

Position Paper

*on the draft Law on the amendment of some
normative acts – procedural aspects regarding the
activity of the courts*

AUTHOR:

Pavel Cazacu, member of the Justice Experts Group
(JEG)

Angela Popil, member of the Justice Expert Group
(JEG)

Reviewed by:

Adrian Ermurachi,
Co-Executive Director IPRE

Date: 22 December 2023



Funded by
the European Union



DISCLAIMER

This position paper was prepared within the project "Ensuring the Integrity, Efficiency, and Independence of the Justice System in Moldova – #Justice4Moldova," implemented by the Institute for European Policies and Reforms (IPRE) in partnership with the Institute for War and Peace Reporting (IWPR), funded by the European Union and co-financed by the Soros Foundation Moldova. The content of this study is the sole responsibility of the author and cannot, under any circumstances, be considered as representing the official position of the European Union, or the Soros Foundation Moldova.



Funded by
the European Union



SUMMARY

This Opinion is formulated as a response to the request of the Ministry of Justice no. 03/5956 of 25 June 2024, addressed to the Institute for European Policies and Reforms.

The opinion is expressed on the draft law on the amendment of some normative acts – with reference to some procedural aspects regarding the activity of the courts.

The authors of the opinion consider it appropriate to promote [the draft law on the amendment of some normative acts – with reference to some procedural aspects regarding the activity of the courts](#), published by the Ministry of Justice on June 25, 2024.

We consider that it is a necessary draft law in the context of ensuring the proper functioning of the courts and the realization of the rights and needs of citizens, this legislative initiative being based on the following fundamental reasoning:

- *implementation of the provisions of Law no. 64/2023 on the Supreme Court of Justice;*
- *avoiding divergent interpretations regarding the subjects competent to challenge with appeal the sentences adopted in the trial procedure on the basis of the evidence administered in the criminal investigation phase;*
- *clarification of some provisions on the revision of civil court decisions;*
- *updating the provisions regarding the bail, the personal guarantee and the organisation's guarantee;*
- *the need for the Supreme Court of Justice to issue a reasoned decision in all cases;*
- *the establishment of an effective mechanism for the hearing of witnesses in criminal investigations, when it cannot be heard directly at the headquarters of the criminal investigation body.*

However, we believe that the draft law needs to be improved, and the conceptual proposals are presented below in the text of the opinion.

In order to improve the draft law, the following recommendations are presented:

- *the elimination of the court's discretion in the procedure for requesting the advisory opinion;*
- *revision of the normative provision that establishes restrictions in the procedure for requesting the advisory opinion;*
- *supplementing the draft law in order to establish a deadline within which the Supreme Court of Justice will issue the advisory opinion;*
- *complementing the changes proposed by the project with criteria that would allow the high reputation of guarantees to be measured;*
- *further analysis of the opportunity to intervene with amendments to the Administrative Code.*



Funded by
the European Union



BACKGROUND

The comprehensive reform of the justice sector, initiated in 2011 with the approval [of the Justice Sector Reform Strategy for 2011 – 2016](#) and continued by [the Strategy on ensuring the independence and integrity of the justice sector for 2022 – 2025](#), justified the intervention in the text of most of the normative acts aimed at the activity of the courts, mainly in the text of the Criminal Procedure and Criminal Procedure Codes. civil procedure in order to rally them to the new legislative changes.

During 2022 and 2023, the Ministry of Justice, jointly with other responsible authorities, promoted a series of amendments to the Code of Criminal Procedure, the Code of Civil Procedure and the Administrative Code. These interventions were justified by the need to align these laws with the needs of society and the country's strategic objectives related to the harmonization of national legislation, including following the adoption and entry into force of [Law no. 64/2023 on the Supreme Court of Justice](#).

