

Amicus Curiae Position Paper

on the complaint no. 114a of 12.04.2023

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#Justice4Moldova

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SUMMARY

This Opinion is set out regarding the notification [no.114a/2023](#) regarding the exception of unconstitutionality of some provisions of the Law on Judicial Organization no. 514 of 6 July 1995, of the Law on the Superior Council of Magistracy no. 947 of 19 July 1996 and of the Law on some measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors no. 26 of March 10, 2022.

The conclusion of the Group of Experts in the Field of Justice (GEJ) is that the challenged provisions of Law 514/1995 and Law 947/1996 exceed the legal scope of competence of the Constitutional Court, because the issues addressed are questions of expediency, but not of constitutionality. At the same time, the anti-blocking mechanisms regulated by these provisions are predictable, proportionate to the legitimate aim pursued and correspond to the principled recommendations of the Venice Commission. On the contrary, the challenged provision of Law 26/2022, which being an infraconstitutional provision, extends the mandate of the members of the SCM in the absence of an express regulation in the Constitution, could raise a question of constitutionality in relation to art. 122 para. (5) of the Constitution.

SUBJECT OF THE COMPLAINT

On 12 April 2023, Adrian Albu, Member of the Parliament of the Republic of Moldova, referred to the Constitutional Court the review of the constitutionality of certain provisions of Law no. 514 of 6 July 1995 on judicial organisation (*hereinafter Law 514/1995*); of Law no. 947 of 19 July 1996 on the Superior Council of Magistracy (*hereinafter Law 947/1996*), as well as from Law no. 26 of 10 March 2022 on some measures related to the selection of candidates for the position of member in the self-administration bodies of judges and prosecutors (*hereinafter Law 26/2022*). In particular, Mr. Adrian Albu requested the declaration as unconstitutional of the following normative provisions:

- **Article 232 of Law 514/1995;**
- **Article 3 of Law 947/1996;**
- **Article 15 para. (11) of Law 26/2022.**

RELEVANT REGULATORY FRAMEWORK

Art. 232 of Law no. 514 of 6 July 1995 on the organisation of the judiciary

General Assembly of Judges

(1) The General Assembly of Judges shall consist of judges of all courts of law of the Republic of Moldova and shall ensure the practical implementation of the principle of self-administration of the judiciary.

(2) The General Assembly of Judges shall be convened annually in ordinary session. The Superior Council of Magistracy shall announce the date of convening the ordinary meeting of the General Assembly of Judges at least two months before the date of the meeting, shall elaborate and distribute to the judges the draft agenda of the meeting, which shall also be placed on the official website of the Superior Council of Magistracy, with the attachment of the materials to be examined. In the event that it is impossible for the General Assembly of Judges to be convened by the Superior Council of Magistracy due to the termination of the



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mandate of its members, due to lack of quorum or in the event of the declaration of a state of emergency under the conditions of Law no. 212/2004 on the regime of the state of emergency, siege and war, the General Assembly of Judges shall be convened by the President of the Superior Council of Magistracy or, as the case may be, by the member of the Superior Council of Magistracy who exercises the functions of the President during his absence. In the event of a vacancy in the office of President of the Superior Council of Magistracy, as well as the absence of a member appointed by decision of the Superior Council of Magistracy to exercise its functions, the General Assembly of Judges shall be convened by the Minister of Justice.

(3) The General Assembly of Judges may be convened also in exceptional cases, at the request of the Superior Council of Magistracy or of at least 50 judges, within a maximum of one month from the date of registration of the request.

(4) The General Assembly of Judges is deliberative if the sitting is attended by a simple majority of the judges in office. The same quorum is required for the extraordinary meetings of the General Assembly of Judges. Participation in the General Assembly takes place by physical presence and/or by teleconference.

(41) If the General Assembly of Judges has not taken place due to lack of quorum, the repeated general assembly shall take place within two weeks and shall be deliberative if it is attended by more than 1/3 of the judges in office.

(5) The meeting of the General Assembly of Judges shall be opened by the President of the Superior Council of Magistracy, who shall transmit the management of the meeting to its President.

