars 2.1. and 2.2. (1998 *European Charter*); *op. cit.* footnote 17, par 27 (2010 Venice Commission's Report on the Independence of the Judicial System); *op. cit.* footnote 16, pars 50-51 (CCJE *Opinion no. 10 (2007) on Judicial Councils*); and par 9 (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*).

possibilities for abuse and arbitrariness.<sup>131</sup> It is also generally recommended to specify what weight/score is to be given to the different elements for the evaluation.<sup>132</sup>

81. “Integrity” is a quite general term, which is not defined in the Draft Law and is in any case difficult to assess in practice.<sup>133</sup> While certain international documents do refer to “integrity” as being essential to the proper discharge of the judicial office, they also warn against the use of “integrity” as a normative concept, emphasizing that its meaning depends on the context and that it is rather recommended to assess whether a specific conduct is likely to diminish respect in the minds of the public.<sup>134</sup> In any case, within the context of an evaluation, the term “integrity” should not be equated with compliance with ethical rules, which given their nature and the fact they are often drafted in general and vague terms, should not be directly applied as a ground for evaluating or disciplining judges, all the more if this may ultimately result in removal from office.<sup>135</sup> It is also unclear why the National Integrity Authority (NIA) will not play a role regarding such assessment based on the statements of assets and personal interests, in accordance with the applicable legal framework. **The legal drafters should clarify the scope and meaning of the term “integrity”.**
82. The reference to “lifestyle”, beyond being unclear and potentially offering a ground for discriminatory treatment, may be too personal (private) and does not necessarily provide a criterion relevant for assessing the role of a judge. Indeed, this may amount to a violation of the right to respect for private life protected by Article 8 of the ECHR as acknowledged in the ECtHR case law when state measures concerned not only professional performance but also *unrelated* aspects of private life.<sup>136</sup> While certain personal conducts of judges may have an impact on the reputation of the judiciary, the legal framework must be clear in terms of the consequences of unacceptable private actions, and provide adequate safeguards to protect the judge against arbitrariness.<sup>137</sup> Moreover, if this relates to issues of assets and other expenditures, then this may already be covered by the general duty to report assets. **Consequently, the “lifestyle” criterion should be removed from the Draft Law or, alternatively, more clearly defined, by specifying the types of undesirable conduct impacting the reputation of the judiciary, which may lead to negative evaluation. In addition, the term “personal qualities” is also not clearly defined and should be specified.**
83. It is important to emphasize that during the assessment of professional activity of the judge, as in the context of an evaluation or disciplinary proceedings, the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to a negative assessment,<sup>138</sup> except eventually in

<sup>131</sup> *ibid.* pars 30 and 49 (5) (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*). For instance, the Albanian “Vetting” Law (Chapters IV-VI) presents each criterion of vetting with great precision and provides for detail as regards the specific aspects and procedure/method of collection of data etc.

<sup>132</sup> See e.g., *op. cit.* footnote 109, par 42 (2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*); and Venice Commission, *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia*, CDL-AD(2009)023, par 22.

<sup>133</sup> See e.g., *op. cit.* footnote 72 par 52 (2017 ODIHR *Opinion on the Law of Ukraine on the Judiciary and Status of Judges*).

<sup>134</sup> See e.g., UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), pars 101-102.

<sup>135</sup> *Op. cit.* footnote 16, pars 44 and 46-48 (CCJE *Opinion no. 3 (2002)*). See also ODIHR-Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, pars 25-28.

<sup>136</sup> See e.g., ECtHR, *Denisov v. Ukraine* [GC] (Application no. 76639/11, judgment of 25 September 2018), pars 103-105.

<sup>137</sup> See e.g., ECtHR, *Özpinar v. Turkey* (Application no. 20999/04, judgment of 19 October 2010), pars 76-78.

<sup>138</sup> See e.g., *op. cit.* footnote 104, par 35 (2016 Venice Commission’s *Amicus Curiae for the Constitutional Court of Albania on the Vetting Law*). See also *op. cit.* footnote 21, par 25 (2010 ODIHR *Kyiv Recommendations*), which states that “[d]isciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into

cases of malice and gross negligence or when there is clear and consistent pattern of erroneous judgements that indicates clear lack of professionalism.<sup>139</sup> This also means that judges should not be removed from office for reasons not rising to this standard, for example because of alleged mistakes in applying the law or because their decisions have been considered to amount to a violation of international law, or if applicable, have been overturned on appeal or review by a higher judicial body.<sup>140</sup> This is key also in light of the existing risk that judges may be subjected to criminal investigation for alleged “unlawful judicial acts”, which jeopardizes judicial independence.<sup>141</sup> **The drafters should consider specifying that aspects related to the content of a judicial decision shall never fall within the purview of the re-evaluation, except in cases of malice and gross negligence or when there is clear and consistent pattern of erroneous judgements that indicate lack of proficiency.**

84. Finally, **the re-evaluation should be carried out without discrimination on any ground, in line with the principle of equality, international anti-discrimination standards<sup>142</sup> and applicable domestic law.**

#### **4.4. Powers of the Evaluation Committee**

85. Article 5 (1) of the Draft Law provides that the Evaluation Committee may “*take any measures to obtain information*” and “*any public authority is obliged to make available to the Evaluation Committee any information requested*”. Article 5 (4) of the Draft Law further states that “[i]t is the burden on the person assessed to submit information that will remove the Committee’s suspicions about the integrity and lifestyle”. Such wide powers of the Evaluation Committee appears problematic on several fronts.
86. First, the fact that the Evaluation Committee may take any measures to obtain information or may request any public authority to provide information about judges may be excessive, even if Article 5 (5) specifies that “*anonymous or state secrecy information is not considered*”. In its [Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), ODIHR noted, regarding the wide-ranging powers of the Evaluation Board to request any “*public authorities [and] legal persons under public or private law*”, that evaluation should not result in wide-ranging investigations into judges, which arguably goes beyond the actual roles of such board.<sup>143</sup> It is therefore recommended **to include in the Draft Law a limited and specified number of documents and information, which are strictly relevant to the re-evaluation process, which may be requested from certain public authorities**, for instance the criminal records, decisions on disciplinary liability of evaluated judges,

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*disrepute. Disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts.”*

<sup>139</sup> See *op. cit.* footnote 15, par 66 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); and e.g., *op. cit.* footnote 104, par 35 (2016 Venice Commission’s [Amicus Curiae for the Constitutional Court of Albania on the Vetting Law](#)).

<sup>140</sup> See e.g., ODIHR, [Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), 13 June 2014, par 25. See also [2009 Report of the UN SRIJL/2009 Report of the UN SRIJL](#), A/HRC/11/41, 24 March 2009, par 58; UN Human Rights Committee, [CCPR/CO/75/VNM/CCPR/CO/75/VNM](#), par 10; [CCPR/CO/71/UZB](#), par 14; and *op. cit.* footnote 21, par 25 (2010 ODIHR [Kyiv Recommendations](#));

<sup>141</sup> See e.g., European Commission, [Association Implementation Report on Moldova](#), 12 September 2019, page 7. See e.g., *op. cit.* footnote 135, pars 44-47 and references contained therein (2014 ODIHR-Venice Commission Joint Opinion on Disciplinary Responsibility of Judges in the Kyrgyz Republic).

<sup>142</sup> See Article 26 of the ICCPR, Article 14 of the ECHR and Protocol No. 12 to the ECHR (ETS No. 177), which was signed by the Republic of Moldova on 4 November 2000, though not yet ratified. See also e.g., *op. cit.* footnote 108, Principle 3 (2016 [Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges](#)); and *op. cit.* footnote 9, Principle 10 (1985 [UN Basic Principles on the Independence of the Judiciary](#)).

<sup>143</sup> ODIHR, [Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), 13 June 2014, par 38.

information on assets and financial situation<sup>144</sup> (see also pars 87-88 *infra* regarding the admissibility and evaluation of evidence).