The informative note accompanying this draft law describes the reasoning that justified its elaboration and promotion, the main arguments being: (1) the correction of the deficiencies found in the activity of the courts, especially in the case of requesting the advisory opinions of the Supreme Court of Justice and the completion of the Code of Criminal Procedure in this regard; (2) clarification of the issues related to the grounds for reviewing civil court decisions, in particular on the basis of Article 449 letter g) of the Code of Civil Procedure, when the Government is notified of a case in the proceedings of the European Court of Human Rights; (3) the need to introduce clear and strict criteria for individuals and organisations offering personal guarantees, as well as to set limits for offences to which these guarantees do not apply; (4) the standardization of the criminal procedure by introducing the possibility of hearing witnesses by means of videoconferencing at the criminal investigation stage.

SUMMARY OF THE PROVISIONS OF THE DRAFT LAW

The draft law proposed by the Ministry of Justice intervenes in the Code of Criminal Procedure, the Code of Civil Procedure and the Administrative Code.

In particular, the draft law operates the following major interventions:

- a) Completion of the Code of Criminal Procedure, by:
 - bringing art. 39 in accordance with the provisions of art. 4 para. (1) letter b) of Law no. 64/2023 on the competence of the Supreme Court of Justice to issue advisory opinions;
 - the completion of art. 3312 which establishes procedural rules related to the request and issuance of the advisory opinion;
 - supplementing Article 109 with paragraph (32) and supplementing Article 370 regarding the hearing of the witness by means of videoconference;
 - supplementing Articles 179, 180 and 181 with reference to some aspects related to the deposit, the personal and organizational guarantee;



Funded by
the European Union



- amending Articles 3641 and 5091 with reference to the appeal of criminal sentences by the injured party;
 - supplementing art. 427 with reference to the limits of the judgment of the appeal.
- b) Supplementing the Code of Civil Procedure by:
- the new wording of Art. 121 regulating the procedure for requesting and issuing the advisory opinion;
 - amending Art. 442 with reference to the limits of the judgment of the appeal;
 - amending Articles 449 and 450 in the part that refers to one of the grounds for reviewing civil court decisions;
- c) Completion of the Administrative Code by:
- amending Article 191 in the sense of establishing the obligation of the Supreme Court of Justice to issue reasoned judgments rendered as a court of first instance;
 - the amendment of art. 226 related to the obligation to briefly explain the reasoning of the court decisions issued;
 - correction of a technical error in Art. 234.



Funded by
the European Union



ANALYSIS OF THE MAIN PROPOSALS OF THE DRAFT LAW

I. Joint recommendations on the amendment of the Code of Civil Procedure and the Code of Criminal Procedure on the mechanism for requesting an advisory opinion (Art. 121 CPC, Art. 39 and Art. 3312 CPP)

According to [Law no. 64/2023 on the Supreme Court of Justice](#), in the context of its role of ensuring the uniform interpretation and application of the legislation in the judiciary, the Supreme Court of Justice (SCJ) issues, at the request of the courts, advisory opinions on the application of the legislation.

In this context, the need to update the procedural normative framework is obvious, and the arguments of the Ministry of Justice in the informative note on the need to transpose this competence of the SCJ by supplementing Article 39 with paragraph (6) and supplementing the Code of Criminal Procedure with Article 3312, as well as the exposition in a new wording of Article 121 of the Code of Civil Procedure, are judicious and pertinent.

The intervention in the Code of Criminal Procedure by supplementing Article 39 with paragraph (6) and supplementing it with Article 3312 is also necessary for the fact that similar provisions are found in the Code of Civil Procedure, the latter being also applicable in administrative proceedings.

At the same time, this amendment is also in line with the findings of the ECtHR, which stressed that ensuring the uniform application and correct interpretation of laws by the supreme courts of a state is a legitimate aim compatible with the Convention.¹ At the same time, a more in-depth analysis of the proposed interventions by amending the text of Article 121 of the Code of Civil Procedure and Article 3312 of the Code of Criminal Procedure, justifies the revision of some procedural aspects of the content of the proposed text with reference to a) the discretion of the court when requesting the advisory opinion, b) the right of the participants to formulate a request for the advisory opinion only once, c) limiting the issuance of advisory opinions only with reference to substantive laws/norms in force on the date of the trial of the case, d) failure to establish the deadline within which the SCJ will be obliged to issue the requested advisory opinion.

a) The court's discretion when requesting the advisory opinion.

