

«Only an Empty Shell» The Undelivered Promise of an Independent Judiciary in Moldova

A Mission Report

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"Only an empty shell"

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I. Introduction

An independent judiciary and legal profession are essential to the maintenance of the rule of law and the fair and proper administration of justice. The independence of the judiciary is a cornerstone of the rule of law and is essential to guarantee the respect, protection and fulfilment of human rights, and access to justice for those whose rights have been violated.¹

In Moldova, after the independence of the country from the Soviet Union, a process of transition took place towards a rule of law-based governance system. The promise to institute an independent judiciary was one of the leading reforms in this process of transition and democratization. Expansive efforts and resources have been poured in the last decade into the realization of this goal. Unfortunately, as the title of this report suggests, these efforts have, at present, produced only an empty shell. Legal reforms have been enacted, yet their implementation is lagging behind and often lacks political will and conviction.

The result is a judiciary that could be, but is not yet, fully independent, as the full meaning of judicial independence is not yet sufficiently rooted in the minds of those who holds it, the judges. This has disappointed the expectations of many Moldovans that an independent judiciary would be developed.

However, as this report will outline, the reforms, despite the problems in their implementation, may signal the beginning of establishing real judicial independence, instilled in the hearts and minds of all actors of the justice system.

1.1. ICJ Mission to Moldova

The International Commission of Jurists (ICJ) carried out a mission to the Republic of Moldova from 19 to 23 November 2018. The aim of the mission was to assess the factors impeding the effective functioning of the judiciary and its independence, including the current disciplinary rules and mechanisms of enforcement to protect against judicial misconduct, as well as the appointment, selection, training and security of tenure of the judiciary. The mission was carried out in co-operation with the Legal Resource Centre of Moldova, which provided logistical support. The mission's assessment and conclusion are solely those of the ICJ.

¹ See, *Basic Principles on the Independence of the Judiciary*, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1; *Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, CoE Doc. CM/Rec(2010)12 ('Council of Europe Recommendation on judges'), Preamble and articles 3, 7; *Magna Charta of Judges*, adopted by the Consultative Council of European Judges (CCJE) at its 11th plenary meeting, Strasbourg, 17-19 November 2010 ('Magna Charta of Judges'), article 3 ("judicial independence shall be statutory, functional and financial"); CCJE, *Opinion no. 10(2007) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society*, adopted at its 8th meeting, Strasbourg, 21-23 November 2007 ('Opinion no. 10'), para. 9.

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The mission was composed of Justice Martine Comte, a former judge of the Court of Cassation and court of appeal in France and a Commissioner of the ICJ; Dragana Boljievic, Court of appeal judge in Serbia and President of the Association of Judges of Serbia; and Massimo Frigo, ICJ Senior Legal Adviser serving in the ICJ Europe and Central Asia Programme.

The mission met with a range of key actors in order to gain an understanding of the situation in the Moldovan judiciary, the progress already made in reforming the justice system and the ongoing legislative and practical reform initiatives. It met with judges and former judges of the Supreme Court, Courts of Appeal and District Courts, as well as members of the Superior Council of the Magistracy. The Superior Council of Magistracy, the Supreme Court and the Association of Judges could not, regretfully, meet with the mission. The mission also held meetings with experts of the Ministry for Justice, the National Institute of Justice, the Prosecutor's office, the Superior Council of Prosecutors and with other expert lawyers, former judges, NGOs and academic and policy institutions. The ICJ is grateful to all those with whom it met, and expresses its thanks for the openness shown by its interlocutors in discussing challenges in the judicial system.

1.2. Historical background

The Moldovan judiciary has been shaped by a difficult history, developing from a Soviet tradition in which the judiciary was subordinated to the executive. Following independence in 1991, and the adoption of a new Constitution in 1994, Moldova undertook a programme of judicial reform, with a series of new laws governing the judiciary and the court system enacted between 1994 and 1996.² During this period, Moldova joined the Council of Europe and became party to the European Convention on Human Rights,³ as well as a number of the principal UN human rights treaties.⁴

The government led by the Communist Party, elected in 2001 and in office until 2009, instituted a further programme of reform, elements of which were in fact retrogressive, which was ostensibly aimed at ending judicial corruption. The main effect of these reforms was to increase government control over the judiciary, including through an enhanced role for the President in the judicial appointments process.⁵ The reforms also brought the Superior Council of Magistracy (SCM), the governing body of the

² ICJ report, *Moldova: the Rule of Law in 2004*, para.52.

³ Moldova joined the Council of Europe on 13 July 1995 and ratified the European Convention on Human Rights on 24 July 1997.

⁴ Moldova acceded to the International Covenant on Economic Social and Cultural Rights (in 1993); the International Covenant on Civil and Political Rights (in 1993); the International Convention on the Elimination of All Forms of Racial Discrimination (in 1993); the Convention on the Rights of the Child (in 1993); the Convention on the Elimination of All Forms of Discrimination against Women (in 1994); and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (in 1995). More recently, Moldova has ratified the first and second Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2004); the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2007); ratified the first Optional Protocol to the ICCPR (2008) and acceded to the Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty (2006); acceded to the Optional Protocol to the Convention on the Elimination of Discrimination Against Women (2006); ratified the Optional Protocol to the Convention Against Torture (2006) and the Convention on the Rights of Persons with Disabilities (2010); and signed the International Convention for the Protection of All Persons from Enforced Disappearances.

⁵ Law no.140 of 21 March 2003, Article 11 (4).

judiciary, under greater government control.⁶ In 2002, the Constitution was amended to reduce the levels of courts from four to three, a measure which resulted in the effective dismissal of a number of judges.⁷ During this period, the judiciary became less independent from the government in practice and there were credible reports of incidents of government officials providing instructions to the judiciary through “telephone justice.”⁸

An ICJ mission which visited Moldova in 2004, to assess the independence of the judiciary, found that there were worrying indications of a return to a judiciary compliant to the executive’s demands, and of a Supreme Council of Magistracy that had effectively become a conduit for the exercise of the President’s will.⁹

Legislative reforms adopted in 2005 have reversed the retrogressive measures enacted in the early 2000s, altered the composition of the Superior Council of Magistracy, strengthened its independence in law, and limited the role of the Moldovan President in judicial appointments.

Between 2011-2017, an ambitious Justice Sector Reform Strategy (JSRS) was implemented. The JSRS and its implementation is part of the Association Agreement Agenda signed between the European Union and Moldova in 2014. The JSRS, adopted by the Parliament, aimed at “strengthening independence, accountability, impartiality, efficiency, and transparency of judiciary”. A series of important reforms were carried out to implement the Strategy and important progress was achieved in areas such as audio-recordings of court hearings, random assignment of cases functioning in all courts,¹⁰ increased numbers of court staff resulting in judicial assistants for each individual judge, increased salaries of judges and court staff, and improvements in several laws regarding the self-governance of the judiciary and the selection, promotion and discipline of judges.

However, the quick pace of reforms seems not to have been matched by effective implementation. On 11 October 2017, the European External Action Service of the European Union (EU) announced that it would not transfer EUR 28 million to the State budget of the Republic of Moldova to assist with the reform in the justice sector,¹¹ because the Moldovan authorities had shown insufficient commitment to reforming the justice sector between 2014 and 2015.

The public trust in the judiciary decreased in recent years and remains at a low level today, in spite of the implementation of the JSRS during 2011-2017. According to a national survey conducted in December 2017 for the

⁶ ICJ report, *Moldova: the Rule of Law in 2004*, paras.64-90.

⁷ *Ibid.*, paras. 21, 101-104.

⁸ *Ibid.*, paras. 113-121.

⁹ *Ibid.*, para.6.

¹⁰ Random assignment of cases is functioning in all courts, but the system is vulnerable to manipulations. The Integrated Case Management System, through which random assignment is done, shall be adjusted to exclude the current vulnerabilities.

¹¹ See for details, EEAS statement available at https://eeas.europa.eu/headquarters/headquarters-homepage/33723/moldova-eu-cuts-budget-support-programme-justice-reforms_en.

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Superior Council for Magistracy,¹² 81 percent of the general population did not trust the judiciary, nor did 81 percent of people that had contact with the courts. The same survey indicates that 75 percent of the general population and 83 percent of those with court experience perceive that justice sector is corrupt. Seventy-three percent of the general population and 77 percent of those with court experience believe that the courts will convict an ordinary person of a crime, even if innocent, and at the same time, a similarly high percentage (79 percent and 80 percent respectively) consider that the courts will exonerate a rich person who is guilty.

Many of the problems of the judiciary that persist in Moldova are derived from the past and are similar to those in other countries of the former Soviet Union. The country's judiciary and the government as a whole has not yet been able to relinquish the traditions and practices which had been challenged by the reforms. However, the biggest challenge of the new and probably most significant wave of the reforms is this Soviet and post-Soviet legacy still salient in Moldova.

The mission heard on many occasions – in line with the general experience from other transitional societies – that the conceptual frames typically internalized by many judges is a serious obstacle to reform. A long-standing tradition of subservience to the executive and the legislative powers remains prevalent among the judiciary. There is no tradition of a strong and independent judiciary capable of providing a check on the power of other branches of the State.

This reality is confirmed by the prosecutorial bias that the mission was repeatedly informed is quite strong in Moldova, a remnant of the Soviet regime where the prosecution was stronger than judiciary. The low acquittal rate is one indicator in this respect. In 2017 the acquittal rate was the lowest since 2009, when the Communist party rule ended. In 2009 the acquittal rate was 2.1 percent, while in 2017 it was 1.65 percent at first instance level (228 court judgments, which is with 54 judgements less than in 2016) and 1.5% at appeal courts level.¹³

¹² Survey conducted for the Superior Council of Magistracy by Open Justice, USAID funded program, and Increased Efficiency, Accountability and Transparency of Courts in Moldova (ATRECO), EU funded project, 2018, available at: http://crjm.org/wp-content/uploads/2018/02/Brosura_finala_compressed.pdf.

¹³ Data on acquittal rate according to the Prosecution General Office annual reports for 2009 – 2017, available at www.procuratura.md.

Box 1. Cases of alleged judicial corruption

In September 2016, a criminal case brought to the public attention the alleged involvement of 16 judges in money-laundering activities of about USD 20 billion in the "Russian Laundromat" scheme.¹⁴ Although the Superior Council of Magistracy had been aware since 2012 about the involvement of judges in these cases,¹⁵ they reportedly did not take action until the autumn of 2016. Several judges involved in such cases were either evaluated "very positive" in their performance review by the competent SCM bodies (Iurie Hîrbu)¹⁶ or promoted to administrative positions in district courts (Serghei Popovici) or to Courts of Appeal (Ștefan Nița¹⁷ and Serghei Gubenco¹⁸) during 2014-2016.¹⁹ According to an analysis of a local think tank IDIS Viitorul, the role of the courts in the "Russian Laundromat" scheme was significant given the fact that it is the courts that have issued the court orders for transfer of funds. The cases against the judges are still pending. To date, there has been no statement by the SCM or the Association of Judges on this case.

In October 2018, the Anticorruption prosecution office arrested five judges as part of a larger scheme involving corruption of judges, lawyers, court bailiffs and doctors. Videos were leaked to the press purporting to show how one of the judges counted Euros and distributed cash in different envelopes, allegedly for sharing with other colleagues.

¹⁴ Reportedly, around 20 billion USD have been laundered from Russia to various European states via Moldova during 2010-2014, including due to "legalization" of these operations by Moldovan courts. This "legalization" was done via simplified procedures (procedure in ordinance), through which the judge, unipersonal, issues a court order (ordinance) that allows collecting / cashing in of an amount of money or reclaiming goods from the debtor, based on the written materials provided by the creditor. For more details on the money-laundering scheme and the arrest of judges in 2016, see one of the investigating journalistic source of 2014: <https://www.rise.md/articol/operatiunea-ruseasca-the-laundromat/>; Press conference of the head of the Anticorruption Prosecution Office and the head of the criminal investigation of the National Anticorruption Center of 21 September 2016 (http://www.realitatea.md/live--viorel-morari-si-bogdan-zumbreanu--conferinta-de-presa-privind-bilantul-operatiunii-de-retinere-a-celor-15-magistrati-si-3-executori-judecatoresti-pentru-fapte-de-coruptie_45501.html). Also see a more recent investigation at <https://www.theguardian.com/world/2017/mar/20/british-banks-handled-vast-sums-of-laundered-russian-money>.

¹⁵ Reportedly, the SCM knew about the "Russian Laundromat" back in 2012 when the Security and Intelligence Service (SIS) was notified of the actions of Judge Iurie HÎRBU at Telenești Court. At that time, the SCM took note of the information provided by the Judicial Inspection that the judge certified the debt of USD 30 million on the basis of unauthenticated copies of documents. The SCM also noted the intention of a member of the SCM to initiate disciplinary proceedings against that judge and forwarded the materials to the General Prosecutor's Office. See for details the SCM decision [no. 812/38 of 8 December 2012 in Romanian, http://csm.md/files/Hotaririle/2012/38/812-38.pdf](http://csm.md/files/Hotaririle/2012/38/812-38.pdf). In 2014, the SCJ analyzed the court practice on this issue and found several misconduct by judges. The findings were brought to the attention of prosecutors, NAC and SCM. In May 2014, SCM took note of this information but did not order any further investigation or disciplinary proceedings. See for details the SCM decision [no. 470/16 of 27 May 2014 in Romanian, http://csm.md/files/Hotaririle/2014/16/470-16.pdf](http://csm.md/files/Hotaririle/2014/16/470-16.pdf).

¹⁶ Between 2012-2014, Judge Iurie Hîrbu was not sanctioned in disciplinary procedure and in February 2015 he was evaluated "very good". See more details: Performance Evaluation Board, decision no. 18/2 of 13 February 2015, <http://csm.md/files/Hotaririle%20CEvaluare/2015/02/18-2.pdf>.

¹⁷ Superior Council of Magistracy, [decision no. 769/30 of 20 October 2015, http://csm.md/files/Hotaririle/2015/30/769-30.pdf](http://csm.md/files/Hotaririle/2015/30/769-30.pdf).

¹⁸ Superior Council of Magistracy, [decision no. 8/2 of 26 January 2016, http://csm.md/files/Hotaririle/2016/02/8-2.pdf](http://csm.md/files/Hotaririle/2016/02/8-2.pdf).

¹⁹ See for details on the Russian Laundromat scheme and the involvement of judiciary and other state institutions in the report *State Capture: The case of the Republic of Moldova*, 2017, Transparency International-Moldova, ADEPT, LRCM and IDIS-Viitorul, available at http://www.transparency.md/wp-content/uploads/2017/06/TI_Moldova_State_Capture.pdf.

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II. The Moldovan Judicial System: Structure and Organization

Moldova is a civil law country. As noted above, among other treaties it has been a party to the European Convention on Human Rights (ECHR) since 1997 and of the International Covenant on Civil and Political Rights since 1993.

Article 1.3 of Moldova's Constitution provides that "[g]overned by the rule of law, the Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values that shall be guaranteed."

International human rights law, including the ECHR, and the Universal Declaration of Human Rights have priority over national legislation according to article 4 of the Constitution.²⁰ In 2000, the Plenary Supreme Court of Justice stated, in an explanatory judgment, that the ECHR should be applied directly.²¹

2.1. Structure of the Court System

In Moldova's judiciary, there are 504 established judicial positions that may be occupied at any one time, including 33 Supreme Court judges. This total number of judicial positions includes the number of posts designed for the courts from "the left side of Nistru", ie, the area of Transnistria where the Moldovan government does not exercise effective control. The exact number of judicial posts per court is decided by the SCM.²² There are by law fifteen District Courts, four Courts of Appeal, and a Supreme Court of Justice.²³

The Law no. 76 on the reorganization of courts, that is being gradually implemented between 1 January 2017 and 31 December 2027, collapsed the jurisdiction of 44 District Courts into just 15 Courts. Out of the 44 district courts merged within the court reorganization reform, two were

²⁰ Art. 4 of the Constitution provides that: "(1) Constitutional provisions concerning human rights and freedoms shall be implemented and applied in accordance with the Universal Declaration of Human Rights, with Covenants and other treaties the Republic of Moldova is party to. (2) In cases of discrepancies between conventions and treaties the Republic of Moldova is party to and her domestic laws, international regulations shall prevail."

