
Warsaw, 23 December 2021
Opinion-Nr.: JUD-MNG/414/2021 [JB]

OPINON ON THE LAW ON THE JUDICIARY

MONGOLIA

This Opinion was prepared based on the contribution of Judge Grzegorz Borkowski, Professor Richard Vogler, University of Sussex, and Professor Andras Sajó, Central European University, Vienna, former Vice-President, European Court of Human Rights.

Based on an unofficial English translation of the Law.



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The analysis in this opinion concerns the Law on Judiciary dated 15 January 2021 (hereinafter “the Law”), which replaced the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia previously reviewed by OSCE/ODIHR in the Opinion of 3 March 2020 (hereinafter referred as “the OSCE/ODIHR Opinion”). The Law also contains provisions on Citizens’ Representatives in Court Trials, which was commented on in a separate Opinion, dated 27 December 2019.

The idea of regulating all the issues relating to the judiciary in one act is generally welcomed, as it allows for better clarity of law and avoids the discrepancies between different legal provisions. Many recommendations from previous opinions, such as the automatic random assignment of cases and that the Chief Judge of the Supreme Court shall not exercise any prerogative rights in judicial proceedings, have been taken into account and are welcome. However, some concerns remain as it is still unclear whether the Chief Justice has the right to decide the composition of the bench and a recommendation to introduce training of judges especially on international human rights treaties. More specifically, and in addition to what was stated above, OSCE/ODIHR makes the following recommendations to further enhance the Law:

- A. To reconsider Article 4.1.1. of the Law as it seems redundant and to revise this article to clarifying that the “missions” of the judiciary are not listed in order of priority; [par 21]
- B. To clarify Article 17.1.3. to ensure that the Chief Judges does not have the power to unilaterally assign/change the composition of the bench of judges; [par 23]
- C. To clarify in Article 25.8.5 of the Law or by cross referencing to other relevant legislation what cases can be transferred to the Supreme Court; [par 26]
- D. To clarify in Article 25.8.4 of the Law the purpose and effect of official interpretation rendered by the Supreme Court and the relation to Article 49 of the Constitution; [par 27-28]
- E. To clarify in Article 5.8 of the Law the competencies of the “administrative body” as they may overlap with those of the Judicial General Council stipulated in Article 74; [par 43]
- F. To clarify the role of both the legislative and executive branches in the process of assessment of candidates for judges to the Supreme Court; to ensure that the appointment of all judges shall be for an indefinite period; and to revisit the power of the President in appointing judges (Article 36.4) further clarifying and limiting it to a ceremonial role, ensuring that s/he is bound by the proposals made by the Judicial General Council; [pars 50, 51 and 55]

- G. To specify in Article 40.2 of the Law that the role of the President of Mongolia is mainly bound by the proposals made by the Judicial General Council to dismiss judges; also to clarify Article 40.6 of the Law on what “justified resignation” entails, and to consider removing Article 40.2.9 as it seems redundant, as age of retirement is mentioned in Article 40.1 as a ground to terminate the mandate of a judge; [pars 57-59]
- H. To include provisions in the law on state provided training for judges on international human right treaties; [par 60-61]
- I. To specify in the Law, unless this is regulated elsewhere in the legislation, that judges may issue dissenting opinions and to reconsider the absolute ban on entering advocacy after resignation or termination of the mandate as a judge; [pars 63-64]
- J. To insert a provision in Article 63 requiring Citizen Representative candidates to make a declaration whether they have visual, hearing or other impairment, which would prevent them from being able to follow court proceedings and to consider whether such impairments can be addressed by measures that would allow Citizen Representatives to properly follow court proceedings; [par 66]
- K. To further clarify Article 63 regarding the order of the selection process and by removing the requirement for two eligibility checks (as opposed to one) in Articles 62.2.3 and 62.5; [par 67]
- L. To extend the notice period given to selected Citizen Representatives in Article 63.4 and to require the Citizen Representative to notify his or her employer (rather than the court) on the selection to serve as Citizen Representative; to strengthen the provisions of Article 63.7 by an assertion that the employment of a Citizen Representative shall not be prejudiced in any way by their public service at court, and to reinstate provisions on the extent of legitimate reasons for non-attendance, together with a statement referring to the consequences of non-attendance without good reason; also to introduce the procedure to be followed by a Citizen Representative, who asks to be excused from service, unless regulated elsewhere in the legislation; [par 69-70]
- M. To amend Article 66.1 to increase number of Citizen Representatives participating in every case; [par 71]
- N. To replace the wording of Article 58.1: “the courts of first instance shall allow representatives of citizens to participate in the proceedings in accordance with the law” with wording which reflects the status of a Citizen Representative as a member of the judicial process, and to include in the Law provisions on “open judicial procedure and transparency” and overall aim for including Citizen Representatives in the judicial process; [pars 72 - 74]
- O. To redraft Article 66 to ensure that the Citizen Representatives deliberate over the verdict collectively with the panel of professional judges and that

their votes must be counted equally in reaching a single, joint decision; [par 75-78]

- P. To clarify in the Law that the conducts mentioned in Article 60 may be considered as “obstructing the course of justice” or similar and penalized accordingly; and to consider reinstating in Article 60 of the Law the provision contained in Art. 9.8 of the 2012 Code on the consequences for failing appear as Citizen Representative without any legitimate reason. [par 82]

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

TABLE OF CONTENT

I. INTRODUCTION	7
II. SCOPE OF REVIEW	7
III. ANALYSIS	8
1. International Standards and OSCE Commitments on Independence of the Judiciary	8
2. National Legal Framework on the Judiciary	11
3. Courts' Establishment and Judicial Organization	11
<i>3.1 Independence and purpose of the Judiciary.....</i>	<i>11</i>
<i>3.2 Organizational framework of the Judiciary</i>	<i>12</i>
<i>3.3 Organizational rules and powers of the Supreme Court</i>	<i>13</i>
<i>3.4 Structure of and rules for the Judicial General Council.....</i>	<i>14</i>
<i>3.5 Disciplinary Committee</i>	<i>15</i>
<i>3.6 Budgetary Independence</i>	<i>17</i>
4. Status of Judges.....	17
<i>4.1 Assessment, Appointment and Dismissal of Judges.....</i>	<i>17</i>
<i>4.1.1 Assessment and appointment of candidates</i>	<i>18</i>
<i>4.1.2 Termination of mandate of judges.....</i>	<i>20</i>
<i>4.2 Training of judges</i>	<i>20</i>
<i>4.3 Other matters concerning judges</i>	<i>21</i>
5. Citizens Representatives' in Court Trials.....	22
<i>5.1 Revisions to the Selection and Notification Process for Citizen Representatives .</i>	<i>22</i>
<i>5.1.1 Eligibility of Citizen Representatives</i>	<i>22</i>
<i>5.1.2 Selection Process for Citizen Representatives</i>	<i>22</i>
<i>5.1.3 Notice to Citizen Representatives.....</i>	<i>23</i>
<i>5.2 Revisions to the Number, Status, and Role of Citizen Representatives</i>	<i>24</i>
<i>5.2.1 Number of Citizen Representatives</i>	<i>24</i>
<i>5.2.2 The Status of Citizen Representatives</i>	<i>24</i>
<i>5.2.3 The Role of Citizen Representatives</i>	<i>25</i>
<i>5.3 Revisions to the Conditions of Service of Citizen Representatives</i>	<i>26</i>
<i>5.3.1 Provision of Information to Citizen Representatives.....</i>	<i>26</i>
<i>5.3.2 Protection of Citizen Representatives</i>	<i>26</i>

