GIZ Project "Enhancing the efficiency, Responsibility and Transparency of courts in Moldova (ATRECO)"

Report on framework legislation regulating the activity of Superior Council of Magistracy. Rating of disciplinary proceedings through the prism of entry into force of Law No. 178 of 24.07.2014 on disciplinary liability of judges in line with European standards and best practices.

Introduction

The main goal of the mission was to assist the project team in the legislative component of the project by examining current laws and normative acts regulating the activity of the Superior Council of Magistracy (SCM) with subsequent submission of proposals for amendment or adjustment of the existing legislative framework respecting European norms.

Purpose of the mission

The purpose of these reviews is to provide advice and recommendations for ensuring correlation of current and future legislation projects at various stages of development. It must be appreciated that the authorities made remarkable efforts in terms of adjusting the legislation to the European standards.

In this report, we pay more attention to certain aspects of the current laws and that are in the opinion of experts, a priority for the period immediately following.

The report represents an analysis of current legislation cumulated with the information presented in meetings with officials of the Superior Council of Magistracy and its subdivisions.

However, it is natural that the opinion expressed in this report is based on international standards set by:

1. The Universal Declaration on the Independence of Justice adopted by the First World Conference on the Independence of Justice Montreal - Quebec, Canada, 1983
2. European Charter on the statute for judges,1998
3. Recommendation No. R (94)12E on the independence, efficiency and role of judges
4. Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges
5. Opinion no. 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality

6. Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society
7. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities
8. CDL-AD(2007)028 European Commission for Democracy through Law (Venice Commission) Judicial Appointments
9. OSCE /ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2010

Also, this is an attempt coming to show whether there is satisfied or not the current legal framework. Thus, if so, to what extent these standards are reflected in national legislation. This opinion shown in this report also highlights some elements that should be considered when talking about real autonomy consolidation of both external and internal magistrates in exercising their functions under the law.

Given the previous surveys conducted by experts, this opinion expresses the personal understanding following the analysis of current legislation and discussions that took place during this mission with the hope that it will help strengthen the independence, transparency and efficiency of justice in the Republic of Moldova.

1. Specific comments

Law on the Superior Council of Magistrates No.947 of 19.07.1996

Article 3 para. (2) may be omitted or rewritten because it does not precisely reflect reality.
Article 3 para. (3). Council membership consists of 12 members including 3 members of law – President of the Supreme Court of Justice, Minister of Justice and Attorney General, 6 judges elected by their colleagues and 3 professors elected by Parliament (3 + 6 + 3). Therefore, the ratio mentioned above could provide the representative nature of this body because 6 members would be elected by the judges. Because the composition of the Board shows a subject of concern because, as required by Article 1.3. of the European Charter on the Statute of judges adopted in 1998, “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.“

Moreover, under para. 18 of the CCJE Opinion No.10 "When there is a mixed composition (judges and non-judges),the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers." Finally, in accordance with Paragraph 27 of Recommendation CM / Rec. (2010) 12: independence, efficiency and accountability, "27. Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.".

Regarding election of members who are not judges, in Opinion No. 10 of the CCJE para. 23 is mentioned that “Prospective members of the Council for the Judiciary, whether judges or non judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary. Each state should enact specific legal rules in this area.” Therefore, it seems to be a delicate situation with the quality of Council member of the Minister of Justice, this being pointed out many times by experts noting that, in most countries this practice is not found.

Thus, even if the SCM includes members who are not part of the magistrates body, they should be free from political influence so that through their participation, public confidence is increased in the independence of justice.

Article 4 lit. a). Superior Council of Magistrates make proposals to the President of Moldova Republic or to the Parliament regarding the appointment, promotion, transfer or dismissal of judges, presidents and deputy presidents of courts, receives the oath of judges. At the same time, this is found in Article 19 para. (1) (4); Article 20 para. (4) (7) all these provisions refer to an involvement of the President or of the Parliament in the career of judges, thus creating a vulnerable situation in legislation. These provisions are largely criticized by experts because they bring suspicions regarding the independence of justice. The provisions mentioned in the articles are in contradiction with those in para. 31 of Opinion No. 10 of the CCJE, which stipulates the following: The CCJE does not advocate systems that involve political authorities such as the Parliament or the executive at any stage of the selection process. All interference of the judicial hierarchies in the process should be avoided. All forms of appointment by authorities internal or external to the judiciary should be excluded.