²¹ See judgment no. 17 of the Plenary Supreme Court of Justice of 19 June 2000, para. 1, as replaced by the explanatory Judgement no. 3 of 9 June 2014 on the application by Moldovan courts of some provisions of the European Convention on Human Rights, judgment, which contains a similar wording on direct application of the Convention.

²² Law no. 514 of 6 July 1995 on the Organisation of the Judiciary, last amended by Law no. 137 of 29 September 2018 (in force since 19 October 2018), art. 21 para (2) and (4). These courts from the left side of Nistru included the courts for Transnistrian Region of the Republic of Moldova (4 courts), which were never operational for the reason that Moldova does not exercise effective control over that territory. After the declaration of Moldovan independence on 23 June 1990, the eastern (Transnistrian) region of Moldova (known also as "Transnistria") self-proclaimed itself as "Republic of Transnistria" on 2 September 1990 and since then is not under the effective control of the Moldovan authorities. The SCM decision no. 68/3 of 22 January 2013 allocated 15 posts for the courts established on the left side of Nistru. These posts have never been filled in since the Government did not have the authority over the territory. On 20 October 2015, by decision no. 774/30 (<https://www.csm.md/files/Hotaririle/2015/30/774-30.pdf>) the SCM decided to redistribute 11 out of the 15 posts initially allocated for Transnistria to Chisinau district and appellate court, due to the later courts' high workload. Hence, currently, there are 4 judicial posts meant for the courts from the area of Transnistria. This number is also indicated in the number of vacancies, available on the SCM site here: https://www.csm.md/files/Lista_judecatorilor/Locuri_vacante.pdf.

²³ Law No.514 of 6 July 1995 on the Organisation of the Judiciary, last amended by Law no. 137 of 29 September 2018 (in force since 19 October 2018), art. 15 para. (1) and (2).

specialized courts – commercial and military, that were both closed since 1 April 2017.²⁴

The ICJ has been informed that the reform of geographical redistribution of district courts was finalized in the law but is not yet fully implemented in practice. It is expected to be finalized by 31 December 2027. While district courts have been reduced in law to fifteen, the majority of judges are still sitting in the same courthouses as before until a new building for a court with increased staff is built or made available by the authorities. For example, the Chisinau District Court is still divided in practice in five sectors with consequences also for the random distribution of cases (see below) that is carried out with the same division, rather than among all judges of the district court. The mission heard that, however, when the courts with increased staff become operational, that would make it possible to create some levels of specialization, for example in commercial law, that was lost with the dismantling of the Commercial Court since 1 April 2017.²⁵

2.2. Guarantees of Independence

The Law on the Status of the Judge affirms that “judges shall be independent, impartial and immovable and shall be subordinate only to the law.”²⁶ It stipulates that “judges shall make decisions independently and impartially and shall act without any direct or indirect restrictions, influences, pressures, threats or interventions from any authority, including judicial ones. The hierarchical organisation of jurisdictions shall not affect the individual independence of the judge.”²⁷ Article 15 of the Law on the Status of Judges, which lists the obligations of judges, states that judges shall be obliged to be impartial and to ensure the defence of a person’s rights and freedoms, honour and dignity.²⁸

According to international standards, the obligation to respect personal independence has particular implications for the structure and organization of the judiciary²⁹ so as not to allow for interference with the judge's freedom to pass judgements uninfluenced by extrinsic

²⁴ Law no. 76 of 21 April 2016 on reorganization of the courts, which entered into force on 1 July 2016, except provisions regarding the closing of the two specialised district courts - military and commercial courts - which entered into force on 1 April 2017. According to 2 of the Law no. 76, the newly created courts (as a result of the merger of the 42 district courts into 15) shall start their activity on 1 January 2017. The reform was preceded by two main studies: Study on optimization of the judicial map (https://crjm.org/wp-content/uploads/2014/06/2014-Study-Optimis-Jud-Map-MD_en-web.pdf), February 2014, LRCM (Nadejda Hriptievshi, Vladislav Gribincea and Jesper Wittrup) and the Feasibility Study for Court Optimization (<https://crjm.org/wp-content/uploads/2015/07/Moldova-Court-optimiz.pdf>), July 2015, USAID ROLISP, The Justice Management Institute, Urban Project Institute and LRCM. The 2014 study proposed three scenarios for merger, on the basis of 5, 7 and 9 minimum judges per court. The Ministry of Justice chose the scenario with 9 minimum judges per court.

²⁵ On 27 November 2018, the Superior Council of Magistracy decided to specialize the judges of the Chisinau District Court in five areas of law, each sector / courthouse being specialized in one of these areas: insolvency law, criminal law, civil law, contravention and investigative judges, and administrative law. This decision shall be implemented from 1 January 2019. Specialization of judges was one of the aims of the judicial reorganization reform, since it is not possible but in larger courts. It is expected to be applied in all merged District Courts that will have sufficient staff to allow both specialization and random assignment of cases. Chisinau District Court is the biggest court in Moldova, with 155 judges, which allowed specialization even while still operating from five different courthouses. The smallest courthouse in Chisinau, specialized on insolvency matters, will have 12 judges and the biggest one, specialized on civil matters, will have 70 judges.

²⁶ Law on the Status of the Judge, Article 1(3).

²⁷ *Ibid.*, article 1(4).

²⁸ Law on the Status of the Judge, Article 15(1)(a) and (b).

²⁹ Council of Europe Recommendation on judges, article 7 and 22.

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considerations or influences.³⁰ The Council of Europe's Venice Commission, which provides advisory opinions on matters of legal concern to Council of Europe States, has stressed that "the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity."³¹

Formally speaking, in Moldova, the judiciary is not organized in a hierarchical structure. A ruling of the Constitutional Court of 9 February 2016 clarified that "the independence of judges excludes any notion of hierarchy, subordination, having the role to settle the litigations in an objective way, in accordance with the law and being a power, the judges may not receive orders, instructions or suggestions regarding their judiciary activity nor from the inside or outside the judiciary system."³²

The ICJ mission, however, heard testimonies according to which judges are generally looking to the directives of senior judges in order to decide whether to talk to certain actors or to regulate their behaviour even outside court. The mission also experienced first-hand that a culture of obedience and deference to the Supreme Council of Magistracy and the Supreme Court of Justice still exists in the Moldovan judiciary. This was also apparent from the denial of requests for certain individual interviews with judges by the ICJ, apparently because the SCJ and the SCM had refused to meet with the ICJ delegation, or that they could meet only if authorized by the SCM. This was despite the fact that no provision in Moldovan law requires judges to have authorization of these bodies for such meetings. The ICJ delegation was told that such deference occurs also with regard to judges' participation to events, workshops and meetings with other international delegations. In addition, judges' continuing education is very strictly regulated by the SCM, which decided in May 2017 that any request for delegation or authorization of judges to participate at any trainings, conference, round tables and other public events must be sent to the SCM via the National Institute of Justice.³³ This regulation limits judges' possibilities to attend public events.

2.3. The Superior Council of Magistracy

The Superior Council of Magistracy is the main governing body of the judiciary, with responsibility for judicial appointments, evaluation of judicial performance, promotions, inspection and disciplinary matters.³⁴ The law provides that it is an independent body.³⁵ There are five bodies affiliated to the SCM: a Disciplinary Board, Judicial Inspectorate, a Selection

³⁰ UNODC, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007 ('Commentary on the Bangalore Principles'), para. 40. See also, para 23; *UN Basic Principles on the independence of the judiciary*, principle 4; Council of Europe Recommendation on judges, paras. 23-24; Magna Charta of Judges, article 10.

³¹ Venice Commission, *Report on independence of the judicial system – Part I: the independence of judges*, adopted at its 82nd Plenary Session, Venice, 12-13 March 2010 ('Report on the independence of judges'), para. 72.

³² Constitutional Court, *Judgment on the interpretation of Article 135 para. (1) let. a) and g) of the Constitution of the Republic of Moldova*, case no. 55b/2015, 9 February 2016, para. 97.

³³ See the SCM decision no. 352/16 of 23 May 2017 on certain aspects related to judges' continuing education, available at <https://www.csm.md/files/Hotaririle/2017/16/352-16.pdf>.

³⁴ Law on the Superior Council of Magistracy, No.997 of 19 July 1996, last amended by Law no. 271 of 23 November 2018.

³⁵ *Ibid.*, Articles 1 (1) and 8 (1).

and Career Board, a Performance Evaluation Board, and a recently established Ethics Commission.

The composition of the SCM ensures a majority of judges in its membership. Currently, the SCM is to be composed of 12 members, including three *ex officio* members: the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General; three law professors³⁶ to be elected by Parliament; and six judges elected by the General Assembly of Judges, and representing all levels of the Courts.³⁷

The General Assembly is made up of all judges in Moldova, and meets once a year.³⁸ The SCM reports to the General Assembly, which elects judges to the SCM and its subordinate boards, approves and amends the Code of Ethics and decides on matters of court administration.³⁹

The SCM has wide ranging competences and a high quality of SCM performance and decision-making is essential for the entire judicial system. However, the ICJ mission was told that the procedure by which its decisions are taken is marred by a lack of transparency and by the poor reasoning of SCM decisions. All SCM decisions are taken by open vote of its members, but in closed sessions, similar to the adoption of court decisions (the so-called procedure in "deliberation"), unlike those of the Superior Council of Prosecutors (SCP) which does not use this kind of procedure. The ICJ delegation was informed that, although the law provides that the decisions of the SCM be motivated, the Council does not include the explanations or grounds for the votes in its decisions.

A recent legislative reform - entered into force on 19 October 2018 - stipulates that, while all decisions are adopted with the vote of the majority of its present members, on decisions on judges' career, their disciplinary liability, sanctioning and dismissal, the members *ex officio* participate without voting rights.⁴⁰ This reform was discussed by some experts with whom the ICJ met, who were concerned about the lack of clarity of the provision as to the calculation of the majority. In particular it was unclear whether the requirement was for a majority of six votes plus one (in respect of the twelve members of the Council) or of five (in respect of the voting nine members).

In this connection, the European Charter on the Statute for Judges specifically states that "in 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."⁴¹ The current situation in the SCM upholds this standard. With regard to the calculation

³⁶ This term denotes full time law professors in accredited higher education institutions.

³⁷ *Ibid.*, Article 3 para. (4).

³⁸ Article 23² para (2) of the Law no. 514 on Organization of Judiciary.

³⁹ Articles 4 and 29 of the Law no. 947 on the SCM.

⁴⁰ Article 24 para. (1), Law no. 947 on the SCM, as modified by Law 137/2018. The procedure is by open vote but still taking place *in camera*.

⁴¹ European Charter on the Statute for Judges, para.1.3

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of the majority, the ICJ stresses nonetheless that it is a common standard in all voting procedures that, unless otherwise clearly stated, the majority would be calculated based on the members with voting rights and not the members present including those without voting rights.

International standards, including those adopted by Council of Europe bodies, strongly affirm that at least half of the members of a Judicial Council should be judges elected by their peers and ensuring the widest representation within the judiciary.⁴² They encourage a mixed composition, with the appropriate guarantees to ensure independent self-governance and avoid political and other external influence. They recommend that some of the tasks of the Council be reserved for the judge-members,⁴³ none of the members be an active politician - in particular no ministers⁴⁴ - and non judge-members should not be appointed by the Executive.⁴⁵ One of the exigencies is to "ensure that a governmental majority cannot fill vacant posts with its followers."⁴⁶

The Council of Europe's Group of States against Corruption (GRECO) has expressed "reservations as to the *ex officio* participation of the Minister of Justice as a member of the SCM,"⁴⁷ as well as of the Prosecutor General, and pointed at "further concern as to the selection process of the members of the SCM, which does not ensure that sufficient information is available to the voters and the public on candidates."⁴⁸

Several local NGOs have jointly voiced similar concerns regarding the election of judges-members of the SCM at the Judges' Annual Assembly of October 2017.⁴⁹ They noted a low level of transparency in the process of nomination of candidates since the courts' assemblies nominated an exact clean slate of six judges for the six vacant judicial posts, and only two additional candidates for district courts presented their candidature. They further complained at the SCM's failure to publish sufficiently in advance the candidates' names and their activity programs, and the SCM lack of interest in organizing public debates among candidates. The NGOs noted that the 2017 elections of the SCM were less transparent than in 2013 and 2014.

Draft Law no. 10/2018⁵⁰ would have excluded from the SCM the current *ex officio* members, and would have increased the SCM mandate to six years but prohibited the holding of two successive terms of office. The Draft Law has not been approved by Parliament and has therefore missed the deadline of one year from its tabling until being approved as a

⁴² Council of Europe Recommendation on judges, para. 27; European Charter on the statute for judges, para. 1.3; Magna Charta of Judges, article 13; CCJE, Opinion no. 10, paras. 15-18, 26-31; Venice Commission, [Judicial Appointments](#), adopted at its 70th Plenary Session, Venice, 16-17 March 2007 ('Report on judicial appointments'), para. 29; Venice Commission, Report on the independence of judges, op. cit., para. 32. UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN Human Rights Council*, UN Doc. A/HRC/20/19, 7 June 2012 ('Annual Report 2012'), para. 28; CCJE, *Opinion no. 10*, para. 19.

⁴³ CCJE, *Opinion no. 10*, para. 20.

⁴⁴ Venice Commission, Report on Judicial Appointments, op. cit., para. 34.

⁴⁵ CCJE, *Opinion no. 10*, paras. 20, 23, 32. Venice Commission, *Report on Judicial Appointments*, op. cit., para. 32.

⁴⁶ Venice Commission, Report on Judicial Appointments, op. cit., para. 32.

⁴⁷ GRECO report 4th evaluation on Moldova, para. 91.

⁴⁸ GRECO report 4th evaluation on Moldova, para. 92.

⁴⁹ See the NGOs declaration in English at <http://crjm.org/wp-content/uploads/2017/10/2017-10-17-Declaratie-transparenta-alegeri-CSM-2017-ENG.pdf>.

⁵⁰ Draft Law no. 10/2018 registered with the Parliament on 18 January 2018 on amending and supplementing the Constitution of the Republic of Moldova.

constitutional amendment, and it became null and void.

The ICJ mission heard repeatedly, almost uniformly and from a variety of stakeholders, that the SCM, instead of playing its crucial role of defending the independence of the judiciary and of the individual judges it governs, has become an instrument of pressure on individual judges and a threat to their individual independence. The ICJ was told that in the last elections of the judges of the SCM the candidates were presented in a single list and judges were "encouraged" to vote for them and not to stand against them in the election.

The ICJ considers, as it already concluded in its 2013 report, that the presence of the Ministry of Justice representative and of the Prosecutor General in the Council constitutes an interference of these powers with the independence of the judiciary and should be removed. Furthermore, the division provided by the Law on the SCM of the six elected judges into two SCJ judges, two court of appeals judges and two first instance judges does not respect the demographics of the judiciary (where the majority of judges are at first instance) and gives a preponderance to SCJ judges (three with the President of the SCJ). This apportionment should be modified to ensure that at least four judges represent the first instance, one the court of appeal and one the SCJ. A similar composition is already in place when it comes to the Superior Council of Prosecutors. Furthermore, the working methods of the SCM should ensure that decisions on the career of judges be taken in configurations of members whose majority is always composed of judges.

The ICJ considers that, in the specific case of Moldova, it would be useful for the SCM to take advantage of the expertise of the legal profession to ensure that SCM decisions on the judiciary reflect the needs of all persons accessing the justice system. A representative appointed by the Union of Lawyers would therefore be a welcome addition to the SCM under the condition that he or she is not a practicing lawyer while being a member of the SCM. In any case, all members of the SCM should undergo a transparent election procedure.

The ICJ considers that the fact that the head of the appeal body against the SCM decision, the President of the SCJ, sits in the SCM taking the very decisions that the court he or she heads will have to assess in appeal, amounts to a conflict of interest. The *ex officio* membership of the President of the Supreme Court should therefore be eliminated.

