



Action against Corruption in the Republic of Moldova

**TECHNICAL PAPER**

REVIEW OF THE COMPOSITION AND OPERATION OF THE SUPERIOR COUNCIL OF  
MAGISTRACY OF THE REPUBLIC OF MOLDOVA

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The project “Action against corruption in the Republic of Moldova” aims to address key priorities and needs in the Republic of Moldova which are closely interlinked with the reform processes initiated by the government and their obligations towards implementing international standards against corruption and the related monitoring recommendations. More specifically the Action is designed to deliver assistance in the legislative, policy and institutional reforms by addressing pending recommendations from the Fourth Evaluation Round of the Council of Europe’s Group of States against Corruption (GRECO).

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The views and opinions presented herein are those of the main author and should not be taken as to reflect the official position of the Council of Europe and/or the US Department of State.



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## ABBREVIATIONS

CoE	Council of Europe
CCJE	Consultative Council of European Judges
EU	European Union
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ENCJ	European Network of Councils for the Judiciary
GRECO	Group of States against Corruption
ICJ	International Commission of Jurists
IFES	International Foundation for Electoral Systems
LRCM	Legal Resources Centre from Moldova
MPs	Members of Parliament
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OSCE	Organization for Security and Co-operation in Europe
SCM	Superior Council of Magistracy
UNODC	United Nations Office on Drugs and Crime
VC	Venice Commission (European Commission for Democracy through Law)



## 1 EXECUTIVE SUMMARY

The goal of this report is to contribute to corruption prevention in respect of judges and prosecutors in the Republic of Moldova, more specifically through the assessment of the legislative and regulatory framework regulating the composition of the Superior Council of Magistracy (SCM), with the objective of advising on necessary amendments to ensure its alignment with GRECO recommendations (GRECO IV round evaluation – R7).

It is the result of a desk review of reports and legislation and a round of online consultative meetings (4-5 November 2020) aimed at interviewing different stakeholders.

Given previous and planned future assessments under the project “Action against Corruption in the Republic of Moldova”, this assessment focuses mainly on the composition and functioning of the SCM, leaving other aspects that, although having to do with the activity and role of a judicial council, were not directly linked with the scope of the report, such as immunity of judges or disciplinary liability.

Based on the interviews and on the data available, the following observations can be made:

Public perception of corruption and political influence over the Judiciary is high in the Republic of Moldova, and there is still a strong hierarchical culture in the Moldovan Judiciary.

The composition and functioning of the Moldovan SCM has been under attention of the national authorities and international organisations such as the Council of Europe or the European Union for many years.

There have been positive steps and progresses in this field, the legislative and regulatory framework of the SCM has been progressively adapted to meet international standards.

The draft amendments to the Constitution of the Republic of Moldova currently under discussion in the Parliament of the Republic of Moldova in general would bring a positive change and should be welcomed, namely in the part where they establish:

- i. a new article 121 stating that the Superior Council of Magistracy is the guarantor of independence of judicial authority;
- ii. the number of members of the SCM and the ratio of judges and non-judges;
- iii. a mixed composition of judges and non-judges in the SCM, in a ratio of 6/6;
- iv. the possibility of non-judge members having professional experience not only in the field of law, but also in any other relevant field;
- v. that non-judge members must not work within the bodies of legislative, executive or judicial power or be politically affiliated;
- vi. a minimum of three fifths majority of votes in the Parliament to elect non-judge members of the SCM;
- vii. the elimination of *ex officio* membership in the SCM of the Minister of Justice, the Prosecutor-General and the President of the Supreme Court.

However, the Constitution would benefit from some adjustments to the draft changes already proposed, namely:

- viii. the distribution of judge members by instance should be included in the Constitution and not only in ordinary law;
- ix. the expression “politically affiliated” regarding non-judge members should be replaced with a more specific expression, such as “member of political party”;
- x. eliminate the rule stating that if the three fifths majority is not reached to elect non-judge members of the SCM, the procedure and conditions of appointment will be established by law;
- xi. an anti-deadlock mechanism should be stipulated, following this proposal or any other option applying the general concept envisaged in this report:



- a) in case the qualified majority for the election of non-judge members of the SCM is not reached in the Parliament after three rounds of voting, the non-judge members will be appointed in this manner:
  - 1) three members by the Parliament, in proportion to the number of seats of each party;
  - 2) one member appointed by the President of the Republic of Moldova;
  - 3) one member appointed by the Ombudsman of Moldova;
  - 4) one member appointed by the Moldovan Bar Association.

Based on the findings of the analysis it transpires that the SCM would benefit from other improvements, as follows:

- i. the Moldovan authorities should quickly adapt Law no. 947-XIII, of 19 July 1996, to the constitutional changes mentioned above, as soon as, and provided, they enter into force;
- ii. the return to a majoritarian composition of judges in the SCM must be reconsidered when the Moldovan judiciary will achieve a higher degree of trust in the society;
- iii. the *ex officio* membership of the President of the Supreme Court must be reconsidered when the Moldovan judiciary will achieve a higher degree of internal independence;
- iv. a time-limit to the prohibition of belonging to a political party in the case of non-judge members should be excluded from any future change to the Law on the SCM,
- v. the SCM and the General Assembly of Judges must assure real diversity in the election procedure of judge members of the SCM, and an effectively competitive process, ensuring a more open debate between candidates and a proactive concern in having different lists of candidates, for instance, one list for each instance;
- vi. the SCM must deepen and develop the transparency of its activity and the reasoning of its decisions, in order to enhance its accountability.



## 2 INTRODUCTION

### 2.1 Scope of the report

The Action against Corruption in the Republic of Moldova is a country specific intervention funded by the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State and implemented by the Council of Europe, and is designed to deliver assistance in the legislative, policy and institutional reforms by addressing pending recommendations from the Fourth Evaluation Round of the Council of Europe's Group of States against Corruption (GRECO).

Its purpose is to enhance capacities of the institutions to implement GRECO recommendations. The project actions should provide direct support to the authorities to address the shortcomings identified in the GRECO 4<sup>th</sup> round evaluation, thus aligning the measures of the Moldovan authorities with the international standards and good practices for prevention and fight against corruption.

This report relates to the "Intermediate Outcome 1: Corruption prevention in respect of judges and prosecutors improved", more specifically in its outcome 1.1 – "The legislative/regulatory framework regulating the composition of the Superior Council of Magistracy reviewed and advise on necessary amendments to ensure its alignment with GRECO recommendations provided (GRECO IV round evaluation – R7)".

### 2.2 Methodology

The report is the result of a desk review of reports and legislation and of consultation meetings held in 4-5 November 2020, interviewing different stakeholders as follows:

- i. Superior Council of Magistracy: Ms. Luiza Gafton, SCM interim President; Mr. Petru Moraru, SCM member;
- ii. Ministry of Justice: Mr. Fadei Nagacevschi, Minister of Justice; Ms. Liliana Rusu, Chief of the Analysis and Policy Evaluation Department;
- iii. Legal Resources Centre from Moldova: Mr. Vladislav Gribincea, Executive Director.

In view of assessing the current composition and operation of the SCM, the following Laws and Bylaws were taken in consideration<sup>1</sup>:

- i. Constitution of the Republic of Moldova (adopted on 27 July 1994 and later amended, especially by Law no. 1471-XV, of 21/11/2002), including the draft laws of amendment of the Constitution: Draft no. 10, of 28 January 2018, and drafts of 2020 – initial version and second version (following the Constitutional Court decision of 22 September 2020);
- ii. Law on the Superior Council of Magistracy (Law no. 947-XIII, of 19 July 1996, as amended by Law no. 193, of 20 December 2019, that entered into force on 31 January 2020, and by Law no. 117, of 09 July 2020);
- iii. Law no. 178, of 25 July 2014, on Disciplinary Liability of Judges;
- iv. Law no. 154, of 05 July 2012, on the selection, performance evaluation and career of judges;
- v. Regulation on the Activity Committee on Ethics and Professional Conduct for Judges, approved by SCM decision no. 229/12, of 08 May 2012;
- vi. Decision CJ-06 no. 13, of 05 February 2020, of the Legal Committee for Appointments and Immunities of the Parliament of the Republic of Moldova, on the organization and conduct of the public competition for selection of candidates to the position of member of the Superior Council of Magistracy by the Parliament – Annexes 1 and 2;

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<sup>1</sup> Translation to English provided by the CoE Office in Moldova.





In addition to others documents referred to in the text, the following key reports and documents were also analysed<sup>2</sup>:

- i. Group of States Against Corruption (GRECO), Council of Europe - Fourth Evaluation Round – Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors:
  - a) Evaluation Report – Republic of Moldova, Strasbourg, 27 June – 1 July 2016;
  - b) Compliance Report – Republic of Moldova, Strasbourg, 3-7 December 2018;
  - c) Second Compliance Report – Republic of Moldova, Strasbourg, 21-25 September 2020;
- ii. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part<sup>3</sup>;
- iii. European Parliament's Committee on Foreign Affairs (AFET) European Implementation Assessment (EIA) on the association agreement between EU and Moldova, Brussels, April 2020<sup>4</sup>;
- iv. Memorandum of Understanding between the European Union and the Republic of Moldova, July 2020<sup>5</sup>;
- v. European Parliament resolution of 20 October 2020 on the implementation of the EU Association Agreement with the Republic of Moldova (2019/2201(INI))<sup>6</sup>;
- vi. The Strategy for Ensuring the Independence and Integrity of Justice Sector for 2021-2024, approved by the Parliament of the Republic of Moldova on 26 November 2020;
- vii. Venice Commission:
  - a) Opinion CDL-PI(2020)001 (no. 976/2019), of 22 January 2020: urgent joint opinion on the draft law on amending the Law no. 947/1996 on the Superior Council of Magistracy;
  - b) Opinion CDL-AD(2020)001 (no. 983/2020), of 20 March 2020: joint opinion on the draft law on amending and supplementing the Constitution with respect to the Superior Council of Magistracy;
  - c) Opinion CDL-AD(2020)007 (no. 983/2020), of 19 June 2020: joint opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy;
  - d) Opinion CD-PI(2020)014 (no. 1003/2020), of 16 November 2020: urgent joint amicus curiae brief on three legal questions concerning the mandate of members of constitutional bodies;
- viii. Informative note of the Minister of Justice of Moldova to the draft law amending the Constitution of the Republic of Moldova;
- ix. Opinion of the Superior Council of Magistracy on the draft law amending the Constitution of the Republic of Moldova;
- x. International Commission of Jurists: Only an Empty Shell – The Undelivered Promise of an Independent Judiciary in Moldova – A Mission Report, 2019<sup>7</sup>;
- xi. Freedom House: Freedom in the World 2020 – Moldova<sup>8</sup>;
- xii. Legal Resources Centre from Moldova:

<sup>2</sup> Where the source is not mentioned, provided by the CoE Office in Moldova.