The president and the secretary of the meeting of the General Assembly of Judges shall be elected at the proposal of the judges participating in the meeting, with the open vote of their simple majority.

(6) The decisions of the General Assembly of Judges shall be adopted by the vote of the simple majority of the judges participating in the hearing and shall be signed by the president and secretary of the meeting.

(7) The decisions of the General Assembly of Judges regarding the election of the members of the Superior Council of Magistracy, of the College for the Selection and Evaluation of Judges or of the College for the Evaluation of the Performance of Judges shall be adopted by secret ballot, under the conditions of Art. 3 para. (4) of Law no. 947/1996 on the Superior Council of Magistracy. At the decision of the General Assembly of Judges, other decisions may also be adopted by secret ballot.

(71) The minutes on the results of the elections to the Superior Council of Magistracy, the Disciplinary College, the College for the Selection and Evaluation of Judges shall be drawn up by the special commission, established according to Art.233 para. (2), shall be signed by the members of the commission and shall be published in the manner provided for in para. (10) of this article.

(8) The candidates who obtained the highest number of votes shall be considered elected as members of the Superior Council of Magistracy, of the Disciplinary College, of the College for the Selection and Evaluation of Judges. The following candidates shall be considered alternates and shall fill vacant positions in descending order of the number of votes obtained.



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(9) The manner of casting votes at the meeting of the General Assembly of Judges shall be established in the Rules of Procedure of the General Assembly of Judges.

(10) The decisions of the General Assembly of Judges shall be published on the official website of the Superior Council of Magistracy on the same day and shall be executed by the judicial self-administration bodies and by the judges.

Note: Even though the author marked certain provisions/texts of the law in his complaint, he requested that Article 232 be declared unconstitutional in its entirety.

Art. 3 of Law no. 947 of 19 July 1996 on the Superior Council of Magistracy

Composition

(1) The Superior Council of Magistracy shall consist of 12 members.

(2) The composition of the Superior Council of Magistracy includes judges and persons who enjoy a high professional reputation and personal integrity, with experience in the field of law or in another relevant field provided for in art.31 para. (11) letter c), who do not work within the legislative, executive or judicial power and are not politically affiliated. At least 4 of them must have experience in the field of law.

*3. **Six members** of the Superior Council of the Judiciary, who are not judges, shall be selected in an open and transparent manner by the Committee on Legal Affairs, Appointments and Immunities, on the basis of a public competition, and shall be appointed by decision of the Parliament with the vote of three-fifths of the elected Members. The manner of organizing the contest shall be determined by the Parliament. The competition is organized until the expiry of the mandate of the previously appointed members and consists of the examination of the files and the hearing of the candidates in a public meeting. The Committee on Legal Affairs, Appointments and Immunities draws up reasoned opinions for each selected candidate and proposes to Parliament that they be appointed.*

(31) The candidates for the position of member of the Superior Council of Magistracy provided for in para. (3) are subject to integrity assessment by the Independent Commission for the Evaluation of the Integrity of Candidates for the position of member of the self-administration bodies of judges and prosecutors, established on the basis of the law. The commission's decision is included in the candidate's file. The candidate who did not pass the evaluation cannot be included in the ballot.

*(32) If the procedure for appointment by the Parliament of the members provided for in para. (3) **failed**, the matter shall be included, after consulting the parliamentary factions, in the agenda of the sitting of the Parliament of the same session, after 15 working days, the respective members being appointed by the vote of three-fifths of the elected deputies.*

(33) If, after two attempts, he fails to appoint all the members of the Superior Council of Magistracy referred to in para. (3), the Parliament may appoint the members of the Superior Council of Magistracy to vacant seats by a simple majority, provided that they obtain the positive opinion of the commission of independent experts. The regulation on the organisation and functioning of that committee shall be approved by Parliament. The Committee of Independent Experts is made up of:

(a) the Ombudsman;

b) a lawyer appointed by the Council of the Union of Lawyers;



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- c) a judge appointed by the Plenum of the Supreme Court of Justice;
- d) a prosecutor appointed by the Superior Council of Prosecutors;
- e) one member appointed by the President of the Republic of Moldova.

