

Chișinău, 11 December 2013

POLICY PAPER
Reforming the Investigating Judge Institution: Challenges, Risks and Solutions

Authors: Sorina MACRINICI, Vladislav GRIBINCEA, Raisa BOTEZATU

Purpose of the paper: This paper aims at assessing the institution of the investigating judge in the Republic of Moldova, the need for reforming it, and the impact of the 2012 legislative reform on the investigating judge institution.

Executive summary: Starting with 2003, the authorization of searches and interceptions, the issuing of arrests and the complaints against the actions of criminal investigative bodies have been examined by the investigating judges. These are judges selected based on specific criteria. Most of them are former prosecutors or criminal investigative officers. It seems, the professional profile of investigating judges made them act in a too favorable manner towards the prosecutors. Statistics shows that investigating judges have signed off on more than 97% of telephone interception requests and on more than 80% of arrest requests. By 31 December 2012, Moldova had been convicted by the European Court of Human Rights (ECtHR) in 232 cases. At least 41 of these cases (17.7%) are directly or indirectly related to the actions of investigating judges. These figures induce the general perception that in Moldova there is no adequate control over the actions of prosecutors and police officers, and that investigating judges do not react to the abuses committed by them.

In 2012, the Moldovan Parliament passed a law to change the status of investigating judges and required that all investigating judges be evaluated. However, this law failed to prescribe the manner and criteria for evaluating investigating judges, or their future career, which may cause a failure in reaching the purpose of the legislative amendments made in 2012. Thus, the evaluation of their performance is conducted according to the current criteria for the evaluation of judges, which does not contribute to a correct assessment of the capacities of investigating judges of working as common law judges. On the other hand, there is no interdiction for the current investigating judges to continue performing the same duties after being integrated in the general pool of judges and there is no limitation to the number of mandates for holding the position of investigating judge, which may lead to perpetuating the same persons in this position. At the same time, when appointed as investigating judges, common law judges¹ are not adequately trained and prepared for performing the duties of an investigating judge.

The Legal Resource Centre of Moldova (LRCM) comes with a number of proposals, as follows: to establish a timeframe of two years during which the current investigating judges to be integrated as common law judges would not be allowed to act as investigating judges; to establish a two-year mandate for the investigating judges and to forbid holding this position for more than two consecutive mandates; to test the knowledge necessary for being reintegrated as common law judges; to provide adequate training both to investigating judges who want to become common law judges and vice versa; etc.

¹ Judges that deal with all categories of cases, except the cases attributed directly in the competence of investigative judges.

Why is a Reform of Investigating Judge Institution Needed?

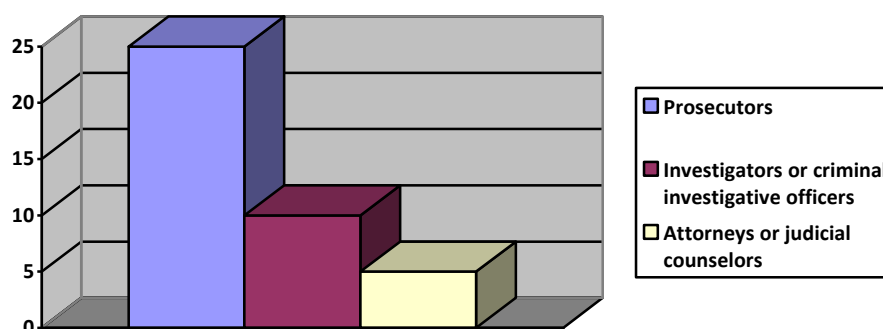
• Investigating Judges Institution

The investigating judges institution was created in 2003 after passing the new Criminal Procedure Code (CrPC). According to the selection criteria introduced in 2003, as investigating judges could be selected the persons with at least 5 years of experience in the position of prosecutor, investigator or criminal investigating officer, or at least 3 years of experience in a judicial position.² In practice, no judges applied for the position of investigating judge.³

The Law no. 247 of 21 July 2006, enforced in summer 2008, unified the conditions for acceding to the positions of common law judge and investigating judge, allowing access to them to the graduates of the National Institute of Justice (NIJ) and other categories of legal professions, such as notaries, attorneys, counselors, court secretaries, etc.⁴ However, before introducing these amendments, most of the investigating judge positions had already been filled.

