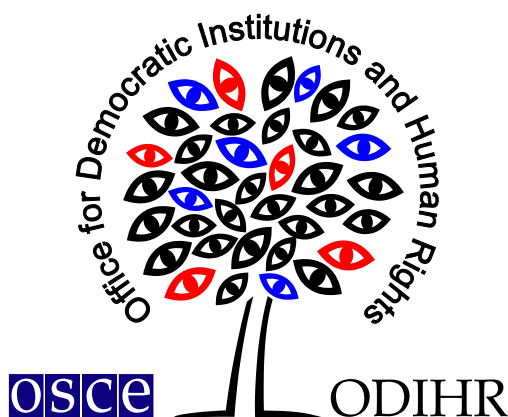


Warsaw, 3 March 2020

Opinion-Nr.: JUD-MNG/352/2020 [AIC]

<http://www.legislationline.org/>



**OPINION**

**ON THE LAWS ON COURTS, ON JUDICIAL  
ADMINISTRATION AND ON THE LEGAL STATUS  
OF JUDGES OF MONGOLIA**

**based on an unofficial English translation of the Laws commissioned by the OSCE  
Office for Democratic Institutions and Human Rights**

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***The Opinion represents the position of the OSCE Office for Democratic Institutions and Human Rights only and does not necessarily reflect the position of the experts.***

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

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## **I. INTRODUCTION**

1. On 3 September 2019, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a request from the Chairperson of the Judicial General Council of Mongolia to review several laws relating to the judiciary in Mongolia. ODIHR agreed to carry out a legal review of these Laws to assess their compliance with OSCE human dimension commitments and international human rights and rule of law standards.
2. Subsequently, ODIHR decided to prepare separate legal analyses, the first one focusing on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges (hereinafter “the Laws”) on the one hand, and the two other respectively on the Mediation Law and on the Law on the Legal Status of Citizen Representatives of Court Trials, which should be read together.<sup>1</sup>
3. This Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.<sup>2</sup>

## **II. SCOPE OF REVIEW**

4. The scope of this Opinion covers only the Laws submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary in Mongolia, though they should be read together with the findings and recommendations made in the [\*ODIHR Opinion on the Law of Mongolia on the Legal Status of Citizen Representatives of Court Trials\*](#) and the *ODIHR Opinion on Law on Mediation of Mongolia*.
5. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions that require improvements than on the positive aspects of the Laws. The ensuing recommendations are based on international and regional standards, norms and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women<sup>3</sup> (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality<sup>4</sup> and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the analysis seeks to take into account the potentially different impact of the Laws on women and men, as judges or as lay persons.
7. The Opinion is based on unofficial English translations of the Laws commissioned by ODIHR, which are attached to this document as an Annex. Errors from translation may

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

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

<sup>3</sup> UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Mongolia deposited its instrument of ratification of this Convention on 20 July 1981.

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

result. The Opinion is also available in Mongolian. However, the English version remains the only official version of the Opinion.

8. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation regulating the judiciary in Mongolia in the future.

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

9. Notwithstanding progress in the reform of the legislative and institutional framework regulating the judiciary, ODIHR notes that problems of corruption, political/executive influence, and lack of judicial independence and of public trust in the judiciary in Mongolia have been widely acknowledged by the international community,<sup>5</sup> even more in light of the most recent amendments of the legislation on the judiciary in March 2019.<sup>6</sup> It has also been widely reported that insufficient funding of the judiciary as well as political involvement and arbitrary decisions on the selection, appointment, career, or dismissal of judges have severely affected the independence and impartiality of the judiciary in Mongolia.<sup>7</sup> Recognizing that the independence, impartiality, accountability, transparency and professionalism of the judiciary are key to the rule of law and to engendering public trust in the judiciary, it is essential that authorities address the above-described challenges faced by the judiciary in Mongolia. ODIHR therefore welcomes the willingness and efforts undertaken by public authorities to undertake a comprehensive reform of the judiciary and of the Laws under review to strengthen judicial independence in the country.
10. Though recognizing the right of every state to reform its judicial system, any judicial reform process should not undermine the independence of the judiciary and should be in compliance with applicable international rule of law and human rights standards and OSCE commitments. This should be kept in mind when initiating such a far-reaching reform, as should the importance of ensuring that the legislative reform conform to key principles of democratic law-making.
11. Overall, the laws in their present form present many lacunae and shortcomings that jeopardize judicial independence, and would justify a comprehensive and systematic revision of the existing legal framework on the judiciary. One of the fundamental concerns of the Laws is the important prerogatives and potential significant influence and discretion of the executive over key decisions pertaining to the judiciary, especially judicial appointments and the composition and functioning of bodies of judicial administration. The Opinion therefore recommends that all provisions providing for the involvement of the executive in the administration of the judiciary be removed from the laws as they risk undermining the separation of powers and the independence of the judiciary. Another concern pertains to judicial appointment modalities, which fail to provide for a fair, impartial, open, transparent and merits-based selection process

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<sup>5</sup> See e.g., Organisation for Economic Co-operation and Development (OECD), *“Anti-corruption reforms in Mongolia – Report on the 4th round of monitoring of the Istanbul Anti-Corruption Action Plan”* (2019), especially pages 10 and 60-62; UN Special Rapporteur on the situation of human rights defenders and UN Special Rapporteur on the independence of judges and lawyers, *Joint Letter and Recommendations* (14 May 2019); UN Human Rights Committee (CCPR), *Concluding observations on the sixth periodic report of Mongolia*, 22 August 2017, pars 31-32; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the fourth periodic report of Mongolia*, 7 July 2015, par 11; and UN Special Rapporteur on the situation of human rights defenders, *End of Mission Statement on the Visit to Mongolia* (30 April – 13 May 2019).

<sup>6</sup> UN Special Rapporteur on the situation of human rights defenders and UN Special Rapporteur on the independence of judges and lawyers, *Joint Letter and Recommendations* (14 May 2019).

<sup>7</sup> See e.g., *op. cit.* footnote 5, pages 10, 53 and 62-63 (2019 *OECD Report on Anti-Corruption*); 2019 UN Special Rapporteur on the situation of human rights defenders’ statement; and par 32 (2017 CCPR *Concluding Observations on Mongolia*).

guaranteeing appointment of the most qualified and experienced candidates. The rules and procedure concerning judges' discipline and disciplinary grounds should also be clarified and further developed to ensure that they are not abused, and that they provide all adequate safeguards for judges subject to disciplinary proceedings. Several provisions also run the risk of undermining judges' individual independence, especially those conferring special prerogatives to chief judges and to the Supreme Court. Finally, measures should be considered by the legal drafters to enhance the access to justice of all, especially women, persons with disabilities and national or ethnic minorities. Several of the recommendations made in the Opinion would or may also involve potential constitutional amendments.

12. More specifically, in light of international human rights and rule of law standards and good practices, ODIHR makes the following recommendations to further enhance the legal framework pertaining to the judiciary in Mongolia:

- A. to reconsider the prerogatives of the executive and legislative branches on a wide range of matters pertaining to the judiciary, especially by;
- deleting all provisions allowing the Minister of Justice to nominate representatives to judicial administration bodies, especially to the Judicial General Council (Article 13.1 of the Law on Judicial Administration) and to the Judicial Ethics Committee (Article 32.4 of the Law on Judicial Administration) or any other future disciplinary body, and the President's prerogative to approve the composition of such bodies; [pars 84 and 137]
  - removing the role of the President in the appointment of the members and chairperson of the Judicial General Council, or limiting her/his role to a purely ceremonial one, or at a minimum, to a pure control of legality, with the obligation to provide written reasons in case of refusal to appoint; [pars 59-60]
  - removing the President's competence to approve the regulations of Judicial Qualifications Committee (Article 23.8 of the Law on Judicial Administration and Article 8.1 of the Law on the Legal Status of Judges) and of the Judicial Ethics Committee (Article 32.4 of the Law on Judicial Administration) or any other future disciplinary body and provide instead that such regulations are developed by the respective bodies and/or the Judicial General Council; [pars 76, 84 and 138]
  - limiting the powers of the President in appointing and dismissing judges to a purely ceremonial role, ensuring that s/he is bound by the proposals made by the Judicial General Council (or disciplinary body), or alternatively substantially limit the President's powers (e.g., by specifying the legal grounds for refusal by the President to appoint or dismiss a candidate, which should be limited to procedural grounds only); [pars 121 and 156]
  - excluding the Parliament from the appointment procedure of Supreme Court judges or, at a minimum, limiting the Parliament's role to scrutinizing the procedural aspects of the selection/nomination undertaken by the Judicial General Council; [par 128]
  - reconsidering the role of the President in the appointment of chief judges and Chief Justice of the Supreme Court and either provide for a procedure similar to the one for other judges as recommended above, or for the assembly of judges of the respective courts to elect their court chairpersons; [pars 164 and 167]
- B. to consider re-introducing the provision prohibiting the reduction of the operational budget of courts, or alternatively, other legal provisions against unwarranted

budgetary cutbacks [par 33], as well as include in the legislation safeguards and criteria to avoid *de facto* reduction of judges' salaries [par 36], while specifying the elements to be covered by the budget in more details [par 32];

- C. to substantially revise the competence of the Judicial Ethics Committee to exclude disciplinary matters against judges from its scope and limit its prerogatives to advising judges and staff on ethical rules and standards of professional conduct [pars 82-83], while establishing a separate disciplinary body composed of a majority of judges elected by their peers and representatives of the Bar and/or academia [par 137], while enhancing the disciplinary system by:
- deleting all provisions of the Laws which state that violation of the Code of Ethics (or ethical rules) shall lead to a disciplinary sanction (especially Articles 31.1, 32.2, 33.1 and 37.1 of the Law on the Legal Status of Judges); [pars 147-148]
  - more clearly distinguishing the grounds and procedures that may lead to removal/dismissal from those that will lead to other disciplinary sanctions; [par 143]
  - removing reference to the involvement of the National Security Council in matters pertaining to the judiciary (Article 17.1.8 of the Law on the Legal Status of Judges); [par 149]
  - ensuring that the person who has received a complaint against a judge and those who have decided on the initiation of disciplinary proceedings, should not take part in the final decision of the disciplinary body; [par 150]
  - providing adequate procedural safeguards to ensure basic standards of procedural fairness and protect judicial independence, including the right of the judge to be informed in advance and in detail of the nature of the disciplinary charge and the alleged facts of the charge, providing for the possibility for the judge to get legal representation and the right to challenge the disciplinary decision before an independent and impartial tribunal; [pars 152-155]
  - expressly stating that disciplinary measures must be in proportion to the gravity of the infraction committed while considering supplementing Article 37.1 of the Law on the Legal Status of Judges with other possible types of disciplinary sanctions; [pars 157-158]
  - providing the possibility to challenge disciplinary sanctions before a court, while ensuring that such sanctions are suspended pending final appeal and decision of the appellate body; [par 159]
- D. to define the grounds for the termination of the mandate of Judicial General Council's members more clearly and precisely, while avoiding overbroad and vague formulations and introducing guarantees of procedural fairness and transparency when such situations arise against Council members; [pars 63-65]
- E. to clarify, in the Law on Judicial Administration, the conditions, modalities and scope of judicial review of the Council's decisions, or if regulated by another law, include a cross-reference to the said law, while ensuring that the Judicial General Council is required to adopt reasoned decisions; [pars 68-69]
- F. to substantially amend the procedure for the selection and appointment of judges to ensure greater openness, transparency, fairness and effectiveness of the process by, among others:

- revising the composition of the Judicial Qualifications Committee to ensure that at least half of its members are judges appointed by their peers; [pars 75 and 137]
  - removing the voting modality for the final selection of the candidates to judgeship by the Judicial General Council (Article 13.2 of the Law on the Legal Status of Judges); [par 126]
  - considering limiting the Council's role when selecting candidates to verifying the compliance by the Judicial Qualifications Committee with procedural requirements and thus following the ranking proposed by the Committee unless there are some clear and duly documented written justifications to depart from such a ranking, or alternatively, clarifying the respective weight of the assessments done by the Judicial Qualifications Committee, by the Bar Association and by the Judicial General Council; [par 125].
  - ensuring that the Judicial General Council provides reasoned decisions on selected candidates to judicial positions explaining the *rationale* for selecting candidates based on the criteria set in the Law; [par 127]
  - providing the candidates with the right to challenge the Council's decision not to nominate a candidate for judicial position, at least on legality and procedural grounds; [par 127]
  - considering other modalities to ensure greater openness and transparency of the selection and appointment process as specified in pars 129-131;
- G. to better reflect the principle of the individual independence of judges throughout the legal framework pertaining to the judiciary; [par 89]
- H. to remove the general reference to “*political matters*” and more generally, to more strictly circumscribe the wording of Article 28.1.2 of the Law on the Legal Status of Judges to ensure that any restriction of judges' freedom of expression adheres to the principles of legal certainty, necessity and proportionality, in line with Article 19 of the ICCPR, while striking a reasonable balance between freedom of expression of judges and the need for them to be and be seen as independent and impartial in the discharge of their duties, and especially consider introducing defences or exceptions anytime judges' statements were intended as part of a public debate on matters pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers, judicial independence and the rule of law in Mongolia; [par 97].
- I. to revise the wording or abrogate Article 5.4 of the Law on Courts in order to remove any language that provides or suggest hierarchical subordination of the courts to the Supreme Court in their decision-making as well as specify the exact nature of the highest court as a cassation or supreme court; [pars 25-26]
- J. to remove the powers of chief judges to approve the decision on appointment of a chair of a court hearing and of a bench of judges [par 170], and to review and resolve disputes over the jurisdiction of the lower courts or chambers (in the case of the Supreme Court) [par 173], as well as reconsider the prerogatives for the Chief Justice to participate in court hearings of any chamber of the Supreme Court or for chief judges to participate in adjudication of any chamber of the respective court; [par 172]
- K. to introduce in the Law on Courts or other relevant primary legislation the principle and modalities of automatic random distribution of cases or, at a minimum,

supplement relevant legislation with clear and objective criteria for case assignment, which would be applicable to all courts; [par 180]

- L. to consider reintroducing a mechanism for performance evaluation of judges drawn up in such a way as not to risk undermining judicial independence; [pars 132-134]
- M. to include provisions to enhance gender and diversity in the judiciary, at all levels, including in the highest jurisdiction, including by:
  - tasking the Judicial General Council to develop and implement initiatives and policies to enhance gender and diversity in the judiciary, at all levels, including in the highest jurisdiction; [par 47]
  - introducing a mechanism to ensure greater gender balance and diversity in the membership of the Judicial General Council; [par 56] and
  - introducing a mechanism to ensure that the relative representation of women and men and of persons from under-represented groups within the judiciary/respective courts is taken into consideration when identifying, ranking and selecting/nominating the candidates to judgeship/chief judge positions. [pars 116-118]

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

#### **IV. ANALYSIS AND RECOMMENDATIONS**

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

- 13. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.<sup>8</sup> The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.<sup>9</sup> This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law. Public confidence in the courts as independent from political influence is vital in a society that respects the rule of law.
- 14. At the international level, it has long been recognized that litigants in both criminal and civil matters have the right to a fair hearing before an “*independent and impartial tribunal*”, as stated in Article 14 of the *International Covenant on Civil and Political Rights*<sup>10</sup> (hereinafter “the ICCPR”). The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the

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<sup>8</sup> See UN Human Rights Council, [Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers](#), A/HRC/29/L.11, 30 June 2015, which stresses “the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards”. As stated in the [OSCE Copenhagen Document 1990](#), “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (par 2).

<sup>9</sup> See e.g., [OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems](#), 6 December 2005.

<sup>10</sup> *UN International Covenant on Civil and Political Rights* (hereinafter “ICCPR”), adopted by the UN General Assembly by the Resolution 2200A (XXI) of 16 December 1966. Mongolia deposited its instrument of ratification of the ICCPR on 18 November 1974.



- [UN Basic Principles on the Independence of the Judiciary](#) (1985),<sup>11</sup> and have been further elaborated in the [Bangalore Principles of Judicial Conduct](#) (2002).<sup>12</sup> International understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee<sup>13</sup> and the UN Special Rapporteur on the independence of judges and lawyers. It is also worth referring to Article 11 of the United Nations Convention against Corruption (UNCAC) whereby State Parties agree to “*take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary*”.<sup>14</sup>
15. OSCE participating States have also committed to ensure “*the independence of judges and the impartial operation of the public judicial service*” as one of the elements of justice, “*which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*” ([1990 Copenhagen Document](#)).<sup>15</sup> In the [1991 Moscow Document](#),<sup>16</sup> participating States further committed to “*respect the international standards that relate to the independence of judges [...] and the impartial operation of the public judicial service*” and to “*ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice*”. Moreover, in its [Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (2008), the OSCE Ministerial Council also called upon OSCE participating States “*to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary*”, as a key element of strengthening the rule of law in the OSCE area.<sup>17</sup> Further and more detailed guidance is also provided by the [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010) (ODIHR Kyiv Recommendations).<sup>18</sup>
  16. Further, and while Mongolia is not a Member State of the Council of Europe (CoE), the Opinion will also refer, as appropriate, to the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the case law of the European Court of Human Rights (ECtHR), and other CoE’s instruments may serve as useful reference documents from a comparative perspective.
  17. Finally, the ensuing recommendations will also make reference, as appropriate, to other specialized documents of a non-binding nature elaborated in various international and regional *fora*, since they provide useful and more practical guidance and examples of good practices to help ensure the independence of the judiciary.<sup>19</sup>

<sup>11</sup> [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>12</sup> [Bangalore Principles of Judicial Conduct](#), adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its Resolution 2006/23 of 27 July 2006. See also [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#) (2010), prepared by the Judicial Group on Strengthening Judicial Integrity.

<sup>13</sup> See especially, CCPR, [General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial](#), 23 August 2007, par 19.

<sup>14</sup> [UN Convention against Corruption](#) (UNCAC), adopted by the UN General Assembly on 31 October 2003. Mongolia deposited its instrument of ratification of the UNCAC on 11 January 2006.

<sup>15</sup> CSCE/OSCE, [1990 Copenhagen Document](#), pars 5 and 5.12.

<sup>16</sup> CSCE/OSCE, [1991 Moscow Document](#), pars 19.1 and 19.2.

<sup>17</sup> OSCE, [Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (Helsinki, 4-5 December 2008).

<sup>18</sup> [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence.

<sup>19</sup> These include, among others: the reports of the UN Special Rapporteur on the independence of judges and lawyers (available at <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>); the [Universal Charter of the Judge](#) (1999, as last updated in 2017), adopted by the International Association of Judges; and the opinions of

## 2. National Legal Framework on the Judiciary

18. The fourth Section of Chapter III of the Constitution of Mongolia governs the judicial power. Article 49 of the Constitution of Mongolia provides that “*judges shall be impartial and subject only to law*”, while prohibiting any interference by any person or entities in the exercise of duties by judges (Article 49 par 2). Article 49 further sets out that the Judicial General Council ensures “*the impartiality of judges and independence of the judiciary*”, and is in charge of the selection of judges, the protection of their rights and of creating the “*the conditions that guarantee the autonomous functioning of judges*”. The President of Mongolia is in charge of appointing the judges of the Supreme Court following their nomination by the Parliament upon presentation by the Judicial General Council, and the judges of other courts, upon the proposal by the Council (Article 51 of the Constitution). Article 51 par 4 of the Constitution provides for the irremovability from judicial office, except in cases of request from a judge or of dismissal on the grounds prescribed by the Constitution or the Law on the judiciary and in accordance with a valid decision by the court. The Constitution also contemplates the “*participation*” of representatives of citizens in the collective adjudication of cases, in accordance with the procedure prescribed by law (Article 52 par 2 of the Constitution). Pursuant to Articles 48 par 2 and 49 par 5 of the Constitution, the organization and operations of courts and of the Judicial General Council, respectively, shall be further established by law.
19. Several other laws, which have been recently amended, deal with the organization of courts, judicial administration, the status of judges, the exercise of the judicial profession and dispute resolution, including the [Law on Courts of Mongolia \(2012, amended 2017\)](#), the [Law on Judicial Administration of Mongolia \(2012, amended 2016\)](#), [Law on Legal Status of Judges of Mongolia \(2012, amended 2019\)](#), the [Law on Legal Status of Citizen Representatives of Court Trials of Mongolia \(2012, amended 2017\)](#), and the [Law on Mediation of Mongolia \(2012, amended 2015\)](#).

## 3. Courts’ Establishment and Judicial Organization

20. It is welcome that the Law on Courts generally emphasizes that the courts shall be independent in their organizational structure (Article 5.1. of the Law on Courts). At the same time, stating the principle of independence is unlikely to yield to results if not accompanied by safeguards and modalities to ensure their independence in law and in practice. In its General Comment no. 32 on Article 14 of the ICCPR, the UN Human Rights Committee specifically provided that States should ensure “*the actual independence of the judiciary from political interference by the executive branch and legislature*”. To ensure that a body is “*independent*” according to Article 14 par 1 of the ICCPR, the UN Human Rights Committee considers that the State should “*take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of primary and secondary legislation, and establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them*”.<sup>20</sup>

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ODIHR (available at <<http://www.legislationline.org/search/runSearch/1/type/2/topic/9>>) and of the Venice Commission (available at <<https://www.venice.coe.int/webforms/documents/?topic=27&year=all>>) dealing with issues pertaining to the independence of the judiciary. Other useful documents elaborated at the European level also include the [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, DAJ/DOC (98)23; the CCJE [Magna Carta of Judges](#), 17 November 2010; the reports and other documents of the European Network of Councils for the Judiciary (ENCJ), available at <<https://www.encj.eu/https://www.encj.eu/>>.

<sup>20</sup> *Op. cit.* footnote 13, par 19 (2007 CCPR [General Comment no. 32](#)).

21. Generally, in determining whether a body can be considered to be independent, regard must be had to both the institutional independence of the judiciary and the individual independence of judges, in light of various elements, including: (a) the manner in which judicial officers are appointed, their status and all aspects relating to their career; (b) the security of tenure of judicial officers and the general principle of irremovability; (c) the existence of adequate guarantees protecting the tribunal and its members from external and internal pressures; and (d) an outward appearance that the tribunal is independent.<sup>21</sup> Overall, placing excessive regulatory powers concerning the judiciary in the hands of the executive may enable it to “*interfere in matters that are directly and immediately relevant to the adjudicative function*”, which the [UNODC Commentary on the Bangalore Principles](#) describes as breaching a minimum condition for the institutional independence of the judiciary.<sup>22</sup> In that respect, and as further detailed below, it overall appears that the President of Mongolia has overbroad powers concerning a wide range of matters pertaining to the judiciary, especially concerning the court organization, the status of judges, their appointment and dismissals, which may actually deprive litigants of their right to “*an independent and impartial tribunal established by law*” under Article 14 of the ICCPR (see specific recommendations below).

### **3.1. Internal Hierarchy of the Judiciary**

22. Article 5.4 of the Law on Courts states that “[a]ctivities and decisions of any courts shall not be out of the oversight of the Supreme Court”, which mirrors the wording of Article 48 par 1 of the Constitution.<sup>23</sup> This means that all courts (first instance and appellate courts) in Mongolia are under the “oversight” of the Supreme Court.
23. While it is not clear how Article 5.4 above is applied in practice, the hierarchical judicial organisation should not undermine the individual independence of judges and superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.<sup>24</sup> While a supreme judicial body such as the Supreme Court generally plays a key role in a country, by, among others, providing legal certainty, foreseeability, and uniformity in the interpretation and application of laws,<sup>25</sup> it should not supervise lower courts nor issue guidelines, directives, explanations, or resolutions that would be binding on lower court judges.<sup>26</sup> In that respect, exemplary decisions of high courts and decisions specifically designated as precedents by these courts shall have the status of recommendations and not be binding on lower court judges in other cases, nor be used to restrict the freedom of lower courts in their decision-making and responsibility.<sup>27</sup> Unless an issue of translation, the unclear formulation “oversight” may

<sup>21</sup> *ibid*, par 19 (2007 CCPR [General Comment no. 32](#)). See also ODIHR, [Legal Digest of International Fair Trial Rights](#) (2012), page 59; and, for the purpose of comparison, European Court of Human Rights (ECtHR), [Campbell and Fell v. the United Kingdom](#) (Application nos. 7819/77, 7878/77, judgment of 28 June 1984), par 78; [Olujic v. Croatia](#) (Application no. 22330/05, judgment of 5 May 2009), par 38; [Oleksandr Volkov v. Ukraine](#) (Application no. 21722/11, judgment of 25 May 2013), par 103; [Morice v. France](#) [GC] (Application no. 29369/10, judgment of 23 April 2015), par 78; on the relation of the judiciary with other branches of power: [Baka v. Hungary](#) [GC] (Application no. 20261/12, judgment of 23 June 2016), par 165; [Ramos Nunes de Carvalho e Sá v. Portugal](#) [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 144; [Guðmundur Andri Ástráðsson v. Iceland](#) (Application no. 26374/18, judgment of 12 March 2019), pars 100-103.

<sup>22</sup> UNODC, [Commentary on the Bangalore Principles of Judicial Conduct](#) (September 2007), par 26. See also ODIHR, [Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland \(as of 26 September 2017\)](#), 13 November 2017, par 86.

<sup>23</sup> Available at <[https://www.legislationline.org/download/id/6489/file/Mongolia\\_Constitution\\_1992\\_am2001\\_en.pdf](https://www.legislationline.org/download/id/6489/file/Mongolia_Constitution_1992_am2001_en.pdf)>.

<sup>24</sup> See, *op. cit.* footnote 18, par 35 (2010 ODIHR Kyiv Recommendations). See also, for the purpose of comparison, Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), 17 November 2010, pars 22-23; CCJE, [Opinion no 1 \(2001\) on standards concerning the independence of the judiciary and the irremovability of judges](#), 23 November 2001, par 68.

<sup>25</sup> See e.g., Venice Commission, [Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina](#), CDL-AD(2012)014, 18 June 2012, pars 64-65.

<sup>26</sup> *Op. cit.* footnote 18, par 35 (2010 ODIHR Kyiv Recommendations); and see also pars 70-71 of 2010 [Venice Commission's Report on the Independence of the Judicial System Part I – The Independence of Judges](#).

<sup>27</sup> *ibid*, par 35 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

call into question the general independence of the courts as well as individual judges' independence,<sup>28</sup> meaning the independence of each individual judge to exercise of his/her functions, without interference from other judges, internal judicial authorities and superior courts. **Therefore, Article 5.4 of the Law on Courts should be clarified so that such oversight should only be exercised through legal review/appeal.** In that respect, it is worth noting that the former reference to the issuance of “*official interpretations for the proper application of laws*” in Article 17.3.1 of the Law on Courts, which would have been in clear contradiction to these principles, has been annulled by a Constitutional Decree in 2015, which is welcome.