5.3.3.	<i>Independence of Citizen Representatives</i>	26
5.3.4.	<i>Prohibited Conduct of Citizen Representatives</i>	27
5.3.5.	<i>Recusal of Citizen Representatives</i>	27
6.	Final Comments	27
6.1	<i>Impact Assessment and Participatory Approach</i>	27

Annexes: Law on the Judiciary of Mongolia of 15 January 2021

I. INTRODUCTION

1. On 16 March 2021, the Judicial General Council of Mongolia sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for a legal review of the Law of Mongolia on the Judiciary of 15 January 2021 (hereinafter “the Law”). The Law entered into force on 1 March 2021.
2. On 29 March 2021, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Law with international human rights standards and OSCE human dimension commitments.
3. In 2020 ODIHR reviewed five related Mongolian Laws (Law on Courts, Law on Judicial Administration, Law on the Legal Status of Judges, Law on the Legal Status of Citizens’ Representatives in Court Trials, and Law on Mediation). This Opinion should be read in conjunction with the OSCE/ODIHR Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia (OSCE/ODIHR 2020 Opinion),¹ and the Opinion on the Law on the Legal Status of Citizens’ Representatives of Court Trials,² OSCE/ODIHR 2019 Opinion), as the present Law on the Judiciary contains elements previously contained in these laws. The previous Law on Courts was adopted in 2012 (hereinafter “the 2012 Law”). This Opinion focuses mostly on the differences from the previous law where recommendations in the ODIHR/OSCE Opinion have not been included, but also describes suggestions that have been included in the current Law.
4. 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.³

II. SCOPE OF REVIEW

5. The scope of this Opinion covers only the Law 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.
6. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas where previous recommendations were not included and areas that require amendments or improvements than on the positive aspects of the Law. The ensuing recommendations are based on international standards, norms and practices (see section III.1 *infra*), as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, the

¹ [Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia](#), 3 March 2020.

² [Opinion on the Law on the Legal Status of Citizens’ Representatives in Court Trials](#), 27 December 2019

³ 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 [...]”.

OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws.

7. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion's analysis takes into account the potentially different impact of the Law on women and men.⁴
8. This Opinion is based on an unofficial English translation of the Law and the assessment comparing current and previous legislation commissioned by the OSCE/ODIHR, which are attached to this document as Annexes. Errors from translation may result. The Opinion has been translated into Mongolian, but the English version shall prevail.
9. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating the judiciary in Mongolia in the future.

III. ANALYSIS

1. INTERNATIONAL STANDARDS AND OSCE COMMITMENTS ON INDEPENDENCE OF THE JUDICIARY

10. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.⁵ The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.⁶ 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 in and credibility of 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, impartial and competent are vital in a society that respects the rule of law.
11. 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

⁴ 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).

⁵ 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).

⁶ 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.

Rights⁷ the ICCPR. “The requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, paragraph 1 (hereinafter “the ICCPR”) is “an absolute right that is not subject to any exception.”⁸ 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*”.⁹

12. The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the UN Basic Principles on the Independence of the Judiciary (1985),¹⁰ and have been further elaborated in the Bangalore Principles of Judicial Conduct (2002).¹¹ International understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee¹² and the UN Special Rapporteur on the independence of judges and lawyers.
13. 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).¹³ In the 1991 Moscow Document,¹⁴ 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.¹⁵ 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).¹⁶
14. 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

⁷ 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.

⁸ [UN Human Rights Committee, General Comment 32](#), par 19

⁹ [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.

¹⁰ [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.

¹¹ [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.

¹² See especially, [UN Human Rights Committee, General Comment 32](#), par 19

¹³ CSCE/OSCE, [1990 Copenhagen Document](#), pars 5 and 5.12.

¹⁴ CSCE/OSCE, [1991 Moscow Document](#), pars 19.1 and 19.2.

¹⁵ OSCE, [Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (Helsinki, 4-5 December 2008).

¹⁶ [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.

Fundamental Freedoms (ECHR) and the case law of the European Court of Human Rights. Other CoE instruments may serve as useful reference documents from a comparative perspective. Such sources could also be relevant in accordance with the Statute of the International Court of Justice, Article 38 d, which stipulates that “judicial decisions” can be, “subsidiary means for the determination of rules of law”.¹⁷

15. Numerous states have sought to enhance citizens’ participation in the administration of justice through courts.¹⁸ The reasons for including laymen in court proceedings are manifold, and differ depending on the respective state – while some aim to strengthen the role of the defendant, others seek to enhance transparency in administering justice, fight corruption and incompetence within the judiciary, enhance popular support for the justice system, and reduce bureaucracy.
16. At the international level, there are not many standards pertaining to the role of lay judges. The United Nations Basic Principles on the Independence of the Judiciary, in its Preamble focus largely on professional judges, but state, in their Preamble, that they apply equally, as appropriate, to lay judges, where they exist.¹⁹ Also, the UN Human Rights Committee has stressed, in its recommendations, that lay judges underlie the same requirements of independence and impartiality as professional judges.²⁰ The European Court of Human Rights (hereinafter “ECtHR”) has confirmed this in its case law as well.²¹
17. When focusing on lay judges, or so-called mixed tribunals, those countries that have introduced this concept into their legislation have regulated it somewhat differently as regards the size, composition, qualifications, types of cases and potential decisions taken by such courts. During deliberations on a case, professional and lay judges are largely seen as equal.²²

¹⁷ [Statute of the International Courts of Justice](#), Article 38 d: “subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

¹⁸ This participation in some countries may take a form of a trial by jury, where laymen make a decision on a case (e.g. in the United States, United Kingdom, Russian Federation, Spain, Georgia) and in others is limited of a lay judges, participating in so-called mixed tribunals, where the bench is composed of both professional judges and laymen (e.g. Germany, Croatia, Japan).

¹⁹ See the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

²⁰ See *Karttunen v Finland*, communication no. 387/1989, Views of the Human Rights Committee of 23 October 1992, par 7.2, where the Committee found that the failure of the competent courts to ex officio disqualify and replace lay judges found to be partial to one of the parties constituted a violation of Article 14 of the International Covenant on Civil and Political Rights (ICCPR), as such lack of impartiality flawed a trial cannot be considered to be fair or impartial. See similar findings of the Human Rights Committee with regard to jurors in *Rookmin Mulai, Lallman Mulai and Bharatraj Mulai v Guyana*, communication no. 811/1998, Views of the Human Rights Committee of 20 July 2004, pars 6.1-6.2. See also Ministerial Council Decision MC.DEC/7/09 which calls all participating States to “Consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies, including security services, such as police services;” and the OSCE Moscow Document 1991 on the Human Dimension in which participating States will ensure “that judges are properly qualified, trained and selected on a non-discriminatory basis;” (19.2)

²¹ ECtHR, *Langborger v Sweden*, application no. 11179/84, judgment of 22 June 1989, pars 34-35. See also *Cooper v United Kingdom*, application no. 48843/99, [GC] judgment of 16 December 2003, par 123 (in this judgment, however, the Court found that due to extensive instructions and training of ‘ordinary members’ (laymen) sitting on court martials on how to react in cases where there was a threat of independence and impartiality of them or their behaviour, there had been sufficient safeguards in place to guarantee the independence of such ‘ordinary members’).