Most of the current investigating judges are former prosecutors or former investigators and criminal investigative officers. As at 1 November 2013, of the total number of 40 investigating judges (4 positions were vacant), 25 were former prosecutors, 10 had had a past career of investigator or criminal investigative officer, and 5 had either been attorneys or worked as judicial counselors in courts.

Table 1. Past positions held by current investigating judges



• Investigating Judges' Attributions

Investigating judges are specialized judges who, according to Art. 300 of CrPC, conduct the judicial control of the pre-judicial proceedings, and namely:

1. examine the motions of the prosecutor authorizing criminal investigative actions, operative investigative measures and the application of coercive procedural measures (e.g. searches, interception of telephone conversations, seizure of goods, pretrial arrest, etc);
2. examine complaints about the illegal acts of criminal investigative bodies or of the bodies performing operative investigative activities, as well as complaints about the illegal actions of the prosecutor;
3. examine motions for expediting the criminal investigative actions.

² Art. XXIV para (4) of the Law no. 206 On Amending and Completing Certain Legal Acts of 29 May 2003.

³ Legal Resources Centre from Moldova "Execution of Judgments of the European Court for Human Rights by the Republic of Moldova. 1997-2012", Chişinău, 2012, page 145, http://crjm.org/app/webroot/uploaded/Execution_of_Judgments_of_the_ECHR_by_the_Republic_of_Moldova_1997-2012.pdf.

⁴ Art. II para. (6) of the Law No. 247 on Amending and Completing Certain Legal Acts of 21 July 2006.

Investigating judges adopt rulings that must be reasoned.

- **Investigating Judges' Career**

Investigating judges work only in first instance courts and their work is very specific. Therefore, it is nearly impossible for them to advance in their careers through promotion to a hierarchically higher court.

- **Investigating Judges' Activity**

Statistics demonstrates that investigating judges have shown a conduct that is favorable to the accusation.⁵ Investigating judges tend to authorize most of the requests for interception, search or issue and extension of arrest warrants, while the reasoning of documents issued by investigating judges suggests that the examination of most such requests seems to be rather superficial.

➤ *Interception of telephone conversations*

In its judgment *Iordachi and others vs. Moldova*,⁶ the ECtHR stressed the too frequent resort to conversation tapping and the extremely high percentage of authorizations granted in this respect by the investigating judges. Although the judgment *Iordachi and others vs. Moldova* was adopted in 2009, the statistics confirms that the situation has not changed at all in this regard. In 2012 there were examined by 30% more requests than in 2009. Every year, investigating judges sign off on more than 97% of interception requests and this percentage has not essentially changed after the *Iordachi and others* judgment.

Table 2. Authorizations of interceptions of telephone conversations in 2006 and 2009-2012⁷

Year	Requests examined	As compared to the previous year mentioned	Requests signed off	% of requests signed off
2006	1,931		1891	97.9%
2009	3,848	+199%	3803	98.8%
2010	3,890	+1.1%	3859	99.2%
2011	3,586	- 7.8%	3539	98.7%
2012	5,029	+40.23%	4,911	97.6%

⁵ Soros Foundation Moldova "Criminal Justice Performance From A Human Rights Perspective. Assessment of the Transformation of the Criminal Justice System in Moldova", Chişinău, 2009, pages 48, 54, 68, <http://soros.md/files/publications/documents/CRIMINAL%20JUSTICE%20PERFORMANCE%20FROM%20A%20HUMAN%20RIGHTS%20PERSPECTIVE.pdf>;

Soros Foundation Moldova, German Foundation for International Judicial Cooperation "Arrest decisions issued by investigative judges in Moldova. An analysis from an international prospect.", Chişinău 2011, page 33, http://soros.md/files/publications/documents/Report_Stange_Final_0.pdf;

Legal Resources Centre from Moldova "Execution of Judgments of the European Court for Human Rights by the Republic of Moldova.1997-2012", Chişinău, 2012, page 145, http://crjm.org/app/webroot/uploaded/Execution_of_Judgments_of_the_ECHR_by_the_Republic_of_Moldova_1997-2012.pdf;

International Lawyers Commission, Soros Foundation Moldova "Reforming the Moldovan Judiciary: Perspectives and Challenges," Chişinău, 2013, page 21, http://soros.md/files/publications/documents/ICJ_SFM_Report.pdf.