<sup>3</sup> Official Journal of the European Union, L 260/4, 30 August 2014.

<sup>4</sup> Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642834/EPRS\\_STU\(2020\)642834\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642834/EPRS_STU(2020)642834_EN.pdf) at

<sup>5</sup> Available at [https://ec.europa.eu/info/sites/info/files/economy-finance/moldova\\_mou\\_signed.pdf](https://ec.europa.eu/info/sites/info/files/economy-finance/moldova_mou_signed.pdf).

<sup>6</sup> Available at [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0279\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0279_EN.pdf).

<sup>7</sup> Available at <https://www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf>.

<sup>8</sup> Available at <https://freedomhouse.org/country/moldova/freedom-world/2020>.



- a) Opinion on the draft law on the evaluation of performances and the career of judges, January 2020<sup>9</sup>;
- b) Opinion on the organisation of the selection process for the appointment of 4 members of the SCM from the side of law professors, 11 March 2020<sup>10</sup>;
- c) Legal Opinion on the Draft Law amending the Constitution of the Republic of Moldova, 30 June 2020<sup>11</sup>;
- d) Additional opinion to the draft Action Plan for the implementation of the Strategy ensuring the independence and integrity of the justice sector for the years 2021-2024, 17 September 2020<sup>12</sup>.

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<sup>9</sup> Available at <https://crjm.org/wp-content/uploads/2020/02/Opinion-IPRE-CRJM-evaluation-judges-12-02-2020.pdf>.

<sup>10</sup> Available at <https://crjm.org/wp-content/uploads/2020/03/Opinion-IPRE-CRJM-appointment-of-members-of-the-SCM-from-the-side-of-law-professors-11.03.2020-EN.pdf>.

<sup>11</sup> Available at <https://crjm.org/wp-content/uploads/2020/07/Opinion-LRCM-IPRE-project-mod-constitution-justice-SCM.pdf>.

<sup>12</sup> Available at <https://crjm.org/wp-content/uploads/2020/09/2020-09-17-Opinie-IPRE-CRJM-Proiectul-PA-EN.pdf>.



### 3 INTERNATIONAL GOOD PRACTICES AND ANALYSIS OF SITUATION IN REPUBLIC OF MOLDOVA

#### 3.1 Background

The matter of the independence of the judiciary and, within it, the composition and functioning of the Superior Council of Magistracy in the Republic of Moldova has been the object of constant attention in recent years.

Public perception of corruption in Moldova is high – in the 2019 *Corruption Perceptions Index of Transparency International*, Moldova ranked 120th in a total of 180 countries – and the situation of the independence of the Moldovan judiciary is pointed out in many reports as unsatisfactory. Freedom House's *Freedom in the World 2020* report noted “major deficiencies in the rule of law”, saying that “Moldova’s judicial branch is susceptible to political pressures that hamper its independence, and judicial appointment processes lack transparency”.

Despite the progresses of recent years, in October 2020 the European Parliament expressed its concern “by the slow course of reforms on the rule of law and democratic institutions” and urged “the government of the Republic of Moldova to complete judicial reforms without delay, so as to warrant the independence, impartiality and effectiveness of the judiciary and specialised anti-corruption institutions; in doing so, calls on the Moldovan government to ensure a transparent process of drafting of the amendments to the Moldovan Constitution concerning the Supreme Council of Magistrates (SCM), and of their subsequent adoption, using international precedents and good practices, in line with the recommendations of the Venice Commission and in consultation with the Council of Europe and EU experts, civil society, and other interested actors”.

Since the independence, in 1991, Republic of Moldova underwent a series of reforms initially intended to break from the Soviet tradition of subordination of the judiciary to the executive. That path, however, was not constantly followed, and from 2001 to 2005 there have been signs of increased control of the executive over the judiciary, later reversed by reforms adopted after 2005<sup>13</sup>.

The 2014 Association Agreement between the European Union and Moldova (that entered into force on 1 July 2016) didn't specifically address the matter of the composition of the SCM, merely stating in a generic way that the parties should cooperate in order to make “further progress on judicial and legal reform, so as to secure the independence of the judiciary, strengthen its administrative capacity and guarantee impartiality and effectiveness of law enforcement bodies” (Article 4 (c)) and that “in their cooperation in the area of freedom, security and justice the Parties shall attach particular importance to the promotion of the rule of law, including the independence of the judiciary, access to justice, and the right to a fair trial” having to “cooperate fully on the effective functioning of institutions in the areas of law enforcement and the administration of justice” (Article 12, §§ 1 and 2).

In the Memorandum of Understanding between the European Union and the Republic of Moldova of July 2020, however, it is explicitly mentioned in Annex I (“*Structural Reform Criteria*”) the obligation for the Government of the Republic of Moldova to “approve the draft law amending the Constitution of the Republic of Moldova regarding the Superior Council of Magistracy, revised fully in accordance with the recommendations of the Venice Commission, including Opinions CDL-AD(2020)001 and CDL-AD(2020)021; and will register it in the Parliament of the Republic of Moldova for adoption. In particular, the revised draft law shall abolish the probationary period for judges, exclude the ex-officio membership in the Superior Council of Magistracy (SCM), ensure that lay members for the SCM are selected in line with the opinions endorsed by the Venice Commission, and revise the transitional provision on the mandate of SCM members to ensure that lay members are appointed to the SCM through a re-selection procedure upon the adoption of constitutional amendments”.

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<sup>13</sup> See International Commission of Jurists' *Only an Empty Shell...*, cit., p. 4-5.



In the Evaluation Report of the Republic of Moldova of the Fourth Evaluation Round (2016), GRECO expressed serious concerns on the composition and operation of the SCM, as well as on the selection process of its members, which were translated into recommendations vii. and viii.:

vii. (i) changing the composition of the Superior Council of Magistracy, in particular by abolishing the *ex officio* participation of the Minister of Justice and the Prosecutor General and by allowing for more diverse profiles among lay members of the Council, on the basis of objective and measurable selection criteria; (ii) ensuring that both judicial and lay members of the Council are elected following a fair and transparent procedure (paragraph 92);

viii. that decisions of the Superior Council of Magistrates be adequately reasoned and be subject to judicial review, both on the merits of the case and on procedural grounds (paragraph 93);

These recommendations were considered by GRECO only partly implemented, either in the first (December 2018) and in the second (September 2020) compliance reports.

### **3.1.1 Changes to the Constitution of the Republic of Moldova**

Following the GRECO recommendations above mentioned, a draft law modifying the Constitution of the Republic of Moldova was submitted by the Government to the Parliament on 18 January 2018, changing, among others, Article 122. The new proposed article stated that the SCM should be composed of judges elected by the General Assembly of Judges, representing all courts of justice levels, and of representatives of civil society with experience in law. The number of members would not be established in the Constitution, but it was mentioned that “*an important part*” of SCM members should be judges, and the *ex officio* participation of the Minister of Justice, the Prosecutor General and the President of the Supreme Court was abolished. The members were to be elected or appointed for a non-renewable term of 6 years.

This draft law expired, as it was not subject to final approval within one year of its presentation to the Parliament.

The procedure was then relaunched by the Government in 2019, in very similar terms. Article 122 would establish 12 as the number of members of the SCM and would cease to provide for the *ex officio* membership of the Minister of Justice, the Prosecutor General and the President of the Supreme Court. The judge members of the SCM would be elected by the General Assembly of Judges, representing all levels of courts, and the lay members must be persons with high professional reputation and integrity, who do not work within bodies of legislative, executive or judicial power and are not politically affiliated. The election and appointment procedure would not be established in the Constitution, but it was mentioned that judges must represent at least half of the total members of the SCM and the term of all members would be of six years, non-renewable.

On 22 September 2020, the Constitutional Court presented a negative opinion on the draft amendments, considering some of them unconstitutional, namely the provision that declares that the mandate of non-judge members of the SCM would cease upon entry into force of the constitutional amendments.

Following this decision of the Constitutional Court, the Government approved on 30 September 2020 an adjusted proposal and resubmitted it to the Constitutional Court. This high court, in turn, asked for the Venice Commission to issue an *amicus curiae*, which it did on 16 November 2020.

On 03 December 2020, the Constitutional Court issued a positive opinion on the draft amendments to the Constitution and decided that the draft could be submitted to the Parliament for approval.

### **3.1.2 Changes to the Law on the Superior Council of Magistracy**

The law regulating the Superior Council of Magistracy is Law no. 947-XIII, of 19 July 1996 (in force since 03 October 1996).



Until 31 January 2020, Article 3 stated that the SCM was composed of 12 magistrates:

- The Minister of Justice, the Prosecutor General and the President of the Supreme Court, as *ex officio* members;
- Three professors of law, selected in an open and transparent way by the Parliament's Committee for Immunities and Appointments, following a public contest and approved by the majority of members of Parliament;
- Six judges elected by secret ballot by the General Assembly of Judges, representing all levels of courts.

In 2019, the Government presented a draft to change that composition and the Parliament approved Law no. 193, of 20 December 2019 (that entered into force in 31 January 2020). The SCM is now composed of 15 members:

- The Minister of Justice, the Prosecutor General and the President of the Supreme Court, as *ex officio* members;
- Five lay members (professors of law) appointed by the Parliament, with the vote of the majority of elected MPs, based on the proposal of the Parliamentary Commission "Legal Committee for appointments and immunities", which shall organize a public competition until the mandate of the appointed members comes to an end or within 30 days from the date when the function became vacant;
- Seven members among judges, elected by secret vote by the General Assembly of Judges, as follows: four among courts of first instance, two among appellate courts and one from the Supreme Court of Justice.

The Venice Commission had been asked to issue an opinion on the draft law that became Law no. 193, of 20 December 2019, but the Parliament approved the law before the Opinion no. 976/2019 (CDL-PI(2020)001), of 22 January 2020, was issued.