87. Under draft Article 5, the Evaluation Committee is granted access to any information deemed necessary for the fulfilment of its task, without any limitation. This appears excessive, especially as this could involve collecting information concerning a judge's lifestyle, which may be very intimate. Especially, the Draft Law also does not **exclude the gathering of information concerning the health status of judges**, which should be protected by the right to respect for private life under Article 8 of the ECHR. Such aspects should be excluded from the scope of review. Moreover, it is not clear whether the Evaluation Committee may also request any information concerning family members of the evaluated judge. In any case, this should be strictly circumscribed by specifying the degree of relationship with the judge/prosecutor and limiting it to information on assets of spouses, dependent family members and, as appropriate, other close relatives, also noting that such information should not necessarily be made public.<sup>145</sup>
88. The Draft Law is silent as to the admissibility of evidence and as to the criteria for evaluating its probative value, and not so clear regarding the standard of proof (see pars 89-90 *infra*).<sup>146</sup> In principle, the sources of evidence on which evaluations are based must be sufficient and reliable, particularly if the evidence is to form the basis of an unfavourable evaluation.<sup>147</sup> In this context, relevant international bodies have cautioned against taking public views on a judge into account when evaluating him/her.<sup>148</sup> It is thus important to introduce mechanisms in the Draft Law that would ensure that **all information received through public means, can be verified and evaluated**.<sup>149</sup> Moreover, it is not stated in the Draft Law that **evidence obtained by unlawful means should be considered inadmissible as they are in civil, administrative or penal procedure**.<sup>150</sup>
89. In case of suspicions about integrity and lifestyle, the burden falls on the person assessed to submit information that will remove the Committee's suspicions (Article 5 (4) of the Draft Law). It is not clear how the evaluated judge may rebut the presumption and as such may be considered a disproportionate measure, potentially giving rise to violations of due process guarantees protected by Article 6 of the ECHR and Article 14 of the ICCPR.<sup>151</sup> In principle, in order not to create a substantial imbalance, **the burden of proving the case to the required evidentiary standard should remain with the Evaluation Committee, except in situations where the evaluated judge owns**

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<sup>144</sup> As a comparison, in the context of recruitment, the ODIHR Kyiv Recommendations stress that, while the selecting body can request a standard check for a criminal record and any other disqualifying grounds from the police, "[n]o other background checks should be performed by any security services" and the checks undertaken must be handled with utmost care (see *op. cit.* footnote 21, par 22 (2010 ODIHR *Kyiv Recommendations*)); similarly, the CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation (*op. cit.* footnote 16, par 26 (CCJE *Opinion no. 21 (2018) on Preventing Corruption*)).

<sup>145</sup> See Leonardo S. Borlini, *Report on GRECO's Findings and Recommendations* (20 March 2019), page 16.

<sup>146</sup> See e.g., though in the context of disciplinary proceedings, ODIHR-Venice Commission, *Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic*, 16 June 2014, par 93.

<sup>147</sup> See e.g., *op. cit.* footnote 16, par 49 (9) (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*).

<sup>148</sup> See e.g., *op. cit.* footnote 72 par 69 (2017 ODIHR *Opinion on the Law of Ukraine on the Judiciary and Status of Judges*). See also *ibid.* par 48 (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*). See also Venice Commission and CoE DHR-DGI, *Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine*, CDL-AD(2010)026-e, par 60.

<sup>149</sup> *ibid.* par 69 (2017 ODIHR *Opinion on the Law of Ukraine on the Judiciary and Status of Judges*). See also par 3.5 of CoE, *Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine*, April 2017.

<sup>150</sup> See e.g., though in the context of disciplinary proceedings, ODIHR-Venice Commission, *Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic*, 16 June 2014, par 93.

<sup>151</sup> See e.g., Venice Commission, *Opinion on Draft Constitutional Amendments enabling the Vetting of Politicians in Albania* (17 December 2018), pars 75-76, where the Venice Commission considered, in the context of vetting of politicians, that given the lack of clarity of the provision, it would be difficult to rebut the presumption, which may thus be considered a disproportionate measure, potentially giving rise to violations of due process guarantees protected by Article 6 of the ECHR and Article 14 of the ICCPR.

**properties or assets manifestly disproportionate to his/her means, which would justify requiring the said judge to justify the sources of income and property.**

90. Article 7 (6) of the Draft Law refers to the mere raising of doubts concerning a judge's integrity or lifestyle. There should be objective and convincing reasons for negative assessment of judicial integrity. **The mere existence of doubts concerning a judge's integrity should neither lead to a negative assessment by the Evaluation Board, nor to further actions, and such wording should be removed from the Draft Law.**
91. While Article 5 (7) provides that the committee members shall sign a commitment to protect personal data to which they will have access during the evaluation process, which is welcome, this falls short of imposing **a clear non-disclosure requirement, including for the relevant administrative staff of the Evaluation body, subject to sanctions in case of violation. The Draft Law should be supplemented accordingly.**

#### **4.5. Basic Standards of Procedural Fairness**

92. The procedure is overall comparable with disciplinary proceedings,<sup>152</sup> and therefore is likely to fall within the ambit of Article 14 par 1 of the ICCPR and Article 6 par 1 of the ECHR, on its civil limb.<sup>153</sup> As such, the procedure should be compliant with basic standards of procedural fairness, irrespective of the status of the Evaluation Committee or SCM as a "tribunal" or not. Accordingly, the following aspects should be duly considered.

##### **4.5.1. Procedural Fairness**

93. Article 6 (1) of the Draft Law states that the judge shall be given "*sufficient time to prepare his/her position*" but unless the timeline is specified, this may not be an effective safeguard, especially if a big amount of information and documents have been collected by the Evaluation Committee. The principle of equality of arms calls for a "fair balance" between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.<sup>154</sup> **It is therefore recommended to specify a minimum time-limit, while ensuring that it is reasonable to prepare and allowing the evaluated judge to request additional time if and as needed.**
94. Article 6 of the Draft Law does not provide any procedure of official notification about the interview and should be supplemented by requiring that **the judge be notified by registered mail or any other ascertainable means, about the date, time and place of the interview.**
95. Similar to the case of disciplinary proceedings, the principle of fair hearing should imply the entitlement for the judge subject to the disciplinary proceedings to be present or represented during the hearing before the Evaluation Board.<sup>155</sup> **The Draft Law should therefore not be interpreted as excluding the possibility for the evaluated judge to get legal representation during the interview, especially if the assessment**

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<sup>152</sup> Even in the context of performance evaluation, which in principle should trigger less serious consequences, the CCJE emphasizes that "*it is important that procedural safeguards are in place for judges participating in the evaluation procedure*", see *op. cit.* footnote 16, par 44 (CCJE *Opinion no. 17 (2014) on Judges' Evaluation*).

<sup>153</sup> See the references cited in *op. cit.* footnote 120.

<sup>154</sup> See for reference ECtHR, *Werner v. Austria* (Application no. 21835/93, judgment of 24 November 1997), par 63.

<sup>155</sup> See par 7.4 of *Aarela and Nakkalajarvi v. Finland*, Human Rights Committee Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001). See also footnote 22, par 5.1. (1998 *European Charter*), which states: "*the judge proceeded against must be entitled to representation*".

of integrity may potentially lead to criminal proceedings being initiated as a second stage.

#### 4.5.2. Public Hearing

96. It is positive that Article 6 (1) of the Draft Law states that the “*college session is public*”. At the same time, there may be specific circumstances that may be invoked by a judge to request a closed session, though this should be duly justified by exceptional circumstances<sup>156</sup> and an independent and impartial body should decide whether the request for a closed hearing is justified.<sup>157</sup> Such decision should be taken on a case-by-case basis with a factual assessment of the circumstances, and due consideration of the right of the judge to the protection of his or her honour, privacy and reputation as guaranteed under Article 17 of the ICCPR and Article 8 of the ECHR. **The legal drafters should provide for such an exception in strictly limited circumstances.** Moreover, in order to effectively ensure the publicity of hearings, the **Evaluation Committee must make information available to the public regarding the time and venue of such oral hearings<sup>158</sup> and the location must be easily accessible to the public.**
97. The Draft Law lacks provisions ensuring that **a record of the hearing is being produced and providing for access of evaluated judges to these records after the interview, given that this is an essential element to exercise the right to effective appeal against a negative evaluation and should be supplemented in that respect.**

#### 4.5.3. Challenging the Results of the Re-evaluation

98. Unless the Evaluation Committee can be turned into an independent tribunal, judicial review before a tribunal should be provided. Indeed, the possibility to challenge the results of the re-evaluation constitutes an important safeguard to guarantee the independence of judges and prosecutors subjected to this vetting process (see Sub-Section 4.7. *infra*).<sup>159</sup>

#### 4.5.4. Publicity of the Results of the Re-evaluation

99. Article 7 (5) of the Draft Law provides that the full evaluation report and result of the evaluation shall be published on the website of the Ministry of Justice. When determining to which extent the different phases of the re-evaluation process should be public, the drafters should balance the need to protect the independence of the judiciary and the necessity to ensure public trust in the process.<sup>160</sup> In particular, when it comes to **the detailed evaluation assessments, results or scores of individual judges should be treated confidentially and as a rule not be published,**<sup>161</sup> unless it is requested by an individual who underwent evaluation. This is distinct from the issue of publication of final decisions on disciplinary measures, which should be made available to the public.<sup>162</sup> Indeed, publishing such individual results and personal information could

<sup>156</sup> See *op. cit.* footnote 11, pars 28-29 (2007 UN HRC [General Comment no. 32](#)).

<sup>157</sup> See, though in the context of disciplinary proceedings, *op. cit.* footnote 21, par 26 (2010 ODIHR [Kyiv Recommendations](#)). See also ECtHR, [Diennet v. France](#) (Application no. 18160/91, judgment of 26 September 1995).

<sup>158</sup> See par 6.2 of [Van Meurs v. the Netherlands](#), Human Rights Committee Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990).