The ICJ delegation heard that the members of the Supreme Court of Justice have a dominant influence in the SCM in part due to the hierarchical culture in the judiciary, but also because they are the more represented judicial instance and, more importantly, because the Supreme Court of Justice constitutes the sole appeal against decisions of the SCM.

The ICJ recommends that the SCM encourage and not impede judges from participation in external events, speaking freely about the challenges for the judiciary and commenting and proposing constructive

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recommendations to strengthen its independence and effectiveness. Judges should be free to attend trainings, conferences, expert meetings or other events, including public events, without the approval of the SCM, National Institute of Justice or court presidents. Finally the SCM should fulfil its role as defender of the independence of the judiciary and the rule of law in Moldova and speak out against threats to the independence of the judiciary and of individual judges.

2.4. Random Allocation of cases

The then-UN Special Rapporteur on the independence of judges and lawyers concluded in 2009 that "assignment of court cases at the discretion of the court chairperson may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others or court chairpersons, in specific cases, retain the power to assign cases to or withdraw them from specific judges which, in practice, can lead to serious abuse."⁵¹ These findings were also reflected by the Venice Commission.⁵²

Guidance from international authorities proposes solutions involving random selection of cases, such as drawing of lots, automatic distribution according to alphabetic order, and pre-determined court management plans.⁵³ When allocation of cases needs to bypass the random selection system, for reasons for example of backlog or specialization, the "criteria for taking such decisions by the court president or presidium should, however, be defined in advance. Ideally, this allocation should be subject to review."⁵⁴

In Moldova, courts are headed by a President of the Court (Chief Judge),⁵⁵ who co-ordinates the work of the judges of the Court, and appoints a head of administration for the Court.⁵⁶ Presidents of Courts do not assign cases; a system of random assignment of cases using electronic software is in place.⁵⁷ It is the responsibility of the President of the Court to oversee the random case assignment system for the court.⁵⁸

The ICJ delegation was told by several stakeholders met that great improvement has been achieved in ensuring independence and objectivity in the distribution of cases in courts via such an automated distribution system to ensure that presidents of courts would not influence the assignment of cases. While welcoming this development, the ICJ learned from several stakeholders, including users of the system, that there are

⁵¹ UN Special Rapporteur on the independence of judges and lawyers, [Annual Report to the UN Human Rights Council](#), UN Doc. A/HRC/11/41, 24 March 2009 ('Annual Report 2009'), para. 47.

⁵² Venice Commission, Report on independence of judges, op. cit., para. 79.

⁵³ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009, op. cit.*, para. 47; Venice Commission, *Report on independence of judges, op. cit.*, para. 80.

⁵⁴ Venice Commission, *Report on independence of judges, op. cit.*, para. 80. See also, para. 81. See also, *Bangalore Principles Implementing Measures*, paras. 3.2, 3.3

⁵⁵ There are also Deputy Chief Judges, one per district court, except for Chisinau court that so far has 5 deputies following the 5 courthouses. In the SCJ and appellate courts, the number of deputies corresponds to the number of panels per court. See article 16 of the Law no. 514 on the Organisation of the Judiciary.

⁵⁶ Law no. 514 on the Organisation of the Judiciary, Article 45 – court manager or heads of administration / secretariat for a court is a new position introduced by the 2012 amendments.

⁵⁷ *Ibid.*, Article 6.

⁵⁸ *Ibid.*, Article 16(1)(i).

situations in which it is possible to bypass the system and that this has occurred on certain occasions. Since the system has reportedly undergone four updates, it has not been possible to verify whether these incidents occurred before such updates or whether the updates have corrected such deficiencies. However, the ICJ stresses the importance of ensuring that, if and when the automated system malfunctions, court presidents must be obliged to provide reasons for the assignment of the case, the reasons for the exception and to make this reasoning public.

2.5. Investigative Judges

Investigative judges are responsible for overseeing the respect of human rights at criminal investigation stage, including authorizing telecommunications surveillance and pre-trial arrest warrants. In 2012, the Parliament adopted a law to reform the system of investigative judges.⁵⁹ The law required that all investigative judges be evaluated and, in case of positive evaluation, reconfirmed as ordinary judges.⁶⁰

In 2016, another reform (Law 266/2016)⁶¹ overhauled the system and amended the procedure of the investigative judges' appointment. The 2016 law introduced as a condition for the appointment of an investigative judge that they have at least three years experience as a judge. The ICJ was informed that this reform was aimed at moving away from the dominance of ex-prosecutors and criminal investigation officers among investigative judges. According to that law, the term of office of the investigative judges should have been three years, without the possibility of holding two consecutive terms. The law also banned judges who worked as investigative judges for at least two years in the period 2013-2017 from serving further as investigative judges.

The reform was however undermined even before its application. While it should have entered into force on 1 January 2017, it was delayed by Parliament for one year.⁶² Shortly before this postponed entry into force, the Parliament scrapped the requirement of a minimum of three years of experience for appointment as an investigative judge. The ban for investigative judges to hold two consecutive terms was excluded by the Parliament in November 2018. Finally, the SCM failed to proceed to a gradual appointment of investigative judges as provided by Law no. 126 of July 2016 to ensure an orderly passage from ordinary to investigative functions, but instead filled the vacancies through two mass appointments in the period of one month.⁶³

⁵⁹ Law no. 153 of 5 July 2012 on amendment of certain legislative acts

⁶⁰ According to assessment of LRCM in 2015 of the reform of the investigative judges' institution (available in English at <https://crjm.org/wp-content/uploads/2015/01/CRJM-Raport-JI-En-28-01-2015-1.pdf>), 30 out of the 40 investigative judges were reappointed as common law judges and only two of them were dismissed for failure to pass the performance evaluation. Out of those 30 reappointed judges, 25 continue to exercise the duties of investigative judge. This does not contribute to their professional integration or to improved protection of human rights. The report also established an uneven distribution of workload among judges. About 50 per cent of the total workload falls on the eight judges from Chisinau.

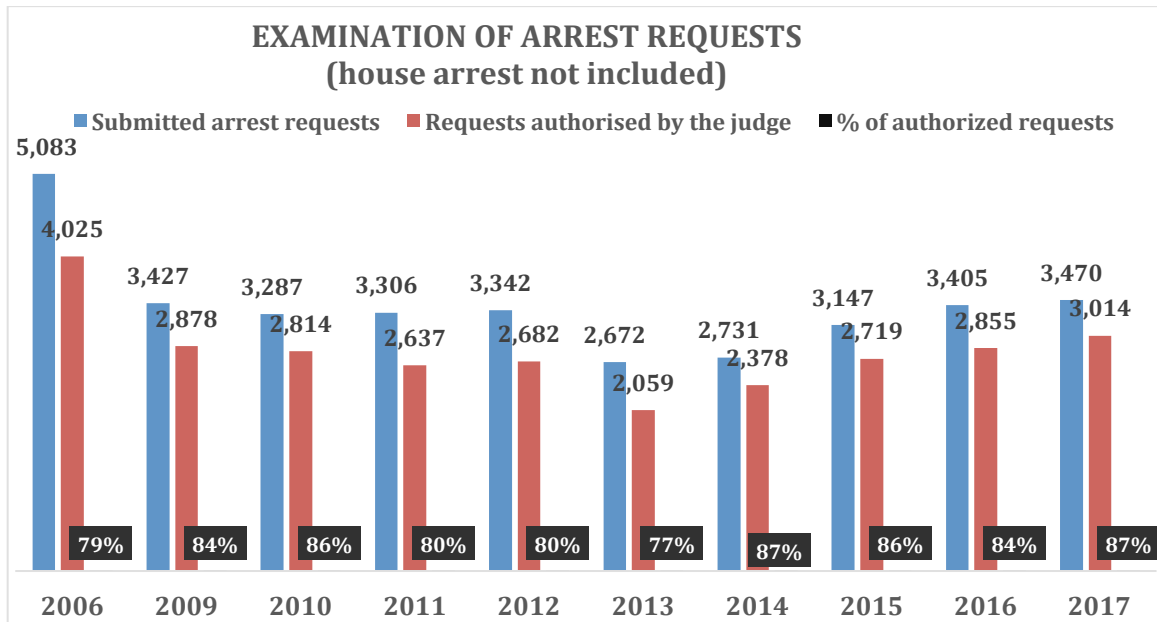
⁶¹ Law no. 126 of 9 July 2016.

⁶² Law no. 266 of 9 December 2016.

⁶³ The SCM has appointed the overwhelming majority of the investigative judges only on 19 December 2017. The rest of the investigating judges had been appointed by the SCM on 16 January 2018, after the amendment that excluded the requirement of having minimum 3 years of experience in the position of judge entered into force. The list of investigative judges is approved and published on the SCM website: https://csm.md/files/Lista_judecatorilor/Lista_de_instructie.pdf.

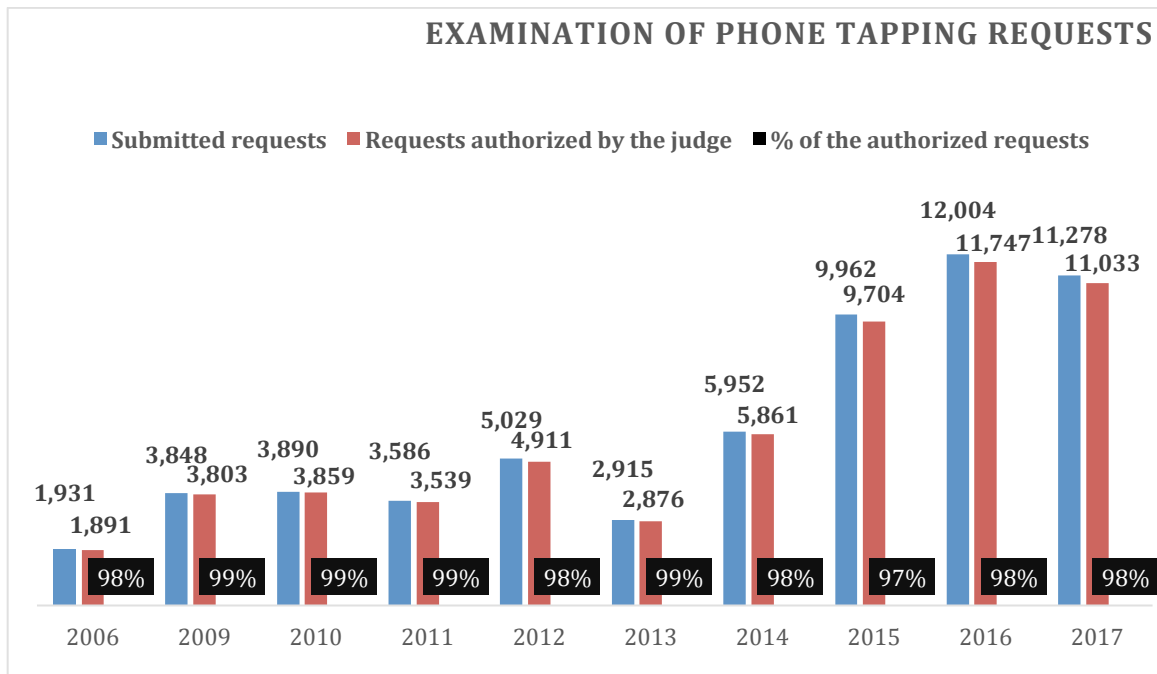
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Table no. 1 Official statistical data regarding pre-trial arrests requests examined by investigative judges in 2006, 2009-2017



Source: Table compiled by the Legal Resources Centre from Moldova based on the data from the annual statistical reports published by the Agency for Court Administration (available at <http://aij.justice.md/ro/report-type/rapoarte-statistice>)

Table no. 2 Official statistics regarding the requests for authorising the telephone tapping examined by investigative judges in 2006, 2009-2017



Source: Table compiled by the Legal Resources Centre from Moldova based on the data from the annual statistical reports published by the Agency for Court Administration (available at <http://aij.justice.md/ro/report-type/rapoarte-statistice>)

The official statistics show that, with regard to requests for authorization of pre-trial detention, the rate of acceptance by investigative judges follows closely the different phases of the judicial reform. While the rate started to decline immediately after the launch of the judicial reform, it subsequently rose above the previous high acceptance rate of the pre-reform years. The trend suggests an increasing subservience of investigative judges to prosecutors. The tendency is confirmed by the essentially blanket acceptance of requests for authorization of telecommunications surveillance.

The ICJ mission heard several complaints about the work of investigative judges with regard to pre-trial detention. The mission was informed that currently investigative judges routinely and perfunctorily approve all requests of pre-trial detention by the prosecutors. The attention of the ICJ delegation was directed to the case of Judge Dorin Munteanu who was subject to criminal prosecution under article 307 of the Criminal Code, for the offence of "wilful rendering of an unlawful judicial act" (see below), for having rejected a request of pre-trial detention by a prosecutor. The ICJ delegation was told that, since that case, unofficial practices are beginning to be used for investigative judges with lists sent to them weekly on which pre-trial requests to approve or reject in order not to have any consequences.

The ICJ expresses grave concern at these reports that point to a propensity for investigative judges to accede automatically to the requests of prosecutors either by cultural subservience or by undue pressure. In its 2013 report, the ICJ noted that Moldova has been repeatedly found by the European Court of Human Rights to be in violation of the European Convention on Human Rights for lack of respect of the right to judicial review of detention under article 5.3 and 5.4 ECHR. A situation such as that encountered by the ICJ in its mission will easily lead to the worrying return of such a trend. The Moldovan authorities should take all measures necessary to ensure that investigative judges enjoy full independence in practice and not only in law and to end any pressure on them.

2.6. Constitutional Court

The Constitutional Court of Moldova (CCM) rules on the constitutionality of laws, decisions of the Parliament, presidential decrees, decisions of the Government and ratified international treaties; interprets the Constitution and authorizes the initiation of amendment of the Constitution; and confirms the results of national referenda and presidential and parliamentary elections.⁶⁴ Two judges of the Constitutional Court are appointed by the Parliament, two by the Government and two by the SCM. Each judge is appointed for a non-renewable six-year mandate.⁶⁵ The Constitutional Court can receive cases by institutions that are so allowed in the Law on the Constitutional Court of Moldova,⁶⁶ and via preliminary

⁶⁴ Constitution, art. 135.

⁶⁵ Constitution, art. 136.

⁶⁶ Art. 25 of the Law no. 317 on CCM, i.e. President, Government, Minister of Justice, Supreme Court of Justice, Prosecutor General, Members of Parliament, Parliamentary factions, Ombudsman, Children's Ombudsman, Councils of administrative-territorial units of first and second level, and the Popular Assembly of Gagauzia (a legislative body of a local autonomy).

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questions submitted by ordinary courts. Following a decision by the Constitutional Court of 9 February 2016, ordinary courts can send their questions of constitutionality directly to the Constitutional Court without passing through the Supreme Court of Justice. The exception may be claimed in legal proceedings by any party to the proceedings and may be raised by the court *ex-officio*. The judge cannot refuse to refer the request to the CCM on the grounds that this issue will be resolved by himself or herself.

The ICJ was recently informed that, at the end of 2018, three judges of the Constitutional Court were appointed in circumstances that did not appear to ensure a sufficient level of transparency. According to information received by the ICJ, three positions were filled by the Government, SCM and Parliament respectively in the course of a week, during a period of electoral campaign and without an open competition process. Two of the vacancies materialized through the sudden resignation of two judges of the Constitutional Court shortly beforehand. The three appointed judges appear to have previously been Prosecutor General, director of the intelligence service and chair of the legal committee of Parliament, part of the current ruling political majority.

2.7. Reasoning of Decisions

Amendments to the Civil Procedure Code of 2012⁶⁷ excluded the obligation on district court judges to provide reasons for their decisions, in civil cases heard at first instance, except if one or more of the parties expressly request that reasons be provided; or if the decision is appealed; or if the decision is to be recognized and executed in another State. The mission was told that this amendment is seen as a means to address the large workload of some district court judges. However the mission was informed that, following the enactment of this measure, appeals from first instance decisions increased significantly, thus undermining its stated purpose of reducing the workload of the courts. Furthermore, the mission was informed that requests for reasoning would come after the ruling with the consequence that judges may have left office or been transferred.