More than that, in the Report on judicial appointments adopted by Venice Commission on 16-17 March 2007 CDL-AD (2007) 028, para. 47 is set that: " Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded." So,this is a much discussed aspect, being one of sufficient controversy that, if it really wants to maintain these provisions, it requires a new version that would balance the position of legislator (emphasizing the ceremonial / formal role of the two powers) and thus, this would end the bitter criticism made by opponents of this position.

Article 7^1 para. (3) according to it "there may be appointed as inspector-judge the person who holds the bachelor's degree in law or its equivalent, with experience in specialty of law for at least 7 years and an impeccable reputation ..." from this provision resulting that the inspector should not be part of the judiciary body, and we believe that the situation should be avoided when a judge’s activity is supervised by a lawyer.

2. Specific comments

Law on the Status of Judge No. 544 of 20. 07.1995
Article 8 para. (4) creates a confusion according to which "The judge that .... was elected Member of Parliament, local government adviser ... "and this in conditions that para. (1) c stipulates that a judge may not" be part of political parties or carry out political activities ... " of those known in the

electoral process, entails certain activities including registration to parties, campaigning, all these activities being incompatible with a magistrate.

Article 11. Appointment of judges in office. The content of this article brings to the forefront the problem mentioned above, namely interference of the President and Parliament in the appointment of judges which seriously undermines the independence of judging system and is in total contradiction with European practices. The second aspect as important as this one is the appointment of judges "Initially for a period of 5 years." This conditioning throws a shadow of suspicion on the authorities (see Opinion No. 1, paragraph 53) " CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter)." Namely, para. 49 of Recommendation CM / Rec. (2010) 12 provides that " Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.. "
Also, para. 51 contains a reference pertaining to the recruitment process " for a probationary period or fixed term," it is also undeniable that this provision establishes that " the decision on whether to confirm or renew such an appointment should only be taken in accordance with paragraph 44 so as to ensure that the independence of the judiciary is fully respected." In conclusion, non- compliance with those standards is a serious violation.

Article 13. Judges performance evaluation is a provision seeking something objective and absolutely necessary that can be found in para. 42 of CM Recommendation / Rec (2010) 12 according to which " With a view to contributing to the efficiency of the administration of justice and continuing improvement of its quality, member states may introduce systems for the assessment of judges by judicial authorities, in accordance with paragraph 58." There is mentioned that these should be based on objective criteria with the right to challenge its findings before an independent authority.

Article 19. The inviolability of the judge is a very much discussed topic, sensitive enough for young democracies where the company considers imperative the existence of additional guarantees for judges so that they can provide some additional protection measures thereby ensuring that the independence of the judges will not be disrupted. This view is totally different from the one that comes from justice systems in countries with a mature democracy, where the judge is responsible before the law like any other citizen. In this situation we just have to point out that the final choice belongs to the legislator and society, they are the ones who will decide on keeping or not these additional guarantees for judges.

Article 20.Judge’s career. according to para. 60 of CCJE Opinion No. 1 "(a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level ".therefore any appointment, transfer should be done only with judge’s agreement except for reorganization or dissolution of the court. This seems to be a problem because para. 52 of Recommendation of CM / Rec. (2010) 12 "... reform of the organisation of the judicial system " that is not the same thing if we refer to the provisions stipulated by Article 20 para. (5).

Article 21. Disciplinary liability of judges - this subject should be treated with precision so as to be absolutely clear what is considered a violation and what that liability may entail.
In order to address the issue of civil liability of judges we must take into account the relevant provisions of Recommendation CM / Rec (2010) 12 para. 67: "Only the state may seek to

establish the civil liability of a judge through court action in the event that it has had to award compensation."

Article 24. The suspension from position para. (1) Letter c "takes part in pre-election campaign as a candidate for public authority or local government authority" is praised that the legislator foresaw such a possibility, but as previously mentioned in these comments, this is a delicate situation for a person who chose the career of judge.