²² Lay judges participate in the deliberations on a case,²² as well as in decision-making and may usually decide on all factual and legal issues of relevance in the main hearing, in conjunction with professional judges. In Japan, however, only professional judges may determine questions of law and procedure; at the same time, judgments need to be agreed upon by the majority of the panel, with at least one lay judge and one professional judge in the majority. In Norway, on the other hand, lay judges must consent to decisions written by the professional judge. In some laws, there is a special voting order (e.g. in Germany, lay judges vote first).

2. NATIONAL LEGAL FRAMEWORK ON THE JUDICIARY

18. The fourth Section of Chapter III of the Constitution of Mongolia governs 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 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.

3. COURTS’ ESTABLISHMENT AND JUDICIAL ORGANIZATION

3.1 Independence and purpose of the Judiciary

19. Unless otherwise specified, references to articles in section 3 refer to the 2021 Law on the Judiciary.
20. Article 1 of the Law emphasizes the need to ensure the impartiality of judges and independence of the judiciary and is stipulated in a clearer manner than the previous law of 2012. The Law covers not only the organization and functions of the judicial system but also the eligibility requirements and criteria for judges, their legal status, the legal status of the Citizen Representatives of court trials, as well as issues regarding the establishing mandate, organizational structure, functions and procedures of the Judicial General Council and Judicial Disciplinary Committee, i.e. the issues covered previously in the Law on Judicial Administration and Law on the Legal Status of Judges of Mongolia, as well as the Legal Status of Citizen Representatives of Court Trials of Mongolia (see Section 5 *infra*). The idea of regulating all the issues relating to the judiciary in one act is generally welcomed. Importantly, it allows for better clarity of law and avoids potential discrepancies between different legal provisions.
21. The concept of strengthening judicial independence and impartiality is further developed throughout the Law. However, it is not clear why there was a change in the order of the principles in Article 4, “Mission of the Judiciary”. In the current Law, the first part of the “mission” (in Article 4.1.1.) is formulated as follows: “to protect the independence and sovereignty of Mongolia, and the Constitutional order and its institutional structure”, whereas previously it was “to protect human rights and freedoms, and/or to reinstate violated rights”, which now mentioned in Article 4.1.2. Such change in the legislation

could, possibly even involuntarily, indicate to the hierarchy of the aims and that the human rights and freedoms are less important than protection of the sovereignty of State and constitutional order. Furthermore, while it is an obligation of any public institution to respect and uphold constitutional principles, it is unusual to define main purpose of courts in such terms. It is not clear whether the purpose of courts to protect the independence and sovereignty is a concept to be considered while balancing between the individual rights and legitimate interest, on one hand, and state's sovereignty and independence, on another, or it is suggested as a primary obligation of courts. And finally, it is suggested to replace the word "mission" (unless it is a result of inaccurate translation) with "purpose", which is arguably a better choice of a word.²³

RECOMMENDATION A

To reconsider Article 4.1.1. of the Law as it seems redundant and to revise this article to clarifying that the "missions" of the judiciary are not listed in order of priority

3.2 Organizational framework of the Judiciary

22. According to Article 14.2, the proposal on establishment, re-organization, dissolution and location of a court, with exception of the Supreme Court, shall be submitted to the State Great Hural (Parliament) by the Government upon a proposal made by the Judicial General Council after consultation with the Supreme Court. Although it is still up to the executive authority to submit the proposal, the President no longer plays a role in the process. This change is welcome and reflects the remarks made in pars. 20-21 of the OSCE/ODIHR 2020 Opinion, which found that the President had "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...".²⁴
23. According to the Article 17.1.3, Chief Judges "shall formalize the decision on the appointment of chair of court hearing and/or panel of judges unless stated otherwise by law". This wording appears to be confusing. Previously existed provision that Chief Judges had "to officiate the decision on appointment of chair of court hearing and/or bench of judges unless stated otherwise by law" was criticized by ODIHR. If the amendment means that the Chief Justice only countersigns and thus "formalizes" the decision (similar to the role of a public notary), then the new wording follows the recommendations presented in the OSCE/ODIHR 2020 Opinion (see par. 170). **However, if the provision leaves to the Chief Judge the power to assign/change the composition of bench of judges and chair of the hearing, then all the previously expressed concerns remain valid.**

²³ [Constitution of Mongolia](#), Article 49 par. 1 cf. Article 20.

²⁴ [Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia](#), 3 March 2020, pars 20-21.

RECOMMENDATION B

To clarify Article 17.1.3. to ensure that the Chief Judges does not have the power to unilaterally assign/change the composition of the bench of judges.

24. Article 19.2.4 stipulates clearly that it is the Judges' Consultation Meeting (not the President as prescribed by the 2012 previous Law on Legal Status of Judges, Article 15.4) that shall select the Chief Judge of that respective court among its peers. This change is welcomed. Furthermore, Article 19.3, which provides for the automatic random assignment of cases, is an extremely important and positive amendment, following the recommendations in the OSCE/ODIHR 2020 Opinion (see par. 180).
25. The inclusion of the General Assembly of Judges (Article 20), as part of judicial self-governance, is also welcomed. It may be advisable however to organize the Meeting of the General Assembly of Judges annually and not only every two years (Article 20.1). Alternatively, the Law should provide a possibility for the General Assembly of judges to meet more frequently if deems so necessary. Article 20.11 of the Law states that "The Chairperson of the General Assembly of Judges shall be elected among its peers", while according to Article 20.3, the General Assembly of Judges shall determine its meeting rules of procedure. What would require clarification is when and how the Chairperson is elected, i.e., prior to or following determining the rules of procedure. **As it stands, the Article does not provide sufficient clarify and would benefit from revision** (e.g. whether the candidates are allowed to present themselves, what the manner of voting will be in addition to being by secret ballot in accordance with Article. 36.8, which concerns elections of Chief Judges in all other courts than the Supreme Court., etc.). The translation of Article 36.8 states Chief Justice, but from the context it seems this translation of the law is inaccurate as the title Chief Justice only refers to the Supreme Court in other Articles.