<sup>159</sup> See, though regarding disciplinary proceedings, *op. cit.* footnote 9, Principle 20 (1985 [UN Basic Principles on the Independence of the Judiciary](#)) according to which decisions in disciplinary matters should be subject to independent review.

<sup>160</sup> *Op. cit.* footnote 109, par 55 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)).

<sup>161</sup> See e.g., *ibid.* par 56 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)). See also *op. cit.* footnote 16, par 48 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>162</sup> *Op. cit.* footnote 21, par 26 (2010 ODIHR [Kyiv Recommendations](#)).

discredit the judge in the eyes of the public or fellow judges<sup>163</sup> and render him/her vulnerable to outside influence, verbal or other attacks<sup>164</sup> or acts of disobedience,<sup>165</sup> especially considering that a judge may remain in the system and be transferred to a different judicial office.

100. Especially here, it is questionable whether the full report should be published, considering that it may contain issues of personal nature or concerning the personal or family life of a judge, as well as professional issues that may seriously affect the reputation of the judge concerned, thus potentially amounting to a violation of Article 8 of the ECHR, especially if the very existence of misconduct is contested afterwards.<sup>166</sup> A compromise could be found by omitting any information concerning judge's private or family life, while however ensuring that the reasoning for reaching the decision is sufficiently disclosed. Consequently, on this basis, **the drafters are encouraged to find the proper balance between ensuring the publicity of the decision, while respecting the private and family life of the evaluated judge.**
101. In any case, publication prior to the appellate body's decision is problematic as the adverse effects of the publication of an unsuccessful re-evaluation on a judge's reputation may hardly be removed by a later rectification.<sup>167</sup> Hence, **publication of the evaluation report should be suspended pending final appeal and decision of the appellate body and Article 7 of the Draft Law should be amended accordingly.**

#### **4.6. Consequences of the Re-evaluation**

102. In case more than 17 judges are successful, only those with "*the highest seniority as judge of the Supreme Court*" will remain on the SCJ bench (Article 7 (7)). Such a "seniority" criteria may not necessarily be the most relevant and it may be more **advisable to take into account the scores and seek to ensure a fair representation of women and men within the SCJ, rather than relying on "seniority" alone.** The other judges who have been re-evaluated successfully will be transferred, upon their consent, to other courts while retaining their salary as SCJ judges (Article 7 (7)), which is in line with standards. At the same time, contrary to what is provided by international recommendations (see par 35 *supra*), there is not guarantee that they will be transferred to the **highest possible judicial office** and a transferred judge may be compelled to take up an office of a much lower standing. **This guarantee should be reflected in the Draft Law.**
103. In case of unsuccessful evaluation, the evaluated judge may be transferred to any other court with his/her consent, and in case of refusal, has the possibility to resign (Article 10 (2)). It is not clear from the Draft Law whether even an unsuccessful candidate on the ground of "integrity" may actually remain in office, which seems at odds with the overall goal of the reform to ensure the integrity of the judiciary and restore public confidence in the justice system. If this were the case, this would lead to a situation whereby a judge alleged to lack integrity would still be transferred to a lower court, which is not desirable. **If there is a suspicion of lack of integrity, the matter should be referred for investigation to the appropriate body, rather than drawing a**

<sup>163</sup> *ibid.* par 48 (CCJE *Opinion no. 17*). See e.g., Venice Commission, *Opinion on the Draft Law about Obtaining Information on Activities of the Courts of Azerbaijan* (11-12 December 2009), CDL-AD(2009)055-e, par 38.

<sup>164</sup> *ibid.* pars 48 and 49 (14) (CCJE *Opinion no. 17*).

<sup>165</sup> See e.g., *op. cit.* footnote 149, par 3.6. (2017 CoE *Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine*).

<sup>166</sup> See ECtHR, *Denisov v. Ukraine* [GC] (Application no. 76639/11, judgment of 25 September 2018), pars 107-108 and 121; and ECtHR, *Pfeifer v. Austria*, Application no. 12556/03, judgment of 15 November 2007, par 35.

<sup>167</sup> Venice Commission, *Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine*, CDL-AD(2014)044-e, par 99.

**negative conclusion regarding the judge and transferring her/him to a lower court.** Similarly, it is difficult to understand why the judges who are incompetent professionally should remain in office, though in lower positions.

104. It must also be noted that pending the appeal of a judge who has not passed the re-evaluation, some measures are immediately applied upon adoption of the evaluation report, such as the reduced 50% salary pending transfer or resignation (Article 7 (4)). This may be excessive given that there may be several reasons for failing to pass the re-evaluation, all the more given the broad and vague criteria for assessment. Of note, Article 6 (1) (c) of the Law on Disciplinary Liability of Judges contemplates salary reduction as a disciplinary sanction, but it should range between 15% and 30%, and only be applied starting with the month following the date on which the decision of the Disciplinary Board remained irrevocable. Hence, the modalities contemplated by the Draft Law are even more stringent than those contemplated during ordinary disciplinary proceedings. It is thus **recommended to reconsider such a measure altogether**, or if maintained, at a minimum, such a measure **should be suspended pending final appeal and decision of the appellate body.**
105. Pursuant to Article 7 (4), an unsuccessful judge shall *de facto* be suspended from her/his activities as SCJ judge from the moment the report was communicated to her/him. It must be noted that suspension of a judicial function represents an infringement of a “civil” right and entitles access to an independent tribunal under Article 6 of the ECHR.<sup>168</sup>

#### **4.7. Challenging the Outcome of the Re-evaluation**

106. Chapter IV provides some modalities for a judge who did not pass the re-evaluation to challenge the evaluation report, first before the second Evaluation Board (Article 8) and then before the Superior Council of Magistracy (Article 9), though the Evaluation Committee has the final word (Article 9 (6) of the Draft Law). Article 14 (1) of the Draft Law provides that by derogation to applicable legislation, the decisions of the SCM issued according to the Draft Law cannot be challenged and are adopted by the vote of 2/3<sup>rd</sup> of its members with voting rights (excluding SCJ judges who are members of the SCM as per Article 15 of the Draft Law). Overall, the whole challenge process involves several back-and-forths between the Evaluation Boards, the SCM, and the Evaluation Committee which does not seem to be neither efficient nor clear and **should be simplified.**

##### *4.7.1. Right of Access to a “Tribunal”*

107. Under the case-law of the ECtHR, the right of access to court under Article 6 of the ECHR normally applies to all “employment disputes” concerning civil service, including recruitment/appointment,<sup>169</sup> career/promotion,<sup>170</sup> transfer,<sup>171</sup> and termination of service<sup>172</sup> of judges. There is a presumption in favour of access to a court by a judge and only exceptional situations may justify absence of access, i.e., when national law has from the very beginning expressly excluded access to a court for the post or category of staff in question and providing that this exclusion is justified on objective

<sup>168</sup> See ECtHR, *Paluda v. Slovakia* (Application no. 33392/12, judgment 23 May 2017), par 34.

<sup>169</sup> ECtHR, *Juričić v. Croatia* (Application no. 58222/09, judgment of 26 July 2011).

<sup>170</sup> ECtHR, *Dzhidzheva-Trendafilova v. Bulgaria* (Application no. 12628/09, decision of 9 October 2012).

<sup>171</sup> ECtHR, *Ohneberg v. Austria* (Application no. 10781/08, judgment of 18 September 2012), par 25.

<sup>172</sup> ECtHR, *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), par 38.

grounds in the State's interest.<sup>173</sup> Article 6 of the ECHR calls for at least one of the following two systems: either the professional disciplinary (or re-evaluation in this case) bodies themselves comply with the requirements of Article 6 par 1, or if they do not comply, there is a possibility of subsequent review by “a judicial body that has full jurisdiction” and provides all the guarantees of Article 6 par 1,<sup>174</sup> in particular, of independence and impartiality.