The ICJ has serious concerns at the impact of this amendment to the Civil Procedure Code, on the capacity of the judicial system to provide access to justice and to ensure effective protection of the rights of litigants to a fair hearing, as protected by article 6.1 ECHR as well as other international human rights treaties. Article 6 ECHR requires that reasons be given for judicial decisions.⁶⁸ The stipulation in the amendment that reasons will be given at the request of the parties will not necessarily result in compliance with Article 6 ECHR. This would be insufficient, for example, where a party to the case is not legally represented and is not aware of the need for the request, or of the deadline for its submission. In

⁶⁷ Law no. 155 of 5 July 2012 (amendments to art. 236 of the Civil Procedure Code).

⁶⁸ The European Court of Human Rights has held that whilst the structure, nature and content of judgments may vary between different systems, a court must "indicate with sufficient clarity the grounds on which they base their decision", see *Hadjianastassiou v Greece* Application no. 12945/87, Judgment of 16 December 1992, para.33; *Karakasus v Greece*, Application No 38194/97, Judgment of 17 October 2000; *Hirvisaari v Finland*, Application No. 49684/99, Judgment of 27 September 2001 ; *Tatishvili v Russia*, Application no. 1509/02 Judgment of 22 February 2007.

addition, the European Court of Human Rights has recognized that reasoned decisions are important not only in the interests of individual litigants, but also in allowing for public understanding and scrutiny of the decision.⁶⁹ In principle, therefore, the burden should not be on the litigant to request reasons for a decision. The amendment is particularly unfortunate, given the poor culture of judicial reasoning which already exists in the Moldovan system, which has led to repeated findings of violation of Article 6 ECHR. This amendment can only serve to further lower standards in reasoning of decisions. Reasoning of decisions is a primary function and responsibility of judges under the rule of law, and the ICJ questions the expressed necessity for the amendment that exonerated judges of district courts to reason their decisions in civil cases.

As previously expressed in its report of 2013,⁷⁰ the ICJ continues to remain greatly concerned at the provision of the Code of Civil Procedure providing that first instance courts do not need to provide reasons to the parties for their decision apart from exceptional cases. There can be exceptions to the obligation to provide reasons for a judgment only when both parties expressly request it and only if this waiver is in line with the interests of justice. The ICJ considers that this provision should be revoked and alternative solutions to reduce judicial workload should be considered.

2.8. Judicial remuneration

Remuneration for judges must be at reasonable and appropriate levels to ensure that highly competent persons will be attracted to the profession and to safeguard against corruption once judicial office is attained. In its 2013 report, the ICJ considered that raising judicial salaries should be the first priority in the deployment of resources in the judicial system. The ICJ therefore welcomes the fact that one of the most visible outcomes of the Justice Sector Reform Strategy was increasing of judges' salaries. The salaries were increased gradually, in two major steps in 2014 and in 2016.⁷¹ In 2018, the salaries of judges from the first instance courts were triple those of 2013.

Judges continue however to benefit from a special pension calculated according to special rules. Under current regulations, a judge who has reached the age of 50 and has at least 20 years of work experience, out of which at least 12 years and 6 months in the office of judge, is entitled to a retirement pension making up 55 percent of the average monthly salary and for every full year of work over the work experience of 20 years an

⁶⁹ *Tatishvili v Russia*, op cit para.58.

⁷⁰ ICJ, *Reforming the Judiciary in Moldova: Prospects and Challenges*, 2013, available at <https://www.icj.org/moldova-more-work-needed-to-implement-judicial-reforms/>.

⁷¹ Until 1 January 2014, Moldovan judges had the lowest salary in the Council of Europe. The Law no. 328 on remuneration of judges and prosecutors of 23 December 2013 substantially changed the amount and the modality of calculating judges' salary in Moldova. Their salaries were linked to the average salary per economy, which is raising annually by 10-15 percent. The Law no. 328 provides for an increase varying between 5 and 20% for the remuneration of court presidents and deputy presidents. Article 3 (2) of the Law No. 328 provides that judges "benefit from single premium payments established by the present law." The Law no. 328 was abrogated on 1 December 2018 by the Law no. 270 of 23 November 2018 on a unified salary system in the public sector. Although the Law no. 270 largely kept the levels of remuneration of judges, it is questionable whether the remuneration of judges and prosecutors should not have been kept separately from the public budgetary employment system given the special status and guarantees of independence necessary for judges and prosecutors.

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additional three percent, but in total not more than 80 percent of the average monthly salary. The judge's pension is recalculated taking into account the monthly salary of a judge in office.

On 16 December 2016, the Parliament repealed the legal provisions on the special pension of judges. This act was declared unconstitutional by the Constitutional Court (CCM).⁷² Other salary and pension reforms have also been found unconstitutional by the Constitutional Court as to the pension scheme for judges.⁷³ Lastly, the government proposed in November 2018 a draft law on a single salary system in the public sector that would insert judges' and prosecutors' salaries within the same system of calculation as that of all other public sector employees, based on the same calculation units determined by Parliament, and not on the average salary per economy. This reform did not lead to reduction of the salaries of judges, but excluded the annual increase of judges' salaries in parallel with the increase of the average salary per economy.

While welcoming that judicial salaries have been raised, in line with the ICJ's 2013 recommendations, the ICJ is concerned at the recent salary reforms of public servants that will place judges in the system of calculation of salaries for public servants through coefficients decided periodically by Parliament. Judges with whom the ICJ met manifested concern with this reform, which they consider would subject them to reprisals from the legislative power for their decision.

The European Charter on a Statute of Judges calls for the system of salary of judges to guarantee their independence and in its explanations specifies that it seems "preferable to state that the level of the remuneration paid had to be such as to shield judges from pressures, rather than to provide for this level to be set by reference to the remuneration paid to holders of senior posts in the legislature or the executive, as the holders of such posts are far from being treated on a comparable basis in the different national systems."⁷⁴ The ICJ also considers it problematic that judges' salaries are linked with those of other public servants.

The ICJ expresses concern at the pension system for judges in Moldova that allows judges to leave the profession at a very early age (50) with few years of work (12.5). The ICJ has heard reports of several judges, including those critical of the current situation of the judiciary, who resigned and entered retirement thanks to this provision which seems to serve as an escape for judges critical of the judicial system.

Finally, the ICJ was informed that judges enjoy an exit career bonus when they leave their position that amounts to half a monthly salary per year served as judge. While the propriety of such an emolument should be

⁷² See CCM decision no. 25 of 27 July 2017 (the press release of the CCM in English at <http://constcourt.md/libview.php?l=en&id=1069&idc=7&t=/Media/News/Ruling-Out-the-Special-Pension-of-the-Judges-Contrary-to-Constitutional-Provisions-on-Their-Independence/>).

⁷³ For example, the CCM decision no. 15 of 2 May 2017 declared unconstitutional the provisions that provided that the judges' and prosecutors' salary will be re-examined annually as of 1 April "within the limits of the amounts envisaged for these purposes in the public national budget", qualified by the CCM as an interference by the executive with the judicial independence.

⁷⁴ Explanatory Memorandum, para. 6.2.

further assessed, the ICJ expresses concern at the fact that the enjoyment of this benefit is foreclosed to judges dismissed on disciplinary or criminal law grounds making them prone to pressure from disciplinary and career bodies.

2.9. Association of Judges of Moldova

In Moldova, there is a single professional association advancing the interests of judges, the Association of Judges of Moldova. According to article 2 of its Statute, the Association's mission is to "strengthen the judges' efforts to defend their rights and interests, to defend the rights and interests of their families, to improve the judiciary system and the professionalism of judges, to guarantee and ensure the state's real insistence on judicial principles the basic principles of the independence of the judiciary, recommended by the UN General Assembly, are the Resolution No. 40/146 of 13/85 and provided for in the Universal Declaration of Human Rights."⁷⁵ It is currently chaired by the President of the Supreme Court of Justice.

The ICJ delegation asked for a meeting with the leadership of the Association of Judges from Moldova, but the request was declined. During its mission, the ICJ delegation heard testimony from a wide variety of stakeholders that the Association of Judges, though sufficiently vocal on issue of judges' salaries and pensions, is ineffective and inactive when there is a need to protect a judge's individual independence.

To take one example, the President of the Republic, Igor Dodon made the following statement in 2017 in reference to an ongoing judicial case that involved him:

"All judges understand that their designation is the responsibility of the President. I'm not saying we put pressure on judges, but they are aware of that. Not all understand it yet, but little by little they will all understand."⁷⁶

No reaction came from the Association of Judges of Moldova.

Under the UN Basic Principles on the Independence of the Judiciary, judges must be protected from "restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." This fundamental principle is reinforced by other international standards.⁷⁷ Furthermore, judges, like other persons, enjoy the right are entitled to freedom of association and assembly and "shall be free to form and join associations of judges or other

⁷⁵ Article 2, Statute (unofficial translation), available at <http://ajm.md/public/despre-noi/statutul-ajm/> (accessed on 16 December 2018).

⁷⁶ Unofficial translation. For details see <http://agora.md/stiri/34151/video--pasarea-pre-limba-ei-piere-declaratiile-lui-dodon--folosite-ca-proba-de-avocatul-lui-basescu-in-dosarul-cetateniei>.

⁷⁷ Basic Principles on the independence of the judiciary, Principles 2 and 4. See also, Singhvi Declaration, article 2; Bangalore Principles Implementing Guidelines, para. 10.1(g); Human Rights Committee, General Comment no. 32 – Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, section III; Council of Europe Recommendation on judges, paras. 8 and 18.

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organizations to represent their interests, to promote their professional training and to protect their judicial independence."⁷⁸

The ICJ is concerned at the inaction of the Association of Judges of Moldova before threats to the independence of individual judges. The concern is enhanced by the impression that it is quicker to react when narrow personal and institutional interests are touched upon by legal reforms, such as salaries and pensions or housing for judges. The ICJ considers that, in Moldova where the perception of corruption in the judiciary is extremely high, it is important that the Association of Judges is not seen as a corporatist instrument but as a body that acts openly and consistently for the defence of the independence of all judges.

The ICJ is further concerned that the current governance of the Association, where its President is also President of the Supreme Court of Justice and member of the SCM, may represent an obstacle to the development of healthy debate and free engagement within the judiciary on its role and independence, due to the still strong culture of hierarchy and obedience to the superior present in the Moldovan judiciary.

The ICJ considers that, in order to break this hierarchical culture in the Moldovan judiciary, it would be advisable that the President and Vice-Presidents of the Supreme Court of Justice as well as the President of the Superior Council of the Magistracy not be present in its governance structures. The ICJ considers important that a pluralism of voices is ensured in the judiciary and advises that consideration be given by judges to the formation of additional associations or groups to contribute to debate on strengthening the independence of the judiciary.

2.10. Use of closed hearing procedure in high profile cases

The ICJ heard with concern that there have been cases in which criminal courts at first instance and appeal level, including in high profile criminal cases, held no hearings and took decisions only in camera. The ICJ delegation was informed, for example, that the case of former Prime Minister Vladimir Filat, who was convicted for passive corruption and traffic of influence,⁷⁹ was entirely examined in closed hearings, despite the defendant's request of an open trial. Only the decisions of the first instance court and of the Supreme Court were published, although with the names redacted.⁸⁰ Two other cases related to nation-wide corruption, called the "billion theft" cases,⁸¹ were reportedly examined entirely behind closed doors.

⁷⁸ Article 11 ECHR, Articles 21 and 22 ICCPR. UN Basic Principles on the Independence of the Judiciary, principles 8 and 9. See Singhvi Declaration, article 8; European Charter on the Statute of Judges, articles 1.7 and 1.8; Magna Charta of Judges, article 12.

⁷⁹ First instance court judgments of 27 June 2016, maintained by appeals court on 11 November 2016 and on 22 February 2017, the Supreme Court rejected his appeal, in written procedure.

⁸⁰ On 21 June 2016, just six days before issuing the sentence in Vladimir Filat's case, the SCM adopted a new Regulation on publishing the court decisions, according to which decisions on the cases examined behind closed doors are not to be published on its website. The previous regulation, dated from 2008, did not provide such a limitation and all court decisions were published. The new SCM regulation, mentioned below, maintains the same rule.

⁸¹ Billion "theft" refers to the disappearance of approx. 1 billion USD from Moldovan banking sector, including the nearly a third of the National Bank Reserves, or the equivalent of 15% of Moldovan GDP, within several years, with the information publicly released at the end of 2014. For a detailed explanation of the issue see

Under international human rights law, all trials in criminal matters must in principle and only with narrow exceptions not applicable here, be conducted orally and publicly. Having a public hearing ensures transparency of proceedings and thus provides an important safeguard for the interest of the individual and society at large.⁸²

Every person facing prosecution for a criminal offence has the right to a public hearing in proceedings before a court or judge of first instance. However, the right to a public hearing does not necessarily apply to all appellate proceedings, which can take place on the basis of written representations, or to pre-trial decisions taken by prosecutors and other public authorities.⁸³

In exceptional circumstances, courts and judges have the power to exclude the public, including the media, from all or part of a trial. These exceptional circumstances are restricted to when it is strictly necessary to protect the interests of justice (for example when it is necessary to protect witnesses); when certain considerations involving the private lives of the parties so require (for example, in cases involving the trial of juveniles, cases in which juveniles or children are victims or those in which the identity of victims of sexual violence needs to be protected); or when it is strictly necessary for reasons of public order, morals or national security in an open and democratic society that respects human rights and the rule of law. Any such restriction must, however, be strictly justified and assessed on a case- by-case basis and be subject to on-going judicial supervision.

The Criminal Procedure Code of Moldova reflects these international law standards since restrictions to open court may be applied only "in the interests of respecting morality, public order or national security, when the interests of the minors of the protection of private life of the parties in the proceedings so require, or to the extent considered strictly necessary by the court when, due to some special circumstances, the publicity could prejudice the interests of justice."⁸⁴

The ICJ is concerned at use of closed hearings including, and particularly, in criminal cases in which there is a public interest. International law affirms clearly that hearings in criminal cases must be held in public and the decisions delivered in public. This measure of transparency would also have the effect of increasing trust in the judiciary so that justice is not only done but it is seen to be done.

<http://www.transparency.md/2016/12/20/radiography-of-a-bank-fraud-in-moldova-from-money-laundering-to-billion-fraud-and-state-debt/>.

⁸² Human Rights Committee, *General Comment No.32, Article 14:Right to equality before courts and tribunals and to a fair trial*, para. 28. See also: European Court of Human Rights, Judgment of 8 December 1983, *Axen v. Germany*, Application No. 8273/78, para. 25; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 172.

⁸³ Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 28.

⁸⁴ Article 18 of the Criminal Procedure Code.

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2.11. Problematic reforms

Two recently proposed legal reforms raise concerns regarding judicial independence and international law. The first reform, approved in the summer of 2018, inserted in the Criminal Code of Procedure, as a ground for pre-trial detention, the lack of a confession by the suspect, thereby effectively stripping the investigative judge of any power to assess the necessity and proportionality of detention in the individual situation of the applicant, and violating the suspect's freedom from self-incrimination. The Constitutional Court declared the reform unconstitutional,⁸⁵ but the ICJ was told that 'the message had been nonetheless understood by judges.'

Secondly, in the context of the current electoral campaign, some political parties have asked the Legal Commission, a body of the Parliament, to work on a draft constitutional law that would introduce the popular election of judges.

The ICJ is concerned that these "reforms" appear to be presented and approved to influence public opinion instead of to solve concrete problems in the administration of justice. The reform of the grounds of detention was in open contradiction with Moldova's obligations under the right to liberty under articles 5 ECHR and 9 ICCPR inasmuch as it introduced a ground for detention not contemplated under article 5.1 ECHR and impeded judges to proceed to an assessment of necessity and proportionality of the detention as required by both these human rights treaty obligations. The decision of the Constitutional Court to strike down the legislation, is a welcome step but the ICJ is concerned at the reports that this measure may continue to have an impact on judicial policy and practice in ordering pre-trial detention, as a means of undue pressure on judges.