3.3 Organizational rules and powers of the Supreme Court

26. In terms of organization of the Supreme Court it must be noted that most of the issues mentioned in the OSCE/ODIHR 2020 Opinion (par. 31) have been addressed and resolved (e.g. by stating the exact number of judges in Article 25.3 and clarifying the nature of the cassation court in Article 25.1, pars. 25-36). However, Article 25.8.5 states that the Supreme Court "shall adjudicate matters concerning of the rule of law, protection of human rights and freedoms transferred to it from the Constitutional Court and/or the state Prosecutor-General" and thus, repeats the provision of Article 17.3.4 of the 2012 Law on Courts. The OSCE/ODIHR 2020 Opinion noted (par. 26) that the actual meaning of this provision requires clarification regarding the types of cases referred to by the Constitutional Court and the Prosecutor General, or a cross-reference the relevant legislation. This recommendation remains valid.

RECOMMENDATION C

To clarify in Article 25.8.5 of the Law or by cross referencing to other relevant legislation what cases can be transferred to the Supreme Court.

27. Furthermore, according to Article 25.8.4 the Supreme Court “shall issue official interpretations for the proper application of laws, except for the Constitution of Mongolia, based on the recommendations of the chambers and shall publish such interpretations on regular basis”. It is not clear what the purpose of those official interpretations is, whether or not they are provided in the context of a given case, and whether they are binding on the Supreme Court and other courts in Mongolia, or not. While it may be reasonable to expect judges to follow the interpretation of the law established by higher courts, limiting unequivocally judges’ liberty to apply different interpretation is not justified. **Therefore, it is recommended that Article 25.8.4 be clarified as regards the procedure and purpose of official interpretations of laws.** Furthermore, Article 25.7.5 b states that (the Supreme Court) “shall review the interpretation of the laws which are interpreted differently that of Supreme Court interpretation”. **It is presumed to mean that the Supreme Court may strike down any decisions of lower courts, provide interpretation of a law in the context of a particular case, and change its own interpretations. It is recommended this be clarified.**
28. In the OSCE/ODIHR 2020 Opinion (par. 172) concern was raised regarding the right of the Chief Justice to participate in hearings in any chamber of the Supreme Court. OSCE/ODIHR is pleased to note the direct prohibition contained in Article 17.2 that the Chief Judge shall not exercise any prerogative rights in judicial proceedings. Furthermore, 25.2 and 25.5 clearly state that the Chief Justice as well as all other judges must be affiliated with one chamber of the Supreme Court. This is a welcome change from the 2012 Law on Courts. It should be noted, that Article 27.1.1 does not state how often the Chief Justice of the Supreme Court shall announce, convene and chair the General Assembly as well as the consultation meeting of the Supreme Court Judges. Although Article 76.4 seems to suggest that meetings of the General Council may be organized on a yearly basis (as a Chairperson of the General Council is elected for the term of one year only), **it is recommended that it be clearly stated in the law how frequently such meetings should take place *ad minimum*.**

RECOMMENDATION D

To clarify in Article 25.8.4 of the Law the purpose and effect of official interpretation rendered by the Supreme Court and the relation to Article 49 of the Constitution

3.4 Structure of and rules for the Judicial General Council

29. Bodies such as the Judicial General Council are intended to safeguard both the independence of the judicial system and the independence of individual judges, and is a structural requirement of a state governed by the rule of law.²⁵

²⁵ According to international 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 / a majority of those who sit are judges elected by their peers, to prevent outside, possibly undue influence. See e.g. [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, DAJ/DOC (98)23, par 1.3.; [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010), pars 9, 26 and 30; [2010 CoE](#)

30. Under Article 76.1, the Judicial General Council will be constituted of ten members. An even number of members could lead decision not being reached, if there are no other rules, especially since the Judicial General Council can function when two thirds of the members are appointed according to Article 76.8 and thus the number of possible votes can vary. A solution could be to give the chairperson the deciding vote in case of ties. It is worth noting that the Disciplinary Committee (see section 3.5 *infra*), Article 95.2, consists of 9 members. Why the two bodies have a different number of members is not clarified. **Consequently it is advisable to clarify the rules on decision making in the Law.** It could also be clarified who elects the Chairperson of the Judicial General Council. This is not specifically mentioned in Article 76.4. It is presumed that this power lies with the Judicial General Council itself as the power is not mentioned in Article 20 on the General Assembly of Judges. It also recommended to consider granting this power to the General Assembly of Judges, as is the case for the Disciplinary Committee, Article 95.4, to avoid any perception of undue influence, if the current composition of the Judicial General Council remains where judges do not constitute a majority.
31. Article 76.2 concerns the membership of the Judicial General Council. Five of the ten members shall be elected by the General Assembly of Judges and the remaining five by the Great Hural. A mixed composition of judges (elected by their peers) and non-judges is in line with international standards.²⁶
32. As mentioned, the non-judge members are selected by the Great Hural. In order to avoid any perception of political influence and influence from the executive branch over the Judicial General Council, **it should be clarified that the members Great Hural, as well as high ranking civil servants with influence in the executive branch, should not be eligible to be elected as members of the Judicial General Council.**²⁷
33. The provision in Article. 82.2.1 which prohibits the Chairperson and members of the Judicial General Council from nominating their own candidature to a judicial position during his/her term in office in the General Council and within one year after the expiration of his/her term is extremely important and is welcomed. Such a provision limits the possibility of undue influence and corruption.

3.5 Disciplinary Committee

34. Similarly, to the Judicial General Council, disciplinary bodies also need to be independent and free from undue influence to serve their purpose.²⁸ Article. 83.2 provides grounds for terminating a mandate of a member of the Judicial General Council, while according to the Article 83.4, Disciplinary Committee is empowered to decide on whether to initiate a disciplinary case.
35. Under Article 95.2, the Disciplinary Committee consists of nine members. As mentioned above, this is different from the Judicial General Council. An uneven number of members could render decision easier to reach. However, as the Disciplinary Committee can

[Recommendation CM/Rec\(2010\)12](#), par 69; [2010 Venice Commission Report on the Independence of the Judicial System](#), par 50; [CCJE Opinion no. 10 \(2007\) on Judicial Councils](#), pars 17-18 and 25; and [CCJE, Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), par 71.

²⁶ Ibid (Opinion no 10 of the CCJE), section 16. See also [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010), section 7; See also, 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"; 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".

²⁷ [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010), section 7 and Ibid (Opinion no 10 of the CCJE,), section 19.

²⁸ See sources in footnote 25.