Immediately after the entry into force of the Law, on 05 February 2020, the Parliament's Legal Committee for Appointments and Immunities announced a competition to fill four positions for lay members of the SCM. The procedure was led in a speedy manner and the opposition boycotted the interview phase of the selection and left the Committee, but that did not prevent the Committee from concluding the procedure: on 17 March 2020, the new four lay members of the SCM were appointed for a term of four years.

The Venice Commission, in its Opinion no. 983/2020 (CDL-AD(2020)001, of 20 March 2020, expressed concern about the way in which the whole process of appointment of these four lay members was conducted and also about the fact that they were appointed for a term of four years, thus putting at risk the aims of the reform of the Constitution under appreciation at that time in the Parliament.



## 3.2 Current standards on Superior Councils

In order to assess the compatibility of the current framework of Moldovan regulation of the SCM with international standards, we must in the first place try to determine what these standards are regarding Judicial Councils, looking for references in the work of a wide range of international institutions.

### 3.2.1 United Nations

The main documents produced at United Nations level on judicial independence directly and indirectly address the matter of Judicial Councils.

#### 3.2.1.1 Basic Principles on the Independence of the Judiciary

In the Basic Principles on the Independence of the Judiciary<sup>14</sup>, it is only stated that “the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary” and “the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law”, but without detailing in which way that independence would be institutionally achieved.

#### 3.2.1.2 The Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)

In 1987, the United Nations Special Rapporteur on the Study on the Independence of the Judiciary, L. V. Singhvi, elaborated *The Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)*<sup>15</sup>. In this document there is the reaffirmation of the principle that “*the judiciary shall be independent of the Executive and Legislature*”, and Judicial Councils are directly or indirectly mentioned throughout it:

- “the process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects” and “participation in judicial appointments by the Executive or legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate effectively” (par. 11, a) and c) );
- “where the law provides for the discretionary assignment of a judge to a post on his appointment or election to judicial office such assignment shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist” (par. 13);
- “There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary” (par. 17);
- “The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary” (par. 27, b)).

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<sup>14</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1985 in Milan, Italy, and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985. By resolution 40/146 of 13 December 1985, the General Assembly welcomed the Principles and invited Governments “to respect them and to take them into account within the framework of their national legislation and practice”. Available at <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>.

<sup>15</sup> Available at [http://digitallibrary.un.org/record/139884/files/E\\_CN.4\\_Sub.2\\_1985\\_18\\_Add.5\\_Rev.1-EN.pdf](http://digitallibrary.un.org/record/139884/files/E_CN.4_Sub.2_1985_18_Add.5_Rev.1-EN.pdf).



### 3.2.1.3 *Bangalore Principles of Judicial Conduct*

In the Bangalore Principles of Judicial Conduct of 2002<sup>16</sup>, the first principle states that “judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects”. The UNODC, in the Commentary on the Bangalore Principles of Judicial Conduct<sup>17</sup>, develops this institutional aspect of judicial independence saying that “an individual judge may possess that state of mind, but if the court over which he or she presides is not independent of the other branches of government, the judge cannot be said to be independent”, which demands that “an external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary’s liberty in adjudicating individual disputes and in upholding the law and values of the Constitution”.

### 3.2.1.4 *Report of the Special Rapporteur on the independence of judges and lawyers Diego García-Sayán (02 May 2018)*

In 02 May 2018, the *Special Rapporteur on the Independence of Judges and Lawyers* Diego García-Sayán presented to the Human Rights Council a report to be taken into consideration at its Thirty-eighth session of 18 June–6 July 2018, addressing the matter of judicial councils<sup>18</sup>.

The Special Rapporteur noted that there is not a single model of judicial council and that each judicial governing body originates from a legal system with distinct historical, cultural and social roots, estimating that over 70 per cent of the countries in the world have some form of judicial council. Despite this large number, he concluded that there was a lack of international legal standards, which led him to offer some recommendations relating to the establishment, composition and functions of judicial councils, of which we may highlight the following, directly related to the subject of this report:

- the establishment of an independent body in charge of protecting and promoting the independence of the judiciary constitutes good practice, and States should be encouraged to consider establishing one, except in those cases in which judicial independence is traditionally ensured by other means;
- in order to guarantee their independence from the executive and legislative branches and ensure effective self-governance for the judiciary, judicial councils should be established under the Constitution in those countries having a written Constitution, or in the equivalent basic law or constitutional instrument in other countries. The Constitution or the equivalent basic law should include detailed provisions regarding the setting-up of such a body and its composition and functions, and guarantee the autonomy of the council vis-à-vis the executive and legislative branches of power;
- Judicial councils should be provided with adequate human and financial resources. In particular, they should have their own premises, a secretariat and a sufficient number of qualified staff to perform their functions independently and autonomously;
- Judicial councils should be endowed with the widest powers in the field of selection, promotion, training, professional evaluation and discipline of judges. They should have

<sup>16</sup> Endorsed by the *Economic and Social Council* in Resolution 2006/23, adopted at the Forty-first plenary meeting, 27 July 2006, available at [https://www.unodc.org/documents/commissions/CCPCJ/Crime\\_Resolutions/2000-2009/2006/ECOSOC/Resolution\\_2006-23.pdf](https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2006/ECOSOC/Resolution_2006-23.pdf).

<sup>17</sup> Available at [https://www.unodc.org/res/ji/import/international\\_standards/commentary\\_on\\_the\\_bangalore\\_principles\\_of\\_judicial\\_conduct/bangalore\\_principles\\_english.pdf](https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf).

<sup>18</sup> Available at [https://digitallibrary.un.org/record/1637422/files/A\\_HRC\\_38\\_38-EN.pdf](https://digitallibrary.un.org/record/1637422/files/A_HRC_38_38-EN.pdf).



- general responsibilities with regard to the administration of the court system and/or the allocation of budgetary resources to the various courts;
- In order to avoid excessive concentration of power in one judicial body and the perception of corporatism, it is good practice to establish different independent bodies competent for specific aspects of judicial administration (e.g. selection, promotion, training and discipline of judges). The composition of these bodies should reflect the particular task entrusted to them;
  - Considering the broad and important functions of judicial councils, they should be held accountable, both institutionally and legally, by society and the appropriate State institutions;
  - All the appointment processes for the councils should be transparent and participative so to avoid and prevent corporatism and appropriation of the process by the de facto powers;
  - Judicial councils should include judges among its members;
  - To avoid the risk of corporatism and self-interest, the councils may also include lay members, for example lawyers, law professors, jurists, Bar members, as well as citizens of acknowledged reputation and experience;
  - Active politicians and members of the legislative or executive branches of power cannot simultaneously serve on a judicial council;
  - The judge members of a council should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels;
  - Certain members of a council, for example the President of the Supreme Court, can be selected ex officio;
  - The election of lay members of a council should be entrusted to non-political authorities;
  - When elected by parliament, lay members should be elected by a qualified majority, necessitating significant opposition support. In no case should they be selected or appointed by the executive branch;
  - The selection and appointment of the members of a judicial council should take place in an open and transparent way in order to eliminate the risks of political interference and appropriation of the process by the de facto powers, and prevent allegations of corporatism;
  - States should enact appropriate measures to ensure a gender perspective in the composition of a council and promote gender parity within judicial bodies, in particular, through a reduction in gender-based barriers to promotion and career advancement that persist within the justice sector;
  - When members of the executive branch, for example the Minister of Justice, participate in the work of a council as ex officio members, appropriate measures should be developed to ensure their independence from any potential interference;
  - The Chair of a council should be held by an impartial person who does not have any political affiliation. In parliamentary systems in which the President or Head of State has only formal powers, it is permissible to appoint him or her as the Chair of the council. In all other cases, the Chair should be elected by the council itself among its judge members. Neither the Chief Justice, the President of the Supreme Court nor the Minister of Justice should be appointed as the Chair of a judicial council.

### 3.2.2 *European Union*

The treaties of the European Union have no hard rules regarding the organisation of the judicial systems of its Member States. With the deepening of the integration process, however, the disappearance of internal borders and the growing interdependence of domestic economies led to an increasing need for judiciaries to interact and that was built on the concept of mutual trust.

In the Tampere European Council of 15-16 October 1999, the EU Council reaffirmed that “the enjoyment of freedom requires a genuine area of justice, where people can approach courts and





authorities in any Member State as easily as in their own” and that “the principle of mutual recognition (...) should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities”.

The development of criteria regarding the organisation of independent judicial systems in the EU area has been made essentially through the work of the EU institutions in candidate countries and, more recently, through the decisions of the European Court of Justice.

In the European Council held in Copenhagen in 1993, the EU established the criteria that States candidate to accession should meet, and among them was the “*stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*”<sup>19</sup>. Applying these criteria to candidate States, the EU Commission has requested the judiciary in those countries to be administered by independent bodies. Based on the analysis of the recommendations and requirements set up by EU institutions to those countries (which, in turn, derived from many of the documents below mentioned, issued by other bodies and institutions), Michal Bobek and David Kosař summarised the main characteristics of what we may call the “Euro-model” of Judicial Council<sup>20</sup>:

- judicial council should have constitutional status;
- at least half of the members of the judicial council must be judges selected by their peers;
- a judicial council ought to be vested with decision-making and not merely advisory powers;
- a judicial council should have substantial competences in all matters concerning the career of a judge including selection, appointment, promotion, transfer, dismissal and disciplining;
- a judicial council must be chaired either by the President or Chief Justice of the highest court or the neutral head of state.

Recent years have seen major developments in the definition of independence of the judiciary by the European Court of Justice. In the ground-breaking decision *Associação Sindical dos Juízes Portugueses* (27 February 2018, case C-64/16), the ECJ affirmed judicial independence as a general principle of EU law stemming from the constitutional traditions common to the Member States, and that “*the concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*”.

In other decisions that followed, the ECJ has had the opportunity to further develop this jurisprudence, analysing either the principle of mutual trust (case C-216/18, *Minister for Justice and Equality (Deficiencies in the system of justice)*) or national laws regarding irremovability of judges (case C-619/18, *Commission v. Poland*). Many cases are pending before the ECJ, and as the President of ECJ, Koen Lenaerts, predicts, we may expect that this court will in the near future deepen its analysis and strengthen the main guidelines that national judiciaries in the EU must follow in order to respect judicial independence<sup>21</sup>, which will certainly have consequences at the level of the organisation of national judicial systems, including Judicial Councils.

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<sup>19</sup> Available at [https://ec.europa.eu/commission/presscorner/detail/en/DOC\\_93\\_3](https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3).