3. Specific comments

Law on judicial organization No. 514 of 06.07.1995

Article 13. The inadmissibility of interference in the administration of justice
Para. (2) Exerting pressure on judges in order to impede complete and objective judging of the case or to influence the issuance of a judicial decision attracts contravention or criminal liability. As a suggestion, it would be better to use the wording of para. 22 Recommendation CM / Rec. (2010) 12: "…each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence."

Article 16. The presidents and vice presidents of courts
Para. (4) It is unacceptable that the career of a judge in our case, a judge in a managerial position should be conditioned by the President of the country having as basis violation of the legislation. In this context, there should be remembered that para. 16 of CM / Rec. (2010) 12: ". Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law." and paragraph 18. If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal."

Article 45. Administration of courts
In Opinion No. 10, CCJE quoted pretty often in this report, has dedicated a chapter to this aspect that comes with a row of specification:
V. F. Court administration and management
"76. The determination of the conditions for the allocation of the budget to the various courts and the decision as to the body which should examine and report on the efficiency of the courts are sensitive issues. The CCJE considers that the Council for the Judiciary should have competence in this respect.
77. The Council for the Judiciary should not have competence in respect of performance management of individual judges.
78. The CCJE is of the opinion that the Council for the Judiciary can make a positive contribution to the promotion of quality of justice. Apart from developing policy in this respect, sufficient funding of the courts shall be provided to enable them to fulfil their obligations in this respect. In some countries systems have been set up to account for and measure the quality of justice; it is important to inquire into the results of such developments. As to developing policy measuring quality, it is important that the Council for the Judiciary can obtain from the courts relevant data and statistics.

79. The Council for the Judiciary should supervise the organisation of the inspection service so that inspection is compatible with judicial independence. This is particularly important where inspection services belong to the executive.
Article 45 para. (2) Nothing to comment, only one remark, namely through institution of this function, magistrates attention is directed towards analyzing the causes to be judged and not look for solutions to the problems of administrative and organizational order. "

4. Specific comments

The law on disciplinary responsibility of judges No.178 dated 24.07.2014

On January 1, 2015 the law came into force. First of all, we would like to point out that the development of these standards is an important step for judicial independence. In the opinion of some experienced magistrates this law is' an instrument of self-protection for judges ".
Thus, the law in general provisions (Chapter I) has established a number of concepts that we use.

By the content of Article 4 one attempted to enumerate a list of misconduct (deeds, inaction and omission) which constitutes misbehavior. We agree with it, this is an approach that complies with international standards.
Article 4.para. (1) provides that: "let. m) committing an act that combines elements of an offense or offenses, if it damaged the prestige of justice" not to mix things that are not subject to this law, belonging to criminal domain, therefore we recommend to exclude this provision.

The letter o) "using inappropriate phrases in the content of judgments or motivation in a contrary way of the legal reasoning, which might affect the prestige of justice or dignity of the judge" I made a reference to para. 66 of CM / Rec (2010) 12 that establishes The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence. So, what we may suggest is a rewording of this provision in more precise terms to avoid interpretations. See Principle VI.2 of Recommendation. R (94) 12 suggests that precise grounds for disciplinary proceedings should always "be defined" in advance "in precise terms by the law".

Para. (2) "a disciplinary offense committed by presidents and vice presidents of courts, delay or failure or improper fulfillment, based on the attributions established by Article 16^1 of Law No. 514-XIII of July 6, 1995 on judicial organization and if it has affected the work of the court. "

Opinion No 3, CCJE "In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards set out in guidelines". Disciplinary proceedings should generally be initiated in case of professional misconduct that is "serious and flagrant", bringing the judiciary in disrepute. Applying disciplinary sanctions to an act that could have merely "affected the court's activity" is excessive. Article 4 para. 2 should be revised.

Article 6. The disciplinary sanctions. According to it, there have been decided 4 types of sanctions that can be imposed on judges namely warning, reprimand, reduction in salary and dismissal of judges. All those 4 are set and regulated by this law using a plain language thus being an approach compliant with international standards. See European Charter on the Statute for Judges (para. 5.1) states that "The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality.". Some examples of possible sanctions appear in Recommendation No. R (94) 12 (Principle VI.1). The CCJE endorses the

need for each jurisdiction to identify the sanctions permissible under its own disciplinary system, and that such sanctions to be, both in principle and in fact proportionate. It must try to have a definitive list.