(34) Following a public interview, the commission referred to in para. (33) shall issue an opinion on each candidate remaining in the competition. The Commission shall issue a positive opinion only if it is satisfied that, as a member, the candidate will contribute effectively to the achievement of the mandate of the Superior Council of Magistracy and will not jeopardise its independence or that of the judiciary.

(4) Six members of the Superior Council of Magistracy from among judges shall be elected by secret ballot by the General Assembly of Judges, as follows: four – from the courts, one – from the courts of appeal and one – from the Supreme Court of Justice. The candidate judges who have accumulated the highest number of votes shall be considered elected as members of the Superior Council of Magistracy. The other candidates are considered alternate members, who fill the vacant positions of members of the Superior Council of Magistracy among judges corresponding to the level of the courts for which they were elected, in descending order of the number of votes obtained. In the case of parity of votes between the candidates for the vacant positions of members of the Superior Council of Magistracy from among judges corresponding to the level of the courts, as well as in the case of alternates, the parity shall be settled by drawing lots, according to the method approved by the General Assembly of Judges.

(5) The Superior Council of Magistracy shall announce the date of the meeting of the General Assembly of Judges, at which its members are to be elected, at least two months before the date of the meeting. Candidates for the position of member of the Superior Council of Magistracy shall submit their participation files to the Superior Council of Magistracy at least 30 days before the date of the meeting of the General Assembly of Judges. The list of candidates and the submitted participation files shall be published on the official website of the Superior Council of Magistracy on the next working day after the deadline for submitting applications.

(6) Candidates for the position of member of the Superior Council of Magistracy from among judges have the right to carry out a promotion (electoral) campaign. Court presidents facilitate candidates' meetings with judges.

(7) In order to ensure the activity of the Superior Council of Magistracy, the judges elected by the General Assembly of Judges shall be seconded during the term of office of member of the Superior Council of Magistracy. After obtaining membership, the administrative positions previously held by the judicial members of the Superior Council of Magistracy become vacant by right.

(8) During the term of office of member of the Superior Council of Magistracy, the members appointed according to para. (3) may not carry out representation activities in the courts, courts of appeal and the Supreme Court of Justice.

Note: Even though the author marked certain provisions/texts of the law in his complaint, he requested that Article 3 be declared unconstitutional in its entirety.



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Art. 15 para. (11) of Law no. 26 of 10 March 2022 on some measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors

*By way of derogation from the provisions of art.9 para. (1) of Law no.947/1996 on the Superior Council of Magistracy and the provisions of art.73 para. (1) of Law no. 3/2016 on the Prosecutor's Office, the mandates of the members of the Superior Council of Magistracy and of the Superior Council of Prosecutors, except for the mandates of the ex officio members, are extended, **by extension**, until the position is occupied by the successors of competence.*

The author of the complaint invoked the incidence of the following articles of the Constitution of the Republic of Moldova:

- **Article 1 – State of the Republic of Moldova**
- **Article 5 - Democracy and political pluralism**
- **Article 6 – Separation and collaboration of powers**
- **Article 7 – The Constitution, Supreme Law**
- **Article 23 – The right of every man to know his rights and duties**
- **Article 116 – Statute of judges**
- **Article 122 – Composition of the Superior Council of Magistracy**

THE ARGUMENTS PRESENTED IN THE COMPLAINT

The author of the complaint criticizes the unconstitutionality of the following legal procedures:

- election of non-judge members of the Superior Council of Magistracy by the Parliament by a simple majority - *art. 3 of Law 947/1996*;
- the convening of the General Assembly of Judges by the Minister of Justice and the deliberative aspect of the meeting if more than 1/3 of the judges in office participate in it - *art.232 of Law 514/1995*;
- extension of the mandate of the members of the Superior Council of Magistracy by an organic law - *art. 15 para. (11) of Law 26/2022*.