<sup>20</sup> Michal Bobek e David Kosař, “Euro-Products and Institutional Reform”, in *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited*, (ed. Michal Bobek), Hart Publishing, Oxford: 2015.

<sup>21</sup> Lenaerts, K. (2020). New Horizons for the Rule of Law Within the EU. *German Law Journal*, 21(1), 29-34.



### 3.2.3 Council of Europe

#### 3.2.3.1 European Charter on the Statute for Judges

In the 1998 European Charter On The Statute For Judges<sup>22</sup>, paragraph 1.3. stated that "in 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".

The explanatory memorandum of the Charter specifies that the establishment a minimum of 50% of judge members aimed to neither allow judges to be in a minority nor to require them to be in the majority, seeing that quota as "*capable of ensuring a fairly high level of safeguards while respecting any other considerations of principle prevailing in different national systems*".

The election of judges by their peers is justified by the fact that the independence of this body "precludes the election or appointment of its members by a political authority belonging to the executive or the legislature. There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties. Finally, without insisting on any particular voting system, the Charter indicates that the method of electing judges to this body must guarantee the widest representation of judges".

#### 3.2.3.2 Consultative Council of European Judges

The CCJE has addressed the topic of the composition and operation of Judicial Councils mainly in two of its opinions.

Already in **Opinion no. 1 (2001)** on standards concerning the independence of the judiciary and the irremovability of judges<sup>23</sup>, the CCJE stated in par. 45 that "*the European Charter - in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges - pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems*".

It was in **Opinion no. 10 (2007)** on "*Councils for the Judiciary in the service of society*"<sup>24</sup>, however, that the CCJE developed the criteria that should preside to the Councils for the Judiciary, starting by letting clear that the Council for the Judiciary should be positioned at the constitutional level, where provisions should be made for the setting up of such body, the definition of its functions and of the sectors from which members may be drawn and for the establishment of criteria for membership and selection methods.

In what regards the composition, the CCJE considers that:

- it may be either composed solely of judges or have a mixed composition of judges and non-judges (in the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self-protection and cronyism, and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy);

<sup>22</sup> Approved at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998 – available at <https://rm.coe.int/090000168068510f>.

<sup>23</sup> Available at <https://rm.coe.int/1680747830>.

<sup>24</sup> Available at <https://rm.coe.int/168074779b>.



- when composed solely of judges, these should be elected by their peers;
- when there is a mixed composition (judges and non-judges):
  - o in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers;
  - o the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice;
  - o some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel;

The opinion also addressed the qualification of members of the Superior Councils, stating that they must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence, and that the composition of the council should reflect as far as possible the diversity in the society.

Whether judges or non-judges, the members should not be active politicians, members of parliament, the executive or the administration, which implies that neither the Head of the State (if he/she is the head of the government), nor any minister can be a member of the Council for the Judiciary.

In what regards specifically non-judge members, the CCJE recommends that they may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status (or from other areas outside the legal field, if required by needs of management of the judiciary).

As for the selection of the members, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels, and that competition for elections should comply with the rules set out by the Council for the Judiciary itself so as to minimise any jeopardy to public confidence in the judicial system. Political authorities such as the Parliament or the executive must not be involved at any stage of the selection process and all interference of the judicial hierarchies in the process should be avoided, as well as all forms of appointment by authorities internal or external to the judiciary.

Non-judge members should not be appointed by the executive and, in the CCJE's view, the desirable system would entrust appointment of non-judges to non-political authorities. If elected by the Parliament, non-judge members of the Council should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society.

The CCJE further considers that the president/chair of the Council should be an impartial person who is not close to political parties, be it the President / Head of State (in parliamentary systems where it only has formal powers) or a member elected by the Council itself, from among the judge members.

Some of these principles were reaffirmed in paragraph 13. of the *Magna Carta of Judges*, adopted during the 10<sup>th</sup> CCJE plenary meeting, from 17 to 19 November 2010<sup>25</sup>: *"To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial*

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<sup>25</sup> Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063e431>.



*majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions”.*

### **3.2.3.3 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities<sup>26</sup>**

In 2010, the Committee of Ministers adopted Recommendation CM/Rec(2010)12, that in the part of Judicial Councils and independent and self-governance authorities stated that:

- Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system;
- not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary;
- Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions;
- in exercising their functions, councils for the judiciary should not interfere with the independence of individual judges;
- the authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers, and at least half of the members of the authority should be judges chosen by their peers;
- where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice;
- the membership of the independent authorities should ensure the widest possible representation.

### **3.2.3.4 Venice Commission**

The Venice Commission has produced extensive work in the field of the independence of the judiciary and the composition and operation of judicial councils.

In the Report on Judicial Appointments<sup>27</sup> (CDL-AD(2007)028), it is stated that “a balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members”.

Although admitting that there is no standard model, the report draws these main guidelines:

- a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself;
- other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest;
- in order to insulate the judicial council from politics, its members should not be active members of parliament;

<sup>26</sup> Adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies, available at <https://rm.coe.int/16807096c1>.

<sup>27</sup> Report adopted at the 70th Plenary Session, in 16-17 March 2007, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e).



- depolitisation of such bodies should be guaranteed through the requirement of a qualified majority for the election of its parliamentary component, ensuring that a governmental majority cannot fill vacant posts with its followers, as a compromise has to be sought with the opposition;
- even in cases where the Minister of Justice is a member, he should not participate in all the council's decisions, for example, the ones relating to disciplinary measures, and it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.

In 2010, in the Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004)<sup>28</sup>, the Venice Commission reaffirmed that “it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges” and even if there isn't one single model in all countries, recommended that “states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers”.

The general principles contained in these documents have been reaffirmed by the Venice Commission in numerous reports regarding individual States.

### 3.2.3.5 European Court of Human Rights

The European Court of Human Rights has been called to analyse the independence of the judiciaries of Council of Europe's Member States in several occasions – we will only focus on the main topics that can be taken out from the main decisions regarding Judicial Councils.

In the *Volkov* decision<sup>29</sup>, the Court found that where at least half of the membership of a tribunal is composed of judges, including the chairman with a casting vote, this will be a strong indicator of impartiality, and “*given the importance of reducing the influence of the political organs of the government on the composition of the HCJ [Ukrainian Judicial Council] and the necessity to ensure the requisite level of judicial independence, the manner in which judges are appointed to the disciplinary body is also relevant in terms of judicial self-governance*”.

In the case of the Ukrainian Council, the Court considered that the fact that the majority of the members “continue to work and receive a salary outside the HCJ (...) inevitably involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality. In particular, in the case of the Minister of Justice and the Prosecutor General, who are ex officio members of the HCJ, the loss of their primary job entails resignation from the HCJ”. It further found that “the inclusion of the Prosecutor General as an ex officio member of the HCJ raises further concerns, as it may have a deterrent effect on judges and be perceived as a potential threat. In particular, the Prosecutor General is placed at the top of the hierarchy of the prosecutorial system and supervises all prosecutors. In view of their functional role, prosecutors participate in many cases which judges have to decide. The presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges of whose decisions he disapproves”.

As for judicial review of the decisions of the Judicial Council, the Court considered that there was a breach of Article 6 of the Convention, because “*judicial review was performed by judges of the*

<sup>28</sup> Adopted by the Venice Commission at its 82<sup>nd</sup> Plenary Session (Venice, 12-13 March 2010), available at <https://rm.coe.int/1680700a63>.

<sup>29</sup> 09 January 2013, Case no. 21722/11, *Oleksandr Volkov v. Ukraine*.



HAC who were also under the disciplinary jurisdiction of the HCJ. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality (as examined above), the Court is not persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the "independence and impartiality" required by the above mentioned Article 6.

In *Ramos Nunes de Carvalho e Sá*<sup>30</sup>, another case concerning a judicial council, the Court dealt with insufficient guarantees of judicial review in disciplinary proceedings, having found a violation of Article 6 § 1 of the Convention on account of the shortcomings in the conduct of the proceedings, due to the lack of effective judicial review and of an oral hearing during the procedure. In this case, the concurring and partly dissenting opinions of some judges are worth noting, as they reaffirmed the essentiality of the principles of a majoritarian (or at least 50%) presence of judges in the composition of judicial councils (vote of judge Paulo Pinto de Albuquerque) and of the impartiality of the body in charge of deciding the appeals of judicial council's decisions – which in the case could be at stake by the fact that the Judicial Division which has that competence is a part of the Supreme Court, the president of which is an *ex-officio* member and president of the council (vote of judges Yudkivska, Vučinić, Pinto de Albuquerque, Turković, Dedov and Hüseyinov).

In the recent *Guðmundur Andri Ástráðsson* decision<sup>31</sup>, judge Paulo Pinto de Albuquerque once again underlined in a concurring opinion the "Council of Europe's principle that judicial appointments must result from a decision of a body composed by at least a majority of judges, a fundamental guarantee of judicial independence that has been set out by the Committee of Ministers and reiterated by the Consultative Council of European Judges (CCJE), the Venice Commission and GRECO".

### 3.2.4 European Network of Councils for the Judiciary

The ENCJ approved in May 2008 the *Resolution of Budapest on Self-Governance for the Judiciary: Balancing Independence and Accountability*<sup>32</sup>. In this resolution it stated that the main tasks regarding the governance of the Judiciary should fall under the authority of a Council for the Judiciary or of one or more independent and autonomous bodies, guaranteed in the Constitution. The composition of such independent body could be either exclusively of members of the judiciary or members and non-members of the judiciary. When the composition is mixed, the Council should be composed of a majority of members of the judiciaries, but not less than 50%, and, in any case, the judicial members of the Council (however appointed) must act as the representatives of the entire judiciary.

It later developed the topic of the composition of Judicial Councils in the report *Councils for the Judiciary Report 2010-2011*<sup>33</sup>.

The ENCJ noted that there is "an emerging international consensus that Councils for the Judiciary should have a broad based membership which includes a majority of judges, but not less than 50% of the membership should be judges" and that "the most successful models appear to be those with representation from a combination of members elected and/or appointed from the ranks of legal, academic or civil society, with broad powers sufficient to promote both judicial independence and accountability".

<sup>30</sup> 06 November 2018, Cases nos. 55391/13, 57728/13 and 74041/13, *Ramos Nunes de Carvalho e Sá v. Portugal*.

<sup>31</sup> 01 December 2020, Case no. 26374/18, *Guðmundur Andri Ástráðsson v. Iceland*.

