

Informative Note

NORLAM's Comments Regarding the Independence of Judges – Appointment of Judges, Tenure, Inviolability, Disciplinary Sanctions etc.

12 November 2009

1.0 INTRODUCTION

The principle of independence of judges is provided in the Constitution of Moldova Art. 116 paragraph (1), the Criminal Procedure Code Art. 26 and the Law on Status of Judge Art. 1 paragraph (3).

Norlam has the impression that some judges not have the apprehension of being independent. We suppose this must be viewed in the light of the present legal framework concerning appointments of judges, including the trial period of 5 years, the re-qualification every 3rd year and the legal framework concerning disciplinary sanctions.

The OSCE Analytic Report of 2008 confirms that judges have stated they have felt pressure from the Moldovan authorities (Vignette 10 page 37). We raise the question if the low percentage of acquittals concerning criminal cases must be viewed in this light.

Appointment of judges is a substantial and a decisive element when it comes to independence of the judiciary and accordingly also when it comes to public confidence in the judiciary. One of the cornerstones of a fair system of justice is the independence of judges. It is necessary to give judges appropriate powers guaranteeing their independence. However, such powers do not authorise them to act in an arbitrary manner.

As mentioned in our note of 29th May 2009 appointments of judges in Moldova seem not to be in accordance with European Standards.

Independence of justice has also to do with several other Basic Principles than appointments of judges and the principle of the irremovability of judges. In this respect we refer to the Basic Principles adopted by the Seventh United Nation Congress on the Prevention of Crime and the Treatment of Offenders (1985) endorsed by the General Assembly.

Besides, we refer to the Venice Commission (1990), the Council of Europe's advisory body on constitutional matters. All Council of Europe member states are members of the Venice Commission, also Moldova. Furthermore we refer to the Council of Europe's Action Plan (2005) promoting common fundamental values as Human Rights, Rule of Law and Democracy. We also mention that The Consultative Council of European Judges (CCJE) in "Opinion no 1" of 2001 have made comments on standards concerning the independence of the judiciary and the irremovability of judges, attachment no 2. We also refer to the EU/Moldova Action Plan approved by Government Decision No. 356 of 22 April 2005; and quote the following under point 2.1: "*Review existing legislation, so as to ensure the independence and impartiality of the judiciary, including the impartiality and effectiveness of the prosecution, and to strengthen the capacity of the judiciary.*" Finally we refer to Action Plan for the Implementation of the European Commission and Council

of Europe Joint Program “Increased Independence, Transparency and Efficiency of the Justice System of the Republic of Moldova” for 2006-2009, approved by Government Decision No. 959 of 22 Aug 2007.

We will in this note make comments on procedures concerning appointments of judges and some of the other Basic Principles.

In our opinion Moldovan practise and legislation is satisfactory at some fields and not in accordance with international legislation and commitments at other fields. Due to a limited time frame, NORLAM has not the capacity of assessing all the Basic Principles concerning independency of judges. We concentrate our comments on the tenure, the Law on Statute of Judge concerning the routines of the Supreme Council of Magistracy, remuneration, inviolability and disciplinary sanctions. We would like to underline that our comments are based on present Moldovan legislation.

We feel there is a need for a speedy change at some fields (for example appointment of judges), others must be developed and accomplished gradually.

2.0 CERTAIN POWERS OF THE SUPERIOR COUNCIL OF MAGISTRACY – LAW ON THE STATUS OF JUDGE(1995), THE LAW ON THE SUPERIOR COUNCIL OF MAGISTRACY (1996) AND THE LAW ON THE QUALIFICATION BOARD AND EVALUATION OF JUDGES (1996)

2.1 The part of this body

According to the European Charter on the Statute for judges (1998) Art. 1.3 and Art. 3.1 an authority independent of the executive and legislative powers should select the candidates who are going to be appointed as judges. This independent body in Moldova is the Superior Council of Magistracy.

The Superior Council of Magistracy shall safeguard that the President appoints persons with satisfactory professional skills and persons who are suitable for the office – based on objective criteria.

The exact composition of the Superior Council of Magistrate does not appear from the Constitution Art. 122. However, according to Law on the Superior Council of Magistracy Art. 3 the board has 12 members. The composition seems securing an independent body in accordance with International standards as 6 of the members are judges (see the European Charter on the Statute for judges Art. 1.3).

We would however call your attention to a certain imbalance of the Superior Council of Magistracy. The General Prosecutor is a mandatory member (*ex officio*) according to the Constitution Art. 122. At the same time, no one from the Moldovan Bar Association is represented. We recommend considering if the Board should be extended with one member from the Moldovan Bar Association, or if one law professor should be replaced by a lawyer. An alternative seems to be that General Prosecutor should not be a member of the Council. We also mention that the International Bar Association concerning a similar body in Russian Federation proposed that the Ombudsman should be a member of the board and not the General Prosecutor. We also raise the question if the Minister of Justice should not be a member of the council in order to increase the independency with regards to the executive power.