Conditions and consequences of applying disciplinary sanctions are reflected in article 7 par. (2) they apply "proportionally to the seriousness of the disciplinary deviation of the judge and personal circumstances".

Chapter II. The Disciplinary Board

According para. 69 of Recommendation CM / Rec (2010) 12 stipulates that disciplinary proceedings against judges "will be held by an independent authority or a court with all the guarantees of a fair trial, also provide the judge with the right to challenge the decision and sanction".
Article 8 establishes the status and competence of the Disciplinary Board stating that it is an independent body.

By Article 8 is established the status and competence of the Disciplinary Board stating that it is an independent body. para. (3) a small comment: college rules of procedure are approved by the Superior Council of Magistracy.

Composition and term of office of the Disciplinary Board are given in Article 9 as follows "is made of five judges and four people in civil society". Such a structure would ensure transparency and community involvement in disciplinary proceedings at the same time eliminating the risk of judicial corporatism. (OSCE / ODIHR Kiev on judicial independence in Eastern Europe, South Caucasus and Central Asia, p. 9): "shall not exclusively be composed of judges, but require representation including members from outside the judicial profession".

Members shall be elected for a fixed term of six years (4).
Article 10 para. (3) provides that "members of the Disciplinary Board among civil society representatives, including four alternates are appointed by the Minister of Justice, being selected through public competition. The competition is organized by a candidate selection committee that includes representatives appointed by the Superior Council of Magistracy. Numerical and nominal composition of the commission, and the criteria for selection of candidates defined in Regulation regarding the selection of members of the Disciplinary Board, approved by the Ministry of Justice, after consultation with the Superior Council of Magistracy." Here are some issues that should be better to be present in the regulations and criteria for selection of candidates, the manner of their appointment and, also, that the involvement of the minister is purely formal.

Article 11. Termination of the Disciplinary Board mandate may terminate or be revoked upon Disciplinary Board's reasoned proposal, adopted by a vote of at least 2/3 of the members – there is required a clarification "present" or "total".

Article 12 (4) In the event of termination or revocation of disciplinary board member's mandate, elected as president of the college, new president will be elected. The President of the Disciplinary Board may be removed upon the reasoned proposal of at least 3 members of the Disciplinary Board, in case of failure without grounded reasons of the duties assigned to the Disciplinary Board's President, for at least three months. It is hard to believe that the activity of a such

important organ will be paralyzed for such a long period. There can be applied the procedure similar to that of Article 11.

Article 14 para. (4) Board member requesting abstention cannot be forced to attend the meetings of the College - we believe it is appropriate to supplement the stipulation with "recusal". Moreover, if he is forced to attend the meeting, in this case he may create the impression of partiality.
We cannot agree with such an approach par. (5) "recusal or abstention is not permitted if in the result of abstention or objection there will be impossible to ensure the Board's deliberative session."

Chapter III – Procedure for the examination of disciplinary cases
Section I - Notification on facts that may constitute disciplinary misconducts of judges

Article 19 lists the persons entitled to file "notification on facts that may constitute disciplinary offenses". According to Article 19.1.a notification on facts that may constitute disciplinary offenses committed by judges may be filed by "any interested person". This wording "any interested person" is too broad. From the discussions held with persons whose activity is regulated by these provisions results that a certain limitation would be welcomed coming from the experience gained this way, it would reduce the ability to abuse it.

Section II – Checking of notifications

Under Article 21, reports of facts that may constitute disciplinary offenses shall be submitted to the Secretary's office of the Council of Magistrates, which records and transmits them to the main inspector of judges. Further, the main inspector-judge distributes the complaints randomly to judge-inspectors to verify them, to take all necessary steps to verify that the deed notified has the elements of a disciplinary offense, including requiring the written opinion of the judge that is referred to in the report, on circumstances invoked (Article 25 para. (2) b). After completing the verification, the inspector-judge prepares a briefing note on the conclusions of the audit, which together with the disciplinary case file is now submitted to the admissibility committee of the Disciplinary Board (see Article 28).