24. Article 5.4 of the Law on Courts should also not be interpreted as providing the possibility for the Supreme Court to perform a supervisory review of lower courts' decisions (outside of exceptional limited situations where they may be cogent reasons for revising them),<sup>29</sup> which would contradict the *res judicata* principle (principle of observing final binding court decisions), and undermine legal certainty, thus conflicting with the rule of law.<sup>30</sup>
25. In light of the foregoing, **the legal drafters should consider clarifying the wording or abrogating Article 5.4 of the Law on Courts in order to remove any language that provides or suggest hierarchical subordination of the courts to the Supreme Court in their decision-making. Alternatively, the Law should specify that the guidance or decisions issued by the Supreme Court should serve as recommendations and not be binding on lower courts.**
26. Article 15.1 of the Law on Courts states that the Supreme Court is the highest judicial organ of Mongolia and the “*court of cassation or review*”. Article 17 further specifies the powers of the Supreme Court, which mirrors Article 50 of the Constitution,<sup>31</sup> including “*the power to hear through cassation procedure and decide legal disputes*”. However, it is not clear from the wording of the Constitution or the Law what this would exactly entail. It should be clarified whether in substance, the highest court is a so-called court of cassation (i.e., it is only reviewing whether the law has been correctly applied by lower courts, and not facts, and is in principle sending back the cases to other courts for *de novo* process) or a supreme court, which reviews both questions of facts and of law and adopts final judgments. Unless a matter of translation, and while the procedural rules/codes may perhaps clarify this matter, for the sake of clarity, **it may be advisable to further specify in the Law on Courts the exact nature of the highest court.** Similarly, unless this is clarified in the relevant legislation on the Constitutional Court and the state Prosecutor General, **Article 17.3.4 would also benefit from clarity regarding the types of cases referred to by the Constitutional Court and the Prosecutor General, or a cross-reference to the relevant legislation should be made.**

<sup>28</sup> See, regarding similar provision, ODIHR-Venice Commission, [Joint Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic](#) (19 October 2016), par 66.

<sup>29</sup> See e.g., for the purpose of comparison, Article 4 of Protocol 7 to the ECtHR, which states that the reopening of the case in accordance with the law and penal procedure is possible if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case (see also e.g., ECtHR, [Lenskaya v. Russia](#) (Application no. 28730/03, judgment of 29 January 2009), pars 36-44). See also e.g., Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, 18 March 2016, par 63. See also Council of Europe, “[The Council of Europe and the Rule of Law - An Overview](#)”, CM(2008)170, 21 November 2008, par 48.

<sup>30</sup> *ibid.* par 35 (2010 ODIHR Kyiv Recommendations), which states: “*The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges. In addition, exemplary decisions of high courts and decisions specifically designated as precedents by these courts shall have the status of recommendations and not be binding on lower court judges in other cases. They must not be used in order to restrict the freedom of lower courts in their decision-making and responsibility. Uniformity of interpretation of the law shall be encouraged through studies of judicial practice that also have no binding force.*” See also e.g., OECD, Istanbul Anti-Corruption Action Plan, [Second Monitoring Report on Kyrgyzstan](#), page 71. See also, for the purpose of comparison, on the supervisory procedure in Russia, ECtHR, [Ryabykh v. Russia](#) (Application no. 52854/99, judgment of 24 July 2003), pars 51-58.

<sup>31</sup> See <[https://www.legislationline.org/download/id/6489/file/Mongolia\\_Constitution\\_1992\\_am2001\\_en.pdf](https://www.legislationline.org/download/id/6489/file/Mongolia_Constitution_1992_am2001_en.pdf)>.



27. Finally, Article 16.1 of the Law on the Courts provides that the Supreme Court shall be composed of a Chief Justice and not less than twenty-four justices. The Law does not provide for a maximum, which does not prevent the possibility for an important number of Supreme Court judges to be newly appointed at once (or “court-packing”), which could be seen as instituting a “take-over” of the highest court, which could have grave repercussions for the independence of this institution.<sup>32</sup> **The legal drafters should consider introducing an upper limit.**

### **3.2. The Participation of the Judiciary in the Law-Making Process**

28. Articles 20.1.3 and 23.1.2 of the Law on Courts provide the powers of appellate and first instance courts to submit recommendations to the Supreme Court on improving the legislation based on judicial proceedings in the respective courts. The practice of involvement of the judiciary in the law-making process varies widely and depends on the legal system in a particular State.<sup>33</sup> At the same time, it is generally considered as a good practice that judges, judges’ associations and judicial councils be consulted in the preparation of legislation concerning the status of judges, the administration of justice, procedural laws and more generally, all draft legislation likely to have an impact on the judiciary and the functioning of the judicial system.<sup>34</sup> In general, it is recommended that judicial commentary should be made as part of a collective or institutionalised effort by the judiciary, not of an individual judge.<sup>35</sup> In that respect, it is welcome that judges do not address their recommendations individually but that they are gathered by the Supreme Court, which submit them to the executive (Article 17.3.2 of the Law on Courts).
29. At the same time, there may be circumstances where any direct involvement of judges in the passage of legislation may be sufficient to cast doubt on his/her judicial impartiality if s/he is subsequently called on to determine a dispute over the interpretation of the legislation or rules at issue or whether reasons exist to permit a variation from the wording of the said provisions.<sup>36</sup> While judges and their professional organizations are welcome to express views on legislative matters concerning the administration of justice and it may be appropriate to involve them in the drafting of substantive provisions, it is important to provide in the legislation a mechanism to prevent them from judging a case in situations where their impartiality may be questioned because an individual judge has been directly involved in the legislative drafting of the law that is being applied in a given case. If the Mongolian legislation allows in practice for the direct and active involvement of certain individual judges in the legislative process, and if not already provided by other acts, the legislation **should specifically include a possibility to recuse a judge or a**

<sup>32</sup> See e.g., ODIHR, [Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor’s Offices of the Republic of Moldova \(as of September 2019\)](#), 16 October 2019, par 40. See also e.g., Venice Commission, [Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts](#), CDL-AD(2017)031, par 80.

<sup>33</sup> See e.g., in the State of California in the United States of America, State Justice Institute, “[Manual for Judges and Court Managers about Judicial Involvement in Legislative Processes](#)”, which provides guidance related to four distinct occasions: judicial involvement regarding judicial branch budget and resources, matters directly and substantially affecting the administration of justice, other matters affecting the administration of justice, and other legislative topics.<sup>33</sup> See also in Scotland, [Briefing for the Public Petitions Committee on the involvement of the Scottish Judiciary in the Legislative Process](#) (2010); and House of Lords, case of [Davidson v. Scottish Ministers](#) (2004).<sup>33</sup> See also the [Ethical Principles for Judges](#) promulgated by the Canadian Judicial Council and the revised [Draft Ethical Principles for Judges](#) (as of 20 November 2019), Principle 5.D.2.

<sup>34</sup> See, UN Special Rapporteur on the independence of judges and lawyers, [2019 Report on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors](#), A/HRC/41/48, 29 April 2019, par 69; and for instance, *op. cit.* footnote 32, pars 141, 143 and 146 (2019 ODIHR [Interim Opinion on Moldova](#)). See also, for the purpose of comparison, CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), par 34; [Opinion no. 10 \(2007\) on “Council for the Judiciary in the Service of Society”](#), par 87; [Opinion no. 18 \(2015\) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy](#), 16 October 2015, par 31; *op. cit.* footnote 19, par 9 (2010 CCJE Magna Carta of Judges); and *op. cit.* footnote 19, par 1.8. (1998 [European Charter](#)).

<sup>35</sup> See *op. cit.* footnote 22, par 139 (2007 UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#)).

<sup>36</sup> See e.g., for the purpose of comparison, ECtHR, [McGonnell v. the United Kingdom](#) (2000), par 55.

**mechanism which automatically excludes an individual judge from cases that arise from or touch upon laws that resulted from the legislative process in which the said individual judge was directly and actively involved.**

### **3.3. Budget of the Judiciary**

30. Article 6.4 of the Law on Courts states that “*the judiciary shall have an independent budget and the government shall provide the conditions of its continuous operation*”. Article 28.3 of the Law on Courts then provides that the judiciary’s budget consists of the budgets of the Supreme Court, of aimag and capital city courts, of specialized courts, and of the Judicial General Council. Article 28.4 provides that the Judicial General Council develops the operational and investment budget for the courts of all instances, and submits it directly to the Parliament. These are important provisions that are not reflected entirely in the Law on Judicial Administration, especially as regards the Judicial General Council’s prerogatives in that respect. For clarity purpose, **it is recommended that either a cross-reference to the Law on Courts is provided in the Law on Judicial Administration or similar provisions are included regarding the Judicial General Council powers in developing and submitting directly to the Parliament the judiciary’s budget.** It is unclear why Article 6.1.1 of the Law on Judicial Administration, which used to specify that the Judicial General Council plans and develops the operational and investment budgets of courts of all instances, has been deleted, whereas such a prerogative is clearly mentioned in Article 28.4 of the Law on Courts. It is important to ensure clarity and consistency in that respect.
31. While the principle that the judiciary shall have an independent budget is overall welcome in principle, the Law lacks specific safeguards to ensure financial independence of the judiciary and that sufficient financial resources are allocated in order to guarantee its proper functioning. Article 28.1 of the Law on Courts states, as part of the so-called “economic guarantees of judicial independence”, that “*the number of judges in the courts of all instances shall be adequate to ensure the independence of the judiciary and the impartiality of judges, and for exercising the judicial power*”. However, without specifying the modalities for determining the *adequate* number of judges, this may remain a mere statement of principle. Regarding the determination of the total number of judicial positions, it is generally considered that the judicial council or the legislator, in consultation with the judiciary, is better placed to make the ultimate assessment of the number of judges needed.<sup>37</sup> **It is recommended to clarify the Law in that respect.**
32. In principle, the development of the budget of the judiciary should be systemically and practically free from inappropriate political interference from the executive and legislative branches.<sup>38</sup> It is generally recommended to entrust judicial councils with general responsibilities with regard to the preparation of the judicial budget and the allocation of budgetary resources to the various courts.<sup>39</sup> Courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria.<sup>40</sup> Each State should therefore allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance

<sup>37</sup> See e.g., [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland](#), 30 August 2017, pars 38-39. See also e.g., Venice Commission, [Joint Opinion of the Venice Commission and the Directorate of Human Rights \(DHR\) of the Directorate of Human Rights and the Rule of Law \(DGI\) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia](#), CDL-AD(2014)031, 14 October 2014, par 19.

<sup>38</sup> See e.g., for the purpose of comparison, European Network of Councils for the Judiciary (ENCJ), [2015-2016 Report on Funding of the Judiciary](#), page 3.

<sup>39</sup> See UN Special Rapporteur on the independence of judges and lawyers, [2018 Report on judicial councils](#), 2 May 2018, A/HRC/38/38, par 91.

<sup>40</sup> See e.g., *op. cit.* footnote 26, par 53 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges).

- with the standards laid down in Article 14 of the ICCPR and to enable judges and court staff to work efficiently.<sup>41</sup> **The Law on Courts should specify that the budget should be adequate to ensure the full, independent, efficient and effective discharge of the responsibilities and functions of the judiciary, including funds for accessible court premises, effective and modern ICT systems, adequate remuneration, social and other benefits and capacity development of judges** (as detailed in pars 35-36 *infra*).
33. It is also key that funding of courts should be protected from fluctuations caused by political instability,<sup>42</sup> and even in case of economic difficulties or crisis, the proper functioning and the independence of the judiciary must not be endangered.<sup>43</sup> Even in certain exceptional situations, when there may be valid reasons for budget reduction, the reduction should not disproportionately affect the judiciary. It is worth noting that Article 28.5 of the Law on Courts, which used to prohibit the reduction of the budget for judicial operations, compared to the previous year, was removed in 2015. The findings from international bodies have noted the low budgetary resources of the judiciary and the negative impact of such recent amendment on the operational budget of the courts, the proper functioning of the judiciary and more generally, on its independence.<sup>44</sup> In that respect, and as also recommended by the OECD,<sup>45</sup> **the legal drafters should consider re-introducing the provision prohibiting the reduction of the operational budget of courts. Alternatively, other legal provisions against unwarranted budgetary cutbacks could also be considered, for instance by stating the principle that compared to the previous year, any reductions in the judiciary's fund allocation should not exceed the percentage of reduction of the budgets of the Parliament and/or the Government.**<sup>46</sup>
34. It is worth emphasizing that the allocation of funds for the court premises should be sufficient to ensure that said premises as well as information and communication tools of the judiciary, are accessible to the wider community, including to persons with disabilities,<sup>47</sup> in line with Article 9 of the UN Convention on the Rights of Persons with Disabilities (hereinafter "CRPD")<sup>48</sup> according to which persons with disabilities have the right "*to live independently and participate fully in all aspects of life*".<sup>49</sup> It is thus recommended to specify in **Article 6.1.9. of the Law on Judicial Administration that the construction and renovation of the court premises should seek not only to ensure openness to the general public but also accessibility to all, including persons with disabilities.**
35. The budget **should also include resources to cover the training of judges**<sup>50</sup> (see also Sub-Section 5.7 *infra*). More generally, the State should ensure **adequate remuneration, social and other benefits (salary, sickness pay, paid maternity/paternity leave and pensions) for judges** with a view to ensure the full, independent and effective discharge

<sup>41</sup> See e.g., for the purpose of comparison, CCJE, *Opinion no. 2 (2001) on the Funding and Management of Courts*; and *op. cit.* footnote 38, Recommendation 4 (2015-2016 ENCJ *Report on Funding of the Judiciary*).

<sup>42</sup> See e.g., *ibid.* Recommendation 5 (2015-2016 ENCJ *Report on Funding of the Judiciary*).

<sup>43</sup> *Op. cit.* footnote 26, par 53 (2010 Venice Commission's *Report on the Independence of the Judicial System – Part I: The Independence of Judges*).

<sup>44</sup> See *op. cit.* footnote 5, pages 53 and 62-63 (2019 *OECD Report on Anti-Corruption*).

<sup>45</sup> *ibid.* new Recommendation 11 on pages 15-16 (2019 *OECD Report on Anti-Corruption*).

<sup>46</sup> See e.g., as a matter of comparison, concerning modalities to ensure the financial independence of NHRIs, ODIHR, *Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland* (31 October 2017), par 88; and ODIHR, *Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland* (6 February 2017), par 76.

<sup>47</sup> See OHCHR, *Report on the Right to Access to Justice under Article 13 of the CRPD* (27 December 2017), par 20.

<sup>48</sup> *UN Convention on the Rights of Persons with Disabilities*, adopted by General Assembly resolution 61/106 on 13 December 2006. Mongolia acceded to the Convention on 13 May 2009.

<sup>49</sup> Article 9 of the CRPD calls on States to take measures to ensure to such persons access not only to facilities and services open to the public, but also information and communication. It is also worth mentioning that the States parties to the CRPD are obliged to ensure that persons with disabilities have access to the existing (not only the new) public services and accordingly adequate resources should also be allocated to ensure the removal of existing barriers.

<sup>50</sup> See e.g., *op. cit.* footnote 38, Recommendation 3 (2015-2016 ENCJ *Report on Funding of the Judiciary*).

of justice.<sup>51</sup> Adequate resources should also be allocated to innovate and modernize the judiciary, such as with well-functioning information and communication technology,<sup>52</sup> which are also accessible to persons with disabilities.

36. It is also important to emphasize that the remuneration of judges should be guaranteed by law in conformity with the dignity of their office and the scope of their duties, given the importance of adequate remuneration to protect judges from undue outside interference.<sup>53</sup> In principle, their remuneration should not be altered to the disadvantage of judges after their appointment.<sup>54</sup> **A provision to that effect could be included in the legislation, though in times of economic emergency, this could be reconsidered providing that there is a general reduction in comparable public service salaries and judges are treated no less favourably than others paid from the public budget.**<sup>55</sup> Moreover, the level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants and should always be based on objective and transparent criteria.<sup>56</sup> A mechanism to ensure salary increased at least in line with the cost of living should be considered, to avoid *de facto* reduction of judges' salaries.<sup>57</sup> **These safeguards and criteria should be reflected in the Law on the Legal Status of Judges.**

### 3.4. Other Comments

37. Article 3.1.2 of the Law on Courts defines specialized courts as “*courts established on specialized task areas of judicial proceedings such as criminal, civil and/or administrative matters*”. Article 22.3 further states that court of first instance may have specialized chambers on specific types of cases or disputes, such as juvenile, family and/or labour disputes, which are established by the Supreme Court in consultation with the chief judge of the respective court, upon the recommendation by the Judicial General Council (Article 22.4). It is worth pointing out to the recent recommendations issued by various international human rights monitoring bodies, recommending the establishment of specialized juvenile courts,<sup>58</sup> with the appointment of trained juvenile judges, as well as the specialization of judges/courts in corruption cases, due to the complexity of these cases and the need for multidisciplinary knowledge to understand complicated fraudulent mechanisms and master modern investigative techniques.<sup>59</sup> **It is recommended that the policy makers and legal drafters in Mongolia properly assess how such specialized courts be established, though this may also require a much more elaborated legal framework in order to design a comprehensive framework on juvenile justice and on anti-corruption. Alternatively, and to allow for more flexibility, specialized boards composed of specialized judges, within the existing courts, could also be considered.**<sup>60</sup>

<sup>51</sup> See e.g., *ibid.* page 5 (2015-2016 ENCJ [Report on Funding of the Judiciary](#)).

<sup>52</sup> See e.g., *ibid.* Recommendation 7 (2015-2016 ENCJ [Report on Funding of the Judiciary](#)).

<sup>53</sup> See e.g., *op. cit.* footnote 26, pars 46 and 51 (2010 Venice Commission's [Report on the Independence of the Judicial System – Part I: The Independence of Judges](#)).

<sup>54</sup> See e.g., *op. cit.* footnote 38, page 5 (2015-2016 ENCJ [Report on Funding of the Judiciary](#)).

<sup>55</sup> See e.g., par 62 of CCJE [Opinion no. 1 \(2001\)](#); and *ibid.* page 5 (2015-2016 ENCJ [Report on Funding of the Judiciary](#)).

<sup>56</sup> See e.g., *op. cit.* footnote 26, par 46 (2010 Venice Commission's [Report on the Independence of the Judicial System – Part I: The Independence of Judges](#)).

<sup>57</sup> See e.g., *op. cit.* footnote 55, par 62 (CCJE [Opinion no. 1 \(2001\)](#)).

<sup>58</sup> See e.g., UN Committee on the Rights of the Child, [Concluding observations on the fifth periodic report of Mongolia](#), 12 July 2017, par 43 (a) (also referring to the recommendations made in UN Committee on the Rights of the Child, [Concluding observations on the combined third and fourth periodic reports of Mongolia](#), CRC/C/MNG/CO/3-4, March 2010, par 76); and UN Committee against Torture, [Concluding observations on the second periodic report of Mongolia](#), 5 September 2016, pars 23-24.

<sup>59</sup> See *op. cit.* footnote 5, page 120 (2019 [OECD Report on Anti-Corruption](#)).

<sup>60</sup> See e.g., in Moldova, Article 15 (2) of the Law on the Organization of Courts System envisages that certain categories of specialized courts could be established as well as specialized boards within the existing courts.



38. Article 11.3 of the Law on Courts states that “[t]he President of Mongolia [...] shall submit to the State Great Khural /Parliament/ proposals on the establishment, modification and dissolution of a court, upon a proposal made by the Judicial General Council in consultation with the Government”. A similar provision is included in Article 6.1.4 of the Law on Judicial Administration.
39. Finally, these powers in the hand of the executive, both the President and the government, constitute an important function in relation to the administration of the judiciary, as well as the management of the state budget, even though the final say is with the Parliament which should adopt the law establishing, modifying or dissolving a court (Article 11.1 of the Law on Courts). As mentioned in par 20 *supra*, placing excessive regulatory powers concerning the judiciary in the hands of the executive may undermine the independence of the judiciary.<sup>61</sup> The Judicial General Council only submits proposals regarding changes of the court structure, after having consulted the Government, and then present the proposal to the President who then submit it for approval by the Parliament. While the consultation of the Government as the drafter of the state budget and the approval by the Parliament as the authority entrusted with budget approval could be justified given the budgetary implications, this system does not allow sufficient independence of the Judicial General Council to decide on matters of court structures and the involvement of the President does not seem justified. **This provision should not be interpreted as providing the President a decisive role over the judiciary. The Judicial General Council could directly address the Parliament after consultation with the Government.**

#### **4. Judicial Administration and Self-Government**

##### **4.1. Role of the Judicial General Council**

40. Article 49 par 3 of the Constitution provides that a “General Council of Courts (Judicial General Council) has the function of ensuring the independence of the judiciary”. According to paragraph 4 of the same article, the Council “without interfering in the activities of courts and judges, deals exclusively with the selection of judges from among lawyers, protection of their rights, and other matters pertaining to the ensurance of conditions guaranteeing the independence of the judiciary”. It is generally recommended at the international level that provisions concerning judicial councils be provided in the Constitution<sup>62</sup> and it is welcome that this is the approach adopted in Mongolia as this further guarantees the Council’s independence from the executive and legislative powers. At the same time, to enhance even more its independence and protect its status, **it may be advisable to include further details on the setting up of such body, its composition (see also comments on this aspect in Sub-Section 4.2 *infra*) and the definition of its functions, as well as its autonomy vis-à-vis the executive and legislative branches of power in the Constitution itself, rather than in legislation.**<sup>63</sup>
41. The Law on Judicial Administration includes further details on the Council. In Article 3.1, it provides that “[j]udicial administration shall consist of the Judicial General Council and its administrative offices, the secretariat of courts at all levels, the research center and other support units”. Article 3.2 enumerates the main functions of the “judicial administration”. Chapter two of the Law on Judicial Administration further details the tasks and powers of the Judicial General Council in five main areas: ensuring

<sup>61</sup> *Op. cit.* footnote 22, par 26 (2007 UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#)).

<sup>62</sup> See e.g., *op. cit.* footnote 39, par 41 (2018 UN Special Rapporteur’s [Report on judicial councils](#)); and *op. cit.* footnote 34, par 13 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>63</sup> *ibid.* par 42 (2018 UN Special Rapporteur’s [Report on judicial councils](#)).

independence of courts and impartiality of courts (Article 6), management of administrative operations of courts (Article 7), selection of judges (Article 8), protection of rights and legitimate interests of judges (Article 9) and courts' human resources management (Article 10).

42. The establishment of an independent body in charge of protecting and promoting the independence of the judiciary is generally considered as a good practice at the international level,<sup>64</sup> especially to prevent pressure from other branches of government and external actors.<sup>65</sup> Where they exist, the establishment of well-functioning judicial councils, ensuring accountability of the judiciary but at the same time preserving its independence is of crucial importance in countries adhering to the principles of rule of law.<sup>66</sup> In light of their essential role to support and guarantee the independence of the judiciary in a given country, such councils should themselves be independent and impartial, i.e., free from interference from the executive and legislative branches.<sup>67</sup> Hence, the choice of having the Judicial General Council is overall in line with the practice of many countries which have set up independent judicial councils with the task to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.<sup>68</sup>
43. Overall, the Judicial General Council carries out various functions pertaining to judicial administration, not only relating to the protection of judicial independence, but also various other tasks ranging from logistical matters (materials, supply, equipment of courts, Article 6.1.2), ensuring the safety and sanitary conditions of the court premises (Article 6.1.7), investment in the construction and renovation of court premises (Article 6.1.9), assessing the quality and results of work performance of heads of court secretariats (Article 7.1.6), the organization, management and monitoring of the courts' finance, economic and accounting operations unit (Article 7.1.14), organization of the use, protection and maintenance of courts' transportation, communication, information analysis and software facilities as well as all courts' assets (Articles 7.1.16 and 7.1.17), provisions of equipment to the courts as well as repair and maintenance (Article 7.1.18), etc. It is questionable whether all these functions should be carried out by the Judicial General Council. The total control of all the administrative and logistical functions of local courts may result in undue interference or bias by the Judicial General Council, thus potentially undermining judicial independence. Local court managers, who should not be subordinated to the Judicial General Council but rather to the local president, would probably be better placed to undertake them. **The legal drafters should discuss whether the allocations of responsibilities between the Judicial General Council and lower courts should be reconsidered to provide better control of administrative and logistical matters at the local level, especially if this has proven to be an issue in the past.**
44. Otherwise, the functions and powers of the Judicial General Council are, to a large extent, in line with recommendations elaborated in regional fora.<sup>69</sup> At the same time, a few provisions would benefit from further clarification or amendments (see additional

<sup>64</sup> See *op. cit.* footnote 39, par 91 (2018 UN Special Rapporteur's [Report on judicial councils](#)). See also e.g., Venice Commission, [Opinion On The Draft Law On Amendments to the Law On The Judicial Council And Judges](#) (Montenegro), CDL-Ad(2018)015, par 37

<sup>65</sup> See e.g., Venice Commission, [Report on Judicial Appointments](#) (2007), CDL-AD(2007)028-e, 22 June 2007, par 48.

<sup>66</sup> See e.g., ODIHR, [Opinion on the Law on the High Judicial Council of the Republic of Uzbekistan](#) (1 October 2018), par 14.

<sup>67</sup> See e.g., ODIHR, [Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland](#) (5 May 2017), par 37. See also *ibid.* par 14; and *op. cit.* footnote 12, Preamble (2002 Bangalore Principles of Judicial Conduct), which states that the Bangalore Principles "presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards which are themselves independent and impartial".

<sup>68</sup> See, for example, *op. cit.* footnote 24, pars 26-29 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); CCJE, [Opinion no.10 \(2007\) on the Council for the Judiciary at the service of society](#), 23 November 2007; *op. cit.* footnote 26, pars 28-32 (2010 Venice Commission's [Report on the Independence of the Judicial System – Part I: The Independence of Judges](#)).

<sup>69</sup> See in particular CCJE, [Opinion no.10 \(2007\) on the Council for the Judiciary at the service of society](#), 23 November 2007, par 42.

comments in other sub-sections on judicial appointments, discipline and ethics). Moreover, there are some additional key aspects, which could be added to the key functions of the Judicial General Council.

45. Especially, Article 7.1.21.c of the Law on Judicial Administration provides that the Council adopts and enforces uniform standards for each duration for preparatory and post-period stages of case adjudication by examining the case-flow. It is hardly conceivable that the duration of the preparatory stages of case adjudication be centrally prescribed, whether this may depend on a variety of factors such as the complexity and subject matters of specific cases. **Article 7.1.21.c may as a consequence potentially violate judicial independence and should therefore be reconsidered in its entirety.** The Council also has also the power to act as the general budget manager for courts at all level (Article 18.1.7), which may enable it to exercise undue influence over the operation and management of courts, thus risking undermining their independence. **Such a power should be reconsidered altogether.** Moreover, the Council's oversight over courts' secretariats at all level, which shall report to the Council (see Chapter 4 of the Law on Judicial Administration) is also problematic in that it may provide opportunities for interference in the management of court. Rather, **chiefs of court secretariat should be accountable towards the chief of court and Chapter 4, particularly Article 22, of the Law on Judicial Administration should be amended accordingly while removing any provisions implying the oversight of the Council over court secretariats.**
46. Indeed, and as noted by several international human rights monitoring bodies, access to justice by certain persons or groups, especially persons with disabilities, women and other minorities, may at times present some challenges in Mongolia. In particular, it has been recommended for Mongolia to adopt legal measures to implement the principle of procedural accommodation, including measures to ensure that persons with disabilities are not discriminated on account of physical status or language (when sign language or Braille is required), or owing to the lack of appropriate training of legal profession, police and prison officers, with special attention to women with disabilities.<sup>70</sup> These bodies have also raised concerns concerning access to judicial remedies, especially for ethnic minorities, indigenous peoples, migrants and refugees when filing complaints of racial discrimination and labour violations,<sup>71</sup> or more generally about instances of prejudices and discrimination based on sexual orientation and gender identity<sup>72</sup> or lack of capacity-building of judges, prosecutors, police officers and other law enforcement officials on the strict application of legislation criminalizing violence against women and on gender-sensitive procedures to deal with women who are victims of violence, in particular women with disabilities.<sup>73</sup> **It is therefore recommended that Article 7 of the Law on Judicial Administration be supplemented by a specific function of the Judicial General Council to adopt relevant measures and policies to ensure access to justice to all, in light of the above-mentioned recommendations, as well as to organize relevant training of judges and court staff. In addition, a comprehensive review of procedural legislation should be carried out to ensure that appropriate gender-,**

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<sup>70</sup> UN Committee on the Rights of Persons with Disabilities (CRPD), [Concluding observations on the initial report of Mongolia](#), 13 May 2015, par 23.