<sup>32</sup> Available at <https://www.ency.eu/images/stories/pdf/opinions/budapestresolution.pdf>.

<sup>33</sup> Available at [https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-enci2017-p/Reports/Report\\_Project\\_Team\\_Councils\\_for\\_the\\_Judiciary\\_2010\\_2011.pdf](https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-enci2017-p/Reports/Report_Project_Team_Councils_for_the_Judiciary_2010_2011.pdf).



The appointment of judicial members must be a system which excludes any executive or legislative interference and the election of judges should be solely by their peers and on the basis of a wide representation of the relevant sectors of the judiciary.

Lay members should be appointed on the basis of their competence and standing in civil society. In ENCJ's view, legal experience gained from practising as a lawyer, or involvement in academia or other quasi-legal position, is considered desirable in order to guarantee that such lay persons have the requisite skills and experience in areas of Council competence, and have a sufficient understanding of judicial life to comprehend the functioning of the judicial system with a view to greater openness to civil society, thereby ensuring greater transparency for the activities of the Council for the Judiciary.

As for the presidency of the Council, the ENCJ believes that being entrusted to an internal member of the Council contributes to guaranteeing the body's independence, and when exercised by an external member, this must have no executive function or powers and should be neutral and possibly a guarantor of the Constitution.

The Minister of Justice should not be a member of the Council, as it entails the risk of interference of the executive power, but it is important to have in place a clear established line of communication to the Minister and ministry officials.

Feeling the need for the establishment of Minimum Judicial Standards in relation to the involvement of non-judicial members in Judicial Governance, the ENCJ further elaborated on that matter in the *ENCJ Report 2015-2016 – Standards VI: Non-judicial Members in Judicial Governance*<sup>34</sup>, from where we can draw these main conclusions, regarding non-judicial members in the composition and operation of Councils:

- non-judicial members should constitute at least 1/3 of members;
- the process of selection, election or appointment of non-judicial members should be merit based and transparent;
- civil society should be involved in one or more of the stages of selection, election or appointment, including the possibility to propose appropriate candidates for consideration;
- where non-judicial members are appointed by parliamentary bodies, it is desirable that their selection be subject to the achievement of particular qualified majorities in order to avoid political influence;
- non-judicial members should be persons of high moral standing who bring to Judicial Governance acknowledged skills and experience from outside the judiciary;
- the body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil society, appointed from among well-known persons of high moral standing on account of their skill and experience in matters such as human resources;
- persons with a range of backgrounds and experience should be considered for appointment as non-judicial members (including: lawyers, academics, and other professionals like sociologists, psychologists, economists, specialists in human resources and representatives of Civil Society Organizations);
- non-judicial members should not be politicians or persons with political affiliations;
- the Minister of Justice should not be a member of the Judicial Council or other relevant body;

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<sup>34</sup> Available at

[https://www.ency.eu/images/stories/pdf/workinggroups/encj\\_standards\\_vi\\_2015\\_2016\\_adopted\\_ga\\_warsaw.docx.pdf](https://www.ency.eu/images/stories/pdf/workinggroups/encj_standards_vi_2015_2016_adopted_ga_warsaw.docx.pdf).



- non-judicial members of Judicial Councils and other relevant bodies should not be involved in politics for a reasonable period of time before and after their mandate as member of a Judicial Council or other relevant body;
- certain persons should always be ineligible for appointment as non-judicial members, in particular: judges, even if retired; persons who have been convicted of criminal offences, who are or have been bankrupt, or who are otherwise disqualified from public office; members of Parliament (including former Members); members of governments (including previous governments);
- judicial and non-judicial members should be involved in the decision making process and non-judicial members must have the same voting rights and should be involved in the work of all relevant bodies, including presiding committees, working groups and subcommittees created by Judicial Councils;
- non-judicial members during their service on Judicial Councils and other relevant bodies should be bound by any rules of conduct applicable to judicial members of such bodies.

### **3.2.5 Organization for Security and Co-operation in Europe / Office for Democratic Institutions and Human Rights**

The OSCE's Office for Democratic Institutions and Human Rights (ODIHR), together with the Max Planck Institute for Comparative Public Law and International Law (MPI), after an expert meeting on Judicial Independence held in Kyiv, Ukraine, on 23-25 July 2010, published the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*<sup>35</sup>.

The Recommendations start by suggesting the establishment of different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority, in order to avoid excessive concentration of power in one judicial body and perceptions of corporatism.

As for the composition, the main points of the *Kyiv Recommendations* are:

- judge members shall be elected by their peers and represent the judiciary at large, including judges from first level courts, and Judicial Councils must not be dominated by appellate court judges;
- where the chairperson of a court is appointed to the Council, he or she must resign from his or her position as court chairperson;
- apart 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;
- prosecutors should be excluded, where prosecutors do not belong to the same judicial corps as the judges;
- other representatives of the law enforcement agencies should also be barred from participation;
- neither the State President nor the Minister of Justice should preside over the Council;
- the president of the Judicial Council should be elected by majority vote from among its members;
- the work of the Judicial Council shall not be dominated by representatives of the executive and legislative branch.

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<sup>35</sup> Available at <https://www.osce.org/files/f/documents/a/3/73487.pdf>. The *Kyiv Recommendations* are currently being updated and reviewed: "The *Kyiv Recommendations* will be updated as part of the project "Strengthening Inclusive and Accountable Democratic Institutions in the OSCE Region", implemented with funds from several participating States, including Germany, Ireland, Norway and the United States" - <https://www.osce.org/odihr/439394>.





### 3.2.6 *International Foundation for Electoral Systems*

In its April 2004 paper “Global Best Practices: Judicial Councils - Lessons Learned from Europe and Latin America”<sup>36</sup>, IFES defined the Seven International Best Practices for Judicial Councils:

- i. Independent, transparent and accountable – Judicial Councils must be independent bodies and operate in a transparent and accountable manner;
- ii. Structure – The structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence. If adequate checks and balances are not in place, the Judicial Council may become a pawn in the hands of the executive, legislative and/or powerful groups, thereby undermining judicial independence.
- iii. Adequate resources – Judicial Councils must be granted adequate human and financial resources.
- iv. Composition – While the exact composition of Judicial Councils varies greatly from country to country and depends on existing obstacles to judicial independence, there is an emerging consensus among judges, legal scholars and practitioners that Judicial Councils should be composed of a majority of judges and that Councils with broad representation may function more fairly and independently.
- v. Judicial membership – Judicial members of the Judicial Council should be elected by their peers rather than appointed by the legislature or executive. The selection process should be transparent and provide for civil society participation and oversight.
- vi. Powers – Judicial Councils around the world have varying powers which range from judicial administration to decisions affecting the judicial career, but there is an emerging consensus that where they exist they should be responsible for the judicial selection process and contribute to the promotion, discipline and/or training of judges.
- vii. Monitoring and reporting – The decision-making process of the Judicial Council should be transparent and allow for civil society participation and oversight. Mechanisms to monitor Judicial Council operations must be put in place and effectively implemented.

### 3.2.7 *Summary*

After analysing all the documents above mentioned, we can draw some principles that could be considered widely consensual international standards regarding Judicial Councils:

- i. The separation of powers and independence of the judiciary should be guaranteed by the existence of a judicial council, with wide competences on all matters regarding the judiciary, namely appointment, transfer, dismissal and disciplinary responsibility of judges;
- ii. The existence and composition of judicial councils must be established at constitutional level;
- iii. Judicial councils may have a mixed composition of judges and non-judges;
- iv. Judge members:
  - should represent a substantial majority, or at least 50% of the total number of members of the council;
  - must be elected by their peers and represent all levels of the judiciary;
- v. Non judge members:
  - should represent at least 1/3 and not more than 50% of the total number of members of the council;
  - must represent the diversity of society;
  - must not be politicians or members of the executive or legislative, either active or retired;
  - must be selected through an open and transparent procedure;

<sup>36</sup>

Available

at

<https://www.csm.org.pt/wp-content/uploads/2017/12/authemaandelena2004judicialcouncilslessonslearnedeuropelatinamerica.pdf>



- when selected by the legislative, the procedure must require a qualified majority of votes, in order to demand inter-party dialogue and prevent manipulation from a majoritarian group;
- vi. Judicial and non-judicial members should be involved in the decision making process and have the same competences and voting rights;
- vii. The Prosecutor-General and the Minister of Justice should not be members of the Judicial Council;
- viii. The President of the Supreme Court should only be member of the Council when that membership does not jeopardize the independence of the organ;
- ix. Judicial councils must act with the highest degree of transparency towards judges and society, under pre-established procedures and through reasoned decisions.



### 3.3 Analysis

In the light of the standards identified, we must now analyse the situation of the Moldovan Superior Council of Magistracy.

- 1. The separation of powers and independence of the judiciary should be guaranteed by the existence of a judicial council, with wide competences on all matters regarding the judiciary, namely appointment, transfer, dismissal and disciplinary responsibility of judges;**
- 2. The existence and composition of judicial councils must be established at constitutional level;**

The Superior Council of Magistracy is the highest body of the judiciary in the Republic of Moldova and has extensive competences, laid down in article 123 of the Constitution of the Republic of Moldova: appointment, transfer, removal from office, upgrade and imposition of disciplinary sentences against judges.

Although its existence is established in the Constitution of the Republic of Moldova, the Constitution does not explicitly define the SCM as a guarantee of the separation of powers and of the independence of the judiciary, which is not in line with international standards.

The draft proposal of changes of the Constitution currently under discussion in the Parliament, however, introduces a new article 121<sup>1</sup>, clearly stating that *“The Superior Council of Magistracy is the guarantor of independence of judicial authority”*. Despite a mere formal proclamation, we believe this explicit mention to the essential role of the SCM should be welcomed.

In the version currently in force, the Constitution also does not establish the number of members of the SCM, its article 122 only establishing that these consist of judges and university lecturers, together with three *ex officio* members: the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General. The number of members of the SCM is therefore currently established only in ordinary law and not in the Constitution, which is not in line with international standards. As seen above, the composition of the Judicial Council is a matter of the utmost importance and the number of members and balance between judicial and non-judicial members is a fundamental aspect of the nature of judicial councils. Seen that importance, it should be clearly established in the Constitution, in order to make it more stable and consensual and less likely to be changed by mere will of the majority of the day.

