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The disciplinary liability of judges in the Republic of Moldova. An evaluation of laws and practices

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LRCM
LEGAL RESOURCES CENTRE FROM MOLDOVA

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An evaluation of laws and practices

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Abbreviations

SCM	Superior Council of Magistracy
SCJ	Supreme Court of Justice
LRCM	Legal Resources Centre from Moldova
Law No. 947	Law No. 947 of 19 July 1996 on the Superior Council of Magistracy
Law No. 514	Law No. 514 of 6 July 1995 on Judicial Organization
Law No. 544	Law No. 544 of 20 July 1995 on the Status of Judges
Law No. 178	Law No. 178 of 25 July 2014 on the Disciplinary Liability of Judges, available in English

Executive summary

Over the last five years, the Superior Council of Magistracy (SCM) received more than 7,500 complaints against judges. The Disciplinary Board initiated disciplinary proceedings against 250 of them and imposed 49 disciplinary sanctions. To ensure the functioning of the disciplinary mechanism, each case that passes through all stages of a disciplinary proceeding requires the involvement of 30 to 38 persons from five entities. Each case lasts on average up to 400 days.

These are the findings of the analysis of the laws and practices on disciplinary matters applied over the last five years in the Republic of Moldova. In 2015, a new law on the disciplinary liability of judges came into force, which should have streamlined this procedure. But even with significant amendments made in 2018, the results are still waited.

The current legal framework has certainly set off a disciplinary activity that has a long way to become more efficient. Today even to impose a simple warning to a judge, a disciplinary a verification and investigation by the Judicial Inspection shall be launched, followed by an examination at the Disciplinary Board, then an appeal before the SCM, and finally an appeal against the decision before the appellate court and the Supreme Court of Justice. The time and human resources involved in this process should be reduced.

The entities that initially were subordinated to the SCM are now specialized. The current regulations emphasize this trend, however, some elements allow us to say that the Judicial Inspection and the Disciplinary Board are only mere components of a mammoth institution named the SCM and that their autonomy needs to be effectively implemented in practice, not only by law.

The regulations of the Judicial Inspection and the Disciplinary Board should be tools for enforcing the law rather than for making it. For example, this analytical document outlines some inconsistencies between the law and the regulations.

The role of the Judicial Inspection should be strengthened: it should become autonomous from the SCM, with more inspectors and amended their selection criteria; inspectors should be specialized and remunerated much better, and they should have own apparatus. It should be the only entity that has the power to bring a case to the Disciplinary Board, so that the person who complained would not have another procedural role. We recommend introducing rules for own initiative-based procedure into the Inspection's rules and clarifying the procedure for considering the admissibility of complaints.

The rationale laid out in the decisions of the Admissibility Panel of the Disciplinary Board should be improved. Currently, the rationale sections only cite the law and the

decisions of the Constitutional Court. If an appeal is dismissed, the litigant should have been ensured with the right to appeal in court.

At the Disciplinary Board, the institution of member-rapporteur is useless. Because of multiple changes made over time, it is the inspector who presents the report to Disciplinary Board members, so the only remaining duties of the rapporteur are administrative ones. The number of Disciplinary Board members sitting on a case should always be the same because they act as a disciplinary tribunal. Therefore, when a member is away even temporarily, an alternate member should take its place.

The disciplinary duties of the Disciplinary Board and those of the SCM seem to overlap. We consider that the SCM should withdraw and all disciplinary duties should be delegated to the Disciplinary Board.

After the Administrative Code came into force, the SCM's decisions became appealable in two-level courts: the appellate court and the Supreme Court of Justice (SCJ). We believe that the law should be amended to exclude the appellate court.

Judges may not be punished for poor professional performance or offences of ethical nature. Disciplinary offences should be linked exclusively to judge's duties. The definition of some disciplinary offences should be rewritten to make them clear and to make it easier for judges to accommodate legal requirements. Along with the strengthening of the judicial system, efforts should be made to optimize judges' work—ensuring a proper caseload and enough judges and technical staff. Moreover, judges should be protected against pressure within the system (particularly from the management of courts) and outside it (from prosecutors and politicians). Such pressure may also take the form of a disciplinary action filed by a litigant discontented with a judge's actions—an inconceivable situation that contradicts the principle of judicial independence.

Offences committed by judicial inspectors, SCM members, or members of other specialized bodies should also be regulated, and judges who are sanctioned should be automatically removed from such bodies. Judges in administrative positions should never receive disciplinary sanctions for poor management and should only be removed from the administrative position they hold.

As the efficiency of the system and the accountability of judges increases, it would be possible to consider publishing the disciplinary decisions only after they are final. Until then, it is not advisable to include the names of judges under disciplinary investigation who have not been sanctioned yet in the annual reports of the SCM or specialized bodies.

In the case of minor offences or mild disciplinary sanctions, sanctioned judges should not be banned from getting transfers. When a judge receives a final disciplinary sanction for acting with bad faith or gross negligence and such circumstances have influenced the resolution of a case, the case should have the possibility to be revised.

In the author's opinion, the low efficiency of the current disciplinary proceedings has two causes: legislative and human. By the legislative cause, we mean that the legal framework is still problematic, as shown in the document. The human cause refers to the misunderstanding of the law by litigants (who often complain to disciplinary bodies about the way judges apply the law) and, sometimes, the questionable way of applying the law by those who are

responsible for this job. To address this cause, legal education programs for citizens shall be conducted with the view to explain them clearly their rights, the ways to exercise them, and institutions to address when their rights are violated. On the other hand, the members of the entities involved in the disciplinary proceedings should benefit from intensive trainings to get to know the laws in this field, the applicable national and constitutional case law, and relevant international standards.

Methodology

Analysis background: In 2014, the Republic of Moldova enacted a new law on the disciplinary liability of judges—Law No. 178 of 25 July 2014 on the Disciplinary Liability of Judges, entered into force on 1 January 2015—thus setting up a new system aiming at a better balance between judicial independence and judicial accountability.

In fall 2018, the Law on the Disciplinary Liability of Judges was amended[1]. Improvement of the judicial disciplinary system was one of the priorities of the Justice Sector Reform Strategy for 2011 – 2016[2] (extended until 2017). It has been proposed anew for the draft version of the Strategy for Ensuring the Independence and Integrity of the Justice Sector for 2020 – 2023[3].

The subject matter of the analytical document: The analysis was conducted on the laws and practices concerning the disciplinary liability of judges system in the Republic of Moldova and included references to international standards, a review of national regulations, and an analysis of the disciplinary case law.

The purpose of the analytical document was to assess the compatibility of the disciplinary liability of judge's system in the Republic of Moldova with European standards and its efficiency as a mechanism for holding individual judges and the entire judiciary accountable. The analytical document will be used as a source for development of recommendations for improving the laws and their implementation by disciplinary bodies.

The objectives of the analysis:

The analysis will try to evaluate three main aspects:

a. conformity of the national primary legislation with European standards

b. correlation between the national primary and the secondary legislation

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[1] Law No. 136 of 19 July 2018 for the amendment of Law No. 178/2014 on the Disciplinary Liability of Judges, available at: https://www.legis.md/cautare/getResults?doc_id=105495&lang=ro.

[2] Law No. 231 of 25 November 2011 on the Justice Sector Reform Strategy for 2011 – 2016, available at: https://www.legis.md/cautare/getResults?doc_id=50463&lang=ro.

[3] Draft version of the Strategy for Ensuring the Independence and Integrity of the Justice Sector for 2020 – 2023, available at: http://justice.gov.md/public/files/directia_analiza_monitorizare_si_evaluare_a_politicilor/Proiect_Strategia_pentru_asigurarea_independentei_si_integritatii_sectorul_justitiei_2020-2023.pdf.

c. What causes the lack of adequate reactions through the disciplinary system to deviations in the justice system?

The methodology of the analysis: The analytical document involved documentation, interviewing, analysis and aggregation of the collected data and information and makes reference to the policy papers *Analysis of the Legislation and Practice regarding Disciplinary Liability of Judges (2015 – 2016)*[4] and *Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges*[5]. The author also analysed and highlighted the current main positive and negative trends compared to the situations in place during previous studies and reports.

The document is based on the analysis and review of international standards (conventions, recommendations, resolutions, opinions) on disciplinary matters developed by international organizations (UN, Council of Europe, OSCE, international associations of judges etc.). All these sources were collected and systematized to serve as a reference base for the analysis of the laws and practices of the Republic of Moldova.

The analysis covered the primary and secondary legislation on disciplinary matters. Particular attention was given to the following legal framework: Law No. 544 of 20 July 1995 on the Status of Judges, Law No. 178 of 25 July 2014 on the Disciplinary Liability of Judges, SCM Regulation on the Work of the Judicial Inspection[6], Guide on filling complaints to the Judicial Inspection[7], Regulation on the Disciplinary Board[8], Code of Ethics[9], and Regulation of the Ethics Commission[10].

Between 3 and 5 February 2020, the author of this analytical document visited the Republic of Moldova for documentation purposes. During that visit, he conducted semi-structured interviews and focus groups with members of the SCM, the Judicial Inspection, and the Disciplinary Board, judges (in office and resigned), representatives of the Agency for Court Administration, and lawyers. Questions were focused on the efficiency of the disciplinary system, the needs of the entities that intervene in case of disciplinary offences, the role of the Disciplinary Board and the actions of the Judicial Inspection, the process

[4] LRCM, policy paper: Analysis of the Legislation and Practice Concerning Disciplinary Liability of Judges 2015-2016, 2016, available at: https://crjm.org/wp-content/uploads/2016/11/CRJM-Raspundere-discipl-2016-11-EN-web.pdf.

[5] LRCM, policy paper: Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges, 2016, available at: https://crjm.org/wp-content/uploads/2016/04/CRJM-Politici-8-Disciplinar-ENG.pdf.

[6] SCM, Regulation on the organization, competence and functioning of the Judicial Inspection, available at: https://www.csm.md/files/Hotaririle/2018/24/506-24.pdf.

[7] SCM, Guide on filling complaints to the Judicial Inspection, available at: https://www.csm.md/files/Acte_normative/Legislatia/Interne/2019/Ghid_pentru_sesizarea_Inspectiei_judiciare_2019.pdf.

[8] SCM, Regulation on the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2018/24/505-24.pdf.

[9] SCM, Code of Ethics and Professional Conduct for Judges, available at: https://www.csm.md/files/Acte_normative/Codul_de_etica_al_judecatorului.pdf.

[10] SCM, Regulation on the Ethics Commission, available at: https://www.csm.md/files/Acte_normative/Legislatia/Interne/2018/Regulament_Com_etrica.pdf.

of appealing against disciplinary procedures, the efficiency of the new appeals mechanism (after the coming into effect of the provisions of the Administrative Code on 1 April 2019), the challenges caused by the limitation period, the disciplinary mechanism for the members of the courts' management bodies, etc.

The drafting of the document involved collection of statistics on disciplinary matters for the past five years, including the number of submitted complaints, the number of complaints admitted by the admissibility panels of the Disciplinary Board, reports of the Judicial Inspection, the number of cases examined and disciplinary sanctions applied by the Disciplinary Board, disciplinary sanctions upheld by the SCM and the SCJ, the length of disciplinary proceedings (the filing of complaints and examination at the Judicial Inspection, admissibility panels, the Disciplinary Board, the SCM, the Chisinau Appellate Court, and the SCJ), and the decisions/orders passed at every stage. Particular attention was given to the role of the Judicial Inspection during the examination of disciplinary cases at the Disciplinary Board and the SCM. Consideration was also given to the role of the civil society members of the Disciplinary Board. The author collected and analysed activity reports of the Judicial Inspection and relevant decisions of the Disciplinary Board, the SCM, and the SCJ concerning various types of disciplinary offences. The analysis of documents was also used to evaluate the interpretation in certain offences that make disciplinary proceedings inefficient.

Introduction: The Independence of Justice and the Accountability of Judges

Justice is the spine without which any democracy would instantly collapse. Traditionally, justice is administered by the courts through the agency of every judge. In practice, however, all three branches of state power contribute to the organization and administration of justice. Justice can achieve its goals—those of restoring the broken legal order and protecting human rights and freedoms—when the independence of justice is acknowledged and guaranteed in the Constitution of the Republic of Moldova, when judges enjoy the protection of the law governing their status, when the laws enacted by the Legislature are coherent and intelligible to the citizens, when the Executive allocates sufficient funds for the judicial and the public prosecution systems, and when judges and prosecutors apply laws correctly, fairly, and promptly.

The *independence of justice* is certainly the most important characteristic of the system for the application of the law by judges. This is because the independence of justice is a core value of the rule-of-law state itself. It is a consequence of the principle of separation of powers in a state, and it refers both to the structural independence of the justice *(institutional independence)* and the individual independence of judges *(personal independence)*.

Obviously, justice administration would be negatively impacted if judges were not independent. The evaluation of the independence of judges involves an analysis of judicial appointment, suspension from office, resignation, and dismissal procedures. Guaranteeing the independence of judges is the responsibility of the judicial council, which—as international standards suggest—should be regulated right at the constitution level, so that this fundamental act of a country would regulate the judicial council's composition, powers, and autonomy. Such a council should have a decisive role in appointing, promoting, and sanctioning judges[11]. In the Republic of Moldova, this judicial council is represented by the SCM —a fundamental institution of the state.

Legally and organizationally, the state ensures judges a special status, with irremovability and independence at the core. However, the state and society also require *accountability* from the judicature. Without accountability—both institutional (through transparency) and individual (through professionalism and integrity)—independence would be just a cover for arbitrariness and abuses. Thus, judicial accountability should be a characteristic

[11] Report on Judicial Appointments, adopted by the Venice Commission on 16 and 17 March 2007, CDL-AD(2007)028, paras. 48 and 49, available at: www.venice.coe.int/webforms/documents/CDL-AD(2007)028.aspx.

of the entire judicature (proven by objective and public criteria for entering and practicing judicial profession, public trials, the participation of civil society in the administration activity, financial audits, an objective assignment of cases, reports about judicial activity, the publication of financial statements and decisions concerning sanctions, etc.) and of its every individual member (proven by expeditious adjudication, professional training, compliance with judicial ethics, absence of corruption, good reasoning of court judgments, compliance with the case law, the publication of asset declarations, etc.). Where accountability ends, liability should start.

There are many forms of judicial liability: criminal, disciplinary, administrative, deontological, pecuniary. This study focuses only on the *disciplinary* liability of judges and aims to analyse the international standards in this field, to evaluate the national legal framework in light of those standards and of the efficiency proven so far, as well as to analyse the practice of the entities involved in disciplinary proceedings in the Republic of Moldova. In preparing this study, the author drew on applicable regulatory acts, decisions of disciplinary bodies and tribunals, and interviews conducted with judges, lawyers, and the personnel of the involved entities.

CHAPTER I.
Disciplinary Liability: Conditions and Procedure

1. Legal Regulation

On 1 January 2015, Law No. 178 of 25 July 2014 on the Disciplinary Liability of Judges came into force. According to the accompanying *informative note*[12], the law was meant to create an effective and transparent disciplinary system for judges by clearly defining actions or inactions that constitute a disciplinary offence, regulating the proportionality of disciplinary sanctions, and improving the quality of disciplinary procedures—all while not letting this system influence or interfere with judges' work of dispensing justice.

Law No. 178 made a series of changes to the judicial disciplinary mechanism: it extended the categories of individuals who may file complaints, introduced the requirement that the Judicial Inspection offer a written reasoning for every dismissal of a complaint, established two phases of the preliminary investigation by the Judicial Inspection, improved the definitions of some disciplinary offences, extended the limitation period for disciplinary liability, and improved the regulation of the consequences of disciplinary sanctions[13].

Amendments made in the following years, especially in 2018[14], clarified some disciplinary offences and removed others, regulated the level of culpability for offences and the status of specialized body for entities until then subordinated to the SCM, clarified that the first phase of the disciplinary procedure was verifying the complaint and then investigating the judge, vested the Judicial Inspection with the role of preparing and presenting disciplinary charges before the Disciplinary Board, and replaced admissibility panels with Admissibility Panels at the Disciplinary Board.

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[12] Informative Note to Law No. 178 of 25 July 2014, available at: http://parlament.md/LegislationDocument.aspx?Id=4f1e09f2-c494-4d0d-b331-55d3d52ae973.

[13] LRCM, *Policy Paper: Analysis of the Legislation and Practice Concerning Disciplinary Liability of Judges 2015 – 2016*, Chisinau, 2016, p. 3, available at: https://crjm.org/wp-content/uploads/2016/11/CRJM-Raspundere-discipl-2016-11-EN-web.pdf.

[14] Law No. 136 of 19 July 2018 on Amendments to Law No. 178/2014 on the Disciplinary Liability of Judges, available at: www.legis.md/cautare/getResults?doc_id=105495&lang=ro.

2. Disciplinary offences

Law No. 178 regulates disciplinary offences that concern judges with executive duties and sets special rules for judges in administrative positions or who are members of disciplinary bodies.

In what follows, we will present the disciplinary offences that concern judges, describing the relevant or problematic practice of the Judicial Inspection, the Disciplinary Board, and the SCM.

2.1. For Judges with Executive Duties

These offences are described in Article 4 para (1) of Law No. 178:

a) failure—intentional or from gross negligence—to comply with the obligation to abstain when the judge knows or should know about the existence of one of the circumstances where abstention is required by law, as well as making repeated and unjustified statements of abstention in a case, which has the effect of delaying the examination of the case;

This disciplinary offence is a reflection of the judge's obligation to be impartial. Speaking of legal wording, the definition of this offence expressly refers to commission with intention or from gross negligence. However, according to a general rule applicable to all disciplinary offences, included in Article 36 para. (1[1]) of Law No. 178 introduced by Law No. 136 of 19 July 2018[15]: *"The Disciplinary Board may find a disciplinary offence and may impose disciplinary sanctions (...) only if it is found that the imputed deed was committed with intent or from gross negligence"*. Thus, the mentioning of the level of culpability in the text of this offence is useless.

No instances of this offence have ever been recorded in practice.

b) the adoption of a court judgment that, intentionally or by gross negligence, violates the fundamental rights and freedoms of individuals or legal entities, guaranteed by the Constitution of the Republic of Moldova and the international treaties on fundamental human rights the Republic of Moldova is a party to;

This offence corresponds to some extent to the obligation under Article 15 para. (1) letter (b) of Law No. 544 to *"ensure the observance of people's rights and freedoms, honour and dignity"*. The offence is a concretization of the rule from Article 21 para. (2) of Law No. 544: *"The annulment or change of a court judgement entails liability under Law No. 178 of 25 July 2014 on the Disciplinary Liability of Judges if the issuing judge has broken the law intentionally or as a result of gross negligence"*.

Again, considering the general rule from Article 36 para. (1)[1] of Law 178[16], the mentioning of the level of culpability is useless.

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[15] *Ibid.*
[16] *Ibid.*

The definition of this offence is too broad. For example, the right to a fair trial is fundamental. Hence, this could include failure to hear a party or a witness, failure to offer the right to defence, failure to explain the reasoning of a decision, or unreasonably lengthy proceedings. But they should be addressed exclusively through appeal remedies. Otherwise, if this article was applied, virtually not one criminal or civil case would be free from incidents.

In interpreting this offence, one should take into account the case law of the Constitutional Court of the Republic of Moldova. The Court has ruled that judicial independence is a prerequisite of the rule-of-law state and that no one may interfere with the decisions and the thinking of a judge other than through established judicial procedures[17] and that only appellate and cassation courts may verify the legality and reasonableness of judicial acts[18]. The Court also ruled that the mere finding of miscarriage of justice that caused damage to fundamental human rights and freedoms is not enough to hold a judge disciplinarily liable. It becomes imputable to the judge because of discharging duties with malice or gross negligence. In this context, judges enjoy immunity in administration of justice. The annulment or change of a court judgment does not offer determinant grounds for sanctioning the judge[19].

Likewise, the Constitutional Court has stressed that judges may not be coerced to discharge their duties under the threat of sanctions as this can influence their decisions negatively. In discharging their duties, judges should have unrestricted freedom to adjudicate impartially, in line with legal provisions in force and their own opinions unaffected by malice. This is why a judge's opinions that determined a decision in a case, which then was annulled or changed, may not serve as a determinant ground for applying pecuniary sanctions to the judge[20].

In another decision, the Court has concluded that holding a judge disciplinarily liable based on a sentence of the European Court of Human Rights against the Republic of Moldova without having proven that the judge had broken the law intentionally or from gross negligence constitutes inadmissible interference with the principles of independence, impartiality, and irremovability of judges[21].

It is worth noting that issuing an illegal judgment knowingly constitutes the offence described in Article 307 of the Criminal Code[22]. When such a decision concerns the arrest

[17] Constitutional Court Decision No. 9 of 28 June 2012, para. 31, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=2&l=ro.

[18] Constitutional Court Decision No. 28 of 14 December 2010 *(subrogation action)*, para. 7.3, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=45&l=ro.

[19] Constitutional Court Decision No. 12 of 7 June 2011 *(grounds for the disciplinary liability of judges)*, para. 7, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=30&l=ro.

[20] Constitutional Court Decision No. 28 of 14 December 2010 *(subrogation action)*, para. 94, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=45&l=ro.

[21] Constitutional Court Decision No. 12 of 7 June 2011 *(grounds for the disciplinary liability of judges)*, para. 8, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=30&l=ro.

[22] Article 307 of the Criminal Code. Issuing a sentence, decision, order, or judgment contrary to the law: *(1) The deliberate adoption by a judge of a judgment, sentence, decision, or order contrary to the law shall be punished by a fine of 650 to 1,150 conventional units or by imprisonment for up to five years, in both cases with disqualification from holding certain offices or practicing certain professions for up to five years. (2) The same action linked to the commission of a serious, especially serious, or*

of a person, the judge commits the offence described in Article 308 of the Criminal Code[23]. Therefore, the purpose of these types of disciplinary offence is unclear, the more so that, according to the Regulations on the Organization, Powers, and Procedures of the Judicial Inspection[24], the verifications by this entity may not extend to court judgments: neither to those that are not final yet and are appealable at law (point 2.2 para. (2)) nor to those that are final, where one must respect *res judicata* authority (point 2.2 para. (1)). Likewise, the Judicial Inspection may not interfere with the examination of cases, issue opinions concerning the essence of court judgments or call it into question (point 5.2). Nevertheless, the above regulations allow inspector-judges to make copies from judges' case files (point 10.23 letter (a)), although this may be necessary only for the examination of the merits of a court case.