⁶ ECHR, *Iordachi and others vs. Moldova*, judgment of 10 February 2009, §§ 19-54.

⁷ Legal Resources Centre from Moldova "Execution of Judgments of the European Court for Human Rights by the Republic of Moldova.1997-2012", Chişinău, 2012, page 161, http://crjm.org/app/webroot/uploaded/Execution_of_Judgments_of_the_ECHR_by_the_Republic_of_Moldova_1997-2012.pdf. The data for 2012 has been taken from the annual statistical reports submitted by the courts to the Department of Judicial Administration.

➤ *Examination of arrest requests*

Out the 232 ECtHR judgments issued by 31 December 2012 in which Moldova was convicted, in 17 of them the reasoning of arrests by investigating judges was found insufficient. Although the first such convictions were issued as far back as in 2005, so far the situation has not essentially changed in this area. After 2009, the number of requests for pre-trial arrest has insignificantly varied. Nonetheless, related to the total number of criminal cases take to court, the rate of arrest requests has been slowly decreasing. However, the rate of acceptance of requests for pretrial arrests remains higher than 80%.

Table 3. Statistics about requests to authorize arrest examined in 2000, 2006, 2009, 2010, 2011 and 2012⁸

Year	No. of criminal cases sent to court	No. of requests	Related to the no. of criminal cases sent to court	As compared to no. of requests of previous year indicated	Requests signed off by judge	% of requests signed off
2000		6,266			5,104	81.4%
2006	13,517	5,083	36.5%	- 18.9%	4,025	79.2%
2009	9,525	3,427	36%	- 32.6%	2,878	84%
2010	9,941	3,287	32.7%	- 0.4%	2,814	85.6%
2011	10,846	3,306	30.5%	+ 0.5%	2,674	80.9%
2012	11,720	3,342	28.5%	+ 1.1%	2,682	80.25%

Usually investigating judges sign off on arrest requests without a detailed analysis of the accusation's reasons and without reasoning the arrest warrants. As a rule, the arrest request reproduces the allegations brought against the person and the sections on the reasonable doubt and justification of the arrest reproduce the provisions of the CrPC.⁹

In all cases when Moldova was condemned before the ECtHR for insufficient reasoning of court orders authorizing arrests by investigating judges, the arrest and/or extension of the arrest was ordered based on simple reproduction of the legal grounds provided by the CrPC, without indication of concrete grounds that served as the basis for the court to consider as valid the allegations that the applicant could have impeded the proceedings, could hide or commit other crimes, and judges did not try to combat the arguments brought by defense against the arrest.¹⁰

According to a recent study that minutely studied 652 cases on arrest procedures authorized by investigating judges between 1 July and 31 December 2011, the following were found:

- In about 50% of the cases, the investigating judges have signed off on the prosecutors requests for applying and extending arrests, filed by violating the timeframes stipulated in the CrPC (3 hours before expiration of the apprehension and, respectively, 5 days before expiration of the earlier issued arrest warrant),¹¹
- In more than 60% of cases, the minutes did not contain any information about the duration of the court hearing in which the request for authorizing the arrest was examined. In about

⁸ Soros Foundation Moldova "Report on the Observance of the Right to Freedom in the Criminal Investigation Phase in Moldova", Chişinău, 2013, page 15,

http://soros.md/files/publications/documents/Raport_Respectarea_Dreptului_print.pdf (Romanian version).

⁹ Legal Resources Centre from Moldova "Execution of Judgments of the European Court for Human Rights by the Republic of Moldova. 1997-2012", Chişinău, 2012, pages 143-144,

http://crjm.org/app/webroot/uploaded/Execution_of_Judgments_of_the_ECHR_by_the_Republic_of_Moldova_1997-2012.pdf.

¹⁰ Idem, page 142.