- operate with two thirds of the members being appointed, according to Article 95.15 and thus the number of possible votes can vary. As for the Judicial General Council a solution could be to give the chairperson the deciding vote in case of ties.
36. Article 95.4 concerns the membership of the Disciplinary Committee. Four of the nine members shall be elected by the General Assembly of Judges and the remaining five by the Great Hural. **It is recommended, however, that in line with international standards, majority of members should be judges.** Similar recommendation was offered in 2020 ODIHR Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia.²⁹
 37. As for the Judicial General Council, non-judge members are selected by the Great Hural. In order to avoid any perception of political influence and influence from the executive branch over the Judicial General Council, **it should be clarified that the members Great Hural, as well as high-ranking civil servants with influence in the executive branch, should not be eligible to be elected as members of the Judicial General Council.**
 38. **In addition, the modalities of appointment of its members should also ensure its independence from the executive and legislative branches. 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.**³⁰
 39. If a disciplinary violation case is initiated, the Disciplinary Committee will appoint an “independent expert” to study the background of the complaint and/or report. **However, it is not clear what conditions must be met by an “independent expert”, as there no requirements are laid down regarding the professional qualities, status or criteria of selection of such an expert, except that they must be “independent”. Such conditions must be specified in the Law for consistency in disciplinary cases.**
 40. Regarding disciplinary proceedings, the introduction of the Disciplinary Committee is welcomed. However, it might be problematic that the Rapporteur, acting as a prosecutor (having the investigative role) in a case, is in fact a member of the Disciplinary Committee. At the same time, Article 111.2 clearly states that the rapporteur member cannot be a member of the adjudicating panel; otherwise the role of the prosecutor and judge would be merged. Yet, it might be potentially perceived as not fully transparent that a member of a certain body serves as a party to the disciplinary proceedings in front of his/her colleagues, and acting as the court of the case regardless of whether he/she is a member of the adjudicating panel. Therefore, members of the same body should not take the decision to prosecute, try the issues arising from the judge’s conduct, determine his/her guilt and impose the sanction.³¹ **In light of the above, a different organization, with the Rapporteur not serving in the Committee, should be reconsidered.**
 41. It must be noted that Chapter 14 of the draft is titled: (Judicial) “General Council, its Composition, Structure and Organization”. Articles 68-86 regulate the above-mentioned issues, whereas Articles 87-96 regulate bodies that are not related to the General Council (e.g. the Administration offices of the courts, the Secretary of a Court session etc.). **From**

²⁹ ODIHR Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia, 2019, par 137.

³⁰ [Kyiv Recommendations](#); par 9, 2014 ODIHR-Venice Commission [Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#), par 74.

³¹ See European Court of Human Rights, *Oleksandr Volkov v. Ukraine*, judgment 9 April 2013, ([Application no. 21722/11](#)), par 114.

the point of view of legislative technique, the latter issues should be regulated in a separate chapter.

3.6 Budgetary Independence

42. Article 5.6 reflects the remarks of the OSCE/ODIHR Opinion (par. 86), as it states: “The judiciary shall have an independent budget, which will be adequate to ensure the full, independent, efficient and effective discharge of the responsibilities and functions of the judiciary. The reduction of the operational budget of courts compared to the previous year shall be prohibited, except for an emergency situation when the general budget is cut.” This is a step in the right direction in comparison with the previous unclear wording that stated: “The judiciary shall have an independent budget, and the government shall provide the conditions of its continuous functioning” (Article 6.4 of the 2012 Law).³²
43. However, it is not entirely clear which body will be responsible for the budgetary issues of the Judiciary. Article 5.8 of the Law states that; “An administrative body with the main function to ensure and support the normal and uninterrupted functioning of judiciary and its security, research and information channelling shall be established, and the relations subject to its legal status shall be regulated by this law.” At the same time, it is the Judicial General Council that is to be responsible for the financial and economic aspects of functioning of the judiciary (Article 74) and judicial research and information (Article 75). It is thus unclear how the functions of the “body” referred to in Article 5.8 will be different from the Judicial General Council and what is the reason for establishing such a separate body if that is indeed an intention of the Law. **Furthermore, if the intention is to establish a separate body, the Law should clearly define its status and functions. However, Article 46.8.1 of the Law also states that the Judicial General Council plan the operating and investment budgets of all courts, other than the Supreme Court, and submit the budget proposal to the Standing Committee for review.**

RECOMMENDATION E

To clarify in Article 5.8 of the Law the competencies of the “administrative body” as they may overlap with those of the Judicial General Council stipulated in Article 74

4. STATUS OF JUDGES

4.1 Assessment, Appointment and Dismissal of Judges

44. Please note that section 5 of the OSCE/ODIHR 2020 Opinion is also applicable to the ensuing discussion.

³² [Opinion no 2 of the CCJE](#), section 5: “The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.”

45. As pointed out in the OSCE/ODIHR 2020 Opinion (par. 111), several international monitoring bodies have noted the need to improve the procedure for selecting and appointing judges in Mongolia in order to increase transparency and impartiality 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.³³
46. As this was further explained in the OSCE/ODIHR 2020 Opinion (par. 112), where it was pointed out that the Law on Status of Judges (Articles 4 to 7 on qualification and eligibility requirements) generally respected relevant international standards and recommendations. However, some issues of concern laid down in the OSCE/ODIHR 2020 Opinion remain in the current Law.

4.1.1 Assessment and appointment of candidates

47. Please note that section 5.4 of the OSCE/ODIHR 2020 Opinion is also applicable to the ensuing discussion.
48. Article 36.2 leaves a role for the Parliament in assessing the candidates for justices of the Supreme Court. **As previously recommended, the Parliament should be excluded from this procedure 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 (OSCE/ODIHR 2020 Opinion, par. 128).** 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.
49. It is of paramount importance that political influence be avoided when appointing judges to the highest court.³⁴ Accordingly, the involvement of the Parliament carries with it a risk of politicization of the appointment process and of the public perception of dependence of the elected Supreme Court judges on the legislature.³⁵ 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. **It is recommended this provision be amended.**
50. **In a similar manner, Article 36.4 should be revised, which allows the President to reject the candidates “on the grounds that the candidate does not meet the eligibility requirements and criteria set forth in Article 31”.** Although most of the requirements listed under the Article 31 are formal such as absence of a criminal record, or existence of a lawyer's license, the Law also requires that candidate should have high level of professionalism, experience and ethics.
51. As mentioned in 2020 OSCE/ODIHR Opinion, 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

³³ See CCPR, [Concluding observations on the sixth periodic report of Mongolia](#), 22 August 2017, par 32. See also 2019 [OECD Report on Anti-Corruption](#), p. 10 and new Recommendation 11 on pages 15-16.

³⁴ 2019 ODIHR [Opinion on the Appointment of Supreme Court Judges of Georgia](#), pars 26-28. 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”.

³⁵ *Ibid.* See also (2015 [CCJE Opinion no. 18](#), par 15); [2001 CCJE Opinion No. 1](#), pars 33 and 45; and CCJE [Opinion no. 10 \(2007\) on Judicial Councils](#), pars 48-51. See also [2007 Venice Commission's Report on Judicial Appointments](#), pars 12 and 29

independent council and judges³⁶ and that appointees are free from influence or pressure when carrying out their adjudicatory role.³⁷ The 2010 ODIHR Kyiv Recommendations suggest that in such a case, the 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.³⁸ **It is therefore recommended that the powers of the President in appointing judges is further clarified and limited to a ceremonial role, ensuring that s/he is bound by the proposals made by the Judicial General Council.**

52. It is welcomed that Article 31.3 establishes the threshold of the minimum years of experience in order for a judge to sit on the bench of the appellate court (six years of experience (previously unspecified) as a judge of a court of first instance)
53. Regarding the candidates' qualification assessment, under Article 34.7 it is not clear how many points are assigned to each criterion; this opens the possibility of non-objective assessment of candidates. Also, the criterion "other" (Article 34.7.6) must be specified. Article 34.12, referring to Article 72.1.5, does not clarify the issue.
54. Article 34.9 states that the assessment results shall be valid for two years. While this may be convenient for some applicants, the article should be amended to ensure that the candidates who believe they have improved significantly within one year and might wish to apply again (and take the test again) for a vacant position the following year, can do so.
55. The wording of Article. 42.3.3, on the duration of judicial appointment, is confusing. It stipulates that judges shall *not* be appointed for *indefinite* period. The English translation of the Law as well as the comparing assessment, contain similar language. Unless a matter of translation, this provision would undermine the guarantees of independence. Presumably, the drafters imply that appointments should be made for a fixed period or until the retirement. **Thus, it is important to make sure that all judges shall be appointed for an indefinite period and until retirement (...)**
56. For reasons mentioned above on political involvement in the judiciary, it is a welcome change that in relation to the appointment of judges, the responsibilities regarding the swearing-in procedures, the design of the judge's gown and its usage (Article 38.3) shift from the President to the Judicial General Council.