According to the informative note, the request for the advisory opinion is a right and not an obligation of the courts. In the opinion of the author of the draft, the establishment of the obligation of the courts to request the SCJ to issue the advisory opinion could lead to excessive and unnecessary requests, a case that could unduly burden the SCJ with requests for the issuance of advisory opinions, as well as lead to the procrastination of the trials.

We do not agree with such an approach. According to the draft law, the advisory opinion can be requested by the court examining the case only if the following 4 imperative conditions are met:

- a) the rule of law is to be applied in the case examined in court;
- b) the clarification of the legal issue is decisive for the resolution of the case;

¹ Baydar v. Netherlands, judgment of 24 April 2018, § 47. Available: <https://hudoc.echr.coe.int/eng?i=001-182454>



Funded by
the European Union



c) there are difficulties in the correct application of the rule of law (material or procedural) that may be interpreted differently;

d) the problem is new and the interpretation given to the question of law has not been resolved or explained previously by the Supreme Court of Justice.

I consider that the conditions under which advisory opinions may be sought are imperative, exhaustive and sufficiently predictable. At the same time, in order to request the SCJ to issue the advisory opinion, the court is required to find the cumulative existence of all the conditions. Moreover, compared to the role of the court in raising the exception of unconstitutionality², in the procedure for requesting the advisory opinion, the judge will not limit himself only to verifying the fulfillment of these conditions, but will also rule on the merits of the notification/request of the parties, in particular he will have to answer the question whether: clarification of the legal issue is decisive for the resolution of the case and whether there are difficulties in correctly applying the rule of law (material or procedural) susceptible to different interpretations.

Taking into account the existence of the mandatory conditions for requesting the advisory opinion, it is not clear whether the author has the option of mentioning the discretionary nature of the court. Or, one could create the impression that although the request for the advisory opinion meets the legal conditions, the court would be entitled not to request the SCJ to issue the advisory opinion. The establishment of the court's obligation to admit the request for an advisory opinion will reduce the impact of the provisions of art. 427 para. (1) item 1) of the Code of Criminal Procedure and the provisions of art. 432 para. (1) letter a) of the Code of Civil Procedure, which provide that the appeal is to be admitted if it is found that the interpretation of the law made by the court is contrary to the uniform jurisprudence of the SCJ and will give efficiency to the role of the SCJ of ensuring the uniform interpretation and application of the legislation.

Thus, we consider it appropriate to eliminate the discretionary right of the court to request the SCJ to issue advisory opinions, by excluding the word "may" from the text of Article 3312(1) of the Code of Criminal Procedure and from the text of Article 121(1) of the Code of Civil Procedure.

b) The right of participants to make a request for an advisory opinion only once.

We also do not agree with the author's proposal to limit the number of requests by parties to request advisory opinions. From the content of the informative note it follows that the purpose of this provision is to prevent possible delays in the examination of cases and to avoid placing too much burden on the SCJ. Even if the argument is based on a legitimate aim – to prevent the procrastination of the case, I consider that this restriction is not justified from the point of view of the public interest to elucidate, at an early stage, any problems of interpretation of a rule determining the examination of the case.

In this regard, we reiterate the above-mentioned arguments regarding the sufficiency of the four conditions provided by the law, which have the task of balancing two principles inherent

² The decision of the Constitutional Court for the interpretation of art, 135 para. (1) letters a) and g) of the Constitution (complaint no. 55/2015),

Available: https://constcourt.md/public/ccdoc/hotariri/h_2_2016_55b_2015_rou.pdf



Funded by
the European Union



in a fair trial: reasonable time versus unitary interpretation of the law. Moreover, we note that situations cannot be excluded in which in a certain case, sufficiently complex, which refers to new normative provisions or which have not previously been applied, there is a need to request the issuance of the advisory opinion twice in the same court.

In this context, we argue that the four imperative conditions for requesting the advisory opinion are sufficiently clear, and can ensure a fair balance to prevent potential abuses of rights by the parties to the proceedings.

c) Limiting the issuance of advisory opinions only with reference to substantive laws/norms in force on the date of the trial of the case.