Finally, the ICJ considers that the popular election of judges runs counter to universal standards on the independence of the judiciary and, even more specifically to European standards on judges and their appointment. The ICJ calls on Moldovan authorities not to proceed with such an initiative.

⁸⁵ CCM decision no. 27 of 30 October 2018, available at <http://constcourt.md/ccdocview.php?tip=hotariri&docid=673&l=ro>. Press release in English available at <http://constcourt.md/libview.php?l=en&idc=7&id=1318&t=/Media/News/Making-Preventive-Arrest-Contingent-Upon-an-Individual-Pleading-Guilty-is-in-Breach-of-the-Constitution>.

III. Qualification and Appointments

While international standards do not prescribe exacting procedures for judicial appointments, they do set forth principles governing any procedure that is adopted. They require, first, that appointments should be according to clear criteria based in the first instance on merit,⁸⁶ among other criteria, and second, that the process and the institutions involved in the process should be sufficiently independent to protect against control of judicial appointments by the executive.⁸⁷

The system of selection and appointment of judges in Moldova has been heavily modified in the first round of judicial reforms in 2012.⁸⁸

The central body in the system is the Board for Selection and Career of Judges (hereinafter "Board for Selection"), responsible for the selection and career of judges. It is composed of four judges and three civil society representatives. Initially the law provided that it was "subordinated to the SCM", but was amended in September 2018 to comprise a "specialized body", not under SCM supervision. The Board for Selection adopts reasoned decisions on the acceptance or rejection of candidates for the office of judge, on the promotion of judges to a higher court, on the appointment of judges to the office of the chairperson or deputy chairperson of the court, and on the transfer of judges to a court of the same level or a lower court and submits them to the SCM for examination.⁸⁹ It evaluates the candidates on the basis of the criteria provided by the Regulations drafted and approved by the SCM. The evaluation by the Board for Selection includes the analysis of documents submitted by the candidate and the interview with the candidate.⁹⁰

⁸⁶ UN Basic Principles on the Independence of the Judiciary, Principle 10; Universal Charter of the Judge article 9; European Charter on the Statute for Judges, para.2.1; Council of Europe, Recommendation No.R (94) 12 Principle I.2.

⁸⁷ Council of Europe, Recommendation No.R (94) 12, Principle I.2.c. The *Council of Europe's Recommendation on judges* affirms that the "authority taking decisions on the selection ... of judges should be independent of the executive and legislative powers" (para. 46); the *Universal Charter of the Judge* (article 9), the *European Charter on the Statute of Judges* (paras. 2.1. and 3.1), the *Magna Charta of Judges* (para. 5) and the Consultative Council of European Judges (*Opinion no. 10, op. cit.*, para. 48-49) affirm that it should be entrusted fully to the Councils for the Judiciary.

⁸⁸ The selection and career of judges are governed by Law no. 514 on judicial organization, Law no. 544 on the status of judge and Law no. 154 on the selection, performance evaluation and career of judges (the latter was adopted in the context of the 2012 reform). After the amendments of 2012, the legal framework was supplemented by the SCM Regulations on the criteria for the selection, promotion and transfer of judges, the SCM Regulations on the organization and conduct of the contest for holding the position of the judge and other relevant acts.

⁸⁹ Art. 5 para. (1) letter h) of Law no. 154. The decisions of the Board for Selection and Career of Judges are submitted to the SCM the day after the expiration of the appeal period.

⁹⁰ For details see the Monitoring Report on the Board for Selection and Career of Judges and the Board for Performance Evaluation of Judges (September 2016 – May 2017), drafted by the Centre for Analysis and Prevention of Corruption (CAPC), 2017, available at: http://capc.md/files/Raport%20de%20monitorizare%20CAPC_30.05.17.pdf.

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The selection and promotion of judges has several stages, illustrated in the table below.

Stage	Appointment of judges	Promotion of judges
1	Training and graduation exams at NIJ ⁹¹ or the exam before the Final Examination Board of the NIJ ⁹²	Evaluation by the Board for Performance Evaluation of Judges
2	Evaluation by the Board for Selection and Career of Judges	Evaluation by the Board for Selection and Career of Judges
3	Interview and proposal on appointment by the SCM	Interview and proposal on appointment by the SCM
4	Appointment by the President of Moldova ⁹³	Appointment by the President of Moldova ⁹⁴ /Parliament

The reasoned decision by the Board for Selection regarding the candidate for the position of the judge is submitted to the SCM,⁹⁵ which can interview the candidates. Until October 2018, when a legislative amendment entered into force,⁹⁶ reports estimated that the interviews by the SCM did not appear to be based on objective criteria and it was not clear their role in the appointment procedure, as they could overturn decisions taken in the previous stages of the process. A welcome 2018 amendment introduced by Law no. 137 has clarified that the SCM interview weights maximum 20 percent of the total score for appointment and that at least 50 percent of this score represents the grade obtained at the exam before the Final Examination Board of the NIJ and not more than 50 percent of the scores assigned by the Board for Selection and, if relevant, the SCM.⁹⁷ A similar rule applies for the promotion of judges.⁹⁸

These amendments also provided expressly that the candidates to the positions of judge, president or deputy president of the court choose the positions announced in the contest in a descending order of the score obtained in the contest.⁹⁹ Furthermore, they introduced the rule of periodic contests for selection, promotion and transfer of judges, as a rule twice per year, to be organized by the SCM.¹⁰⁰

⁹¹ Candidates who graduated the National Institute of Justice.

⁹² Candidates with tenure in law.

⁹³ The President has the right to refuse the candidacy proposed by the SCM only once, giving reasons for that. The SCM may repeatedly propose the same candidacy by a vote of 2/3 of the members, a mandatory proposal for the President.

⁹⁴ Similar to the appointment, the President/Parliament has the right to refuse the candidacy proposed by the SCM for promotion only once, giving reasons for that. The SCM may repeatedly propose the same candidacy by a vote of 2/3 of the members, a mandatory proposal for the President/Parliament.

⁹⁵ Art. 5 para. (1) letter h) of Law no. 154.

⁹⁶ Law no. 137 of 27 September 2018 on amending certain legislative acts, in force since 19 October 2018

⁹⁷ Art. 5 para. (2) of the Law no. 154, as amended by Law no. 137.

⁹⁸ Art. 5 para. (3) of the Law no. 154, as amended by Law no. 137.

⁹⁹ Art. 9 para. (9) of the Law no. 544 on the status of judge.

¹⁰⁰ Art. 9 para. (3) of the Law no. 544.

On the recommendation of the SCM, judges are appointed by the President of Moldova (in the case of District Court and Court of Appeal judges) or by the Parliament (in the case of Judges of the Supreme Court). In the case of appointments by the President, he or she may reject the recommendation of the SCM, but may only do so once and must give reasons establishing that the candidate is unsuitable for the office, or has violated the law or procedures for selection. If the SCM proposes the candidate a second time, with a two-thirds majority vote, the President is under an obligation to make the appointment.¹⁰¹

Draft Law no. 10 on amending and supplementing the Constitution of the Republic of Moldova planned to pass the competence of Parliament to appoint the judges of the Supreme Court of Justice to the President, with the same system as for ordinary judges. The amendment was welcomed by the Council of Europe's Venice Commission as a contribution to the depoliticization of judges' appointments.¹⁰² Unfortunately, the draft law expired without being approved by Parliament.

Merit-based appointments and promotion within the judiciary system have been highlighted to the mission as a serious problem in the Moldovan judiciary. The Council of Europe assessment of the level of implementation of the JSRS 2011-2016 has also concluded that the progress planned regarding selection and evaluation of judges has not been achieved, particularly as a result of disregard for procedures, selective approaches, and issues with candidates' integrity, despite the adoption of formal criteria and a legal framework.¹⁰³

The Group of States against Corruption of the Council of Europe (GRECO) expressed concern "about the insufficient justification of the SCM's decisions, especially in recruitment, career and disciplinary matters," especially since the SCM "gives no reasoning when it chooses to deviate from [the decisions of the Selection Board], citing only the number of votes obtained by each candidate."¹⁰⁴ More worryingly, the GRECO "is also deeply concerned by indications that candidates presenting integrity risks are appointed as judges,"¹⁰⁵ and referred to nine cases in which the President of the Republic rejected the appointment of candidate judges on the basis of lack of integrity but was overruled by the SCM.

The ICJ was informed that the Superior Council of Magistracy, when it selects or promotes judges, often overlooks the points awarded by the Selection and Career Board, without reasoning its decisions. Between January 2013 and May 2017, only 115 out of 150 judges proposed by the SCM for appointment were selected based on contests with more than two participants. Eighty-three candidates out of 115 proposed in contests (or 72 percent) were candidates who scored lower than others. SCM did not provide any reasoning for ignoring the scores. During the same period,

¹⁰¹ Law on the Status of the Judge, Article 11.

¹⁰² See document no. CDL-AD(2018)003, para. 27.

¹⁰³ Justice Sector Reform Strategy of the Republic of Moldova, Review of Implementation, Assessment and Recommendations, Council of Europe, Directorate General Human Rights and Rule of Law, 5 December 2017, available at https://crjm.org/wp-content/uploads/2018/02/Moldova-JSRS_assessment.pdf, para. 125.

¹⁰⁴ GRECO 4th report, para. 93.

¹⁰⁵ GRECO 4th report, para. 100.

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five out of 12 judges promoted to the Supreme Court based on contests (or 42 percent) had lower scores than other contestants.¹⁰⁶

Most notably, between 2013-2016, at least six judges¹⁰⁷ were promoted by SCM to the Courts of Appeals and at least 5 judges¹⁰⁸ were promoted to the Supreme Court of Justice, even though they had lower or even the lowest points awarded by the Board for Selection.

Conclusions

The ICJ was informed of several cases in which the SCM has favoured candidates that had achieved only low scores by the Selection Board, in preference to those with higher scores for appointment to judicial positions (in particular with regard to promotion to higher instances). These "exceptions" do not appear to be motivated. The ICJ is concerned at this lack of transparency and arbitrariness in proceedings of appointment and promotion. The ICJ welcomes that recent legislation of September 2018 has set up a system that would require the decision of the SCM to respect the score of candidates obtained at the Final Examination Board of the NIJ and from the Board for Selection, while at the same time assigning 20 percent of the score decision to the SCM that should correctly evaluate the candidate and provide a reasoned decision for the score. The ICJ looks forward to the practical and strict implementation of these new rules that could be beneficial to objective appointments in the judiciary.

The ICJ heard concerns at the system of appointment of the Supreme Court of Justice. Currently all judges are proposed by the SCM and approved by Parliament. Many stakeholders met by the ICJ said that this situation makes the SCJ judges too close to the political powers so as to ensure appointment. The ICJ delegation was also told of one occasion in which Parliament, in order to refuse an appointment, simply decided not to decide and left the nomination pending. The ICJ considers that, due to the high level of political pressures on judges in Moldova and the hierarchical judicial culture, it would be advisable that the selection and appointment of SCJ judges would follow the same process as for the other members of the judiciary. Nonetheless, if, in consideration of the special role of Supreme Courts, this selection system were to be retained, the ICJ considers it essential that decisions on appointment by the SCM be publicly reasoned based on objective criteria and that Parliament be obliged to accept the nomination if it has taken no action after a certain period of time.

¹⁰⁶ See for details *Public Policy Document: Selection and Promotion of Judges: Challenges and Needs*, Legal Resources Centre from Moldova, 2017, available at <http://crjm.org/wp-content/uploads/2017/12/CRJM-Selectia-si-cariera-jud-2017-ENG.pdf>.

¹⁰⁷ Judges Ous, Colev, Simciuc, Negru, Balmus and Morozan.

¹⁰⁸ Judges Sternioala, Guzun, Moraru, Toma, Pitic.

IV. The Judicial Career: Security of Tenure and Performance Evaluation

4.1. The Five-year Initial Appointment Period

New judges are initially appointed for an initial appointment period of five years.¹⁰⁹ Only if they satisfactorily serve for this period are they appointed with life tenure, until the age of 65.¹¹⁰ The process for passing the initial appointment period and securing life tenure is the evaluation procedure described below. This five-year period is a longstanding provision of the Constitution that was retained, even though its repeal was identified in the Justice Sector Reform Strategy as a priority.¹¹¹

A draft law on amending the Constitution in this regard was registered with the Parliament in 2016, but did not receive the necessary number of votes within one year of the registration and, hence, became null and void.¹¹² A similar new draft law was initiated, subjected to public consultations and adopted by the Government in 2017 and registered with the Parliament on 18 January 2018 (draft law no. 10), but encountered the same fate despite the positive opinions by the Constitutional Court and the Venice Commission.

International standards on probationary appointments and judicial security of tenure are in favour of permanent and mandatory tenure of judges until the age of retirement.¹¹³ Generally, the requirement of probationary periods is problematic. Several expert bodies on the independence of judges and lawyers have indicated that “the requirement of re-appointment following a probationary period runs counter to the principle of the independence of judges”¹¹⁴ and, if applied require specific safeguards so the non-confirmation occur only in cases of grounds for dismissal.¹¹⁵ The rationale is simple, namely that probationary appointments can severely undermine independence, when a judge perceives that his or her decisions may have an impact on chances for permanent appointment.

In regard to the probationary period in Moldova, the Council of Europe has recommended that “taking into consideration that a temporary appointment system still exists in Moldova, and in light of the need for security of tenure, the Experts advise that permanent appointment be

¹⁰⁹ Article 116 para. (2) of the Constitution; Law on the Status of the Judge, Article 11 para. (2).

¹¹⁰ *Ibid.*, Article 11 (2).

¹¹¹ The amendments are also part of the implementation of the National Action Plan for the Republic of Moldova - EU Association Agreement for the period of 2017-2019.

¹¹² Under article 142.3 of the Constitution, constitutional amendments shall be adopted within one year from the registration with the Parliament.

¹¹³ Basic Principles on the Independence of the Judiciary, principle 12; Singhvi Declaration, para. 16; European Charter on the Status of the Judge, Article 3.3; *Universal Charter of Judges*, International Association of Judges, November 1999, article 8; *Council of Europe Recommendation on judges*, para. 49; Human Rights Committee, General Comment no. 32 – Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, section III.

¹¹⁴ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009*, *op. cit.*, para. 56.

¹¹⁵ *Ibid.*, para. 56; Venice Commission, *Judicial Appointments*, *op. cit.*, para. 40. See also, Venice Commission, *Report on independence of judges*, *op. cit.*, para. 38; *Bangalore Principles Implementing Measures*, paras 13.2-13.4; *European Charter on the Statute of Judges*, para. 3.3; *Council of Europe Recommendation on judges*, para. 51; *Singhvi Declaration*, para 17.

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considered as an extension of the first appointment where judges meet objective transparent and pre-established criteria."¹¹⁶ The UN Human Rights Committee has also expressed concern in regard to the probationary period for judges in Moldova, and its impact on judicial independence.¹¹⁷ The Venice Commission has affirmed, including with regard to the case of Moldova, that the "[p]ro probationary periods for judges in office are problematic from the point of view of independence."¹¹⁸ The GRECO was "firmly convinced that the five-year initial appointment period for judges is detrimental to their statutory independence."¹¹⁹

Draft Law no. 10/2018 on amending and supplementing the Constitution of the Republic of Moldova aspired to eliminate the probation period of judges under article 166.2 of the Constitution.¹²⁰ Unfortunately, this reform has not been approved by the Moldovan Parliament within the time limits required for passing a constitutional amendment.

The ICJ shares the above-mentioned concerns by UN and Council of Europe bodies and considers that the necessity and desirability of the probationary period should be reconsidered in light of its potential effect on judicial independence and impartiality. There is an enhanced potential for a judge to be influenced by considerations extrinsic to the judicial function when the judge must submit to what is an effective reappointment procedure. The insecurity of a judge's position during the first formative years of his or her professional experience, are not conducive to the independent exercise of the judicial power.

None of those with whom the ICJ delegation met was in favour of the maintenance of this system that constitutes a Damocles' Sword on the judge's career and guarantees influences internal to the judiciary on them and their decisions. The ICJ was told that the lifting of the five-year probation period was unpopular because it was perceived as an anti-corruption measure. The ICJ is not aware of any country where this is an effective anti-corruption measure. On the contrary, it is a dangerous threat to the independence of individual judges. The ICJ therefore renews its recommendations that it should be abolished.