The procedure for initiating a disciplinary case must have a high degree of “formalization”. In particular, there is recommended that people who claim to have suffered from judge's professional error, can lodge a complaint, but do not have the right to initiate disciplinary action themselves or to insist on its initiation; in particular, there must be a filter - specialized body to check and either reject unjustified complaints filed by disappointed litigants, either, after obtaining explanations from the judge concerned and accumulating substantiated information, to transmit the cause to the disciplinary authority. (CCJE (2002) Opinion no. 3 para. 67.68.)

Section 3 - Examination of admissibility of complaints to start disciplinary cases

According to Article 27, the case is examined by a panel of admissibility consisting of 3 members (2 + 1) of the Disciplinary Board appointed by the decision of the Disciplinary Board, which will decide on the admissibility or rejection of notification.

Article 28 concerns the admissibility of the referral. Decision on admissibility is adopted if it is voted by at least one member of the panel. Rejected - unanimously. This seems somewhat disproportionate.

Article 28.alin. (7) should provide that panels admissibility decisions be communicated not only to the person who filed the complaint, but also to the attention of the judge concerned.

Section 4-A. Examination of disciplinary cases by the Disciplinary Board

Article 30 provides that cases are assigned randomly by the president of the Board of members, to persons that will be designated rapporteurs; There may however be useful to simplify the procedure to entrust to the inspector - judge dealing with the task of presenting the case to the Disciplinary Board and to perform the duties of the rapporteur judge.

Article 31 refers to participants in the disciplinary case and in paragraph 3 provides that "repeated failure, without reasonable grounds, of the judge or person who filed the complaint or their representatives at the meeting of the Disciplinary Board shall not preclude examination of the case."

Article 31 para. (5) provides that "Board member appointed rapporteur or any member of the Disciplinary Board may ask to hear witnesses or other persons in the hearing of the disciplinary case". The judge whose case is under consideration should be given similar rights.

Article 34 provides that meetings of the Disciplinary Board shall be public, unless the panel decides, on its own motion or at the request of the judge concerned in the disciplinary case, that the case should be judged in closed session for the respect of public order or national security or when there is necessary to protect privacy participants in the disciplinary proceedings.

Article 35, which refers to deliberation and adoption of the ruling of the Disciplinary Board, we believe that it should be added that the Judge must not vote on the decision.

Article 39 para. (1) provides that the decisions of the Disciplinary Board may be appealed to the Superior Council of Magistracy and that they remain final in 15 days of receipt of the copy of the judgment. Any appeal against the disciplinary proceedings should prevent the decision from becoming final until completion of the appeal.

Article 39 Appealing of the decision of the Disciplinary Board

A development of its provisions by establishing more detailed regulations to ensure equitable remedy.

Adding a stipulation that would prevent the same member of the Superior Council of Magistracy to be involved in all stages of the disciplinary proceedings, therefore the risk of being accuses of impartiality.

According to the provisions of Article 40 provides that the Superior Council of Magistracy may be appealed to the Supreme Court "by people who have filed complaints, the inspectorate or the judge concerned." It is not clear why the judicial inspection challenges the decisions. Or, the right to challenge should only be given to parties involved - the plaintiff and the judge concerned.

Recommendations

• Explicit limiting of measure of release from the position of judge in the most serious cases, or cases of relapse or incapacity, or conduct that disqualifies judges in their work;
• clarification of the criteria for selecting candidates for the Disciplinary Board - members of civil society and the mechanism for the appointment and functioning of the committee charged with selecting them;
• Limiting the right to lodge a complaint to persons who have been affected by actions or judge's actions, or those who have some form of "legal interest" in the case;
• The right of a judge to hear witnesses or other persons during the examination of disciplinary proceedings;
• Adding a provision that would prevent the same member of the Superior Council of Magistracy to be involved in all consecutive stages of the disciplinary procedure
• The details of the proceedings before Superior Council of Magistracy;
• Creation of a mechanism for reducing the work volume of the judges members of the Disciplinary Board;
• Judicial Inspection capacity consolidation
• Establishment of the Judicial Inspection own secretary's office;
• Modification of terms of works.