<sup>71</sup> UN Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined 23rd and 24th period reports of Mongolia](#), 17 September 2019, par 28.

<sup>72</sup> See CCPR, [Concluding observations on the sixth periodic report of Mongolia](#), 22 August 2017, pars 11-12.

<sup>73</sup> UN Committee on the Elimination of Discrimination against Women (CEDAW), [Concluding observations on the combined eighth and ninth periodic reports of Mongolia](#), 10 March 2016, par 19 (b). See also CESCR, [Concluding observations on the fourth periodic report of Mongolia](#), 7 July 2015, par 21.

child- and diversity-sensitive measures are included,<sup>74</sup> especially concerning persons with disabilities.

47. Finally, the Judicial General Council, in light of its key role of selecting judges, may play a key role in **framing initiatives and policies to enhance gender and diversity in the judiciary, at all levels, including in the highest jurisdiction.**<sup>75</sup> This could also be reflected under Chapter 2 of the law on Judicial Administration. In that respect, the recommendations developed by ODIHR in its recent publication *Gender, Diversity and Justice* (2019) could serve as a useful reference for the Judicial General Council. This is especially important in light of UN Committee on the Elimination of Discrimination against Women's latest concluding observations on Mongolia, which express concern regarding the low percentage of women in political and public life, in particular in decision-making positions,<sup>76</sup> and recommend to **adopt targeted measures, including training, gender-sensitive recruitment and temporary special measures.**<sup>77</sup> The legal drafters and/or the Judicial General Council could consider adopting such targeted measures.

#### **4.2. Composition of the Judicial General Council and Nomination/Selection Procedure and Recalling of its Members**

##### **4.2.1. Composition**

48. The Council is composed of five full-time members, three of whom are nominated respectively by the conference of judges from the courts of first instance, from the courts of appeal, and from the Supreme Court, plus one member - by the Bar Association of Mongolia, and one member - by the Ministry of Justice and Home Affairs (Article 13.1 of the Law on Judicial Administration). The same provision provides that the five members are "*subject to the approval by the President of Mongolia*". **To ensure the continuity of the work of the Council, it may be advisable to also provide for the nomination of substitute members who may step in in case of impairment by the Council's members.**
49. Article 16 of the Law on Judicial Administration further details the eligibility requirements for becoming a council members i.e., Mongolian citizenship, higher level of legal education, not less than five years of professional experience (and ten years for the Chairperson), lack of criminal record, integrity and high ethics, the ability to independently assess without any undue influence the knowledge, skills and experience of candidates for judgeship. In addition, the Chairperson needs to have managerial work

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<sup>74</sup> See, concerning gender-sensitive criminal proceedings, *op. cit.* footnote 44, par 15 (2011 UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice). See also e.g., Section 4 of the *ODIHR Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (19 June 2015). This should include, among others, modalities to avoid contact between perpetrator and the victim at all stages of the criminal proceedings, including investigations on police premises, unless contacts are necessary or useful for the proper conduct of proceedings; the presence of third parties such as psychologists or other professionals, in addition to the defence lawyer or legal representative, to support the victim; having the intake interview/interrogation carried out by same sex officer, unless the victim requires otherwise; the use of video equipment for all interviews of child victims and witnesses; ensuring that safety risks, including the vulnerability of victims, are taken into account in decisions concerning non-custodial or quasi-custodial sentences, the granting of bail, conditional release, parole or probation, especially when dealing with repeat and dangerous offenders; the obligation to notify victims when the accused/convicted person is released from custody or escape; ensuring that risks affecting victim safety are taken into account in decisions regarding the release of perpetrators; the possibility for victims and witnesses to testify without being seen by other participants in the trial, for instance via video transmission; exclusion of cases of domestic violence from the procedure of plea-bargaining/conciliation; various confidentiality and privacy measures; and more generally, a victim-centred approach and a duty to inform victims about their rights at all stages of the criminal justice process.

<sup>75</sup> See e.g., ODIHR, *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia*, 17 April 2019, par 49. See also ODIHR, *Gender, Diversity and Justice* (2019), pages 22-27.

<sup>76</sup> *Op. cit.* footnote 73, par 22 (2016 CEDAW *Concluding observations on Mongolia*).

<sup>77</sup> *ibid.* par 23 (b) (2016 CEDAW *Concluding observations on Mongolia*).



experience and practice, **though it would be advisable to specify the number of years required.**

50. First, unless an issue of translation, the Law is not clear as to whether the persons chosen by the conference of judges should be judges from the respective level of courts. According to international and regional standards, in order to safeguard judicial independence, every decision affecting the selection, recruitment, appointment, evaluation or termination of office of judges should be undertaken by an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers, to prevent outside, possibly undue influence.<sup>78</sup> It is recommended, unless this is clear in Mongolian language, **to specify in Article 13 of the Law on Judicial Administration that the three members nominated by the conferences of judges are judges of the respective courts.**
51. Regarding the number of members chosen by the conference of judges, Article 13 seems to suggest that each member will represent the respective court level. It is generally recommended to ensure the widest representation of the judiciary at all levels.<sup>79</sup> ODIHR has in the past recommended to seek to respect a certain proportion between all instances of courts and the different branches of the judiciary, to the extent possible.<sup>80</sup> **The drafters might consider the possibility of assigning different numbers for judicial membership per court level, more proportionate to the total number of judges at the respective court level to ensure a better representation of judges from all level of courts, which may eventually require increasing the number of members of the Council.**
52. It is also not clear, from Article 13 of the Law on Judicial Administration, whether the members nominated by the Bar Association or the Ministry of Justice and Home Affairs will be licensed attorneys or members of the Bar Association, law professors, civil society representatives or others, apart from the fact that they should meet the eligibility requirements listed under Article 16, including having a higher education in law (Article 16.1.2). **This should be clarified.**
53. The [2010 ODIHR Kyiv Recommendations](#) state that “[a]part from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors and preferably a member of the bar, to promote greater inclusiveness and transparency”.<sup>81</sup> The Law on Judicial Administration could therefore **clarify that the member selected by the Bar Association should be a member of the Bar while the fifth member could for instance be a law professor or civil society representative, which could be selected via open, genuine, free, transparent and fair selection process.**
54. The very fact that the Ministry of Justice and Home Affairs nominates a non-judicial member of the Council is generally not considered as a good practice. Indeed, the UN Special Rapporteur on the independence of lawyers and judges has expressly stated that

<sup>78</sup> See *op. cit.* footnote 18, par 30 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 32, par 132 (2019 ODIHR [Interim Opinion on Moldova](#)). See also, for the purpose of comparison at the European level: *op. cit.* footnote 19, par 1.3. (1998 [European Charter](#)); *op. cit.* footnote 26, par 50 (2010 Venice Commission’s Report on the Independence of the Judicial System), which state that “[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself”; *op. cit.* footnote 24, par 27 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)) which states that “[n]ot less than half the members of such councils should be judges chosen by their peers”; *op. cit.* footnote 34, pars 17-18 and 25 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)), where it is stated that “[w]hen there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers”.

<sup>79</sup> See e.g., *op. cit.* footnote 39, par 107 (2018 UN Special Rapporteur’s [Report on judicial councils](#)); *op. cit.* footnote 34, par 27 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)), which recommends that “judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels”; and *op. cit.* footnote 18, par 7 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>80</sup> See e.g., *op. cit.* footnote 32, footnote 86 (2019 ODIHR [Interim Opinion on Moldova](#)); and *op. cit.* footnote 67, par 51 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)).

<sup>81</sup> *Op. cit.* footnote 18, par 26 (2010 ODIHR [Kyiv Recommendations](#)).

*“[t]he election of lay members of a council should be entrusted to non-political authorities [and] [w]hen elected by parliament, lay members should be elected by a qualified majority, necessitating significant opposition support [and] in no case should they be selected or appointed by the executive branch”,<sup>82</sup> while also pointing out that “it is also preferable that they are not appointed by the legislative branch”,<sup>83</sup> though this is done in many countries. **The selection of one council member by the Ministry of Justice and Home Affairs should therefore be reconsidered,<sup>84</sup> and the legal drafters should discuss which nominating body could be considered (e.g., law faculties, a body composed of civil society representatives, the national human rights institution, etc.), while ensuring that adequate safeguards are in place to avoid the politicization of the nomination process.***

55. Moreover, Article 16 is silent as to the potential incompatibilities to sit as a member of the Judicial General Council. ODIHR, the CCJE, the Venice Commission and the UN Special Rapporteur on the independence of judges and lawyers, have questioned the practice of having members of parliament or of the executive sit on judicial councils at all,<sup>85</sup> mainly to avoid undue influence of the other branches of power on the functioning and decision-making of a body, which is the guarantor of the independence of the judiciary. **It is thus recommended to specify in Article 16 that members of parliament, and more generally, active politicians and members of the legislative or executive branches of power<sup>86</sup> are not eligible to sit on the Council.**
56. It is worth noting that the Law on Judicial Administration is silent as to the requirement to ensure greater gender balance and diversity in the composition of the Judicial General Council. This is not in line with international recommendations, which urge to seek gender-balanced representation in all appointments made by public authorities to public functions,<sup>87</sup> including within the judiciary and specifically in judicial councils.<sup>88</sup> Accordingly, the legal drafters **should consider introducing mechanism(s) to ensure greater gender balance and diversity within the Council.**<sup>89</sup>

#### 4.2.2. Nomination/Appointment of the Council Members

57. Article 13 of the Law on Judicial Administration refers to the “*nomination*” by the conference of judges, without specifying the selection modalities. It is generally recommended that judge members be “*elected*” by their peers, though it must be

<sup>82</sup> See *op. cit.* footnote 39, par 108 (2018 UN Special Rapporteur’s [Report on judicial councils](#)).

<sup>83</sup> *ibid.* par 78.

<sup>84</sup> *ibid.* par 108. See also *op. cit.* footnote 34, par 32 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); and *op. cit.* footnote 65, par 32 (2007 Venice Commission’s [Report on Judicial Appointments](#)).

<sup>85</sup> See e.g., *op. cit.* footnote 67, par 52 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)); *op. cit.* footnote 34, par 23 and 32 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); UN Special Rapporteur on the Independence of Judges and Lawyers, [Report on judicial accountability](#), A/HRC/26/32, 28 April 2014, par 93; and *op. cit.* footnote 65, par 32 (2007 Venice Commission’s [Report on Judicial Appointments](#)).

<sup>86</sup> See *op. cit.* footnote 39, par 107 (2018 UN Special Rapporteur’s [Report on judicial councils](#)).

<sup>87</sup> At the Council of Europe level, this would mean that the representation of either women or men in any decision-making body in political or public life should not fall below 40%; see Preamble and par 9-10 of the [Appendix to Recommendation Rec \(2003\)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making](#), 12 March 2003. Furthermore, in its Resolution 66/130, the UN General Assembly encourages States “to appoint women to posts within all levels of their Governments, including, where applicable, bodies responsible for designing constitutional, electoral, political or institutional reforms”; see par 8 of the [General Assembly Resolution 66/130](#) adopted on 19 March 2012.

<sup>88</sup> See *op. cit.* footnote 39, par 110 (2018 UN Special Rapporteur’s [Report on judicial councils](#)); *op. cit.* footnote 67, par 51 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)); and *op. cit.* footnote 32, par 132 (2019 ODIHR [Interim Opinion on Moldova](#)). See also ODIHR, [Gender, Diversity and Justice](#) (2019), Recommendation 3; and *op. cit.* footnote 34, par 24 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)), which states that “the composition of the Council for the Judiciary should reflect as far as possible the diversity in the society”.

<sup>89</sup> This could, for instance, be drafted along the lines of the recommendations made by the ODIHR and the Venice Commission regarding proposed measures to ensure greater gender balance in the composition of the Disciplinary Commission under the Council of Judges of the Kyrgyz Republic (see Sub-Section 5.1 of the [OSCE/ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#), 16 June 2014). See also e.g., European Commission for the Efficiency of Justice (CEPEJ), [Report on European Judicial Systems – Efficiency and Quality of Justice](#), CEPEJ Studies No. 23, Edition 2016 (2014 data), page 101.

acknowledged that there exists a variety of models for selecting/appointing members of judicial councils in the OSCE region.<sup>90</sup> The [2010 ODIHR Kyiv Recommendations](#) refer to the “election” of judge members<sup>91</sup> and it is recommended that this be reflected in the Law on Judicial Administration, along with provisions on the modalities of election to ensure an objective, fair, transparent<sup>92</sup> and inclusive election process. It is noted that direct or indirect elections with secret ballots, as used in certain countries,<sup>93</sup> may ensure a fairer treatment of all the candidates to the position and prevent potential external interferences in the process.<sup>94</sup> **This could be considered by the legal drafters.**

58. In any case, **the procedure and modalities of nomination/appointment by each body should be further detailed, while ensuring that the process is open, inclusive and transparent**, in order to eliminate the risks of political interference and prevent allegations of corporatism.<sup>95</sup>
59. The most problematic aspect of the procedure contemplated in the Law is that appointment of council members is subject to the approval by the President of Mongolia (Article 13.1). The Law does not provide further details to conclude whether the approval is merely a formal one, or whether the President has a decisive role in appointing the members of the Council. As mentioned above, judicial councils as guarantors of the independence of the judiciary should themselves be independent and impartial,<sup>96</sup> i.e., free from interference from the executive and legislative branches. In that respect, the manner in which judges and other members are appointed to a judicial council, and particularly the nature of the appointing authorities, is relevant in terms of judicial self-governance,<sup>97</sup> and there should be no influence of the political organs of the government on the composition of such council.<sup>98</sup> The UN Special Rapporteur on the independence of judges and lawyers has specifically stated that “international standards discourage the involvement of political authorities, such as parliament, or the executive at any stage of the selection process [of judge members]”<sup>99</sup> and that “[i]n no case should [non-judicial members] be selected or appointed by the executive branch”.<sup>100</sup> In that respect, both ODIHR and the Venice Commission have criticised appointment modalities whereby the country’s president appoint the judicial council’s members.<sup>101</sup> **The legal drafters should**

<sup>90</sup> See e.g., *op. cit.* footnote 67, par 43 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)), which notes that the great majority of EU states with councils provide for judge members to be “either elected by their peers or appointed or proposed by their peers”.

<sup>91</sup> *Op. cit.* footnote 18, par 30 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>92</sup> See *op. cit.* footnote 39, pars 75 and 109 (2018 UN Special Rapporteur’s [Report on judicial councils](#)).

<sup>93</sup> See e.g., the Italian Consiglio Superiore della Magistratura <<https://www.csm.it/web/csm-internet/norme-e-documenti/normativa>>; the [Law on the Judicial council of Montenegro](#) (2008), Article 8; regarding indirect elections, see e.g., France ([1994 Law on the Superior Council of Magistrates](#), as last amended in 2017, especially Articles 3 and 4).

<sup>94</sup> See e.g., *op. cit.* footnote 67, par 51 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)); and Venice Commission, [Compilation of Venice Commission Opinions and Reports concerning Courts and Judges](#), CDL-PI(2015)001, 5 March 2015, Section 4.3 Procedural Aspects of Appointment/Elections of the Members of the Council, pages 84-88.

<sup>95</sup> See *op. cit.* footnote 39, par 109 (2018 UN Special Rapporteur’s [Report on judicial councils](#)); and *op. cit.* footnote 32, par 67 (2019 ODIHR [Interim Opinion on Moldova](#)). See also *op. cit.* footnote 67, par 51 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)), which recommends for instance “achieving greater openness and transparency by ensuring that all documents pertaining to the selection process, including with respect to potential candidates, are made available to the public, and that the meetings of the appointing bodies, when they discuss the appointment of judge members, are also open to the public”.

<sup>96</sup> See *op. cit.* footnote 10, Preamble (2002 Bangalore Principles of Judicial Conduct), which states that the Bangalore Principles “presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards which are themselves independent and impartial”. See also *op. cit.* footnote 67, pars 25 and 37 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)).

<sup>97</sup> ECtHR, [Oleksandr Volkov v. Ukraine](#) (Application No. 21722/11, judgment of 25 May 2013), pars 109 to 117, particularly par 112.

<sup>98</sup> See e.g., *op. cit.* footnote 67, pars 37-39 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)). See also e.g., ECtHR, [Oleksandr Volkov v. Ukraine](#) (Application No. 21722/11, judgment of 25 May 2013), par 112; it must be highlighted that the composition of the High Council of Justice of Ukraine has now been modified in order to reduce potential political influence on the Council, see Article 131 of the Constitution of Ukraine as amended in 2016 (<<http://www.legislationline.org/topics/country/52/topic/9>>) and pars 17-21 of the [Venice Commission’s Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015](#), adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).

<sup>99</sup> See *op. cit.* footnote 39, par 76 (2018 UN Special Rapporteur’s [Report on judicial councils](#)).

<sup>100</sup> *ibid.* par 108 (2018 UN Special Rapporteur’s [Report on judicial councils](#)).

<sup>101</sup> See e.g., *op. cit.* footnote 66, pars 22-25 (2018 ODIHR [Opinion on the Law on the HJC of Uzbekistan](#)); and Venice Commission, [Opinion on the Concept Paper on the Reform of the High Judicial Council of Kazakhstan](#), CDL-AD(2018)032, par 21.

reconsider the appointing role/approval of the President in the appointment of the members of the Judicial General Council altogether, or, at a minimum, ensure that s/he has only a ceremonial role,<sup>102</sup> with no power to reject the nominations. Alternatively, the President's power could be limited to a mere control of legality (compliance with eligibility requirements, procedural requirements and potential conflict of interests) with the obligation to provide written reasons.

60. Regarding the Chairperson of the Judicial General Council, s/he is nominated by the council members from among them, but is also subject to appointment by the President (Article 13.2). It is welcome that the Chairperson is selected by the council members.<sup>103</sup> At the same time, the fact that the President appoints him/her may be problematic if the President has more than formal powers in that respect and may reject the proposal.<sup>104</sup> As recommended above, **the power of the President in that respect should be reconsidered altogether, or limited to a purely formal one, which should be specified in the Law. It is also recommended that neither the Chief Justice, the President of the Supreme Court nor the Minister of Justice be appointed as the Chair of a judicial council.**<sup>105</sup>
61. Finally, Article 17.2 of the Law on Judicial Administration provides that the salary of the Chairperson and of the members of the Judicial General Council shall be set forth by the Parliament. It is important, to ensure the independence of the Council that the remuneration of its members be commensurate to their position and the workload within the Council.<sup>106</sup> As such, the Law should ensure that Council members benefit from a salary similar to that of a minister or other comparable office-holder. **Article 17.2 of the Law on Judicial Administration should be amended accordingly.**

#### 4.2.3. Termination of the Mandate of the Members of the Judicial General Council

62. Article 19 pars. 1.1-1.2 of the Law on Judicial Administration provides that the Chairperson and the members of the Judicial General Council may be released from office upon expiry of their term of office, attaining the retirement age, if unable to exercise their function due to health or “*other respectful reasons*”.
63. Generally, the early termination of the mandate of judicial council members for no legitimate reason (an amendment to relevant legislation not being such a legitimate reason) raises concerns with regard to respect of the independence of such a body, and as a consequence of the judiciary as a whole.<sup>107</sup> As mentioned above, judicial councils constitute essential safeguards of judicial independence, and as such, their members should enjoy guarantees of independence,<sup>108</sup> and their tenure should not be subject to undue interference by the executive or legislative branches.<sup>109</sup> Vague, imprecise and broadly-worded provisions on grounds for removal may lead to potential undue influence or abuse. In that respect, **the wording “other respectful reasons” is too vague and should be clarified or removed.** In any case, change to legislation should not constitute such a ground.<sup>110</sup>

<sup>102</sup> See also the recommendation made in that respect in *op. cit.* footnote 5, page 10 (2019 [OECD Report on Anti-Corruption](#)).

<sup>103</sup> *Op. cit.* footnote 18, par 7 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>104</sup> See *op. cit.* footnote 39, par 112 (2018 UN Special Rapporteur's [Report on judicial councils](#)); and par 33 (CCJE [Opinion no.10 \(2007\) on the Council for the Judiciary at the service of society](#)).

<sup>105</sup> See *op. cit.* footnote 18, par 7 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 39, pars 80-81 and 112 (2018 UN Special Rapporteur's [Report on judicial councils](#)).

<sup>106</sup> See e.g., *op. cit.* footnote 34, par 36 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>107</sup> *Op. cit.* footnote 67, par 81 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)).

<sup>108</sup> See e.g., *op. cit.* footnote 34, par 36 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>109</sup> *Op. cit.* footnote 67, par 82 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)).

<sup>110</sup> *ibid.* pars 81-85 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)). See also *op. cit.* footnote 66, par 37 (2018 ODIHR [Opinion on the Law on the HJC of Uzbekistan](#)).



64. Article 19.1.4 provides for the release from office of the Chairperson and the members of the Judicial General Council upon the decision of the conferences of judges, the Bar Association or the Central State administration on judicial matters/Ministry of Justice and Home Affairs. No further details are provided as to the legal grounds based on which the nominating authorities, which elected the respective members can recall a member of the Council. Such vague provisions have the potential to negatively affect the security of the fixed term of the council members of the Council, which serves the purpose of ensuring their independence from external pressure including from the bodies who have nominated/elected them. To protect the independence of the said body, the members should in principle serve their full term of office without interference.<sup>111</sup> Generally, the early termination of the mandates of members of judicial councils should be guided by similar safeguards and principles as those applicable to judges.<sup>112</sup> These principles mean that the removal of a member before the expiration of his/her mandate should be possible only for the reasons specified in law,<sup>113</sup> on the basis of clearly established and transparent procedures and based on clear and objective criteria,<sup>114</sup> in order to exclude any risk of political influence on early removal from office. This also means that council members should only be dismissed for very serious reasons clearly stipulated by the law and that may harm the reputation of the judiciary, such as when a serious breach of disciplinary rules or criminal law violation by an individual member is clearly established, following proper disciplinary or judicial procedures.<sup>115</sup> Voluntary resignation, death of a member or a criminal sentence against a council member according to regular criminal proceedings are among the most often found in legislation of participating States and generally constitute an acceptable reason for early dismissal.<sup>116</sup>
65. In line with the above, **it is recommended to clarify the grounds for the termination of council members' mandate more clearly and precisely, while avoiding overbroad and vague formulations and introducing guarantees of procedural fairness and transparency when such situations arise against council members.**
66. Article 19.2.1 of the Law on Judicial Administration provides that the Chairperson and the members of the Judicial General Council can be suspended for “*repeated absence in a number of times from the sessions without any valid reasons*”. This provision is not sufficiently clear and predictable, which can lead to abusive interpretations and applications in practice. **It is therefore recommended that the law clarifies the notion of “valid reasons” and provides exactly the number of absences without valid reasons that can lead to suspension, as well as the duration of suspension and the conditions for reinstating/ending the suspension.**
67. Finally, in order to guarantee the continuity of the Council's functions, its members should not all be replaced at the same time.<sup>117</sup> **This should be reflected in the Law on Judicial Administration. Also, the re-appointment procedure is rather unclear and should be specified.**

<sup>111</sup> *ibid.* pars 83 and 85 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)). See also *op. cit.* footnote 39, par 83 (2018 UN Special Rapporteur's [Report on judicial councils](#)), which states that the early termination of all judicial members triggered by a change of legislation is in breach of existing standards on the independence of the judiciary and the separation of powers.

<sup>112</sup> See e.g., CCJE, [Opinion No. 19 on the Role of Court Presidents](#), 10 November 2016, pars 44-48.

<sup>113</sup> *Op. cit.* footnote 67, par 82 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)). See e.g., Venice Commission, [Opinion on the Seven Amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones](#), CDL-AD(2014)026-e, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), par 77.; and Venice Commission, [Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia](#), CDL-AD(2013)007, 11 March 2013, pars 72-73.

<sup>114</sup> *ibid.*, par 82 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)); and *op. cit.* footnote 66, par 37 (2018 ODIHR [Opinion on the Law on the HJC of Uzbekistan](#)).

<sup>115</sup> *ibid.*, par 82 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)); and *ibid.* par 37 (2018 ODIHR [Opinion on the Law on the HJC of Uzbekistan](#)). See also e.g., *op. cit.* footnote 34, par 44 (2015 CCJE Opinion no. 18).

<sup>116</sup> See e.g., *ibid.* par 35 (2018 ODIHR [Opinion on the Law on the HJC of Uzbekistan](#)).

<sup>117</sup> See *op. cit.* footnote 39, par 83 (2018 UN Special Rapporteur's [Report on judicial councils](#)).

#### **4.3. Judicial Review of the Decisions of the Judicial General Council**

68. Article 15.3 of the Law on Judicial Administration provides for the judicial review of the decisions of the Judicial General Council before the administrative court, which is overall welcome, though it is not clear whether all such decisions may be subject to judicial review. Indeed, it is essential that decisions of judicial councils, especially when they involve individual acts, be challengeable, such as those concerning the selection/appointment of judges, their careers and promotions and potential removal from office (see also Sub-Section 5.6 *infra* on Discipline).<sup>118</sup> However, the Law does not include any details regarding the conditions and modalities for such judicial review, especially in terms of personal, material and temporal scope and related procedure. Especially, the Law should specify who has standing, which level of administrative court will be competent and whether the decision of the said administrative court will be further subject to appeal. Moreover, the Law does not mention the time limit for lodging a complaint nor the scope of the judicial review, e.g., whether it is a full judicial review or only regarding matters of law/procedure, or whether the limits of judicial review may vary depending on the types of decisions of the Council.<sup>119</sup> **Unless specified in another legislation, it is recommended that the Law on Judicial Administration be supplemented in that respect by detailing the conditions, modalities and scope of judicial review of the Council's decisions, or if regulated by another law, a cross-reference to the said law should be included.**
69. In order to be able to exercise this prerogative, it is important that councils of the judiciary **adopt reasoned decisions** that demonstrate that the decisions were not arbitrarily adopted, in line with recommendations elaborated at the international and regional level.<sup>120</sup> It is also important for a candidate to know why s/he was unsuccessful.<sup>121</sup> This requirement also contributes to ensure greater transparency towards judges and society in general. **This should be reflected under Article 15 of the Law on Judicial Administration.**
70. Article 15.4 provides that the Council determines its own rules of procedure. The Law does not specify if these rules are public or not. **It is recommended that the Council's rules of procedure be public and that this be expressly provided in the Law,** as this would ensure greater openness and transparency of its functioning, which is important to enhance public trust in this body.<sup>122</sup>
71. Article 15.7 provides that resolutions of the Council are promulgated upon signature by the Council's Chairperson. The law does not, however, provide whether the resolutions are published and where. To ensure transparency and accountability of the Council, it is

<sup>118</sup> See e.g., *op. cit.* footnote 75, par 78 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)); and *op. cit.* footnote 32, pars 107-115 (2019 ODIHR [Interim Opinion on Moldova](#)). See also e.g., *op. cit.* footnote 34, par 39 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>119</sup> *ibid.* par 78 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)); and *ibid.* pars 14 and 62 (2019 ODIHR [Interim Opinion on Moldova](#)).

<sup>120</sup> See e.g., *ibid.* pars 61 and 78 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)); and *ibid.* pars 118 and 127 (2019 ODIHR [Interim Opinion on Moldova](#)). See also e.g., CCJE, [Opinion no. 10 \(2007\) on the Council for the Judiciary at the service of society](#), 23 November 2007, par 39, which refers to an explanation of the judicial councils' decisions grounds; *op. cit.* footnote 24, pars 28 and 48 (2010 CoE Recommendation CM/Rec(2010)12); [Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges](#) (February 2016), which are the outcome of an international research project led by Professor Hugh Corder of the University of Cape Town, carried out in collaboration with the Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative Law, Principle 13; and ENCJ, [Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges](#) (May 2012), Indicator no. I.10. See also Venice Commission, [Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts](#), CDL-AD(2018)029-e, par 45, where the Venice Commission noted that it is important to have individual acts adopted by the HCJ, especially those concerning the career of judges, duly reasoned.