Likewise, point 4 of the 2019 Guide to Alerting the Judicial Inspection[25] states in the last letter that *"The SCM does not have jurisdictional powers and may not get involved in the examination of cases tried by competent courts, express its opinion and/or evaluate the legality and reasonableness of court judgments"*. Thus, if the SCM itself has given up this power through administrative procedure, how could it examine disciplinary offences of the type in question? As of the time of drawing up this study, we had not found data that this offence had ever been recorded.

c) the judge's actions in the administration of justice that reveal gross and evident professional incompetence;

Professional competence is a characteristic evaluated during the nomination of candidates for judge[26] and during their professional career[27]. The incompetence of a judge cannot be established based on the evaluation of one judgment or one procedural action. Moreover,

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exceptionally serious crime shall be punished by imprisonment for three to seven years with disqualification from holding certain offices or practicing certain professions for up to five years. The rule from Article 307 of the Criminal Code was found unconstitutional by Constitutional Court Decision No. 12 of 28 March 2017.

[23] Article 308 of the Criminal Code. Illegal detention or arrest: *(2) The deliberate illegal arrest warranted by a judge shall be punished by imprisonment for up to three years with disqualification from holding certain offices or practicing certain professions for up to five years.*

[24] SCM, Regulations on the Organization, Powers, and Procedures of the Judicial Inspection, approved by SCM Decision No. 89/4 of 29 January 2013, available at: https://www.csm.md/files/Hotaririle/2018/24/506-24.pdf.

[25] SCM, Guide to Alerting the Judicial Inspection, approved by SCM Decision No. 5/1 of 15 January 2019, available at: https://www.csm.md/files/Acte_normative/Legislatia/Interne/2019/Ghid_pentru_sesizarea_Inspectiei_judiciare_2019.pdf.

[26] Article 9 para. (2) of Law No. 544 of 20 July 1995: *"The Superior Council of Magistracy shall organize competitions for judge in accordance with the regulation it approved, which must provide for objective criteria for nominating the best candidates"*.

[27] Article 13 para. (1) of Law No. 544 of 20 July 1995: *"The review of judges' performance is intended to evaluate the professional qualification and skills of judges"*. Article 12 para. (1) of Law No. 154 of 5 July 2012: *"The Board for the Review of Judges' Performance shall review judges' performance to determine the professional knowledge and skills of judges and their ability to apply the required theoretical knowledge and skills in judicial practice, to identify weaknesses and strengths in their work, to stimulate the desire to improve professional skills, and to improve the efficiency of judges' work at the level of individuals and at the level of courts"*.

the Disciplinary Board would not even be able to conduct such evaluations because they are in the charge of the Judicial Performance Board. And the purpose of performance reviews is not at all to sanction judges, but rather to improve their performance.

On the other hand, incompetence would be visible through the violation of participants' rights. In practical terms, this type of offence is useless because the actions that fall within its definition are also described in the content of other offences. Therefore, we recommend excluding it.

And yet there were cases where this aspect was considered in disciplinary proceedings. Thus, in one case, the Admissibility Panels determined that *"Gross and obvious professional incompetence implies actions that prove a lack of knowledge or experience in a certain field—in this case, the application of laws—and a lack of consistent practice in adjudicated cases, and such circumstances are absent in this case"*[28].

In another case, the plenum of the SCM ordered the dismissal of a judge from office as a disciplinary sanction for having remanded a defendant in custody despite evidence and statements on record that the defendant had been mentally ill, which had resulted in the death of the defendant in police custody[29]. It is worth noting that no analysis was offered concerning the judge's personal circumstances that would help to determine whether in its decision the SCM considered the proportionality of the sanction.

Finally, in another case, the Disciplinary Board sanctioned a judge by dismissing him and the SCM changed the sanction to warning for having imposed a criminal fine to a culprit charged with crimes that under the law were punishable only by prison. Curiously, the judge's action was categorized as two disciplinary offences: one from letter (b) and one from letter (c) of Law No. 178[30]. We believe, however, that none applies to this case: neither letter (b)—because one cannot consider that the defendant's rights were infringed by the milder sanction—nor letter (c)—because one cannot conclude that the judge was incompetent just because of one wrong judgment that was overruled and corrected by higher courts. In fact, we believe that this case concerned the offence from letter (i) at most, but only if one can prove the judge's intent or malice. In this case, however, no evidence was mentioned that would support this level of culpability.

d) interference in the judicial activity of another judge;

It is worth noting that for such an action, a judge can also be punished under criminal law, namely under Article 303 of the Criminal Code, *Interference with the dispense of justice and with criminal investigations*[31].

[28] Decision No. 341/12 of 16 November 2018 of Admissibility Panel I of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2018/CA1/12/341-12.pdf.

[29] SCM Decision No. 4/1 of 16 January 2018 on the challenge from Decision No. 44/41 of 24 November 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2018/01/4-1.pdf.

[30] SCM Decision No. 296/17 of 23 July 2019 on the challenge from Decision No. 1/1 of 18 January 2019 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2019/17/296-17.pdf.

[31] Article 303 of the Criminal Code. Interference with the dispense of justice and with criminal investigations: *(1) Interference in any form with the examination of cases in national or international*

e) unlawful interference or malfeasance in judicial office in relations with other authorities, institutions, or officials, either to settle requests or to claim or to accept solutions for personal or other interests or to obtain undue benefits;

In one case, the Disciplinary Board sanctioned a judge with dismissal from office and the plenary of the SCM upheld this decision because *"the judge's actions at the meeting of the local council of the commune qualified as the disciplinary offence from Article 4 para. (1) letter (e) and letter (p) of the Law on the Disciplinary Liability of Judges, taking into account that by those actions and the threats with criminal action against the councilors if they did not solve the discussed problem as desired, the judge exceeded the legal restrictions on judicial office and showed a behaviour that was incompatible with judicial office"*[32].

Here we have two comments. First, there is a legal aspect to this case, and we agree with the categorization as the offence from letter (e) but do not understand the reference to the offence from letter (p). Anyway, the SCM does not explain whether this means two distinct offences or just one action that accepts two categorizations. In this context, the offence from letter (p) is general and applies only to actions that do not qualify as any other offence.

Second, there is the merits of the case. The judge had intervened for a piece of land owned by his spouse, so it is understood that he had personal interest. In this situation, the judge could not be expected to avoid any discussion or intervention, because as a citizen he had the same rights as any other. The right to petitioning, the right to free expression, the right to justice may not be denied to a judge who acts in civilian capacity. From this point of view, we consider that the offence should have a clearer regulation.

f) failure to keep the secret of deliberation or the confidentiality of work of this kind or other confidential information that came to the knowledge of the judge legally in the line of duty;

In practice, we did not find such cases when preparing this study. The offence is, however, defined correctly.

courts in order to hinder the comprehensive, complete, and objective examination of a concrete case or at obtaining an illegal court judgment shall be punished by a fine of 550 to 850 conventional units or by community service for 180 to 240 hours or by imprisonment for up to two years. (2) Interference with the work of investigation bodies or of the personnel of international courts in order to hinder the expeditious, complete, and objective investigation of a criminal case shall be punished by a fine of up to 700 conventional units or by community service for 180 to 240 hours. (3) The actions described in para. (1) and (2), committed by malfeasance in office shall be punished by a fine of 750 to 950 conventional units or by imprisonment for up to four years, in both cases with disqualification from holding certain offices or practicing certain professions for up to three years.

[32] SCM Decision No. 419/21 of 16 October 2018 on the challenge from Decision No. 3/4 of 20 April 2018 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2018/21/419-21.pdf.

g) the violation—due to reasons imputable to the judge—of time frames for procedural actions, including time frames for drawing up court judgments and handing out copies of them to trial participants, if this has directly affected the rights of trial participants or other persons;

First, handing out copies of court judgments is the responsibility of judicial assistants or court clerks, not judges. Second, this legal wording is confusing because any violation of procedural time frames affects somebody's rights one way or another. In fact, this regulation is intended to sanction judges who are slow in administering legal proceedings and, respectively, drawing up court judgments.

The wording "reasons imputable" gives room for subjectivity from those in charge of disciplinary investigation against judges. There are no criteria for determining the caseload that judges could reasonably handle all while complying with all time frames required by law. For example, will such an analysis use the judge's previous performance, the performance of other judges from the same court, or the performance of an imaginary reasonably diligent and hardworking judge as the baseline?

Disciplinary practice is not consistent, and sometimes decisions do not explain the reasoning properly.

Therefore, the Judicial Inspection does not always investigate this type of offences. Thus, the Judicial Inspection dismissed a complaint concerning too many trial periods set for a civil case, because under Article 192 para. (1^2) of the Civil Procedure Code, only court has the power to determine whether the reasonable time frame for case examination was broken. By the same decision, the Judicial Inspection also dismissed a complaint about the dragging out of two criminal cases, reasoning that it concerned procedural aspects, which can be invoked by appeal, and that only court can determine whether the time frame for case examination was broken and order the fast-tracking of proceedings[33]. In addition, the Admissibility Panels established that *"under Law No. 87 of 21 April 2011, only court in proceedings regulated strictly by law can determine whether the time frame for the examination of a case or the enforcement of an irrevocable judgment was broken"*[34]. This is a confusion between the disciplinarily sanctionable behavior of a judge who drags out a case unreasonably and the procedural aspect of delaying a case that may be sanctioned procedurally through the procedure of fast-tracking the trial[35]. Should we admit the argument of the Judicial Inspection, then no one could ever verify such complaints and would have to dismiss them as inadmissible. In this case, however, the Judicial Inspection has already inquired the courts and, although initially it had verified the way of delaying the civil and criminal cases, it concluded later that it did not have the power to investigate this aspect.

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[33] Decision of 15 January 2020 of the Judicial Inspection (Case No. 1583s-1928p/m).

[34] Decision No. 341/12 of 16 November 2018 of Admissibility Panel I of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2018/CA1/12/341-12.pdf.

[35] LRCM, *Policy Paper: The Mechanism for Compensation Damages Caused by the Violation of Reasonable Time Requirement—Is It Efficient?* available at: https://crjm.org/wp-content/uploads/2014/09/Policy-document-nr-1-web.pdf.

In another case, the plenum of the SCM admitted a challenge but upheld the decision of the Disciplinary Board, which had dismissed the request that a judge be sanctioned for being 162 days late in drawing up a court judgment. It was reasoned that the legal time frame for preparing the judgment was broken not because of the judge, but rather because of a big caseload[36]. The decision, however, did not specify whether it was an isolated instance or one of many and whether other judges with similar caseloads had managed to meet the deadlines. It did not even present statistics on the work of the judge in question.

In another case, the plenum of the Disciplinary Board sanctioned a judge for having drawn up the reasoning of a judgment dated July 2016 ten months beyond the legal time frame, which was 15 days. The SCM overruled that decision because the delay was not imputable to the judge for two reasons: the judge's court clerk had been replaced and the new one needed training. Thus, *"according to statistics, during the year 2015, the judge had 805 cases under examination and issued judgments in 504 cases, which is an extremely large caseload in comparison with other courts, where this indicator was at 243, 259, and 403 cases. As mentioned in Decision No. 45/5 of 31 March 2017 of the Board for Evaluation of Performance of Judges, according to data retrieved from ICMS, the judge did not examine cases out of the reasonable time frame and prepared and published all 504 judgments on the website completely within the required time frames"*[37]. Our question then is why the Judicial Inspection and the Disciplinary Board had not examined these statistics themselves so that they would not have to sanction the judge. The SCM should set certain objective criteria as guidance for the bodies that investigate and try judges for being slow and dragging out cases[38].

Another complaint concerned a judge who had dragged out the examination of an administrative case for one year and three months. The plenum of the SCM upheld the decision of the Disciplinary Board to terminate the disciplinary proceedings because *"the time frame for examining the administrative case starting from the filing date was broken due to the postponement of hearings on participants' requests. The court hearings were scheduled taking into account the availability of participants to attend the sittings. The violation of the time frame for examination does not constitute a determining factor for establishing disciplinary*

[36] SCM Decision No. 238/12 of 28 March 2017 on the challenge from Decision No. 61/17 of 16 December 2016 of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/12/238-12.pdf.

[37] SCM Decision No. 811/36 of 12 December 2017 on the challenge from Decision No. 23/4 of 5 May 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/36/811-36.pdf.

[38] Although it does not fall directly within the scope of this study, we would like to include a comment about judges' workload. Almost all candidates for member of the SCM pledged to contribute to the development of regulations concerning the optimal workload for judges. However, data on judges' real workload presented in the SCM's annual reports and in disciplinary investigations against some judges do not seem to confirm the success of the SCM's Regulations on National Single Complexity Levels for Court Cases, available at: www.csm.md/files/Acte_normative/Reg_stabilirea%20gradelor%20complexivitate.pdf. In addition, in 2014, the SCM delegated one of its members to carry out a study concerning the optimal workload for judges www.csm.md/files/Hotaririle/2014/06/162-6.pdf, and in 2016, it set up a task force for optimizing the staffing tables of the courts in accordance with the workload recorded over the previous five years www.csm.md/files/Hotaririle/2016/03/75-3.pdf. No notable progress has been achieved, though.

offence, *and it is not imputable to the judge because it happened as a result of large workload at the court and requests from case participants"*. Then the SCM goes on to refer to the rules of the Council of Europe and decisions of the Constitutional Court concerning the independence of judges[39]. The presented arguments are contradictory. If it was concluded that the legal proceedings had spanned several hearings due to postponements requested by the parties, then it did not make sense to invoke the judge's workload. And if the workload argument had been sufficient, then it would have been necessary to include supporting statistics[40]. In any case, the reference to the independence of judges is useless and inappropriate in this case.

In another case, the Disciplinary Board sanctioned a judge with a warning, upheld by the SCM, because the judge had been several months late in drawing up reasoning parts for judgments in three distinct cases. Although the legal time frame was 30 days, the reasoning parts were missing even eight months after the deadlines. It was reasoned that *"the plenum of the SCM admits that the workload of a judge at courts is excessive. But the caseload at the Chișinău district court and at most courts in the country is the same. Having the same working conditions, most judges organize their work correctly and comply with the reasonable time frame for examining cases, avoiding gross procedural offences, including those related to the preparation of judgments"*[41]. The SCM's rationale is not sufficiently consistent: on the one hand, it refers to workload and adjudication time frames without citing statistics, which renders the argument somehow subjective, and on the other hand, the Republic of Moldova registers an ever growing number of complaints about the violation of time frames for adjudication or the drawing up of judgments, which indicates that the overburdening with cases is a generalized, systemic issue.

We cannot help mentioning another two non-conforming decisions that illegally introduced additional conditions to delay and culpability. One states that the complainant must prove that they suffered harm from the delay. Thus, the plenum of the SCM mentions that *"despite the complainant's allegation that the judge dragged out sending the copy of the order more than two months after it was issued, this does not have a causal connection with the dismissal of the cassation on account of expired limitation period. Therefore, the late referral of the case for examination in cassation does not represent a determining factor per se for establishing the*

[39] SCM Decision No. 159/8 of 16 April 2019 on the challenge from Decision No. 17/10 of 7 December 2018 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2019/08/159-8.pdf.

[40] Statistical data are available in official reports. For example, the 2019 activity report of the Judicial Inspection, available at: https://www.csm.md/files/RAPOARTE/2019/RAPORT_IJ_2019.pdf, mentions: *In 2019, the average annual caseload per judge was 621 cases, and the average monthly caseload was 62 cases. In 2019, the judges of the Supreme Court of Justice had an average monthly caseload of 49.8 cases each, and an average monthly load of disposed cases of 42.6 cases each. The judges of the Chișinău Court had an average annual caseload of 633 cases each, and an average monthly caseload of 63 cases each. In 2019, the Comrat Court had the largest average annual caseload per judge (including pending and disposed cases), the Criuleni Court had the smallest average annual load of pending cases, and the Hincești Court had the smallest average annual load of disposed cases.*

[41] SCM Decision No. 297/17 of 23 July 2019 on the challenge from Decision No. 21/4 of 12 April 2019 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2019/17/297-17.pdf.

disciplinary offence, and the complainant did not mention severe consequences that could have affected their rights beyond repair. The complainant's cassation appeal was dismissed as late due to reasons imputable to them rather than the judge"[42]. The reasoning of the decision exceeds the legal framework because the disciplinary body should have only mentioned the breach of the legal time frame for drawing up the order and that this was imputable to the judge. That the judicial control court admitted or dismissed the appeal was not relevant. Indeed, the complaint concerned the delay caused by the judge from the district court, not the decision issued by the Chișinău Court of Appeal.

In another decision, a judge was sanctioned with a warning for failing to make representations to the disciplinary body. Thus, the plenum of the Disciplinary Board noted that the judge had exceeded the time frame for preparing the judgment by more than four months, which had allegedly affected the complainant's rights directly. The plenum *"considers that the judge showed inadmissible attitude during the disciplinary proceedings by disregarding Inspector-judges' and the Disciplinary Board' requests for representations about the facts set out in the complaint"*[43]. This decision is inconsistent. On the one hand, the Disciplinary Board did not explain how exactly the complainant's rights had been affected. The mere reference to the legal text is insufficient. It should have offered a concrete reasoning. We consider that the complainant neither lost their right nor missed the deadline for filing a cassation appeal, and hence, they will be able to use their rights in court. On the other hand, the judge's written or verbal representations concerning the disciplinary proceedings is not an obligation at all, but rather a right meant to ensure fair proceedings. Therefore, nobody can sanction the judge harsher for refusal to make representations about the complainant's allegations or for failing to appear before the disciplinary body.

In conclusion, before applying the provision concerning this offence, it is necessary to clarify the interpretation and to unify the practice. Moreover, we believe that the law should specify that only repeated actions can constitute such an offence. An isolated action should not lead to the sanctioning of a judge.

h) groundless absences from work, coming to work late or leaving without grounded reasons, if it affected the activity of the court;

The large number of sick leaves taken by judges is a warning sign. However, neither the SCM through its boards nor the Judicial Inspection have studied the sick leaves phenomenon and its impact on courts' work. We believe this may be explained either by occupational illnesses—which should be addressed by administrative measures—or by the fact that some judges abuse this right, perhaps with the complicity of certain doctors, which is a matter requiring criminal investigation. Whatever the causes, the investigation of judges

[42] SCM Decision No. 315/18 of 30 July 2019 on the challenge from Decision No. 22/4 of 12 April 2019 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2019/18/315-18.pdf.

[43] Decision No. 11/2 of 15 February 2019 of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2019/Sesizari/11-2.pdf.

on sick leave should be prohibited, and the limitation period for disciplinary liability should be suspended while they are on sick leave. Any verbal discussion, including over the phone, between civil servants from disciplinary entities and investigated judges should be later recorded in writing.

During the vacation or sick leave of a judge, the court president should assign their cases to other judicial panels. Obviously, since there might be recusal requests, which require action within five days, or restraining orders, which require action within 24 hours, one cannot wait till the incumbent judge reports back to work. Thus, delays in the adjudication of such cases are not disciplinary by nature, but rather administrative.

The offence we consider should be clarified in practice. The SCM should develop criteria to enable the identification of concrete effects on the court's work—for example, these might refer to disruption of work, litigants' rights, or personnel's access to court.

i) the violation of mandatory rules in administration of justice;

This is most confusing and debatable disciplinary offence. Does it refer to the type of violated rules (imperative) or to the place and time of the offence (during legal proceedings)? We say this because the rules judges must observe are included both in procedural codes and in other laws. For example, Law No. 544, Article 15, lists judges' statutory obligations that are also applicable during the adjudication of cases, such as the uniform interpretation and application of laws and the observance of the Code of Judicial Ethics. Judges should not be sanctioned for failing in these obligations, even during the adjudication of a case. We say this because the Legislature has excluded the offence described as "the intentional, malicious, or repeated (due to gross negligence) application of laws contrary to the uniform judicial practice" that was present in the initial version of Law No. 178 of 2015.

First, rules get broken in any judicial proceedings. For example, court may fail to summon a participant or to communicate a statement of claim or the reference of the adverse party, it may change the order of those who present pleas or bar a party from speaking or reject an invoked exception or a piece of evidence, it may break procedural time frames or the secret of deliberation, etc. Some offences may be completely invalidated and lead to the removal of unlawful actions and the reconsideration of the case, others may be partially invalidated and covered if they were invoked within a certain limitation period. It is not fair, therefore, that any offences, even those that do not have a negative procedural impact, trigger the disciplinary liability of the judge.

Second, there are no provisions concerning the number of offences and the severity of their consequences required to start a disciplinary investigation. For example, would one offence be sufficient, even if none of the parties has objections, but the Judicial Inspection takes action *ex officio*? If yes, then there would not be a day without a new investigation against a judge.

Third, some actions that would fit the content of this offence are covered by the definitions of other offences from Article 4 letters (b), (f), (g), (j), and (l) of Law No. 178.

It is worth noting that those violations are interpreted in light of the case law. Thus, it was determined that this regulation covers the disregard of a decision of the Constitutional Court[44].

Moreover, we identified a decision of the SCM's plenary that explains the meaning of *imperative rule*. *"Imperative rules are the rules that impose a certain behaviour without derogation—that is, without the possibility of setting other rules for their legal relations than those imposed. These rules may require certain actions or inactions by imposing a behaviour that subjects of law may not deviate from. Thus, mandatory rules are those that impose certain actions or inactions on subjects of law, that set a mandatory strictly determined unequivocal behaviour for subjects of law. These rules also prohibit subjects of law from derogating or disregarding them, under the threat of sanction"*[45].