Another aspect on which we disagree is the provision of Article 3312 of the Code of Criminal Procedure and Article 121 of the Code of Civil Procedure, according to which the SCJ will not issue an advisory opinion in case of repeal, finding unconstitutionality or amending the rule of law.

According to the Constitutional Court, the exception of unconstitutionality can be raised both in respect of acts in force and in respect of acts that are no longer in force, if legal relationships have arisen under them that continue to produce effects, and the rule is applicable in disputed legal relationships and is decisive for the resolution of the case.³

From this perspective, the subsequent amendment or repeal of the contested provision does not eliminate any violation of the rights and freedoms guaranteed by the Constitution. For example, according to the provisions of Article 8 of the Criminal Code, *the criminal nature of the act and the punishment for it are established by the criminal law in force at the time of the commission of the act, and in accordance with the provisions of Article 3 of the Code of Criminal Procedure, the law that is in force during the criminal investigation or the trial of the case in court shall be applied in the conduct of the criminal trial. The criminal procedure law can have ultraactive effect, i.e. its provisions, during the transition period to a new criminal procedure law, can remain applicable to procedural actions regulated by the new law. The ultraactive character is stipulated in the new law.* Similar provisions can be found in the Civil Code and the Code of Civil Procedure.

Thus, it follows that when solving a criminal, civil, contravention or administrative litigation case, the court will be required to apply the provisions of the law in force on the date of the commission of the crime, the creation of the obligations or the constitution of the right, the issuance of the administrative act, even if it has been subsequently amended and/or repealed and if during the trial of the case a problem of interpretation or application of this rule arises, The SCJ must give its absolution.

Taking into account the nature and role of the advisory opinion, we consider that the rules applicable to the procedure for lifting the exception of unconstitutionality with reference to the verification of the constitutionality of the amended or repealed legal norms can be considered applicable also in the case of advisory opinions, the issuance of which may be requested in criminal, civil, contravention or administrative litigation trials.

³ Ibid., § 73



Funded by
the European Union



Consequently, it is proposed to amend the text of art. 3312 para. (8) Code of Criminal Procedure and Art. 121 para. (8) Code of Civil Procedure and its exposition in the following wording:

"(8) The Supreme Court of Justice shall not issue advisory opinions in the event of a finding of unconstitutionality of the rule of law."

d) Failure to establish the deadline within which the SCJ will be obliged to issue the requested advisory opinion.

In line with our recommendations set out *above*, we consider it necessary for the author to establish in the text of Article 3312 of the Code of Criminal Procedure and in the text of Article 121 of the Code of Civil Procedure a reasonable term within which the SCJ will have to issue the requested advisory opinion.

This recommendation is strengthened by the case-law of the ECtHR, which has held that the provisions of the European Convention do not guarantee the right of access to a court with jurisdiction to give an official interpretation to it. The ECtHR also held that the provisions of Article 6 of the Convention do not guarantee the right to a national or international court to be seized of a question for a preliminary⁴ ruling. However, if the state establishes such a mechanism, it is advisable that it be regulated in such a way that it leaves no room for abuse.

In this context, it is wise to establish a reasonable period for the SCJ to examine the request for the issuance of the advisory opinion.⁵ Thus, I consider that the 2-month period is a reasonable period and will bring more predictability to that procedure.

Consequently, in order to consolidate the draft law proposed for approval, in this regard, we recommend:

- *the elimination of the discretionary right of the court to request the SCJ to issue advisory opinions, by excluding the word "may" from the text of Article 3312 paragraph (1) of the Code of Criminal Procedure and Article 121 paragraph (1) of the Code of Civil Procedure.*
- *the exclusion of the limitation of the right of the parties to the proceedings to request the issuance of the advisory opinion;*
- *amending the text of Article 3312(8) of the Code of Criminal Procedure and Article 121(8) of the Code of Civil Procedure and setting it out as follows: "(8) The Supreme Court of Justice shall not issue advisory opinions in the event of a finding of unconstitutionality of the rule of law.";*
- *establishing a reasonable deadline for the SCJ to examine the request for the issuance of the advisory opinion, taking into account the 2-month deadline.*

II. Establishing the reputational criterion in relation to individuals or organizations acting as guarantors in criminal proceedings and limiting the applicability of the personal guarantee and the guarantee of an organization (Articles 179, 180 and 181 of the Code of Civil Procedure).