<sup>121</sup> *Op. cit.* footnote 210, Indicator no. I.10 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also *op. cit.* footnote 120, Principle 17 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

<sup>122</sup> See also e.g., CCJE, [Opinion no. 10 \(2007\) on the Council for the Judiciary at the service of society](#), 23 November 2007, par 91.

recommended that the Council's resolutions are published at a minimum on its website, and if possible, also on the Official Gazette where the laws and other normative acts are published. In any case, **the publication of the Council's resolutions shall be expressly provided in the Law.**

72. Article 18.1.8 provides that the Chairperson of the Judicial General Council shall "[p]resent and introduce the work reports of the General Council on annual basis to the President". This provision is not clear. If this is meant as a simple information presented to the President, such a provision could be acceptable from the perspective of the Council's independence. However, **if this provision means that the Council reports to the President on an annual basis, with the President's competence to reject or request amendments to the report, then such provisions raise important issues regarding the lack of operational independence of the Judicial General Council and should be revised. In addition, it is recommended that the Law expressly provides that the Council's annual reports are published on its website, as a means for ensuring the Council's transparency and accountability towards the public.**<sup>123</sup> Finally, the report should not only describe what the Council has done and the difficulties encountered but also **suggest measures to be taken in order to improve the functioning of the justice system in the interest of the general public, and access to justice by all.**<sup>124</sup> The Law should be supplemented accordingly.

#### **4.4. Other Bodies of Judicial Administration**

73. Article 23 of the Law on Judicial Administration provides for the establishment by the Judicial General Council of a Judicial Qualifications Committee, while Article 32 contemplates the separate creation of a Judicial Ethics Committee. It is generally considered a good practice to distinguish among and separate different competences of the judicial administration, such as selection, promotion and training of judges, discipline, professional evaluation and ethics, between different independent bodies in order to avoid excessive concentration of power in one judicial body and perceptions of corporatism.<sup>125</sup> The option of establishing different independent bodies, with a composition reflecting their particular task, and without subjecting them to the control of a single institution or authority, is generally recommended.<sup>126</sup> In this context, it is commendable that the above-mentioned separate bodies are established in Mongolia. The composition and competencies of each are examined separately below.

##### **4.4.1. Judicial Qualifications Committee**

74. According to Article 23.2 of the Law on Judicial Administration, the Judicial Qualifications Committee is established by the Judicial General Council. It is comprised of nine part-time members, who shall be highly-qualified and specialized lawyers and judges with a legal or administration of justice experience of not less than ten years of work practice, appointed by the Judicial General Council upon the recommendation from the Bar Association. Staff/personnel of the Judicial General Council and the judicial administrative organizations, as well as attorneys and prosecutors cannot be members of the Judicial Qualifications Committee (Article 23.4).

<sup>123</sup> See in this regard CCJE, [Opinion no.10 \(2007\) on the Council for the Judiciary at the service of society](#), 23 November 2007, par 96.

<sup>124</sup> *ibid.* par 96.

<sup>125</sup> *Op. cit.* footnote 18, par 2 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 39, par 95 (2018 UN Special Rapporteur's [Report on judicial councils](#)). See also e.g., CCJE, [Opinion no.10 \(2007\) on the Council for the Judiciary at the service of society](#), 23 November 2007, par 43, which suggests that these competences could be concentrated in the judicial council, but split into its various branches.

<sup>126</sup> See *op. cit.* footnote 39, par 95 (2018 UN Special Rapporteur's [Report on judicial councils](#)). CCJE, [Opinion no.10 \(2007\) on the Council for the Judiciary at the service of society](#), 23 November 2007, par 45.

75. The composition of the Judicial Qualifications Committee raises several issues. Firstly, the judges have no say in the establishment of the Committee, since the members are recommended by the Bar Association and appointed by the Judicial General Council. Secondly, there is no provision establishing at least some quota for a minimum number of judges to be members of the Committee. At the same time, the main function of the Committee is to evaluate the candidates for judgeship and chief judge positions in the context of selection for the respective positions (Article 23.6.1). It is widely accepted at the international level that the bodies that are entrusted with the selection and career of judges should be made by independent judicial councils or other bodies where at least half of the members are judges elected or appointed by their peers,<sup>127</sup> so that the judiciary has a decisive role in judicial appointment procedures.<sup>128</sup> The composition of the Judicial Qualifications Committee does not follow these standards. **It is recommended that the composition of the Judicial Qualifications Committee be revised, to provide specifically that at least half of its members, though not an overwhelming majority, shall be judges, either elected or appointed by their peers. The composition should be mixed, with other members being for instance civil society representatives and/or lawyers appointed by the Bar Association and/or other stakeholders, if this is deemed appropriate in the Mongolian context.** Also, and as mentioned in par 55 *supra* regarding the composition of judicial councils, to avoid the influence of political considerations in the process of selecting candidates for judgeship,<sup>129</sup> **active politicians and members of the legislative or executive branches of power should not be eligible to sit as members of such Committee and Article 23 of the Law on Judicial Administration should be supplemented in that respect.**
76. Regarding the functioning of the Judicial Qualifications Committee, Article 23.8 of the Law on Judicial Administration and Article 8.1 of the Law on the Legal Status of Judges provide that the President of the country approves the regulation of the said Committee, upon the recommendation of the Judicial General Council. The approval by the President may raise issues of operational independence of the Judicial Qualifications Committee. For bodies entrusted with the selection of judges, it is vital that they “*are not under executive control and that they operate independently from regional governments*”.<sup>130</sup> Even if the President’s approval of the Committee’s regulation is a formal one, this may still instil the perception of some executive control over the *modus operandi* of the Committee. Moreover, the regulations of the Committee should include technical details regarding its operation, as well as the criteria and procedures of judges’ evaluation (see also Sub-Section 5.4. *infra*), which appear overly specific to fall within the competence of the highest executive authority like the President of the country. **It is therefore recommended that the regulation of the Judicial Qualifications be developed and approved by the Committee members or the Judicial General Council, and not by the President, or at a minimum, to ensure that the President’s role is purely formal.**

<sup>127</sup> See e.g., *op. cit.* footnote 18, par 8 (2010 ODIHR Kyiv Recommendations), which states that “*apart from a substantial number of judicial members*”, “[the] composition [of bodies deciding on judicial selection] shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office”; *op. cit.* footnote 19, par 1.3 (1998 European Charter on the Statute for Judges), which states that “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”; *op. cit.* footnote 34, par 48 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)), which stated that “[i]t is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary”; *op. cit.* footnote 24, par 46 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that “[i]f the authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers”; and *op. cit.* footnote 65, pars 25 and 32 (2007 Venice Commission’s [Report on Judicial Appointments](#)).

<sup>128</sup> See *op. cit.* footnote 67, par 69 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)).

<sup>129</sup> See *op. cit.* footnote 34, par 51 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); *op. cit.* footnote 24, par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); and *ibid.* par 8 (2010 ODIHR Kyiv Recommendations).

<sup>130</sup> *Op. cit.* footnote 18, par 4 (2010 ODIHR Kyiv Recommendations).



77. There are also a number of important missing details regarding the functioning of the Judicial Qualifications Committee, especially as regards the legal force of the Committee's decisions. Namely, it is not clear from the Law if the recommendations of the Qualifications Committee are binding or not on the Judicial General Council. There are also no details regarding the possibility for the unsuccessful candidate judge/candidate chief judge to challenge the decisions of the Qualifications Committee, and whether the said decisions should be reasoned.<sup>131</sup> **It is recommended that these details be added to the Law** (see also Sub-Section 5.4 on Selection and Appointment of Judges *infra*).
78. Moreover, **the legal drafters should review whether the part-time membership in the Committee allows its members to perform their functions in the most proficient, diligent, effective and timely manner. If not, introducing full-time membership in this body may be considered**, as also recommended by the OECD<sup>132</sup> - though if this option is retained, the legal drafters should assess whether to reduce the number of members. It should also be noted that since the members of the Committee exercise their functions on a part-time basis, they will most probably continue to work and receive salaries for their usual functions, which may inevitably involve a certain material, hierarchical and administrative dependence of the members on their primary employers.<sup>133</sup> **Therefore, the drafters should consider adding a clear statement in the Law that all the members are independent, equal and act in their personal capacity, independently from the body which nominated them and/or from their primary employers** (see also comments on gender balance and diversity in the context of selection and appointment of judges in Sub-section 5.4 *infra*).

#### 4.4.2. *Judicial Ethics Committee*

79. Article 33 of the Law on Judicial Administration sets out the responsibilities of the Judicial Ethics Committee. From this provision, it is understood that the Ethics Committee is primarily in charge of examining disciplinary complaints against judges, reviewing the case and issuing decisions accordingly. Article 32 provides that the Judicial Ethics Committee shall be composed of nine members from distinguished legal professionals, academic scholars and researchers. These nine members shall be nominated as follows: one member from each of the conferences of judges from the courts of first instance, appeal and cassation levels; three members from the Bar Association; and three members by the Central State administration authority in charge of justice matters/Ministry of Justice and Home Affairs. The Law further prohibits judges, Judicial General Council and judicial administrative staff, attorneys, prosecutors to be members of the Ethics Committee (Article 32.3). The composition and the regulations of the Judicial Ethics Committee are approved by the President (Article 32.4). Articles 33 to 37 of the Law on the Legal Status of Judges also detail the disciplinary proceedings before the Judicial Ethics Committee.
80. The establishment of a body in charge with discipline of judges, separate from the Judicial General Council, is welcomed and in line with international recommendations.<sup>134</sup> Similarly, it is commendable that the respective body is not composed exclusively of judges, in order to prevent allegations of corporatism.<sup>135</sup>

<sup>131</sup> *Op. cit.* footnote 75, pars 61 and 78 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)).

<sup>132</sup> See *op. cit.* footnote 5, new Recommendation 11.9 on pages 15-16 and page 54 (2019 [OECD Report on Anti-Corruption](#)).

<sup>133</sup> See e.g., *op. cit.* footnote 89, par 87 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>134</sup> See the reference cited in *op. cit.* footnote 125.

<sup>135</sup> See, for example, *op. cit.* footnote 18, pars 2, 5 and 9 (2010 ODIHR [Kyiv Recommendations](#)).

81. At the same time, there are a number of potential issues with the contemplated disciplinary system. First, it is important to emphasize the importance of ensuring a strict separation of duties and responsibilities between the advisory body on ethics and the disciplinary body.<sup>136</sup> Given the nature of rules of professional ethics, they should not be equated with a piece of legislation and directly applied as a ground for disciplinary sanctions.<sup>137</sup> Indeed, these ethical norms are often drafted in general and vague terms,<sup>138</sup> which do not meet the requirement of foreseeability that disciplinary grounds should fulfil.<sup>139</sup> The purpose of a code of ethics is to provide general rules, recommendations or standards of good behaviour that guide the activities of judges and enable judges to assess how to address specific issues which arise in conducting their day-to-day work, or during off-duty activities.<sup>140</sup> In the majority of countries, codes of ethics have only unofficial status and the breach of the ethical principles does not constitute direct ground for disciplinary action. This is entirely different from the purpose achieved by a disciplinary procedure which is designed to police misconduct and inappropriate acts that reach a certain level of seriousness, which call for some form of disciplinary sanction.<sup>141</sup> According to the CCJE, “*principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence*”.<sup>142</sup> Breaches of the ethical norms should, in the end, usually result in moral rather than in disciplinary liability.<sup>143</sup>
82. Further, in light of the above, **the legal drafters should completely reconsider the competence of the Ethics Committee and exclude disciplinary matters against judges from its scope of competence** (see especially Articles 33 to 37 of the Law on the Legal Status of Judges), **and instead consider establishing a separate independent body or a branch of the Judicial General Council in charge of disciplinary proceedings** (see also Sub-Section 5.6. *infra* on discipline of judges).
83. In terms of judicial ethics specifically, it is generally considered desirable to have one or more bodies or persons within the judiciary to advise judges confronted with a problem related to professional ethics or compatibility of non-judicial activities with their status.<sup>144</sup> **The Judicial Ethics Committee’s competence as outlined in the Law on Judicial Administration and the Law on the Legal Status of Judges should be**

<sup>136</sup> See e.g., *op. cit.* footnote 34, par 97 (*2019 Report of the UN Special Rapporteur on the independence of judges and lawyers*). See also e.g., *op. cit.* footnote 89, pars 25-27 and 30 (2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*). See also CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, pars 44 and 46-47.

<sup>137</sup> *ibid.*

<sup>138</sup> See par 31 of the *Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan*, CDL-AD(2013)035, of 10 December 2013, adopted by the Venice Commission at its 97<sup>th</sup> Plenary Session (6-7 December 2013).

<sup>139</sup> See ODIHR, *Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland* (14 January 2020), pars 70-74; *op. cit.* footnote 13, par 19 (2007 UNHRC *General Comment no. 32*), which states: “States should take specific measures guaranteeing the independence of the judiciary [...] through the constitution or adoption of laws establishing clear procedures and objective criteria for the [...] dismissal of the members of the judiciary and disciplinary sanctions taken against them”. See also ODIHR-Venice Commission, *Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova*, CDL-AD(2014)006, par 16; and the case-law of the ECtHR, which emphasizes that conducts giving rise to disciplinary action should be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct accordingly. See e.g. ECtHR, *N.F. v. Italy* (Application no. 37119/97, judgment of 2 August 2001), pars 29-30; and *Volkov v. Ukraine* (Application no. 21722/11, judgment of 1 January 2013), par 173ff.

<sup>140</sup> See e.g., *op. cit.* footnote 89, par 26 (2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*).

<sup>141</sup> See *Bangalore Implementation Measures*, par 15.1, which states that: “Disciplinary proceedings against a judge may be commenced only for serious misconduct. The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed”; and *op. cit.* footnote 18, par 25 (2010 ODIHR *Kyiv Recommendations*), which states that “[d]isciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute”. See also e.g., CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, par 60; *op. cit.* footnote 24, pars 72-73 (CoE Recommendation CM/Rec(2010)12); and *op. cit.* footnote 89, par 27 (2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*).

<sup>142</sup> See CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, par 48 (i).

<sup>143</sup> *Op. cit.* footnote 20, par 36 (Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan).

<sup>144</sup> See *op. cit.* footnote 34, par 97 (*2019 Report of the UN Special Rapporteur on the independence of judges and lawyers*); and e.g., CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, par 49.

substantially reviewed in line with the above, but also to emphasize the Ethics Committee's consultative and advisory role in terms of ethical rules and standards of professional conduct,<sup>145</sup> including for instance issues of conflict of interest. This all the more important since it is currently a recognized problem that the Judicial General Council and the courts do not have specialized personnel to provide judges with professional advice on the issues related to conflict of interests and rules of ethics.<sup>146</sup> Judges should also receive adequate training on ethical principles relating to the exercise of their duties and fundamental freedoms, both in relation to their profession and with regard to outside activities, including practical guidance on the use of social media.<sup>147</sup> This could be organized by the Judicial Ethics Committee. On the use of social media specifically, it is important to clarify what is appropriate behaviour, and what is not and the [2015 Bologna and Milan Global Code of Judicial Ethics](#) may serve as useful guidance in that respect.

84. Moreover, it is important that the Judicial Ethics Committee be independent from other branches of powers. In that respect, the fact that three of its nine members are appointed by the Ministry of Justice and Home Affairs (Article 32.3 of the Law on Judicial Administration) and that the composition and its regulation are approved by the President (Article 32.4 of the same Law) is problematic as it confers an undue influence of the executive over this body. **The legal drafters should reconsider the Minister of Justice's and President's roles relating to the composition and functioning of the Judicial Ethics Committee.** It is also important that the body be composed of both judges and non-judges and therefore, the prohibition for judges to be a member of the Judicial Ethics Committee provided in Article 32.3 of the Law on Judicial Administration is problematic and should be reconsidered in its entirety (see also comments regarding the composition of a disciplinary body in Sub-Section 5.6.1. *infra*).
85. Article 32 of the Law on the Legal Status of Judges mentions a Code of Ethics and the duty of every judge to uphold and abide by the Code. However, the Law fails to specify how such a Code will be drafted and approved. In any case, it is important that the Code be developed by the judiciary itself, for instance under the aegis of the Ethics Committee, according to an open and transparent process, while ensuring broad consultation with judges and their representative organizations.<sup>148</sup> **This aspect should be mentioned expressly in the Law.** In that respect, the review of the UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#) (2007) may serve as a useful resource to develop standards of professional conduct.

#### 4.5. Judicial General Council's Budget and Administrative Office

86. Article 28.3 of the Law on Courts provides that the judiciary budget includes the budget of the Judicial General Council. At the same time, to further guarantee the Council's independence and impartiality, it should enjoy financial independence, meaning that it should have the power and capacity to negotiate and organize its own budget effectively, to ensure that it has adequate human, financial and material resources, including its own

<sup>145</sup> *ibid.* par 29 (2002 CCJE [Opinion no. 3](#)).

<sup>146</sup> See *op. cit.* footnote 5, page 57 (2019 [OECD Report on Anti-Corruption](#)). Note that Articles 91 to 93 of the [Code of Civil Procedure of Mongolia](#) specifically provides for the recusals of judges and possible situations of conflict of interests.

<sup>147</sup> See e.g., ODIHR, [Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan](#) (27 December 2018), pars 46-50. See also *op. cit.* footnote 34, par 96 (2019 [Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

<sup>148</sup> See *ibid.* par 95 (2019 [Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also e.g., *op. cit.* footnote 144, par 48 (ii) (2002 CCJE [Opinion no. 3](#)); and *op. cit.* footnote 24, pars 72-74 of CoE Recommendation CM/Rec(2010)12.

premises,<sup>149</sup> to allow the Council to operate independently and autonomously.<sup>150</sup> This is especially important given the scope of the competences contemplated in Articles 5 to 12 of the Law on Judicial Administration. **The legal drafters may consider supplementing the Law on Courts or Law on Judicial Administration or other relevant legislation on public finance or budgetary processes to introduce additional safeguards to protect Judicial Council's financial independence also in practice.**<sup>151</sup>

87. It is also important that the legal framework also ensures the Council's functional independence, especially regarding its executive secretary and the staff of the administrative office, all the more since this may have an impact in terms of perceived and actual independence of the Council. In that respect, **it is important that the Judicial General Council appoints or elects its Executive Secretary and to supplement Article 14.1 of the Law on Judicial Administration in that respect. The Law should also specify the legal status of the staff of the Council's administrative office, while ensuring that the Council has the freedom to organise itself, without being answerable for its activities to any political or other authority, and to have its own staff according to its and its members' needs.**<sup>152</sup>

## 5. Status of Judges

88. It is important to note that Article 52 par 2 of the Constitution of Mongolia contemplates the status of citizen's representatives sitting in criminal and civil first instance court trials. In that respect, ODIHR has also reviewed the Law of Mongolia on the Legal Status of Citizen Representatives of Court Trials, and the present Opinion should be read together with the findings and recommendations made in the related [Opinion](#). In any case, all the requirements of independence and impartiality apply to lay judges, as they do to professional judges and juries.<sup>153</sup>

### 5.1. The Independence and Impartiality of Judges

89. Overall, the national legal framework seems to refer to the “*impartiality of judges*” and the “*independence of the judiciary*” but does not mention the individual independence of judges. The requirement of independence applies not only to the judicial institution but also to the individual judge,<sup>154</sup> to ensure that judicial officers are free from any form of direct or indirect influence, whether this comes from the government, the parliament, the parties in the proceedings, other judges or third parties.<sup>155</sup> **It is recommended that the principle of the individual independence of judges be better reflected throughout the legal framework pertaining to the judiciary.** It is also important to emphasize that when assessing whether a body is independent, it is key that the said body presents an outward appearance of independence, also meaning that the mere hypothetical possibility

<sup>149</sup> See e.g., *op. cit.* footnote 34, pars 37-38 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); and ENCJ, [Report on the Funding of the Judiciary 2015-2016](#), 3 June 2016, Principle 3 on Council for the Judiciary on pages 12-13.

<sup>150</sup> *ibid.* pars 37-40 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); and *op. cit.* footnote 11, pars 93 and 106 (2014 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers).

<sup>151</sup> *Op. cit.* footnote 67, par 56 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)).

<sup>152</sup> See e.g., *op. cit.* footnote 34, par 38 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>153</sup> See *op. cit.* footnote 21, Sub-Section 3.3.3 on pages 66-67 (2012 ODIHR [Legal Digest of International Fair Trial Rights](#)). See also, for example, ECtHR, [Landborger v. Sweden](#) (Application no. 11179/84, judgment of 22 June 1989), pars 34-35; and CCPR, [Wilson v. Australia](#), Communication no. 1239/2004, UN Doc CCPR/ C/80/D/1239/2004 (2004), para 4.4, in relation to jury trial.

<sup>154</sup> UN OHCHR, [Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers](#) (2003), Chapter 4: Independence and Impartiality of Judges, Prosecutors and Lawyers, page 123.

<sup>155</sup> *Op. cit.* footnote 13, par 19 (2007 CCPR [General Comment no. 32](#)).



of influence or interference may be sufficient to undermine the independence of the judiciary.<sup>156</sup>

90. Chapter 7 of the Law on Courts of Mongolia specify the guarantees for judicial independence. Article 27.1 specifically prohibits any state organizations and officials at all levels, political parties, legal entities, citizens and any other persons to interfere with the judges in the exercise of their judicial functions, and directly or indirectly influence them. At the same time, the Law does not specify the related sanctions, which may render the said provisions a mere statement of intent. **Unless provided in other legislation, in which case a cross-reference to the specific provision would be advisable, it is recommended to specify the sanctions that would apply.**
91. Moreover, it is essential that in the performance of their judicial duties, judges ensure equality of treatment to all before the courts.<sup>157</sup> **This principle could be expressly stated in the Law on the Legal Status of Judges** (see also par 146 *infra* regarding disciplinary grounds).

## **5.2. Rights of Judges**

92. Overall, the Law on the Legal Status of Judges and other laws are silent as to the rights of judges, though certain of its provisions such as Articles 27.1.2 and 28.1.2, potentially restrict the right to freedom of expression and freedom of religion or belief (see pars **Error! Reference source not found.-Error! Reference source not found.** *infra*). In principle, like all individuals, judges are entitled to freedom of expression, religion or belief, association and peaceful assembly and to take part in public debate (Articles 9-11 of the ECHR and Articles 18-22 of the ICCPR).<sup>158</sup> In that respect, the UN Special Rapporteur on the independence of judges and lawyers specifically recommended that national legislation on the organization and functioning of the judiciary include specific provisions recognizing that judges are entitled to exercise the right to freedom of expression, belief, association and assembly, as well as political rights, on an equal basis with others, and that the exercise of these rights can only be subject to those restrictions that are necessary in a democratic society to maintain the authority of the judiciary, as well as the independence and impartiality of individual judges.<sup>159</sup>
93. Any restriction to the above-mentioned rights must meet the three-part test i.e., be “*prescribed by law*”, pursue a “*legitimate aim*” provided by international human rights law (Articles 18(3), 19(3), 21 and 22(2) of the ICCPR) and be “*necessary in a democratic society*”, and as such respond to a pressing social need. The principles of independence, impartiality and integrity require judges to behave in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary at all

<sup>156</sup> See *op. cit.* footnote 21, page 61 (2012 ODIHR [Legal Digest of International Fair Trial Rights](#)). See also, for the purpose of comparison, European Court of Human Rights (ECtHR), [Campbell and Fell v. the United Kingdom](#) (Application nos. 7819/77, 7878/77, judgment of 28 June 1984), par 78. See also [Olujic v. Croatia](#) (Application no. 22330/05, judgment of 5 May 2009), par 38; [Oleksandr Volkov v. Ukraine](#) (Application no. 21722/11, judgment of 25 May 2013), par 103; [Morice v. France](#) [GC] (Application no. 29369/10, judgment of 23 April 2015), par 78; on the relation of the judiciary with other branches of power: [Baka v. Hungary](#) [GC] (Application no. 20261/12, judgment of 23 June 2016), par 165; [Ramos Nunes de Carvalho e Sá v. Portugal](#) [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 144; [Guðmundur Andri Ástráðsson v. Iceland](#) (Application no. 26374/18, judgment of 12 March 2019), pars 100-103.

<sup>157</sup> See *op. cit.* footnote 10, Principle 5 (2002 Bangalore Principles of Judicial Conduct); and *op. cit.* footnote 22, pars 183-191 (2007 UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#)).

<sup>158</sup> See *op. cit.* footnote 11, Principle 8 (1985 [UN Basic Principles on the Independence of the Judiciary](#)), which states that judges as individuals are “*entitled to freedom of expression, belief, association and assembly [providing] that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary*”. See also *op. cit.* footnote 34, pars 66 and 110-111 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)); and for the purpose of comparison, *op. cit.* footnote 34, par 42 ([CCJE Opinion no. 18 \(2015\)](#)); CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), pars 27-36; and Venice Commission, [Report on the Freedom of Expression of Judges](#), 23 June 2015.

<sup>159</sup> *ibid.* pars 93 and 101 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

- times.<sup>160</sup> Due to the public scrutiny that they are under at all times, judges must therefore accept certain personal restrictions that might be viewed as burdensome by ordinary citizens,<sup>161</sup> but may be justified to protect the impartiality and independence of the judiciary providing that they comply with international human rights standards.
94. Article 28 of the Law on the Legal Status of Judges specify limitations on civil and political rights of judges and should be read together with Article 27, which lists a number of prohibited acts for judges.
  95. Article 27.1 of the Law on the Legal Status of Judges lists a number of prohibited acts pertaining to the exercise of freedom of expression by judges. Any individual's right to freedom of expression may be limited, as outlined in Article 19(3) of the ICCPR, if such restrictions are provided by law, are necessary out of respect of the rights or reputations of others, or in order to protect national security, public order (*ordre public*), or public health or morals, and are proportionate to such aims. Legitimate restrictions to judges' right to freedom of expression primarily derive from the principle of confidentiality, binding judges to professional secrecy with regard to their deliberations and information obtained in the course of their functions.<sup>162</sup> Professional secrecy also means that judges must refrain from expressing their views or opinions in relation to cases currently or previously before the court, in order to maintain the perception of independence and impartiality.<sup>163</sup> In this respect, some of restrictions contained in Article 27.1 are overall in line with the limitations generally considered necessary in a democratic society as they are linked to the principle of confidentiality and professional secrecy (see e.g., Articles 27.1.2, 27.1.3, 27.1.5 of the Law on the Legal Status of Judges).
  96. At the same time, Article 28.1.2 of the Law on the Legal Status of Judges prohibits the "*expression of views and opinions regarding political and religious matters as addressed to the political parties, other public organizations and citizens*". Such a wording is unduly vague and the reference to "*political and religious matters*" is too broad in scope and could potentially be subject to various and potentially arbitrary interpretation, thus failing to fulfil the requirement of legal certainty and foreseeability required under international human rights standards.<sup>164</sup> It must be pointed out that beyond the context of specific cases before them, legitimate restrictions of judges' freedom of expression and association result from the requirement in international law that courts and tribunals need to be "*independent and impartial*", which implies that in addition to being free of actual bias "*the tribunal must also appear to a reasonable observer to be impartial*".<sup>165</sup> Judges are therefore bound by "*a duty of loyalty, reserve and discretion*" to the public, which means that they are expected to "*show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question*".<sup>166</sup> Consequently, judges should avoid commenting on cases before them,<sup>167</sup> and their engagement in activities outside their judicial mandate needs to be compatible with their impartiality and independence.<sup>168</sup> At the same time, as recently reiterated by the UN Special Rapporteur on the independence of judges and lawyers,

<sup>160</sup> See e.g., ODIHR, [Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan](#) (27 December 2018), par 36. See also *op. cit.* footnote 11, Principle 8 (1985 [UN Basic Principles on the Independence of the Judiciary](#)).