We assume that any amendments in this field provide for changing Art. 122 from the Constitution. If the composition of the Superior Council of Magistracy is changed, at least half of the members should still be judges (see the European Charter on the Statute for judges Art. 1.3).

2.2 Powers of the Superior Council of Magistracy

The requirements according to the Law on the Status of Judge Art 6 letter d) the applicant should not have any *criminal records* and should enjoy a *good reputation*. We agree – of course- upon these requirements. We will however emphasize that way of collecting information concerning “good reputation” may violate the principle of objectiveness. We do not know how such information is collected, for instance if the Ministry of Internal Affairs or the Secret Service is contacted. We do not know if the General Prosecutor as a member of Superior Council of Magistracy contributes with information about the applicants. We mention that the Law on the Qualification Board and Evaluation of Judges Art. 15 implies that the Board is quite free to collect information about the applicants nearly wherever the Board wants which may violate the principle of objectiveness in this field.

According to International standards, the UN Basic Principle no 13 concerning appointment and promotion states: ” *Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience*”.. The Consultative Council of European Judges (CCJE) has in Recommendation No. R (94) 12 stated: “*All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency.*” Law on the Superior Council of Magistracy Art.19 (2) and Law on Status of Judge Art 9 coincide with the mentioned Recommendation of the Consultative Council of European Judges. NORLAM just raise the question if Moldovan practise is satisfactory in this field.

In our opinion, any use of statistics requires great caution. In Lithuania, for instance statistics including those statistics relating to reversals on appeal have been used with regards to appointment to a new office or promotion. The CCJE has criticized this practise.

2.3 Recommendations

NORLAM suggests that present routines are to be examined in order to safeguard that they are based on objective criteria and that necessary transparency is satisfied. We mention this as the Law on the Qualification Board and Evaluation of Judges opens for an arbitrary practise.

3.0 APPOINTMENTS - TENURE - UNITE NATIONS BASIC PRINCIPLE NO 12

3.1 Security of tenure

Principle 11 of the Basic Principles provides that

“The term of office of judges, their independence, security, adequate remuneration, conditions of service pensions and the age of retirement shall be adequately secured by law”

Principle 12 reads as follows:

“Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”

Judges in Moldova are with some exceptions appointed for 5 years and thereafter they have to re-qualify every third year, compare Law on the Status of Judges (1995) Art. 11 and Art. 13 compare the Law on the Qualification Board and Evaluation of Judges Art. 23 (2). Art. 24 (1) in the last-mentioned law also opens for an arbitrary practise concerning evaluation of judges every 3rd year. According to Art. 23 (4) a judge may be subjected to evaluation even before the term of 3 years. Chapter II (Evaluation of judges) should be deleted and replaced by provisions regarding continuous training. Our opinion is that focus should be on training and not on control.

As stated in our note of 29th May 2009 the current practise does not seem to be in accordance with European Standards, legislation and commitments. The European Charter, paragraph 3.3 also refers to recruitment procedures providing *“for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis.”* We also mention that UN Human Rights Committee has pointed out that the tenure of judges in Armenia of 6 years is not satisfactory and that the independence of the Judiciary was not fully guaranteed. The same committee has on several occasions forwarded criticism concerning recertification.

We have the opinion that the Moldovan term of 5 years and the requirement of recertification/re-qualification every 3rd year separately does not fully guarantee the independence.

Irremovability of judges is closely related to the legislation on disciplinary sanctions. According to Moldovan Law on the Status of Judge Art 18 the judge shall be irremovable within his/her term of office except for the cases provided for by Art. 25. According to Art. 23 “Dismissal” is one of 5 disciplinary sanctions. In our point of view Article 25 gives grounds for an arbitrary removal of a judge, see for instance Art 25 section 1 letter e) “he/she is professionally incapable” and Art. 25 section 1 letter l) *“his/her limited legal capacity or legal incapacity was confirmed by a final court judgment”*. We also refer to Art 20(5) concerning *“improper level of professional knowledge.”* We suppose it is hard to make such a decision based upon objective criteria. “Wrong” judgments should be appealed, and the judge should not be removed.

3.2 Recommendations

European practise is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.

3.2.1 Appointments until mandatory retirement age

Law on Status of Judges Art 11/13 and Law on the Qualification Board and Evaluation of Judges Art. 23 should be amended so that all new judges are appointed until mandatory retirement age. There is a need for transitional provisions. Sitting judges should also be appointed until retirement age.

3.2.2 Trial period

If the Moldovan Parliament prefers and decides a trial (interim) period with regards to new judges, this trial period should be as short as possible, for instance 1 year until

appointment on mandatory retirement age. In this connection we will quote the Consultative Council of European Judges: “ *The CCJE considers that when tenure is provisional or limited, the body responsible for the objective and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter).*”

4.0 DISCIPLINARY SANCTIONS

We think there is need for a review of the legislation on disciplinary sanctions. We have no information about the present Moldovan practise. But as mentioned above the Law on the Status of Judge may imply an arbitrary removal of a judge. It even opens up for removal due to the content of a judgement, compare Art. 25. We also refer to different provisions of the Law in the Disciplinary Board and Disciplinary Liability, for instance Art. 19 paragraph (2). The legislation should be adjusted to International standards. In order to safeguard the principle of independence there is also need for amendments of Law on the Status of Judges Chapter VI.