108. As noted above, the Draft Law presents a number of shortcomings, especially in terms of lack of independence of the Evaluation Committee, which could mean that the Evaluation Committee is not a “tribunal” for the purpose of Article 6 par 1 of the ECHR. This also means that the Draft Law should provide an additional level of review before another organ, which satisfies the guarantees of Article 6 par 1 of the ECHR. Even if considered a “tribunal” for the purpose of Article 6 par 1 of the ECHR, the re-evaluation procedure presents a number of shortcomings and should be substantially revised to fully comply with that provision.
109. According to international standards, everyone should have an effective means of redress against administrative decisions<sup>175</sup> and the decisions of courts or tribunals that review an administrative act should, at least in important cases, be subject to appeal to a higher court or tribunal, unless the case is directly referred to a higher tribunal in accordance with the national legislation.<sup>176</sup> This constitutes an important safeguard for the judges' independence and the independence of the judiciary overall. The Venice Commission has expressly acknowledged that judges and prosecutors subjected to the vetting should enjoy basic fair trial guarantees and should have the right to appeal to an independent body.<sup>177</sup> Providing for a possibility to appeal the decision of a judicial council or similar bodies is in line with international and regional recommendations.<sup>178</sup> As stated by the CCJE, “the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court”.<sup>179</sup> If a “tribunal” can indeed fully examine the merits of the case that lead to removal, then the judge subject to the decision of removal will be considered to have had access to a court under the domestic system, in compliance with Article 6 par 1 of the ECHR and Article 14 par 1 of the ICCPR.<sup>180</sup> The approach of ODIHR has traditionally been to provide for the possibility to challenge the decisions of disciplinary bodies<sup>181</sup> before an independent body presenting all the characteristics of a “tribunal” under Article 6 par 1 of the ECHR irrespective of the fact that such disciplinary bodies may or may not themselves be considered as “tribunal” under Article 6 par 1 of the ECHR. Similar reasoning should apply in the case of re-evaluation, which may ultimately lead to the same grave consequences as disciplinary proceedings, i.e., removal from office. The re-evaluated judge **should therefore be able to challenge the decision of the SCM before a court, at least in cases where the re-evaluation is unsuccessful.**

<sup>173</sup> ECtHR, *Vilho Eskelinen and Others v. Finland* (Application no. 63235/00, judgment of 19 April 2007), par 62. See also ECtHR, *Baka v. Hungary* [GC] (Application no. 20261/12, judgment of 23 June 2016), pars 116-117.

<sup>174</sup> ECtHR, *Albert and Le Compte v. Belgium* (Application nos. 7299/75, 7496/76, judgment of 10 February 1983), par 29.

<sup>175</sup> CSCE/OSCE, *1990 Copenhagen Document*, par 5.10.

<sup>176</sup> CoE, *Recommendation Rec(2004)20 on Judicial Review of Administrative Acts*, 15 December 2004, par B.4.i.

<sup>177</sup> See e.g., *op. cit.* footnote 72, par 137 (2015 Venice Commission *Interim Opinion on the Judiciary of Albania*).

<sup>178</sup> See e.g., *op. cit.* footnote 21, par 26 (2010 ODIHR *Kyiv Recommendations*), which suggests the right to appeal to a competent court. See also *op. cit.* footnote 9, Principle 10 (1985 *UN Basic Principles on the Independence of the Judiciary*).

<sup>179</sup> *Op. cit.* footnote 16, par 77 (v) (CCJE *Opinion no. 3 (2002)*).

<sup>180</sup> *Op. cit.* footnote 135, par 113 (2014 *Joint ODIHR-Venice Commission on Disciplinary Responsibility of Judges in the Kyrgyz Republic*).

<sup>181</sup> See *op. cit.* footnote 21, par 26 (2010 ODIHR *Kyiv Recommendations*); and *ibid.* par 111 (e.g., 2014 *Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic*). See also *op. cit.* footnote 72, par 116 (2015 Venice Commission *Interim Opinion on the Judiciary of Albania*).

4.7.2. *Challenge before the Superior Council of Magistracy*

110. The ECtHR has expressly recognized that fair trial rights, including the right to challenge a decision impacting such rights before a tribunal, are applicable to disputes concerning a judge's removal from office.<sup>182</sup> Therefore, a judge should in principle be entitled to challenge the decisions relating to his or her early removal, although the ECtHR also stated that the domestic law can exclude access to a court for certain category of staff where this exclusion is enshrined in the law concerning the status of such staff *ab initio* and is justified by the State's objective interest.<sup>183</sup>
111. It is necessary to consider whether the challenge procedure before the SCM as it stands offers a possibility for satisfactory judicial review. The ECtHR held that for the determination of civil rights and obligations by a "tribunal" to satisfy Article 6 of the ECHR, the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it.<sup>184</sup> Pursuant to Article 9 (6) of the Draft Law, at the final stage of the appeal review, the SCM is bound by the findings of the Evaluation Committee and accordingly lacks the power to make its own determination of fact and law. As such, it does not exercise proper judicial review over the decision of the Evaluation Committee.<sup>185</sup> Consequently, the **legal drafters should reconsider such limitation on SCM's powers to decide on the re-evaluation results**. This is notwithstanding other shortcomings concerning the composition of the SCM, especially the presence of the Minister of Justice and Prosecutor General as *ex officio* members and the potential influence of the executive and legislative branches over the appointment of lay members of the SCM (see new draft Article 3 of the Law on the SCM), which may put into question its independence and impartiality.<sup>186</sup>
112. Moreover, Article 14 (1) of the Draft Law provides that decisions of the SCM adopted pursuant to the (Draft) Law cannot be challenged. **Explicitly excluding the possibility to challenge, before a tribunal, the re-evaluation outcome endorsed by the SCM may amount to a violation of the evaluated judges' right to access to a court as guaranteed by Article 6 par 1 of the ECHR.**<sup>187</sup> **Such exclusion should therefore be**

<sup>182</sup> See ECtHR, *Olujic v. Croatia* (Application no. 22330/05, judgment of 5 February 2009), pars 31-44. See also ECtHR, *Baka v. Hungary* (Application no. 20261/12, judgment of 23 June 2016), pars 107-111.

<sup>183</sup> *ibid.* par 34 (2009 ECtHR *Olujic v. Croatia*).

<sup>184</sup> See e.g., ECtHR, *Ramos Nunes de Carvalho E Sá v. Portugal* [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), pars 176-177. See also ECtHR, *Obermeier v. Austria* (Application no. 11761/85, judgment of 28 June 1984), par 70, where the Court has considered that review limited to merely checking the boundaries of discretion exercised by public authorities is not sufficient, while in ECtHR, *Bentham v. The Netherlands* (Application no. 8848/80, judgment of 23 October 1985), par 40, the Court has considered that a mere power to issue advisory opinions, even if those are followed in practice, falls short of the requirement of a "tribunal".

<sup>185</sup> See e.g., *Ramos Nunes de Carvalho E Sá v. Portugal* [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), pars 176-184.

<sup>186</sup> According to the proposed new composition of the SCM (see draft Article 3 of the Law no. 947/1996 on the Superior Council of Magistracy), the SCM shall be composed of 15 members: the Parliament and the Government will each appoint three law professors; the General Assembly of Judges will select six judges, i.e. three from first instance courts, two from the court of appeal and one from the SCJ. The President of the SCJ, Prosecutor General and Minister of Justice are *ex officio* members of the SCM according to Article 122 par 2 of the Constitution. Thus, in the 15-member composition, only six members are judges selected "by their peers", which is less than half or a substantial majority, as recommended by international standards (see footnote 238 *infra*). Furthermore, according to Article 9 (3), the following shall not have the right to vote: 3 *ex officio* members, and the judges from the SCJ. This leaves the SCM with 6 professors appointed by the executive and legislative bodies and only 5 judges, who have the right to vote on issues pertaining to judges career. Finally, the mere presence of the Prosecutor General and Minister of Justice in the composition of the SCM (Article 14 (2)) may jeopardize the structural impartiality of the organ, which is tasked with decision-making concerning the career of judges; see e.g., ECtHR, *Denisov v. Ukraine* [GC] (Application no. 76639/11, judgment of 25 September 2018), pars 68-69.

<sup>187</sup> See ECtHR, *Baka v. Hungary* [GC] (Application no. 20261/12, judgment of 23 June 2016), pars 116-117, where the ECtHR specifically noted that it must be determined "whether access to a court had been excluded under domestic law before, rather than at the time when, the impugned measure concerning the applicant was adopted"; otherwise the authorities could abuse the mechanism by barring access to a court by simply including provisions to that effect in an *ad hoc* statutory provision not subject to judicial review, when the individual measures concerning their public servants are adopted. According to the existing legal framework, decisions of the SCM can

**reconsidered.** At the same time, the question of which “tribunal” should be able to hear such a challenge remains to be solved (see Sub-Section 4.7.3. *infra* for options in that respect).

#### 4.7.3. *Potential Solutions to Ensure Effective Review*

113. The legislator **should provide for the possibility to challenge the unsuccessful re-evaluation decision before an independent body presenting all the characteristics of a “tribunal” according to Article 6 par 1 of the ECHR.**
114. Accordingly, **several options could be considered:**
- reforming the SCM and ensuring that it carries out a proper judicial review and has a final say when a judge challenge the re-evaluation outcome, assuming that the reformed SCM satisfies the requirement of an independent and impartial “tribunal”,<sup>188</sup> which cannot necessarily be guaranteed;<sup>189</sup>
  - providing the possibility of appeal before a special Appeal Chamber, which could for instance be composed of the first three re-evaluated SCJ judges; or alternatively, before another independent body, for instance the Constitutional Court (though this may require amendment of the Constitution since this is not currently contemplated under Article 135 of the Constitution, which may not be realistic in such a short period of time); or
  - establishing an independent *ad hoc* body, though this should in principle be considered only in exceptional circumstances, when necessary because of the complexity of a problem and for the proper administration of justice;<sup>190</sup> in any case, this would require again to ensure that this body is independent and impartial and that the procedure before it provides all the safeguards enshrined in Article 6 par 1 of the ECHR.<sup>191</sup>
115. Finally, Article 8 (1) of the Draft Law provides three working day form the communication of the report for the judges to challenge it, which **appears insufficient for the preparation of an adequate appeal, with legal assistance as the case may be, and should be extended** (e.g., to 15 days minimum).