<sup>161</sup> See *op. cit.* footnote 12, Principle 4.2 (2002 Bangalore Principles of Judicial Conduct).

<sup>162</sup> *Op. cit.* footnote 34, pars 53 and 89 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also *op. cit.* footnote 11, Principle 15 (1985 [UN Basic Principles on the Independence of the Judiciary](#)).

<sup>163</sup> *Op. cit.* footnote 34, par 53 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

<sup>164</sup> *Op. cit.* footnote 139, pars 55, 58 and 61 (2019 ODIHR [Urgent Interim Opinion on the Judiciary in Poland](#)).

<sup>165</sup> See e.g., *op. cit.* footnote 13, par 21 (2007 UNHRC [General Comment no. 32](#)); *op. cit.* footnote 34, par 42 ([CCJE Opinion no. 18 \(2015\)](#)); CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), pars 27-36; *op. cit.* footnote 11, Principle 8 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); *op. cit.* footnote 34, pars 66, 89 and 110-111 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)); and Venice Commission, [Report on the Freedom of Expression of Judges](#), 23 June 2015.

<sup>166</sup> *Op. cit.* footnote 34, pars 33 and 101 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

<sup>167</sup> *ibid.* pars 101-106 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

<sup>168</sup> See *op. cit.* footnote 24, par 21 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).

there are a number of situations in which a judge may speak about matters that are politically sensitive, for instance in order to comment on legislation and policies that directly affect the operation of courts, the independence of the judiciary, or fundamental aspects of the administration of justice.<sup>169</sup> The [Bangalore Principles of Judicial Conduct](#) (2002) consider to be an individual right of judges to write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters.<sup>170</sup> Moreover, the UN Special Rapporteur on the independence of judges and lawyers has considered that in certain circumstances, judges even have a duty to speak out even on a politically controversial topic if this is in defence of the constitutional order and the restoration of democracy where democracy, the integrity and independence of the judiciary and the rule of law are threatened.<sup>171</sup> Judges are also entitled to publicly criticise legal reforms and pieces of legislation, especially when they concern the functioning of the justice system and issues relating to the separation of powers, even if this may have so-called political implications, all the more since the public would generally have a legitimate interest in being informed about it.<sup>172</sup> In light of the foregoing, restrictions of judges' freedom of expression must not be used to impose disciplinary sanctions on judges who publicly comment on issues pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers and the rule of law in the country.<sup>173</sup>

97. In light of the above, the general reference to “*political matters*” should be removed and more generally, the wording of Article 28.1.2 of the Law on the Legal Status of Judges should be more strictly circumscribed to ensure that any restriction of judges' freedom of expression adheres to the principles of legal certainty, necessity and proportionality, in line with Article 19 of the ICCPR, while striking a reasonable balance between freedom of expression of judges and the need for them to be and be seen as independent and impartial in the discharge of their duties. At a minimum, the legal drafters should consider including defences or exceptions, for instance when the statements were intended as part of a public debate on matters pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers, judicial independence and the rule of law in Mongolia.
98. As regards the “*expression of views and opinions regarding [...] religious matters*”, it may be legitimate for a state to impose on civil servants, on account of their status, a duty to refrain from any ostentation in the expression of their religions or beliefs in public.<sup>174</sup> As such, limiting the manifestation of a judge's religion or belief during court hearings and in other situations that are linked to his/her work may be justifiable given the need for absolute independence, impartiality and credibility before court and the fact that judges' personal values, philosophy, or beliefs should not bias the decisions that they take on a given case.<sup>175</sup> However, this should not be interpreted as limiting judges' right to manifest their religions or beliefs outside of courtroom, in worship, teaching, practice and observance, under Article 18 of the ICCPR, so long as this does not question the

<sup>169</sup> *Op. cit.* footnote 34, par 13 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also *op. cit.* footnote 12, pars 134-140 (2007 UN [Commentary on the Bangalore Principles of Judicial Conduct](#)).

<sup>170</sup> See Principle 4.11 of the [Bangalore Principles of Judicial Conduct](#);

<sup>171</sup> *Op. cit.* footnote 34, pars 90 and 102 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also, for instance, for the purpose of comparison, Inter-American Court of Human Rights, [case of Lopez Lone et al. v. Honduras](#), judgment of 5 October 2015, pars 169-173, especially par 173. See also, ENCI, [Sofia Declaration on Judicial Independence and Accountability](#), 7 June 2013, Principle (vii) and the Canadian [Ethical Principles for Judges](#).

<sup>172</sup> *ibid.* par 89 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also e.g., ODIHR, [Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan \(2018\)](#), par 42. See also, for the purpose of comparison, *op. cit.* footnote 34, par 42 ([CCJE Opinion no. 18 \(2015\)](#)); and ECtHR, [Baka v. Hungary](#) [GC] (Application no. 20261/12, judgement of 23 June 2016), pars 162-167 and 171.

<sup>173</sup> See e.g., *op. cit.* footnote 139, pars 58 and 61 (2019 ODIHR [Urgent Interim Opinion on the Judiciary in Poland](#)).

<sup>174</sup> See e.g., for the purpose of comparison, ECtHR, [Pitkevich v. Russia](#) (Application no. 47936/99, decision of 8 February 2001).

<sup>175</sup> See *op. cit.* footnote 22, par 60 (2007 UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#)).

impartiality of the said judge.<sup>176</sup> It is not clear whether the wording “*addressed to political parties, other public organizations and citizens*” would imply that the prohibition only concerns such manifestation in the context of a judge’s official functions. Unless a matter of translation, **Article 28.1.2 should be clarified to prevent judges from promoting a religious opinion, belief or other personal views during the performance of her/his official functions. In any case, this should not be interpreted as preventing the manifestations of religion in the private sphere, including the visits to places of worship or other ritual and ceremonial acts giving direct expression to belief.**<sup>177</sup>

99. Article 28.1.1 of the Law on the Legal Status of Judges prohibits a judge’s affiliation with a political party while Article 27.1.16 prohibits holding a leadership and other official positions in any “*political organisations*”, endorsing any candidates in election campaigns or in political institutions or participating in their election campaign or providing and financing or giving any donations for candidates in political elections. Article 27.4 of the Law on Courts also prohibits judges and/or court staff, with a function to assist in the implementation of judicial proceedings, to be a member of any political party or “*political movement*”. This provision is worded slightly differently from the ones included in the Law on the Legal Status of Judges. **To avoid any confusion, it is recommended to align the respective wording or make a cross-reference to the other Law.**
100. Judges like other individuals have a right to freedom of association, even though restrictions on this right may be justified in order to preserve the independence and impartiality of judges and the appearance thereof, in particular when it is deemed necessary to maintain their political neutrality.<sup>178</sup> ODIHR and the Venice Commission have specifically acknowledged the possibility of imposing restrictions on the exercise of the right to freedom of association of some public officials in cases “*where forming or joining an association would conflict with the public duties and/or jeopardize the political neutrality of the public officials concerned*”.<sup>179</sup> In that respect, judges’ political involvement and membership in political parties may pose some problems from the viewpoint of their independence, impartiality and separation of powers.<sup>180</sup> While there is no consensus at the international level on whether a judge has the right to be member of a political party,<sup>181</sup> judges should generally show restraint in the exercise of public political activity, in order to preserve the separation of powers and independence of the judiciary,<sup>182</sup> including the appearance of independence.<sup>183</sup> Accordingly, limitations pertaining to membership in a political party may be acceptable.
101. At the same time, it is unclear whether the wording “*affiliation*” in Article 28.1.1 of the Law on the Legal Status of Judges refers to membership in a political party or more generally to participation in its activities, attendance of meetings, or others. Also the term “*political organisation*” is unclear and should not prevent the membership in trade unions<sup>184</sup> or non-profit organisations of various types, such as charitable organizations,

<sup>176</sup> See e.g., as a comparison, in relation to Article 9 of the ECHR on the right to freedom of religion or belief of judges, ECtHR, *Albayrak v. Turkey* (Application no. 38406/97, judgment of 31 January 2008), par 42; and *Wille v. Lichtenstein* [GC] (Application no. 28396/95, judgment of 28 October 1999), par 44.

<sup>177</sup> See *op. cit.* footnote 160, pars 51-58 (2018 ODIHR *Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan*). See also CCPR, *General Comment no. 22 on Article 18 of the ICCPR*, 1993, par 4.

<sup>178</sup> See e.g., regarding public servants in general, ECtHR, *Ahmed and Others v. United Kingdom* (Application no. 22954/93, judgment of 2 September 1998), pars 53 and 63.

<sup>179</sup> See e.g., ODIHR-Venice Commission, *Joint Guidelines on Freedom of Association* (2014), par 144.

<sup>180</sup> See e.g., CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, par 30.

<sup>181</sup> *Op. cit.* footnote 34, pars 60, 64 and 109 (2019 Report of the UN Special Rapporteur on the independence of judges and lawyers).

<sup>182</sup> *ibid.* par 110 (2019 Report of the UN Special Rapporteur on the independence of judges and lawyers).

<sup>183</sup> *ibid.* pars 66 and 111 (2019 Report of the UN Special Rapporteur on the independence of judges and lawyers). See also CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, pars 27-36.

<sup>184</sup> *Op. cit.* footnote 22, par 176 (2007 UN *Commentary on the Bangalore Principles of Judicial Conduct*).



university and school councils, lay religious bodies, hospital boards and so on.<sup>185</sup> Similarly, the term “*political movement*” in Article 27.4 of the Law on Courts is a rather broad and unclear term and may be misinterpreted in practice by limiting the judges’ freedom of association and right to participate in debates of public interest or supporting movements that are of public interest, which are in any case protected by the right to freedom of expression and association. **Unless an issue of translation, it is recommended to clarify the wording “affiliation” and “political organisations” in the Law on the Legal Status of Judges and remove the term “political movement” from Article 27.4 of the Law on Courts, while ensuring that judges can form and join professional organizations to protect their interests as well as non-profit organisations of the above-mentioned types. This would prevent potential abusive interpretations in practice that may limit judges’ freedom of opinion, expression and association** (see also Sub-Section 7 regarding the prohibition concerning court staff).

102. It is noted that the Law also places some limitations concerning judges wishing to run for political elections who shall request a release from office and cannot re-apply for a judge position within three years of such a release (Articles 28.2 and 28.3 of the Law on the Legal Status of Judges). This measure may help avoiding the perception that the different branches of power intermingle. One might consider however whether such a three-year limitation in case of an independent candidate who does not get elected may not be excessive. It is noted that in some systems, a judge’s position is suspended when the judge declares that s/he intends to run and s/he can be re-admitted in case s/he is not elected. **The legal drafters should assess whether, in light of the local context, such a limitation is justified and proportionate.**
103. Article 28.1.3. of the Law on the Legal Status of Judges prohibits the possibility for a judge to abandon or suspend his/her official duties as a mean to resolve a labour dispute, which in substance, limits the judges’ right to strike. As noted in the UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#) (2007), “*given the public and constitutional character of the judge’s service, [...] restrictions may be placed on the right to strike*”, though this should not prevent judges from forming or joining a trade union or association of that nature to represent or defend judges’ professional interests.<sup>186</sup>
104. Also, it would not be appropriate for a judge to hold membership in any organization that discriminates on the basis of race, religion, gender, national origin, ethnicity or sexual orientation, because such membership might give rise to the perception that the judge’s impartiality is impaired.<sup>187</sup> Accordingly, **this limitation could be reflected under Article 28 of the Law on the Legal Status of Judges.**
105. Finally, it may be useful that specific guidelines on the exercise of fundamental freedoms by judges be developed and more detailed in the Code of Ethics or other guidance on professional standards.<sup>188</sup>

### 5.3. Security of Tenure and Immunity of Judges

106. Article 51.4 of the Constitution states that “[a] removal of a judge of the court at any instance shall be prohibited, except for the cases whereby he/she is released at his/her own request, or when dismissed on the grounds prescribed by the Constitution and/or by

<sup>185</sup> *ibid.* par 167 (2007 UN [Commentary on the Bangalore Principles of Judicial Conduct](#)).

<sup>186</sup> See Principle 4.13 of the [Bangalore Principles of Judicial Conduct](#); and *op. cit.* footnote 22, par 176 (2007 UN [Commentary on the Bangalore Principles of Judicial Conduct](#)). See also *op. cit.* footnote 34, par 108 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

<sup>187</sup> *Op. cit.* footnote 34, par 60 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

<sup>188</sup> See e.g., *ibid.* par 94 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

*the law on judiciary, and in accordance with a valid decision by the court*". Article 20.4.4 of the Law on the Legal Status of Judges provides that a judge shall be appointed for an indefinite term, unless otherwise provided by law. The Law does not provide for probationary terms or other cases of appointment of judges for a limited mandate, which is welcome. However, the phrase "*unless otherwise provided by the law*" introduces some ambiguity as whether there may be cases of fixed-term judicial appointment or whether this refers to cases of early termination, in which case the Law should clearly and exhaustively specify the situations that may lead to early removal from office. A permanent appointment until a mandatory retirement age or life appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions, or in case of early retirement when a judge makes a request or on medical grounds.<sup>189</sup> **It is important that a cross-reference be made to relevant provisions concerning early termination in the above-mentioned cases.** To protect even more judicial independence, it may be advisable to state in the Constitution, and not the law, the grounds for early removal of a judge from office, to avoid potential abuses.

107. Article 26 of the Law on the Legal Status of Judges states that a judge shall be entitled to immunity, and further refers to the inviolability of official and private premises, official and private transportation and communication equipment, luggage and other property and documents in the judge's position (Article 26.2). In principle, the legislation should protect functional immunity for judges' (lawful) acts performed in the exercise of their judicial functions, which is essential to ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of the initiation of prosecution or civil action by an aggrieved party, including state authorities.<sup>190</sup> As regards the immunity of judges, it is necessary to separate the substantive issue relating to the material scope of the functional immunity, which should provide the legal grounds to pronounce the inadmissibility of a complaint against a judge, from the procedural safeguards which exist to protect such functional immunity (see par 110 *infra* on the procedure for lifting immunity).
108. Article 26.3 states that, unless there is a court decision promulgated concerning the judge's abuse of power, issuance of clearly unlawful judgment, verdict or other judicial act, it is prohibited to hold a judge liable for the opinion and decisions made during his/her term, and this is so even after the judge's term of office has expired. This provision is welcome as it provides functional immunity, which is not absolute since there are exceptions in case of abuse of powers or "*clearly unlawful*" acts. However, it is not specifically clear what is meant by "*clearly unlawful*" judgment or other judicial act. It is important to emphasize that judges should not be held individually liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law nor should it be sufficient to define a judicial decision as unlawful by referring to the fact that his or her decisions have been overturned at higher instance.<sup>191</sup> Such a vague, imprecise and broadly-worded provision may have a chilling effect on judges' independent and impartial interpretation of the law, assessment of facts and weighing of evidence, and may also be abused to exert undue pressure on judges when deciding cases

<sup>189</sup> See *op. cit.* footnote 11, Principle 12 (1985 [UN Basic Principles on the Independence of the Judiciary](#)). See also e.g., *op. cit.* footnote 24, pars 49-50 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>190</sup> See e.g., UN Special Rapporteur on the independence of judges and lawyers, [Report on the notion of judicial accountability](#), A/HRC/26/32, 28 April 2014, par 52. See also *op. cit.* footnote 89, pars 37 and 41 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)); *op. cit.* footnote 190, par 19 (2013 Venice Commission's [Amicus Curiae Brief](#)); CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), par 52; and ECtHR, [Ernst v. Belgium](#) (Application no. 33400/96, judgment of 15 October 2003), par 85, holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued.

<sup>191</sup> See e.g., Venice Commission, [Amicus Curiae Brief for the Constitutional Court on the Criminal Liability of Judges](#), CDL-AD(2017)002, par 49.

and thus undermine their independence and impartiality,<sup>192</sup> if they fear that their judgment may be considered as “clearly unlawful”. **Unless a matter of translation, it is therefore recommended to clarify such wording, by referring to malice or gross negligence instead.** In any case, if a judge commits a criminal offense in the exercise of his or her office, he or she should not benefit from functional immunity.<sup>193</sup> Given the recognized need to fight corruption in Mongolia,<sup>194</sup> the Law could also specifically provide that the material scope of the functional immunity does not include bribery, corruption or traffic of influence.<sup>195</sup> It is worth highlighting that even if the material scope of the functional immunity is reduced (e.g., by expressly excluding certain criminal offenses such as bribery, corruption or traffic of influence), some procedural safeguards may still be provided for in law to protect the judges e.g., from blackmail relating to an alleged crime committed in office, by ensuring that only duly substantiated claims or complaints will get the consent of judicial council to proceed further.<sup>196</sup>

109. Finally, it is also not clear whether the immunity could potentially cover any acts performed by a judge, even in his/her private life. In principle, when not exercising judicial functions, judges should in principle be liable under civil, criminal and administrative law in the same way as any other citizen,<sup>197</sup> though certain procedural safeguards, as those mentioned in par 110 *infra*, may be provided to protect judges from unfounded or false, and vexatious accusations or complaints that are levelled against a judge in order to exert pressure on him or her (see below on the procedural safeguards). **This should be clarified under Article 26.**
110. In terms of procedural safeguards to protect judicial independence (procedural immunity), Articles 26.7 to 26.9 provides for a special procedure in case a judge is arrested *in flagrante delicto*, whereby the Judicial General Council shall submit recommendation to the President on suspending the power of a judge and the President shall make a decision in that respect within two working days. Hence, the Law provides for a procedure for lifting judge’s immunity only in cases of *flagrante delicto*. For other cases, the Law on the Legal Status of Judges does not specify the procedure for lifting immunity, if any. The rationale for such procedural safeguards is to avoid false accusations or vexatious claims against judges, and accordingly provide a mechanism for preventing or stopping investigation/proceeding when there is no proper case for suggesting that any criminal liability exists on the part of a judge.<sup>198</sup> Research shows that occasionally, judicial councils tend not to lift the immunity, i.e. give consent to the initiation of criminal proceedings against their peers, which may have a disastrous impact on the reputation of the judiciary as a whole,<sup>199</sup> especially in case of bribery or corruption of judges. As mentioned in par 108 *supra*, given the recognized need to fight corruption in Mongolia, **the national stakeholders should discuss whether, in light of the specific**

<sup>192</sup> *ibid.* par 48 (2017 Venice Commission’s [Amicus Curiae Brief](#)).

<sup>193</sup> See *op. cit.* footnote 26, par 61 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges), which states: “[judges] should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes”); see also par 3 of the Venice Commission Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, Chapter 7: Justice: Article 118 to Article 129 (1994).

<sup>194</sup> See *op. cit.* footnote 5, page 57 (2019 [OECD Report on Anti-Corruption](#)).

<sup>195</sup> *Op. cit.* footnote 89, pars 42, 59-61 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>196</sup> *ibid.* par 42 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>197</sup> *ibid.* par 50 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)). See also e.g., *op. cit.* footnote 24, par 71 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that “[w]hen not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen”. See also CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), par 75: “i) judges should be criminally liable in ordinary law for offences committed outside their judicial office; ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions”. See also *op. cit.* footnote 190, par 53 (2013 Venice Commission’s [Amicus Curiae Brief](#)).

<sup>198</sup> *ibid.* par 55 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>199</sup> See *op. cit.* footnote 190, par 24 (2013 Venice Commission’s [Amicus Curiae Brief](#)), referring to Transparency International Global Corruption Report, 2007, p. 280.

context in Mongolia and depending on whether there is a fear that unjustified charges could actually be brought against judges,<sup>200</sup> the initiation of criminal proceedings for certain specific criminal offenses, such as bribery, corruption or traffic of influence, should be exempt from requiring prior consent by the Council,<sup>201</sup> as done in certain countries.<sup>202</sup> Alternatively, the legislation could specify that consent should in principle be given in such cases, unless the Council finds that the complaint is manifestly ill-founded.<sup>203</sup>

#### 5.4. Selection and Appointment

111. Several international monitoring bodies have noted the need to improve the procedure for selecting and appointing judges in Mongolia in order to be more transparent and impartial and to ensure merit-based appointment of judges in law and in practice, while excluding political institutions, especially the President and the Parliament, from the related decision-making processes.<sup>204</sup>

##### 5.4.1. Eligibility Requirements and Criteria

112. Articles 4 to 7 of the Law on the Legal Status of Judges provide for the qualifications and requirements to be appointed as a judge. Overall, these qualifications and requirements seem in line with the recommendations elaborated at the international level, according to which the selection of judges should be based on merit, according to objective, pre-established, and clearly defined criteria,<sup>205</sup> aiming to assess candidates' ability, integrity and experience.<sup>206</sup>
113. It must be noted however that some of the requirements, for instance the holding of a lawyer's professional license (Article 4.1.4), should be assessed in the context of a more in-depth analysis of the rules and practices of access to the legal profession in Mongolia. This will help reaching more informed conclusions on the appropriateness of this requirement, and whether it may indirectly discriminate certain persons or minority groups in the national context. Similarly, the requirement to have written and published articles in the professional publications and to have initiated proposals for amending the legislation (Article 5.1.3) for appointment as appellate court judge could raise issues of disadvantaged position of judges/candidates from areas that may not have easy access to specialized publications or legislative authorities, unless there are easily accessible practices of electronic submissions. **If this requirement has been highlighted as an unjustified impediment for certain candidates, it would be more appropriate to formulate it as a desirable competence rather than as a requirement.** The requirement regarding the health of the judicial candidates should be strictly regulated by secondary legislation to avoid any discriminatory practices regarding the candidates and ensure respect for the privacy of judicial candidates.

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<sup>200</sup> See *ibid.* pars 26-27 (2013 Venice Commission's [Amicus Curiae Brief](#)).

<sup>201</sup> See *op. cit.* footnote 89, par 60 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>202</sup> See e.g., in Moldova, the Constitutional Court actually recognized as constitutional the removal of the need to seek consent from the Superior Council of Magistracy for the initiation of criminal instruction and for instituting criminal proceedings against judges in cases of corruption offences ([judgment of 5 September 2013](#)).

<sup>203</sup> See *op. cit.* footnote 89, par 60 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>204</sup> See CCPR, [Concluding observations on the sixth periodic report of Mongolia](#), 22 August 2017, par 32. See also *op. cit.* footnote 5, page 10 and new Recommendation 11 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

<sup>205</sup> See e.g., *op. cit.* footnote 13, par 19 (2007 CCPR [General Comment no. 32](#)); *op. cit.* footnote 24, par 44 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 18, par 21 (2010 ODIHR [Kyiv Recommendations](#)); *op. cit.* footnote 19 pars 2.1. and 2.2. (1998 [European Charter](#)); *op. cit.* footnote 34, pars 50-51 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>206</sup> *Op. cit.* footnote 11, Principle 13 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); and *op. cit.* footnote 55, pars 17 and 29 (CCJE [Opinion no. 1 \(2001\)](#)).



114. Concerning Supreme Court judges, Article 6 requires in addition that they should have five years of working experience as a judge at the appellate court, ten years of professional experience as attorney, judge or prosecutor or 10 years teaching in a law school accredited by the Bar Association. Given their specific role, the drafters could consider adding other specific requirements. In that respect, one would expect that additional personal skills and qualities would be considered as done in some other countries, for instance sensitivity to the needs of different communities and groups,<sup>207</sup> **extensive expertise in human rights**, since the Supreme Court has also a key role to play in that respect,<sup>208</sup> ability to consider difficult and sensitive issues,<sup>209</sup> commitment to the judiciary as an institution, and other qualities required from candidates for high judicial office, such as persuasiveness, reputable conduct and integrity, among others.<sup>210</sup> **The drafters should consider supplementing Article 6 of the Law on the Legal Status of Judges in that respect.** While such qualities may sometimes be more difficult to evaluate in practice,<sup>211</sup> these could eventually be assessed based on situational and experience-based questioning,<sup>212</sup> with the weighting of the various criteria determined in advance to limit the risk of subjectivity.<sup>213</sup>
115. It is noted that the Law on the Legal Status of Judges and more generally the legal framework is overall silent as to the objective to ensure that the composition of the judiciary reflects the composition of the population as a whole<sup>214</sup> and is balanced in terms of gender.<sup>215</sup> An independent, impartial and gender-sensitive judiciary has a crucial role in advancing women's and men's human rights, achieving gender equality and ensuring that gender considerations are mainstreamed into the administration of justice.<sup>216</sup> Therefore, states should make an effort to evaluate the structure and composition of the judiciary to ensure adequate representation of women at all levels and provide necessary conditions for the advancement of gender equality within the judiciary.<sup>217</sup> At the same time, any attempt to achieve diversity in the selection and appointment of judges should not be made at the expense of the basic criterion of merit.<sup>218</sup>
116. Especially, there is no specific mechanism to ensure that gender balance is achieved and maintained with the future judicial appointments, at all levels, in Mongolia. In that respect, the *OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life* (2009) specifically calls on participating States to “consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies”. To be in line with OSCE human dimension

<sup>207</sup> See e.g., the criteria for appointment to the UK Supreme Court, available at <<https://www.supremecourt.uk/docs/information-pack-for-justices-role-2019.pdf>>.

<sup>208</sup> See e.g., Venice Commission, *Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina*, CDL(1999)078, para 30 and 32.

<sup>209</sup> *Op. cit.* footnote 207, criteria for appointment to the UK Supreme Court.

<sup>210</sup> See ENCJ, *Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges* (May 2012), Indicator no. I.4.

<sup>211</sup> See *op. cit.* footnote 75, para 43 (2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*); see also para 30-31 of 2009 Venice Commission's *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia*.

<sup>212</sup> See e.g., the US National Centre for State Courts, *Handbook for Judicial Nominating Commissioners* (2nd Edition), Chapter 7, pp. 146-147.

<sup>213</sup> See *op. cit.* footnote 18, para 21 (2010 ODIHR *Kyiv Recommendations*). See also e.g., *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers* (2018), para 3.7.

<sup>214</sup> *ibid.* para 24 (2010 ODIHR *Kyiv Recommendations*).

<sup>215</sup> See para 190 under Strategic Objective G.1: “Take measures to ensure women's equal access to and full participation in power structures and decision-making” of the *Beijing Platform for Action*, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1); *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, para 1; see also *op. cit.* footnote 27, para 81 and 91 (2011 Report of the UN SRIJL on Gender and the Administration of Justice).

<sup>216</sup> See Article 1 of CEDAW; and UN General Assembly, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice*, A/HRC/17/30, 29 April 2011, para 45.

<sup>217</sup> *ibid.* para 47.