RECOMMENDATION F

To clarify the role of both the legislative and executive branches in the process of assessment of candidates for judges to the Supreme Court;

To ensure that the appointment of all judges shall be for an indefinite period;

To revisit the power of the President in appointing judges (Article 36.4) further clarifying and limiting it to a ceremonial role, ensuring that s/he is bound by the proposals made by the Judicial General Council.

³⁶ See 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.

³⁷ See e.g., for the purpose of comparison, European Court of Human Rights, [Maktouf and Damjanović v. Bosnia and Herzegovina](#) [GC] (Application nos. 2312/08 and 34179/08, judgment of 18 July 2013), par 49.

³⁸ 2010 ODIHR [Kyiv Recommendations](#).

4.1.2 Termination of mandate of judges

57. Article 40.2 states that the President has the power to terminate the mandate of a judge in cases clearly stipulated by the same law. However, it is not clear whether proposal from the **Judicial General Council** is required for a President to make such decision. In order to avoid undue interference in judicial matters, as well as to align the procedure of appointment and dismissal, **it is recommended to clearly that the role of the President is limited to issuing a decree of dismissal, which would be based on the proposal from the Judicial General Council.**
58. Article 40.6 regulates the situation when a Chief Justice of the Supreme Court voluntarily resigns from his/her function. The General Assembly of the Supreme Court Judges should then assess the request for resignation and express whether it is “justified”. However, the provision does not regulate the situation in which the General Assembly of the Supreme Court Judges deems the request to be unjustified. It does not seem reasonable to force a person to stay in the function, if he/she clearly announces the wish to resign. **It is recommended to clarify what “justified resignation” entails or that this passage be deleted.**
59. The relation between Articles 40.1 and 40.2.9 on reaching retirement is not entirely clear, as they seem to concern the same issue. Article 40.2.9 seems redundant, as retirement age is also mentioned in Article 40.1 as a ground to terminate the mandate of a judge. The aspect of retirement also has a gender dimension as the legal age of retirement is 55 for women and 60 for men,³⁹ which could complicate a possible aim to reach gender parity in the courts.

RECOMMENDATION G

To specify in Article 40.2 of the Law that the role of the President of Mongolia is mainly bound by the proposals made by the Judicial General Council to dismiss judges;

Also to clarify Article 40.6 of the Law on what “justified resignation” entails, and to consider removing Article 40.2.9 as it seems redundant, as age of retirement is mentioned in Article 40.1 as a ground to terminate the mandate of a judge.

4.2 Training of judges

60. As outlined in the OSCE/ODIHR 2020 Opinion (section 5.7), international human rights monitoring bodies have emphasized the importance of (mandatory) training of judges in Mongolia, on international human rights treaties;⁴⁰ including but not limited to the absolute prohibition of torture;⁴¹ legislation criminalizing violence against women, domestic violence and human trafficking, and the vulnerabilities of victims;⁴² the recognition of the legal capacity of persons with disabilities and on the mechanisms of

³⁹ [Financial assessment of the proposed reform to the social security system for older persons and a proposed new pension scheme for the herders and self-employed persons, ILO/TF/Mongolia/R.4](#)

⁴⁰ See CCPR, [Concluding observations on the sixth periodic report of Mongolia](#), 22 August 2017, par 6.

⁴¹ UN Committee against Torture, [Concluding observations on the second periodic report of Mongolia](#), 5 September 2016.

⁴² *Ibid.* pars 23-24, 28 (f) and 38 (a) (UNCAT). See also, 2016 CEDAW [Concluding observations on Mongolia](#), par 19 (b); and CESCR, [Concluding observations on the fourth periodic report of Mongolia](#), 7 July 2015, par 21.

supported decision-making;⁴³ and on ethics, anti-corruption and integrity.⁴⁴ **It was recommended in the OSCE/ODIHR 2020 Opinion to include the above in the Law on Courts, but as this recommendation has not been followed.**

61. As for the training of judges in the 2021 Law, especially of justices of the Supreme Court (Article 37.2), **it seems advisable to organize specialized training by the State (if this means public bodies such as the Supreme Court or the Judicial General Council), not by the appointees' "own accord") for the newly appointed judges from outside the judiciary (i.e. one-third of the composition of the Supreme Court (Article 31.6)).**
62. Article 24.5 stipulates that "inclusion of cases and disputes that have not been finally resolved in the court on the training programme curriculum and methodology shall be prohibited." It seems to be a somewhat arbitrary rule. It should be allowed to use hypothetical, anonymized case-studies for teaching purposes, even if the case has not been solved yet. A valid point can be that there may be cases where details should not be divulged which would transgress the respect for the right to privacy.

RECOMMENDATION H

To include provisions in the law on state provided training for judges on international human right treaties.

4.3 Other matters concerning judges

63. When comparing Article 22.7 with the previous Article 31.5 of the Law on Courts, it is not clear whether a judge may issue a dissenting opinion, which is a common feature in most jurisdictions. **The matter of dissenting opinions should be regulated either in the Law itself or by a cross-reference to the relevant legislation.**
64. Article 51.2 and 51.3 introduce a ban on performing advocacy after voluntary resignation and termination of mandate as a judge or retirement. The reasons for such a total prohibition are not obvious and seems to go too far. It is not clear why a judge would be prohibited to practice advocacy after a resignation or retirement (Article 51.3). Furthermore, it is also not clear what is the difference between the Article 51.2, which imposes two-year long restriction on advocacy in case of reassignment and Article 51.3, which seems to impose life-long prohibition to practice advocacy "in the event of the termination of his/her mandate as a judge or after retirement". It should be noted that according to the Article 40, one of the grounds for termination of the mandate is a letter of resignation. It might be restricted to serving as an attorney in his/her former court for a specified period (e.g. for two years) but forbidding the access to advocacy as such seems to go too far in limiting freedom to choose a profession.

RECOMMENDATION I

To specify in the Law or by cross referencing to other relevant legislation that judges may issue dissenting opinions and to reconsider the absolute ban on entering advocacy after resignation or termination of the mandate as a judge.

⁴³ UN CRPD, [Concluding observations on the initial report of Mongolia](#), 13 May 2015, par 21.

⁴⁴ See 2019 [OECD Report on Anti-Corruption](#), p. 10.