#### 4.8. *Transparency and Publicity of the Process*

116. Transparency is a fundamental element of the judicial process, which promotes accountability, enhances public confidence in the justice system and reassures society that justice is served, while demonstrating the independence of the judiciary from the

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be challenged (Article 25 of the Law on the SCM), though the appeal should be heard by a panel of five judges of the SCJ. This means that the condition of express exclusion of access to a court is not met since a right to appeal currently exists in the legislation.

<sup>188</sup> See e.g., ECtHR, *Kamenos v. Cyprus* (Application no. 147/07, judgment of 31 October 2017), pars 75 and 84.

<sup>189</sup> See, for instance, the ECtHR case of *Mnatsakanyan v. Armenia* (Application no. 2463/12, communicated on 18 December 2017), where the ECtHR decided to communicate the applicant's (former judge dismissed through disciplinary procedure) complaint under Article 6 of the ECHR (access to court), because the applicant was not allowed access to Administrative Court, while the composition, powers and procedures of the Council of Justice raised issues, which merited communication. Note that the Council of Justice of that time was composed of nine judges elected by judges and four professors elected by the President and the Parliament, and acted as a court in disciplinary cases. Notwithstanding such strong composition and court-like procedures and guarantees, the ECtHR still decided to put a question to the Government on whether or not the Council satisfied the requirements of a “tribunal”.

<sup>190</sup> See e.g., *op. cit.* footnote 16, par 50 (CCJE *Opinion no. 21 (2018) on Preventing Corruption*).

<sup>191</sup> See *op. cit.* footnote 16, par 37 (CCJE *Opinion no. 15 (2012) on the Specialization of Judges*), where CCJE specifically stressed that “providing specialist judges to meet the complexity or particular requirements in specific legal fields is a separate matter from setting up special, *ad hoc* or extraordinary courts as dictated by individual or specific circumstances. There is a potential danger of these latter courts failing to provide all the safeguards enshrined in Article 6 of the Convention.”

legislative and the executive branches of the State.<sup>192</sup> In particular, it is crucial to **ensure full transparency of the process of selecting the Evaluation Committee members by requiring that each appointing authority follows a fully open, transparent and public selection process.**<sup>193</sup>

117. Moreover, as for judicial appointments or evaluation of judges, the public should be able to understand the general principles, criteria and procedure of the re-evaluation process.<sup>194</sup> **Therefore, the procedural framework and methods of re-evaluation should be available to the public.**<sup>195</sup>
118. Some other aspects could further enhance the transparency of the procedure, e.g., providing that the public, civil society organizations and/or other entities could be proposing some potential candidates to the appointing authorities, a public audition of the potential nominees could be organized, where NGOs and experts could ask questions, proofs of their professional experience could be made available to the public, a reasoned motivation for selecting a member could be published, etc.<sup>196</sup> At the same time, as mentioned in par 99 *supra*, when determining to which extent the different phases of the re-evaluation process should be public, the drafters should always balance the need to protect judicial independence, the right to respect to private life of individual judges and the necessity to ensure public trust in the process. Generally speaking, it is the process of evaluation and decision-making that must be open and transparent, not necessarily all the personal details of evaluation of an individual judge.<sup>197</sup>

#### ***4.9. Re-evaluation of Presidents of Appeal Courts and First Instance Courts and other Key Judicial Office-Holders***

119. It is worth emphasizing that special measures justified by the public authorities for the purpose of reforming the SCJ, are extended without specific justification to other judges and institutions, which are not affected by the reform. In any case, the concerns raised regarding the re-evaluation of SCJ judges are relevant to the same extent to the situation of the presidents of appeal courts and first instance courts, and other key judicial office-holders. In that respect, to preserve judicial independence, court presidents who are appointed for a particular term should serve that term in full.<sup>198</sup> Early removal can only occur pursuant to established and transparent procedures and safeguards regarding removal, based on clear and objective criteria,<sup>199</sup> in order to exclude any risk of undue political influence.

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<sup>192</sup> See e.g., *op. cit.* footnote 10, Sub-section 6 (2010 [Measures for the Effective Implementation of the Bangalore Principles](#)); *op. cit.* footnote 22, par 14 (2010 CCJE [Magna Carta of Judges](#)); *op. cit.* footnote 21, pars 10, 21, 26 and 32 (2010 ODIHR [Kyiv Recommendations](#)); the [Istanbul Declaration on Transparency in the Judicial Process](#) (2013); and the [Copenhagen Declaration on the Reform of the European Convention on Human Rights system](#) (2018), par 60.

<sup>193</sup> For more details on this point, see *op. cit.* footnote 149, par 2.4. (2017 CoE [Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine](#)). See also e.g., Principle 15 of the [Istanbul Declaration on the Transparency in the Judicial Process](#) (2013) and the [Measures for the Effective Implementation of the Istanbul Declaration on Transparency in the Judicial Process](#) (2016).

<sup>194</sup> *Op. cit.* footnote 21, par 21 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 108, Principle 9 (2016 [Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges](#)). Regarding the evaluation of judges, *op. cit.* footnote 16, par 48 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>195</sup> *ibid.* par 48 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>196</sup> *Op. cit.* footnote 149, par 2.4. (2017 CoE [Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine](#)). See also, for instance, *op. cit.* footnote 109 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)).

<sup>197</sup> *Op. cit.* footnote 72 par 62 (2017 ODIHR [Opinion on the Law of Ukraine on the Judiciary and Status of Judges](#)).

<sup>198</sup> *Op. cit.* footnote 16, par 46 (CCJE [Opinion no. 19 \(2016\) on the Role of Court Presidents](#)). See also *op. cit.* footnote 46, par 101 (2014 Venice Commission-DHR-DGI Joint Opinion on the draft Amendments to the Organic Law on General Courts of Georgia).

<sup>199</sup> *ibid.* par 46 (CCJE [Opinion no. 19](#)). See also UN Human Rights Committee, [Pastukhov v. Belarus](#), Communication no. 814/1998, UN Doc. CCPR/C/78/D/814/1998, 19 August 2003, par 7.3.

120. The ECtHR has also expressly considered that office-holders/court executives have the right within the meaning of Article 6 par 1 of the ECHR to serve their terms of office until their mandates expire or come to an end.<sup>200</sup> In cases where these office-holders/court executives' tenures were prematurely terminated due to the adoption of new legislation, the Court found this to be in violation of Article 6 of the ECHR, because the respective decision to terminate was not open to review by an ordinary national tribunal or other domestic body exercising judicial powers.<sup>201</sup> This justifies even more the need to ensure that proper stringent safeguards are in place in accordance with the above-mentioned principles. In light of the foregoing, **the early termination of the mandate of court presidents should only occur if they are held liable for serious misconduct amounting to serious disciplinary offences or criminal offence, or serious cases of mismanagement, and only following procedures offering stringent safeguards, and subject to appeal before a "court"**.

#### *4.10. Other Comments*

121. To reflect on how the re-evaluation process has worked in practice,<sup>202</sup> **it is recommended to provide that a critical and independent review of the re-evaluation process should be carried out once completed, in particular with respect to the concrete reasons leading to the removal of judges.** To ensure even greater transparency of the process, **the drafters could also explicitly provide for the attendance of civil society representatives or other entities as monitors or observers during the re-evaluation process.**

### **5. Re-assessment of Prosecutors**

122. The Prosecutor General and deputies as well as other key positions of the prosecution service will be evaluated according to a similar procedure, which may lead to their dismissal if they are unsuccessful (Article 21 of the Draft Law), except that the appeal is brought before the Superior Council of Prosecutors (Article 21). A major difference however is that none of the provisions restricts the right of the prosecutor to challenge the decision of the Superior Council of Prosecutors (SCP) or the order of dismissal issued by the Prosecutor General (Article 21 (3)) before ordinary courts. If that is the case, then it appears that prosecutors may have the possibility to obtain an effective judicial review and may invoke all deficiencies of law and procedure before the courts, which is positive.
123. As noted in the ODIHR-Venice Commission [\*Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova\*](#), "[i]t is important, in light of their independence, that prosecutors have security of tenure".<sup>203</sup> As a general rule, prosecutors' "recruitment and career of prosecutors, including promotion, mobility, disciplinary action and dismissal, should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review".<sup>204</sup> According to the 2014 UNODC [\*Guide on the Status and Role of Prosecutors\*](#), "having an established, transparent and accountable regime for the removal of the head of the

<sup>200</sup> ECtHR, [\*Baka v. Hungary\*](#) (Application no. 20261/12, judgment of 23 June 2016), pars 107-111.

<sup>201</sup> *ibid.* pars 120-122.