4.2. The "Evaluation" Procedures

International standards on the judiciary are clear that any procedure of evaluation in the judiciary must have the exclusive purpose of improve the performance of judges and do not undermine their independence.¹²¹ The

¹¹⁶ Council of Europe, Eastern Partnership, *Enhancing Judicial Reform in the Eastern Partnership Countries, Working Group on the Independent Judicial System*, September 2011.

¹¹⁷ Concluding Observations of the Human Rights Committee on the Republic of Moldova, CCPR/C/MDA/CO/2, 4 November 2009 para 24.

¹¹⁸ See document no. CDL-AD(2018)003, par. 19.

¹¹⁹ GRECO 4th report, para. 102.

¹²⁰ See document no. CDL-AD(2018)003, par. 20.

¹²¹ *Commentary to Bangalore Principles, op. cit.*, paras. 41-42; *Council of Europe Recommendation on judges*, paras. 42 and 58; *European Charter on the Statute of Judges*, para. 4.1. See also, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report 2009, op. cit.*, para. 71; CCJE, *Opinion no. 10, op. cit.*, para. 53-54: "[q]uality of justice can of course be measured by objective data, such as the conditions of access to justice and the way in which the public is received within the courts, the ease with which available procedures are implemented and the timeframes in which cases are determined and decisions are enforced. However, it also implies a more subjective appreciation of the value of the decisions given and the way these decisions are perceived by the general public. It should take into account information of a more political nature, such as the portion of the State budget

Council of Europe’s Consultative Council of European Judges has pointed out that “[a]n unfavourable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard.”¹²²

The new Performance evaluation mechanism of judges in Moldova was introduced in late 2012.¹²³ The system became operational in 2013. The new mechanism established a Board for Performance Evaluation of Judges (BPE) to carry out periodic performance evaluation of judges, which consists of seven members: two Supreme Court judges, two Courts of Appeal judges, one first instance court judges and two civil society representatives.¹²⁴ The BPE members are appointed for a single-term mandate of four years, without the possibility of re-election. Judicial members of the Board are appointed through election by the General Assembly of Judges, while the SCM organizes a public competition to select the civil society members.

BPE activity (Years 2013 – 2017):

Year	2013	2014	2015	2016	2017
Total no. of judges evaluated	124	210	64	115	131
Awarded with „insufficient”	N/A	5	1	0	2
Awarded with „failed” (eșuat)	1	1	0	0	0
Total no. of judges dismissed based on the evaluation result	1 ¹²⁵	1 ¹²⁶	0	0	0

The SCM regulation provides the following three criteria for judges’ evaluation: efficiency of judge’s work, quality of work and professional integrity. In addition, court Chiefs and deputy court Chiefs are evaluated based on their leadership, management capacities and communication skills. Each criterion is assessed based on a set of indicators provided in the SCM regulation and is assigned a certain number of points. The procedure of evaluation provides that each member of the Board fills in the evaluation form and grants a score to the evaluated judge. The final score is determined after the interview with the evaluated judge, after which the evaluation form is signed and sent to the secretariat of the Evaluation Board.

allocated to justice and the way in which the independence of the judiciary is perceived by other branches of the government. All these considerations justify the active participation of Councils for the Judiciary in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges’ work.”

¹²² CCJE, *Opinion no. 17 on the evaluation of judges’ work, the quality of justice and respect for judicial independence*, CoE Doc. CCJE(2014)2, 24 October 2014, para. 49.12.

¹²³ Introduced by Law no. 154 on the selection, performance evaluation and career of judges of 5 July 2012.

¹²⁴ By the provision of art. 17 of the Law on the Selection, Evaluation, Performance and Career of Judges, the BPE has the competence to prepare and examine documents related to the judicial performance evaluation; to organize and conduct interviews with the objective to evaluate judges’ performance and award specific scores and ratings to the performance evaluation. In addition, the BPE members are responsible for observing the work of the judges evaluated, in court sessions, for the purpose of their evaluation.

¹²⁵ Judge Lanovenco.

¹²⁶ Judge Ghețu.

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Following the evaluation, the BPE can either adopt a decision awarding one of the four qualifications: "excellent", "very good", "good" and "insufficient", or adopt a decision on the failed evaluation.¹²⁷ A judge receiving a grade of "insufficient" in an evaluation will be subject to extraordinary evaluation within a period set by BPE.¹²⁸ A judge may be awarded a "fail" grade only where he or she clearly does not comply with his or her function.¹²⁹ If a judge fails the evaluation,¹³⁰ or receives the grade "insufficient" on two consecutive occasions,¹³¹ he or she may be dismissed.¹³²

In addition to the three-yearly periodic performance evaluations, judges' performance is also to be evaluated after the first five years of their appointment, in order to secure life tenure until the age of 65;¹³³ when they are candidates for promotion or transfer;¹³⁴ and exceptionally, when the decisions they adopted raises doubts about their qualification or professional abilities.¹³⁵

An analysis conducted by the OSCE/ODIHR in 2014¹³⁶ on the system of performance evaluation of judges made conclusions and recommendations on the evaluation system that appear still relevant today. The OSCE/ODIHR recommended that the content of the decisions of the Board should be improved as regards the justification of its decisions, which are usually briefly justified and do not explain the way the score and the rating for each judge is estimated. It further recommended to delete the quantitative indicator of number of judgment issued by the judge being quashed by higher courts as it may lead, indirectly, to the establishment of a hierarchical control over judges by higher courts, and to eliminate the possibility to dismiss a judge after the failed performance evaluation, which raises issues with security of tenure of judges.

In the case of Moldova, the ICJ holds a real concern that the periodic evaluation process could become a means for intimidating judges and undermining their security of tenure. It is important that any periodic evaluation process not lead to the dismissal of judges before they have been given an adequate opportunity to redress any failings. No judge should be dismissed through the evaluation procedure where the judge could not otherwise have been dismissed through disciplinary action for the same reasons. The procedure must not serve as a backdoor for dismissing judges. It is also important that the evaluation process be applied according to standards which do not constrain the independent decision-making of a judge.

¹²⁷ Law on the Selection, Evaluation of Performance and Career of Judges, Article 23 (1)(a).

¹²⁸ *Ibid.*, Article 13 (2).

¹²⁹ *Ibid.*, Article 23 (2).

¹³⁰ *Ibid.*, Article 23 (3).

¹³¹ *Ibid.*, Article 13 (2).

¹³² Law no. 544 on the status of judges, Article 25 (1)(b).

¹³³ *Ibid.*, Article 13 (3)(a).

¹³⁴ *Ibid.*, Article 13 (3) (b)- (d).

¹³⁵ *Ibid.*, Article 13 (4). See also, Law on the Selection, Evaluation of Performance and Career of Judges, Article 13 (3) and (4).

¹³⁶ Assessment of the Performance Evaluation of Judges in Moldova, OSCE/ODIHR, June 27, 2014, available at <https://www.osce.org/odihr/120213?download=true>.

4.3. Security Checks

Until December 2017, every judge was subject to verification by the Security and Intelligence Services (SIS) every five years on "compatibility with the judicial role". On 5 December 2017, the Constitutional Court¹³⁷ declared the provisions allowing SIS to periodically verify judges unconstitutional, since they affect judicial independence. Until this recent judgment of the Constitutional Court, the SCM was used to proceed to dismissal of judges or refusal of appointments based on the intelligence files sent to the by the Secret Service of Moldova. The practice of use of these intelligence files was also inconsistent with the case of at least nine judges (see below GRECO findings) whose appointment was rejected by the President of the Republic based on such files but that were later reconfirmed by a two-thirds majority of the SCM without an explanation of the decision.

Under the Law on the Status of Judges, a health examination was introduced for candidates, to be conducted before the admission competition takes place.¹³⁸ This includes a "psychological and psychiatric examination".¹³⁹ The ICJ mission was informed that the psychological test consists of a written test. The reason for and nature of this examination is unclear, and it may leave scope for abuse.

Another "anti-corruption" measure of concern is the use of polygraph testing of judge and prosecutor candidates that should have been implemented for both since January 2015.¹⁴⁰ Polygraph tests are inherently unreliable and have been rejected for use as evidence in courts in many jurisdictions.¹⁴¹

The ICJ welcomes the ruling of the Constitutional Court abolishing the use of security checks and renews its concern, expressed in its 2013 report, that the nature and purpose of security and health checks is unclear and that they carry the potential to undermine a fair appointments process. A further concern is the obligation of judges and prosecutors to pass a polygraph test as one of the criteria for appointment that, despite not being used in practice for judges, still remains in the law and may be applied in the future.¹⁴²

¹³⁷ See the Constitutional Court decision no. 32 of 5 December 2017 at <http://constcourt.md/ccdocview.php?tip=hotariri&docid=643&l=ro>. The press release in English is available at <http://constcourt.md/libview.php?l=en&idc=7&id=1104&t=/Media/Noutati/Verification-of-judges-by-the-Security-and-Intelligence-Service-unconstitutional/>.

¹³⁸ Law on the Status of the Judge, Article 6 para. (1) f).

¹³⁹ *Ibid.*, Article 6¹ para. (3).

¹⁴⁰ *Ibid.*, art. 6 para. (1) g).

¹⁴¹ See, for example, American Psychological Association, *The Truth About Lie Detectors (aka Polygraph Tests)*, at <https://www.apa.org/research/action/polygraph.aspx>.

¹⁴² The Constitutional Court has declared the obligation of taking a polygraph test unconstitutional, insofar as it constitutes a mandatory requirement for appointment and not one of the criteria in consideration among others, but has not abrogated the norm altogether. See, CCM decision no. 6 of 10 April 2018, available at <http://constcourt.md/ccdocview.php?tip=hotariri&docid=652&l=ro>. Press release in English available at <http://constcourt.md/libview.php?l=en&idc=7&id=1160&t=/Media/News/The-Court-examined-the-constitutionality-of-certain-provisions-of-the-Law-on-the-Polygraph-Test-and-the-Law-on-the-National-Integrity-Authority>. The ICJ was informed that the SCM has not at present acquired the proper instruments to conduct polygraph examinations so that, in practice, for judges, this obligation is disapplied.

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4.4. Ethics and Professional Conduct Commission

International standards affirm that ethical principles should be distinguished from disciplinary rules.¹⁴³ In particular, such "principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary. Judges should play a leading role in the development of such codes. ... Judges should be able to seek advice on ethics from a body within the judiciary."¹⁴⁴

The ICJ welcomes the establishment of a Commission on Ethics and Professional Conduct of Judges in May 2018 under the SCM.¹⁴⁵ The Commission consists of five members, selected exclusively from SCM judge members (SCM law professors/civil society members, or the SCM president cannot serve in the Ethics Commission).

The Commission aims to prevent violations of professional ethics and to promote the standards of professional conduct of judges. Any judge can request the Commission to provide an advisory opinion on a particular ethical issue or dilemma. The Commission Regulation provides that all the communications by the Commission are usually confidential, except if it decides otherwise. The Commission's main priority is to issue, on request or *ex officio*, opinions and recommendations for judges with regard to the dilemmas concerning the interpretation and application of the Code of Ethics and Professional Conduct for Judges. The Commission will also ensure the annual systematization of its practice, and may propose to the General Assembly of judges, to amend the Code of Ethics and Professional Conduct of the Judge.

In July 2018, the Commission met for the first time, electing its Chair. By January 2019, the Commission has not yet issued any public opinions or recommendations.

¹⁴³ Magna Charta of Judges, CCJE, para. 18; Council of Europe Recommendation no. (2010)12, para. 72.

¹⁴⁴ Council of Europe Recommendation no. (2010)12, para. 73-74.

¹⁴⁵ Decision of the Superior Council of Magistracy (SCM) no. 229/12, approving the Regulation on the activity of the Commission of ethics and professional conduct of judges.

V. Liability to Prosecution and the Role of the SCM

Moldovan authorities in recent years have enacted several reforms and initiatives to tackle corruption at all levels of Government including in the judiciary. As the rate of distrust in the judiciary suggests- although the perception rate may not necessarily correlate with the rate of actual corruption - these reforms have not produced a concrete impact.

Some criminal investigation of judges, including for corruption, have been undertaken since 2013, but still with few final results. For example, in 2014-2015, the National Anticorruption Centre investigated 17 judges. Of these, only eight were remanded to trial, some of them for the controversial offence of rendering an unlawful judicial act (see below). Of these, one judge was found guilty for passive corruption and sentenced to seven years of imprisonment (although she fled the country before the judgment was pronounced) and one judge was found guilty of passive corruption by a first instance court but acquitted by the Supreme Court in 2017.¹⁴⁶ In 2016, the National Anticorruption Centre investigated 21 judges, including 16 related to the Russian Laundromat case (see box no. 1 above).¹⁴⁷

The ICJ delegation was informed that the SCM has not taken adequate steps to ensure that judges against whom there was evidence of corruption or other abuse are not admitted to the judicial system or at least promoted. On the contrary, the delegation was informed that, during 2013-2016, several cases were noted in which judges with integrity issues were appointed or promoted by the SCM, including after the President's refusal to appoint some of them, providing no reasoning that would exclude the doubts regarding candidates' integrity.¹⁴⁸

The Law on the Status of the Judge provides that criminal investigations against judges may be initiated only by the Prosecutor General, with the consent of the SCM.¹⁴⁹ Furthermore, a judge must not be apprehended, brought to court by force, arrested or searched, except in cases of a flagrant offence, or charged with a crime, without the consent of the SCM.¹⁵⁰ Following the Justice reforms, the SCM's consent is no longer necessary for initiating a criminal case regarding offences provided by

¹⁴⁶ See for details the article on three judges sentenced for corruption, available in Romanian at <http://anticoruptie.md/ro/stiri/trei-judecatori-condamnati-pentru-acte-de-coruptie-in-ultimii-doi-ani>.

¹⁴⁷ National Anticorruption Centre, 2016 activity report, available in Romanian at www.cna.md.

¹⁴⁸ For example, in an appeal of 29 September 2014 (<http://crjm.org/ong-uri-solicita-presedintele-rm-verifice-informatii-candidati-judecatori-si-admita-pe-cei-cu-reputatie-ireprosabila/>) several civil society groups requested the President to verify the compatibility of 5 candidate judges, about whom the press reported serious issues related to their integrity, such as unjustified or undeclared properties, conflict of interests, relations with controversial persons etc. The President appointed only one of the 5 candidates and refused the other four. Since then, the SCM has appointed two of the four candidates (Lucia Bagrin in a Chisinau court and Natalia Berbec in Hincesti court) providing no reasoning for ignoring the issues raised in mass-media and in the President's refusal (http://crjm.org/apel_hotararii-csm_bargrin/). The other two candidates are still participating in contests for appointment as a judge. On 2 June 2015, the SCM repeatedly proposed for reconfirmation the judge Anatolie Galben at a Chisinau court, after almost six months from the President's refusal, providing no reasoning regarding the alleged integrity issues by the President. On 26 January 2016, the SCM proposed for appointment as a President of Cahul Court of Appeals of judge Serghei Gubenco, who was previously refused by the President for risk factors (<http://crjm.org/wp-content/uploads/2016/02/2016-02-08-Apel-CarieraJudecatori-ENG.pdf>). The SCM provided no reason for its repetitive decision.

¹⁴⁹ Law on the Status of the Judge, no.544-XIII of 20 July 1995, Article 19 (4).

¹⁵⁰ *Ibid.*, Article 19 (5).

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Articles 324 (passive corruption), 243 (money laundering), 330 (illicit enrichment) and 326 (trading of influence) of the Criminal Code.¹⁵¹

The SCM has been long criticized for authorizing requests for criminal prosecution of judges without providing reasons for their authorization, or, in rare cases, for their refusal. Recently, Law no. 137 of 29 September 2018, which implemented a CCM decision of 27 June 2017 in this regard, introduced the obligation for the SCM to provide reasons for authorizing a request for criminal prosecution of a judge. The SCM currently needs to publish its decisions regarding criminal prosecution or rejection to provide consent for criminal prosecution of judges, with anonymization of data regarding judge's identity.