¹¹ Soros Foundation Moldova "Report on the Observance of the Right to Freedom in the Criminal Investigation Phase in Moldova", Chişinău, 2013, page 7, http://soros.md/files/publications/documents/Raport_Respectarea_Dreptului_print.pdf (Romanian version).

half of the cases for which the duration of the court hearing could be established, the examination of the request lasted up to 30 minutes;¹²

- Although in many cases no evidence was attached to the arrest requests, the latter were accepted by the investigating judge. In about 31% of the total number of arrest cases studied there is evidence that confirms that the criminal case file had also been submitted to the investigating judge. Although this contravenes the European Convention on Human Rights, the judges refused the defense's access to the criminal case file submitted by the prosecutor, invoking the confidentiality of the criminal investigations;¹³
- In less than 45% of the rulings issued by the investigating judges on applying and extending arrest warrants the reasonable doubt about the crime committed was invoked, although this is a mandatory condition for the arrest;¹⁴
- In only 28.5% of rulings by investigating judges for applying or extending arrest warrants an alternative for the arrest was considered, although the arrest cannot be approved if other preventive measures prove sufficient;¹⁵
- In only about 40% of rulings by investigating judges for applying and extending arrest warrants the arguments of the parties were examined and rebutted;¹⁶
- In only about 30% of rulings by investigating judges for applying and extending arrest warrants the ECHR caselaw was invoked.¹⁷

- **Monitoring Investigating Judges' Activity**

Investigating judges examine various categories of cases. As a rule, their rulings are irrevocable from issuance. The only exception from this rule are the rulings on preventive measures, which can be appealed with cassation. Out of the circa 22,000 cases examined in 2011 by the investigating judges, only about 3,300 cases referred to preventive measures, which accounts for about 15%. The other 85% of the rulings did not undergo a judicial control, as provided by the law. The statistics in the table below shows the number of arrest requests authorized as compared to the number of cases annually examined by investigating judges.

Table 4. Statistics about the investigating judges' activity in 2006, 2009, 2010 and 2011¹⁸

Year	Search authorized	Seizure of objects and documents authorized	Seizure of correspondence authorized	Interception of conversations authorized	Complaints against actions of the criminal investigation body examined	Arrest requests examined	Total
2006	3,515	882	200	1,931	1,995	5,083	13,606
2009	5,437	1,890	57	3,848	1,985	3,427	16,644
2010	7,453	3,182	83	3,890	1,932	3,287	19,827
2011	8,759	3,939	160	3,586	2,190	3,306	21,940

¹² Idem, page 8.

¹³ Idem, pages 7-8.

¹⁴ Idem, pages 76.

¹⁵ Idem, page 91.

¹⁶ Idem, page 94.

¹⁷ Idem, page 97.

¹⁸ Legal Resources Centre from Moldova "Execution of Judgments of the European Court for Human Rights by the Republic of Moldova. 1997-2012", Chişinău, 2012, page 145.

http://crjm.org/app/webroot/uploaded/Execution_of_Judgments_of_the_ECHR_by_the_Republic_of_Moldova_1997-2012.pdf.

What Is the Reform of the Investigating Judge Institution About?

- **Law No. 153 of 5 July 2012**

The legislation passed in 2003 turned investigating judges into a separate group of judges, with special conditions for appointment, special competences, and reduced opportunities for career promotion. This has led to serious issues related to the efficiency of and trust in investigating judges. The Law no. 153, in force as from 31 August 2012, came to solve these gaps. The law provides that investigating judges should be re-evaluated and in case of a successful evaluation, they should be reconfirmed in their positions of common law judges. The Law no. 153 also provides for the appointment of common law judges for a determined period of time for carrying out the duties of an investigating judge.

Art. VIII para. (3) of the Law no. 153 provides for the following in regard to *the integration of current investigating judges in the general pool of judges*:

- (1) Within 3 years from the coming into effect of the Law no. 153 (i.e. by 31 August 2015), acting investigating judges may request the Superior Council of Magistracy (SCM) to be reconfirmed as judges within the same court;
- (2) Investigating judges shall be reconfirmed in the position of judges in the same court only after (a) performance evaluation; and (b) after having taken training courses at the National Institute of Justice;
- (3) Investigating judges shall be reconfirmed in the position of judge at the proposal of the SCM, by a decree of the Moldovan President.

The appointment of new investigating judges is to take place at the proposal of the chief judge made to the SCM for appointing one or more judges as investigating judge from among the court's judges. According to Art. VIII para. (7) of the Law no. 153, the SCM was to develop and adopt a regulation on the procedure and conditions for appointing investigating judges.