<sup>202</sup> *Op cit.* footnote 72 par 59 (2017 ODIHR [\*Opinion on the Law of Ukraine on the Judiciary and Status of Judges\*](#)).

<sup>203</sup> ODIHR-Venice Commission-Council of Europe DG I, [\*Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova\*](#), 23 March 2015, par 118.

<sup>204</sup> *Op. cit.* footnote 27, Principle XII (2014 CCPE Rome Charter).

*prosecution service serve to protect independence*". Therefore, the terms under which prosecutors may be removed from office should be phrased clearly and unambiguously,<sup>205</sup> be subject to strict requirements guaranteeing the independence and impartial performance of their activities and protecting them from arbitrary or politically motivated dismissal.<sup>206</sup> Especially concerning the Prosecutor General, the law should clearly define the conditions of potential pre-term dismissal.<sup>207</sup> Though not necessarily enjoying the same protection as judges, the procedure of re-evaluation of prosecutors should still enjoy proper safeguards as those applicable in the context of disciplinary proceedings against prosecutors. Given that the re-evaluation may lead to their dismissals, the vagueness of the criteria for re-evaluation, the independence and impartiality of the Evaluation Committee, the need for basic standards of procedural fairness, and the possibility to challenge the outcome of the re-evaluation are all concerns for the re-evaluation of prosecutors as well.<sup>208</sup> Hence, the recommendations provided under Sub-Section 4 *supra* in relation to these aspects are overall applicable to the re-evaluation of prosecutors.

124. As to the role and status of the SCP, though an assessment of the applicable legal framework is beyond the scope of this review, it is worth referring to the [ODIHR-Venice Commission-Council of Europe DG I Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova](#) (2015). It is welcome in that respect that, since the publication of this Opinion, a number of recommendations have been implemented, especially that basic provisions regarding the role, composition and functioning of the Superior Council of Prosecutors have now been included in the Constitution (new Article 125<sup>1</sup>). At the same time, the Prosecutor General, the Minister of Justice and the President of the SCM are still *ex officio* members of the SCP,<sup>209</sup> which might question the self-governing nature of the body as noted in the Joint Opinion.<sup>210</sup> It is worth noting in that respect that in its latest report on Moldova, GRECO emphasized the need for appropriate measures be taken to ensure that the composition and operation of the SCP be subject to appropriate guarantees of objectivity, impartiality and transparency, including by abolishing the *ex officio* participation of the Minister of Justice and the President of the SCM.<sup>211</sup>
125. Moreover, contrary to what is provided for the judiciary, the Draft Law does not specify, in case the re-evaluation of the Prosecutor General and deputies is unsuccessful, how the new office-holders will be appointed. Articles 22 and 23 of the Draft Law seem to only mention the selection of the chief prosecutor of Anti-Corruption Prosecutor's Office, the Prosecutor's Office for combating Organized Crime and Special Cases as well as their deputies. It is understood that a separate reform of the procedure for appointing the Prosecutor General is carried out in parallel<sup>212</sup> and it is difficult to understand why this aspect is/was not included in the Draft Law as well.

<sup>205</sup> *Op. cit.* footnote 203, par 118 (2015 [Joint Opinion on the Prosecution Service of Moldova](#)).

<sup>206</sup> *Op. cit.* footnote 27, par s72-73 of the Explanatory Memorandum (2014 CCPE Rome Charter).

<sup>207</sup> *ibid.* par 73 of the Explanatory Memorandum (2014 CCPE Rome Charter); and *op. cit.* footnote 31 (2010 Venice Commission's Report on European Standards as regards the Prosecution Service).

<sup>208</sup> See e.g., Venice Commission, [Compilation of Venice Commission Opinions and Reports concerning Prosecutors](#), 11 November 2017, especially Sub-Section 3.5.3 on Disciplinary proceedings. See e.g., Venice Commission and CoE-DHR, [Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine](#), CDL-AD(2013)025, par 149.

<sup>209</sup> See Article 69 of the [Law no. 3/2016 regarding the Prosecutor's Office of the Republic of Moldova](#) (2016).

<sup>210</sup> ODIHR-Venice Commission-Council of Europe DG I, [Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova](#) (23 March 2015), par 131.

<sup>211</sup> *Op. cit.* footnote 32, pars 89 and 92 (2019 GRECO Report on Moldova).

<sup>212</sup> See [here](#).

## 6. The Nomination of New SCJ Judges

126. Articles 11 to 13 of the Draft Law regulate the procedures for filling the remaining vacant positions of SCJ judges if the re-evaluation procedure does not lead to identifying 17 suitable office-holders. Pursuant to Article 11 (4) of the Draft Law, judges having at least 10 years of experience may apply, which reflects Article 116 (4) of the Constitution of the Republic of Moldova.
127. Even in the exceptional situation where a court would be *legitimately* re-organized and this justifies certain judicial transfers or re-appointments, the standards applicable to the selection and appointment of judges should apply in the context of these new appointments.<sup>213</sup> According to recommendations elaborated at the international level, the selection of judges should be based on merit, according to objective, pre-established, and clearly defined criteria,<sup>214</sup> aiming to assess candidates' ability, integrity and experience,<sup>215</sup> while ensuring that the composition of the judiciary reflects the composition of the population as a whole<sup>216</sup> and is balanced in terms of gender.<sup>217</sup> It should follow open and transparent procedures<sup>218</sup> that ensure the independence of the judiciary, public confidence in judges and the court system. The objective is to ensure that the respective selection decisions are based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law in conformity with human rights norms,<sup>219</sup> while ensuring that the selection process triggers acceptance by the community of legal professionals.<sup>220</sup> Any decisions relating to appointment or promotion of judges should be reasoned with explanation of their grounds, with the possibility for the unsuccessful candidate to challenge the respective decision,<sup>221</sup> which should be subject to judicial review.<sup>222</sup> In that respect, ODIHR refers to its recent [Opinion on the Selection and Appointment of Supreme Court Judges of Georgia](#), which provides useful guidance on the relevant conditions and procedures according to international and regional standards and recommendations.
128. It is not clear whether the general selection criteria provided in Article 2 of the [Law no. 154 on the Selection, Performance Evaluation and Career of Judges](#) are applicable, and even if they were, they should probably be supplemented to include other requirements beyond those that are required for candidates to lower judicial positions. For instance,

<sup>213</sup> See e.g., *op. cit.* footnote 38, par 79 (August 2017 [ODIHR Opinion on the Supreme Court of Poland](#)).

<sup>214</sup> See e.g., *op. cit.* footnote 11, par 19 (2007 UNHRC [General Comment no. 32](#)); *op. cit.* footnote 15, par 44 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 21, par 21 (2010 ODIHR [Kyiv Recommendations](#)); *op. cit.* footnote 22, pars 2.1. and 2.2. (1998 [European Charter](#)); *op. cit.* footnote 16, pars 50-51 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>215</sup> *Op. cit.* footnote 9, Principle 13 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); and *op. cit.* footnote 16, pars 17 and 29 (CCJE [Opinion no. 1 \(2001\)](#)).

<sup>216</sup> *ibid.* par 24 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>217</sup> See par 190 under Strategic Objective G.1: "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the [Beijing Platform for Action](#), Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1); [OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life](#), 2 December 2009, par 1; see also *op. cit.* footnote 27, pars 81 and 91 (2011 Report of the UN SRIIL on Gender and the Administration of Justice).

<sup>218</sup> *Op. cit.* footnote 21, pars 21-23 (2010 ODIHR [Kyiv Recommendations](#)); *op. cit.* footnote 17, pars 23-32 (2010 Venice Commission Report on the Independence of the Judicial System); and *op. cit.* footnote 22, Articles 4-1, 5-1 and 5-2 (1999 [Universal Charter of the Judge](#)).

<sup>219</sup> *Op. cit.* footnote 15, par 44 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 17, pars 4 and 10 (2007 Venice Commission's Report on Judicial Appointments); and *op. cit.* footnote 9, Principle 10 (1985 [UN Basic Principles on the Independence of the Judiciary](#)), which states that "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".

<sup>220</sup> See e.g., Venice Commission, [Opinion on the Law on Amending and Supplementing the Constitution \(Judiciary\) of the Republic of Moldova](#), CDL-AD(2018)003-e, par 33.

<sup>221</sup> See *op. cit.* footnote 15, par 48 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 21, par 23 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 16, pars 50-51 and 91-93 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)) and pars 17-31 (CCJE [Opinion no. 1 \(2001\)](#)).