Under international standards concerning the judiciary, judicial independence and accountability go hand in hand, the accountability of judges being a necessary safeguard to protect against any abuses that might arise from the independent exercise of judicial power. In general terms, there is no prohibition against the prosecution of judges on the same terms as other persons, provided that such prosecution is not undertaken in a manner which undermines the independence of the judge concerned.¹⁵² The Magna Charta of Judges affirms that "[c]riminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions. ... The remedy for judicial errors should lie in an appropriate system of appeals."¹⁵³ The Council of Europe's Recommendation on judges states that the "interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice."¹⁵⁴

Already in 2013, the ICJ expressed concern that implementation of anti-corruption laws targeting the judiciary, in the particular context of Moldova, could in practice lead to abuses which amount to harassment of judges, and which would violate international standards that stipulate the protection of judges against such attacks.

In its 2018 mission, the ICJ delegation heard testimonies of several cases of judges subject to criminal prosecution for the offence of "wilfully rendering a judgment, sentence, decision or ruling in breach of the law" under article 307 of the Criminal Code.

The constitutionality of the criminal offence was upheld by the Constitutional Court on 28 March 2018. The Constitutional Court based its decision on a strict interpretation of the offence, stressing that it could be prosecuted "only on the basis of indisputable evidence that would prove the intention of the judge in issuing a judicial act in breach of the law."¹⁵⁵ The Constitutional Court decision followed an opinion by the Venice

¹⁵¹ *Ibid.*, Article 19 (4).

¹⁵² Universal Charter of the Judge, article 10; Singhvi Declaration, article 20.

¹⁵³ Magna Charta of Judges, CCJE, paras. 20-22.

¹⁵⁴ Council of Europe Recommendation no. (2010)12, para. 68.

¹⁵⁵ See CCM decision no. 12 of 28 March 2017, available at <http://constcourt.md/ccdocview.php?tjp=hotariri&docid=612&l=ro>. Press Release in English available at <http://constcourt.md/libview.php?l=en&idc=7&id=985&t=/Media/News/Criminal-Liability-of-Judges-Arising-from-a-Wilful-Rendering-of-an-Illegal-Decision-Constitutional>.

Commission, issued at the request of the Constitutional Court, which found that such offences could only be possible “in cases of malice and, possibly, gross negligence [and that] judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in interpretation of the law. The principal remedy for such mistakes is the appellate procedure.”¹⁵⁶

The Constitutional Court further stressed that “responsibility to refrain from unjustified application of Article 307 of the Criminal Code against judges and to avoid a labelling effect in this regard, does not apply only to the Prosecutor General and courts of law, but especially to the Superior Council of Magistrates, as a guarantor of the independence of the judiciary. Subsequently, the Superior Council of Magistrates, when authorising the launch of criminal prosecution under Article 307 of the Criminal Code, is under the duty to consider the fact that criminal liability shall always be a measure which is to be applied as a last resort.”¹⁵⁷

In the cases presented to the ICJ, these prosecutions were taken when judges issued rulings unfavourable to the request of the public prosecutors or that were contrary to the will of the political powers. The Superior Council of the Magistracy generally grants this authorization. In the cases brought to the attention of the ICJ, the use of this criminal offence clearly constituted undue interference with the independence of the judiciary and of the individual judge. Members of the General Prosecutor Office advanced the case that article 307 CCP was a useful tool to fight corruption in the judiciary. The ICJ is unable to grasp how this provision may be useful in an anti-corruption investigation other than to bypass procedural guarantees. If judges are suspected of corruption or of issuing decisions under external pressure or influence they should be prosecuted for these criminal offences through effective investigations and prosecutions respectful of procedural rights.

The ICJ was repeatedly told by different stakeholders that corruption or lack of compliance with financial regulations and rules on income and assets declarations is a constant of Moldovan society in all professions, including the judiciary. It was said that it is likely many professionals have legal “vulnerabilities” of this kind when entering the professions and/or once they are admitted as judges. This situation or that of their family members makes them reportedly targets of or at least vulnerable to blackmail or criminal prosecution for economic offences in an anti-corruption effort. That said, the ICJ considers that one cannot draw the conclusion that all judges subject to pressures have disreputable background.

The public perception of corruption in the judiciary is very high and many people met by the ICJ recognized the existence of corruption in the judiciary. The ICJ stresses that it is important that corruption in the judiciary is fought robustly and as a priority, in full respect of the rule of

¹⁵⁶ Venice Commission, Doc. no. CDL(2017)008, para. 53.

¹⁵⁷ See CCM decision no. 12 of 28 March 2017, available at <http://constcourt.md/ccdocview.php?tip=hotariri&docid=612&l=ro>. Press Release in English available at <http://constcourt.md/libview.php?l=en&idc=7&id=985&t=/Media/News/Criminal-Liability-of-Judges-Arising-from-a-Wilful-Rendering-of-an-Illegal-Decision-Constitutional>.

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law and human rights. The ICJ is concerned that the focus of many criminal investigations seems to be directed more at stifling dissent or preventing dissident voices in the judiciary rather than at really eradicating the phenomenon of corruption.

Box 2. Case examples: the offence of "unlawful judicial act" and pressure on judges

Judge Dorin Munteanu was prosecuted, with the SCM's approval, at the beginning of 2017 for refusing the prosecutor's request to prolong the preventive arrest of a defendant.¹⁵⁸ The judge contested the SCM's consent to initiate the criminal case against him before the Supreme Court. The Judge also challenged the constitutionality of several provisions of the Law on the SCM regarding the latter competence in examining the requests for criminal investigations against judges. In its judgment of 27 June 2017, the Constitutional Court declared the provisions according to which the SCM was not supposed to look into the quality and authenticity of the materials presented by the prosecution when issuing the SCM's consent for criminal investigations against judges, unconstitutional. In December 2017, the Supreme Court dismissed judge Munteanu's appeal to the SCM decision that approved the criminal investigation against him. The Supreme Court did not go into the merits of whether the SCM fulfilled this obligation when issuing the consent regarding the investigation of judge Munteanu, but limited itself to examine the procedural matters of the SCM decision and concluded that the SCM's consent was issued according to the law. The criminal case of Judge Munteanu was sent to the first instance court and is still pending.

Judge Domnica Manole has been prosecuted for a judgment, issued in April 2016, obliging the Central Electoral Commission to allow a national referendum on introducing direct elections of the President of Moldova. The judge gave an interpretation of a constitutional article due to contradictory provisions of the Constitution regarding the necessary conditions for organizing a referendum, with no judicial precedent on this matter. The Supreme Court annulled Judge Manole's judgment, while also interpreting the Constitution. The referendum initiative approved by Judge Manole was called by an opposition party and denied by Central Electoral Commission, largely dominated by the ruling Democratic Party. The Superior Council of Magistracy (SCM) authorized the criminal investigation against Judge Manole on 31 May 2016.¹⁵⁹ The Judge appealed the SCM decision to the Supreme Court, which rejected the appeal after almost one and a half years, on 7 December 2017, keeping the criminal investigation going. On 4 April 2018, Judge Manole was informed about the end of the criminal investigation and had the possibility for the first time to have full access to the criminal investigation materials. On 21 April 2018, the indictment and the case file against Judge Manole were sent to court. Since then several hearings have taken place, even though the judge

¹⁵⁸ See for details the public statement of 1 February 2017 available in Romanian at <http://crjm.org/wp-content/uploads/2017/02/17-01-31-CRJM-apel-Dorin-Munteanu.pdf>.

¹⁵⁹ Criminal investigations against judges, except for corruption related cases, can be initiated by the prosecution office only with the SCM authorization.

asked for postponements. As of January 2019, the criminal case was pending.

In separate proceedings, on 4 July 2017, the SCM dismissed Judge Manole on the basis of risk factors highlighted in an opinion issued by the Security and Intelligence Service (SIS)¹⁶⁰ and inappropriate third party communication.¹⁶¹ The SCM dismissed the judge without undergoing a disciplinary procedure, as provided by law, and the accusations of inappropriate third party communication were not brought forward in advance, but briefly stated during the SCM hearing and later on included as one of the reasons for dismissal in the SCM judgment. Judge Manole challenged the constitutionality of the legal provisions allowing for periodic verification of judges by SIS before the Constitutional Court. The SCJ suspended the examination of judge Manole's case until the decision of the Constitutional Court. On 5 December 2017, the Constitutional Court¹⁶² declared the provisions allowing the SIS periodically to verify judges as unconstitutional, since they affect judicial independence. Based on this ruling, Judge Manole requested the SCM to revise its decision on her dismissal. The SCM rejected the request in February 2018. The judge continued with the case to the SCJ. The Supreme Court upheld the SCM decision to dismiss judge Manole on 19 November 2018.

¹⁶⁰ At that time, legislation provided for periodic mandatory verification of judges by SIS and judge Manole was due for such verification in 2017.

¹⁶¹ Communication of her separate opinion to a TV station in a defamation case concerning the Speaker of the Parliament, before the case was irrevocable.

¹⁶² See the Constitutional Court decision no. 32 of 5 December 2017 at <http://constcourt.md/ccdocview.php?tj=hotariri&docid=643&l=ro>. The press release in English is available at <http://constcourt.md/libview.php?l=en&idc=7&id=1104&t=/Media/Noutati/Verification-of-judges-by-the-Security-and-Intelligence-Service-unconstitutional/>.

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VI. The Disciplinary System

The *UN Basic Principles on the independence of the judiciary* set out the international framework for discipline, suspension and removal of judges. They state that a

*"charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. ... Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. ... All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct. [Finally, d]ecisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."*¹⁶³

The *Council of Europe's Recommendation on judges* provides that disciplinary proceedings "should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate."¹⁶⁴ The CCJE adds that "a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body."¹⁶⁵

The disciplinary system for judges in Moldova is regulated by the Law no. 178 of 25 July 2014 on the disciplinary liability of judges, with the latest amendments by Law 136 of 19 July 2018. The current disciplinary system includes the following bodies:

- The Judicial Inspectorate, that is in charge of receiving the disciplinary complaints, investigating them and bringing those with merit to the Disciplinary Board;¹⁶⁶
- The Disciplinary Board, that examines the disciplinary cases initiated by the Judicial Inspection and takes a decision to sanction the judge or to dismiss the case, which is subject to appeal before the Superior Council of Magistracy;
- The Superior Council of Magistracy, that can examine the appeal regarding the Disciplinary Board decision, on merits and procedure;

¹⁶³ *UN Basic Principles on the independence of the judiciary*, Principles 17-20.

¹⁶⁴ *Council of Europe Recommendation on judges*, para 69. Similar expressions of this principle are contained in the *Singhvi Declaration*, para 26(b); the *Universal Charter of the Judge*, article 11; the *European Charter on the Statute of Judges*, para. 5.1; the *Magna Charta of Judges*, para. 6; the *Bangalore Principles Implementing Measures*, para. 15.4; and are endorsed by the Consultative Council of European Judges in *Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviours and impartiality*, CoE Doc. CCJE (2002) Op. N° 3, 19 November 2002, para. 77(ii)-(iii)-(iv); and by the Venice Commission in *Report on Independence of the Judiciary*, *op. cit.*, para. 43.

¹⁶⁵ CCJE, *Opinion no. 10, op. cit.*, para. 63.

¹⁶⁶ Until the entry into force of the latest amendments to the Law no. 178 (the Law no. 136 of 19 July 2018 – which entered into force on 14 September 2018) the competences of the Judicial Inspection were more limited, as there was another body within the Disciplinary Board – Admissibility Board – that was deciding on admissibility of disciplinary complaints. In addition, the Judicial Inspection did not have the expressly provided competences to present the disciplinary case before the Disciplinary Board

- The Supreme Court of Justice – a special panel that examines the cases against the decision of the Superior Council of Magistracy, on merits and procedure.¹⁶⁷

According to the Law no. 947 on the Superior Council of Magistracy, the **Judicial Inspectorate** consists of seven inspectors-judges.¹⁶⁸ One of the inspector-judges is the Chief Inspector-judge. Until the Law no. 137 of 29 September 2018 (in force since 19 October 2018), the Judicial Inspectorate was subordinated to the SCM. However, currently under the new legislation, the Judicial Inspectorate is an independent body, which has functional autonomy. Inspectors-judges are employed full-time. The secretariat is administered by the SCM. The Judicial Inspectorate has competence in five domains: verification of the organizational activity of the courts; examination of petitions regarding the ethics of judges; verification of complaints regarding disciplinary liability of judges; verification of applications addressed to the SCM to authorize the criminal prosecution against judges and examination of the grounds for rejection of the SCM nominees for the office of judge or promotion.

According to Law no. 947 and the Law no. 178 on disciplinary responsibility of judges, the **Disciplinary Board (DB)** is an independent body that examines the disciplinary causes regarding judges and resigned judges for acts committed during their duties, and applies disciplinary sanctions. The Disciplinary Board is composed of nine members, which include five judges and four representatives from civil society/academia. The mandate of the Disciplinary Board (DB) members is for six years. The members cannot be elected or appointed for two consecutive mandates.

The judges who are members of the DB are elected on secret ballot by the General Assembly of the Judges, as follows: one judge from the Supreme Court of Justice; two judges from the courts of appeal; and two judges from the district courts. Judges may be elected to DB only if they have been serving for at least six years as Judge. During the General Assembly of the Judges, five alternate members also are elected, respecting the proportions mentioned above. The alternate members are designated to take on the work of members in case of termination or revocation of a DB member's mandate.

The members of the DB from civil society, including four alternates, are appointed by the Minister of Justice, selected by means of public competition. The competition is organized by a selection panel, which includes representatives nominated by the Superior Council of Magistracy. Appeals against decisions of the Board are filed with the SCM whose decision can be further appealed to the Supreme Court of Justice.

¹⁶⁷ Until 14 May 2018 (CCM decision no. 13 of 14 May 2018, available at <http://constcourt.md/ccdocview.php?tip=hotariri&docid=660&l=ro>) the Supreme Court was examining only the procedural aspects, although the law on disciplinary responsibility of judges initially provided expressly a full appeal. The Law no. 136 of 19 July 2018 (in force since 14 October 2018) annulled any limitation regarding the Supreme Court competence to examine the appeals on the SCM decisions on disciplinary matters.

¹⁶⁸ Currently they are five. This enlargement of membership will enter into force on 1 January 2019, under amendments provided in the Law no. 137 of 29 September 2018.

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Under Law no. 178, as recently amended, the following disciplinary offences are provided for:¹⁶⁹

- intentional or grossly negligent non-observance of the duty to recuse oneself when the judge knows or ought to have known that there is a situation obtaining that is prescribed by law for his or her recusal; as well as making repeated and unjustified statements of recusal in the same case, which has the effect of delaying the examination of the case;
- adoption of a judgment by which, intentionally or through gross negligence, there has been a violation of the fundamental rights and freedoms of natural or legal persons, guaranteed by the Constitutional or international treaties to which Moldova is a party;
- actions of the judge in the process of justice administration that demonstrate serious and obvious professional incompetence;
- the interference in the justice delivery of another judge;
- unlawful interference or exploitation of the position of judge in relation to other authorities, institutions or officials either for the settlement of claims, pretending or acceptance of the solving of personal interests or of other persons, or for the purpose of obtaining undue advantage;
- non-observance of the secrecy of the deliberations or the confidentiality of activities that have this character, as well as of other confidential information that judge gained due the exercise of his duties, in accordance with the law;
- breach due to reasons imputable to the judge, of the deadlines for performing procedural actions, including deadlines for drafting court judgments and submission of their copies to the participants in the proceedings, if this has affected directly the rights of the trial participants or other persons;
- unjustified absences from work, delay or departure without objective reasons from work, if it affected the activity of the court;
- violation of the imperative legal norms in the process of justice delivery;
- failure to fulfill or delay or inadequate performance of a service obligation, without reasonable justification, if it has directly affected the rights of trial participants or other persons;
- undignified attitude in the process of justice delivery towards the colleagues, lawyers, experts, witnesses or other persons;
- violation of the provisions on incompatibilities, prohibitions and service restrictions affecting judges;
- non-compliance with the provisions of the Law on Institutional Integrity Assessment;
- obstructing, by any means, the work inspector-judges;
- other actions that affect the honour or professional integrity or prestige of justice to such an extent as it affects the trust in the judiciary, committed while performing service duties or outside them, which, by their gravity, cannot be qualified only as breaches of the Code of Ethics and Professional Conduct of Judges;
- a disciplinary offence committed by court presidents and deputy presidents is non-fulfilment or fulfilment with delay or inadequate

¹⁶⁹ Most of them were amended or completed by Law 136 of 19 July 2018.

fulfilment, without a reasonable justification, of a duty provided in art. 16¹ of the Law no 514 on judicial organization and if this has affected the activity of the court.