- **SCM Regulation no.145/6 on the Procedure and Conditions for Appointment of Investigating Judges, of 12 February 2013 (SCM Regulation)**

The SCM Regulation reproduces the provisions of the Law no. 153, introducing the following new elements in the procedure of *appointment of investigating judges* from among common law judges:

- (1) Judge's consent to holding the position of investigating judge;
- (2) At least 3 years of experience in the position of judge;
- (3) Participation in continuous training courses at NIJ dedicated to investigating judges;
- (4) An investigating judge's mandate shall be up to 3 years;
- (5) Existence of the decision of the College for the Evaluation of Judicial Performance;
- (6) Reducing the timeframe for starting the procedure of reconfirming common law judges in their position by 6 months before the deadline established by law (i.e. by 1 March 2015)

What Are the Risks of the Reform of Investigating Judge Institution?

The reform of the investigating judge institution proposed by the Law no.153 raises the following concerns:

- (1) The legislative amendments do not clearly define if the current investigating judges can be reappointed to perform the duties of an investigating judge. Taking into account the fact that the reform of the investigating judge institution aims at enabling a better control

- over the quality of the investigating judge's work¹⁹ as well as the questionable reputation of many of the current investigating judges, this issue is crucial.
- (2) The SCM regulation indicates that an investigating judge's mandate is of up to 3 years but does not contain limitations about the number of consecutive mandates that can be exercised. There is a possibility that upon expiration of the mandate the same investigating judges may be again appointed to the same position countless times, which may lead to perpetuating the same persons in this position (who may also be the current investigating judges) and would reduce to nil the amendments made to the Law no. 153.
 - (3) The Law no.153 stipulates that, in order to be confirmed in their positions of common law judges, the current investigating judges that would request reconfirmation would undergo a performance evaluation. After being reconfirmed as common law judges, they will be able to examine all categories cases. It is not clear from the text of the law if the evaluation refers to the performance in the position of investigating judge or to another position. In practice, the evaluation of the performance of investigating judges currently conducted by the College for the Evaluation of Judicial Performance refers to their previous work as investigating judge. In such case, the purpose of evaluating the work of investigating judges to assess their knowledge and skills necessary for working as a common law judge is not clear. The evaluation of the work of investigating judges will not be able to say anything about how good they will be as common law judges if the evaluation referred only to their past work i.e. in the position of investigating judges.
 - (4) The Law no. 153 does not clearly provide for the procedure and criteria of evaluation of the current investigating judges in view of reconfirming them as common law judges. The International Commission of Jurists has expressed its concern that many judges with various experience, coming from various backgrounds, will be evaluated together on criteria that have not been clearly established yet.²⁰ When investigating judges are evaluated under the current criteria of judicial evaluation, this does not contribute to an accurate evaluation of the capacities of investigating judges to act as common law judges.
 - (5) Investigating judges have specific functions that are different from those of common law judges. The evaluation of the performance of investigating judges using the evaluation criteria established by the SCM Regulation does not cover the entire range of activities carried out by investigating judges, is not adjusted to the specifics of their function and does not objectively reflect their work.
 - (6) The request formulated for the current investigating judges to follow a continuous training course at NIJ is very vague, without detailing if the attendance by investigating judges of this course will be assessed in any manner during their reconfirmation and if the knowledge and skills acquired during the training will be tested.
 - (7) In May 2013 the SCM established the topic and duration of the continuous training courses at NIJ to become a common law judge. The training courses last for 40 hours and had to include such subjects as civil law, labor law, family law, financial and banking law, administrative review law, civil procedure law, customs law, enforcement of civil judgments, and human right protection from the ECHR prospect. The SCM did not include criminal law and procedure-related subjects in the list of courses. Although the work of investigating judges is directly related to the control of the criminal prejudicial proceedings, they were not trained in the criminal substance and procedural law. In practice, in autumn 2013, the investigating judges attended 40 hours of continuous training at NIJ to become common law judges. The NIJ, however, did not provide to the Evaluation College or the SCM any information about the course content or whether it was in accordance with the SCM decision. Nor was it clear whether the knowledge acquired was sufficient to examine all categories of cases examined by common law judges.