5. Citizens Representatives' in Court Trials

65. As mentioned previously, provisions on the Citizens' Representatives in Court Trials are now regulated in the Law on the Judiciary (Articles 58-67). As mentioned, the previous law was analysed in the OSCE/ODIHR 2019 Opinion.⁴⁵ All references to Articles below are to the Law on Judiciary of Mongolia of 15 January 2021 unless otherwise stated. As above, the focus will be on whether problematic issues identified in the OSCE/ODIHR 2019 Opinion have been addressed.

5.1 Revisions to the Selection and Notification Process for Citizen Representatives

5.1.1 Eligibility of Citizen Representatives

66. The previous recommendations suggested that the eligibility criteria should exclude those suffering from mental health difficulties (provided such provisions were enacted and operated with sensitivity) and that Citizen Representatives should be able to follow proceedings both visually and aurally. The Law has added a requirement that the Citizen Representatives should be "legally capable" and added a higher age limit of 60 (Article 59.1.1) but no provisions regarding hearing and eyesight have been added. Thus, the Law lacks a provision that the Citizen Representatives declare they are able to follow the court proceedings. To accommodate for people with disabilities it can be added that use of equipment that allows Citizen Representatives to properly follow the proceedings should be allowed, such as spectacles or hearing aid. The ineligibility of persons holding political and/or special government positions is included in Article 60.3 under the heading "Prohibited Conducts for Citizen Representatives". This looks anomalous as it is clearly an eligibility issue rather than one of conduct. If this provision were moved to Article 59, this would also meet the concerns expressed in the 2019 Opinion (par. 42) that this criterion was excluded (and still is excluded) from the eligibility checks now carried out under Article 62.2.3.

RECOMMENDATION J

To insert a provision in Article 63 requiring Citizen Representative candidates to make a declaration whether they have visual, hearing or other impairment, which would prevent them from being able to follow court proceedings and to consider whether such impairments can be addressed by measures that would allow Citizen Representatives to properly follow court proceedings.

5.1.2 Selection Process for Citizen Representatives

67. Concerns were expressed in the OSCE/ODIHR 2019 Opinion (par. 44) that the original selection process was not coherent as a shorter list of candidates was apparently being compiled before a longer one. These concerns have been addressed to a certain extent. The longer list required by Article 62.2 is compiled by random electronic selection (Article 62.2.2) and the validity of this list has been extended beyond one year (Article 62.3), as recommended in the 2019 Opinion (par. 54). Thus, more clarity on the selection process

⁴⁵ *Op. cit.* footnote 2.

has been provided, as previously recommended. However, it is not clear why the administrative office of the court should have to verify the eligibility criteria twice (Articles 62.2.3 and 62.5). It is also unclear what grounds the administrative office of the respective court should use to “select” a Citizen Representative from the list of names (Article 63.1) or what criteria the head of the administrative office of the respective court should use to “approve” the list as required by Article 63.2. It also seems odd that the approval of the list should occur after a Citizen Representative has been selected from it. Article 63.3 refers to “random electronic selection” for the “participation order” but it is not clear at which stage this occurs.

68. It is further suggested that there should be a clear statement in Article 63, as previously recommended (2019 Opinion pars. 47 and 49), and in line with international practice, **that the selection process should be conducted in a way which is open and fair and which ensures inclusivity towards all eligible citizens from all backgrounds, ethnicities, genders, age groups and occupations.**

RECOMMENDATION K

To further clarify Article 63 regarding the order of the selection process and by removing the requirement for two eligibility checks (as opposed to one) in Articles 62.2.3 and 62.5

5.1.3 Notice to Citizen Representatives

69. The 2019 OSCE/ODIHR Opinion (par. 56) highlighted the comparative shortness (compared to international practice) of the 5 working day notice period given to the Citizen Representatives and the difficulties presented to the court administration by being required to notify the employers of the Citizen Representative. However, these provisions remain unchanged in the new draft (Articles 63.4 and 63.6). It is nevertheless encouraging to see more details being given about notification methods to the Citizen Representative and to note that the duties of the employer have been strengthened in Article 63.7 by a requirement to provide paid leave and to avoid interference or hindrance – even though it is unclear what the prohibition of interference or hindrance refers to. Unfortunately, these provisions do not go as far as those recommended in the 2019 Opinion.
70. The 2019 Opinion criticized the legitimate reasons for non-attendance were criticised for being as under-inclusive and vague. It seems that any guidance on legitimate reasons for non-attendance has been removed completely from the Law, as has the provision in the former Article 9.8 drawing attention to the penal consequences of a failure to attend. Such guidance should be included in the law.

RECOMMENDATION L

To extend the notice period given to selected Citizen Representatives in Article 63.4 and to require the Citizen Representative to notify his or her employer (rather than the court) on the selection to serve as Citizen Representative;

To strengthen the provisions of Article 63.7 by an assertion that the employment of a Citizen Representative shall not be prejudiced in any way by their public service at court, and to reinstate provisions on the

extent of legitimate reasons for non-attendance, together with a statement referring to the consequences of non-attendance without good reason;

Also to introduce the procedure to be followed by a Citizen Representative, who asks to be excused from service, unless regulated elsewhere in the legislation.

5.2 Revisions to the Number, Status, and Role of Citizen Representatives

5.2.1 Number of Citizen Representatives

71. Article 66.1 of the Law provides that “(u)p to three Citizen Representatives shall be allowed to participate in the panel of the judges of the court hearings resolving a case or dispute at the first instance courts”. There is no minimum threshold for the number of Citizen Representatives. Later in the text of the Law, “the citizen judge” is referred to in the singular form. Thus, it is clear that only one Citizen Representative is envisaged for normal cases. This issue was discussed in the 2019 Opinion (pars 50–53) where it was suggested that “a single citizen representative amongst 3 professional judges is likely to feel isolated and dominated and cannot possibly play any meaningful role ...” This is particularly the case in view of the new scheme of participation set out in Article 66 (see section 5.2.3 *infra*). As explained above, the restriction to one participant is not in line with international practice, nor is it in line with regional practice, including in the new Citizen Representative systems in Asia, as the role of the Citizen Representatives is essentially deliberative and collective. There seems not to be any other lay participation scheme in the OSCE region where a single participant is considered acceptable (worldwide China is amongst the lowest with 4 participants, Japan and Taiwan have 6, Spain 9, Kazakhstan 10, Georgia and Russia and most other jury-based systems, 12). Almost every system of mixed bench tribunals in the world stresses the equality of lay and professional judges in deliberations and it is very hard to see how the objectives of “open judicial procedure and transparency”, which were expressed as being the purpose of the appointment of Citizen Representatives in the 2012 legislation, could be achieved by a single Citizen Representative in a highly isolated position in the trial process.

RECOMMENDATION M

To amend Article 66.1 to increase number of Citizen Representatives participating in every case.

5.2.2 The Status of Citizen Representatives

72. Article 58.1 provides that “the courts of first instance shall allow representatives of citizens to participate in the proceedings in accordance with the procedures prescribed by law.” It is significant that the text of the 2012 legislation required that “the citizen representative shall participate” and the word “allow” has been inserted in the Law, presumably to emphasize that the Citizen Representatives do not participate by right but are present only on a permissive basis. This is very unfortunate and again is a very significant departure

from international practice. It is recommended the provision be amended to ensure the Citizen Representative has the right to participate.