<sup>218</sup> See *op. cit.* footnote 210, Indicator no. I.8 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also e.g., the *vacancy notice for the position of UK Supreme Court judge*, page 4, which states that “[s]ubject to the overriding principle of selection on merit, the selection commission will wish to ensure as far as possible that there is an appropriate balance of expertise, professional experience and background within the Court”.

commitments,<sup>219</sup> international standards and good practices,<sup>220</sup> **the drafters could consider introducing a mechanism to ensure that the relative representation of women and men within the judiciary/respective courts is taken into consideration when identifying, ranking and selecting/nominating the candidates to judgeship/chief judge positions**, while not compromising on the experience and professional quality of candidate.<sup>221</sup>

117. As regards the persons with disabilities, Article 27 of the CRPD prescribes their right to work, on an equal basis with others, including the right to gain a living by “*work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities*”. Persons with disabilities also have the right to participate on an equal basis in the justice system, not only as users of the system, but also as judges, prosecutors, jurors and lawyers. “Participation on an equal basis” in justice sector professions implies not only that selection and employment criteria must be non-discriminatory, but also that states are obliged to take positive measures to create an enabling environment for the realization of full and equal participation of persons with disabilities,<sup>222</sup> meaning that adequate conditions should be provided to facilitate the work of qualified candidates. This could be specified in vacancy notices.
118. In light of the above, **the drafters could consider introducing a mechanism to ensure that the Judicial Qualifications Committee takes into account the relative representation of women and men within the judiciary and the respective court, as well as of under-represented persons or groups, especially minorities and persons with disabilities, when ranking and selecting candidates though not at the expense of the basic criterion of merit**. In certain jurisdictions the legal framework even include provisions pertaining to the consequences of the violation of this gender and diversity balance requirement.<sup>223</sup> **The drafters could also state in the Law on Judicial Administration that the Judicial General Council or the Judicial Qualifications Committee should adopt relevant policies in that respect, while equally ensuring the quality of the selected candidates** (see also par 47 *supra*).

#### 5.4.2. Selection and Appointment Procedure

119. Articles 11-13 and 15 of the Law on the Legal Status of Judges regulate the selection and appointment procedure for judges, which can be summarized as follows. The Judicial General Council announces the vacancies and collects the applications, which are then reviewed by Judicial Qualifications Committee, which evaluates each candidate and provides the Judicial General Council with an assessment of each candidate’s meeting

<sup>219</sup> OSCE participating States have committed to provide “for specific measures to achieve the goal of gender balance [...] in all judicial and executive bodies” (Athens, 2009, Decision No. 7/09) and to ensure “that judges are properly qualified, trained and selected on a non-discriminatory basis” (Moscow, 1991); see OSCE Ministerial Council, Decision No. 7/09, “*Women’s Participation in Political and Public Life*”, Athens, 2 December 2009, par 1; and *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, Moscow, 10 September to 4 October 1991, par 19.2 (iv).

<sup>220</sup> UN CEDAW Committee, *General Recommendation No. 23 (1997) on Political and Public Life*, par 5; *Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women*, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), pars 182 and 190, particularly Strategic Objective G.1. “Take measures to ensure women’s equal access to and full participation in power structures and decision-making”; CoE, *Appendix to Recommendation Rec (2003)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making*, adopted on 12 March 2003, which refers to the goal of achieving a minimum representation of 40% of women and men in political and public life, through legislative, administrative and supportive measures. See also *op. cit.* footnote 18, par 24 (2010 Kyiv Recommendations), which states that “[g]enerally, it would be desirable that the composition of the judiciary reflects the composition of the population as a whole”.

<sup>221</sup> *Op. cit.* footnote 75, par 47 (2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*). See e.g., regarding some possible mechanisms, *op. cit.* footnote 89, Sub-Section 5.1 (2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*).

<sup>222</sup> See recommended standards for judicial selection and training set forth in Part II of 2010 Kyiv Recommendations, *op. cit.* footnote 18.

<sup>223</sup> See *op. cit.* footnote 75, par 49 (2019 ODIHR *Opinion on the Appointment of Supreme Court Judges of Georgia*). For instance, the Law could provide that the selection of the candidates of the over-represented gender shall be annulled. See e.g., Article 75 of the *French Law on Equality between Men and Women* (2014). See also par 39 of the 2013 *Report of the UN Working Group on the issue of discrimination against women in law and in practice* (A/HRC/23/50), adopted on 19 April 2013.

the requirements for becoming a judge/being appointed as a chief judge (provided in Articles 4-7 of the Law). The Bar Association also submits an assessment of each candidate's professional qualification, skills and reputation (Article 12.2). Then the Judicial General Council interviews each candidate and ranks them based on its own assessment as well as the assessments of the Judicial Qualification Commission and of the Bar Association (Article 13). Afterwards, the Judicial General Council members vote on each candidate (open vote) and the ones supported by the majority are presented to the President of the country for appointment. Judges of first instance and appellate courts are appointed solely by the President, while judges of the Supreme Court are appointed by the President upon introducing the candidates to the Parliament (Article 15.1 of the Law on the Legal Status of Judges). The President can either appoint or reject the proposal. No further details are provided on conditions when the President can reject a proposal, nor on whether the Judicial General Council can resubmit the same candidature to the President.

120. The selection and appointment procedure itself should be open and transparent<sup>224</sup> to ensure the independence of the judiciary, public confidence in judges and the court system. The objective is to ensure that the respective selection/appointment decisions are exclusively based on merit,<sup>225</sup> while ensuring that the selection process triggers acceptance by the community of legal professionals and the public in general.<sup>226</sup>
121. In that respect, the decision-making process of the Judicial General Council requires improvements to ensure a merit-based appointment system in law and in practice. In principle, the public should be able to understand the criteria, general principles and procedure of the appointment process, which therefore need to be made available to the public.<sup>227</sup> First, there is no clear rules regarding the scoring of the candidates and how the evaluation made by the Judicial Qualifications Committee and how the recommendations of the Bar Association come into play when the Judicial General Council ranks the candidates. Moreover, there is no link between the ranking of the candidates made on this basis and the final Council's majority voting of the candidates to be recommended for appointment. Generally, when there is a separate body in charge of assessment of candidates, the competence of the judicial council should be restricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority.<sup>228</sup> **The legal drafters should consider such a modality of limiting the Council's role to verifying the compliance by the Judicial Qualifications Committee with procedural requirements and thus following the ranking proposed by the Committee, unless there are some clear and duly documented written justifications to depart from such a ranking. Alternatively, the Law should clarify the respective weight of the assessments done by the Judicial Qualifications Committee, by the Bar Association and by the Judicial General Council.**
122. Further, the Law does not provide the obligation of the Judicial General Council to provide reasons concerning the selection of candidates recommended for appointment,

<sup>224</sup> *Op. cit.* footnote 18, pars 21-23 (2010 ODIHR [Kyiv Recommendations](#)); *op. cit.* footnote 26, pars 23-32 (2010 Venice Commission Report on the Independence of the Judicial System); and *op. cit.* footnote 19, Articles 4-1, 5-1 and 5-2 (1999 [Universal Charter of the Judge](#)).

<sup>225</sup> *Op. cit.* footnote 24, par 44 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 65, pars 4 and 10 (2007 Venice Commission's Report on Judicial Appointments); and *op. cit.* footnote 11, Principle 10 (1985 [UN Basic Principles on the Independence of the Judiciary](#)), which states that "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".

<sup>226</sup> See e.g., Venice Commission, [Opinion on the Law on Amending and Supplementing the Constitution \(Judiciary\) of the Republic of Moldova](#), CDL-AD(2018)003-e, par 33.

<sup>227</sup> *Op. cit.* footnote 18, par 21 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 120, Principle 9 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges). As a comparison, regarding the evaluation of judges, CCJE, [Opinion no. 17 \(2014\) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence](#), par 48.

<sup>228</sup> *ibid.* par 3 (2010 ODIHR [Kyiv Recommendations](#)).

but only provides for a voting procedure. Such a vote has, in fact, the paradoxical effect of undermining any merit-based selection system, whereas the assessment of the merits of candidates is actually fundamental in the overall process of judicial appointments.<sup>229</sup> Accordingly, **the modalities for selection of the candidates by voting provided in Article 13.2 of the Law on the Legal Status of Judges should be reconsidered altogether.**

123. Moreover, the use of a vote also means that the Judicial General Council does not provide any explanation as to the selected candidates and there is no separate provision regarding the right to challenge the Council's decision before court. This is not in line with recommendations elaborated at the international and regional level whereby to ensure transparency towards judges and society, councils of the judiciary should adopt *reasoned* decisions that demonstrate that the decisions were not arbitrarily adopted.<sup>230</sup> Accordingly, any decisions relating to appointment or promotion of judges should be reasoned with explanation of their grounds, with the possibility for the unsuccessful candidate to challenge the respective decision, which should be subject to judicial review at least on procedural grounds or in case of discrimination.<sup>231</sup> **The Law should provide the Judicial General Council's obligation to issue reasoned decisions on selected candidates explaining the rationale for selecting candidates based on the criteria set in the Law and the right to challenge the Council's decision not to nominate a candidate for judicial position to court at least on legality and procedural grounds, as also recommended by the OECD.**<sup>232</sup> Unless specified in another law, in which case a cross-reference to the said law should be made, **the Law should also clarify the respective procedure for challenging the Council's decision in court.**
124. The Law also does not specify if the candidates are provided the opportunity to examine the Bar Association's assessment prepared in accordance with Article 12.2 of the Law on the Legal Status of Judges and at least respond to them during the interview before the Judicial General Council. **This should be considered by the legal drafters.**
125. As to the President's role in judicial appointment processes, there is a variety of procedures for judicial appointments across the OSCE region.<sup>233</sup> Recommendations elaborated at the regional level emphasize that an undue influence of political interests in the appointment process may be avoided if the authorities in charge of the selection and career of judges are independent of the executive and legislative powers, e.g., if such decisions are made by independent judicial councils or other bodies where at least half of the members are judges appointed by their peers.<sup>234</sup> The aim of these arrangements is

<sup>229</sup> See *op. cit.* footnote 75, pars 60-61 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)). See also e.g., ECtHR, [Guðmundur Andri Ástráðsson v. Iceland](#) (Application no. 26374/18, judgment of 12 March 2019), par 116.

<sup>230</sup> See e.g., *op. cit.* footnote 24, pars 28 and 48 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); footnote 120, Principle 13 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges); and *ibid.*, Indicator no. I.10 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also Venice Commission, [Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts](#), CDL-AD(2018)029-e, par 45, where the Venice Commission noted that it is important to have individual acts adopted by the HCJ, especially those concerning the career of judges, duly reasoned.

<sup>231</sup> See *op. cit.* footnote 75, par 78 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)). See also *op. cit.* footnote 18, par 23 (2010 ODIHR [Kyiv Recommendations](#)); *op. cit.* footnote 24, par 48 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 34, pars 39, 50-51 and 91-93 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); and *op. cit.* footnote 55, pars 17-31 (CCJE Opinion no. 1 (2001)). See also e.g., Venice Commission, [Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD\(2012\)001 on Hungary](#), CDL-AD(2012)020, 15 October 2012, par 56; *op. cit.* footnote 19, Articles 5-2 par 3 (Universal Charter of the Judge); *op. cit.* footnote 210, Indicator no. I.10 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also *op. cit.* footnote 120, Principle 17 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges) which states that "[d]ecisions of the commission should also be reviewable by the courts on established grounds of legality and constitutionality".

<sup>232</sup> See *op. cit.* footnote 5, page 10 and new Recommendation 11 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

<sup>233</sup> *Op. cit.* footnote 67, pars 67-68 (2017 ODIHR [Final Opinion on the National Council of the Judiciary of Poland](#)).

<sup>234</sup> See e.g., *op. cit.* footnote 24, par 46 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)), which states that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers"; *op. cit.* footnote 18, par 8 (2010 ODIHR [Kyiv Recommendations](#)), which states that "apart from a substantial number of judicial members", "[t]he composition [of bodies



to ensure that judges are selected based on candidates' merits rather than on political considerations.<sup>235</sup> The very fact that judges are appointed by the executive does not itself violate the requirements of independence and may be acceptable, providing that the executive body is bound by a proposal made by an independent council and judges<sup>236</sup> and that appointees are free from influence or pressure when carrying out their adjudicatory role.<sup>237</sup> The [2010 ODIHR Kyiv Recommendations](#) suggest that in such a case, President's refusal to appoint a candidate should be based on procedural grounds only and must be reasoned, while also proposing as an option the possibility for the selection body to overrule a presidential veto by a qualified majority vote.<sup>238</sup> However, the Law on the Legal Status of Judges does not seem to provide limitations as to the powers of the President to reject candidates nor to detail the conditions in which the President can reject the proposed candidate, which is especially problematic from the viewpoint of judicial independence.

126. Consequently, in order to reduce the executive influence over judicial appointments and thus protect judicial independence, **it is recommended that the powers of the President in appointing judges be limited to a purely ceremonial role, ensuring that s/he is bound by the proposals made by the Judicial General Council.**<sup>239</sup> Alternatively, the drafters should specify the legal grounds for refusal by the President to appoint a candidate, which should be limited to procedural grounds only, and limit the number of times the President can reject a candidate, while requiring that s/he should provide reasons for the rejection and offering the possibility of the Judicial General Council to recommend again the same candidature and overcome the President's refusal. In the latter case, the proposal of the Council should be binding on the President.<sup>240</sup>
127. As regards appointment of Supreme Court judges, Article 15.1 of the Law on the Legal Status of Judges provides that they are appointed by the President "*after the Judicial General Council recommendation is introduced in the Parliament*". There are no more details provided in the Law on what this procedure exactly entails. In that context, it is of the utmost importance that the influence of partisan politics be prevented when appointing judges to the highest court.<sup>241</sup> Accordingly, the involvement of the Parliament carries with it a risk of politicisation of the appointment process and of public perception of dependence of the elected Supreme Court judges on the legislature.<sup>242</sup> OSCE commitments and soft law elaborated at the international and regional level generally

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*deciding on judicial selection] shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office"; op. cit. footnote 19, par 1.3 (1998 European Charter on the Statute for Judges), which states that "[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"; op. cit. footnote 34, par 48 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)), which stated that "[i]t is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary"; and op. cit. footnote 65, pars 25 and 32 (2007 Venice Commission's [Report on Judicial Appointments](#)), which states that, "a judicial council should have a decisive influence on the appointment and promotion of judges" and that judicial councils should be insulated from politics.*

<sup>235</sup> See *ibid.* par 51 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); *op. cit.* footnote 24, par 44 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); and *op. cit.* footnote 18, par 8 (2010 ODIHR [Kyiv Recommendations](#)).par 8 (2010 ODIHR Kyiv Recommendations).

<sup>236</sup> See *op. cit.* footnote 21, page 59 (2012 ODIHR [Legal Digest of International Fair Trial Rights](#)); and Venice Commission, [Report on Judicial Appointments](#), CDL-AD(2007)028, 22 June 2007, par 14.

<sup>237</sup> See e.g., for the purpose of comparison, ECtHR, [Maktouf and Damjanović v. Bosnia and Herzegovina](#) [GC] (Application nos. 2312/08 and 34179/08, judgment of 18 July 2013), par 49.

<sup>238</sup> *Op. cit.* footnote 18, par 23 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>239</sup> See *op. cit.* footnote 5, new Recommendation 11 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

<sup>240</sup> *Op. cit.* footnote 18, par 29 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>241</sup> *Op. cit.* footnote 75, pars 26-28 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)). See also e.g., [Beijing Statement of Principles of the Independence of the Judiciary](#) (1995), signed by 32 Chief Justices throughout the Asia Pacific region, Principle 12, which states that "[t]he mode of appointment of judges [...] must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed".

<sup>242</sup> *ibid.* See also *op. cit.* footnote 34, par 15 (2015 CCJE Opinion no. 18); pars 33 and 45 (2001 CCJE Opinion No. 1); and *op. cit.* footnote 34, pars 48-51 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)). See also *op. cit.* footnote 65, pars 12 and 29 (2007 Venice Commission's Report on Judicial Appointments).

recommend that judicial appointments, including at the highest court level, be undertaken by independent bodies such as judicial councils.<sup>243</sup> When the appointment of judges to the highest level is the subject of a vote by Parliament, as this is often the case in OSCE participating States, the risk that political considerations prevail over the objective merits of a candidate cannot be excluded.<sup>244</sup> In any case, judicial councils or other independent bodies should have the decisive role when appointing judges, and not the political bodies, which, if they are involved at all, should be able to object only on procedural grounds.<sup>245</sup>

128. In view of the foregoing, to avoid the politicization of judicial appointments, **it is recommended that the drafters exclude the Parliament from the appointment procedure of Supreme Court judges<sup>246</sup> or, at a minimum, that the Parliament's role be limited to scrutinizing the procedural aspects of the selection/nomination undertaken by the Judicial General Council.**<sup>247</sup>
129. Finally, the legal drafters could also refer to ODIHR recent [Opinion on the Selection and Appointment of Supreme Court Judges of Georgia](#), which provides useful guidance on the relevant conditions and procedures according to international and regional standards and recommendations to enhance the openness and transparency of the procedure. In that respect, recommendations elaborated at the international level<sup>248</sup> advise for the vacancy to be readily accessible to candidates and the public at large,<sup>249</sup> in order for the appointment process to be opened to a pool of candidates as diverse and reflective of society as a whole as possible and to reach out to underrepresented persons or groups.<sup>250</sup> Hence, **vacancies for judicial positions should be published in a variety of media such as national newspapers and other relevant professional websites or media, and widely disseminated, while ensuring that such publications are accessible and disability-friendly.**<sup>251</sup>
130. Articles 11.5 and 11.6 provide for the publication of the list of candidates judges and the possibility of the Judicial Qualifications Committee to receive information from the general public on the judicial candidates, for further analysis and presentation to the members of the Judicial General Council. It is generally welcome to allow the involvement of civil society in the selection procedures, which should increase the public trust in such processes. At the same time, relevant international bodies have cautioned against taking public views on a judge into account when evaluating him/her.<sup>252</sup> It is thus important to introduce mechanisms in the Law that would ensure that **all information**

<sup>243</sup> See e.g., *op. cit.* footnote 18, par 7 (2010 Kyiv Recommendations); *op. cit.* footnote 24, par 27 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 19, par 1.3 (1998 European Charter on the Statute for Judges); and *op. cit.* footnote 34, pars 27-30 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>244</sup> See e.g., *op. cit.* footnote 65, pars 12 and 47 (2007 Venice Commission's Report on Judicial Appointments). See also Venice Commission, [Opinion on the Draft Revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017](#), CDL-AD(2017)023-e, par 45.

<sup>245</sup> See *op. cit.* footnote 75, par 28 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)). See also *op. cit.* footnote 18, par 23 (2010 Kyiv Recommendations); *op. cit.* footnote 24, par 47 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 65, pars 10, 12, 25 and 32 (2007 Venice Commission's Report on Judicial Appointments); and *op. cit.* footnote 34, par 49 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)).

<sup>246</sup> See e.g., *ibid.* (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)); and Venice Commission, [Opinion on the Law on amending and supplementing the Constitution of the Republic of Moldova \(Judiciary\)](#), CDL-AD(2018)003, 19 March 2018, par 27.

<sup>247</sup> See e.g., *ibid.* pars 82-87 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)).

<sup>248</sup> *Op. cit.* footnote 18, par 21 (2010 ODIHR [Kyiv Recommendations](#)). See also *op. cit.* footnote 120, Principle 9 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

<sup>249</sup> See e.g., [Istanbul Declaration on Transparency in the Judicial Process](#) (2013); *op. cit.* footnote 12, par 12.3 (2010 [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#)); and *ibid.* Principle 9 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

<sup>250</sup> See e.g., OSCE High Commissioner on National Minorities, [The Graz Recommendations on Access to Justice and National Minorities](#), November 2017, page 25; and *ibid.* Section 13 (2013 Istanbul Declaration on Transparency in the Judicial Process).

<sup>251</sup> This includes, for example, easy-to-read formats, the option to switch on voiceover, sub-titles including sounds and provision of transcripts for audio and video content for persons with visual impairments.

<sup>252</sup> See e.g., 2017 ODIHR [Opinion on the Law of Ukraine on the Judiciary and Status of Judges](#), par 69. See also *op. cit.* footnote 227, par 48 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)); and Venice Commission and CoE DHR-DGI, [Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine](#), CDL-AD(2010)026-e, par 60.

received through public means, can be verified and evaluated,<sup>253</sup> and subject to challenge before the decisions of the Judicial General Council is rendered.

131. Other aspects would be similarly important to be expressly provided in order to increase the transparency of the process. For example, the Law does not provide the obligation of the Judicial General Council to publish its decision on selected candidates and whether the interviews are public – though this should be used with caution. Indeed, while the publicity of selection/appointment processes can help maintain public confidence in the judiciary,<sup>254</sup> when determining to which extent the different phases of the judicial selection/appointment process should be public, the drafters should balance the need to protect the independence of the judiciary and the necessity to ensure public trust in the process.<sup>255</sup> In the context of a particular society, holding interviews of candidates in public may promote legitimacy and credibility of the appointment process, especially when there are allegations of lack of transparency and/or risk of corporatism within the judicial council.<sup>256</sup> At the same time, the questioning during the public hearing should always be conducted in a manner that is respectful and fair to candidates<sup>257</sup> and does not compromise judicial independence. **The Law should at least provide for the publication of the Judicial General Council's decision on selection of judicial candidates and consideration may be given to providing that the interviews should be public.**

### **5.5. Performance Evaluation**

132. It is understood that performance evaluation of judges has been abolished on the grounds of protection of the judicial independence.<sup>258</sup> Mongolian legislation used to provide for the Council's powers to conduct performance evaluation of the judges every three to five years, with the criteria and regulations of such evaluation to be developed by the Judicial General Council and approved by the Chief Judge of the Supreme Court. However, according to a ruling of the Constitutional Court issued in 2015, the respective legislative provisions were declared not compliant with the Article 49, sections 1 and 4, of the Constitution, which guarantee judicial independence and stipulate the scope of the Council's powers.<sup>259</sup>
133. It is important to emphasize that judges' performance evaluations are not *per se* a threat against judicial independence. The impact on judicial independence very much depends on the objectives, criteria, modalities and consequences attached to the evaluation. Generally, some form of evaluation of individual judges<sup>260</sup> is necessary to fulfil two key requirements of any judicial system, namely justice of the highest quality and proper accountability in a democratic society.<sup>261</sup> Generally, evaluations of judges may be used

<sup>253</sup> *ibid.* par 69 (2017 ODIHR [Opinion on the Law of Ukraine on the Judiciary and Status of Judges](#)). See also par 3.5 of CoE, [Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine](#), April 2017.

<sup>254</sup> *Op. cit.* footnote 75, par 54 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)).

<sup>255</sup> *ibid.* par 55.

<sup>256</sup> *ibid.* par 55. See also e.g., *op. cit.* footnote 120, Principle 12 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges). See also *op. cit.* footnote 249, Section 4 (2013 Istanbul Declaration on Transparency in the Judicial Process).

<sup>257</sup> See e.g., *op. cit.* footnote 75, par 62 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)). See also *op. cit.* footnote 26, par 25 (2010 Venice Commission Report on the Independence of the Judicial System), which states that “[t]ransparent procedures and a coherent practice are required”; and *op. cit.* footnote 227, par 11 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)). See also e.g., *ibid.* Principle 12 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

<sup>258</sup> See *op. cit.* footnote 5, page 53 (2019 [OECD Report on Anti-Corruption](#)).

<sup>259</sup> *ibid.* page 53 (2019 [OECD Report on Anti-Corruption](#)).

<sup>260</sup> *Op. cit.* footnote 18, par 28 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>261</sup> See *op. cit.* footnote 34, par 45 (2019 ODIHR [Interim Opinion on Moldova](#)). e.g., *op. cit.* footnote 227, par 49 (1) (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

to help them identify aspects of their work on which they might want to improve and for purposes of possible promotion.<sup>262</sup>

134. As to the entity in charge of evaluation, while a judicial council may play a role in specifying the criteria and the procedure, professional evaluations should be conducted at the local level, by a group of judges from the same or other courts, and not under the exclusive competence of court chairpersons.<sup>263</sup> In terms of modalities and criteria of evaluation, it is important that the evaluation of judges is based exclusively on statutorily pre-determined criteria and is not too frequent,<sup>264</sup> as this may otherwise limit their independence.<sup>265</sup> ODIHR [Kyiv Recommendations](#) emphasize that the evaluation shall be primarily qualitative and focus upon judges' skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), social competence (ability to mediate, respect for the parties) and, for possible promotion to an administrative position, competence to lead.<sup>266</sup> Judges should not be evaluated for the outcome of their decisions or verdicts (either directly or through the calculation of rates of reversal)<sup>267</sup> and statistics on the efficiency of court operations shall be used mainly for administrative purposes and serve as only one of the factors in the evaluation of judges.<sup>268</sup> In order not to jeopardize judicial independence, an unfavourable evaluation *per se* should never lead to a judge's removal from office.<sup>269</sup> Indeed, an evaluation process should primarily aim to improve the work of the judiciary, and as such should be kept clearly separate from the question of removal from office following disciplinary procedures in case of concrete cases of wrongdoing.<sup>270</sup> The evaluation process should enable judges to express their views on their own activities and on the assessment that is made of these activities, and should enable them to challenge an unfavourable evaluation assessments before an independent authority or a court.<sup>271</sup> In any case, the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence<sup>272</sup> and there should be procedural safeguards in place for judges participating in the evaluation procedure.<sup>273</sup> **The legal drafters should, based on a proper assessment that identifies what are the problems to be corrected through evaluation, consider whether to reintroduce a mechanism for performance evaluation of judges drawn up in accordance with the above-mentioned criteria.**

<sup>262</sup> *Op. cit.* footnote 18, par 28 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>263</sup> *ibid.* par 30 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>264</sup> See ODIHR, [Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), 13 June 2014, pars 10.D and 34.

<sup>265</sup> *ibid.* See also e.g., *op. cit.* footnote 227, par 6 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)); and *op. cit.* footnote 26, par 72 (2010 Venice Commission Report on the Independence of the Judicial System).

<sup>266</sup> *Op. cit.* footnote 18, par 27 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>267</sup> *ibid.* par 28 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>268</sup> *ibid.* par 28 (2010 ODIHR [Kyiv Recommendations](#)). For instance, quantitative statistical criteria can be complemented by qualitative statistical methods that classify decisions according to their type, subject and complexity, as seen for instance in Spain (see European Network of Councils for the Judiciary (ENCJ), [Development of Minimal Judicial Standards III: Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary](#) (2012-2013), page 15).

<sup>269</sup> *ibid.* par 28 (2010 ODIHR [Kyiv Recommendations](#)). See also ODIHR, [Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), 13 June 2014, pars 31-33. See also e.g., *op. cit.* footnote 227, par 29 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)). See also ODIHR, [Opinion on the Procedure for Qualification Assessment of Judges of Ukraine](#), 12 November 2015, par 53.

<sup>270</sup> See *op. cit.* footnote 34, par 45 (2019 ODIHR [Interim Opinion on Moldova](#)). See also e.g., *ibid.*, par 29 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)); and par 53 (2015 ODIHR [Opinion on the Procedure for Qualification Assessment of Judges of Ukraine](#)).

<sup>271</sup> See *op. cit.* footnote 18, par 28 (2010 ODIHR [Kyiv Recommendations](#)), which states that there should be opportunities for review of the outcome of the evaluation on appeal; and e.g., *ibid.*, par 41 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)).

<sup>272</sup> *Op. cit.* footnote 55, especially par 45 (CCJE [Opinion no. 1 \(2001\)](#)); and par 34 (CCJE [Opinion No. 6\(2004\)](#)).