If we applied this definition, we could question the sanction imposed by the Disciplinary Board and upheld by the plenum of the SCM on a judge who had allegedly admitted a lawyer unauthorized to participate to a hearing and on the lawyer's motion, granted time for providing new evidences. The appellate court judge was charged under Article 4 letter (i) of Law No. 178[46]. We believe, however, that the purpose of the law is not to sanction the presence of lawyers, but rather to sanction their absence when legal assistance is mandatory.

We recommend removing this offence from the legal text and redefining other offences with more care.

j) failure to perform, or a late or inadequate performance of, a job duty without good reason, if this directly infringed the rights of case participants or other individuals;

It is not clear what this offence refers to. As the first part of the definition refers to job duties, apparently, it refers to duties at law, acts adopted by the SCM, or orders of court presidents. The second part refers to the rights of case participants, which means that the offence refers to judicial activity. Finally, the third part refers to the rights of other individuals, leaving us in obscurity as to what strangers to the case could be affected by judges' actions.

In our opinion, the observance of procedural rules in examining cases is part of judges' job duties anyway. Therefore, failure to perform, late performance, or inadequate performance of job duties are the violation of the law in justice administration. If these rules were imperative (*i. e.* procedural acts sanctioned by law with total nullity), then the offence from letter (j) would be superposed over that from letter (i). This means that offence from letter (j) should refer only to the violation of other legal rules than the imperative ones.

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[44] Decision No. 198 of 18 October 2019 of Admissibility Panel I of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2019/CC1/08/198-8.pdf.

[45] SCM Decision No. 595/27 of 12 September 2017 on the challenge from Decision No. 28/4 of 5 May 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/27/595-27.pdf.

[46] SCM Decision No. 690/31 of 31 October 2017 on the challenge from Decision No. 36/6 of 7 July 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/31/690-31.pdf.

Anyway, this offence should refer to judges' administrative duties rather than judicial duties, or else the provision should at least specify the job duties it refers to.

k) undignified attitude in justice delivery towards colleagues, lawyers, experts, witnesses, or other persons;

We believe that this offence should specify the meaning of the words "other persons". For example, these could be the prosecutor, court clerk, judicial assistant, employees from court chancellery. Alternatively, the SCM can offer its interpretation on this.

There might be difficulty determining the difference between this disciplinary offence and the violation of the Code of Ethics, which states in Article 7 para. (7) that *"judge shall avoid arrogance, shall treat colleagues, case participants, and representatives of law enforcement and public authorities with respect and courtesy, and shall react tactfully and diligently"*. In fact, it seems that the SCM itself has this dilemma. Thus, in one case, the plenum of the SCM concluded that *"although at first sight the judge's actions could be categorized as disciplinary offence described in Article 4 letter (k) of Law No. 178, the examined actions are in reality related to the judge's compliance with certain rules of ethics. In their support, the complainant presented the plenum of the SCM a CD with an audio recording of the court hearing that confirmed that the judge had shouted at the complainant when they did not answer the questions of the attorney of the adverse party, after which Gheorghe Percic rebuked the judge for not allowing them to speak and supporting the adverse party"*[47].

In another case, there is a confusion between the process of justice administration and the performance of administrative duties. Thus, a court employee and court vice-president got in tense relations that resulted in statements interpreted by the complainant as threats, insults, and discriminatory comments. By Decision No. 258/14 of 31 October 2016, the Admissibility Panel admitted the challenge against the decision of the Judicial Inspection concerning the court vice-president, quashed the decision of 21 March 2016 of the Judicial Inspection, and put the case for examination on the merits, concluding that *"there is reasonable suspicion that the judge committed the disciplinary offence described in Article 4 para. (1) letter (k), undignified attitude toward colleagues, lawyers, experts, witnesses, or other persons during the judicial activity, and letter (p), other actions that undermine honor or professional integrity or the prestige of justice committed in the line of duty or in other circumstances"*. In this case, there are no grounds for categorizing the incident as offence under letter (k) because the reported actions did not happen during the examination of a case. Thus, in this case, only the offence from letter (p) could be kept as having the right legal categorization. Anyway, the plenum of the SCM did not uphold the complaint. The complainant challenged this decision at the SCM, which dismissed the challenge,[48] reasoning that, according to the case law of the

[47] SCM Decision No. 356/17 of 30 May 2017 on the challenge from Decision No. 7/1 of 27 November 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/17/356-17.pdf.

[48] SCM Decision No. 433/20 of 27 May 2017 on the challenge from Decision No. 3/1 of 27 January 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/20/433-20.pdf.

Constitutional Court, judges enjoy immunity in administration of justice and must be free from any pressure. We believe that this argument was wrong. The complaint concerned the behaviour of the person in the administrative capacity of the court vice-president, not that of a judge sitting in a case, and therefore the offence from letter (k) did not apply.

In conclusion, the examined offence should refer only to the activity of adjudicating cases.

l) violation of the provisions on incompatibilities, prohibitions and job restrictions concerning judges;

The legal rules governing the regime of incompatibilities, prohibitions and restrictions for judges are imperative and laid out in Article 8 of Law No. 544.

Before concluding that a judge broke the regime of incompatibilities, one should establish that the judge failed to abstain when it was mandatory. But this action would fall within the purview of letter (a), so we do not consider that this duplicated provision is necessary. Therefore, what prohibitions and job restrictions are meant in the content of this offence should be regulated at law, or else the SCM could define the scope of this offence.

m[1]) noncompliance with the provisions of Article 7 para (2) of Law No. 325 of 23 December 2013 on the Evaluation of Institutional Integrity;

This offence corresponds to judges' obligation under Article 15 para. (1) letter (d[1]) of Law No. 544 to *"comply with the provisions of Article 7 para. (2) of Law No. 325 of 23 December 2013 on the Evaluation of Institutional Integrity"*. It has the following content:

"(2) Public agents must:

a) not admit acts of corruption;

b) report any attempt to involve them into actions described in letter (a) immediately to competent authorities;

c) report undue influences immediately and declare gifts and conflicts of interests in accordance with the law;

d) know and comply with their obligations under the national and sectoral anti-corruption policies described in Article 5;

e) comply with the specific professional integrity requirements to the work of public agents at public entities, which were communicated to them;

f) apply the measures included in the integrity plan adopted after the assessment of institutional integrity".

We did not find cases of this offence in the practice of the disciplinary bodies of the Republic of Moldova.

n) the obstruction of the work of inspector-judges in any way;

We did not find cases of this offence—which is defined sufficiently clearly—in the practice of the disciplinary bodies.

Let us remind, however, the earlier case where a judge was sanctioned of warning for failing to make representations to the disciplinary body. The plenum of the Disciplinary Board noted that *"the judge showed inadmissible attitude during the disciplinary proceedings by disregarding Inspector-judges' and the Disciplinary Board' requests for representations about the facts set out in the complaint"*[49]. If that judge were to be sanctioned, their action should have been investigated under the offence from letter (n). But then again, defending a judge before the Judicial Inspection is a right rather than an obligation. Therefore, this offence refers to anyone's actions but those that are part of a judge's exercising the right to defence.

p) other actions affecting honour or professional integrity or prestige of justice to such an extent that they affect trust in justice committed while performing service duties or outside them and that due to their severity cannot be qualified only as violations of the Code of Ethics and Professional Conduct of Judges.

This offence corresponds to some extent to judges' obligation under Article 15 para. (1) letter (d) of Law 544 to *"refrain from actions that are detrimental to the interests of the service and the prestige of justice and compromise the honour and dignity of judges"*.

The rule of thumb in disciplinary matters, just like in criminal matters, is that actions must be described as precisely as possible because only then judges are likely to adapt their behaviour accordingly. The expressions "other actions" or "the prestige of justice" are rather vague[50]. According to guidance from the European Court of Human Rights, the law should be accessible to litigants and its effects should be predictable. To be predictable, a law must specify the extent of the deliberative powers of relevant authorities and ways of exerting them with sufficient clarity, taking into account the pursued legitimate purpose, in order to offer a person adequate protection against arbitrariness *(see Judgment of 4 May 2000 in Rotaru v. Romania, para. 52[51], and Judgment of 25 January 2007 in Sissanis v. Romania, para. 66[52])*.

A positive aspect is that distinction is made between a disciplinary offence and the violation of the Code of Ethics. Thus, whereas disciplinary rules are imperative, and their offence entails sanction, ethics rules are only advisory in nature. Anyway, it is worth noting that disciplinary sanctions may not be imposed for the violation of the Code of Ethics.

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[49] Decision No. 11/2 of 15 February 2019 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2019/Sesizari/11-2.pdf.

[50] Joint Opinion No. 755/2014 of the Venice Commission and the OSCE on the Draft Law on the Disciplinary Liability of Judges of the Republic of Moldova, para. 32, available in Romanian at: www.legislationline.org/download/id/5274/file/Joint_VC_Opinion_JUD_MLD_24March2014_ro.pdf.

[51] ECtHR, Decision on *Rotaru v Romania*, 4 May 2000, available at: http://legislatie.just.ro/Public/DetaliiDocumentAfis/25965.

[52] ECtHR, Decision on *Sissanis v Romania*, 25 January 2007, available in Romanian at: http://legislatie.just.ro/Public/DetaliiDocumentAfis/99496.

The discussion of this offence brings up a case where a judge was dismissed from office for allegedly borrowing large sums of money from five individuals and failing to repay them. It is worth noting that although during the proceedings, two complainants withdrew their complaints, the Moldovan law allowed the continuation of proceedings. The Disciplinary Board ordered the dismissal of the judge from the judiciary, reasoning that *"a judge's default on their obligations may lead to unfairness or perception of unfairness that undermine public trust in the judiciary"*[53]. We found no concrete reference to how trust in the judiciary may get undermined if a judge fails in their civil obligations in dealings with private individuals nor to the judge's antecedents to consider whether they should have received the harshest sanction.

Special treatment must be given to the way judges exercise freedom of expression and sanctions imposed in such cases[54]. There are situations when Moldovan judges go public about irregularities in the system, ranging from failure to assign cases in a randomized way to interferences with justice from certain judges, especially those in administrative positions. It is worth noting that the duty of being integer implies not only that a judge should be fair in their judicial work but also that they should watch that other people be fair. Denouncing systemic irregularities is not only a legal obligation, but also a moral duty, especially so, in fact. Unfortunately, many judges fear that if they denounce irregularities, they will face retaliation. This is aggravated by a career growth system that has allowed subjective decisions over the years. Even the appointment to the Disciplinary Board has allowed such decisions: some members were appointed on recommendation or with backing from court presidents, which looks like a kind of disciplinary immunity for them.

Apparently, those who suffered from those denunciations were mostly the whistleblowers themselves, which is inadmissible and sanctionable at the European Court of Human Rights (ECtHR)[55]. Consider the case of a judge, member of an extremely vocal professional organization founded in 2019 and mother of five, who had to commute to work, spending four hours on the way to the courthouse and four hours back daily, because she had been repeatedly denied transfer to a court that was closer to her home[56]. Considering that Moldovan judges have hearings every day and do not have enough time for preparing the reasoning part of their judgments, asking diligence or timeliness from them is unreasonable. In the same context, we believe that the ban on transfer for judges who have not served five years of initial tenure should be abandoned or at least reduced[57].

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[53] SCM Decision No. 357/17 of 30 May 2017 on the challenge from Decision No. 6/1 of 27 January 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/17/357-17.pdf.

[54] See Opinion 806/2015 of the Venice Commission for a comprehensive study of this subject. Report on the freedom of expression of judges, approved at the plenary session of 19 and 20 June 2015, CDL-AD(2015)018.

[55] ECtHR, Decision on *Kudeshkina v Russia*, 26 February 2009, available at: http://hudoc.echr.coe.int/fre?i=001-91501.

[56] SCM Decision No. 321/19 of 6 August 2019, available at: www.csm.md/files/Hotaririle/2019/19/321-19.pdf.

[57] Article 20 para. (3) of Law No. 544: "Judges may apply for transfer to a court of the same level five years after appointment at the earliest, and judges in the office of court president

There was also the case of a judge whose application for life tenure filed on the termination of the initial five-year tenure under Article 11 para (1) of Law No. 544 was rejected at the SCM on 16 April 2020 after he had gone public about the interferences of certain judges in administrative positions with the examination of cases[58]. Notably, just two and a half months earlier, on 31 January 2020, the Judicial Performance Board had graded his performance as "very good"[59]. It is true that on the date of the SCM's refusal to nominate, the judge faced four ongoing disciplinary procedures, but none was active. The rejection of the application for life tenure raises many questions. First, it brings back the government's commitment to amend the Constitution, which included the abandonment of the initial five-year tenure for judges. On 22 January 2020, the government approved the draft amendments to the Constitution, and on 20 March 2020, the Venice Commission issued a favourable opinion in this regard[60]. Second, the discretionary vote of SCM members could neither find that the judge had had negative results at performance reviews nor impose disciplinary sanctions on him. Third, there is a perception that judges who speak out about pressures in the system are not accepted in the judicial system and get exposed to retaliation, which discourages other judges.

We consider that such situations could be avoided if the Law on Whistleblowers[61] would also apply to the judicial system. Unfortunately, as of the publication of this study, this law had not extended to workers from the justice sector. There are neither regulations concerning its application nor debates about this subject at the SCM, the management bodies of the courts, or associations of judges.

2.2. For Judges with Administrative Duties

According to Article 4 para (2) of Law No. 178, *"failure to perform, or late or inadequate performance of, the job duties described in Article 16[1] of Law No. 514-XIII of 6 July 1995 on Judicial Organization by court presidents and vice-presidents without good reason, when this has affected the activity of the court, constitutes disciplinary offence".*

This article describes the duties of the court president and vice-president. Thus, *"the court president shall: a) participate in the examination of cases assigned under Article 6[1]; b) approve the composition of court panels and coordinate their work; c) coordinate the work of judges to ensure that cases are examined within a reasonable time; d) set the job duties of court vice-president of*

or vice-president may apply for transfer to a court of the same or lower level only after the termination of their terms in, or dismissal from, respective offices". See also Chapter V of the SCM's Regulations on the Criteria for Judicial Nomination, Promotion, and Transfer, available at: www.csm.md/files/Acte_normative/Legislatia/Interne/2018/Regulament_criterii_selectie_2018.pdf.

[58] SCM Decision No. 67/6 of 16 April 2020, available at www.csm.md/files/Hotaririle/2020/06/67-6.pdf.

[59] Decision No. 3/1 of 31 January 2020 of the Board for the Review of Judges' Performance, available at: https://www.csm.md/files/Hotaririle%20CEvaluare/2020/01/3-1.pdf.

[60] Opinion No. 983/2020 of the Venice Commission on the amendments to the Constitution concerning the SCM, CDL-AD(2020)001, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)001-e.

[61] Law No. 122 of 12 July 2018 on Whistleblowers, available at: https://www.legis.md/cautare/getResults?doc_id=105486&lang=ro.

the courts; e) recommend the Superior Council of Magistracy one or more judges from their court for appointment as investigating judges; f) ensure the specialization and in-service training of the judges from their courts; g) decide on the need to try certain matters or categories of persons in collegial panels; h) form judicial panels and decide on changing their members under Article 6[1] para (1[1]); letter i) check the randomized assignment of cases filed to the court for examination; j) exercise control over the preparation and publication of the information about cases set for trial, including their subject matter, within the time frames prescribed by procedural rules; k) lead the work on the unification of judicial practice and the analysis of judicial statistics and report to the Superior Council of Magistracy on these activity and, respectively, the Agency for Courts Administration on the analysis of judicial statistics; l) resolve complaints in accordance with the law, with the exception of those concerning judges' actions during justice administration and their behaviour; m) approve and present the schedule of judges' annual vacation leaves to the Superior Council of Magistracy, grant judges annual vacation leaves, and recall them from vacation; n) represent their courts in relations with public authorities and the media; o) appoint civil servants, change, suspend, and terminate their employment relations in accordance with the law, employ, change, suspend, and terminate employment relations of the contracted personnel of the court's secretariat; p) apply disciplinary sanctions and incentives to the personnel of the court's secretariat; q) perform other duties in accordance with the law". The court vice-president performs the duties of the court president in their absence.

As we can see, all job duties listed in Article 16[1] of Law No. 514/1995 are administrative rather than judicial. In fact, the effect specified in the text concerning the offence is related to the work of the entire court rather than a legal action. Note that there is not a single criterion that would help to determine whether the judge's action affected the work of the court. Anyway, the offence of administrative duties should only entail an administrative measure, dismissal from administrative office being surely the most advisable. In other words, for deficient management, a court president or vice-president should be dismissed from administrative position rather than sanctioned disciplinarily. The same should also apply to incumbents in similar offices at administrative or disciplinary bodies, such as the SCM, the Judicial Inspection, the boards of the SCM, etc.

Article 6 para. (2) of Law No. 178 provides, however, for two types of disciplinary sanctions for the same deed: a general one for judges in executive positions—warning, reprimand, salary reduction—and one specifically for judges in administrative positions—dismissal from such positions. This regulation has two drawbacks: first, the same action may entail two sanctions, which contradicts the principles of law. Second, the law specifies that the application of the second sanction is *mandatory* only under Article 6 para. (7) of Law No. 178—that is, in cases of gross or repeated disciplinary offences committed while discharging administrative duties. In other cases, if a court (deputy) president is disciplinarily sanctioned for one or several mild disciplinary offences[62] committed while discharging administrative

[62] In case of complaints against a judge's multiple actions, it seems that law distinguishes between the cumulation of disciplinary offences and the repeated commission of a disciplinary offence. Article 6 para. (3) of Law No. 178: *"A repeated disciplinary* offence *is a disciplinary* offence *committed during the effective period of an earlier disciplinary sanction, regardless of the type of the disciplinary* offence".

duties or for one or several disciplinary offences committed while discharging judicial duties, dismissal from office is just an *option* for the disciplinary body. In other words, a court president may be allowed on a purely subjective basis to stay in office even if they are sanctioned with, say, the decrease of salary for judicial work or the work of court (deputy) president.

Here we have a paradox: the provisions of Article 7 para. (5) of Law No. 178 prohibit the appointment of a judge who has been disciplinarily sanctioned as court (deputy) president[63]. However, as we could see, if a disciplinary sanction is applied after they had been appointed as court president or vice-president, they can keep this administrative position.

2.3. For Inspector-Judges

A special rule applies to inspector-judges. Article 24 para. (1) letter (f) prescribes the obligation for them to *"refrain from verifying a complaint and conducting disciplinary investigation if they are related by consanguinity of up to fourth degree or affinity of up to third degree with the judge subjected to the disciplinary action or to the complainant or if they have a direct or indirect personal interest in the adjudication of the disciplinary case or there are other circumstances that cast doubt on their objectivity and impartiality".* Failure to comply with this obligation is categorized as the disciplinary offence from Article 4 letter (a) of Law No. 178, which seems reasonable.

However, we consider that it should also be reasonable to have special rules concerning inspector-judges in the Law on Disciplinary Liability. The Judicial Inspection's regulations have such rules, which is unconstitutional because they amend to the law point 4.1 and the following paragraphs of the rules of procedure regulate disciplinary offences and disciplinary sanctions applicable to inspectors, and point 3.18 letter (c) states that an inspector-judge loses their office if they commit a disciplinary offence, but does not specify who is investigated, how, and by what procedure.

However, the rules of procedure show that an inspector can be held disciplinarily liable for dereliction of duty, but only as a subsidiary measure and only if there are no elements of criminal or civil liability (point 3.17), which looks like a confusion of the types of liability: at least civil liability and disciplinary liability are not incompatible. Anyway, this creates the impression that inspectors are super-judges.

The regulations state that an inspector-judge may not be held liable for their opinion expressed while administration of justice (point 3.2), which is hard to understand. On the one hand, an inspector-judge does not administer justice, because this is judges' duty discharged in courts. On the other hand, the provision concerning the offence of imperative rules apply to all judges but inspector-judges, and this is so by the will of SCM members rather than the Legislature.

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[63] According to Article 7 para. (5) of Law No. 178, *"During the effective period of a disciplinary sanction, a judge may not be transferred, appointed as court president or vice-president, or promoted to another court".* According to Article 6 paras. (3) – (5) of Law No. 178, the effective period of a warning is one year, the effective period of a reprimand is two years, and the reduction of salary represents a decrease in salary for any period between three months and one year.

2.4. For Judges from the Disciplinary Board

According to Article 11 of Law No. 178, if a member of the Disciplinary Board participates in decision-making and does not abstain when this is expressly required by law (Article 14 para. (1)), has an incompatibility (Article 11 para. (1) letter (d)), or fails to perform their legal duties as a member of the Disciplinary Board for at least three months without good reason (Article 11 para. (1) letter (e)), their membership is terminated.

The law is silent about the procedure for establishing these two offences. Moreover, as the above two actions are disciplinary offences, it is not clear whether a judge member of the Disciplinary Board should be subjected to disciplinary action for the offences described in Article 4 para. (1) letter (a) and (j) of Law No. 178. If yes, what goes first, the completion of disciplinary action, followed by termination of membership, or termination of membership, followed by the initiation of disciplinary action?

One could counterargue that under Article 7 para. (1) of Law No. 178, disciplinary offences refer only to the actions committed while discharging judicial duties and therefore a judge who commits disciplinary offences in the capacity of member of the Disciplinary Board should not be held disciplinarily liable. This is, however, debatable, because there is still the disciplinary offence under Article 4 para. (1) letter (p) of Law No. 178 that refers to *any actions*, including those committed outside judicial duties.

Similarly, Article 13 para. (2) letter (e) of Law No. 178 states that members of the Disciplinary Board must keep the confidentiality of received acts and information. If a judge member violates this obligation, could or could they not be subjected to disciplinary investigation for the offence described in Article 4 para. (1) letter (f) of the law? We believe the answer should be "yes". Thus, the membership of a judge in the Disciplinary Board does not mean that they are not judges any more, especially so that Article 13 para. (3) of Law No. 178 states that the only difference is that they have a smaller caseload.