RELEVANCE OF THE ARTICLES OF THE CONSTITUTION INVOKED IN THE COMPLAINT

Alleged violation of Articles 1, 5, 6, 7, 23, 116 of the Constitution

In its settled case-law, the Court held that the exception of unconstitutionality must include three mandatory elements: the text challenged from the point of view of constitutionality (the legal provision), the reference text alleged to have been violated (constitutional provision) and the reasoning by the author of the exception of the relationship of contradiction between the two texts, i.e. the reasoning of the unconstitutionality of the criticized text (*DCC no. 182 of 25 November 2021, § 15*).

With reference to the impact of Articles 1, 5, 6 and 116, I note that the author did not adequately substantiate his claims in the light of the articles invoked. The Court has



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underlined in its consistent jurisprudence that "the mere enumeration of these articles, as well as the taking over of some considerations from the jurisprudence of the Constitutional Court and the European Court of Human Rights in the absence of their own argumentation, do not represent genuine criticisms of unconstitutionality". (see *DCC No 34 of 22 March 2022*, § 23).

Article 7 of the Constitution has a general character, represents an imperative that underpins any regulations and cannot constitute individual and separate landmarks. (see *DCC no. 126 of 05.08.2021*, § 24).

Regarding the incidence of Article 23 of the Constitution, the Court found that it does not have an applicability in its own right. In order to be applicable, the author of the complaint must demonstrate, in a reasoned manner, the existence of an interference in the rights guaranteed by the Constitution (*DCC no. 189 of 21.12.2023*, § 21).

Therefore, we consider that with regard to the invocation of Articles 1, 5, 6, 7, 23, 116 of the Constitution, from our point of view, the complaint is inadmissible in this part.

ANALYSIS OF ALLEGED CONSTITUTIONAL NON-CONFORMITIES

The alleged unconstitutionality of Article 232 of Law 514/1995 and Article 3 of Law 947/1996

As a result of a defective argumentation, the criticisms of constitutionality of Article 232 of Law 514/1995 and Article 3 of Law 947/1996 are not certain. However, the author of the complaint did not individually argue the relevance and relevance of the constitutional norms invoked. At the same time, the alleged non-compliance of the criticized provisions with the constitutional provisions was not argued. Thus, we would like to emphasize that, in similar situations, the Court rejected as inadmissible the complaints made, specifying each time that **"the mere reference to a text of the Constitution, without explaining the alleged non-compliance with it of the challenged legal provisions, does not amount to an argument"**. (*DCC no. 5 of 20 January 2020*, § 20). Thus, the complaint could be declared inadmissible in this respect.

However, if the Court nevertheless decides to examine the merits of this head of referral, I recommend that the following aspects be taken into account:

According to Opinion no. 2 of 3 December 2020, the Constitutional Court held that¹:

- *Parliament has a wide discretionary margin in choosing mechanisms capable of avoiding blockages in the appointment of non-judge members of the Superior Council of Magistracy.*

Similarly, taking into account the logical reasons mentioned *above*, I consider that Parliament also has a wide margin in choosing mechanisms capable of avoiding blockages in the procedures for convening the General Assembly of Judges.

At the same time, because fundamental in this regard are the guarantees established by law to put the anti-blocking mechanisms into operation, we will further analyze the sufficiency and quality of the existing guarantees that are provided by the challenged articles, and whether they are able to prevent certain undue political influences.

¹ Opinion of the Constitutional Court no. 2 of 3 December 2020 on the draft law on amending and supplementing the Constitution (judicial system), paras. 103-104, <https://www.constcourt.md/ccdocview.php?tip=avize&docid=69&l=ro>



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a) On the procedure for the appointment by the Parliament of candidates for the position of member of the Superior Council of Magistracy by simple majority - art. 3 of Law 947/1996

Article 122(3) and (4) of the Constitution are worded as follows: '(3) *Candidates for the position of member of the Superior Council of Magistracy who are not judges shall be selected by competition, on the basis of a transparent procedure, on the basis of merit, and shall be appointed by Parliament with the vote of three-fifths of the elected deputies.* 4. *If the appointment of candidates who are not judges to the post of member of the Superior Council of Magistracy under paragraph 3 has failed, the procedure and conditions for their appointment shall be laid down by law.*'

Findings of the Venice Commission on the anti-blocking mechanism in the procedure for electing non-judge members of the SCM²:

'25. (...) both in the opinion of March 2020 and in the opinion of June 2020 it was recommended that an anti-blocking mechanism should be considered in the case of the election by the Parliament of the non-judge members of the SCM. It is therefore welcome that such an anti-blocking mechanism is now mentioned in the Constitution. (...)