The draft proposal of changes of the Constitution currently under discussion in the Parliament introduces in article 122 the number of members of the SCM and the ratio of judges and non-judges. In the light of what has been said, this proposed change to the Constitution, in order to explicitly mention the number of members of the SCM and the ratio of judges and non-judges, should be welcomed.

### **3. Judicial councils may have a mixed composition of judges and non-judges;**

Article 122 of the Constitution in the version currently in force establishes that the SCM is composed of judges and university professors, together with three *ex officio* members: the President of the Supreme Court, the Minister of Justice and the Prosecutor General.

Law no. 947-XIII, of 19 July 1996 (as last amended by Law no. 193, of 20 December 2019, that entered into force on 31 January 2020) establishes that the SCM is composed of 15 members: three *ex-officio* members, seven judges elected by the General Assembly of judges and five lay members (professors of law) appointed by the Parliament, under a majoritarian vote.

The draft changes to the Constitution under discussion in the Parliament establish that the SCM would be composed of 12 members, six being judges and six being persons who enjoy a high professional reputation and personal integrity, with experience in law or any other relevant field.



According to the current composition and the one previewed in the draft changes to the Constitution, the standard of a mixed composition in the Judicial Council appears to be met by the Moldovan SCM.

#### 4. Judge members:

- a) **should represent a substantial majority, or at least 50% of the total number of members of the council;**

In its current composition, judges are the majority in the SCM – 8 out of the 15 members are judges: seven judges elected by their peers and the President of the Supreme Court as *ex officio* member.

In the draft changes to the Constitution, the balance between judges and non-judges would be changed, as the SCM would no longer have *ex officio* members and would be composed of only 12 members: six judges elected by their peers and six non-judges.

In the online meeting with the SCM, some concerns were expressed regarding this proposed change and the end of the majoritarian participation of judge members in the composition of the SCM, which could be seen as a downgrade of the independence of that body.

Either in the current composition or in the projected one, judges represent at least 50% of the members of the SCM, which seems to be in line with the international standard above identified. As it may be drawn from all the documents analysed in the previous point, the consensus is that at least half of the members should be judges – a majority of judges is not seen by all international organisations as a mandatory requirement for the guarantee of the independence of a judicial council.

Always respecting the minimum consensual threshold of 50% of judge members, the decision of a majoritarian composition of judges in a judicial council must be taken having in mind the specific reality of each country. As the Venice Commission noted in the *Report on Judicial Appointments*<sup>37</sup> (CDL-AD(2007)028), “a balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary”. Many organisations (mentioned above in point 1.) concluded that currently the public perception of corruption and susceptibility to political pressure of the Moldovan judiciary is high, so an equal participation of judges and non-judges in the SCM could be considered to contribute to give to society an image of bigger transparency and accountability, as long as the selection of the members prevents any political influence. As the UN Special Rapporteur noted<sup>38</sup>, each judicial governing body originates from a legal system with distinct historical, cultural and social roots and social reality must be taken into consideration when assessing the different possibilities of organisation. In the specific context of the current Moldovan reality, it is not to be excluded that a strictly paritarian composition could better address the challenges faced by the Moldovan judiciary and its needs of affirmation before the society as a non-corporatist and truly independent power of the State.

Another aspect that has to be taken into account is the hierarchical culture that still exists in the Moldovan judiciary<sup>39</sup>, a situation that could be argued to be better dealt with if judges are not in an absolute majority in the SCM.

In addition, the Venice Commission, in its opinion of 19 June 2020 (CDL-AD(2020)007), considered that the new composition of the SCM proposed in the draft changes to the Constitution was in line with international standards and should be welcomed.

<sup>37</sup> Report adopted at the 70th Plenary Session, in 16-17 March 2007, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e).

<sup>38</sup> See 1.4.1.4. above.

<sup>39</sup> See International Commission of Jurists' *Only an Empty Shell...*, cit., pp. 13 and 45. This was also mentioned by Legal Resources Centre in the meeting held.



We may therefore conclude that the standard of having at least 50% of judge members in the composition of the Judicial Council seems to be met by the Moldovan SCM.

A warning note should nevertheless be made: this solution must always be seen as specific to the case of Moldova and to the current state of its Judiciary. The current composition of the SCM grants majority to judges (7 judges + president of the Supreme Court, out of 15 members). The draft changes to the Constitution are decreasing that already attained level and that should never be praised. Moreover, the even number of members and the strictly paritarian composition may eventually lead the SCM to become a non-functional and weak body not able to perform its duties<sup>40</sup>.

The solution must therefore always be seen as specific to the case of Moldova and a transitory remedy, always having in mind the return to a majoritarian composition, when the Moldovan judiciary will achieve a degree of trust in the society that would allow it.

**b) must be elected by their peers and represent all levels of the judiciary;**

Article 122 of the Constitution in its current wording is silent on the election procedure of judge members of the SCM.

The draft proposal of changes to Article 122 of the Constitution under appreciation by the Parliament establishes that the judge members are “*elected by the General Assembly of Judges, representing all levels of courts of law*”, leaving to ordinary law “*the procedure and requirements for electing, appointing and terminating the mandate of the members of the Superior Council of Magistracy*”.

Law no. 947-XIII, of 19 July 1996 (in the version in force since 31 January 2020), in its Article 3, §§ 4 and 4<sup>1</sup>, establishes that:

- judge members are elected by secret vote by the General Assembly of Judges, as follows: four (4) among courts of first instance, two (2) among appellate courts and one from the Supreme Court of Justice;
- candidate judges who have accumulated more than half of the votes of those present at the meeting of the General Assembly of Judges shall be considered elected as members and substitute (alternate) members of the Superior Council of Magistracy, according to the descending order of the number of votes obtained. The substitute members shall fill the vacant positions of members of the Superior Council of Magistracy from among the judges corresponding to the level of the courts for which they were elected, in descending order of the number of votes obtained;
- the SCM announces the date of the meeting of the General Assembly of Judges at which its members are to be elected at least 60 days before the date of the meeting, but not later than 30 days from the expiration of the term of office of a member of the Superior Council of Magistracy;
- candidates for the position of member of the SCM submit the participation files to the Council at least 30 days before the date of the meeting of the General Assembly of Judges. The list of candidates and the files submitted are published on the official website of the Superior Council of Magistracy on the first day after the deadline for submission of files. Candidates for the position of member of the Superior Council of Magistracy have the right to carry out a promotion campaign among the judges, in the manner established by the Superior Council of Magistracy.

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<sup>40</sup> See in this regard the Opinion of the CCJE Bureau following a request by the Judges' Association of Serbia to assess the compatibility with European standards of the newly proposed amendments to the Constitution of the Republic of Serbia which will affect the organisation of judicial power, CCJE-BU(2018)9, of 21 December 2018, available at <https://rm.coe.int/opinion-on-the-newly-proposed-amendments-to-the-constitution-of-the-re/168090751b>: “increasing the number of judicial members elected by their peers and putting in place an odd number of members would be the most promising solution, as it would have the greatest impact on increasing the independence of the judiciary”.



The election procedure and the division among instances of the judge members had been widely criticized for not assuring a real free choice and a proportionate representation of judges<sup>41</sup>.

The changes introduced by Law no. 193 of 20 December 2019 to the Law on the Superior Council of Magistracy corrected those shortcomings, by providing for a wider representation of the first instance and clarifying the election procedure. Those changes appear to be in line with the international standards, as noted by the Venice Commission in Opinion CDL-PI(2020)001, of 22 January 2020.

One should note, however, that some negative remarks have been made regarding the effective application of the rules of election of judges by the General Assembly. Not only the *International Commission of Jurists* mentioned it regarding previous assemblies<sup>42</sup>, but also Legal Resources Centre, in the meeting held, voiced some concerns regarding the fact that due to the strong hierarchical culture of the Moldovan judiciary, the diversity in the election procedure is not put in practice, and an effectively competitive process must be assured.

The problem with General Assemblies is often the previous control by some judges from Superior Courts of the functioning of the Assembly and the elaboration of lists.

There is the need for a more open debate between candidates and a proactive concern in having different lists of candidates, for instance, one list for each instance (again to counterbalance the hierarchical culture).

Another aspect to consider is that experience shows us that the distribution of judge members by instance is a major factor to combat the pattern of the hierarchical culture typical of ex-communist countries. Therefore, the matter of distribution of judge members by instance is of particular importance and should be included in the Constitution and not only in ordinary law, in order to render it more stable.

#### **5. Non judge members:**

- a) should represent at least 1/3 and not more than 50% of the total number of members of the council;**

Regarding this point, we already noted that in the current composition of the SCM, non-judge members are in a ratio of 7/8 and in the composition proposed by the draft law amending the Constitution would be in a ratio of 6/6, so we may therefore conclude that the balance between judges and non-judges in the current and proposed compositions of the Moldovan SCM appears to be in line with international standards.

- b) must represent the diversity of society;**  
**c) must not be politicians or members of the executive or legislative, either active or retired;**

The version currently in force of the Constitution stipulates in Article 122, § 1, that non-judge members must be “*university lecturers*”.

In the draft law of proposed amendments, § 1 of Article 122 would establish that the six non-judge members would have to be “six persons who enjoy a high professional reputation and personal integrity, with professional experience in the field of law or any other relevant field, who do not work within the bodies of legislative, executive or judicial power, and are not politically affiliated”.

In accordance with the wording of the Constitution currently in force, Article 3, § 3 of Law no. 947-XIII, of 19 July 1996, stipulates that lay members must be “*professors in law*”.

While limiting to university professors the possible lay members of the SCM, the model currently in force does not meet the international standard of ensuring the representation of the diversity

<sup>41</sup> Ibid., pp. 12-13.

<sup>42</sup> Only an Empty Shell..., cit., p. 12.



of society. As the Venice Commission<sup>43</sup> and also the UN Special Rapporteur<sup>44</sup> noted, membership in the SCM should be open not only to law practitioners other than university professors, but also to persons with relevant expertise from other areas, thus contributing to reduce “*the perception that such councils are a lawyers’ monopoly*”<sup>45</sup>. We must conclude that the proposed changes seem to be a positive step and to be in line with the international standards.

Also, the criteria of prohibition of political affiliation of lay members of Judicial Councils is not met by the current regulation of the Moldovan SCM.

In the proposed amendments to the Constitution, as mentioned above, Article 122, § 1 would stipulate that lay members must not “*work within the bodies of legislative, executive or judicial power*” or be “*politically affiliated*”. This appears to be a positive step towards compliance with international standards that must be welcome.