<sup>273</sup> See e.g., *op. cit.* footnote 227, par 44 (CCJE [Opinion no. 17 \(2014\) on Judges' Evaluation](#)), where the CCJE emphasizes that "it is important that procedural safeguards are in place for judges participating in the evaluation procedure",



## 5.6. Discipline

135. Articles 31 to 37 of the Law on the Legal Status of Judges regulate disciplinary proceedings against judges, while Article 27 lists the prohibited conducts for judges. At the outset, it is important to emphasize the latest recommendations made by the UN Human Rights Committee that disciplinary procedures and sanctions applicable to judges should be duly established by law.<sup>274</sup>

### 5.6.1. Disciplinary Body

136. Currently, the Judicial Ethics Committee is in charge of disciplinary matters against judges based on complaints from individual citizens, government officials or legal entities (Article 33 of the Law on the Legal Status of Judges) and decides whether to impose disciplinary sanctions or not on a judge upon review and consideration of a disciplinary case (Articles 34 to 37). Article 32.1 of the Law on Judicial Administration provides that the Judicial Ethics Committee shall be the only body in charge of determining whether or not to impose a disciplinary sanction. At the same time, Article 8 of the Law on Judicial Administration provides that the Judicial General Council submits proposals for dismissal of judges to the President. Article 18.3 of the Law on the Legal Status of Judges further states that the Council adopts recommendation for early termination of power of a judge, while Article 37.2 of the Law on the Legal Status of Judges mentions that the Council submit and present the decision on sanction to the President. **It is therefore unclear who is competent to dismiss judges on disciplinary grounds and it should be clarified.** In any case, as mentioned in Sub-Section 4.4.2 *supra*, it is key to ensure a strict separation of duties and responsibilities between an advisory body on ethics and a disciplinary body<sup>275</sup> and it is recommended to completely reconsider the Judicial Ethics Committee's competence and limit it to a purely advisory role on ethical rules and their development (see pars 82-83 *supra*).
137. If a separate disciplinary body is established, it is important that it is independent and not subject to executive control or political influence, composed of a majority of judges though not entirely.<sup>276</sup> In addition, the modalities of appointment of its members should also ensure its independence from the executive and legislative branches. As noted in Sub-Section 4.4.2. *supra*, the existing composition of the body in charge of disciplinary matters against judges (the Judicial Ethics Committee) is not in line with these principles, as three of its members are appointed by the Ministry of Justice and Home Affairs. In general, the composition of a disciplinary body should include judges (who should not be involved in administration, budgeting, or judicial selection), but also non-judges, who are not subject to political influence, in order to avert the risk of judicial corporatism.<sup>277</sup> As mentioned in par 80 *supra*, **the prohibition for judges to be a member of the disciplinary body (Article 32.3 of the Law on Judicial Administration) is problematic and should be reconsidered in its entirety.** Additionally, the majority of its members are not necessarily judges, and the appointment of all members including the Head of the body is made by the President of Mongolia, who has the same level of

<sup>274</sup> See CCPR, [Concluding observations on the sixth periodic report of Mongolia](#), 22 August 2017, par 32.

<sup>275</sup> See *op. cit.* footnote 89, par 30 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>276</sup> According to international standards, in order to safeguard judicial independence, every decision affecting the selection, recruitment, appointment or termination of office of judges should be undertaken by an authority independent of the executive and legislative powers within which at least one half / a majority of those who sit are judges elected by their peers, to prevent outside, possibly undue influence. See e.g., *op. cit.* footnote 19, par 1.3. (1998 [European Charter](#)); *op. cit.* footnote 18, pars 9, 26 and 30 (2010 ODIHR [Kyiv Recommendations](#)); *op. cit.* footnote 24, par 69 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 26, par 50 (2010 Venice Commission Report on the Independence of the Judicial System); *op. cit.* footnote 34, pars 17-18 and 25 (CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#)); and CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), par 71.

<sup>277</sup> *ibid.* par 9 (2010 ODIHR [Kyiv Recommendations](#)). See also *op. cit.* footnote 89, par 76 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

discretion as in other appointments in the judiciary (Article 32.2 of the Law on Judicial Administration). **The legal drafters should avoid conferring any role to the Ministry of Justice and Home Affairs and of the President in the nomination and appointment of the members of the disciplinary body** (see par 84 *supra*), while also ensuring that a majority of the members of such body are judges appointed by their peers.

138. The President also approves the regulations of the Committee (Articles 32.4 and 32.6 of the Law on Judicial Administration). In principle, as clearly stated in the [2010 ODIHR Kyiv Recommendations](#), any kind of control by the executive branch over judicial councils or bodies entrusted with discipline is to be avoided.<sup>278</sup> Hence, **the legal drafters should also remove the President's competence to approve the regulations of the disciplinary body, which should be developed by the disciplinary body itself.**
139. As for the Judicial Qualifications Committee, **the legal drafters should also assess whether a part-time membership in the disciplinary body would allow its members to perform their functions in the most proficient, diligent, effective and timely manner. If not, they may consider introducing full-time membership in this body,** as also recommended by the OECD,<sup>279</sup> providing that this is realistic and not too burdensome in light of the national context.
140. Finally, as for appointment to any public body, gender and diversity considerations should be taken into account when appointing the members of the disciplinary body.<sup>280</sup>

#### *5.6.2. Disciplinary Offences and Grounds for Removals from Office*

141. Article 18 of the Law on the Legal Status of Judges refers to two different terms for ending a judge's mandate: "release" prior to judge's term and "removal" of the judge. The difference between these two procedures, each having specific grounds, is unclear. Unless this is a translation issue and the terminology is clear in Mongolian, the Law should clarify the differences and whether different procedures are applied in the two cases.
142. Article 18.3.2 of the Law on the Legal Status of Judges provides that a judge shall be released if s/he is unable to exercise the power of a judge due to health "*or other valid reasons*". This provision is vague and may lead to arbitrary dismissals.<sup>281</sup> **It is recommended that the term "other valid reasons" is either clarified or excluded from the Law.**
143. The Law on the Legal Status of Judges provides a number of grounds for removal/dismissal of judges, including engagement in activities incompatible with the judge's position; committal of a second disciplinary violation within one year; court decision on convicting the judge of criminal offense; decision on forced medical treatment etc. (Article 18.4). Separately, the Law provides a list of grounds for early release/termination of the judge's powers, such as a written request for dismissal; inability to exercise the judicial power; participation of the judge in political elections; refusal to be transferred to another court in connection with the dissolving or restructuring of the court; moving to another position etc. (Article 18.3). Additionally, Article 27 of the Law enumerates a list of actions that are prohibited for the judges. **The Law does not specifically state that violation of Article 27 may lead to disciplinary**

<sup>278</sup> *ibid.* par 9 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>279</sup> See *op. cit.* footnote 5, new Recommendation 11.9 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

<sup>280</sup> See e.g., *op. cit.* footnote 89, Sub-Section 5.1 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>281</sup> See e.g., for the purpose of comparison, ECtHR, [Oleksandr Volkov v. Ukraine](#) (Application no. 21722/11, judgment of 25 May 2013), pars 174-185 regarding the vague notion of "breach of the judicial oath" as a ground for dismissal.

**responsibility of judges and this should be clarified in the Law.** Also, it appears that some of the behaviours prohibited under Article 27 of the Law somewhat overlap with the grounds for removal/dismissal of judges under Article 18.4. This creates a confusing legal situation where several sets of rules that are overlapping to a certain extent are applicable to the same conduct, which may give rise to questions as to the certainty and foreseeability of the legislation.<sup>282</sup> **The legal drafters should more clearly distinguish the grounds and procedures that may lead to removal/dismissal from those that will lead to disciplinary liability.**<sup>283</sup>

144. It is also not clear what is mean by activities incompatible with the judge's position (Article 18.4.1), and whether this may refer to the prohibited acts listed under Article 27 or other activities. **This should be clarified.** Also, one of the possible grounds for dismissal is the situation where a judge is subject to a disciplinary sanction, within a year of committing a previous one (Article 18.4.2). It is not clear whether this termination of office will be mandatory or subject to a new assessment by the disciplinary body. It is important that the accused judge be provided with procedural safeguards, including the right to present a defence and also the right to appeal to a competent court,<sup>284</sup> in all cases of allegations that s/he may have committed a disciplinary offence, even if it may be a second occurrence. **Article 18.4.2 should thus not be interpreted as providing for a ground for automatic dismissal.**
145. In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague, is a good practice/approach in conformity with international standards.<sup>285</sup> Accordingly, assuming that the behaviours listed under Article 27 amount to disciplinary offences, such a list is welcome and overall reflect the kinds of disciplinary offences generally provided in OSCE countries. At the same time, Article 27 pars 1.11 – 1.14 include a series of prohibitions to judges regarding their relations with foreign governments, institutions, organizations, citizens or international organizations. These are difficult to understand without further context. For example, it is not clear why judges should be prohibited from engaging in research or academic activities funded by foreign countries or international organizations, unless agreed with the courts of the respective countries or with international institutions, as authorised through international treaties to which Mongolia is a State Party. This prohibition, if understood correctly, prohibits Mongolian judges to engage in research or academic studies funded by a foreign university, which does not seem to be justified. Similarly, it is not clear why a judge would be prohibited from receiving any honorary titles, such as academic titles or honouring the promotion of human rights by the respective judge, awarded by foreign governments, public institutions or other organizations. **It is recommended to reconsider the appropriateness of the prohibitions included in Article 27 pars 1.11-1.12, at least, though the legal drafters could for instance consider a duty to inform the Council instead.**
146. Moreover, in light of the importance for judges to ensure equality of treatment to all before the courts, **the legal drafters could also consider supplementing Article 27 by an express reference to situations where judges, by words or conduct, manifest bias or prejudice, or engage in harassment, based upon national or ethnic origin, sex, gender, religion or belief, disability, age, sexual orientation, marital status,**

<sup>282</sup> See, for the purpose of comparison, ECtHR, *Rekvényi v. Hungary* [GC] (Application no. 25390/94, judgment of 20 May 1999), par 34.

<sup>283</sup> See *op. cit.* footnote 5, page 10 and new Recommendation 11 on pages 15-16 (2019 *OECD Report on Anti-Corruption*).

<sup>284</sup> See e.g., *op. cit.* footnote 18, par 26 (2010 ODIHR *Kyiv Recommendations*)

<sup>285</sup> See ODIHR-Venice Commission, *Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova*, CDL-AD(2014)006, par 15; and CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, pars 63-65.

**socioeconomic status, political or social affiliation. They shall also not knowingly let court staff, lawyers, parties to proceedings do so.**<sup>286</sup>

147. Article 31.1 of the Law on the Legal Status of Judges provides that a judge who violated “*intentionally or unintentionally the rule of law and justice principles, as well as ethical rules*” is liable and subject to disciplinary sanctions or legal prosecution as prescribed by law. First, this provision is vague and overly broad to fulfil the requirement of foreseeability, whereby the conduct giving rise to disciplinary action should be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct accordingly.<sup>287</sup> More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application.<sup>288</sup> Furthermore, the broad wording of Article 31.1 could potentially encompass the interpretation of the law, assessment of facts or weighing of evidence by judges. However, these actions are covered by the functional immunity (see Sub-Section 5.3. *supra*) and judges should not be subject to civil or disciplinary liability for such acts, except in cases of malice and gross negligence.<sup>289</sup> Indeed, disciplinary proceedings shall deal with gross misconduct that brings the judiciary into disrepute, and not the content of rulings or verdicts or criticism of courts.<sup>290</sup> Finally, and as mentioned in par 81 *supra*, ethical rules, by their very nature and purpose to provide general recommendations or standards of good behaviour to guide judges, should generally not be equated with a piece of legislation and directly applied as a ground for disciplinary sanctions,<sup>291</sup> also because they often do not fulfil the requirement of foreseeability. Hence, ethical rules should be clearly distinguished from disciplinary rules<sup>292</sup> though there may be certain ethical rules which may be drafted in a clear and precise manner and therefore included in the law as a ground for disciplinary liability. In that respect, Article 32.2 of the Law on the Legal Status of Judges, which also states that the violation of the Code of Ethics shall trigger disciplinary sanction, is likewise problematic.
148. In light of the above, **it is recommended to reconsider Article 31.1 in its entirety and rather to specify, as suggested in par 143 *supra*, that the prohibited acts listed in Article 27 may lead to disciplinary liability. In any case, the provisions of the Law on the Legal Status of Judges, which refer to disciplinary liability or sanctions as the result of the violation of the Code of ethics or ethical rules should be deleted (see Articles 31.1, 32.2, 33.1 and 37.1 of the Law on the Legal Status of Judges).**

### 5.6.3. Suspension and Disciplinary Procedure

149. Article 17.1.8 of the Law on the Legal Status of Judges provides for the judge’s suspension from office on the basis of the Judicial General Council’s recommendation following the issuance of a recommendation by the National Security Council. However,

<sup>286</sup> *Op. cit.* footnote 22, pars 183-191 (2007 UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#)).

<sup>287</sup> See *op. cit.* footnote 13, par 19 (2007 CCPR [General Comment no. 32](#)), which states: “States should take specific measures guaranteeing the independence of the judiciary [...] through the constitution or adoption of laws establishing clear procedures and objective criteria for the [...] dismissal of the members of the judiciary and disciplinary sanctions taken against them”; and ODIHR-Venice Commission, [Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova](#), CDL-AD(2014)006, par 16. See also e.g., for comparison purpose, ECtHR, [N.F. v. Italy](#) (Application no. 37119/97, judgment of 2 August 2001), pars 29-30; and [Volkov v. Ukraine](#) (Application no. 21722/11, judgment of 1 January 2013), par 173ff.

<sup>288</sup> See *op. cit.* footnote 89, par 24 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>289</sup> See ODIHR-Venice Commission, [Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova](#), CDL-AD(2014)006, pars 20-23. See also *op. cit.* footnote 24, pars 66-68 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).

<sup>290</sup> *Op. cit.* footnote 18, par 25 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>291</sup> See references cited in *op. cit.* 136.

<sup>292</sup> See e.g., *op. cit.* footnote 89, pars 25-28 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)). See also CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), pars 60 and 48 (i); and *op. cit.* footnote 24, pars 72-73 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).



no further details are provided regarding the circumstances and modalities of issuance of such a recommendation, and whether it is reasoned and to what extent a judge may have access to the content of such recommendation. It is worth noting that pursuant to Article 33 of the Constitution of Mongolia, such the National Security Council is headed by the President. It also involves the Prime Minister and the Chairperson of the Parliament. This ground for suspension raises concerns of potential undue interference with judges' independence by the executive and potential for abuse. **The drafters should reconsider the involvement of the National Security Council in matters pertaining to the judiciary, or at the very minimum, include strong guarantees to protect judges' independence. This should include in particular a mention that the National Security Council's recommendation is not binding upon the Judicial General Council, and that it should be reasoned and motivated in substance, while specifying the limitative list of circumstances where a judge may be suspended and providing for the judge's right to have access to the content of the National Security Council's recommendation and challenge it (or the suspension) before court. It is also important to note that there is no time limit for suspension and this should be specified in Article 17 of the Law on the Legal Status of Judges, in order not to be abused. As for other decisions of the Council (see Sub-Section 4.3 *supra*), it is important that the suspension decision be subject to judicial review. Indeed, it is worth emphasizing that suspension of a judicial function represents an infringement of a "civil" right and entitles access to an independent tribunal under Article 14 of the ICCPR.**<sup>293</sup>

150. It is important to note that the review of the complaint is carried out by a member of the Judicial Ethics Committee (Article 34.1) while the decision to initiate a disciplinary case is taken by three members (Article 34.2). Then the decision on disciplinary liability is adopted by a majority of the members of the Committee (Article 35.1), and subject to appeal before the appellate court (Article 35.2). It should be pointed out that international recommendations suggest that the functions of initiating disciplinary proceedings and investigating disciplinary matters, on the one hand, and the functions of deciding on the disciplinary liability of a judge, on the other hand, should be carried out by separate bodies.<sup>294</sup> The [2010 ODIHR Kyiv Recommendations](#) specifically state that "*bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them*".<sup>295</sup> In that respect, the Law does not provide such a safeguard as Articles 34 and 35 do not specify that the member who has received the complaint and those who have decided on the initiation of disciplinary proceedings, should not take part in the final decision of the disciplinary body. **It is recommended to amend Articles 34 and 35 accordingly.**
151. Article 18.6 provides that in case of judge's removal (Article 18.4), as well as in cases of exercised influences over the judge (Article 18.5), the judge is dismissed by the President upon the Judicial General Council's recommendation. There are no further details provided in the law regarding the procedure to be followed by the Judicial General Council. While some of the grounds may be straightforward, for instance where the recommendation of the Judicial General Council is based on another decision (e.g., a court decision finding the judge guilty of a criminal offence), other grounds require some assessment and, hence, a certain procedure presenting certain safeguards to protect

<sup>293</sup> See e.g., *op. cit.* footnote 34, par 105 (2019 ODIHR [Interim Opinion on Moldova](#)). See also, for the purpose of comparison, ECtHR, [Paluda v. Slovakia](#) (Application no. 33392/12, judgment 23 May 2017), par 34.

<sup>294</sup> See *op. cit.* footnote 18, par 5 (2010 ODIHR [Kyiv Recommendations](#)), which states: "*In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures*". See also *op. cit.* footnote 24, par 69 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); and pars 68, 69 and 77 of CCJE Opinion 3 (2002).

<sup>295</sup> *ibid.* par 26 (2010 OSCE/ODIHR [Kyiv Recommendations](#)). Kyiv Recommendations on Judicial Independence).

judicial independence and the judge's rights. Indeed, disciplinary procedure fall within the ambit of Article 14 par 1 of the ICCPR, on its civil limb,<sup>296</sup> and the UN Human Rights Committee specifically stated that disciplinary proceedings should be carried out in accordance with fair procedures ensuring objectivity and impartiality.<sup>297</sup>

152. In particular, **nothing is said as to whether the Committee's meetings will be public or not, and this should be clarified.** As stated in the [2010 ODIHR Kyiv Recommendations](#), disciplinary hearings should be open, unless the accused judge requests otherwise, in which case a court shall decide whether to have a closed hearing.<sup>298</sup> In any case, it would be helpful to specify in which circumstances the judge affected by the disciplinary proceedings may request a closed session.<sup>299</sup> In this context, it should be highlighted that OSCE participating States have agreed that proceedings may only be held *in camera* in the circumstances prescribed by law and consistent with obligations under international law and international commitments.<sup>300</sup> Consequently, a closed hearing should not be granted automatically upon the request of the judge but the Committee shall instead decide whether the request is justified<sup>301</sup> and such decision should be taken on a case-by-case basis with a factual assessment of the circumstances, with due consideration of the right of the judge to the protection of his or her honour, privacy and reputation as guaranteed under Article 17 of the ICCPR.<sup>302</sup> Moreover, in order to effectively ensure the publicity of hearings, as applicable, the Committee must make information available to the public regarding the time and venue of such oral hearings<sup>303</sup> and the location must be easily accessible to the public. **The Law should be supplemented accordingly.**
153. Moreover, the Law is silent as to **the right of the judge to be informed in advance and in detail of the nature of the disciplinary charge and the alleged facts of the charge.** The [UN Basic Principles on the Independence of the Judiciary](#) require that “*the judge shall have the opportunity to comment on the complaint at the initial stage*” and that “[*t*]he examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge”.<sup>304</sup> **This should be reflected in the Law.**
154. During the proceeding itself, the principle of equality of arms calls for a “fair balance” between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.<sup>305</sup> **It would be advisable to supplement the Law in that respect.** Additionally, the Law should also state expressly that the judge subject to the disciplinary proceedings **shall be present or represented at the disciplinary**

<sup>296</sup> See e.g., *op. cit.* footnote 89, par 105 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>297</sup> See *op. cit.* footnote 13, par 20 (2007 UNHRC [General Comment no. 32](#)).

<sup>298</sup> *Op. cit.* footnote 18, par 26 (2010 ODIHR [Kyiv Recommendations](#)). Specifically, the ODIHR and the Venice Commission recommend that “a closed hearing should not be granted automatically upon the request of the judge” but upon a case-by-case basis. See *op. cit.* footnote 89, par 106 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>299</sup> See e.g., *ibid.* par 106.

<sup>300</sup> See par 12 of Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

<sup>301</sup> *Op. cit.* footnote 18, par 26 (2010 ODIHR [Kyiv Recommendations](#)). See also ECtHR, [Diennet v. France](#) (Application no. 18160/91, judgment of 26 September 1995).

<sup>302</sup> See e.g., *op. cit.* footnote 89, par 106 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>303</sup> See CCPR, [Van Meurs v. the Netherlands](#), Human Rights Committee Communication no. 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990), par 6.2.

<sup>304</sup> See *op. cit.* footnote 11, Principle 17 (1985 [UN Basic Principles on the Independence of the Judiciary](#)).

<sup>305</sup> See e.g., *op. cit.* footnote 89, par 107 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)). See also, for reference, ECtHR, [Werner v. Austria](#) (Application no. 21835/93, judgment of 24 November 1997), par 63.

hearing<sup>306</sup> and shall be assisted by a lawyer of his or her choice.<sup>307</sup> The Law should be supplemented accordingly.

155. It is also key that the decision adopted by the Committee pursuant to Article 35.1 of the Law on the Legal Status of Judges be motivated and state the essential findings, evidence and legal reasoning,<sup>308</sup> so that the judge or the complainant may evaluate the legality of the decision taken, as well as analyse the possibility to successfully achieve the desired result by means of an appeal.<sup>309</sup> Moreover, as recommended in the [2010 ODIHR Kyiv Recommendations](#), the Law should specify that final decisions on disciplinary measures shall be published.<sup>310</sup> **These aspects should be reflected in Article 35 of the Law on the Legal Status of Judges.**
156. Articles 18.6 and 37.2 of the Law on the Legal Status of Judges provides that in case of dismissal, the Judicial General Council shall submit and present it to the President. It is unclear whether the powers of the President in that respect are merely ceremonial. Generally, the involvement of the executive/the President in the disciplinary proceedings against judges seriously undermines judicial independence and contradicts the principle of separation of powers.<sup>311</sup> The [2010 ODIHR Kyiv Recommendations](#) specifically state that “[b]odies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline [and] [a]ny kind of control by the executive branch over judicial councils or bodies entrusted with discipline is to be avoided”.<sup>312</sup> **Unless the President’s power is only ceremonial regarding the dismissal of judges, such power should be reconsidered in its entirety. As to the Parliament and President’s powers provided in Article 18.6 and Article 18.7 respectively, it is recommended that the President’s role be limited to simply issuing the dismissal decree as a mirror to the appointment competence, if kept, without any competencies to decide on the merits of the case. If the above recommendation to exclude the Parliament’s role in the appointment of Supreme Court judges is accepted, then the Parliament should be removed from this procedure as well. In any event, the Parliament should not have but a formal role in judges’ dismissal procedure.**

#### 5.6.4. Disciplinary Sanctions

157. Article 37.1 of the Law on the Legal Status of Judges provides three possible disciplinary sanctions to be applied for judges: warning; reduction of a salary for up to 30 percent during a period for up to six months and dismissal from his/her official position. The Law does not provide that the sanction to be applied should be proportional to the offense committed. **It is recommended that the principle of proportionality of disciplinary sanctions is expressly provided in the law, for instance by expressly stating that disciplinary measures must be in proportion to the gravity of the infraction**

<sup>306</sup> See CCPR, [Aarela and Nakkalajarvi v. Finland](#), Communication no. 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001), par 7.4. See also, for reference, *op. cit.* footnote 19, par 5.1. (1998 [European Charter](#)): “the judge proceeded against must be entitled to representation”.

<sup>307</sup> See CCPR, [Kulov v. Kyrgyzstan](#), Communication 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), par 8.7. See also par 13.9 of the [OSCE Concluding Document of the Vienna Meeting](#), Vienna 1989.

<sup>308</sup> *Op. cit.* footnote 18, See par 26 (2010 of the OSCE/ODIHR [Kyiv Recommendations](#)), which states: “[t]he decisions regarding judicial discipline shall provide reasons”. See also par 29 of General Comment no. 12 of the Human Rights Committee. See also e.g. in the case of a decision on disciplinary responsibility taken by a Bar Council, ECtHR, [H. v. Belgium](#) (Application no. 8950/80, judgment of 30 November 1987), par 53.

<sup>309</sup> See *op. cit.* footnote 18, par 26 (2010 ODIHR [Kyiv Recommendations](#)); and e.g., *op. cit.* footnote 89, par 108 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>310</sup> *ibid.* par 26 (2010 ODIHR [Kyiv Recommendations](#)); and *op. cit.* footnote 13, par 29 (2007 CCPR [General Comment no. 32](#)).

<sup>311</sup> *ibid.* par 26 (2010 ODIHR [Kyiv Recommendations](#)); and par 29 (2007 CCPR [General Comment no. 32](#)).

<sup>312</sup> See e.g., OHCHR, [Human Rights in the Administration of Justice - A Manual on Human Rights for Judges, Prosecutors and Lawyers](#) (2008 Addendum), page 8, point 4.6. See also ODIHR, [Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland \(as of 26 September 2017\)](#), 13 November 2017, par 119.

<sup>312</sup> *Op. cit.* footnote 18, par 9 (2010 ODIHR [Kyiv Recommendations](#)).

**committed**,<sup>313</sup> unless a referral to the criminal procedural code is made and the principles are expressed therein.

158. Moreover, having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality when the competent body has to decide on a sanction.<sup>314</sup> From this point of view, **the drafters should consider supplementing Article 37.1 with other possible types of disciplinary sanctions**, as is done in most jurisdictions. These could encompass e.g., downgrading or demotion, suspension of promotion, removal of certain honorary privileges, transfer to another judicial office,<sup>315</sup> temporary suspension from office, as well as distinguishing between early dismissal with or without pension benefits.<sup>316</sup>

#### *5.6.5. Appeal against Disciplinary Sanctions*

159. The Law on the Legal Status of Judges is silent as to the possibility to appeal the decisions of the disciplinary body. According to international standards, everyone should have an effective means of redress against administrative decisions.<sup>317</sup> Also, providing for a possibility to appeal the decision of a judicial council or similar bodies on matters relating to discipline is in line with international and regional recommendations.<sup>318</sup> Especially when disciplinary sanctions are imposed on judges, this constitutes an important safeguard for the judges' independence and the independence of the judiciary overall. The approach of ODIHR has traditionally been to provide for the possibility to challenge the decisions of disciplinary bodies against judges<sup>319</sup> before a court irrespective of the fact that such disciplinary bodies may or may not themselves be considered as "tribunal" under Article 14 par 1 of the ICCPR. If a "tribunal" can indeed fully examine the merits of the case that lead to removal, then the judge subject to the decision of removal will be considered to have had access to a court under the domestic system, in compliance with Article 14 par 1 of the ICCPR.<sup>320</sup> **The Law on the Legal Status of Judges should provide for the possibility to challenge before a court the imposition of a disciplinary sanction by the disciplinary body. The imposition of such sanctions should be suspended pending final appeal and decision of the appellate body.**

#### *5.7. Training of Judges*

160. International human rights monitoring bodies have emphasized the importance of (mandatory) training of judges in Mongolia, especially on international human rights treaties;<sup>321</sup> on the absolute prohibition of torture;<sup>322</sup> on the legislation criminalizing violence against women, domestic violence and human trafficking, and the

<sup>313</sup> See e.g., *op. cit.* footnote 89, par 66 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>314</sup> *ibid.* par 64.

<sup>315</sup> See *op. cit.* footnote 24, par 52 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)), which provides that "[a] judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system".

<sup>316</sup> See e.g., *op. cit.* footnote 89, par 64 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>317</sup> CSCE/OSCE, [1990 Copenhagen Document](#), par 5.10.

<sup>318</sup> See e.g., *op. cit.* footnote 18, par 26 (2010 ODIHR [Kyiv Recommendations](#)), which suggests the right to appeal to a competent court. See also *op. cit.* footnote 11, Principle 10 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); and, for the purpose of comparison, *op. cit.* footnote 144, par 77 (v) (2002 CCJE [Opinion no. 3](#)).

<sup>319</sup> See *op. cit.* footnote 18, par 26 (2010 ODIHR [Kyiv Recommendations](#)); and par 111 (2014 [Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic](#)). See also Venice Commission, [Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania](#), 21 December 2015, par 116.