2.5. For Members of the SCM

There are no special rules concerning the disciplinary liability of SCM members. We believe that judge members should have the same rules concerning disciplinary offences as any other judge. In this case, investigations into their actions should be governed by special rules to speed up proceedings. And SCM members who receive disciplinary sanctions should lose membership in the SCM by virtue of law[64].

2.6. For Retired judges

Article 7 para. (1) of Law No. 178 states that *"disciplinary sanctions shall be applied to sitting judges and retired judges for actions committed during the time in judicial office"*.

We consider that this regulation is appropriate.

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[64] See para. 82 of Opinion No. 966/2019 of the Venice Commission and the Directorate of Human Rights of the Council of Europe concerning the draft law on the reform of the Supreme Court of Justice and the prosecution system in the Republic of Moldova for more information about the dismissal of SCM members from office in case of a disciplinary sanction, available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)020-e.

3. Offence Effects

Article 7 para. (2), third thesis, of Law No. 178 states: *"The inflicted consequences shall be assessed taking into account both the effects on the persons involved in the judicial proceedings where the action was committed and the effects on the image and prestige of justice"*.

Just as discussed earlier, the wording "the image and prestige of justice" used in this article is unclear. This matter has also been discussed in Romania during debates concerning the law on the bar, which allowed the rejection of a candidate for deliberate offences that could harm the prestige of the bar. Thus, by Decision No. 225/2017[65], paras. 25 and 26, the Constitutional Court of Romania ruled that the wording "that can harm the prestige of the bar" in Article 14 letter (a) of Law No. 51/1995 for the Organization and Practice of the Profession of Lawyer, republished, was unconstitutional and against the provisions of Article 1 para. (5) of the Constitution and lacked clarity and precision since it did not clarify what deliberate offences could harm the prestige of the bar. Therefore, the lack of an express description of the offences[66] that can harm the prestige of the bar gave room for arbitrariness. This allowed a differential application of the sanction of disqualification from the bar depending on the subjective opinion of the bar structures empowered to consider cases of undignified actions. This lack of clarity, precision, and predictability[67] of the wording sets prerequisites for differential, discriminatory application because of arbitrary interpretation or evaluation. Therefore, the Court considered that the Legislature had the duty to give the criticized legal rule a constructive regulatory content and to establish a coherent legal framework free of ambiguity as to the concrete circumstances in which disqualification from the bar was possible as a result of the application of the provisions concerning undignified actions from Article 14 letter (a) of Law No. 51/1995, republished.

4. Culpability Level

The application of sanctions to judges must strictly follow the Constitution and the legal framework. To find a judge guilty of a disciplinary offence, the Disciplinary Board as a disciplinary tribunal must find the existence of its elements, namely the objective and subjective parts. Without any of these elements, the disciplinary offence is not considered to have been committed, and therefore, the judge may not be held disciplinarily liable[68].

According to Article 36 para. (1)[1] of Law No. 178: *"The Disciplinary Board may find a disciplinary offence and may impose disciplinary sanctions (...) only if it is found that the imputed deed was committed with intent or from gross negligence"*. This means that this type of

[65] The decision is available at: http://legislatie.just.ro/Public/DetaliiDocumentAfis/190287.

[66] Although the Constitutional Court of Romania referred to *offences* that can harm the prestige of the bar, the presented rationale fully applies to *actions that affect the image and prestige of justice* referred to in the Moldovan legal text.

[67] For information about these requirements in the Republic of Moldova, see, for example, Constitutional Court Decision No. 24 of 17 October 2019, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=30&l=ro.

[68] Constitutional Court Decision No. 12 of 7 June 2011 *(grounds for the disciplinary liability of judges)*, para. 8, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=30&l=ro.

culpability must be identified for all offences from Article 4 rather than only for the offence that the Legislature has indicated expressly.

While the concept of *intent* is clear, that of *gross negligence* should be defined by law. In Romania, *gross negligence* means a situation where "the judge disregards the rules of substantive or procedural law by fault, grossly, beyond any reasonable doubt, and without excuse"[69].

In the Republic of Moldova, the two levels of culpability are defined in the annual report of the Judicial Inspection: *"Considering the concept of gross negligence, thought to be present in cases of gross omission of due diligence in procedures, where even the simplest and most obvious rationale was not applied and what would have been obvious for anyone was not taken into account, and that malice implies a deliberate distortion of the law with obvious and deliberate errors, even when such deeds are present, not every error—be it even gross—may be the object of disciplinary sanction"*[70].

Another definition can be found in a decision of the Admissibility Panels of the Disciplinary Board affiliated to the SCM: *"the concept of gross negligence applies when a judge disregards the rules of substantive or procedural law grossly, beyond any reasonable doubt, and without excuse"*[71]. In the same vein, another decision states: *"gross negligence, thought to be present in cases of gross omission of due diligence in procedures, where even the simplest and most obvious rationale was not applied and what would have been obvious for anyone was not taken into account, and that malice implies a deliberate distortion of the law with obvious and deliberate errors"*[72].

Furthermore, the plenum of the SCM found that *"Gross negligence is present when a judge violates the rules of substantive and procedural law by their fault. By using the wording "gross negligence," the Legislature established the level of culpability as culpa lata. Therefore, disciplinary liability arises only from errors that are obvious, exist beyond any doubt, cannot be justified in any way, and are in clear contradiction with the law. Applying this objective criterion to the part of work that constitutes the administration of justice, the golden standard should be that of a "diligent judge," who acts with consideration to the public interest of dispensing justice and protecting the general interests of society and subordinates their behaviour to the requirements imposed by professional duties and the deontological rules they must observe"*[73].

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[69] Article 99[1] para. (2) of Law No. 303/2004 of 28 June 2004 on the Status of Judges and Prosecutors of Romania, available at: http://legislatie.just.ro/Public/DetaliiDocument/53074.

[70] 2018 activity report of the Judicial Inspection, p. 19, available at: www.csm.md/files/RAPOARTE/2018/2018_raport_IJ.pdf.

[71] Decision No. 230/8 of 18 October 2019 of Admissibility Panel I of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2019/CC1/08/230-8.pdf.

[72] Decision No. 182/8 of 19 September 2019 of Admissibility Panel II of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2019/CC2/08/182-8.pdf.

[73] SCM Decision No. 4/1 of 16 January 2018 on the challenge from Decision No. 44/41 of 24 November 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2018/01/4-1.pdf.

A judge's intentional or malicious action means that the judge violated the rules of substantive or procedural law knowingly, which resulted in harm to a person[74].

What is not clear is who and when exactly determines the level of culpability of a judge, as the subjective part of disciplinary liability, when the judge is charged with unlawful actions in discharging judicial duties—the body responsible for disciplinary matters or the highest court? Thus, in a disciplinary case, the complainant alleged that a district court judge had warranted a search at their offices in the absence of substantiating evidence on file, and after an appeal, the prosecutor's motion was dismissed. On 27 January 2017, the plenum of the Disciplinary Board considered all materials of the disciplinary case and sanctioned the judge with a warning (Decision No. 2/1) for the disciplinary offence described in Article 4 para. (1) letter (i) of Law 178. The plenum of the SCM admitted the judge's challenge and dismissed the complaint, reasoning that although the appellate court had noted that *"the investigating judge issued an unreasoned and premature order and did not take into account the factual and legal circumstances,"* it *"did not mention that the judge had not committed any unlawful deed imputable to them"* and *"did not mention that the judge had applied laws contrary to the uniform judicial practice in an intentional, malicious, or repeated (due to gross negligence) manner"*[75]. We agree with this reasoning. The role of a court of judicial control is only to find whether the judgment of a district court conforms with laws and evidence in a case, and not whether a lower court judge committed a potential violation of laws or weighed evidence wrongly with culpability. Only the disciplinary body has this legal power. Otherwise, if a court had to find not only that a judge was guilty of the violation of laws but also the level of culpability, then it would never be possible to hold judges from court of last resort disciplinarily liable because of the absence of those who would be empowered to find them guilty of the violation of rules and judges of the court of judicial control would become the disciplinary body for lower court judges. Thus, the SCM cannot but impose disciplinary sanctions automatically as any investigation and disciplinary trial is useless.

In another case, a prosecutor alerted the Judicial Inspection when a person had avoided extradition procedure because of a decision issued by a judge. That case reached the SCM, which upheld the dismissal of the complaint, reasoning that *"the evaluation of the legality of court acts can be verified by higher level courts only"* and reiterated the reasoning of the plenum of the Disciplinary Board that *"mere annulment or change of a court judgment cannot entail the sanctioning of a judge". In this case, it was not proven that the judge had issued the order with malice or from gross negligence"*[76]. The question that remains is this: Who should demonstrate the level of culpability? The prosecutor who filed the complaint, the Judicial Inspection,

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[74] Decision No. 230/8 of 18 October 2019 of Admissibility Panel I of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2019/CC1/08/230-8.pdf.

[75] SCM Decision No. 452/51 of 4 July 2017 on the challenge from Decision No. 2/1 of 27 January 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele/2017/21/452-21.pdf.

[76] SCM Decision No. 595/27 of 12 September 2017 on the challenge from Decision No. 28/4 of 5 May 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/27/595-27.pdf.

which conducted disciplinary investigation, the Disciplinary Board, which conducted the disciplinary adjudication, or the SCM, which verified the latter's decision?

Finally, in another case, it was noted that the complainants *"did not prove that the judges from the district court acted illegally, treating them with malice and bias, during the examination of administrative cases with their participation"*[77]. Apparently, here the SCM found that the burden of proof must be on the complainant, which, in our opinion, is impossible.

We believe that the Disciplinary Board itself should investigate the subjective part of offences and the correct justification in a case like those mentioned earlier should be "the disciplinary body finds that the judge did not act intentionally and not even from gross negligence".

5. Disciplinary Procedure in Relation to Other Procedures

5.1. In Relation to Appeals

According to Article 4 para. (2) of Law No. 178, *"disciplinary liability shall not depend on whether the act issued by the judge subjected to a disciplinary action was challenged or on the outcome of the examination under appeal or in cassation"*.

Thus, disciplinary bodies could initiate a disciplinary investigation against a judge while the judge is still sitting on the case, without waiting for the sentence or the decision concerning the appeal from it, and the period for holding a judge disciplinary liable is two years from the commission of the disciplinary offence, according to Article 5 para. (1) of Law No. 178.

This can cause difficulties. For example, if a litigant is dissatisfied with the decision of a district court judge concerning a procedural exception or complains about the violation of a fundamental right as a result of the sentence, the Judicial Inspection should start disciplinary investigation into the offences described in Article 4 para. (1) letter (i) and, respectively, (b) of Law No. 178 and the Disciplinary Board should decide whether the judge committed those offences. In the meantime, the case adjudicated by the judge would move on to the appeal or cassation phase. In this situation, if the disciplinary body did not wait for the decision of the judicial control court, we would have a paradox - the district court judge could be sanctioned for the disciplinary offence, but the appellate/cassation court could still uphold their decision as legal and substantiated. Obviously, the Judicial Inspection would have to start disciplinary investigation against the judges of the appellate court as well, which is inadmissible because on seeing the decision of the Judicial Inspection or the Disciplinary Board, the judges of the appellate/cassation court could adapt their decision to that of the disciplinary bodies to dodge disciplinary investigation. This would clearly violate the principle of judicial independence enshrined in the law.[78]

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[77] SCM Decision No. 535/25 of 27 November 2018 on the challenge from Decision No. 19/6 of 22 June 2018 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2018/25/535-25.pdf.

[78] Article 1 of Law 544/1995 on the Status of Judges: *"Judges shall make decisions independently and impartially and shall act without any direct or indirect restriction, influence, pressure, threat, or intervention from any authority, including judicial ones. The hierarchical organization of jurisdictions*

The identified issue can be resolved only through practice, through a correct application of the disciplinary procedure. Judges should be protected from complaints from litigants who seek to harass or press them. The Judicial Inspection should conduct proceedings as quickly as possible and avoid investigating the merits of cases still under the examination of judges.

On the other hand, according to Article 5 para. (2) of Law 178 *"if from an irrevocable judgment of a national (…) court of law, it results that a judge committed a disciplinary offence, the judge shall be liable to disciplinary action within one year of the judgment of the national (…) court becoming irrevocable, but not within more than five years from the offence"*. The existence of this legal text practically means that there are two limitation periods for the same deed, depending on how the judge's offence is found during the examination of a case. If the offence is found during the proceedings, the judge may be sanctioned within maximum two years. If the offence is found after they closed the case through a decision of the judicial control court, the limitation period for sanctioning is maximum five years of the offence. This issue requires unified regulation.

5.2. In Relation to the Review of Judges' Performance

According to Article 23 para. (4) of Law No. 154/2012, *"If grounds for holding a reviewed judge liable are identified, the Judicial Performance Board shall suspend that performance review procedure and shall alert the Superior Council of Magistracy in consideration of disciplinary action. The performance review procedure shall resume after the response from the Superior Council of Magistracy concerning the refusal to initiate disciplinary action or, as the case may be, after the end of the disciplinary action against the reviewed judge unless the judge is dismissed from office"*.

In our opinion, the review of judges' performance and disciplinary action against them are not connected and one should not preclude the other.[79]

5.3. Mutual Relation with the Ethics Procedure

By Decision No. 317/16 of July 3, 2018[80], the SCM set up the Committee for the Ethics and Professional Conduct of Judges, which includes five SCM members. By Decision No. 229/12 of 8 May 2018, the SCM approved the Rules of Procedure of the Commission for the Ethics and Professional Conduct of Judges[81]. In two years of work (2018 and 2019), the Ethics Commission had two meetings (on 20 December 2018 and on 22 April 2019) and

shall not affect the individual independence of judges". Article 2 of Law No. 178, The principles of disciplinary procedure against judges: *"Disciplinary procedure against judges shall rest on the principles of: a) legality; b) respect for judicial independence; c) fairness of proceedings; d) proportionality of sanction with committed disciplinary offence; e) transparency"*.

[79] For a broader examination of this aspect, please, see Opinion No. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, adopted by the Consultative Council of European Judges, available at: https://www.coe.int/en/web/ccje/opinion-n-17-on-the-evaluation-of-judges-work-the-quality-of-justice-and-respect-for-judicial-independence.

[80] SCM Decision No. 317/16 of 3 July 2018, available at: www.csm.md/files/Hotarirle/2018/16/317-16.pdf.

[81] SCM Decision No. 229/12 of 8 May 2018, available at: www.csm.md/files/Hotarirle/2018/12/229-12.pdf.

adopted four advisory opinions[82] concerning: the participation of judges in political activity (Advisory Opinion No. 1 of 20 December 2018), the impartiality of judges (Advisory Opinion No. 2 of 22 April 2019), the use of social networks by judges (Advisory Opinion No. 3 of 24 June 2019), and the communication of judges with court personnel, prosecutors, lawyers, and other judges (Advisory Opinion No. 4 of 1 July 2019).

When there is a disciplinary procedure, the resolution of ethical issues is not precluded. Thus, according to the Rules of Procedure of the Disciplinary Board, if the actions indicated in a complaint contain elements of both a disciplinary offence and a violation of the Code of Judicial Ethics, the case is severed and the violations of ethics are referred to the plenum of the SCM for examination (see point 62).

If the Ethics Commission has already been alerted, the Rules of Procedure of the Commission for the Ethics and Professional Conduct of Judges state in point 4.3 that *"The Commission may not issue advisory opinions/recommendations regarding the dilemmas or issues that are known to be objects of a litigation or a past or ongoing disciplinary investigation or procedure, or when the Commission has already issued an advisory opinion on the same issue".*

It is not clear what effect the violation of the Code of Ethics has on judges' careers. Thus, when the plenum of the SCM examined the challenge of a complainant dissatisfied that the Disciplinary Board had not sanctioned a judge for failing to wear a robe during a court hearing, it upheld the decision of the Disciplinary Board, reasoning that the judge's deed was a mere violation of the Code of Ethics and that the judge had not committed a disciplinary offence[83]. In another case, the Disciplinary Board dismissed a complaint requesting a sanction for a judge, reasoning that the judge's deed was a mere violation of the Code of Ethics[84].

In a case, by Order No. 1 of 3 January 2020, the Chișinău Court dismissed a judge's request for a child care leave and imputed absence from work during a certain period and irregularities in the handling of some cases to the judge[85], even though the Judicial Performance Board graded his performance as "very good" by Decision No. 3 of 21 January 2020[86]. The figures and facts from the vice-president of the court order and the Judicial Performance Board's decision do not match, which leads to the conclusion that either the process of reviewing judges' performance is faulty or the court's management was not fair.

In another case, by Decision No. 3/4 of 20 April 2018, the Disciplinary Board sanctioned a judge by disqualifying him from the judiciary, and the SCM dismissed his challenge. The

[82] The opinions of the Ethics Commission are available at: www.csm.md/ro/organe-subordonate/comisia-de-etica/opinii.html.

[83] SCM Decision No. 133/7 of 21 February 2017 on the challenge from Decision No. 62/17 of 16 December 2016 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2017/07/133-7.pdf, and dissenting opinion, available at: https://www.csm.md/files/Hotaririle/2017/07/133-opinia.pdf.

[84] Decision No. 7/1 of 27 January 2017 of the Plenum of the Disciplinary Board upheld by SCM Decision No. 356/17 of 30 May 2017, available at: https://www.csm.md/files/Hotaririle/2017/07/133-opinia.pdf.

[85] The document is not public, but the expert consulted it.

[86] Decision No. 3/1 of 31 January 2020 of the Board for the Review of Judges' Performance, available at: https://www.csm.md/files/Hotaririle%20CEvaluare/2020/01/3-1.pdf.

president of the country dismissed the judge from office. The Chișinău Court of Appeal, however, quashed both decisions, and by Decision No. 370/21 of 24 September 2019, the SCM admitted the ex-judge's request for the reinstatement of his former rights. After that, by Decision No. 19 of 14 January 2020, the SCM dismissed the judge's request for moral damages caused by dismissal from office, absence from work from 20 April 2018 through 22 November 2019, and obstruction to career growth during this period.[87] The SCM reasoned that *"tort liability may not arise if no harm was inflicted. For even though the court found that Judge Gheorghe Balan had been dismissed form office illegally, the extent of harm inflicted on him is covered by the reinstatement of his rights. In addition, even though according to the irrevocable judgment of the court, the judge's deeds cannot be categorized as disciplinary offence, it still has the characteristics of a violation of the Code of Ethics that do not require his dismissal from office. What is important is that the illegal actions of the Board did not determine the forfeiture of Judge Gheorghe Balan's right to work and he had the possibility to find a job in other fields. For example, it is known that from June through November 2019, Gheorghe BALANn worked as acting chief of the General Police Inspectorate"*. Although the judge could not work as a judge, he still could work and held a top office of state remunerated accordingly. Apparently, the SCM turned into a court of law. The consideration of moral damages for the period during which the judge was wrongfully prosecuted under disciplinary procedure, possibly for groundless statements made in the decisions issued against him, etc., should be the responsibility of civil court.

5.4. In Relation to the Criminal Procedure

Article 116 para. (1) of the Constitution of the Republic of Moldova states: *"Judges sitting in the courts are independent (...) under the law"*. We believe that the law the Constitution refers to the rule from Article 19 para. (3) of Law No. 544: *"The judge may not be liable for his/her opinions expressed while administering justice and for judgments s/he passed unless is found guilty of criminal abuse by a final sentence"*. Thus, judges enjoy freedom of decision only if they observe the law in adjudicating cases; otherwise, the professional immunity does not apply, and they will be held liable.

Criminal liability and disciplinary liability are different by nature. While the former refers to the commission of crimes, the latter refers to dereliction of duty. Therefore, they are not mutually exclusive[88]. In fact, in a case concerning a police officer, the Supreme Court of Justice ruled expressly that the application of a disciplinary sanction did not exclude criminal, administrative, or civil liability[89].

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[87] SCM Decision No. 19/1 of 14 January 2020 on the motion of Chisinau district court, Radu Turcanu, concerning the adjudication of the matter on payments due to Judge Gheorghe Balan, available at: https://www.csm.md/files/Hotaririle/2020/01/19-1.pdf.

[88] Opinion No. 880/2017, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal Liability of Judges, adopted by the Venice Commission at the 111th plenary session held in Venice on 10 and 11 of March 2017, point 53, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)002-e.

[89] SCJ Judgment No. 3ra-1226/16 of 28 September 2016 establishes this according to Article 55 para. (8) of Law No. 320 of 27 December 2012 on the Work of the Police and the Status of Police Officers. SCJ Judgment No. 3ra-1226/16 of 28 September 2016, available at: http://jurisprudenta.csj.md/search_col_civil.php?id=31171.

It is true, sometimes the same action may be legally categorized both under the Law on Disciplinary Liability and under the Criminal Code. For example, a judge's interferes with a judicial panel to obtain a certain decision on a case entails disciplinary liability for the offence described in Article 4 para. (1) letter (d) of Law No. 178 and also criminal liability for the crime described in Article 303 of the Criminal Code or, in certain circumstances, even the crime of active corruption described in Article 325 of the Criminal Code. Likewise, a judge's admission of anyone's intervention with a case under the judge's examination entails disciplinary liability for the violation described in Article 4 para. (1) letter (p) of Law No. 178 and, in certain circumstances, criminal liability for the crime of passive corruption described in Article 324 of the Criminal Code. If ultimately the judge allows the intervention and commits an abusive action, they become disciplinarily liable for the violation described in Article 4 para. (1) letter (b) of Law No. 178 and criminally liable for the crime described in Article 307 or even that in Article 308 of the Criminal Code.

In such situations, if both the Judicial Inspection and the criminal investigation bodies are alerted, it is necessary to clarify whether the two investigations can run parallel or one gets in the way of the other. Obviously, if criminal investigation goes first and the judge is found guilty and convicted, they will be excluded from the judiciary under Article 25 para. (1) letter (g) of Law No. 544 and disciplinary liability will lose relevance. Therefore, Article 19 para. (3) of Law No. 544 does not even apply when this form of liability comes into play.