⁴ Pronina v. Ukraine, application no. 63566/00 of 18.07.2006. Available: <https://hudoc.echr.coe.int/eng?i=001-76457>

⁵ Similar to the procedure for examining the exception of unconstitutionality by the Constitutional Court



Funded by
the European Union



With reference to the interventions proposed in Articles 179, 180 and 181 of the Code of Criminal Procedure regarding the establishment of the "high reputation" requirement for persons who intend to participate as guarantors and who are to post security, we will mention that the draft information note does not sufficiently justify the need to impose the reputational condition on future guarantors.

A priori, national legislation does not operate with the term "high reputation", for example Law no. 1260/2002 on the legal profession, Law no. 54/1995 on the status of judges, Law 3/2016 on the Prosecutor's Office operate with the term "irreproachable reputation" and all these normative acts determine what are the criteria that demonstrate that the person enjoys an irreproachable reputation.

In contrast, although the author argues that this intervention will increase the safety of the person under criminal investigation and will increase the degree of execution of the commitments assumed including by the guarantors, reducing the risks of non-compliance with the commitments, the failure to clearly determine which are those criteria that measure the irreproachable reputation, leaves room for interpretation and makes this provision devoid of substance and predictability.

Another aspect that, in our opinion, requires a more solid argumentation is the intervention in Article 181(1) of the Code of Criminal Procedure, according to which the provisions on guarantees are listed in an exhaustive list.

From our point of view, limiting the application of personal guarantees or guarantees made by organizations only to corruption and corruption-related crimes is not sufficiently justified, and the comparison made with the guarantees offered to the suspect, the accused or the defendant by other procedural mechanisms, such as the guilty plea agreement, the cooperation agreement and the conditional suspension of criminal prosecution, is not relevant because these mechanisms are not comparable.

In our view, there is a need for a more convincing argumentation of the briefing note on limiting the application of the institution of the personal guarantee or the guarantee of an organisation in the case of corruption and corruption-related offences. However, it is not clear why this limitation could not extend to the crime of torture, sexual abuse or other exceptionally serious crimes, whose social danger is as great (and perhaps greater) than in the case of corruption crimes.

At the same time, the author is also to take into account the legal nature of these procedural institutions – preventive measures, or the suspect, the accused, the defendant enjoys the presumption of innocence. In these circumstances, it is important to find a fair and proportionate balance between the public interest in ensuring the proper conduct of the criminal trial and the presumption of innocence. Thus, pursuant to Article 271 of Law 100/2017⁶ on normative acts, we recommend carrying out a regulatory impact analysis from the perspective of existing international standards in this field.

With reference to this intervention, we recommend:

- *standardizing the terminology by replacing the text "high reputate" in the proposed amendments to Articles 179 and 180 of the Code of Criminal Procedure with the text*

⁶ Effective July 5, 2024



Funded by
the European Union



"irreproachable repute" and indicating the criteria on the basis of which it is possible to assess it;

- *judicious argumentation in case of limitation of the applicability of the personal guarantee or the organisation's guarantee in the case of certain categories of crimes.*

III. Other amendments to the Code of Criminal Procedure.

It is welcome to intervene in Articles 3641 and 5091 of the Code of Criminal Procedure, which gives the injured party the opportunity to challenge the court sentences in order of appeal and in the part that refers to the merits of the case, not only in the part that refers to compliance with procedural requirements.

We thus find that this intervention ensures the elimination of the unfairness between the injured parties and the civil parties, allowing both categories of parties to challenge the court sentences equally.

Likewise, this intervention ensures the clarification and standardization of the appeal procedures to ensure that all parties have the same opportunities to address the higher court, the implementation of these amendments will contribute to a uniform and coherent application of the procedural rules, eliminating divergent interpretations and unfair treatment in the criminal process.