The ICJ notes that the same law provides that disciplinary liability does not depend on whether or not the act issued by the subject of the disciplinary case was challenged, or by the outcome of hierarchically superior courts examination (appeal).¹⁷⁰

Assessment

The ICJ welcomes the reforms of the disciplinary system of judges and, in particular, the latest in September 2018. It is too early to provide an assessment of these new disciplinary offences. Nonetheless, considering the context of Moldova and experience of the Moldovan judiciary in judicial discipline, the ICJ recommends that these offences be strictly construed and applied in such a way so as to not affect the independence of individual judges.

In particular, the ICJ remains concerned by the ground of dismissal of issuing a decision contrary to fundamental rights because the disciplinary proceedings could be triggered even before a final decision by the last instance court is issued and may constitute undue pressure on the internal independence of appellate judges. By allowing the disciplinary proceedings for such a disciplinary offence before the final decision on the case, there is a risk that issues that should be solved through the ordinary appeal process may be intercepted and anticipated by exercising pressure on the judge (and on the appeal courts) via the disciplinary procedure.

The ICJ is further concerned about the ground of dismissal after two negative evaluations (insufficient qualification received at two consecutive evaluations) or a failed evaluation. Disciplinary proceedings should not be linked to evaluation assessments, as they should relate only to disciplinary offences provided by international standards.

¹⁷⁰ This provision was included in the law no. 136 of 19 July 2018 as a result of the fact that the Disciplinary Board and the Superior Council of Magistracy until now had a controversial practice of rejecting disciplinary complaints if it concerned the conduct of a judge in a case that was not overturned at appeal level. Following the same practice, judges of the Supreme Court of Justice were practically free of disciplinary liability since their cases were final, with no appeal procedures. This amendment should lead to improvements in the disciplinary practice, if applied in good faith.

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VII. Conclusions and Recommendations

Immediately following ICJ's last mission to the country in 2012, Moldova underwent a vast legal reform process of its judicial system. Most of the laws and administrative measures adopted during the process, on their face, met the recommendations of the ICJ mission report of 2013. The ICJ welcomes those reforms of the country's Constitution and laws and stresses their importance as a basis for an independent judiciary.

However, as highlighted in the ICJ's 2013 report, adoption of laws is only a first step. Already then the ICJ heard from many experts it met with that Moldova is known for adopting good laws and executing them poorly.

Unfortunately, and despite such reform, the ICJ cannot but confirm this bleak picture five years later.

Both the public and the stakeholders of the justice system typically do not yet perceive an amelioration in access to justice or in the independence of the judiciary. The ICJ delegation met several stakeholders who said the situation of the independence of the judiciary is far worse now than in 2012 – some even said worse than during the Soviet times - and almost none had confidence that it would improve. The leitmotiv the ICJ heard is that the reform process left Moldova with, broadly, good legislation but with a poor, insincere and ineffective implementation.

A mentality of excessive hierarchy in the judiciary and of the judge as having a merely notary role to the work of the prosecution office (called by some experts met a "Soviet mentality") is still prevalent among judges, even despite the fact that the majority of judges are young and have been appointed after 2011. The mission heard from several stakeholders that, these changes of personnel notwithstanding, this orientation and attitude persists, transmitted from generation to generation of judges. The ICJ mission saw first-hand that a system of deference to the Superior Council of Magistrates and the Supreme Court of Justice still exists in the Moldovan judiciary.

This situation is in line with the general experience from other transitional societies in which this retrogressive approach of judges is a serious obstacle to reform. Indeed, in Moldova, there is no tradition of a strong and independent judiciary capable of providing a check on the power of other branches of the State.

The situation is exacerbated by the high level of perception of corruption in the judiciary that prompts sympathy in public opinion for reforms and initiatives that risk undermining the independence of the judiciary in the name of "anti-corruption". The ICJ stresses that corruption in the judiciary must be fought robustly and as a priority, in full respect of the rule of law and human rights. The ICJ is concerned that the focus of many criminal investigations seems to be directed more at stifling dissent or preventing dissonant voices in the judiciary that at really eradicating the phenomenon of corruption.

The ICJ delegation was presented with witness statements and stories of judges living often in a condition of fear: fear to express their opinions on the situation of the judiciary; fear of criminal prosecution for issuing a decision contrary to the *desiderata* of the prosecutor's office or the people in power; fear of dismissal proceedings or ruining their career for expressing their views in disagreement with the judicial *nomenklatura* and the hierarchy that exists in practice, even if abolished in law.

The ICJ considers that this climate is deleterious for the independence of the judiciary and that no legal reform, however ideal on its face and in line with international standards, would be able to bring fruit if implanted in such atmosphere of fear. The bodies of governance of the judiciary and any institution in the Republic of Moldova, within the limits of their competence, should do their utmost to strongly and publicly encourage all judges not to fear pursuing their professional responsibilities independently within the boundaries of the rule of law. Transparency, pluralism and free, respectful and competent, even if critical, opinion should be the cornerstone of the judiciary in Moldova

Achieving judicial independence requires a change of attitude towards the judiciary from the executive and other sources of State and private power, but most importantly from the judiciary itself. The process may not always be smooth or speedy and may involve tensions with other State institutions. Such tensions, open or latent, are inherent in all societies based on the rule of law. But it is an inevitable route if Moldova is to establish a truly independent judiciary capable of fulfilling its responsibilities and functions.

With this in mind the ICJ recommends:

The Superior Council of the Magistracy (SCM)

The ICJ is concerned at the findings that the SCM, instead of playing its crucial role of defending the independence of the judiciary, institutionally and in respect of individual judges, has become an instrument of pressure on individual judges and a threat to their independence.

In light of the strong culture of hierarchy in the Moldovan judiciary, the ICJ is concerned that the division provided by the Law on the SCM of the six elected judges into two SCJ judges, two court of appeals judges and two first instance judges does not respect the demographics of the judiciary (where the majority of judges are at first instance) and gives a preponderance to SCJ judges (three with the President of the SCJ as *ex officio member*). The ICJ further considers that the fact that the head of the appeal body against the SCM decision, the President of the SCJ, sits in the SCM constitutes a conflict of interest, since the SCJ is the appeal body against SCM's decisions.

Finally, the ICJ considers that, in the specific context of Moldova, it would be useful for the SCM to take advantage of the expertise of the legal profession to ensure that its decisions on the judiciary take into account

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the needs of all persons accessing the justice system. In this regard, the addition of a representative appointed by the Union of Lawyers could be considered, under the condition that he or she is not a practicing lawyer while being a member of the SCM.

The ICJ therefore reiterates the recommendation of its 2013 report that, as already proposed in Draft Law no. 10/2018, the *ex officio* membership of the SCM of the Ministry of Justice and of the Prosecutor General should be removed, since their presence constitutes an interference of these powers with the independence of the judiciary. It further recommends the removal of the *ex officio* membership of the President of the Supreme Court of Justice, since its presence may create a conflict of interest with regard to appeals against decisions of the SCM itself to the SCJ and in order to counter the dominant hierarchical culture within the judiciary.

The ICJ further recommends that to ensure the transparency and accountability of the works of the SCM, its meetings be as a rule not held with the procedure behind closed door and that the decisions of the SCM include the motivations of the decisions taken.

Finally, the ICJ recommends that the SCM encourage and not impede judges from participation in external events, speaking freely about the challenges for the judiciary and commenting and proposing constructive recommendations to strengthen its independence and effectiveness. Judges should be free to attend trainings, conferences, expert meetings or other events, including public events, without the approval of the SCM, National Institute of Justice or court presidents. Finally the SCM should fulfil its role as defender of the independence of the judiciary and the rule of law in Moldova and speak out against threats to the independence of the judiciary and of individual judges.

Investigative judges

The ICJ is concerned at the work of investigative judges in particular concerning the routine approval of pre-trial detention requests by the prosecution service. Investigative judges appear to have become prone to routine compliance with the requests of prosecutors either by cultural subservience or by outright undue pressure. This concern is enhanced by the findings that investigative judges that attempt to rule against such requests risk undergoing a criminal investigation for "unlawful judicial act" under article 307 of the Criminal Code (see below).

The ICJ urges the Moldovan authorities to take the measures necessary to ensure that investigative judges enjoy full independence in practice and not only in law and to end any pressure on them, including the recommendations provided in other sections of this report.

Judicial liability to prosecution

The ICJ is concerned at the existence of the offence of "wilfully rendering a judgment, sentence, decision or ruling in breach of the law" in article 307 of the Criminal Code and its use to pressure judges.

As highlighted in this report, the ICJ received testimonies of several cases of judges subject to criminal prosecution for this offence, including of cases where these prosecutions were undertaken when judges issued rulings unfavourable to the request of the public prosecutors or that were contrary to the will of the executive or other politically powerful actors.

The ICJ consider that, in light of the still ongoing cases in Moldova, an application of the offence in a manner that is compliant with the Constitution and international law and standards, even if possible in the abstract where strict application of proof of intent is guaranteed, appears to be wishful thinking rather than an effective guarantee for judicial independence.

The ICJ is further concerned at the fact that the Superior Council of the Magistracy appears to regularly grant authorization to prosecute under article 307 CC, rather than only in rare cases.

The ICJ considers that the criminal offence under article 307 CC constitutes a dangerous instrument of pressure on judges by the prosecution service.

The ICJ urges Moldovan authorities to remove the criminal offence under article 307 from the Criminal Code.

Closed hearings in high-level criminal trials

The ICJ considers very concerning the use of closed court hearings including, and particularly, in high-level criminal cases that raise matters of public interest. International law affirms clearly that hearings in criminal cases must be held in public and the decisions must be clearly delivered in public. This measure of transparency would also have the effect of increasing trust in the judiciary so that justice is not only done but it is seen to be done.

The ICJ considers that the SCM should closely inquire into these cases of apparent misuse of the exceptions to the right to an open criminal trial under articles 6 ECHR and 14 ICCPR and, if there is evidence of disciplinary offences proceed to disciplinary proceedings in accordance with the law and international standards.

Association of Judges

The ICJ is concerned at the inaction of the Association of Judges of Moldova in the face of threats to the independence of individual judges. The concern is enhanced by the impression that the Association will be ready to react on issues such as salaries and pensions, but no on broader points of principle or on specific threats to individual members. The ICJ considers that, in a country such as Moldova where the perception of corruption in the judiciary is extremely high, it is important that the Association of Judges should not be seen as a corporatist instrument, but

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as acting openly and consistently for the defence of the independence of all judges.

The ICJ is further concerned that the current governance of the Association, where its President is also President of the Supreme Court of Justice and member of the SCM, may constitute an obstacle to the development of healthy debate within the judiciary on its role and independence, due to the strong culture of hierarchy that continues to prevail in the Moldovan judiciary.

The ICJ considers that, in order to break this hierarchical culture in the Moldovan judiciary, it would be advisable that the President and Vice-Presidents of the Supreme Court of Justice as well as the President of the Superior Council of the Magistracy not be present in its governance structures. The ICJ considers important that a pluralism of voices is ensured in the judiciary and advises that consideration be given by judges to the formation of additional associations or groups to contribute to debate on strengthening the independence of the judiciary.

Selection and appointment

The ICJ is concerned at the lack of transparency and arbitrariness in proceedings of appointment and promotion of judges in Moldova. The ICJ is concerned at reports that the SCM has favoured candidates who have attained only low scores from the Selection Board, without providing reasons for such "exceptions".

The ICJ welcomes that recent legislation of September 2018 has set up a more mandatory system that would require respect the score for the decision, while at the same time assigning a 20 percent of the score decision to the SCM that correctly should evaluate the candidate and provide with a reasoned decision for the score.

The ICJ attends to see the practical and strict implementation of these new rules that could be beneficiary to objective appointments in the judiciary.

The ICJ concurs with the aim of the reform in Draft Law no. 10 and the related opinion of the Venice Commission with regard to the system of appointment of judges of the Supreme Court of Justice. The ICJ considers that, due to the high level of political pressures on judges in Moldova and the hierarchical cultures in the judges looking up at the SCJ it would be advisable that the selection and appointment of SCJ judges follow the same process as for the other members of the judiciary.

If this selection system were to be retained, the ICJ considers it essential that decisions on appointment by the SCM be publicly motivated based on objective criteria and that Parliament be obliged to accept the nomination if it has taken no action after a fixed and limited amount of time.

The five-year initial appointment period

The ICJ considers that the necessity and desirability of the temporary initial appointment period should be reconsidered in light of its potential effect on judicial independence and impartiality. There is an enhanced potential for a judge to be influenced by considerations extrinsic to the judicial function when the judge must submit to what is an effective reappointment procedure.

The ICJ repeats its recommendation of 2013 to the Moldovan authorities to repeal the system of probation period.

The evaluation system

The ICJ remains concerned that the periodic evaluation process could become a means for intimidating judges and undermining their security of tenure.

The ICJ recommends that any periodic evaluation process should not lead to the dismissal of judges before they have been given an adequate opportunity to redress any failings.

Finally, the ICJ recommends the rescindment of any legal provision that would lead to the dismissal of a judge, as a consequence of the evaluation procedure, who could not otherwise have been dismissed through disciplinary action.

Security checks

The ICJ welcomes the ruling of the Constitutional Court abolishing the use of security checks and renews its concern, expressed in its 2013 report that the nature and purpose of security and health checks is unclear and that they carry the potential to undermine a fair appointments process. A further concern is the maintenance in law of the obligation of judges and prosecutors to pass a polygraph test for appointment. The ICJ recommends the abolition of this test.

Disciplinary system

The ICJ welcomes the recent reforms to the disciplinary system of September 2018 and is eager to see its results as soon as the implementation is in full regime.

The ICJ delegation remains concerned by the ground of dismissal of issuing a decision contrary to fundamental rights because the disciplinary proceedings could be triggered even before a final decision by the last instance court is issued and may constitute an undue pressure on the internal independence of appellate judges.

The ICJ delegation is further concerned that there are grounds for dismissal based on two negative evaluations (insufficient qualification

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received at two consecutive evaluations) or a failed evaluation. Disciplinary proceedings should not be linked to evaluations assessments, as they should relate only to disciplinary offences provided by international standards.

Random allocation of cases

The ICJ welcomes the improvement achieved in ensuring independence and objectivity in the distribution of cases in courts via an automated distribution system. The ICJ stresses the absolute importance to ensure that, if and when the automated system is malfunctioning, the court president must be obliged to motivate the assignment of the case, the reasons for the exception and to communicate such information publicly.

Reasoning of decisions

The ICJ remains concerned at the impact of this amendment to the Civil Procedure Code, on the capacity of the judicial system to provide access to justice and to ensure effective protection of the rights of litigants to a fair hearing, as protected by article 6.1 ECHR as well as other international human rights treaties. The ICJ recommends the deletion of this provision and the research by Moldovan authorities of alternative solutions to the deflation of the civil courts' workload.

Judicial remuneration

The ICJ welcomes the increase of judges' salaries as recommended in its 2013 report. The ICJ, however, is concerned at the recent salary reforms of public servants that will insert judges in the system of calculation of salaries for public servants through a coefficient decided periodically by Parliament.

Finally, the ICJ expresses concern at the pension system for judges in Moldova that allows judges to leave the profession at a very early age (50) with few years of work (12.5), that could push judges who fall into disfavour with authorities in charge of judicial governance to chose retirement as a way out of the system.

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October 2018 (for an updated list, please visit www.icj.org/commission)

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