¹⁹ International Commission of Jurists, Soros Foundation Moldova "Reforming Moldovan Judiciary: Perspectives and Challenges", Chişinău, 2013, page 59, http://soros.md/files/publications/documents/ICJ_SFM_Report.pdf.

²⁰ Idem

- (8) The vast majority of the current investigating judges have never worked as common law judges. This hides the danger of having the quality of the act of justice lowered as a result of accepting into the system investigating judges without the necessary experience and knowledge to work as common law judges. On the other hand, if they are appointed as investigating judges, common law judges are not adequately trained or prepared to perform the duties of investigating judges.
- (9) The SCM Regulation stipulates that chief judges shall propose to the SCM the candidate for the position of investigating judge from among the common law judges with the judge's consent. However, the situation when none of the judges has consented is not provided for.

Taking into account the above-said, there is the risk that the current investigating judges may be reappointed to the same position, in the absence of a genuine process of verification of their knowledge and that the existing problems may not be solved.

Proposals

A. Performing the duties of investigating judge in the future:

- (1) Limit the possibility for current investigating judges to be integrated in the general judicial pool of accessing again the mandate of the investigating judge at least for 2 years from being reconfirmed as a common law judge;
- (2) Establish a two-year mandate for the position of investigating judge and forbid holding the position of the investigating judge for more than two consecutive mandates;
- (3) Establish a deadline after which none of the current investigating judges will be able to exert this function and from which the newly appointed investigating judges will start their mandates. This date can be 1 January 2015. According to the Law no. 153, the deadline by which current investigating judges can request to be reconfirmed is 31 August 2015. Given the fact that nearly all investigating judges have already started the reconfirmation procedure, we think the timeframe of 1 year is enough to reorganize this institution and prepare the new investigating judges to take over the position. Establishing this timeframe would give the possibility to bring uniformity and clarity in regard to the reconfirmation of current investigating judges, to the appointment of new investigating judges, continuous training of both investigating and common law judges, assignment of cases to be completed by all judges, and other logistical matters. This will ensure that the rotation of judges takes places at the same time in the entire judicial system. This will contribute to making all processes uniform in the judicial system;
- (4) Newly appointed investigating judges who have not started working in this position yet, should not be assigned new cases or their load should be gradually reduced 3 months before the deadline (1 January 2015), i.e. starting with 1 October 2014. In any case, these judges should not be assigned cases to in the month prior to starting the investigating judge mandate. If they do not complete their cases by the deadline of 1 January 2015, they will be required to complete them at the same time performing the duties of investigating judge;
- (5) If none of the eligible judges in a court has agreed to be appointed as investigating judge, the chief judge shall decide independently, or by drawing lots, on the candidate to be presented to the SCM;
- (6) A vacancy position of investigating judge shall be regulated by the law. At the beginning of the year, the SCM is to appoint, at the proposal of the chief judge, one or more judges to fill in temporarily the vacancy position of investigating judge.

B. Testing the knowledge of current investigating judges to become common law judges

- (7) Introduce a system for testing the necessary knowledge of current investigating judges to work as common law judges. Failing the knowledge test would serve as grounds for

dismissal. This rule is to be applied in regard to those investigating judges who have worked in this position in the period from the passing of the Law no.153 until now, including in regard to those investigating judges who have been reconfirmed as common law judges after the passing of the Law no.153.

C. Training of current investigating judges to be appointed as common law judges

- (8) The training of current investigating judges for reintegration in the general pool of judges is to take place according to a special course that would include the examination in first instance of criminal, contravention, civil, and administrative review cases. The SCM is to check the compliance of the content of the training courses for each investigating judge in part.

D. Training of common law judges to be appointed as investigating judges

- (9) The training of common law judges in view of being appointed as investigating judges is to take place according to a special curriculum for the initial training of investigating judges, developed by NIJ. The duration of the courses must be sufficient to ensure an adequate training. The course must be taken from the appointment as investigating judge until the starting of the mandate.

E. Assessment of the work of investigating judges

- (10) In addition to the existing criteria, we think that in assessing the work of investigating judges, criteria specific to the assessment of investigating judge's work should be used.

This policy brief has been produced with the financial support of Soros Foundation Moldova as part of the project "Contributing to the quality and transparency of the integration of current investigating judges as common law judges." The opinions expressed in this study exclusively belong to the authors and do not necessarily express the position of the donor.