However, as noted by the Venice Commission<sup>46</sup>, the expression “*politically affiliated*” could give rise to a broader interpretation, thus being advisable to replace it with a more specific expression, such as “*member of political party*”. In this particular aspect, the arguments put forward by the Minister of Justice of Moldova in the *Informative Note* to the draft law amending the Constitution of the Republic of Moldova<sup>47</sup> do not seem sufficient to overcome the problems raised by the Venice Commission, namely the possibility of interpreting “*politically affiliated*” as including “*conducting advocacy activities*”<sup>48</sup>.

Another aspect that the informative note hypothetically raises and is not in line with the international standards is the possibility of limiting in the organic law the prohibition of belonging to a political party (the informative note refers to a 3-year period). As analysed above, political links should be excluded, either previous or still active. The possible establishment of a time limit would therefore not be in line with the international standards.

- d) must be selected through an open and transparent procedure;**
- e) when selected by the legislative, the procedure must require a qualified majority of votes, in order to demand inter-party dialogue and prevent manipulation from a majoritarian group;**

Articles 122 and 123 of the Constitution do not establish any method of election or appointment of lay members of the SCM.

Article 3, § 3 of Law no. 947-XIII, of 19 July 1996, stipulates that lay members are to be appointed by the Parliament, with the vote of the majority of elected MPs, based on the proposal of the Parliamentary Commission “*Legal Committee for appointments and immunities*”. This Commission shall organize a public competition until the mandate of the appointed members comes to an end or within 30 days from the date when the position becomes vacant. The public competition involves at least the examination of the application files and the interview with the candidate.

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<sup>43</sup> Opinions CDL-AD(2020)001 and CDL-AD(2020)007.

<sup>44</sup> See 1.4.1.4. above.

<sup>45</sup> Opinion CDL-AD(2020)001, par. 52. This recommendation was supported by Legal Resources Centre of Moldova in its Legal Opinion on the Draft Law amending the Constitution of the Republic of Moldova, 30 June 2020.

<sup>46</sup> Opinion CDL-AD(2020)007, par. 10 and 23. Also here supported by *Legal Resources Centre of Moldova*, *ibid*.

<sup>47</sup> “the organic law, in particular Law no. 947/1996 on the Superior Council of Magistracy will contain detailed regulations regarding the meaning of political affiliation. Therefore, the mere establishment of a ban on not being a member of a political party for lay members of the SCM cannot ensure its apolitical nature. Moreover, fulfilling the condition of not being a member of a political party may, in fact, constitute a mere formality to be fulfilled for future candidates for SCM membership and does not correspond essentially to the purpose of this draft law, non-admission of political intervention in the activity of the judiciary, through the SCM. Clarification of the notion of politically unaffiliated at the level of organic law could, probably, be in the form of a requirement not to be member of a political party for the last 3 years, etc.”.

<sup>48</sup> Opinion CDL-AD(2020)001, par. 54.



That same commission will develop motivated notes to the file in respect to each candidate and proposed to the Parliament their appointment to the position.

The draft law amending the Constitution stipulates that lay members will be elected through a competition, based on a transparent procedure, based on merits and appointed by Parliament with the votes of three fifths of elected deputies. In case that majority is not reached, the procedure and conditions of appointment of these will be established by law.

Seen the absence of a rule requiring a qualified majority, the appointment model currently in force does not meet the international standards, as noted by the Venice Commission<sup>49</sup>.

The draft changes that provide for the introduction of a three fifths majority are therefore apparently in line with international standards<sup>50</sup>.

However, although acknowledging the remarks made by the Venice Commission in Opinion CDL-AD(2020)007<sup>51</sup>, we see with concern the absence of a stronger prevision in the Constitution for the situations when a qualified majority is not reached. We must take into consideration the specific reality of Moldova, namely the way in which the procedure to appoint four lay members following the entry into force of Law no. 193, of 20 December 2019, was conducted. The lack of transparency and inability or unwillingness to reach a consensus between parties (as denounced by the Venice Commission<sup>52</sup> or Legal Resource Centre<sup>53</sup>) could easily be repeated if some limits to the deadlock mechanism are not explicit in the Constitution and it is only left to the organic law to establish that mechanism, which in the words of the Ministry of Justice (in the informative note) could be not only providing “*for the revision of the list of candidates by organising a new contest to select the best candidates*”, but also “*the reduction of the required number of votes in Parliament to the absolute majority of the elected members*”. The latter would in practice mean that the aim of the constitutional stipulation of a qualified majority could simply be voided and jeopardized, as it would be easy for the majority to block any agreement, knowing that it could afterwards impose its own list of candidates.

It is true that devising an anti-deadlock mechanism is a very delicate task, seen all the interests at stake<sup>54</sup>. However, that mechanism is of essential nature to prevent distortions in the pluralism of judicial councils and the capture of those bodies by a single political majority.

Although the option of the Moldovan Constitution was to give exclusive competence to the Parliament to appoint lay members of the SCM, other options could be devised – e.g., the inclusion of other bodies in the appointment procedure<sup>55</sup>, giving to other institutional actors legitimacy to

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<sup>49</sup> Opinion CDL-AD(2020)001, par. 26.

<sup>50</sup> As the Venice Commission also noted in Opinion CDL-AD(2020)007, par. 28.

<sup>51</sup> Namely in par. 44: “It is further welcome that the revised draft provisions provide for a requirement of a qualified majority of MPs (three-fifths) for the election of the lay members. It is recommended to indicate in the Constitution that the organic law will provide for an anti-deadlock mechanism in case parliament fails to reach a qualified majority of three fifths, without specifying which mechanism. Indeed, provision for a decreased majority after a reflexion period of fifteen days might not suffice as an incentive for the first round of voting to be successful, but devising an appropriate alternative requires more time than is available at this stage”.

<sup>52</sup> See Opinion CDL-AD(2020)001, par. 57-60.

<sup>53</sup> Opinion on the organisation of the selection process for the appointment of 4 members of the SCM from the side of law professors, 11 March 2020.

<sup>54</sup> See the Venice Commission’s CDL-PI(2018)003rev of 27 June 2018 - Compilation of Venice Commission Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms in Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial and Prosecutorial Councils and the Ombudsman.

<sup>55</sup>As suggested by the Venice Commission (Opinion CDL-PI(2020)001, par. 27 and 35), the *International Commission of Jurists (Only an Empty Shell...*, cit., p. 13) or Legal Resources Centre (*Opinion on the organisation of the selection...*, cit., p. 4).





appoint members or establishing new relations between state institutions<sup>56</sup> - which would give guarantees of higher diversity in the appointed lay members.

An effective anti-deadlock mechanism must ensure that enough pressure is put on political parties to force them to overcome their differences, while at the same time guaranteeing that if that consensus is not reached, an alternative solution is possible, in order not to block the functioning of the judicial council.

Seen the option of the Constitution of giving to the Parliament the competence to, in a first approach, appoint the lay members of the SCM, a possible mechanism to solve deadlocks could be to establish that in case the qualified majority is not reached in the Parliament after three rounds of voting, that competence would be distributed by other institutional actors.

In order to ensure diversity in the appointment of lay members, in a second approach, the lay members would be appointed in this manner (or any other option if applying the general concept now envisaged):

- three members by the Parliament, in proportion to the number of seats of each party;
- one member appointed by the President of the Republic of Moldova (with the increased legitimacy of being elected by all citizens and not by the Parliament<sup>57</sup>);
- one member appointed by the Ombudsman of Moldova;
- one member appointed by the Moldovan Bar Association.

We have been informed of the fact that the Ombudsman has been appointed in 2019 as a member of the Superior Council of Prosecutors, and that following that appointment, he immediately submitted a written request to the SCP mentioning that he would not attend the meetings since he could find himself in a position of possible conflict of interest. We believe, however, that the situation is not the same as in the solution proposed. The Ombudsman would not be part of the SCM or have any participation in its activity or decisions. The intervention of the Ombudsman would be just the appointment of one member, immediately ceasing in that moment and not being in any way connected or responsible for the performance of the member appointed. This means that the Ombudsman would remain free to exercise his competences regarding the SCM without any conflict of interests.

The system proposed has the advantage of not eliminating completely the competence of the Parliament, while assuring that it would not be possible for the majority to fill all the posts with its followers.

As for the efficacy of the mechanism proposed, this system would put pressure on the parties (either from the majority or the minority) to reach an agreement, because in case they don't, the consequence would be losing the right to appoint all the members (and this way preventing the majoritarian party from blocking the negotiations, because it wouldn't have the possibility of future appointment by simple majority). On the other hand, even if with that pressure an agreement is not reached, the judicial council's activity would not be blocked, because a system of appointment of the lay members would function. This is particularly important in times when the blockage of councils is a problem in several countries and tends to aggravate with the more radical disputes between political parties that are becoming increasingly partisan.<sup>58</sup>

**6. *Judicial and non-judicial members should be involved in the decision making process and have the same competences and voting rights;***

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<sup>56</sup> As the Venice Commission suggested in par. 8 of Opinion CDL-AD(2013)028, of 15 October 2013, on the draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro.

<sup>57</sup> This solution is not unseen in Council of Europe's Member States – e.g., in the Portuguese Superior Judicial Council, two of its members are directly appointed by the President of the Republic.

<sup>58</sup> In Spain, e.g., where the mandate of the members of the Superior Council is already exceeded by two years.



Article 10 of Law no. 947-XIII, of 19 July 1996, establishes the rights of members of the SCM:

- “a) take knowledge of the materials presented to the Council for examination;
- b) participate in examining them;
- c) file requests, express his/her arguments and present additional materials;
- d) ask courts, Ministry of Justice, other institutions and organizations for information and documents that are necessary to exercise his/her responsibilities;
- e) propose issues that are related to the competence of the Council to be discussed within Council’s session;
- f) participate by vote in passing decisions and express, as the case may be, a separate opinion;
- g) enjoy other rights under law.”

This article does not distinguish between judges and lay members, thus being apparently in line with the international standard in this matter.

One specific right, however, has been subject to recent changes and was mentioned in the meeting with the SCM – the right to be elected President of the SCM. In the meeting with the SCM, concerns were raised about this point, seen as a matter of independence of the judiciary.

Law no. 193/2019, of 20 December 2019 (that entered into force in 31 January 2020) had introduced a change to Article 5, stipulating that the President of the SCM must be elected among judge members. This was later modified by the Parliament through Law no. 117, of 09 July 2020, that introduced the possibility for a non-judge member to be elected as Chair of the SCM.