<sup>222</sup> *ibid.* par 48 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); and par 39 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)). See also e.g., Venice Commission, [Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD\(2012\)001 on Hungary](#), CDL-AD(2012)020, 15 October 2012, par 56.

this could include sensitivity to the needs of different communities and groups,<sup>223</sup> extensive expertise in human rights, since the highest courts generally have a key role to play in that respect,<sup>224</sup> creativity and flexibility,<sup>225</sup> ability to consider difficult and sensitive issues,<sup>226</sup> commitment to the judiciary as an institution, among others.<sup>227</sup> In any case, to avoid arbitrary application, it is important, at a minimum, to detail in primary legislation the selection criteria, including the weight to be given to the different elements for the evaluation,<sup>228</sup> and to provide for open and transparent procedures.<sup>229</sup>

129. While such qualities may sometimes be more difficult to evaluate in practice,<sup>230</sup> these could eventually be assessed based on situational and experience-based questioning,<sup>231</sup> with the weighting of the various criteria determined in advance to limit the risk of subjectivity.<sup>232</sup> It would also be recommended **to include a specific statement ensuring that the appointment process is carried out without discrimination on any ground,<sup>233</sup> while providing a mechanism to achieve more gender balance and diversity in the composition of the SCJ, though not compromising on the experience and professional quality of candidate.**<sup>234</sup>
130. Other measures to ensure greater transparency and accountability of the process should also be considered (see the [Opinion on the Selection and Appointment of Supreme Court Judges of Georgia](#)).

## **7. Change in the Composition of the Superior Council of Magistracy**

131. Currently, the SCM is composed of twelve members, including six judges representing all level of courts elected by the general assembly of judges, three law professors selected by the Parliament and three *ex officio* members, i.e., the Prosecutor General, the Minister of Justice and the President of the SCJ (Article 122 of the Constitution and Article 3 of the Law no. 947 on the SCM).<sup>235</sup> Pursuant to Article III of Title III of the Draft Law, the number of SCM members will be increased to fifteen, with three additional members being law professors appointed by the government (two members) and by the President of the Republic (one member) following a public competition. The Draft Law also seeks to ensure a more proportionate representativeness of judges from

<sup>223</sup> See e.g., the criteria for appointment to the UK Supreme Court, available at < <https://www.supremecourt.uk/docs/information-pack-for-justices-role-2019.pdf>>.

<sup>224</sup> See e.g., Venice Commission, *Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina*, CDL(1999)078, pars 30 and 32.

<sup>225</sup> *Op. cit.* footnote 223, criteria for appointment to the UK Supreme Court.

<sup>226</sup> *ibid.*

<sup>227</sup> See ENCI, *Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges* (May 2012), Indicator no. I.4.

<sup>228</sup> See e.g., *op. cit.* footnote 109, par 42 (2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*); and Venice Commission, *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia*, CDL-AD(2009)023, par 22.

<sup>229</sup> *op. cit.* footnote 21, pars 21-23 (2010 ODIHR *Kyiv Recommendations*); and *op. cit.* footnote 17, pars 23-32 (2010 Venice Commission Report on the Independence of the Judicial System). See also the *Istanbul Declaration on Transparency in the Judicial Process* (2013), which was adopted by Chiefs Justices and Senior Justices of the Asian Region on 22 November 2013, Section 13.

<sup>230</sup> See e.g., *op. cit.* footnote 228, pars 30-31 (2009 Venice Commission's *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia*).

<sup>231</sup> See e.g., the US National Centre for State Courts, *Handbook for Judicial Nominating Commissioners* (2nd Edition), Chapter 7, pp. 146-147.

<sup>232</sup> See *op. cit.* footnote 21, par 21 (2010 ODIHR *Kyiv Recommendations*). See also e.g., *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers* (2018), par 3.7.

<sup>233</sup> *Op. cit.* footnote 109, pars 44-45 (2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*).

<sup>234</sup> See *op. cit.* footnote 124 and references cited therein. See *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, which specifically calls on participating States to "consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies". See also *ibid.* par 49 (2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*), regarding possible mechanisms.

<sup>235</sup> See Article 3 of the *Law of the Republic of Moldova on the Superior Council of Magistracy* (1996, as last amended on 23 November 2018).

first instance courts, which is much welcomed and in line with international recommendations.<sup>236</sup> At the same time, the Draft Law does not go further in terms of amendment to the composition and organizations of the SCM, despite several recommendations to that effect made by various international or regional bodies and previous attempts to amend the Constitution for that purpose (see pars 49-50 and 53 *supra*).

### 7.1. Composition of the SCM

132. It is generally acknowledged at the international level that judicial councils or other similar independent bodies should not be composed completely or almost solely by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and also the perceptions of corporatism.<sup>237</sup> In that respect, the SCM's composition ensures a relatively mixed membership with representatives of the judiciary and non-judicial members, which is welcome. At the same time, judges appointed by their peers should represent a substantial element, at least half or a majority of judicial councils' members.<sup>238</sup> The Draft Law will increase the number of lay members, which will put into minority the number of judges appointed by their peers, who will account for six members out of a total of fifteen. **The legal drafters should therefore ensure that a substantial part or the majority of the members of the SCM are judges appointed by their peers. In addition, requirements to ensure greater gender balance and diversity in the SCM's composition should also be considered.**<sup>239</sup>
133. Moreover, as noted in par 111 *supra*, the composition and appointing modalities, i.e., **the presence of the Minister of Justice and Prosecutor General as *ex officio* members** and the potential influence of the executive and legislative branches over the appointment of lay members, may put into question the independence and impartiality of such a body. Indeed, regional and international bodies have questioned the practice of having representatives of the executive sit on judicial councils at all,<sup>240</sup> mainly to

<sup>236</sup> See *op. cit.* footnote 30, par 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that “[the] judge members shall [...] represent the judiciary at large, including judges from first level courts”.

<sup>237</sup> See *op. cit.* footnote 21, par 2 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 16, par 16 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)). See also e.g., Venice Commission, [Opinion on the Seven Amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones](#), CDL-AD(2014)026-e, pars 68-76.

<sup>238</sup> *ibid.* par 26 (2010 ODIHR [Kyiv Recommendations](#)), which state that “[a]part from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors and preferably a member of the bar, to promote greater inclusiveness and transparency”; *op. cit.* footnote 15, par 27 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)), which states that “[n]ot less than half the members of such councils should be judges chosen by their peers”; par 1.3 (1998 [European Charter](#)), which states that “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”; pars 17-18 and 25 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)), where it is stated that “[w]hen there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers”; *op. cit.* footnote 12, par 25 (2007 Venice Commission's Report on Judicial Appointments) and par 50 (2010 Venice Commission's Report on the Independence of the Judicial System), which both state that “[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself”; *op. cit.* footnote 43, par 2.1 (ENCI Report on Council for the Judiciary 2010-2011).

<sup>239</sup> *ibid.* par 24 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), which states that “the composition of the Council for the Judiciary should reflect as far as possible the diversity in the society”. This could be drafted along the lines of the recommendations made by the ODIHR and the Venice Commission regarding proposed measures to ensure greater gender balance in the composition of the Disciplinary Commission under the Council of Judges of the Kyrgyz Republic (see Sub-Section 5.1 of the [OSCE/ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#), 16 June 2014). See also European Commission for the Efficiency of Justice (CEPEJ), [Report on European Judicial Systems – Efficiency and Quality of Justice](#), CEPEJ Studies No. 23, Edition 2016 (2014 data), page 101.

<sup>240</sup> *Op. cit.* footnote 7, pars 23 and 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); *op. cit.* footnote 11, par 93 (2014 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers); and *op. cit.* footnote 22, par 32 (2007 Venice Commission's Report on Judicial Appointments). See e.g., *op. cit.* footnote 43, par 99 (2015 GRECO's Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Serbia), where a majority of members of the Council for the Judiciary is elected by the Parliament, and GRECO specifically recommended to change the composition of the High Judicial Council, in particular by excluding the National Assembly

avoid undue influence of the other branches of power on the functioning and decision-making of a body, which is the guarantor of the independence of the judiciary. **This should be reconsidered, though this would require constitutional reform.**

134. As a good practice, consideration should also be given in the future to ensuring that **apart from a substantial number of judge members, the SCM is also composed of members of other legal professions or users of the judicial system,**<sup>241</sup> as was contemplated by the draft constitutional amendments in 2018. But this would again require a constitutional amendment.
135. At the same time, it may **not be advisable to excessively broaden the size of the SCM,**<sup>242</sup> as it may impede its effective functioning, and may also be perceived as an attempt by the executive and legislative branches to over-take such a body.