IV. Other amendments to the Code of Civil Procedure (Art. 442, Art. 449 and Art. 450 CPC).

By the draft law proposed for approval, the author intervenes in the text of Article 442 of the Code of Civil Procedure by setting out in a new wording paragraph (2) of this article and in the text of Articles 449 and 450 .

We support the author's reasoning set out in the draft information note and consider that the new wording of Article 442(2) of the Code of Civil Procedure is justified, as long as this amendment introduces a derogation from the general rule that prohibits the taking of new evidence in the appeal phase after the retrial. Thus, under the conditions of the new regulation, additional evidence may be presented in the appeal to support the claims for compensation provided for in art. 372 para. (1) and para. (3) Code of Civil Procedure. This amendment allows the appeal court to fully settle claims for damages, including default interest, thus avoiding the initiation of further legal proceedings.

With reference to the interventions made in Articles 449 and 450 of the Code of Civil Procedure, the author sets out in a new version Article 449 letter g). Thus, the basis for the revision of civil court decisions is reshaped, establishing the rule according to which it will be possible to file a request for revision when the Government is informed by the ECtHR of the submission of a request from which a fundamental defect is inferred in the previous procedure, which raises well-founded doubts as to the correctness of the solution in the judgment under appeal.

In the same context, a new wording of Article 450(e) of the Code of Civil Procedure is proposed, whereby the deadline for submitting the request for revision under Article 449(g) of



Funded by
the European Union



the Code of Civil Procedure is extended for the duration of the case before the ECtHR, i.e. from the date of informing the Government until the ECtHR resolves the request.

From the author's argument it follows that the amendment of Article 449 letter g) of the Code of Civil Procedure aims to prevent situations of reopening judicial proceedings in the absence of compelling reasons and to ensure the protection of legal certainty in accordance with the recommendations of the Committee of Ministers of the Council of Europe on the review of court decisions.

We consider these amendments appropriate in the context in which the Constitutional Court itself, by [Decision no. 19/2023](#) on the exception of unconstitutionality of art. 476 para. (1) The Contravention Code (review of a final decision on the application of the contravention sanction) held that the principle of legal certainty requires that no party to the process has the right to request the review of a final and binding decision only for the purpose of obtaining a re-examination and a new determination of the case. In view of the extraordinary nature of the review procedure, the Court holds that the grounds which are capable of triggering such a procedure must also be exceptional. Revision is a way of retracting the judgment based on the detection of a fundamental defect in the previous proceedings or on the emergence of new or newly discovered facts, if they are likely to have an impact on the judgment.

Respectively, the establishment of the possibility of submitting a request for review during the period from the information of the Government until the actual resolution of the request by the ECtHR can be framed within the State's margin of appreciation regarding the establishment of internal mechanisms for remedying violations of fundamental human rights and freedoms. Because the period of examination of applications by the ECtHR is quite long, sometimes lasting several years, the possibility of reviewing civil court decisions at the stage of informing the Government could prevent a greater damage that can be caused to the rights recognized and defended by the Convention.

V. Amendment of the Administrative Code.

The proposed amendments to Article 191 of the Administrative Code aim to resolve the Supreme Court of Justice's dilemma regarding the type of judgment to be rendered when examining an administrative case, as a court of first instance (actions on the review of the legality of SCM and SCP decisions) - reasoned decision or only the operative part.

We note that this intervention ensures a uniform standard in judicial practice by obliging the Supreme Court of Justice (SCJ) to motivate all the decisions rendered in the first instance, given that they cannot be appealed. Thus, the reasoning of judgments is essential for their clarity and enforcement.

However, we are of the opinion that these amendments are to be excluded from this draft and communicated to the Parliament of the Republic of Moldova in the form of proposals to amend the draft law on the amendment of the Administrative Code and the Enforcement Code, which is currently under examination in the Parliament of the Republic of Moldova ([draft no. 390 of 02.11.2023](#)), being adopted in Reading I on 9 November 2023.