27. (...) The main function of the anti-blocking mechanism is to make the initial procedure work, causing the majority and minority to reach a compromise. Qualified majorities strengthen the position of the parliamentary minority, while anti-blocking mechanisms restore the balance. Of course, these mechanisms should not discourage reaching an agreement in advance. The fact that the anti-blocking mechanism is unattractive to both the majority and the minority may help to encourage an agreement. (...)

30. That interpretation of the Constitution does not exclude the contribution of external institutional actors in the third round of parliamentary elections. In particular, when a simple majority of deputies becomes sufficient to elect a non-judicial member of the SCM, the condition could be introduced that this candidate obtains the support of an institution that does not have a clear political affiliation. Again, the interlocutors did not have a clear vision of the institution or institutions that would be best suited to assume this important function. As a provisional solution, the Bar Association and the Ombudsman were mentioned, being considered capable of playing this role. It is up to the national authorities to discuss and develop the most appropriate model, taking into account the political and institutional realities in the Republic of Moldova. Whichever institution is chosen to play this role, the Commission considers that limited intervention by an independent institution could improve the overall mechanism and help to counterbalance the lack of a broader consensus in the early stages of the appointment process."

Article 3 of Law 947/1996 regulates the procedures applicable in the event of failure of the procedure for the appointment by Parliament of non-judicial members of the Superior Council of Magistracy (the anti-blocking mechanism recommended by the Venice Commission). Next we will analyze the anti-blocking mechanism provided by the law regarding the existing

² Opinion of the Venice Commission on legal changes to the judicial system, (CDL-AD(2022)019, paras. 25, 27, 30, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2022\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)019-e)



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guarantees, and whether it corresponds to the recommendations proposed by the Venice Commission.

According to Article 3 of Law 947/1996, if the procedure for the appointment by the Parliament of non-judge members of the SCM has failed:

- The issue may be included in the agenda of the sitting of the Parliament at the same session after 15 working days, and only after consulting the parliamentary factions;
- Non-judge members will also be appointed by the vote of three-fifths of the elected deputies, **similar to the first** attempt.

We note that, at this stage, **there is no decrease in the threshold of parliamentary approval of the candidate.**

If, due to two attempts, it fails to appoint all the members of the Superior Council of Magistracy (non-judicial members), the Parliament may appoint the members of the Superior Council of Magistracy to the vacant seats by a simple majority, **provided that they obtain the positive opinion of the commission of independent experts:**

- The Commission of Independent Experts consists of: a) the Ombudsman (Ombudsman); b) a lawyer appointed by the Council of the Union of Lawyers; c) a judge appointed by the Plenum of the Supreme Court of Justice; d) a prosecutor appointed by the Superior Council of Prosecutors; e) one member appointed by the President of the Republic of Moldova.
- Following a public interview, the commission of independent experts issues an opinion on each candidate remaining in the competition;
- The commission of independent experts issues a positive opinion only if it is convinced that, as a member, the candidate will contribute effectively to the achievement of the mandate of the Superior Council of Magistracy and will not jeopardise its independence or that of the judiciary.

Analyzing the above-mentioned provisions, we find that the principles of the Venice Commission have been taken over, especially those regarding the **"limited intervention by an independent institution"** (the Commission of Independent Experts), but also **the maintenance of the same threshold of parliamentary approval of the candidate** for the second attempt to vote (*three-fifths of the elected deputies*). Thus, we consider that the procedure for the appointment by the Parliament of candidates for the position of member of the SCM (non-judge members) by simple majority after two failed attempts, does not exceed the reasonable limits of the Parliament's discretion. Moreover, it is a balanced one, with sufficient guarantees and protection mechanisms so as not to admit an inappropriate influence of the legislature or the parliamentary majority.

b) On the convening of the General Assembly of Judges by the Minister of Justice and the deliberative aspect of the assembly if more than 1/3 of the judges in office participate in it - art. 232 of Law 515/1995

We further argue that the Parliament has a wide margin in choosing the mechanisms capable of avoiding blockages in the procedures for convening the General Assembly of Judges. According to Article 232 of Law 515/1995, in addition to the general rule, exceptions to it (anti-blocking mechanism) are provided.