This means that problems arise only when there is a verification, an investigation, or even a disciplinary action but not a criminal conviction of a judge for that deed. In such a situation, it is worth noting that there is not a rule that would expressly require the suspension of disciplinary proceedings while criminal proceedings are under way. In practice, the Judicial Inspection halts verifications and refers the case to a prosecutor, and disciplinary proceedings resume after the end of criminal proceedings, albeit by that time the limitation period usually elapses. Therefore, this should be expressly regulated. A solution would be to regulate by law that criminal investigation does not preclude the conduct of disciplinary proceedings. Another solution would be that the Legislature provide for the suspension of the limitation period for disciplinary liability during the period of criminal proceedings concerning the same action. This way, the Judicial Inspection will finish the disciplinary verification and if it finds that the action can be categorized under criminal law, will suspend disciplinary proceedings and refer the case to a prosecutor. If the prosecutor does not find grounds for criminal liability, the disciplinary proceedings will resume.[90]

A case on the docket of the Judicial Inspection included investigation into the interference by the president of the Chișinău Court of Appeal with the work of other judges. The complaint originated from a judge who had been dismissed from office on disciplinary grounds. The Judicial Inspection dismissed the complaint, reasoning that it was unfounded. Later, a judicial assistant from the Chișinău Court of Appeal, interrogated as a witness on 7 November 2019, testified under oath about the court president's acts of interference with the work of several judges. From the date of the testimony until 16 April 2020, when the

[90] See also point 14 of Joint Opinion No. 755/2014 of the Venice Commission and the OSCE, cited earlier.

SCM admitted the court president's resignation without reserves[91], the Judicial Inspection did not resume investigation, which is unacceptable. Once new evidence in the criminal proceedings showed that the court president had committed interferences, the disciplinary case against him should have been reopened.

In the same context, we should make reference to the prosecution of some judges. Thus, according to Article 19 paras. (4) and (5) of Law No. 544, *"only the Prosecutor General or the First Deputy Prosecutor General—and in their absence, another deputy under an order issued by the Prosecutor General—may start prosecution against a judge with consent from the Superior Council of Magistracy in line with the Criminal Procedure Code. If the judge committed the crimes described in Articles 243, 324, 326, or 330² of the Criminal Code of the Republic of Moldova or any flagrant crimes, the consent of the Superior Council of Magistracy to the initiation of criminal investigation shall not be required. Judges may not be detained, taken by force, arrested, or searched without consent from the Superior Council of Magistracy. All procedural actions against judge, apart from cases of flagrant crime, shall be allowed only after the issue of an order for the initiation of the criminal investigation, observing the guarantees established by the rules of the Constitution and international acts. The consent of the Superior Council of Magistracy shall not be required in cases of flagrant crime".*

The involvement of the Judicial Inspection into criminal investigation consists in the presentation of an informative note to the SCM when the Prosecutor General requests consent for prosecution (points 7.1 and 7.2 of the Judicial Inspection's rules of procedure). Apparently, the Judicial Inspection only presents procedural aspects, without any evaluation. It simply presents the prosecutor's charges, without referring to applicable laws, without analysing the judge's arguments. Therefore, it does not act as a filter that protects the independence of judges prosecuted for judicial work, which is incompatible with international standards. Based on the informative note presented by the Judicial Inspection, the SCM will have to take a decision, which cannot be formal or automatic, as decided by the Constitutional Court, but reasoned to avoid arbitrariness[92].

There was a case where prosecutors received the files of all cases examined by a judge - apparently from the court's management - without a complaint from litigants. This raises the question whether this could have been a disguised search by an incompetent entity. Such practice is meant as pressure on judges and the SCM should address it quickly and firmly.

5.5. In Relation to Complaints at the ECtHR

Article 5 para. (2) of Law No. 178 states: *"if from an irrevocable judgment of a[n] (…) international court of law, it results that a judge committed a disciplinary offence, the judge shall be liable to disciplinary action within one year of the judgment of the (..) international court becoming irrevocable, but not within more than five years of the offence".*

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[91] SCM Decision No. 66/6 of 16 April 2020, available at: www.csm.md/files/Hotaririle/2020/06/66-6.pdf. On 11 May 2020, the president of the Republic of Moldova issued a decree concerning the dismissal from office.

[92] Constitutional Court Decision No. 23 of 27 June 2017 on Article 23 para. (2) of Law No. 947/1996 on the SCM *(the withdrawal of judicial immunity)*, available at: www.legis.md/cautare/getResults?doc_id=101651&lang=ro.

Proceedings at the ECtHR usually take more than five years. Therefore, we recommend increasing the limitation period for disciplinary offences in this case to seven years.

6. Disciplinary Measures

If a judge is found guilty of disciplinary offences, the consequences are as follows:

6.1. Disciplinary Sanctions

Article 6 of Law No. 178 provides for the following disciplinary sanctions for judges: a) warning; b) reprimand; c) the reduction of salary; and d) dismissal from judicial office. In addition to the disciplinary sanctions from letter (a) to (c), judges who hold the office of court president or vice-president also risk dismissal from administrative office.

According to Article 24 para. (1^1) of Law No. 544, a judge may be suspended from office at law on the proposal of the Disciplinary Board concerning dismissal from office of judge. Suspension lasts from the day of adoption of the SCM's corresponding decision until the judge's dismissal from office by the president of the country or Parliament, as the case may be.

Article 7 para. (6) of Law No. 178 provides for a specific sanction for retired judges: *"If a retired judge receives the disciplinary sanction described in Article 6 para. (1) letter (d), the retired judge shall lose the one-off retirement benefit, and their pension shall be recalculated under Article 25 para. (3^1) of Law No. 544 of 20 July 1995 on the Status of Judges"*. This rule is intended to underscore that judges remain members of a corpus of professionals even after retirement. Therefore, retirement should not exempt judges from the liability specific to their job.

6.2. The Cumulation of Offences

If several disciplinary offences are committed, four scenarios are possible:

a) If a complaint denounces several deeds, it is a situation of concurrence of offences, and they will be investigated together.
b) If different complaints denounce several deeds committed by the same judge, the cases will be joined.
c) If a new disciplinary offence is committed after the end of an earlier disciplinary action but during the effective period of the corresponding disciplinary sanction, this is a situation of the aggravating circumstance under Article 7 para. (3) of Law No. 178.
d) If a new disciplinary offence is committed after the end of the effective period of a disciplinary sanction under an earlier disciplinary action, this circumstance will be treated as if the judge had no disciplinary antecedents.

6.3. Effects on Career

There are three categories of consequences on the sanctioned judge:

a) During the effective period of the disciplinary sanction, the judge may not be

transferred, appointed as court president or vice-president, or promoted to another court, according to Article 7 para. (5) of the Law No. 178. We believe that the prohibition on transfers is excessively harsh[93]. Thus, if a judge fails to draw up a court judgment within the legal time frame and is sanctioned with a warning, they cannot request transfers during a year, and if the sanction is a reprimand, during two years. We believe that the prohibition on transfers should not extend to minor deeds or mild sanctions, but this would require amending laws.

b) A judge who has been sanctioned disciplinarily in the past three years may not candidate for member of the SCM, according to Article 82 para. (1) letter (b) of Law No. 947.

c) A judge who was sanctioned with dismissal from office may not be elected or appointed during five years in any position at the SCM and specialized bodies and may not work at the National Institute of Justice, neither in administrative nor in academic positions, according to Article 7 para. (7) of Law No. 178.

6.4. The Reopening of a Case

To repair the situation, we believe that when a judge receives a final disciplinary sanction for discharging duties with malice or gross negligence and these circumstances have influenced the decision in a case, that case should be revised. However, for reasons that we do not understand, none of the procedural codes provides for such a revision.

Such a solution is only natural. Just like there are revisions when judges are convicted for offences committed during the examination of a case (for example, for bribery) so there should be revision when judges are sanctioned disciplinarily for disciplinary offences that resulted in illegal judgments.

As a reference, Article 509 (1) para. 4 of the Civil Procedure Code of Romania has the following provisions: "*The revision of a judgment issued on, or invoking, the merits of a case is allowed if the judge receives a final disciplinary sanction for discharging duties with malice or gross negligence and these circumstances have influenced the decision in that case*".

[93] See also point 45 of Joint Opinion No. 755/2014 of the Venice Commission and the OSCE, cited earlier.

CHAPTER II.
Institutional Organization and Functioning

SECTION I. Judicial Inspection

1. Legal Nature

Under the current legal provisions, the Disciplinary Board is definitely the first-level disciplinary tribunal. However, before reaching the trial phase, a case must be prepared by the Judicial Inspection. This entity verifies the allegations mentioned in complaints, conducts disciplinary investigation into judges' actions, and refers judges to the Disciplinary Board for sanctioning, if applicable. Therefore, it is fair to say that the Judicial Inspection is a *disciplinary prosecution body.*

2. Legal Regulation

The organization and functioning of the Judicial Inspection is regulated by Law No. 947 (Articles 7 and 7[1]), Law No. 544 (Article 24[1]), Law No. 178, and the Rules of Procedure of the Judicial Inspection[94]. This regulation is insufficient and causes constitutionality issues.

Thus, the status of judges is enshrined in the Constitution, whereas the essential elements concerning the establishment, application, change, and termination of their legal employment relations are regulated by organic laws (Law No. 947 and Law No. 178) and ordinary laws (Law No. 544) rather than by an administrative act with subsidiary legal power. Contest terms, contest organization, the status and duties of judges-inspector, and their disciplinary liability should be regulated by law. Instead, these essential aspects are regulated by the regulations adopted by an SCM decision[95]. For example, by these regulations, inspectors are untouchable (point 3.2)—a rule that does not exist in any law on the judicial system.

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[94] Regulations on the Organization, Powers, and Procedures of the Judicial Inspection, approved by SCM Decision No. 506/24 of 13 November 2018, available at: https://www.csm.md/files/Hotaririle/2018/24/506-24.pdf.

[95] On 10 March 2020, the Constitutional Court of Romania declared unconstitutional the provision of the Law on the Status of Judges that allowed the SCM to adopt *Regulations on admission to the judiciary* that introduced a complex procedure that was not provided for by the law. As of the date of finishing this study, the decision was not drawn up yet. See the press release at: www.ccr.ro/download/comunicate_de_presa/Comunicat-de-presa-10-martie-2020.pdf.

3. Position in the System

Initially, the Judicial Inspection was subordinated to the SCM. Today, the law states that it is a *specialized* body that is neither part of, nor attached to, any other institution (Article 7 of Law No. 947). That said, the regulations of the Judicial Inspection state that it is a body *affiliated to the SCM* (Article 1.1), and the Disciplinary Board considers the Judicial Inspection a *specialized body of the SCM*[96].

Legal analysis reveals, however, that the Judicial Inspection is still a *subordinated* department of the SCM. Complaints concerning potential disciplinary offences are filed at the secretariat of the SCM, and the SCM recruits inspectors, appoints the Chief Inspector-judge of this structure, issues badges for inspectors, dismisses inspector-judges from office, pays their salaries, and offers them office rooms and supplies.

4. Composition

Initially, the Judicial Inspection had five members. By SCM Decision No. 983/32 of 9 December 2014, it was proposed that the Judicial Inspection have 15 inspector-judges and 15 judicial assistants. Article 7[1] of Law No. 947 states that the Judicial Inspection has seven inspector-judges. On 1 May 2020, the Judicial Inspection had only five inspector-judges who were not aided by any jurists or other specialized personnel.

The office of inspector-judges is accessible to anyone with a licentiate degree in law or an equivalent, at least seven years of experience in legal profession, and an irreproachable reputation as required by Article 6 para. (4) of the Law on the Status of Judges, and has not worked as a judge in the past three years. The current members of the Judicial Inspection include inspectors who have never worked as judges. We doubt this was a wise decision to have former lawyers investigate judges or verify the administration of courts because the involved procedures are difficult even for judges to understand, never mind for those from outside the judicial system[97]. The prohibition on holding the position of inspector-judges for those who have worked as judges in the past three years is too strict because it rules out the possibility of recruiting a whole range of professionals. In reality, the recruitment procedure should be extremely strict.

The number of inspectors is insufficient because they have 18 legal duties on top of those related to disciplinary investigation. This makes it impossible to observe the legal time frames for complaint procedures, on the one hand, and precludes inspectors from conducting regular controls at the courts, on the other hand. These inspectors should not be only from Chisinau, but the interest of professionals from outside it in working at the Judicial Inspection raises the problem of transportation and accommodation costs. We

[96] See, for example, Decision No. 239/2 of 24 October 2019 of Admissibility Panel II of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2019/CC2/09/239-9.pdf.

[97] In 2018, Parliament amended Article 7[1] para. (3) of the Law on the SCM so that today persons who have worked as judges in the past three years cannot be appointed as inspectors. The LRCM was against this amendment. For more information, see Opinion on the Draft Law No. 182 of 4 July 2018 on the Amendment of Certain Legislative Acts, available at: https://crjm.org/wp-content/uploads/2018/07/2018-07-04-PL-182-SistJust-Op-CRJM.pdf.

consider that more inspectors would enable inspectors' specialization by distinct duties of the Judicial Inspection. We also recommend that the Judicial Inspection have its own apparatus, distinct from that of the SCM.

It is necessary to identify mechanisms to increase the performance of the Judicial Inspection. The inspector recruitment competition should be based on the examination of legal knowledge and the knowledge of the laws concerning the system and management and should not give room for subjectivity (such as interviews or only an interview with SCM members).

As for the training of inspectors, we believe that they should be given opportunities for professional training (considering that they verify the quality of decisions issued in concrete cases or the quality of the highest court) and specialization (for example, ethics or disciplinary liability or management).

5. Competences

5.1. Complaint Registration

Under Law No. 178, complaints concerning potential disciplinary offences must be filed at the secretariat of the SCM, registered, and sent to the chief inspector within three days of filing. Then, they are assigned at random to an inspector for verification (Article 21).

If the Judicial Inspection is to be independent, we do not see why complaints should be filed at another entity, namely the SCM, which is the third entity involved in the chain of entities vested with disciplinary powers. We also do not understand why it should take three days to register a complaint and to send it to another floor in the same building. The law does not specify how much time does it take a complaint to get from the chief inspector to the inspector assigned to examine it.

We were surprised that the SCM had proposed for the year 2020 *"to initiate legislative amendments by introducing the possibility of ex officio actions at the Judicial Inspection based on media reports concerning judges"*[98]. We consider that this proposal is useless. Thus, according to Article 19 para. (1) (d) of Law No. 178, the Judicial Inspection can act *ex officio*, and according to letter (2), it can do it regarding actions that came to its knowledge in the line of duty or from media reports. In fact, in a case, the SCM itself noted that by order of 4 September 2017, the Judicial Inspection of the SCM acted *ex officio* on the circumstances of a case it took cognizance of from mass-media concerning potential offences in warranting the arrest of a defendant, who later died while in state custody.[99]

It is true, however, that the Judicial Inspection does not have clear procedures for *ex officio* actions, and therefore they should be included in its regulations. Today, it has rather too much leeway in deciding on this aspect. Without objective rules, accusations of persecution

[98] SCM Decision No. 59/6 of 16 April 2020, point 9, available at: www.csm.md/files/Hotaririle/2020/06/59-6.pdf.

[99] SCM Decision No. 4/1 of 16 January 2018 on the challenge from Decision No. 44/11 of 24 November 2017 of the Plenum of the Disciplinary Board, available at: https://www.csm.md/files/Hotaririle/2018/01/4-1.pdf.

against some judges perceived as righteous or courageous and of the covering of irregularities committed by other judges are inevitable.

5.2 Complaint Verification for Form

If a complaint does not meet the legal requirements concerning form, it is returned to the complainant for correction within three days.

5.3. Complaint Verification for Admissibility

Due to certain legal incoherencies, several preparatory clarifications concerning the procedural terminology used in Romania might be in order:

- Complaints (grievances, complaints, challenges, appeal remedies) that are not allowed by the law or have other reasons than those provided for in the law are dismissed as *inadmissible*. Thus, they are not admitted from the very beginning, without any consideration of merits, because they do not comply with the law.
- Complaints filed before the start of the limitation period for filing are dismissed as *premature*, meaning that such a complaint can be filed, but the time for this has not come yet.
- Complaints filed after the end of the limitation period for filing are dismissed as *late*.
- Complaints that refer to events that do not check out—that is, cannot be proven—are dismissed as *unfounded* (or groundless, which means the same thing).
- Repeated complaints concerning the same deeds are *terminated* (when they refer to administrative or disciplinary matters) or dismissed on the ground of *res judicata* in accordance with the principle *ne bis in idem* (when they refer to judicial matters under prosecution or, respectively, trial).

Reverting to the Moldovan law, note that on receipt, complaints should be considered for admissibility—that is, for the possibility of admitting them to examination on their merits. But from the terminological perspective, Law No. 178 creates confusion. Thus, according to Article 20 para. (2), *"A complaint shall be considered manifestly unfounded if it concerns actions that are not related to the offences described in Article 4, its limitation period prescribed under Article 5 has elapsed, or the complaint is filed repeatedly in the absence of new evidence"*. The term *manifestly unfounded* suggests the merits of a case, yet we are only at the admissibility phase. In reality, none of the three situations refers to the merits of a case, but rather the first aspect refers to a complaint that should be dismissed as inadmissible (not because the action does not exist, but because it cannot be categorized as any of the offences expressly and restrictively described in the law); the second aspect refers to a complaint that should be dismissed as late (so, the complaint is admissible, but cannot be considered because it was filed after the expiry of the judge's disciplinary liability); and the third aspect refers to a complaint that should be terminated (because it had been filed previously and has already been adjudicated and the complainant brings it back without invoking new circumstances). These aspects should be expressly clarified by law.

Let us also mention that by Decision No. 104/4 of 18 April 2019 of Admissibility Panel II of the Disciplinary Board, it was established that *"in line with Article 10 para. (3) of Law No. 190 of 19 July 1994, on Petitioning, the official body or official person has the right not to examine the merits of complaints that contain expletives, offensive language, threats to national security, public order, and the life and health of the official and their family members".* We believe that this provision should also apply to justice. Complainants who use offensive language should receive civil and pecuniary sanctions rather than get their complaints requesting the investigation of judges blocked. Complaints to the Judicial Inspection are regulated only by Law No. 178, not by other laws.

5.4. Complaint Verification for Merits

The issues reported in complaints are investigated in three phases:

During the first phase, an inspector verifies the allegations for veracity. The time frame is 20 days, and it can be extended for another 15 days. The inspector may reach the following conclusions:

- The allegations do not check out, in which case the inspector issues a reasoned decision to dismiss the complaint as unfounded. The complainant can challenge this decision at the Disciplinary Board within 15 days of the communication.
- The allegations check out, in which case the inspector issues a resolution to initiate disciplinary proceedings.

During the second phase, after the initiation, the inspector conducts disciplinary proceedings within 30 business days, with the possibility of extending them for another 15 days. The second phase was introduced by Law No. 136/2018 to avoid contacting judges immediately after filing complaints against them. Thus, after a complaint passes the admissibility filter, the Judicial Inspection must start the investigation: first, it verifies the reported facts, and if they do not check out, the case is terminated. Otherwise, the case against the judge enters disciplinary proceedings. In practice, though, it seems that there is no difference between the verification of the merits of a complaint and disciplinary investigation: in both procedures, the inspector must establish the facts based on evidence, receive the written representations of the sued judge, and determine the legal categorization. We consider that this uselessly extends the disciplinary proceeds carried out by the inspector, and therefore, the two phases should be differentiated either in law or in practice.

There were situations where inspectors contacted judges over the phone, but disciplinary files do not contain such information. We consider that any verbal communication, including over the phone, between civil servants of disciplinary entities and investigated judges should be later recorded in writing in minutes and appended to the case file.

During the third phase, when disciplinary investigation is over[100], the inspector may reach the following conclusions:

[100] Note that there is a legal incoherence caused by the legal amendments from 2018: the title of Article 26 is "The outcome of complaint verification," whereas its content refers to disciplinary investigation.

- No disciplinary offence was found, in which case the inspector issues a reasoned decision to dismiss the complaint as unfounded. The complainant can challenge this decision at the Disciplinary Board within 15 days of the communication.
- A disciplinary offence was found, in which case the inspector sends the Disciplinary Board a report along with the case file.

Note that, according to Article (25) para. (2) letter (b) of Law No. 178, the investigated judge can contact the complainant, either personally or through a representative, in the presence of the judicial inspector. This rule should not exist because contacts that have the legal nature of judicial confrontation, which is specific exclusively to parties in the classical judicial proceedings, should not be allowed. It seems odd for a litigant to sue the judge sitting in their judicial case and the judge to be confronted with the litigant while the trial is still under way, only in front of the inspector. If the judge is sued for an illegal act committed during the preparation of a case, the purpose of such a confrontation is only to find out the explanation or reasoning of the action under investigation. That a judge should explain their actions or decisions to a party in a judicial case outside the procedural setting is unconceivable and would contradict the principle of judicial independence.

By Decision No. 14/1 of 25 January 2019 of Admissibility Panel II of the Disciplinary Board affiliated to the SCM, it was found that *"under the provisions of Law No. 87 of 21 April 2011, the Judicial Inspection concluded that the Superior Council of Magistracy, due to its duties at law, may not interfere with the process of justice administration and express its opinions about the legality and the reasoning of court judgments"*. This decision comes as a surprise because the Judicial Inspection—autonomous from the SCM though it is—motivates a decision to dismiss a complaint as if it were the SCM itself, although the application of disciplinary sanctions is the responsibility of the Disciplinary Board.[101]

5.5. Complaint Withdrawal

A litigant may file a complaint against a judge, whom the Judicial Inspection starts to verify and investigate. If the litigant decides to withdraw the complaint, the law does not explain what happens with the proceedings conducted so far. Only if the case reaches the Disciplinary Board, there is a rule—Article 19 para. (4) of Law No. 178—that allows the Disciplinary Board to continue the proceedings. This rule should also apply to the Judicial Inspection, which could examine the complaint *ex officio* if public interest is at stake.