## 7.2. Further Reform

136. As mentioned in par 53 *supra*, the legal drafters **should conduct a proper assessment of the SCM and decide whether a more in-depth structural reform may be needed.**
137. If the legal drafters believe that the presence of international experts may promote greater compliance with applicable legislation, this could also be considered on a temporary basis, providing the phasing out of this measure (see par 72 *infra*). Also, the legislation could for instance specify whether the SCM may depart from the scoring or classification of the candidates made by the Selection and Performance Board, but only following proper examination of the merits of the candidates and only if further collection of evidence or other materials can substantiate such departure from the proposed ranking, and the SCM's decision is thus duly motivated.<sup>243</sup> In addition, it is noted that the Law on the SCM does not provide for grounds of removal beyond those limited ones listed in its Article 12 of the Law on the SCM, which refers to general "*ill-founded non-fulfillment of the obligations of member*" and is subject to the proposal of the Council. The Law on the SCM does not explicitly **address cases of serious violations of the law, breach of disciplinary proceedings or criminal law,**<sup>244</sup> and could be supplemented in that respect.
138. The legal drafters could also **consider the involvement of external autonomous entities/bodies** (e.g., universities, non-governmental organizations, bar associations, etc.) **and/or civil society representatives in the process of nominating candidates to become non-judicial or judicial members in the SCM.**<sup>245</sup> They could also aim at achieving even greater openness and transparency by ensuring that all documents pertaining to the selection process, including with respect to potential candidates, are made available to the public, and that the meetings of the appointing bodies, when they

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from the election of its members, providing that at least half its members are judges elected by their peers and abolishing the *ex officio* membership of representatives of the executive and legislative powers. For an overview of the composition of judicial councils in EU countries, see ODIHR, [Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, pars 52-53.

<sup>241</sup> See e.g., *op. cit.* footnote 30, pars 7-9 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 7, pars 22-23, 32 and 45 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); Venice Commission, [Compilation of Venice Commission Opinions and Reports concerning Courts and Judges](#), CDL-PI(2015)001, 5 March 2015, Section 4.2.4 Lay members: importance of having the civil society represented, pages 78-80; and European Network of Councils of the Judiciary (ENCJ), [Report on Council for the Judiciary 2010-2011](#), par 2.2.

<sup>242</sup> See e.g., Venice Commission, [Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina](#), CDL-AD(2014)008, par 31.

<sup>243</sup> See also CoE DHR-DGI, [Justice Sector Reform Strategy of the Republic of Moldova – Review of Implementation – Assessment and Recommendations](#) (5 December 2017), Recommendation 26.

<sup>244</sup> See e.g., ODIHR, [Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, par 82.

<sup>245</sup> See e.g., Venice Commission, [Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania](#), CDL-AD(2016)009, 14 March 2016, pars 15-16.

discuss the appointment of judge members, are open to the public. More generally, civil society representatives could be provided with the opportunity to monitor the selection and appointment processes of members of the SCM, and more generally of the council's work and functioning in general.<sup>246</sup> In case of reform of the SCM, it is worth emphasizing that SCM members' mandate should not be subject to early termination, since as guarantors of the independence of the judiciary, they should themselves enjoy guarantees of independence<sup>247</sup> and their tenure should not be subject to undue interference by the executive or legislative branches or other external pressures.<sup>248</sup> Generally, the early termination of the mandates of judicial councils members should be guided by safeguards and principles similar to those applicable to judges.<sup>249</sup>

## **8. Additional Concerns Related to the Process of Preparing and Adopting the Draft Amendments**

139. OSCE participating States have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, par 5.8).<sup>250</sup> Moreover, key OSCE commitments specify that “[*l*]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, par 18.1).<sup>251</sup>
140. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.<sup>252</sup> Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.<sup>253</sup> According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information.<sup>254</sup> To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,<sup>255</sup> meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance

<sup>246</sup> See e.g., ODIHR-OSCE Mission to Serbia, [Report on Monitoring of Peer Elections for the High Judicial Council and State Prosecutors' Council of the Republic of Serbia](#), 23 May 2016, pages 21 and 35.

<sup>247</sup> See e.g., *ibid.* par 36 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#))

<sup>248</sup> See ODIHR, [Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, par 82.

<sup>249</sup> *Op. cit.* footnote 16, pars 44-48 (CCJE [Opinion no. 19 \(2016\) on the Role of Court Presidents](#)).

<sup>250</sup> Available at <<http://www.osce.org/fr/odihr/elections/14304>><http://www.osce.org/fr/odihr/elections/14304>>.

<sup>251</sup> Available at <<http://www.osce.org/fr/odihr/elections/14310>><http://www.osce.org/fr/odihr/elections/14310>>.

<sup>252</sup> *ibid.*

<sup>253</sup> See e.g., [Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes](#) (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

<sup>254</sup> See e.g., ODIHR, [Opinion on the Draft Law of Ukraine “On Public Consultations”](#) (1 September 2016), pars 40-41.

<sup>255</sup> See ODIHR, [Assessment of the Legislative Process in Georgia](#) (30 January 2015), pars 33-34. See also e.g., ODIHR, [Guidelines on the Protection of Human Rights Defenders](#) (2014), Section II, Sub-Section G on the Right to Participate in Public Affairs.

confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted, and enhance public trust in the institutions in general.

141. With regard to the judiciary's involvement in legal reform affecting its work, the CCJE has expressly stressed "*the importance of judges participating in debates concerning national judicial policy*" and the fact that "*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*".<sup>256</sup> The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or any change proposed as to the basis for their remuneration, or as to their social welfare, including their retirement pension, to ensure that judges are not left out of the decision-making process in these fields.<sup>257</sup> More specifically, regarding the legislative process when adopting laws relating to the highest Court, the Venice Commission has considered that "[i]t is [...] highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process [...]".<sup>258</sup>
142. It is understood that the Ministry of Justice announced the initiation of the drafting of the Draft Law on 23 July 2019, asking for proposals to be submitted by 1 August 2019, thus leaving about a week to contribute, which is extremely short.<sup>259</sup> On 16 September 2019, the SCM also published a call for opinions and proposals on the Draft Law from judges, with input to be submitted by 18 September 2019.<sup>260</sup>
143. If the Draft Law was not subjected to any legitimate, open and meaningful consultation process prior to this date, especially with bodies of the judiciary, association of judges or similar bodies, and individual judges, as well as with the public or civil society organizations, this would appear to be at odds with the foregoing principles. In that respect, it is worth referring to GRECO's most recent conclusions on the law-making process of Moldova, noting with concerns the lack of implementation of the procedure of public consultation.<sup>261</sup>
144. Moreover, given the potential impact of the Draft Act on the independence of the judiciary and the rule of law, it is essential that such legislation be preceded by an in-depth research and impact assessment, completed with a proper problem analysis using evidence-based techniques to identify the best efficient and effective regulatory option.<sup>262</sup>
145. Given the short timeline for the adoption of the Draft Law, since it should enter in force on 1 January 2020 according to the Final and Transitory provisions, with some provisions immediately applicable upon publication in the Official Gazette, it is also highly unlikely that the Parliament of the Republic of Moldova would have had sufficient time to review and evaluate the draft legislation, and to take professional

<sup>256</sup> *Op. cit.* footnote 16, par 31 ([CCJE Opinion no. 18 \(2015\)](#)).

<sup>257</sup> *Op. cit.* footnote 22, par 1.8. (1998 [European Charter](#)). See also *op. cit.* footnote 22, par 9 (2010 CCJE Magna Carta of Judges), which states that "[i]f the judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)"; and ENCJ, [2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate](#), Recommendation 5, which states that "[j]udiciaries and judges should be involved in the necessary reforms".

<sup>258</sup> *Op. cit.* footnote 46, par 19 (2014 Joint Venice Commission-DGI Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia).

<sup>259</sup> See <http://www.justice.gov.md/libview.php?l=ro&idc=184&id=4439>.

<sup>260</sup> See <https://www.csm.md/ro/noutatii/3187-anunt-privind-prezentarea-opiniilor-si-propunerilor-asupra-proiectul-de-lege-cu-privire-la-reformarea-curtii-supreme-de-justitie-si-organelor-procuraturii.html>.

<sup>261</sup> GRECO, Council of Europe's Group of States against Corruption (GRECO), [Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for the Republic of Moldova](#), GrecoRC4(2018)10, 24 July 2019. adequate implementation of the new legal framework regulating the lawmaking process, including the procedure of public consultation, is still a challenge (par 10).

<sup>262</sup> ODIHR, [Report on the Assessment of the Legislative Process in the Republic of Moldova](#) (2010), par 14.5.

account of the opinions of the staff and the relevant committee, or consider the views of judicial stakeholders, civil society organizations and other experts. In principle, adequate time limits should be set prior to the actual drafting exercise, as well as for the proper verification of draft laws and legislative policy for compatibility with international standards at all stages of the law-making process.<sup>263</sup>

146. In light of the above, the process by which the Draft Law was developed and adopted does not seem to conform to the aforesaid principles of democratic law-making. Any legitimate reform process relating to the judiciary, especially of the highest jurisdiction, **should be transparent, inclusive, extensive and involve effective consultations, including with representatives of the judiciary, judges' and lawyers' associations, the academia, civil society organisations and should involve a full impact assessment including of compatibility with relevant international standards, according to the principles stated above. Adequate time should also be allowed for all stages of the ensuing law-making process.** It would be advisable for relevant stakeholders to follow such processes in future legal reform efforts. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

[END OF TEXT]

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<sup>263</sup> *Op. cit.* footnote 255, pages 6 and 7 (2015 ODIHR Report on the Assessment of the Legislative Process in Georgia).