We do not in this note go into further details concerning disciplinary sanctions and we confine quoting the Consultative Council of European Judges (2001): “*Insists on the need for precise definitions of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights*”.

4.1 Recommendations

The provisions concerning disciplinary sanctions should be reviewed in order to strengthen the independency and in order to remove the possibilities of arbitrary dismissals.

5.0 REMUNERATION

According to Principle no 11 of the Basic Principles the judges should have adequate remuneration and also pensions. The question of fair and adequate remuneration is important since it may help attract qualified persons and may also make judges less likely to yield to the temptation of corruption and political or other undue influences.

The status accorded to judges should be commensurate with the dignity of their profession and their remuneration should represent sufficient compensation for their burden of responsibilities. These factors are essential to the independence of judges, especially the recognition of the importance of their role as judges, expressed in terms of due respect and adequate financial remuneration.

We also mention that the CCJ has stated that that it is generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in the line with the cost of living.

We have been informed that a first instance judge has a monthly salary of approximately 3 700 lei. At the same time we are informed that the average Moldovan monthly salary amounts to approximately 2 400 lei.

We think there is a need for a considerable increase of salary. But it is difficult or impossible for us to estimate any amount. We are aware of the economic problems in Moldova, and suggest the salary should be increased gradually.

5.1 Recommendation

The level of salaries of the judges should be reviewed. In accordance with the recommendations of the CCJ special legal provision as mentioned above should be considered.

6.0 JUDGE'S INVIOABILITY/PROPERTY LIABILITY OF JUDGES

The principle of inviolability is adopted in Law on the Status of Judge Art. 19. According to Art. 19 paragraph (3) a *“judge may not be held liable for his/her opinions expressed while dispensing justice, as well as for the judgment he/she has passed, unless he/she has been found guilty of a criminal abuse by a final sentence.”* It is unclear in which cases and to what extent a judge may be held liable.

NORLAM has been informed that “some” consider to hold the judge liable by means of having recourse against a judge concerned.

Art 19 paragraph (3) is as mentioned unclear and Art 21 paragraph (3) and (4) seem to give the State and others the possibility of bringing before a court a compensation claim against a judge. This may violate the Basic Principle on Independency of the Judiciary (1985). We quote point 51 section 16 under mentioned principle: *“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.”*

We are however aware of the fact that the European Charter on the statute for judges Art. 5.2 *“may provide that the State has the possibility of applying within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties”*

6.1 Recommendations

In our point of view the Ministry should consider deleting Art. 21 paragraph (3) and (4) in order to avoid civil suits for monetary damages with regards to the exercise of the judicial functions of judges. According to Art. 19 paragraph (3) there will still be an opportunity to hold the judge liable with regards to a criminal case against the judge.

7.0 SUMMING UP

Increasing the independency of judiciary is not done overnight, and the goal must be reached step by step. A significant step would be to introduce appointments until retirement age.

7.1 Composition of the Superior Council of Magistracy

In order to obtain a more balanced composition we recommend considering if the composition of the Superior Council of Magistracy should be altered in the way that a member the Moldovan Bar Association should be a member of the council, alternatively that the General Prosecutor should not be a member. As mentioned we also recommend considering if the Ministry of Justice should not be a member.

7.2 Routines of the Superior Council of Magistracy

There is a need to examine the procedure of collecting information about the applicants in order to safeguard that the selection is based on objective criteria. As mentioned above we also recommend amendments of the provisions opening up for an arbitrary practise.

7.3 Appointments of judges

In order to ensure the independency of the judges all new judges should be appointed to the office until mandatory retirement age. For sitting judges there is a need for transitional arrangements. If possible these amendments should be done as soon as possible.

7.4 Disciplinary Sanctions

In our opinion it is necessary with a revision of the Law on the Status of Judge and Law on the Disciplinary Board and Disciplinary Liability in order to bring Moldovan legislation in accordance with European standards. Possibilities of arbitrary sanctions should be eliminated. This seems to be quite a comprehensive task, among others things coordination of provisions of mentioned laws.

7.5 Remuneration

Increase of wages should be done as soon as possible. We think it is appropriate to set up a goal for the desirable level of wages, for instance desired level within 3 - 5 years. At the same time desired increase per year should be pointed out, with the reservations of the allocation of Parliament.

7.6 Liability of judges

Art. 21 paragraph (3) and Art 21 paragraph (4) should be deleted. Art. 19 paragraph (3) will still open up for reimbursement from a judge in case of a gross and inexcusable breach of the rules governing the performance of judicial duties.

7.7 Consultation of the Council of Europe

We would recommend that drafts concerning possible major amendments as mentioned should be submitted for the body concerned within the Council of Europe for possible comments.

Sincerely yours,

Ivar Svendsgaard,
Judge, Rule of Law Adviser