[101] The same solution was given in Decision No. 21/2 of 8 February 2018 of Admissibility Panel II of the Disciplinary Board, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2018/CA2/02/21-2.PDF and Decision No. 92/3 of 16 March 2018, available at: https://www.csm.md/files/Hotarirele_CDisciplinar/2018/CA2/03/92-3.PDF.

SECTION II. Disciplinary Board

1. Role

According to Article 8 para. (1) of Law No. 178, the Disciplinary Board is an independent body that examines disciplinary cases concerning sitting and retired judges and applies disciplinary sanctions. Thus, it is a *disciplinary tribunal*.

Before the enactment of the new Law on the Disciplinary Liability of Judges in 2014, it had not been clear what body should sanction judges. Thus, in the practice of the Constitutional Court, some decisions state that imposing disciplinary sanctions is a duty *"of the SCM,"* whereas others state that it is "*also of the SCM"*. Thus, in one decision, the Constitutional Court states that *"the SCM is the disciplinary tribunal that may find a judge guilty of a disciplinary offence when it finds the elements of the violation, namely the objective and subjective parts"*[102]. In another decision, the Constitutional Court states that *the SCM and the Disciplinary Board are disciplinary tribunals*[103]. Finally, in a new decision, the Constitutional Court specifies that the examination of disciplinary cases is the exclusive duty of the *Disciplinary Board*, which must issue reasoned decisions, mentioning the supporting evidence and imposing disciplinary sanctions (point 36). Then, after invoking Law No. 947, under which the *SCM* has the duty of imposing disciplinary sanctions on judges (point 37), the Court concludes in a strange way that the right to decide on disciplinary sanctions for judges is vested with the *Disciplinary Board and the SCM* (point 41)[104].

It is worth considering either legal amendments or a reorientation of the practice of the Constitutional Court to acknowledge that the Disciplinary Board imposes disciplinary sanctions and there is no need to involve the SCM in a type of delegation of the Disciplinary Board by the SCM[105].

2. Legal Regulation

Article 8 para. (3) of Law No. 178 mentions that the work of the Disciplinary Board is regulated by Law No. 178 and the Rules of Procedure of the Disciplinary Board approved by the SCM[106]. Article 13 para. (2) of Law No. 178 also states that the duties of its members are described in the law and in the rules of procedure.

According to the principle at law, rules of procedure can never add to laws. Rules of procedure can only enlarge on the provisions already contained in law. Thus, the administrative body usurps the powers of Parliament, which is unacceptable.

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[102] Constitutional Court Decision No. 12 of 7 June 2011 *(grounds for the disciplinary liability of judges)*, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=30&l=ro.

[103] Constitutional Court Decision No. 28 of 14 December 2010 *(subrogation action)*, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=45&l=ro.

[104] Constitutional Court Decision No. 9 of 28 June 2012, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=2&l=ro.

[105] In the same line, see LRCM, *Policy Paper: Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges*, February 2016, p. 23, available at: https://crjm.org/wp-content/uploads/2016/04/CRJM-Politici-8-Disciplinar-ENG.pdf.

[106] Rules of Procedure of the Disciplinary Board, approved by SCM Decision No. 505/24 of 13 November 2018, available at: www.csm.md/files/Hotaririle/2018/24/505-24.pdf.

3. Position in the System

In 2016, according to Law No. 947, the Disciplinary Board was a body *affiliated to* the SCM. According to Law No. 947, Article 7 para. (1) letter (c), in the current reading, the Disciplinary Board is a *specialized* body and not part of the SCM but rather one of the components of the judicial system. This is clearly meant in Article 8 para. (1) of Law No. 178, according to which the Disciplinary Board is an *independent* body.

Although in law everything seems clear, the same cannot be said about official documents. Thus, the introductory part of the decisions we examined contained the wording "the Admissibility Panel of the Disciplinary Board *affiliated* to the SCM". In a contradictory way, an activity report of the SCM mentions: "In accordance with Article 7 of Law No. 947 of 19 July 1996 on the Superior Council of Magistracy, one of the specialized bodies operating in *subordination* to the Superior Council of Magistracy is the Disciplinary Board, which, in its turn, is an *independent* body that examines disciplinary cases against judges and imposes disciplinary sanctions"[107]. We believe that this is a technical error rather than a finding of the SCM.

Law No. 178 contains, however, provisions that cause a relation of dependency from the SCM. Thus, the SCM approves the Rules of Procedure of the Disciplinary Board (Article 8 para. (3) of Law No. 947); the Minister of Justice organizes competitions and appoints civil society members to the Disciplinary Board, and the SCM has its representatives in the candidate nomination committee (Article 10 para. (3) of Law No. 947); the SCM ensures the organizational and secretariat activity of the Disciplinary Board (Article 16 para. (1) of Law No. 947); the decisions of the Disciplinary Board are published on the website of the SCM (Article 35 para. (4) of Law No. 947); decisions on dismissal from office go to the SCM for submission to the president of the country/Parliament (Article 38 para. (1) of Law No. 947); and the Disciplinary Board submits the SCM an annual activity report, which is then published on the SCM's website (Article 17 of Law No. 947). Furthermore, the Disciplinary Board holds its hearings in the building of the SCM.

All this shows that, in fact, the Disciplinary Board is subordinated to the SCM. By *subordination* it is understood that an entity has no autonomy and no legal personality. In this case it depends on another body that is responsible for its organization and operation. Therefore, we recommend broadening the autonomy of the Disciplinary Board, potentially by allowing it and the Judicial Inspection to share one administrative apparatus.

4. Composition

Under Articles 9 and 10 of Law No. 178, the Disciplinary Board has nine members: five judges (members and alternate members are elected at the General Assembly of Judges, according to Article 23^3 of Law No. 514) and four civil society members appointed by the Minister of Justice.

[107] 2019 activity report of the SCM, p. 54, available at: www.csm.md/files/Raport_anual/RAPORTCSM2019.pdf.

For each incumbent member there is an alternate one. Alternate members sit in the Disciplinary Board only in case of the termination or withdrawal of the mandate of an incumbent, according to Article 11 para. (3) of Law No. 178. Interestingly, an alternate member can become active only in case of the final dismissal of an incumbent and not during temporary absences. Therefore, at least in theory, at least three of the nine members can be absent for up to three months without precluding the work of the plenum of the Disciplinary Board, because under Article 15 para. (4) of Law No. 178, the quorum required for that is six members. Since decisions are passed by the majority of attending members, according to Article 35 para. (2) of Law No. 178, in some situations, even just four attending members out of the nine incumbents can decide on judges' careers. Such situations should be avoided for reasons of legitimacy of decisions adopted by this body.

Thus, we showed that the plenum of the Disciplinary Board constitutes a *disciplinary tribunal* because it has jurisdictional powers in disciplinary matters. As any court, it should work with a fixed number of members. Therefore, all nine members should be present at hearings, and if they cannot participate even temporarily, alternates should sit in their place. An argument supporting this reasoning is that, if a member is recused or recuses themselves, that member should be replaced, and apparently Article 14 para. (5) of Law No. 178 allows this. Similarly, if an incumbent member is temporarily absent (for less than three months) for various reasons, it should be expressly regulated that they be replaced by an alternate. This way, the disciplinary panel will always have nine members.

We are aware of the difficulties in convening nine members. That is why we believe that a legal amendment could be introduced to reduce the number of members in the Disciplinary Board, the more so that the decisions of the Disciplinary Board can be challenged before courts (at the Chișinău Court of Appeal in panels of three judges and at the SCJ in panels of five judges).

5. Case Initiation at the Disciplinary Board

5.1. The Referral of Cases

A disciplinary case reaches the Disciplinary Board by two ways:

- by a *challenge*, when the inspector issues a decision to dismiss a complaint; or
- by a *report* prepared by the inspector, when the facts of a complaint check out.[108]

5.2. The Withdrawal of Complaints

If a case reaches the Disciplinary Board and then the complainant withdraws their complaint, Article 19 para. (4) of Law No. 178 allows the Disciplinary Board to continue the proceedings where *"there is public interest capable to undermine the prestige of justice"*. This rule raises multiple issues.

[108] The inspector presents the report at the hearing before the Disciplinary Board (Article 34 para. (3) of Law No. 178), and the report lays out the scope of the disciplinary proceedings (Article 34 para. (5) of Law No. 178).

First, the text has improper wording. It should not be *public interest* that undermines the prestige of justice, but the *action* committed by the judge and referred to in the complaint the litigant decided to withdraw.

Second, the law does not define the meaning of "prestige of justice" and how to evaluate it, which allows subjectivity from the body that determines it. In fact, the legal framework of the Republic of Moldova contains more instances of similarly ambiguous wording. For example, "actions that discredit justice or compromise honour and dignity of judge" from Article 26 paras. (1) and (6) of the Law no. 544. Unless legal amendments are made, this wording should be clarified in practice, offering several identifiable objective criteria.

5.3. Case Initiation Procedure at the Disciplinary Board

In *challenges* from inspector-judges' decisions to dismiss a complaint after verification (Article 23 para. (1^1) of Law No. 178) or after disciplinary investigation (Article 26 para. (1) of Law No. 178), it is clear that proceedings before the examination panel start as a result of the challenge.

However, when disciplinary investigation is over and the inspector-judge prepares a report and sends the disciplinary case to the Disciplinary Board, Law No. 178 is not clear about the person or entity that should initiate the proceedings before the Disciplinary Board. This is important for clarifying the parties that must appear before the Disciplinary Board and who may challenge the decision of the Disciplinary Board and later the decision of the first-level court. Thus, the question is which is the initiating act—the complaint filed at the Judicial Inspection and referred to in law as *complaint*,[109] which has already been verified by the inspector-judges, or the *report* the inspector sent to the Disciplinary Board along with the disciplinary case file? In other words, who initiates the case at the Disciplinary Board—the litigant or the Judicial Inspection?

This issue is important because, if we consider that it is the complainant who initiates the case at the Disciplinary Board, then we do not understand the role and presence of the Judicial Inspection at disciplinary proceedings, which are supposed to be adversarial proceedings conducted only between the investigated judge and the complainant. Only if the Judicial Inspection acted *ex officio* or when a member of the SCM filed the complaint, should they appear before the Disciplinary Board to support their complaint.

If, however, we consider that it is the Judicial Inspection that initiates the case at the Disciplinary Board, then we do not understand the presence of the litigant at disciplinary

[109] We consider that the law uses the term *alert* improperly. To alert an entity means to let it know, verbally or by filing a written document. Therefore, Law No. 178 should use the term *grievance* or *complaint* when it refers to a document filed by those who inform the Judicial Inspection about potential offence committed by a judge. It is by complaint that the Judicial Inspection is alerted. We insist on this distinction because during disciplinary proceedings, other bodies also get alerted, for example the Supreme Court of Justice. But recourse to the Supreme Court is used when one of the parties alerts the Court by "statement/notice of cassation" not the initial complaint filed at the Judicial Inspection. Anyway, Law No. 178 mentions *alert* only when it refers to alerts concerning disciplinary offences. (Translator's note: the Romanian word translated for clarity as *complaint* in this document means literally *the action of alerting*.)

proceedings, because they are supposed to be adversarial proceedings conducted only between the investigated judge and the Judicial Inspection. Here is the solution used in Romania[110] that we support: the contact between the judge of a case and any of the case parties is not allowed anywhere—not even in disciplinary proceedings—but in court of law. Outside trial, a judge does not have to justify their actions or decisions to a party of the trial carried out by the judge. Therefore, the role of litigants in disciplinary proceedings should be limited to alerting the Judicial Inspection, after which the latter should carry out disciplinary action against the investigated judge: verify, investigate, initiate cases at the Disciplinary Board, challenge decisions of the Disciplinary Board at the SCM, and appeal against decisions of the SCM before in courts.

We agree that in a system in which the Judicial Inspection is efficient, active, and autonomous and disciplinary bodies are committed to the role of ensuring accountability in the judicial system, the participation of the complainant in disciplinary proceedings is useless and even exaggerated.[111]

6. The Competences of the Disciplinary Board

6.1. Body for the Examination of Challenges

Three members of the Disciplinary Board sit in an Admissibility Panel: two are judges and one is civil society representative, according to Article 27 of Law No. 178. The law does not stipulate the number of Admissibility Panels, but the rules of procedure limit it to two (point 51).

These panels verify the legality and grounds of decisions adopted by inspectors who dismissed a complaint. The law does not specify the organization of hearings, leaving this to the rules of procedure. Let us reiterate: this legislative technique is faulty because it transforms the SCM into a legislature. And under the rules of procedure, it is not allowed to add to the law.

The procedure is only summary, according to Article 28 para. (3) of Law No. 178.

The law allows panel members to have the Judicial Inspection perform additional verifications or collect new documents or evidence, according to Article 28 para. (2). We do not believe that the Legislature intended to offer the right to request this to every *member* of the panel, because this power should be exercised by the *panel.* Anyway, we believe that this power should be abandoned because the Judicial Inspection and the Admissibility Panels cannot exchange administrative letters, and there is a way to complement materials prepared by the Judicial Inspection under the solution expressly described in Article 28 para. (3) letter (a) of Law No. 178.

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[110] See Article 44 and the following articles of Law No. 317 of 1 July 2004 on the Superior Council of Magistracy (of Romania), available at: http://legislatie.just.ro/Public/DetaliiDocument/64942.

[111] LRCM, *Policy Paper: Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges*, February 2016, p. 26, available at: https://crjm.org/wp-content/uploads/2016/02/CRJM-Politici-8-Disciplinar-ENG.pdf.

Thus, according to the law, the Admissibility Panel has two courses of action:

a) *To dismiss the challenge as unfounded* by a decision declared as final at law. It is debatable that in this case the right of access to justice should not be respected, and thus the author of the complaint should be granted the right of appeal in court. For example, in Romania, by Decision No. 397/2014[112], the Constitutional Court established that the legal provision under which a judicial inspector can dismiss the complaint by a written reasoned final resolution if preliminary verification finds no indication of a disciplinary offence are against constitutional provisions concerning free access to justice and administrative provisions concerning the right to a fair trial. When this study was being prepared, a similar application was also pending at the Constitutional Court of the Republic of Moldova.

b) *To admit the challenge* and to return the case to the Judicial Inspection for additional verification. In this case, the decision is mandatory for the Judicial Inspection, although it is not clear which phase the verification should be repeated from because the Judicial Inspection may issue decisions either following verification or following disciplinary investigation. And Article 29 para. (3) of Law No. 178 states that after the return, the Judicial Inspection must proceed directly to disciplinary investigation, which means that it does not matter whether the complaint was verified or not. But if the complaint was not verified and the Judicial Inspection proceeds directly to disciplinary investigation, it skips a mandatory phase. The time frame for these verifications may not exceed 20 days, with the possibility of extending it by another 15 days at most. In our opinion, if the inspector does not comply with the decision of the Disciplinary Board, the inspector becomes guilty of the disciplinary offence described in Article 4 para. (1) letter (j) of Law No. 178.

We believe that there is also a third solution that should be regulated—*to dismiss the challenge as late* if it exceeded the 15-day limitation period for filing.

6.2. Tribunal

Judge members of the Disciplinary Board work concurrently at a court of law and at the Disciplinary Board. A decision of the SCM from 2015 establishes that they receive 70% of the regular caseload,[113] but it seems that this percentage is not always observed. Considering that at the Disciplinary Board, they also must prepare reports and rationale parts for judgments within 20 days of ruling being issued, it is obvious that they cannot comply with the legal time frames.

The Judicial Inspection sends the report and the disciplinary file to the Disciplinary

[112] Decision No. 397 of 3 July 2014 of the Constitutional Court of Romania on the challenge to constitutionality of Article 47 para. (1) letter (b) of Law No. 317/2004 on the Superior Council of Magistracy, available at: http://legislatie.just.ro/Public/DetaliiDocumentAfis/159921.

[113] SCM Decision No. 98/4 on the percentage applied for the assignment of cases by means of the Integrated Case Management System (ICMS) at courts and to members of the Disciplinary Board, the Board for the Review of Judges' Performance, and the Board for the Selection and Career of Judges of 10 February 2014, available at: www.csm.md/files/Hotaririle/2015/04/98-4.pdf.

Board, which must examine the case within 60 days at most (Article 33 of Law No. 178). The chairperson assigns materials at random to a reporting member (Articles 30 and 32 of Law No. 178), who ensures: a) the preparation of the case for examination at the Disciplinary Board; b) the summoning of the parties and other participants in disciplinary proceedings; and c) the drafting of the decision of the Disciplinary Board. We consider that these administrative tasks are rather secretarial and do not need to be performed by members of the Disciplinary Board.

The citees include the judge under examination, the inspector-judge, and the complainant (who may be a litigant, a third party, or even a member of the SCM, according to Article 31 para. (1) of Law No. 178. Again, we note an inconsistency—during disciplinary proceedings, the judge is brought face to face with a litigant from one of their trials or a member of the SCM who decides on their career. There is also another question: If the complaint originates from the Courts Administration Agency, which is subordinated to the Ministry of Justice, will the minister be summoned for the disciplinary investigation of the judge as well? This would be inadmissible.

Note that during disciplinary adjudication, case participants do not have equal positions—only the judge and the members of the Disciplinary Board may call anyone to testify (Article 31 para. (5)), whereas the complainant and the inspector may not. Here the rules of procedure add to the law: point 91 states that all parties *(without defining them)* and any member of the Disciplinary Board may request evidence, including testimony from any person.

Moreover, during the preparation for case examination, only members of the Disciplinary Board may have the Judicial Inspection perform additional verifications or collect new documents or evidence (Article 32 para. (2)). It is worth noting that the Judicial Inspection does not have to obey these orders and it is not specified by what type of acts they are made. Anyway, this regulation is contradictory. On the one hand, during the preparation for case examination, only the reporting judge has access to the case, which was assigned in a randomized way, and on the other hand, the preparation of a case at the Disciplinary Board must involve the cooperation of all its members and the deliberation on evidence as individual members cannot consider it all by themselves! Any evidence must be proposed and approved within the proceedings, after discussion with the parties, and it cannot be weighed in administrative procedure by each member of the Board. Finally, another argument is based on Article 34 para. (5) of Law No. 178. A disciplinary case is examined only within the scope of the report of the Judicial Inspection, which already refers to the facts that were found, and evidence that was considered, at the phase that involved the Judicial Inspection. We do not see how Article 34 para. (5) could apply if additional verification and new evidence would be ordered before the hearing at the Disciplinary Board.

Decisions are taken after secret deliberation, by the vote of the attending majority (Article 35 para. (2) of Law No. 178)—that is, by minimum four votes if only six are present—which raises the question of legitimacy as only four members of a nine-member collegial body decide.

According to the Rules of Procedure of the Disciplinary Board, point 121, at the deliberation phase, the reporting member presents the draft decision. We consider that this way, the reporting member decides beforehand and cannot be impartial afterward. This is yet another argument for either the annulment of the institution of reporting member or regulating that this judge may not vote.[114]

In the end of the trial, the Disciplinary Board may reach the following conclusions (Article 36):

- The offence was not demonstrated, or the complaint was withdrawn (with the exception mentioned earlier), in which case the disciplinary procedure is *terminated*.
- The offence was demonstrated, but the period of disciplinary liability has elapsed, in which case the disciplinary procedure is *terminated*.
- The offence was demonstrated, in which case the judge is sanctioned disciplinarily, and the Disciplinary Board may propose the SCM to order the extraordinary review of the judge's performance.[115] We consider that the latter arrangement should be excluded. For reasons discussed earlier, there should not be any link between disciplinary liability and performance review.

6.3. The Publication of Disciplinary Decisions

Decisions concerning the sanctioning of judges or the termination of procedure against them are published on the SCM's website even if they are not final. Until the system becomes more efficient, this arrangement should remain to ensure accountability to the interested public who needs to regain confidence in the justice sector. After that, however, the law should be amended to allow the publication of disciplinary decisions from the moment they become final. We think that for now, the activity reports of the SCM and its bodies should not include the names of investigated judges. Currently, they do include them even when complaints are dismissed or procedures are terminated, which has no justification.

Analysing the decisions published by the Disciplinary Board, we noted that over 90% simply reproduce the factual information already determined and described by the Judicial Inspection and directly cite paragraphs from international standards or decisions of the Constitutional Court on judicial independence. We concluded that the reasoning of decisions needs to be improved.

Thus, although reference to the work of the Judicial Inspection and applicable legal tools is obviously necessary, the decisions of the Disciplinary Board should have substance. As any other judicial decision, decisions concerning disciplinary actions should start with the alerting act, refer to the weighed evidence, lay out legal arguments, offer the interpretation of the case, express the logical conclusions about the commission or non-commission of an offence, after which go into the individualizing elements of disciplinary sanction justifying the choice of one sanction over others, as applicable.

Doubled legal categorization of same deeds and excessive theorization should be avoided. It is preferable to analyse proportionality when choosing the sanction.

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[114] See also para. 80 of Joint Opinion No. 755/2014 of the Venice Commission and the OSCE cited earlier.

[115] Article 13 para. (4) of Law No. 544: *"Judges may be subjected to performance review on an ad hoc basis if court judgments passed by them cast doubt on their professional qualification and skills"*.

SECTION III. Superior Council Of Magistracy

1. International Regulations

The Judiciary is one of the three powers of state. The judicial activity is the exclusive power of the courts, which discharge it through the agency of judges. In a democratic society, judges have three roles[116]:

a. to resolve disputes between citizens and between citizens and authorities;
b. to guarantee the fundamental human rights and freedoms;
c to promote and to support the rule of law.