<sup>320</sup> See *op. cit.* footnote 89, par 113 (2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#)).

<sup>321</sup> See CCPR, [Concluding observations on the sixth periodic report of Mongolia](#), 22 August 2017, par 6.

<sup>322</sup> UN Committee against Torture, [Concluding observations on the second periodic report of Mongolia](#), 5 September 2016.



vulnerabilities of victims;<sup>323</sup> on the recognition of the legal capacity of persons with disabilities and on the mechanisms of supported decision-making;<sup>324</sup> and on ethics, anti-corruption and integrity,<sup>325</sup> among others. **These aspects could be specifically mentioned in Article 10.1.4 of the Law on Judicial Administration when mentioning the professional development/training for judges.**

## **6. Court Chairpersons and Supreme Court Chambers' Presidents**

### **6.1. Appointment of Chief Judges**

161. According to Article 15.4 of the Law on the Legal Status of Judges, the President shall appoint chief judges of the other courts for a term of three years and may re-appoint them once. Article 12.4 of the Law on Courts provides that the President shall appoint chief judges for all courts, except for the chief justice of the Supreme Court, upon a proposal from the Judicial General Council. Article 14.2 of the Law on the Legal Status of Judges, referring to the applicable of Article 10, seems to imply that the Judicial General Council will also be responsible for the nomination and selection of chief judges. **Overall, the wording of both laws could be better streamlined to avoid inconsistencies and confusion, and avoid somewhat overlapping provisions. In particular, the respective roles of the Judicial General Council and of the President in the appointment of chief judges of other courts should be more clearly specified.**
162. It is not clear from Article 15.4 of the Law on the Legal Status of Judges whether the President's appointment of the chief judges of the other courts – first instance and appellate courts – has to follow the recommendation of the Judicial General Council and, hence, is a mere formal/procedural appointment by the President or whether the President selects and appoints chief judges at will. The latter especially raises important concerns regarding the internal independence of judges and courts, since it may result in excessive influence of the executive over the administration of the judiciary. This may in turn have a negative effect on judicial independence since this may imply a type of hierarchical relationship between the President and the appointed presidents.
163. It is generally considered that the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges in general, including a process of evaluation of the candidates by the independent body having the authority to select and/or appoint judges based on pre-established objective criteria to ensure that their selection is based on merits, while ensuring that the candidates also demonstrate some managerial competences.<sup>326</sup> In that respect, the legislation does not mention any additional requirement beyond those applicable to judges in general (Article 14.1 of the Law on the Legal Status of Judges). Moreover, judges of the court in question could be involved in the process, in the form of a binding or advisory vote,<sup>327</sup> or by directly electing the court president.<sup>328</sup>
164. In light of the foregoing, **it is therefore recommended that chief judges be appointed in a manner similar to other judges, with the involvement of the Judicial General Council, taking into consideration the views from the local bench, and with a mere**

<sup>323</sup> *ibid.* pars 23-24, 28 (f) and 38 (a) (UNCAT). See also *op. cit.* footnote 73, par 19 (b) (2016 CEDAW [Concluding observations on Mongolia](#)); and CESCR, [Concluding observations on the fourth periodic report of Mongolia](#), 7 July 2015, par 21.

<sup>324</sup> UN CRPD, [Concluding observations on the initial report of Mongolia](#), 13 May 2015, par 21.

<sup>325</sup> See *op. cit.* footnote 5, page 10 (2019 [OECD Report on Anti-Corruption](#)).

<sup>326</sup> *Op. cit.* footnote 18, par 16 (2010 ODIHR [Kyiv Recommendations](#)); and see e.g., for the purpose of comparison, CCJE, [Opinion No. 19 on the Role of Court Presidents](#), 10 November 2016, par 38.

<sup>327</sup> *ibid.* par 16 (2010 ODIHR [Kyiv Recommendations](#)); and *ibid.* par 38 (2016 CCJE [Opinion No. 19 on the Role of Court Presidents](#)).

<sup>328</sup> See e.g., Venice Commission and DGI, [Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia](#), CDL-AD(2014)031, 14 October 2014, par 84.

formal/procedural appointment by the President. Another good option could be to have the judges of the particular court elect the court chairperson, as also recommended by the OECD.<sup>329</sup> In any case, the recommendations concerning judicial appointments in general made in Sub-Section 5.3 *supra* would be similarly applicable.

165. It is also important to emphasize that the selection of chief judges should be transparent and open, with the vacancies being published and all judges with the necessary seniority/experience being able to apply.<sup>330</sup> It is also worth reiterating here the recommendation made to Mongolia regarding the need to strengthen its efforts to increase representation of women in the public and private sectors, especially in senior managerial positions.<sup>331</sup> **Consequently, the drafters should also consider introducing a mechanism to ensure that the relative representation of women and men as chief judges in the judiciary in Mongolia (as well as of under-represented persons or groups, especially minorities and persons with disabilities), is taken into consideration when ranking candidates though not at the expense of the basic criterion of merit** (see examples of such mechanisms in par 118 *supra*).

## 6.2. Appointment of the Chief Justice of the Supreme Court

166. The appointment of the Chief Justice of the Supreme Court is regulated by Article 12.3 of the Law on Courts and Article 15.3 of the Law on the Legal Status of Judges. Accordingly, the Chief Justice of the Supreme Court is appointed for a term of six years by the President among Supreme Court judges based on the recommendation of the Supreme Court. **It is unclear whether the Chief Justice can be re-appointed and this should be clarified. The procedure for nomination by the Supreme Court is not provided, nor the voting modalities, if any, and this should be specified to avoid uncertainty or abuse of the process.**
167. Moreover, this procedure raises concerns similar to the ones raised above regarding the President's powers to appoint judges, namely whether the President is bound by the Supreme Court judges' recommendation or not, and the extent to which the President has to follow their recommendation. It is essential that the modalities of selection and appointment of the Chief Justice of the Supreme Court, as the highest court of the country, should formally rule out any possibility of political influence.<sup>332</sup> Accordingly, as mentioned in par 126 *supra* concerning judicial appointments, **the powers of the President in appointing judges should be limited to a purely ceremonial role.** Alternatively, as stated in the [2010 ODIHR Kyiv Recommendations](#), in case of executive appointment of court chairpersons, **an advisory body (such as the general assembly of Supreme Court judges in this case) should be entitled to make a recommendation which the executive may only reject by reasoned decision, in which case, the advisory body may recommend a different candidate or may be able to override the executive veto by qualified majority vote.**<sup>333</sup> Article 12.3 of the Law on Courts and Article 15.3 of the Law on the Legal Status of Judges should be amended accordingly.

<sup>329</sup> See *op. cit.* footnote 5, new Recommendation 11 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

<sup>330</sup> *Op. cit.* footnote 18, par 16 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>331</sup> See CCPR, [Concluding observations on the sixth periodic report of Mongolia](#), 22 August 2017, par 10.

<sup>332</sup> See e.g., *op. cit.* footnote 75, par 88 (2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#)); and also, for the purpose of comparison, CCJE, [Opinion No. 19 on the Role of Court Presidents](#), 10 November 2016, par 53.

<sup>333</sup> *Op. cit.* footnote 18, par 16 (2010 ODIHR [Kyiv Recommendations](#)).

### 6.3. Role and Powers of Chief Judges and Supreme Court Chambers' Presidents

168. It is welcome that Article 6.3 of the Law on Courts of Mongolia expressly states that chief judges shall be prohibited from interfering in adjudication process by any judge, and from issuing directives, guidelines or from assignment of a case to a particular judge in relation to this process, or in any other manner. This is in line with international recommendations that provide that court chairpersons must not interfere with the adjudication by other judges.<sup>334</sup>
169. Article 12.2 of the Law on Courts specifies that a chief judge shall head the respective court and Article 13 further lists the powers of chief judges, including the representation of the respective courts, prerogatives concerning judges' meetings, relations with the public and handling petitions and complaints as well as the chairing of court hearings and decisions on appointment of chair of court hearing and/or bench of judges. It is generally welcome that court presidents, after appointment, continue to perform as judges in order to ensure their continuing professionalism, to maintain contact with other judges in accordance but also to best fulfil their organizational role through direct awareness of issues arising in daily practice.<sup>335</sup> At the same time, they should do so with strict respect to the principle of judicial independence, especially internal judicial independence, and in accordance with the principle of *primus inter pares*.<sup>336</sup> Court chairpersons' role should be limited to assuming judicial functions which are equivalent to those exercised by other members of the court<sup>337</sup> and administrative decisions which may affect substantive adjudication should not be within their exclusive competence.<sup>338</sup>
170. In that respect, it is understood that the powers of chief justices have been reduced with the adoption of new legislation,<sup>339</sup> which is welcome. At the same time, Article 12.2 still empowers them to decide on appointment of a chair of a court hearing and a bench of judges, which may ultimately have an impact on substantive adjudication and on the internal independence of judges. Also, the Law does not provide clear criteria regarding the performance of such prerogatives. **It is therefore recommended to remove the powers of chief judges to approve the decision on appointment of a chair of court hearing and of a bench of judges, as also recommended by the OECD.**<sup>340</sup>
171. Article 13.1.3 of the Law on Courts also provides that chief judges shall have the power "to chair a court hearing". No further details are provided. A similar provision is included in Article 14.1.3 regarding the powers of a presiding judge a Supreme Court's chamber, who has the power "to chair a court hearing in accordance with the procedure stipulated in the law". It is not clear whether these provisions mean that they preside over all court hearings in the respective court/chamber or only the hearings in the specific cases the chief judge/chamber president is directly involved in. Both interpretations would be problematic, since such a power immediately confers a special status to the chief judge/chamber president when examining and adjudicating on disputes, by assigning them, by default, a court or chamber hearings' chair function, which should not be the case. **This should be clarified or reconsidered.**
172. Article 18.2 of the Law on Courts provides that the Chief Justice of the Supreme Court "shall participate in court hearings of any chamber of the Supreme Court" and Article 21.1.4 provides that chief judges of the appellate courts "shall participate in adjudication

<sup>334</sup> *ibid.* par 11 (2010 ODIHR [Kyiv Recommendations](#)); see also e.g., *op. cit.* footnote 332, par 13 (2016 CCJE [Opinion no. 19 on the Role of Court Presidents](#)).

<sup>335</sup> *ibid.* par 15 (2016 CCJE [Opinion no. 19 on the Role of Court Presidents](#)).

<sup>336</sup> *ibid.* pars 13-17 (2016 CCJE Opinion no. 19).

<sup>337</sup> *Op. cit.* footnote 18, par 11 (2010 ODIHR [Kyiv Recommendations](#)).Kyiv Recommendations on Judicial Independence).

<sup>338</sup> *ibid.* par 12 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>339</sup> See *op. cit.* footnote 5, page 62 (2019 [OECD Report on Anti-Corruption](#)).

<sup>340</sup> *ibid.* new Recommendation 11 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

*process of any chamber at the same court*”. As for chief judges of other courts, chief justices of the Supreme Court and of appellate courts should not have a different or dominant role in the cases they participate in. They may only assume judicial functions, which are equivalent to those exercised by other members of the court,<sup>341</sup> in accordance with the principle *primus inter pares*. As such, the differentiated approach regarding the participation of chief judges of the Supreme Court and appellate courts in *any* chamber as opposed to other judges who shall only participate in the work of their assigned chambers clearly puts chief judges in a different position in the exercise of their judicial function. It is unclear from the wording of these provisions whether chief judges may choose to participate in, or even chair, the hearings/cases of interest at will. In principle, to avoid undue interference by chief justices in the adjudication of cases, the participation of chief justices in cases should follow the general rules of objective or random assignment of cases (see Sub-Section 8.1 *infra*), to preclude any practices by which the chief judges just choose to chair/participate in the hearings or cases of interest. **The Law on Courts should be clarified in that respect, to avoid such interpretations, and Article 18.2 and 21.1.4 of the Law on Courts should be reconsidered.**

173. Articles 18.1.2 and 21.1.3 of the Law on Courts provide the Chief Justice of the Supreme Court and the chief judges of the appellate courts with the power to review and resolve disputes over the jurisdiction of the lower courts or chambers, in the case of the Supreme Court). This prerogative goes beyond a mere administrative competence and involves a core judicial function, as such disputes usually entail interpretation of the law or at least the circumstances of the conflict over jurisdiction. Assigning such an important judiciary function to the chief judges alone, rather than to a panel of judges or to any judge based on random assignment of cases, puts the chief judges in a special or more privileged position compared to other judges. As mentioned above, the [2010 ODIHR Kyiv Recommendations](#) recommend that court chairpersons assume judicial functions equivalent to those exercised by other members of the court.<sup>342</sup> **This special prerogative should therefore be reconsidered.**
174. Finally, according to Article 14 of the Law on Courts, presiding judges of the Supreme Court’s chambers are empowered to “*supervise the work*” of the respective chambers. These supervisory powers appear to leave open the possibilities for influencing judges sitting in these chambers, thus potentially jeopardizing their judicial independence. **It is therefore recommended to remove such powers from Article 14 of the Law on Courts**, as also recommended by the OECD.<sup>343</sup> This of course should not prevent the presiding judges from having a casting vote in case of a tie vote among judges of that chamber.

## **7. Judicial Personnel / Court Staff**

175. Article 25.1 of the Law on Judicial Administration provides that judicial administrative staff shall be comprised of assistant judges, secretary of the court hearings, and the staff members of court secretariats. It is important to emphasize that assistant judges, by supporting judges in their adjudicative process, are involved in the exercise of judicial tasks and as such, must comply with the highest professional and ethical standards, and respect and promote judicial independence.<sup>344</sup> The regulation of their duties, their legal rights and status must ensure that their dual role as part of court administration and

<sup>341</sup> *Op. cit.* footnote 18, par 11 (2010 ODIHR [Kyiv Recommendations](#)).

<sup>342</sup> *ibid.* par 11.

<sup>343</sup> See *op. cit.* footnote 5, new Recommendation 11 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

<sup>344</sup> See e.g., for the purpose of comparison, CCJE, [Opinion no. 22 \(2019\) on the Role of Judicial Assistants](#), pars 19 and 57.



supporting judges in their adjudicative functions, is neither abused from outside nor from inside the judiciary, meaning that in case of conflicting orders from the judge working on a concrete case and from the court administration, the decision of the judge must be respected.<sup>345</sup> Hence, **it may be important to specify that assistant judges are not subordinated to the chiefs of secretariat.**

176. Article 27.4 of the Law on Courts not only prohibits judges but also “*court staff, with a function to assist in the implementation of judicial proceedings*”, to be a member of any political party or “*political movement*”. As mentioned in par 101 *supra*, the term “*political movement*” is vague and should be avoided. It is also unclear what is meant by “*with a function to assist in the implementation of judicial proceedings*”, which could potentially cover a wide range of court staff, from judicial assistants, secretaries of court sessions and other judicial administrative staff. The prohibition of political party membership of court staff would appear legitimate regarding staff who directly support judges or panels of judges in their adjudicative work.<sup>346</sup> In such cases, the parties coming to court will indeed expect impartiality not only from the judge hearing their case but also from a judicial assistant supporting the judge working on the case,<sup>347</sup> which means that in terms of political party membership, similar limitations as those applicable to judges may be justifiable. Apart from this, the high standards of impartiality applied to judges should not be applicable to other court staff who are not involve in the adjudicative work, except if this could potentially jeopardize their more general duty of neutrality. Indeed, ODIHR and the Venice Commission have specifically acknowledged the possibility of imposing restrictions on the exercise of the right to freedom of association of some public officials in cases “*where forming or joining an association would conflict with the public duties and/or jeopardize the political neutrality of the public officials concerned*”.<sup>348</sup> Consequently, **the above-mentioned limitation should be more clearly circumscribed in light of the foregoing.**
177. If not provided by other legislation, a number of other limitations should also be applicable to court staff. This involves, among others, an express prohibition to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with one’s duties or functions.<sup>349</sup> Similarly, certain specific obligations could be usefully specified in the Law, such as **the duty of court staff to discharge their functions with due respect for the principle of equal treatment of parties, especially by avoiding any bias or discrimination and any form of harassment, including sexual harassment.**<sup>350</sup>

## 8. Additional Comments

### 8.1. Case Assignment

178. Article 6.3 of the Law on Courts specifies that a chief judge shall be prohibited from assigning a case to a particular judge, which is welcome. At the same time, the rules concerning the assignment of cases are unclear. It is understood that, in practice, the assignment of cases is regulated by secondary legislation and that all cases are randomly distributed to judges by a special system and without any undue interference.<sup>351</sup> To

<sup>345</sup> *ibid.* par 57 (2019 CCJE Opinion no. 22).

<sup>346</sup> *ibid.* par 4 (2019 CCJE Opinion no. 22).

<sup>347</sup> *ibid.* par 55 (2019 CCJE Opinion no. 22).

<sup>348</sup> See e.g., ODIHR-Venice Commission, [Joint Guidelines on Freedom of Association](#) (2014), par 144.

<sup>349</sup> See *op. cit.* footnote 22, Principle 4.15 (2007 UNODC [Commentary on the Bangalore Principles of Judicial Conduct](#)).

<sup>350</sup> *ibid.* pars 183-185.

<sup>351</sup> See *op. cit.* footnote 5, page 57 (2019 [OECD Report on Anti-Corruption](#)).

protect judicial independence and also prevent corruption, it is important to ensure that case assignment cannot be influenced in any manner, and that it should therefore be either random or organized on the basis of predetermined, clear, transparent and objective criteria.<sup>352</sup> In principle, the general rules on allocation of cases to individual judges, including exceptions, should be formulated by the law or by special regulations on the basis of the law, based on such criteria.<sup>353</sup> Indeed, if the court presidents have the power to influence the assignment of cases among the individual judges, this could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only certain specific cases, which may ultimately be a very effective way of influencing the outcome of the process.<sup>354</sup> Proper rules and procedures will render external interference more difficult.<sup>355</sup>

179. A variety of considerations should be taken into account in that respect, such as the importance of ensuring that the cases are heard within a reasonable time, while ensuring that this is balanced with other considerations such as the possibly urgent nature of a case, or its importance in political and social terms, the complexity of a case (which may require participation of judges who are expert in that area), the specialization of judges, their workload – to ensure a fair distribution of work among judges, as well as the more general principle of the good administration of justice.<sup>356</sup> Although it may not always be possible to establish a fully comprehensive abstract system that applies in all cases, exceptions should be justified and the criteria for decisions on case allocation taken by the court president shall be defined in advance on the basis of objective criteria.<sup>357</sup> Once adopted, a distribution mechanism may not be interfered with.<sup>358</sup>
180. Article 25.2.8 of the Law on Courts provides that the Consultative Session of Judges, existing at each court, approves the regulations for case distribution. This provision implies that each court has its own case assignment system, which may be problematic, especially when considering the increased and constantly growing workload of judges, which may open space for corruption risks, as emphasized by the OECD.<sup>359</sup> This may also create disparities across the country in terms of the handling of individual cases, and potential for corrupt practices due to case assignment systems that may be more easily manipulated. In that respect, **the OECD specifically recommended to introduce through the law an automatic random distribution of cases.**<sup>360</sup> **ODIHR supports this recommendation, or at a minimum, the drafters should supplement the primary legislation with clear and objective criteria, which would be applicable to all courts, and Law on Courts should be amended accordingly.**

## **8.2. Motivation of Courts' Decisions**

181. Article 31.1 of the Law on Courts provides that the courts shall render their decisions on behalf of Mongolia. However, nothing is said in the Law on the duty to properly motivate the decisions. Judgments of courts and tribunals should adequately state the reasons on which they are based, especially with regard to essential findings, evidence and legal

<sup>352</sup> See *op. cit.* footnote 18, par 12 (2010 ODIHR [Kvív Recommendations](#)). See also *op. cit.* footnote 19, Articles 3-4 (1999 [Universal Charter of the Judge](#)).

<sup>353</sup> *Op. cit.* footnote 26, pars 80-81 (2010 Venice Commission's Report on the Independence of the Judicial System).

<sup>354</sup> *ibid.* par 79 (2010 Venice Commission's Report on the Independence of the Judicial System).

<sup>355</sup> See *op. cit.* footnote 21, pages 60-61 (2012 ODIHR [Legal Digest of International Fair Trial Rights](#)).

<sup>356</sup> See e.g., although in cases of constitutional justice, ECtHR, [Stöckmann v. Germany](#) (Application no. 20024/92, judgment of 16 September 1996), par 56; and Venice Commission, [Opinion on the Amendments to the Act of 25 June 2015 of the Constitutional Tribunal of Poland](#), CDL-AD(2016)001, 11 March 2016, pars 54-66.

<sup>357</sup> See e.g., Venice Commission, [Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary](#), CDL-AD(2012)001, 19 March 2012, par 91.

<sup>358</sup> See *op. cit.* footnote 18, par 12 (2010 ODIHR [Kvív Recommendations](#)).

<sup>359</sup> See *op. cit.* footnote 5, page 58 (2019 [OECD Report on Anti-Corruption](#)).

<sup>360</sup> *ibid.* new Recommendation 11 on pages 15-16 (2019 [OECD Report on Anti-Corruption](#)).

reasoning.<sup>361</sup> This is key as this requirement contributes to certainty about the interpretation and application of the law, allows parties to judicial proceedings to determine whether or not there are grounds to appeal a court's decision, serves the purpose of demonstrating to the parties that they have been heard and allows public scrutiny of the administration of justice, among others.<sup>362</sup> It is recommended to specify under Article 31 of the Law on Courts that the decisions should be properly motivated in terms of essential findings, evidence and legal reasoning.

### **8.3. Protection of Privacy of the Parties to Cases**

182. It is welcome that courts' decisions are published (Article 31.6 of the Law on Courts),<sup>363</sup> as it is a way to ensure greater transparency of the justice system and to pursue the above-mentioned objectives (see par 181 *supra*). At the same time, the online availability of certain judicial decisions could place privacy rights of individuals at risk and jeopardize the interests of companies, therefore justifying that appropriate measures are taken for safeguarding private data,<sup>364</sup> including by considering anonymizing court decisions, for instance. **The legal drafters should consider including such a caveat under Article 31 of the Law on Courts.**

## **9. Final Comments on the Process of Preparing and Adopting Draft Amendments to the Legal Framework relating to the Judiciary in Mongolia**

183. OSCE participating States have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, par 5.8).<sup>365</sup> Moreover, key OSCE commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, par 18.1).<sup>366</sup>
184. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.<sup>367</sup> Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation;<sup>368</sup> the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.<sup>369</sup> To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,<sup>370</sup> meaning not only when

<sup>361</sup> See e.g., *op. cit.* footnote 13, par 29 (2007 CCPR *General Comment no. 32*); and *op. cit.* footnote 21, pages 209-211 (2012 ODIHR *Legal Digest of International Fair Trial Rights*). See also, for the purpose of comparison, CCJE, *Opinion no. 11 (2008) on the Quality of Judicial Decisions*, pars 31-50.

<sup>362</sup> *ibid.* pages 210-211 (2012 ODIHR *Legal Digest of International Fair Trial Rights*); and par 31 (2008 CCJE Opinion no. 11).

<sup>363</sup> See e.g., *op. cit.* footnote 18, par 32 (2010 ODIHR *Kyiv Recommendations*)

<sup>364</sup> See e.g., CCJE, *Opinion no.14 (2011) on Justice and Information Technologies*, par 17.

<sup>365</sup> Available at <<http://www.osce.org/fr/odihr/elections/14304><http://www.osce.org/fr/odihr/elections/14304>>.

<sup>366</sup> Available at <<http://www.osce.org/fr/odihr/elections/14310><http://www.osce.org/fr/odihr/elections/14310>>.

<sup>367</sup> *ibid.*

<sup>368</sup> According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, *Opinion on the Draft Law of Ukraine “On Public Consultations”* (1 September 2016), pars 40-41.

<sup>369</sup> See e.g., *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

<sup>370</sup> See ODIHR, *Assessment of the Legislative Process in Georgia* (30 January 2015), pars 33-34. See also e.g., ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), Section II, Sub-Section G on the Right to Participate in Public Affairs.

the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted, and enhance public trust in the institutions in general.

185. With regard to the judiciary's involvement in legal reform affecting its work, international recommendations have stressed *the importance of judges participating in debates concerning national judicial policy and legislative reform concerning the judiciary*.<sup>371</sup>
186. It is understood that during the past year, amendments to the Law on the Legal Status of Judges were adopted hastily, with a vote of the Parliament, in an emergency session without hearings or public consultations.<sup>372</sup> It has also been noted that generally, the authorities are not proactive to engage NGOs, and that participation opportunities are not regular, systematic or institutionalised and are largely dependent on individuals, who in recent years have been quite passive.<sup>373</sup> It was further noted that the space for civil society organizations is gradually shrinking and the OECD has specifically recommended the authorities to ensure systematic, structured and institutionalized work with civil society.<sup>374</sup>
187. The preparation of future amendments to the legal framework pertaining to the judiciary should be subjected to legitimate, open and meaningful consultation process, especially with bodies of the judiciary, association of judges or similar bodies, and individual judges, the academia, lawyers' associations as well as with the public or civil society organizations. Moreover, given the potential impact of a future reform of the Laws on the independence of the judiciary and the rule of law, it is essential that such reform be preceded by an in-depth research and impact assessment, completed with a proper problem analysis using evidence-based techniques to identify the best efficient and effective regulatory option.<sup>375</sup>
188. It is also key that proper time be allocated for the preparation and adoption of amendments. In that context, both the government and the Parliament should have sufficient time to review and evaluate the draft amendments, and to take professional account of the opinions of the staff and the relevant committee, and consider the views of judicial stakeholders, civil society organizations and other experts. In principle, adequate time limits should be set prior to the actual drafting exercise, as well as for the proper verification of draft laws and legislative policy for compatibility with international human rights standards, including a gender and diversity impact assessment, at all stages of the law-making process.<sup>376</sup> Furthermore, given the potential substantive changes, sufficient *vacatio legis* should be provided to allow adequate time to implement the proposed reform.
189. In light of the above, the process by which future amendments will be developed and adopted should conform to the aforesaid principles of democratic law-making. Any

<sup>371</sup> *Op. cit.* footnote 34, par 31 ([CCJE Opinion no. 18 \(2015\)](#)); *op. cit.* footnote 19, par 1.8. (1998 [European Charter](#)). See also *op. cit.* footnote 19, par 9 (2010 CCJE Magna Carta of Judges), which states that “[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)”; and ENCJ, [2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate](#), Recommendation 5, which states that “[j]udiciaries and judges should be involved in the necessary reforms”.

<sup>372</sup> See UN Special Rapporteur on the situation of human rights defenders, [End of Mission Statement on the Visit to Mongolia](#) (30 April – 13 May 2019).

<sup>373</sup> See *op. cit.* footnote 5, page 28 (2019 [OECD Report on Anti-Corruption](#)).

<sup>374</sup> *Ibid.* page 28 (2019 [OECD Report on Anti-Corruption](#)).

<sup>375</sup> See e.g., ODIHR, [Report on the Assessment of the Legislative Process in the Republic of Moldova](#) (2010), par 14.5.

<sup>376</sup> See e.g., *op. cit.* footnote 370, pages 6 and 7 (2015 ODIHR Report on the Assessment of the Legislative Process in Georgia).



legitimate reform process relating to the judiciary, especially of this scope, **should be transparent, inclusive, extensive and involve effective consultations, including with representatives of the judiciary, judges' and lawyers' associations, the academia, civil society organizations and a full impact assessment including of compatibility with relevant international human rights standards, according to the principles stated above. Adequate time should also be allowed for all stages of the preparation of the amendments and ensuing law-making process.** ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary or in other fields.

*[END OF TEXT]*