General rule:



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The General Assembly of Judges shall be convened annually in ordinary session. The Superior Council of Magistracy shall announce the date of convening the ordinary meeting of the General Assembly of Judges at least two months before the date of the meeting, shall elaborate and distribute to the judges the draft agenda of the meeting, which shall also be placed on the official website of the Superior Council of Magistracy, with the attachment of the materials to be examined.

Regulated exceptions (anti-blocking mechanism):

- In the event that it is impossible for the General Assembly of Judges to be convened by the Superior Council of Magistracy due to the termination of the mandate of its members, due to lack of quorum or in the event of the declaration of a state of emergency under the conditions of *Law no. 212/2004 on the regime of the state of emergency, siege and war*, the General Assembly of Judges shall be convened by the President of the Superior Council of Magistracy or, as the case may be, by the member of the Superior Council of Magistracy who exercises the functions of the President during his absence.
- In the event of a vacancy in the office of President of the Superior Council of Magistracy, as well as the absence of a member appointed by decision of the Superior Council of Magistracy to exercise its functions, the General Assembly of Judges shall be convened by the Minister of Justice.

The purpose of regulating exceptions is to ensure the practical realization by the General Assembly of Judges of *the principle of self-administration of the judiciary*, thus the realization of a legitimate interest.

Analyzing the mentioned provisions, we note that the exceptions established by the legislator are exhaustive (they are limited), they are certain and predictable (they do not offer a wide margin of interpretation, they are not confusing), and the prerogative of convening the General Assembly of Judges by the Minister of Justice is nothing more than a measure of last resort, which can be achieved **only if several cumulative** conditions are met (The Superior Council of Magistracy, or the President of the SCM, or a member of the SCM with corresponding attributions, for certain objective reasons, cannot convene the General Assembly of Judges).

Thus, in addition to the broad margin of discretion of the Parliament to regulate the mechanisms for avoiding blocking the convening of the General Assembly of Judges, its convening by the Minister of Justice is a proportionate measure, of an exceptional nature, and is based on the legitimate and reasonable need to ensure the practical realization of the principle of judicial self-administration.

As a result of the reasons mentioned *above*, we consider that the subject matter of the complaint (*the alleged unconstitutionality of Article 23/2 of Law 515/1995 and Article 3 of Law 947/1996*) exceeds the legal scope of the Court's jurisdiction, since the issue addressed in the complaint is a matter of expediency, but not of constitutionality. At the same time, the anti-blocking mechanisms envisaged by Parliament are predictable, proportionate to the legitimate aim pursued, and provide sufficient guarantees to reduce any undue influence.



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The alleged unconstitutionality of art. 15 para. (11) of Law 26/2022 – extension of the mandate of SCM members

Findings of the Venice Commission regarding the extension of the mandate of the members of the SCM³:

(...) '46. ***It is essential to ensure the continuity of the SCM and to ensure that it is fully functional despite vacancies, so that the SCM can carry out its tasks effectively.*** However, it cannot be ignored that Article 122 para. (5) of the Constitution limits the mandate of the members of the SCM to a single period of six years. The Constitution does not provide for the possibility of extending this mandate, and the use of a legal provision for this purpose may raise the question of the constitutionality of such an extension. However, ***in certain situations, a short-term technical extension of the mandate of a constitutional body may be unavoidable, but, as underlined in the opinion on Montenegro, this should not become a rule: "the extension of the mandate of the resigning PG as interim is the most obvious solution in [cases where the new PG cannot be appointed in time] on the basis of the law of necessity and since the resigning PG has at least a certain residual legitimacy [...]. However, such a temporary arrangement should not be extended indefinitely – otherwise, the constitutional provisions that give Parliament the power to elect the PG and that set a limited term of office of the PG would be meaningless."***

47. The Commission also notes ***that a legal provision allowing for an extension could lead to a proliferation of members of the SCM on an interim or interim basis, which would undermine the credibility of the institution.*** Finally, such extensions could have a role in discouraging the relevant bodies – the General Assembly of Judges and the Parliament – from seeking compromises regarding SCM candidates and filling existing vacancies within constitutional and legal deadlines. For these reasons, the focus should rather be on making it easier to identify new members before the expiry of the mandates."