The justice system has *litigant* in its center. Litigants should enjoy fair trials, and this is ensured by judges, who must be independent, competent, and impartial. To live up to these aspirations, the concept of judicial council was developed. Its fundamental role is to guarantee and protect the independence of justice, meaning concretely the following:[117]

a. *At the level of the judicial system*:
- Separation of state powers to ensure the autonomous governance of justice
- System indicators and evaluation to promote the efficiency and quality of justice
- Accountability to the public by ensuring transparency and legal education

b. *At the level of each judge*:
- Meritocratic nominations, appointments, and promotions that take into account, in addition to thorough legal knowledge, a good understanding of the concepts of ethics and even sensitivity to social issues
- Ensuring the compliance with judicial discipline and ethics, at a level that does not allow the verification of the legality and good grounds of court judgments (because this is the exclusive scope of appeal remedies)
- Protecting the image of justice to preserve confidence in judges

Thus, a judicial council must protect the independence of justice, on the one hand, and guarantee its efficiency and quality, on the other. Considered this way, ***the SCM is meant to ensure* a balance between the independence and accountability of justice.**

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[116] These three roles were mentioned for the first time in the Universal Declaration on the Independence of Justice adopted by the First World Conference on the Independence of Justice in 1983: *"2.01. The objectives and functions of the judiciary shall include: a. to administer the law impartially between citizen and citizen, and between citizen and state; b. to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; c. to ensure that all peoples are able to live securely under the rule of law"*.

[117] For a broader examination of the powers of a judicial council, please, see Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, adopted by the Consultative Council of European Judges, available in Romanian at: https://www.coe.int/en/web/ccje/opinion-n-10-on-council-for-the-judiciary-in-the-service-of-society.

2. National Regulations

The SCM of the Republic of Moldova is regulated at the level of the Constitution (Titles III and V), the laws (Law on the SCM, Law on Judicial Organization, Law on the Status of Judges, and other regulatory acts), and regulations.

The SCM is one of the components of the Judiciary and is a fundamental authority in the state.[118] It ensures the self-administration of the judiciary (Article 24 of Law No. 514) and is formed to ensure the organization and functioning of the judicature (Article 1 of Law No. 947). In this regard, the Constitutional Court has stated that the *primary role* of the SCM concerns the procedures for nominating for, promoting and transferring to, and accepting resignations and dismissing from, office of judge, court president or vice-president[119].

The SCM is the guarantor of the independence of the Judiciary (Article 1 of Law No. 947), and the Constitutional Court has specified that the SCM is the guarantor of the independence of judges, courts, and the entire judiciary in the Republic of Moldova[120].

Article 123 of the Constitution establishes the *powers* of the SCM. Thus, this body ensures the appointment, transfer, temporary posting, promotion, and disciplinary sanctioning of judges. The Constitutional Court itself has acknowledged these powers: "The SCM acts in a twofold capacity: *administrative* (usually this authority discharges administrative duties) and *jurisdictional* (when it acts as a disciplinary tribunal)"[121] and "the Superior Council of Magistracy was *delegated by law* to approve regulations"[122].

3. The Disciplinary Powers of the SCM

3.1. Legal Powers

Article 123 para. (1) of the Constitution of the Republic of Moldova states: *"The Superior Council of Magistracy shall ensure the appointment, transfer, removal from office, upgrading and imposing of the disciplinary sentences against judges"*. These provisions are enlarged upon in sub-constitutional laws.

According to Article 4 para. (3) of Law No. 947, the SCM has the following three types of duties in the field of judicial discipline and ethics:

a) adopt decisions concerning citizens' complaints about judges' ethics;

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[118] Constitutional Court Decision No. 23 of 9 November 2011, para. 33, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=17&l=ro.

[119] Constitutional Court Decision No. 11 of 27 April 2010, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=54&l=ro; Constitutional Court Decision No. 23 of 9 November 2011, para 36, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=17&l=ro.

[120] Constitutional Court Decision No. 9 of 28 June 2012, para. 32, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=2&l=ro; Constitutional Court Decision No. 23 of 9 November 2011, para. 34, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=17&l=ro.

[121] Constitutional Court Decision No. 9 of 28 June 2012, para. 32, available at: http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=2&l=ro.

[122] Constitutional Court Decision No. 17 of 2 July 2013, para. 71, available at: http://constcourt.md/ccdocview.php?tip=hotariri&docid=457&l=ro.

b) examine challenges from decisions of the Disciplinary Board;
c) based on decisions of the Disciplinary Board, submit the president of the Republic of Moldova or Parliament proposals concerning dismissal from the office of court president or vice-president or a judge.

3.2. The Examination of Challenges from Decisions of the Disciplinary Board

Complainants, the Judicial Inspection, or the sanctioned judge may challenge a decision of the Disciplinary Board within 15 days of the decision being communicated (Article 39 para. (1) of Law No. 178). Again, we believe that this violates the principle of equality of arms—the judge is brought to legal proceedings by the complainant, who is a litigant in a trial conducted by the judge, and also prosecuted by the Judicial Inspection. However, as long as it is the Judicial Inspection that collects and sends all evidence concerning judges to the Disciplinary Board, it should naturally have the exclusive right to challenge decisions of the Disciplinary Board.

Challenged disciplinary cases are assigned in a randomized way to any member of the SCM, bar *ex officio* members (Article 39 para. (1^1) of Law No. 178). The challenge is examined within 30 days.

Only the concerned judge and the complainant are notified about the examination of the challenge (Article 39 para. (3) of Law No. 178). This means that, when a case reaches the SCM, the Judicial Inspection is not notified because there is not a legal provision like the one from Article 31 para. (4) of Law No. 178 that would refer to the notification of the Judicial Inspection when the case is before the Disciplinary Board. We consider that this is a legal shortcoming, especially considering that it is the Judicial Inspection that filed the challenge.

4. The Adoption of Decisions

According to Article 24 of Law No. 947, the SCM adopts decisions by an open majority vote. The attending SCM members at law may not vote. The decision is communicated in public, and its reasoning part is drawn up within maximum 30 days.

The SCM considers both the legality and the grounds of decisions of the Disciplinary Board. According to Article 39 para. (4) of Law No. 178, by its decision, the SCM may:

- dismiss the challenge and uphold the decision of the Disciplinary Board;
- admit the challenge and adopt a new decision in line with all rules applicable to the Disciplinary Board.

It is worth noting that the SCM's decisions are rather administrative as they are signed only by the SCM's chairperson. Unlike them, decisions of the Disciplinary Board are signed by every board member and considered as full-fledged court judgments. We do not see why this difference. Since decisions of both types are communicated as part of the disciplinary procedure, they should be signed by all those who adopt them. Therefore, we recommend that the SCM's disciplinary decisions be signed by all members participating in deliberation.

SECTION IV. Courts Of Law

1. Appellate Court

According to Article 40 of Law No. 178, *"(1) The complainants, the Judicial Inspection, or the judge whom the decisions of the Superior Council of Magistracy adopted under Article 39 concern may challenge such decisions at the Supreme Court of Justice within 15 days of receiving the reasoned decision. (2) A panel formed under Article 25 para. (2) of Law No. 947/1996 on the Superior Council of Magistracy shall examine the challenges. The examination period may not exceed 30 days".*

Note that the legal text has not been updated. Thus, para. (2) mentions a panel of five judges of the Supreme Court of Justice that has the power to examine such challenges first.

Under Article 25 of Law No. 947, amended in 2019, *"any interested party may challenge a decision of the Superior Council of Magistracy at the Chișinău Court of Appeal within 30 days of the decision being communicated".* This regulation is complemented by rules of the Administrative Code.

Thus, according Article 191 para. (3) of the Administrative Code, the Chișinău Court of Appeal examines the merits of administrative disputes against SCM decisions. According to Article 193 para. (2) of the Administrative Code, the appellate court adjudicates administrative disputes in panels of three judges.

Cases that on the effective date of the Administrative Code had already reached the SCJ were taken from the docket list and sent to the appellate court for examination.[123] This was done in accordance with Article 258 para. (2) of the Code: *"Administrative disputes assigned to other courts under special laws before the effective date of this Code shall be referred to competent courts in accordance with the provisions of this Code after its effective date".*

2. Supreme Court of Justice

After the appellate court's decision, interested parties have one more appeal remedy.

Thus, according to Article 191 para. (5) of the Administrative Code, the Supreme Court of Justice examines cassation appeals from judgments, decisions, and orders of appellate courts. According to Article 193 para. (3) of the Administrative Code, "the Supreme Court of Justice examines cassation appeals from orders and the admissibility of cassation appeals in panels of three judges and cassation appeals in panels of five judges".

Initially, the Legislature established that courts may verify challenged SCM's decisions only for the legality of the issue/adoption procedure. The established judicial practice was that decisions were issued/adopted in deliberative meetings by vote and, as a result, this phase was governed by important procedural formalities, such as quorum, debates,

[123] For example, under this rule, the panel of the Supreme Court of Justice ordered the transmission of Case No. 3d-12/19 to the Chișinău Court of Appeal on 28 August 2019. Then it proceeded similarly with another five cases.

deliberation, and vote[124]. Therefore, judicial control concerned exclusively the procedural part and definitely excluded the control of the merits of a case[125].

Today, Constitutional Court Decision No. 13 of 14 May 2018 regulates the extent of the SCJ's control over the SCM's challenged disciplinary decisions, namely that the Supreme Court must have the power to decide on any matter of law or of merits. Thus, the Court may dismiss a cassation appeal as unfounded or admit a cassation appeal and change the decision of the Disciplinary Board, including in respect of sanctions imposed on judges.

Concerning the new appeal remedy at the appellate court, we believe that this change was not necessary. Thus, the current disciplinary procedure involves two phases at the Judicial Inspection, two phases at the Disciplinary Board, one phase at the SCM, one at the Chișinău Court of Appeal, and one at the Supreme Court of Justice. This procedure takes much time and involves over 30 persons[126].

We recommend simplifying the entire procedure so that it would involve only three entities: The Judicial Inspection, the Disciplinary Board, and the Supreme Court of Justice. Thus, each would have a single procedural role: the first entity would be responsible for disciplinary investigation, the second, for examining disciplinary actions, and the third, for examining appeals.

[124] SCJ Judgment of 30 November 2017 of the Superior Council of Magistracy on Case No. 3d-17/2017 on the annulment of Decision No. 466/22 of 11 July 2017 of the plenum of the Superior Council of Magistracy. This conclusion is also reflected in Decision No. 17 of 2 July 2013 of the Constitutional Court of the Republic of Moldova.

[125] SCJ Judgment of 7 December 2017 on Case No. 3d-20/2017 on the annulment of Decision No. 2845 of 7 October 2017 of the plenum of the Superior Council of Magistracy.

[126] See Table 2 from the appendix.

Conclusions and proposals

The judicial system of the Republic of Moldova is on the path towards a genuine independence. It has modern regulations that enshrine this aspiration and a new generation of judges who understand this value.

We consider, however, that the protection of independence must prevail over the actions to discipline the judges[127]. The SCJ lost its credibility after the September 2019 scandal, when evidence came to the public's knowledge that the Chief Justice had given instructions to judges in certain cases[128]— evidence that could be categorized as related to politics or to some politically affiliated interest groups. The fact that all cases get to the SCJ has a compromising effect on the authority of lower court judges, and, if reports about cases of interference from court presidents are true, it is absolutely clear that at the SCJ temptations are the strongest. In addition, the judiciary itself made statements that judges who had applied solutions that were contrary to expectation or had tried to oppose such influences were immediately subjected to various disciplinary or other actions, got poor performance grades, or were driven out of the system[129].

Some judges do not dare to denounce interferences within the system and pressures outside it. The Judicial Inspection is inefficient in investigating allegations concerning improper influence. Interestingly, some politicians stated publicly over the past months that judges had complained to them.[130] Some judges get promoted although it is known that they exert influence on others in decision-making.[131] The media reported stories where, after

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[127] Art. 14 letter (f) of Law No. 544 states that to ensure the independence of judges, it is necessary, among other things, to allocate proper resources for the operation of the judicial system and to create organizational and technical conditions that are conducive to courts' work. Thus, firstly, one should protect independence, and only then one can talk about disciplinary measures, which is also implied from the content of art. 2 of Law No. 178.

[128] *Cases in Which Ion Druta Has Allegedly Given Instructions to SCJ Judges. Documents Taken by Prosecutors*, a news report of 25 October 2019, available at: https://agora.md/stiri/63085/dosarele-in-care-ion-druta-ar-fi-dat-indicatii-judecatorilor-csj--documentele--ridicate-de-procurori-doc.

[129] Statements made at the conference organized by the Association Vocea Justitiei "Agenda of the General Assembly of Judges, 12 March 2020—Priorities, Problems, and Solutions," available at: https://www.ipn.md/ro/csm-trebuie-sa-iasa-din-pozitia-de-victima-care-7967_1072131.html.

[130] The post of 22 April 2020 by Judge Victoria Sanduta that refers to a TV program about a politician, available at: https://www.facebook.com/permalink.php?story_fbid=966613273735417&id=100011602602549

[131] Statements at an interview with an expert.

making bold statements, a judge had not been reconfirmed in office when his initial five-year tenure ended[132] or the brother of an SCM member had been put under investigation[133] or four judges of the Constitutional Court had been surveilled[134]. These situations must be resolved quickly so that the system could regain credibility.

Concurrently, it should be understood that judicial independence is closely related to accountability. This understanding should be present both at the level of the entire system and the level of individuals. As for judicial accountability, one solution could take the form of a simple and quick disciplinary system. Currently, the Moldovan disciplinary system is extremely complex, fueling distrust in procedures both from litigants and the public and from judges themselves. The new law on the disciplinary liability of judges and the new Administrative Code has only complicated verifications and examinations of judges' actions and have overloaded the entities involved in the disciplinary procedure. Thus, to examine each of the 13 disciplinary cases in 2019, it was necessary to set off a system that involved 30 to 38 persons, of whom 16 judges, over a period of minimum one year and a half[135]. It took at least one year and a half before a judge got a sanction in the form of a warning through a mechanism that involved 16 judges. Such a system is inefficient beyond any doubt.

The shortcomings of the disciplinary system are related not only to the procedure for holding judges accountable and sanctioning them but also to some aspects of justice administration and judicial independence.

Our recommendations for streamlining disciplinary activity involve legislation, management, and professional competency.

a. reference to the status of judges:

- Observe, guarantee, and promote freedom of expression for judges.
- Establish by law the possibility of dismissing court presidents from administrative positions for reasons of unfitness (not as a disciplinary sanction).

b. reference to the management:

- Moldovan justice faces the systemic issue - unfair caseload distribution between courts, which overburdens some judges, making them vulnerable and prone to disciplinary sanctions. Therefore, the SCM should consider the workload of a judge

132 *The SCM Has Refused to Nominate Judge Murgulet for Life Tenure after He Had Denounced Pressure in the Judicial System*, a news report of 16 April 2020, available at: https://cotidianul.md/2020/04/16/csm-a-respins-numirea-pana-la-atingerea-plafonului-de-varsta-a-judecatorului-murgulet-care-a-denuntat-presiuni-in-sistemul-judecatoresc.

133 *High-level Blackmailing in the Justice Sector? A Criminal Case against the Brother of an SCM Member Who Had Allegedly Refused to Resign*, news report of 30 April 2020, available at: www.zdg.md/stiri/stiri-justitie/santaj-la-nivel-inalt-in-justitie-dosar-penal-pe-numele-fratelui-unui-membru-al-csm-care-ar-fi-refuzat-sa-si-dea-demisia-eu-am-fost-filat-din-luna-iunie.

134 *Are Inconvenient Judges Shadowed in the Name of the Russian Loan?* news report of 1 May 2020, available at: https://moldova.europalibera.org/a/sunt-fila%C8%9Bi-judec%C4%83torii-incomozi-%C3%AEn-numele-creditului-rusesc-/30587304.html.

135 See Table 1 from the appendix.

to identify the acceptable caseload per judge and to manage the number of judges in every court of law properly. Thus, *the maximal caseload* should be used for a fair assignment of the caseload that could be supported by every judge and the *average caseload per judge* which takes into account the complexity of cases should be used for reporting on every court to analyse the causes of delays.

- Numerous reports of the Judicial Inspection refer to the offences of Art. 4 para (4) letter g) of Law No. 178 *(offence — due to reasons imputable to the judge—of deadlines for procedural actions, including deadlines for the drafting of court judgments and the transmission of their copies to trial participants, if this has directly affected the rights of trial participants or other persons)*. Therefore, judges should be trained in *case management*, and court clerks and judicial assistants should be held accountable.

c. reference to offences:

- Redefine disciplinary offences as suggested in the analytical document and strengthen the practice of the SCM by having this body offer the criteria for determining the incidence of deviations defined in the law generally.
- Offer a legal definition for "gross negligence".
- Amend procedural codes by introducing the grounds for revision: *"when a judge receives a definitive disciplinary sanction for misfeasance or gross negligence and these circumstances have influenced taken decision in the case"*.
- The legal disciplinary mechanism is too complex: five state entities and over 30 people are involved in deciding whether a judge is amenable to, say, a warning because s/he was too late at work, did not wear a robe during a hearing or was four months slow in drafting a court decision. The disciplinary procedure could have only three bodies: one for disciplinary inquiries (Judicial Inspection), one for determining an accusation (Disciplinary Board), and one court of law (Supreme Court of Justice).

d. reference to the Judicial Inspection:

- Elaborate the regulations about the work of the Judicial Inspection by including a separate chapter in Law No. 947 or Law No. 178 to cover the provisions that currently are part only of the regulations of the Judicial Inspection.
- Increase the personnel of the Judicial Inspection to 10 inspectors-judges and 5 secretaries/assistants.
- Revert to the system where inspectors are recruited from among judges, without temporal prohibitions, but with the regulation of the incompatibility of checking its own court or cases.
- Specialize inspectors in two fields: disciplinary proceedings and verifications of the courts' work. We believe that disciplinary cases should be examined by inspectors who have worked as judges in their career.
- Limit the roles of the Judicial Inspection to two: disciplinary examinations and verifications of the courts' work. Such duties as answering complaints or having

appointments concerning the law on public information should be executed by the SCM's office.
- Train inspector-judges in professional and specific fields: case management, court management, disciplinary case law, international standards.
- Set the criteria for appointment and procedure for dismissal of the chief inspector. Establish for regulating the execution of the duties of the chief inspector in his absence.
- Involve the chief inspector in the recruitment of inspectors. The recruitment of inspectors should include the verification of knowledge of the law, on the whole, the laws of the system, and management.
- Introduce a system for reviewing the activity of inspector-judges and dismissing them.
- Provide for a procedure for dismissing inspectors for reasons of poor performance, which differs from the disciplinary procedure.
- The Judicial Inspection must have a register of complaints addressed to it in a separate digital register.
- Ensure the internal regulation of the Judicial Inspection's *ex officio* initiative based procedures for certain irregularities in the court's work reported in the media.
- Simplify and clarify the procedure for verifying the admissibility of complaints.
- Explicitly regulate the obligation of the Judicial Inspection to continue disciplinary proceedings even when Prosecutor's Office is also alerted about the same judge.
- Interferences from judges and court presidents or pressures from prosecutors cannot be ignored any longer. Such situations should disappear. Therefore, the Judicial Inspection should prioritize its verifications and examinations, disposing of such cases reported by judges themselves as soon as possible.
- The Judicial Inspection should react properly to information published in the media when judicial independence is under attack.

e. reference to the Disciplinary Board:

- Establish by law incompatibilities for lawyers or judges sitting in the Board to bar them from examining the cases where they act as attorneys or, respectively, judges.
- Explain the legal nature of the Judicial Inspection and the Disciplinary Board: defining them either as entities autonomous from the SCM, with their legal personalities and secretaries or as the SCM's units.
- Exclude the possibility that the members of the collegial body request new evidence or additional verifications individually. Decisions in this regard should be discussed and adopted by all members of the Board.
- Exclude the possibility that litigants attend disciplinary proceedings against judges in another capacity than as witnesses.
- Ensure a better quality of the rationale of the decisions passed by the Disciplinary Board: avoid double legal categorizations of the same action, avoid excessive theorization, include the analysis of proportionality when choosing the sanction.

- Anonymize the names of judges subjected to disciplinary investigation in the reports of the SCM, the Judicial Inspection, and the Disciplinary Board.

f. reference to the SCM:

- Ensure that all attending SCM members sign adopted decisions on disciplinary matters.

g. reference to the involved courts:

- Revert to a previous system where SCM decisions were appealable only at the SCJ.

Table 1. *The Duration of Disciplinary Proceedings and the Involved Persons*

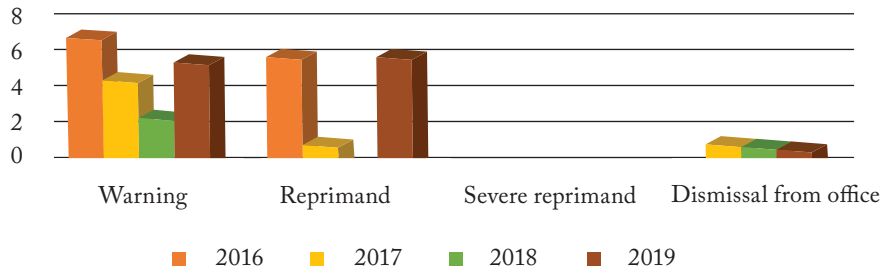
Involved entity	Operations	Maximum required time	Involved human resources
SCM's Secretariat	Complaint registration	3 business days	1 secretary
Judicial Inspection	- Complaint assignment - The returning of non-compliant complaints - Complaint verification - Disciplinary investigation - The sending of reports to the DB	Unregulated 3 days 20 days – 35 days 30 days – 45 days 3 days Unregulated	1 chief inspector 1 inspector Another inspector in case of recusal/ abstention
Disciplinary Board - Admissibility Panela	- The examination of challenges - The communication of decisions	Reasonable time 7 days	3 members, possibly one inspector in case of returning
- Plenum	- Adjudication - The preparation of decisions - The communication of decisions - The filing of challenges - Referral to the SCM	60 days 20 days 3 days 15 days Unregulated	1 secretary for preparation and 6 to 9 members (including 2 to 5 judges) for adjudication
SCM	- The resolution of challenges - The preparation of decisions	30 days 30 days	12 members (including 4 judges)
Appellate court	- The filing of challenges - Adjudication - The preparation of decisions	30 days Unregulated 30 days	3 judges
Supreme Court of Justice	- Adjudication - The preparation of decisions	Unregulated 30 days	5 judges
Total		**Minimum 414 to 444 days**	**30 to 38, including minimum 16 judges**

Table 2. *Disciplinary Complaints, Procedures, and Sanctions*

According to the SCM's annual activity reports,[136] disciplinary procedures and sanctions had the following trends:

Year	Complaints to the Judicial Inspection	Petitions to the Judicial Inspection	Cases assigned to the plenum of the Disciplinary Board	Disciplinary sanctions imposed by the Disciplinary Board
2019	1,595	415	43	13
2018	1,223	416	38	4
2017	1,234	471	55	7
2016	1,687	325	72	13
2015	1,889	580	41	12
Total	**7,628**	**2,207**	**249**	**49**

Graph 1.*Comparative aspects of the sanctions imposed on judges during the years 2016 through 2019*



[136] Annual activity reports of the SCM, available at: www.csm.md/ro/activitatea/rapoarte-anuale.html.