The Venice Commission had considered the restriction to be able to be elected President of the SCM to judge members as “*a regrettable step back*”, in Opinion CDL-PI(2020)001<sup>59</sup>. It later consequently praised the proposed amendment that would allow lay members to be elected<sup>60</sup>.

As previously noted, the solutions have to be analysed in light of the specific reality of each country, and in the case of Moldova, the current state of its Judiciary seems to suggest that **more openness to society is needed to affirm the SCM as a true non-corporatist and guarantor of independence body.**

Following the Venice Commission’s opinion, in the specific case of Moldova we do not see the possibility of election of a lay member as President of a judicial council as a threat to the independence of the Judiciary. In the case of the Moldovan SCM, the duties of the President prescribed in Article 6 of Law no. 947-XIII, of 19 July 1996, do not grant the holder of the position increased powers over the functioning and work of the Council, in order for it to be seen as a determinant position. We must therefore consider that the possibility of a lay member to be elected president of the SCM may not contradict international standards.

### **7. The Prosecutor-General and the Minister of Justice should not be members of the Judicial Council;**

In Article 122, § 2 of the version of the Constitution currently in force, the Minister of Justice and the Prosecutor-General are included as *ex officio* members of the SCM. In line with that constitutional provision, Article 3, § 2 of Law no. 947-XIII, of 19 July 1996, also stipulates their *ex officio* membership.

This is not in accordance with international standards, as above seen.

The proposed changes of the Constitution, that eliminate the *ex officio* membership of the Minister of Justice and the Prosecutor-General, are therefore welcomed, and the Moldovan authorities

<sup>59</sup> Par. 29.

<sup>60</sup> Opinion CDL-AD(2020)001, par. 13.



should quickly adapt Law no. 947-XIII, of 19 July 1996, to that constitutional change, as soon as it enters into force.

**8. The President of the Supreme Court should only be member of the Council when that membership does not jeopardize the independence of the organ;**

Also the President of the Supreme Court is an *ex officio* member of the SCM, according to Article 122, § 2 of the version of the Constitution currently in force and to Article 3, § 2 of Law no. 947-XIII, of 19 July 1996.

In the meeting held, the members of the SCM expressed a favourable opinion on the membership of the President of the Supreme Court, based on the fact that the Supreme Court is the highest institution in the judicial hierarchy and has competences in the area of the uniform application of the law.

As previously seen, contrary to the situation of the Minister of Justice and the Prosecutor-General, the international standards do not exclude the possibility of the President of the Supreme Court to be member of the judicial council. However, that may only be admissible when that membership does not put at risk the independence of the body.

Although the competence to decide the appeals against decisions of the SCM no longer belongs to the Supreme Court, but to the Appeal Court of Chisinau (according to the change introduced to Article 25 of Law no. 947-XIII, of 19 July 1996, by Law no. 193, of 20 December 2019), it has been noted that the Moldovan judiciary still shows signs of a strong hierarchical culture, with a dominant influence of the members of the Supreme Court, and the SCM sometimes “*instead of playing its crucial role of defending the independence of the judiciary and of the individual judges it governs*”, becoming “*an instrument of pressure on individual judges and a threat to their individual independence*”<sup>61</sup>. This problem should be addressed on a multiple level and must be considered a serious systemic problem for the judiciary.

This reality, together what was above mentioned regarding the balance between judges and lay members of the SCM, may lead to consider that in the specific case of Moldova, the *ex officio* membership of the President of the Supreme Court would not be beneficial.

The proposed changes of the Constitution, that eliminate the *ex officio* membership of the President of the Supreme Court, appear to be positive, and the Moldovan authorities should quickly adapt Law no. 947-XIII, of 19 July 1996, to that constitutional change, as soon as it enters into force.

As mentioned above in the case of the number of judge members, however, this solution must also be seen as specific to the case of Moldova and a transitory remedy, always having in mind that the *ex officio* membership of the President of the Supreme Court should be reconsidered when the Moldovan judiciary will achieve a degree of internal independence that would eliminate the identified risks.

**9. Judicial councils must act with the highest degree of transparency towards judges and society, under pre-established procedures and through reasoned decisions.**

The matter of transparency in the activity of the SCM is established in Article 8<sup>1</sup> of Law no. 947-XIII, of 19 July 1996, there being stipulated that:

- its activity is transparent and ensured by providing access to the society and the media to information on Council’s activities;
- meetings shall be public (except for cases when, upon reasoned request of the President or of at least three members of the Council, it is deciding that the meetings shall be closed in order to protect the information constituting state secret or where, due to special

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<sup>61</sup> *International Commission of Jurists, Only an Empty Shell...*, cit., p. 13 and 45. This point was also mentioned by Legal Resources Centre in the meeting held.



circumstances, public character may prejudice the interests of justice or could affect the privacy of individuals. The reasoned decision on the declaration of the closed session shall be adopted by the majority vote of the present members);

- SCM shall create conditions and shall take the necessary measures to ensure the participation of media representatives and interested persons to attend its meetings;
- the agenda of the meetings, draft resolutions and additional materials to be submitted for examination, shall be placed on the website of the Council at least three days before the meeting;
- meetings must be recorded in video and audio and registered in the minutes, which are placed on the website of the Council;
- the regulations approved and announcements on launching of competitions for judicial positions are published in the Official Journal of the Republic of Moldova;
- the decisions of the SCM and its specialized bodies, including the decisions adopted within closed meetings, individual opinions of members of the Council, as well as Council's annual reports are published on the website of the SCM. Decisions expressing consent or disagreement for the commencement of criminal prosecution shall be published on the official website of the SCM, with the anonymization of data on the identity of the judge.

Despite these rules, there are complaints about the lack of transparency of the activity of the SCM and the poor reasoning of its decisions<sup>62</sup>. Also here, the problem may be not in the law, but in its concrete execution, so a recommendation must be made to the SCM to deepen and develop the transparency of its activity and the reasoning of its decisions.

Follow-up mechanisms on the enforcement of transparency procedures should be put in place. On a general approach, the essential topic of “judicial integrity” must also be considered in the context of the reforms. A culture of integrity is a pre-requisite for any judicial reform.

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<sup>62</sup> GRECO - IV Evaluation Round, Evaluation Report – Republic of Moldova, par. 93. See also *International Commission of Jurists, Only an Empty Shell...*, cit., p. 11.



#### 4 CONCLUSIONS AND FOLLOW-UP

From all the analysis made, we may conclude that the evolution of the legislative and regulatory framework regarding the composition and functioning of the SCM has been positive and most of the changes introduced or under debate in the Parliament of the Republic of Moldova have been in the direction of adjusting the SCM with international standards regulating judicial councils.

However, some improvements may still be made and the SCM would benefit from some further adjustments, summarized in the conclusions that will be formulated in the next section.

One must also notice that much of the success of the reforms depends more of the practical application of the laws than of the laws themselves, so additional efforts must be put in practice by the SCM and the Moldovan authorities (namely the Parliament and the Government) to ensure that the SCM truly plays its crucial role of guaranteeing the independence of the Judiciary. That can only be achieved through loyal institutional cooperation and responsible exercise of the constitutional competences of each of those bodies.

Also a robust ethical commitment by the members of those bodies is essential, linked with the efforts on implementing Codes of Judicial Ethics and the correlated training.

A possible follow-up would be the development of missions on the ground to assess the effective implementation of changes to the Law and the Constitution.

The conclusions of this report will be further discussed in the planned roundtable meeting that will follow and the author remains fully available for any further discussion and contribution that may be of interest.



## 5 RECOMMENDATIONS

Based on the analysis, the following **recommendations** can be made:

- I. The Moldovan Parliament should complete the process of amendment of the Constitution of the Republic of Moldova as soon as possible, approving the proposed changes of:
  - a. introducing a new article 121 stating that the Superior Council of Magistracy is the guarantor of independence of judicial authority;
  - b. explicitly mentioning the number of members of the SCM and the ratio of judges and non-judges;
  - c. establishing a mixed composition of judges and non-judges in the SCM, in a ratio of 6/6;
  - d. opening the possibility of non-judge members having professional experience not only in the field of law, but also in any other relevant field;
  - e. stipulating that non-judge members must not work within the bodies of legislative, executive or judicial power or be politically affiliated;
  - f. establishing a minimum of three fifths majority of votes in the Parliament to elect non-judge members of the SCM;
  - g. eliminating the *ex officio* membership in the SCM of the Minister of Justice, the Prosecutor-General and the President of the Supreme Court;
  
- II. These changes should be introduced in the draft proposal of amendments to the Constitution:
  - a. The distribution of judge members by instance should be included in the Constitution and not only in ordinary law;
  - b. The expression “*politically affiliated*” regarding non-judge members should be replaced with a more specific expression, such as “member of political party”;
  - c. Eliminate the rule stating that if the three fifths majority is not reached to elect non-judge members of the SCM, the procedure and conditions of appointment will be established by law;
  - d. An anti-deadlock mechanism should be stipulated, following this proposal or any other option applying the general concept envisaged in this report:
    - i. in case the qualified majority for the election of non-judge members of the SCM is not reached in the Parliament after three rounds of voting, the non-judge members will be appointed in this manner:
      1. three members by the Parliament, in proportion to the number of seats of each party;
      2. one member appointed by the President of the Republic of Moldova;
      3. one member appointed by the Ombudsman of Moldova;
      4. one member appointed by the Moldovan Bar Association.
  
- III. The Moldovan authorities should quickly adapt Law no. 947-XIII, of 19 July 1996, to the constitutional changes above mentioned, as soon as they enter into force.
  
- IV. The return to a majoritarian composition of judges in the SCM must be reconsidered when the Moldovan judiciary will achieve a higher degree of trust in the society.
  
- V. The *ex officio* membership of the President of the Supreme Court must be reconsidered when the Moldovan judiciary will achieve a higher degree of internal independence.



- VI.** A time-limit to the prohibition of belonging to a political party in the case of non-judge members should be excluded from any future change to the Law on the SCM.
- VII.** The SCM and the General Assembly of Judges must assure real diversity in the election procedure of judge members of the SCM, and an effectively competitive process, ensuring a more open debate between candidates and a proactive concern in having different lists of candidates, for instance, one list for each instance.
- VIII.** The SCM must deepen and develop the transparency of its activity and the reasoning of its decisions, in order to enhance its accountability.