The author of the complaint invoked the contradiction with art. 15 para. (11) of Law 26/2022 with para. (3) of Article II of Law no. 120 of September 23, 2021, which is a constitutional law.

Analysis of the procedures governed by the challenged provision and the constitutional provision invoked by the author:

- Para. 3 of art. II of Law 120/2021 regulates the situation of the mandate of the members of the judges within the Superior Council of Magistracy who were in office on the date of entry into force of the law, i.e. on April 1, 2022. Being a transitional provision, it had the determined purpose of ensuring the certainty of the new amendments in relation to the constitutional mandate of the members of the SCM ("the old SCM").
- On the other hand, the provision of art. 15 para. (11) Law 26/2022 regulates the extension of the mandate of the members of the Superior Council of Magistracy, who were to be elected according to the new verification procedures (pre-vetting), which entered into force on 16 March 2022 ("the new SCM"). In fact, the first judicial members of the "new SCM" were voted by the General Assembly of Judges on April 28, 2023.

In this case, we consider irrelevant the constitutional provision invoked by the author (*paragraph 3 art. II of Law 20/2021*), because it refers to a situation absolutely distinct from

³ Opinion of the Venice Commission on legal changes to the judiciary, (CDL-AD(2022)019, paras. 46-47, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2022\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)019-e)



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the challenged provision (*art. 15 para. (11) Law 26/2022*). Moreover, the author did not argue the existence of a causal relationship between them. In other similar cases, the Court declared the complaint inadmissible if the author did not show the causal link between the contested provision and the constitutional provision invoked.⁴

However, because the author also invoked the incidence of art. 122 of the Constitution – *the composition of the Superior Council of Magistracy*, the Court could hold the relevance of para. (5) Article 122 of the Constitution.

According to art. 122 para. (5) of the Constitution, the mandate of the members of the SCM is limited to a period of six years, without the possibility of holding two mandates. We note that ***the Constitution does not expressly provide for the possibility of extending the mandate of the members of the SCM***. Thus, the use of an infraconstitutional provision (art. 15 para. 11 of Law 26/2022 is a provision of an organic law) in order to extend the mandate of the members of the SCM, could raise a question of constitutionality.

A solution to ensure the continuity of the SCM and to ensure that it is fully functional despite vacancies is to regulate a "technical extension" of the mandate, an extension that is limited in time in a predictable way, in order to avoid repeated extensions, but also to avoid the proliferation of SCM members as interim or interim. This solution was also suggested by the Venice Commission.⁵

CONCLUSIONS

1. The issues regarding the ***convening of the General Assembly by the Minister of Justice (art. 232 of Law 515/1995)***, as well as the ***possibility of appointing members of the SCM with a simple majority of the Parliament (art. 3 of Law 947/1996)***, represent a matter of expediency, not of constitutionality. At the same time, the current provisions (anti-blocking mechanisms) establish sufficiently balanced guarantees, which correspond to the principled recommendations of the Venice Commission.
2. Because the Constitution does not expressly provide for the possibility of extending the mandate of SCM members, ***the use of an infraconstitutional provision for this purpose could raise a problem of constitutionality in relation to art. 122 para. (5) of the Constitution***.
3. The optimal solution to ensure the continuity of the SCM despite the vacancies could be ***to regulate a "technical extension"***, predictably limited in time, of the mandate of the SCM members.

⁴ DCC no. 130 of 02.12.2019, § 23, <https://www.constcourt.md/ccdocview.php?l=ro&tip=decizii&docid=720>

⁵ Opinion of the Venice Commission on the legal amendments to the judiciary of 20 June 2022 (CDL-AD(2022)019, paras. 46-47), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2022\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)019-e)