Appendix: International Standards Concerning Judicial Discipline

Worldwide, there are many governmental and nongovernmental bodies (European, regional, and international) that have developed either mandatory tools like conventions and treaties, or soft-law documents. Some of those international regulations concern the disciplinary liability of judges.

Public entities or national authorities with powers to consider and decide in this field should accept all international tools as public policy. This is both to respect the work of various experts within and outside national legal systems and to accept these documents as genuine standards, which sooner or later will make their way into national laws and practices anyway, the more so that they were prepared at the level of state bodies or professional bodies the Republic of Moldova is part of.[137]

The chronological presentation of these documents highlights the development of the regulation of this type of liability. The most recent standards date back from 2018.

1981 – Draft Principles on the Independence of the Judiciary *(Siracusa Principles)* were prepared by an expert committee set up by the International Association of Penal Law, the International Commission of Jurists, and the Center for the Independence of Judges and Lawyers.[138]

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[137] The obligation of member states to include the recommendations of various international organizations into their own regulations is sometimes expressly stated, either in the international regulations themselves—as in the final part of the recitals of Recommendation (2010)12 of the Committee of Ministers of the Council of Europe, available at: https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d —or in subsequent international regulations—as in *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*, available at: www.unodc.org/res/ji/import/international_standards/procedures_for_the_effective_implementation/procedures_for_the_effective_implementation.pdf or in *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*, available at: www.unodc.org/res/ji/import/international_standards/measures_implementation/measures_implementation.pdf. For a broad reference to international standards (on the status of prosecutors) and their consideration in adjudicating an important case, see ECtHR's judgment of 5 May 2020 in *Kovesi v Romania*, available at: http://hudoc.echr.coe.int/eng-press?i=003-6688430-8898922.

[138] Siracusa Principles, available at: www.icj.org/wp-content/uploads/2013/10/CIJL-Bulletin-2526-1990-eng.pdf.

Discipline

Article 13. Any disciplinary proceedings concerning judges should be before a court or a board composed of and selected by members of the judiciary.
Article 14. All disciplinary action should be based upon standards of judicial conduct promulgated by law or in established rules of court.
Article 15. The decision of a disciplinary board should be subject to appeal to a court.

1983 – Universal Declaration on the Independence of Justice *(Montreal Declaration)* was adopted unanimously at the First World Conference on the Independence of Justice on 10 June 1983. The purpose of the declaration was to guarantee the independence of international judges, national judges, lawyers, jurors, and judicial assessors.[139]

Discipline and Removal

2.32. A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33. a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary.

[...]

2.34. All disciplinary action shall be based upon established standards of judicial conduct.

2.35. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

2.36. With the exception of proceedings before the Legislature, the procedure for discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37. With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.

1985 – Basic Principles of the Independence of Judiciary were approved at the Seventh Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders from 26 August through 6 September 1985 and adopted by the UN

[139] Montreal Declaration, available at: www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf.

General Assembly's Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.[140]

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

1989 – Draft Universal Declaration on the Independence of Justice (Singhvi Declaration).[141]

Discipline and Removal

27. (a) A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

(b) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board.

28. All disciplinary action shall be based upon established standards of judicial conduct.

29. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

30. […] Judgments in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published.

10. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

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[140] Basic Principles of the Independence of Judiciary, available at: https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.

[141] The Singhvi Declaration is included in document E/CN.4/Sub.2/1985/18/Add.5/Rev.1, available at: https://digitallibrary.un.org/record/139884.

1997 – Judges' Charter in Europe was approved by the European Association of Judges on 4 November 1997.[142]

9. Disciplinary sanctions for judicial misconduct must be entrusted to a body made up of members of the judiciary in accordance with fixed procedural rules.

1998 – The European Charter on the Statute for Judges was adopted by the participants of the multilateral meeting on the status of judges in Europe, held by the Council of Europe in Strasbourg from 8 through 10 July 1998.[143]

5. Liability

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

1999 – Universal Charter of Judges was approved by the International Association of Judges on 17 November 1999.[144]

ARTICLE 7 – DISCIPLINE

Article 7-1 – Disciplinary proceedings

The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judges genuine independence, and that attention is only paid to considerations both objective and relevant.

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[142] Judge's Charter in Europe, available at: www.icj.org/wp-content/uploads/2014/10/Judges-charter-in-europe.pdf.

[143] The European Charter on the Statute for Judges is accompanied by an explanatory memorandum for each article. It is available at: https://rm.coe.int/16807473ef.

[144] Universal Charter of the Judges, available at: https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf.

Disciplinary proceedings should be carried out by independent bodies, that include a majority of judges, or by an equivalent body. Save in case of malice or gross negligence, ascertained in a definitive judgement, no disciplinary action can be instituted against a judge as the consequence of an interpretation of the law or assessment of facts or weighing of evidence, carried out by him/her to determine cases.

Disciplinary proceedings shall take place under the principle of due process of law. The judge must be allowed to have access to the proceedings and benefit of the assistance of a lawyer or of a peer. Disciplinary judgments must be reasoned and can be challenged before an independent body.

*Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure. Disciplinary sanctions should be proportionate.*Ascultaţi

2002 – Opinion No. 3 on the Principles and Rules Governing Judges' Professional Conduct, in Particular Ethics, Incompatible Behaviour and Impartiality was adopted by the Consultative Council of European Judges (CCEJ) in Strasbourg on 19 November 2002.[145]

77. As regards disciplinary liability, the CCJE considers that:

I) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed;

II) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings;

III) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence;

iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges) advocated by the CCJE in paragraph 46 of its Opinion N° 1 (2001);[146]

IV) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court;

V) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner.

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[145] Opinion No. 3 on the principles and rules governing judges' professional conduct, available at: https://rm.coe.int/16807475bb.

[146] Note that Opinion No. 3 contains an editorial error. In fact, it refers to para. 45 of Opinion No. 1 of 2001, which concerns the need for an independent authority with considerable judicial representation elected democratically by other judges, which would prepare opinions or recommendations or even decide on judges' careers.

2003 – The Commonwealth Principles on the Three Branches of Government *(Latimer House Principles)* regulate the relationship between the Legislature, the Judiciary, and the Executive in the member states and were agreed by justice ministers and approved by chiefs of governments from the Commonwealth in 2003.[147]

VII (b) Judicial Accountability

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

2007 – Global Corruption Report in 2007 was published by the world association Transparency International.[148]

Accountability and discipline

11. Disciplinary procedures. Disciplinary rules ensure that the judiciary carries out initial rigorous investigation of all allegations. An independent body must investigate complaints against judges and give reasons for its decisions.

12. Transparent and fair removal process. Strict and exacting standards apply to the removal of a judge. Removal mechanisms for judges must be clear, transparent and fair, and reasons need to be given for decisions. If there is a finding of corruption, a judge is liable to prosecution.

13. Due process and appellate reviews. A judge has the right to a fair hearing, legal representation and an appeal in any disciplinary matter.

2008 – The Mount Scopus International Standards on Judicial Independence were adopted in 2008 and updated in 2015.[149]

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[147] The Commonwealth is a voluntary association of 54 states that support one another and cooperate to achieve shared objectives of democracy and development. Latimer House Principles, available at: https://thecommonwealth.org/history-of-the-commonwealth/latimer-principles.

[148] *Global Corruption Report 2007 – Judicial Corruption***.** The report of the world association Transparency International is available at: http://files.transparency.org/content/download/173/695/file/2007_GCR_EN.pdf. This study cites the recommendations from *Executive summary: key judicial corruption problems*.

[149] *The Mount Scopus International Standards on Judicial Independence* include standards concerning the independence of justice for both national and international judicial systems. They are available at: www.jiwp.org/mt-scopus-standards.

5. Judicial Removal and Discipline

5.1. The proceedings for discipline and removal of judges shall be processed expeditiously and fairly and shall ensure fairness to the judge including adequate opportunity for hearing.

5.2. With the exception of proceedings before the Legislature, the procedure for discipline should be held in camera. The judge may however request that the hearing be held in public and such request should be respected, subject to expeditious, final and reasoned disposition of this request by the disciplinary tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

5.3. All of the grounds for the discipline, suspension and removal of judges shall be entrenched constitutionally or fixed by law and shall be clearly defined.

5.4. All disciplinary, suspension and removal actions shall be based upon established standards of judicial conduct.

5.5. A judge shall not be subject to removal, unless by reason of a criminal act or through gross or repeated neglect or serious infringements of disciplinary rules or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge. The grounds for removal shall be limited to reasons of medical incapacity or behaviour that renders the judge unfit to discharge their duties.

5.6. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.

5.7. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

2010 – Recommendation No. (2010)12 on judges: independence, efficiency and responsibilities adopted by the Committee of Ministers on 17 November 2010.[150]

Liability and disciplinary proceedings

66. 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.

69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.

*70. Judges should not be personally accountable where their decision is overruled or modified on appeal.*Ascultaţi

[150] Recommendation No. (2010)12 superseded Recommendation No. (1994)12, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cde7d.

2010 – The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus, and Central Asia were adopted under the auspices of the Organization for Security and Cooperation in Europe at the meeting of experts in Kyiv on 23 through 25 June 2010.[151]

Part III. Accountability of Judges and Judicial Independence in Adjudication

Disciplinary Proceedings

25. Disciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute. Disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts.

Independent Body Deciding on Discipline

26. There shall be a special independent body (court, commission or council) to adjudicate cases of judicial discipline. The bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them. These bodies shall provide the accused judge with procedural safeguards, including the right to present a defence and also the right to appeal to a competent court. Transparency shall be the rule for disciplinary hearings of judges. Such hearings shall be open, unless the judge who is accused requests that they be closed. In this case a court shall decide whether the request is justified. The decisions regarding judicial discipline shall provide reasons. Final decisions on disciplinary measures shall be published.

2010 – Report on the Independence of the Judicial System, Part I: The Independence of Judges was adopted by the European Commission for Democracy through Law *(Venice Commission)*.[152]

32. To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

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[151] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus, and Central Asia, available at: www.osce.org/ro/odihr/73489?download=true.

[152] Report of the Venice Commission on the Independence of the Judicial System, available at: https://rm.coe.int/1680700a63.

2010 – Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct were adopted by the Judicial Integrity Group on 21 and 22 January 2010.[153]

15. Discipline of Judges

15.1. Disciplinary proceedings against a judge maybe commenced only for serious misconduct.[154] *The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed.*

15.2. A person who alleges that he or she has suffered a wrong by reason of a judge's serious misconduct should have the right to complain to the person or body responsible for initiating disciplinary action.

15.3. A specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. In the event of such a conclusion, the body or person should refer the matter to the disciplinary authority.[155]

15.4. The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive.

15.5. All disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence.

15.6. There should be an appeal from the disciplinary authority to a court.

15.7. The final decision in any proceedings instituted against a judge involving a sanction against such judge, whether held in camera or in public, should be published.

15.8. Each jurisdiction should identify the sanctions permissible under its own

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[153] In 2001, on invitation from the UN and Transparency International, a group of high ranking magistrates, chief justices of the Anglo-Saxon system, who had set up the *Judicial Group on Strengthening Judicial Integrity* (in consultation with magistrates from the continental legal system) published the *Bangalore Principles of Judicial Conduct*. The principles were improved in 2002 at a meeting in Hague, the Netherlands. The authors of the code took into account the main international documents in the field prepared by institutions and organizations from various countries. The UN Commission on Human Rights adopted these principles by Resolution 2003/43 of 29 April 2003 and recommended them to member states, intergovernmental bodies, and nongovernmental organizations. In 2007, under the auspices of the UN, experts from all countries gathered in Vienna and developed the *Commentary on the Bangalore Principles*. The Bangalore Principles of Judicial Conduct and the Commentary on the Bangalore Principles of Judicial Conduct are available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

[154] "*Conduct that gives rise to disciplinary sanctions must be distinguished from a failure to observe professional standards. Professional standards represent best practice, which judges should aim to develop and towards which all judges should aspire. They should not be equated with conduct justifying disciplinary proceedings. However, the breach of professional standards may be of considerable relevance, where such breach is alleged to constitute conduct sufficient to justify and require disciplinary sanction*" (official note).

[155] "*Unless there is such a filter, judges could find themselves facing disciplinary proceedings brought at the instance of disappointed litigants*" (official note).

disciplinary system, and ensure that such sanctions are, both in accordance with principle and in application, proportionate.

2015 – The Statement of Principles of the Independence of the Judiciary adopted at the Conference of Chief Justices of Central and Eastern Europe on 14 October 2015.[156]

22. Whenever a judge is sought to be removed, the judge must have the right to adequate notice and to a full and fair hearing. No judge should be disciplined or removed for judicial acts except for gross negligence or intentional disregard of the law.

24. All disciplinary, suspension or removal proceedings must be determined in accordance with previously established standards of judicial conduct and be transparent.

31. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary or in a competent body in which the judiciary has a majority representation or otherwise has an effective role.

2015 – Minimum Judicial Standards V: Disciplinary Proceedings and Liability of Judges were approved by the General Assembly of the European Network of Councils for the Judiciary in June 2015.[157]

Judges should be guided by ethical principles of professional conduct, which include duties and responsibilities breach of which may be sanctioned by disciplinary measures. Judges should not be liable to civil or disciplinary liability in respect of their interpretation of the law, their assessment of facts or their weighing of evidence in determining a case, save for cases of malice or gross negligence. Any disciplinary measures and procedures should be regulated by law. Disciplinary procedures established to provide for the accountability of the Judiciary must not be allowed to become a means of intimidating judges.

The minimum standards that should apply in relation to those principles are:

1. *Guidelines and/or a code of conduct/ethics should be drawn up by judges or a Council for the Judiciary. Lay members may be asked to contribute by advising or guiding on the content of such a code or guidelines.*

2. *There should be a list or description of types of judicial conduct/ethics the breach of which would be unacceptable in any particular country. Such list or description should be provided at national level and not at a European level.*

3. *A judge has a right to a private life but should act with the highest degree of integrity in both his/her professional and private life. Conduct which is capable of bringing the Judiciary into disrepute should be capable of disciplinary action.*

[156] Statement of Principles of the Independence of the Judiciary, available at: https://ceeliinstitute.org/wp-content/uploads/2015/10/Brijuni-statement-in-Romanian.pdf.

[157] Minimum Judicial Standards, available at: www.encj.eu/node/257.

4. *There should be a separate body responsible for receiving complaints and the administration of them, independent of the Ministry of Justice and answerable only to the Judiciary.*

5. *A complainant should normally be identified, however if a complaint can be made by anyone, there needs to be a mechanism or a summary procedure by which the complaint can be dismissed or a decision can be taken that the complaint should not be progressed. The procedure should be in the control of a Judge, or a body of Judges, or a person directly answerable to the Judiciary.*

6. *There should be a person or body responsible to the Judiciary who has power to investigate the complaint. The investigation should include the possibility of receiving written and/or oral evidence.*

7. *The decision making person or body should be regulated by law. The body should include a majority of Judges, and a Judge expert in the jurisdiction and senior to the Judge being investigated. The body in charge of judicial discipline could be the appropriate national Council for the Judiciary (or a specific committee or department within the Council for the Judiciary) or an independent national judicial discipline board or committee independent from the executive and legislature.*

8. *There should be a time limit for the bringing of a complaint which should only be extended in exceptional circumstances.*

9. *There should be a time limit for the concluding of the investigation, the making of a decision, and the imposition of any sanction. The imposition of any sanction should be immediately after the decision on the merits of the case, and in any event without undue delay. These limits should be capable of being extended only in exceptional circumstances, such as the complexity of the investigation, illness of the judge or a criminal investigation.*

10. *It is undesirable to publish the name of the Judge prior to any sanction being imposed. Where a sanction is imposed, the judgment may or may not be published (with or without naming the judge).*

11. *A judge should only be suspended in the most serious and exceptional cases, and where it is necessary for the administration of Justice.*

12. *A judge if suspended should remain on full salary during the investigation, unless the Judge causes significant delay or does not co-operate with the investigation or in other exceptional circumstances. Any salary withheld during the investigation should be repaid if the Judge is not disciplined or later found not to have committed the acts alleged.*

13. *A judge has the right to be legally represented or assisted by a person of his/her choosing if s/he so wishes. A judge acquitted of any allegations should be able to recover his/her legal costs reasonably incurred and where appropriate from the State.*

14. *The following rights should be accorded to the judge subject to disciplinary procedure: 1. to be fully informed of the case against him/her; 2. to representation; 3. [...] to appear before any hearing and be heard, and call evidence either in writing or orally; 4. to be informed promptly if a complaint is to be investigated; 5. to be given a timetable for the investigation of the complaint, and the making of the decision; 6. to be given reasons for any decision made; 7. to appeal.*

15. *Any sanction should be clearly defined, authorised by law and proportionate in principle and application to the matter alleged.*

16. *There should be a right of appeal by way of judicial review or cassation appeal, although this may not apply to decisions of the highest court or legislature.*

2015 – The Bologna-Milan Global Code of Judicial Ethics was approved at the International Conference on Judicial Independence in June 2015.[158]

1.2. A judge shall be seen as having breached a rule of the Code of Judicial Conduct in a way allowing submittal of a complaint to the Disciplinary Authority if his conduct constitutes intentional or gross violation of the code reaching the extent of improper conduct in fulfilling his role or conduct which does not befit the status of a judge.

1.2.1. The procedure of disciplinary measures shall be conducted in full transparency including the final judgement.

1.3. Every jurisdiction should establish citizens' complaints procedure to allow citizens to submit complaints against misconduct or improper conduct of judges. The panel of the review body of the complaints must include lay-people who are not judges or former judges; they shall be the majority of the panel.

7.13.1 Judicial office-holders must also notify the appropriate senior judicial officer if they are the subject of any complaint or disciplinary proceedings by any professional body to which they belong; or if they get into serious financial difficulties particularly where legal proceedings are or are likely to be initiated.

7.13.2. Failure to report proceedings as set out above could result in disciplinary action.

2016 – The Rule of Law Checklist was adopted by the Venice Commission at its 106th plenary session on 11 and 12 March 2016.[159]

I. a) iii. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence?

78. Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s).

2017 – Opinion No. 20 on the role of courts with respect to the uniform application of the law was adopted by the Consultative Council of European Judges of the Council of Europe.[160]

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[158] The Bologna-Milan Global Code of Judicial Ethics complements the Mount Scopus International Standards on Judicial Independence presented earlier and is available at: www.icj.org/wp-content/uploads/2016/02/Bologna-and-Milan-Global-Code-of-Judicial-Ethics.pdf.

[159] Rule of Law Checklist, available at: www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e.

[160] Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, available at: https://www.coe.int/en/web/ccje/the-role-of-courts-with-respect-to-uniform-application-of-the-law.

e. The consequences for judges for not following the established case law

39. Legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary.

2018 – The Declaration on Judicial Integrity was adopted by the United Nations Office on Drugs and Crime and the Global Judicial Integrity Network.[161]

We, the members of Judiciaries and other justice sector stakeholders here gathered, on 9 and 10 April 2018 at the United Nations in Vienna, decide to:

(...)

5. Support the creation and the strengthening of oversight, evaluation, disciplinary and other accountability mechanisms, without prejudice to judicial independence;

2018 – Opinion No. 21 on preventing corruption among Judges was adopted by the Consultative Council of European Judges of the Council of Europe.[162]

30. Lastly, disciplinary proceedings are another important regulatory mechanism to fight corruption. In the CCJE's view, disciplinary proceedings should always be carried out essentially by judicial bodies (such as a disciplinary commission or court, or a branch of the high judicial council). This not only gives the judiciary a good self-regulatory instrument, but it also guarantees that persons with the requisite professional background assess whether the behaviour in question should entail disciplinary liability, and if so what sanction would be adequate and proportionate. Further, judges should always be entitled to appeal disciplinary sanctions rendered against them to a judicial body.[163]

The preventive effect of properly investigating and penalising corruption among judges

48. Evidently, adequate criminal, administrative or disciplinary penalties for a judge's corrupt behaviour, and severe actual sanctions pronounced against corrupt judges, can serve as a strong deterrent and thus have a preventive effect. The CCJE reiterates what has already been said in a more general context in its Opinion N° 3 (2002) on the ethics and liability of judges as regards the criminal and disciplinary liability of judges.

49. Corruption committed by a judge must be addressed in accordance with the principle of proportionality and taking into account its seriousness. It may be sanctioned by a measure

[161] Declaration on Judicial Integrity, available at: www.unodc.org/documents/ji/draft_declaration/Declaration_23042018_final-PDF.pdf.

[162] Opinion No. 21 (2018) on preventing corruption among Judges, available at: https://www.coe.int/en/web/ccje/judicial-integrity-and-corruption.

[163] The European Court of Human Rights [...] has found violations when this was not the case: see *Baka v. Hungary*, 23 June 2016; see also *Paluda v. Slovakia*, 23 May 2017. *(official note)*

removing the judge from office or by another appropriate disciplinary measure following disciplinary proceedings. Criminal acts must be punished by the penalties provided for by criminal law, up to a term of imprisonment. The seriousness of criminal acts can be assessed in particular by their impact on the general public's confidence in the judicial system.

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