73. It is also unfortunate that the objectives of promoting “open judicial procedure and transparency” have been deleted from the current Law and there are now no objectives or justifications for the use of Citizen Representatives anywhere in the Law. It is recommended that this be reintroduced.
74. The use of the terminology “to participate” was discussed at length in the previous OSCE/ODIHR 2019 Opinion (pars 59-63) and was found not to conform to internationally understood approaches to citizen participation, where the equality of all judges, lay and professional, in deliberation and judgement, is the norm.

RECOMMENDATION N

To replace the wording of Article 58.1: “the courts of first instance shall allow representatives of citizens to participate in the proceedings in accordance with the law” with wording which reflects the status of a Citizen Representative as a member of the judicial process, and to include in the Law provisions on “open judicial procedure and transparency” and overall aim for including Citizen Representatives in the judicial process.

5.2.3 The Role of Citizen Representatives

75. The 2019 Opinion (pars 64-66) called for greater clarity in the delineation of the role of the Citizen Representatives at trial and this has been provided to some extent. It is positive, for example, to see the introduction of provisions in Article 66.3.2 enabling Citizen Representatives to ask questions directly to all participants albeit with permission of the presiding judge. However, the scheme for the participation of the Citizen Representatives and their role in decision-making remains ambiguous and is highly problematic. Article 66.3.3 proposes that the Citizen Representative shall provide “a written verdict on whether the defendant and/or plaintiff are guilty or not”. This must be read out by the Citizen Representative him or herself (Article 66.5) and “considered” by the panel of judges when making their decision” (Article 66.6). It is clear from this wording that the Citizen Representative has no personal part in this final decision or the deliberations of the panel judges which precede it. It is recommended to revise Article 66.3.3 to not include a written deliberation on the question of guilt by the Citizen Representative, but participate in the deliberations to reach the verdict.
76. The Law seems to indicate that Citizen Representatives should participate in both criminal and civil cases, (Article 58.1). In that regard there seems to be some confusion regarding the term plaintiff, but this may be an issue of translation. This is normally the party in a civil lawsuit that initiates the case (files the lawsuit). It would normally be for the court to decide whether the plaintiff has a legitimate claim against the opposite party (the defendant).
77. It is doubtful whether this system of Citizen Representatives is workable. It creates a subordinate and entirely dispensable role for the Citizen Representatives and excludes them from deliberations on the verdict, making their participation of very little value or purpose. Almost all countries, using Citizen Representatives, as indicated above, insist on

the equality of all judges, both lay and professional. In many countries the lay judges are always able to outvote the professional judges in decision-making.⁴⁶ It is clearly incompatible with the recommendation in the 2019 Opinion (par 63):

“Although there is no obligation on states to introduce systems of lay judges or jury trials, the entire concept of lay participation in court proceedings will only be effective if citizens have the possibility to actually impact deliberations and decision-making processes of the court; this means that their decisions and conclusions are something that panels are obliged to take into account, and not mere recommendations to take or to leave.”

78. Citizen Representatives have neither the training nor the experience to produce independent written judgements with no assistance and should not be expected to do so. The process seems designed to distance the views of the Citizen Representatives from those of the panel of professional judges and to assert their subordinate position in the most public way possible. It also presents the very real possibility of the lay and professional judges reaching completely different verdicts, announced in open court, in the same case. Nothing could be more likely to confuse the defendant, undermine the legitimacy of both judgements and to offer grounds for appeal.

RECOMMENDATION O

To redraft Article 66 to ensure that the Citizen Representatives deliberate over the verdict collectively with the panel of professional judges and that their votes must be counted equally in reaching a single, joint decision

5.3 Revisions to the Conditions of Service of Citizen Representatives

5.3.1 Provision of Information to Citizen Representatives

79. Article 65 seems to repeat the similar requirements of the 2012 Code without making any substantive changes. The 2019 Opinion’s recommendation (par. 74) that training should be made mandatory for all Citizen Representatives is not included in the Law. **It is recommended to include training for Citizen Representatives in the Law.**

5.3.2 Protection of Citizen Representatives

80. The 2019 Opinion (par. 72) suggested that provisions requiring the authorities to safeguard the **personal safety of the Citizen Representatives in the discharge of their important and potentially dangerous public duties should be reinstated but this has not been included in the Law.** The suggestion that Citizen Representatives should have immunity from court proceedings while engaged in this public service has also not been adopted.

5.3.3 Independence of Citizen Representatives

81. The 2019 Opinion (par. 69) suggested that the wording of what is now Article 61.1 on influencing the Citizen Representatives is too broad. Only improper influence should be

⁴⁶ For some examples see: [Toby S. Goldbach & Valerie P. Hans, *Juries, Lay Judges, and Trials*](#), Cornell Law School, 2014, p. 10.

prohibited. **Article 61.1 requires elaboration, as “influence” could potentially include valid arguments presented in court relevant for the decision that will be reached.**

5.3.4. Prohibited Conduct of Citizen Representatives

82. As indicated in the 2019 Opinion (section 5.1), the conduct mentioned in Article 60 (leaving the court, failing to comply with court procedure, conducting their own investigations, meeting the parties or disclosing information etc.) are all exceptionally serious matters which threaten the integrity of court proceedings. The penalty proposed by Article 60.2, e.g. the removal “of the right to be selected again” as a Citizen Representative, seems wholly inadequate to mark the seriousness of such conduct.

RECOMMENDATION P

To clarify in the Law that the conducts mentioned in Article 60 may be considered as “obstructing the course of justice” or similar and penalized accordingly;

To consider reinstating in Article 60 of the Law the provision contained in Art. 9.8 of the 2012 Code on the consequences for failing appear as Citizen Representative without any legitimate reason.

5.3.5. Recusal of Citizen Representatives

83. The 2019 Opinion (par. 12) recommended that clear guidance on the circumstances in which a Citizen Representative should seek recusal or could be challenged to do so should be stipulated in the Law, but there are still no provisions concerning this. **It is recommended that provisions on recusal be included in the Law.**

6. FINAL COMMENTS

6.1 Impact Assessment and Participatory Approach

84. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.⁴⁷ 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.⁴⁸ To guarantee effective participation, consultation mechanisms must allow for input at an

⁴⁷ 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 the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

⁴⁸ See e.g., OSCE/ODIHR, Opinion on the Draft Law of Ukraine “On Public Consultations”, 1 September 2016, pars 40-41, <<http://www.legislationline.org/documents/id/20027>>.

early stage and throughout the process,⁴⁹ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.⁵⁰ 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.

85. In light of the above, the Mongolian legislator is therefore encouraged to ensure that the Law is subject to further inclusive, extensive and effective consultations, according to the principles stated above, at all stages of the law-making process, in case of future revision of the Law.

[END OF TEXT]

⁴⁹ See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs, <<http://www.osce.org/odhr/119633>>.

⁵⁰ *Ibid.*