LRCM | LEGAL RESOURCES CENTRE FROM MOLDOVA

L E G A L O P I N I O N

On the Draft Law on the Disciplinary Responsibility of Judges

Drafted by Vladislav GRIBINCEA, Nadejda HRIPTIEVSCHI, Pavel GRECU

Legal Resource Center of Moldova (LRCM)[1]

31 March 2014

[1]The Legal Resource Center of Moldova (LRCM) is a not-for profit non-governmental organization based in Chișinău, Republic of Moldova. LRCM strives to ensure a qualitative, prompt and transparent delivery of justice and effective observance of civil and political rights in Moldova. In achieving these aims, LRCM combines policy research and advocacy in an independent and non-partisan manner. Efficiency of the judicial system is one of the LRCM objectives. In 2011, LRCM participated in drafting the Justice Sector Reform strategy (JSRS) and of the Action Plan for the implementation thereof. In 2011 and 2012, LRCM participated in drafting legislation on judicial organization and on the civil procedure and criminal procedure; in 2012-2013, it was involved in preparing the draft law on the disciplinary liability of judges; and 2013–2014, it has been fully involved in preparing the draft legal acts on the prosecution reform. Since 2011, LRCM has been monitoring the work of the Superior Council of Magistracy, and since 2014 – also of the Disciplinary Board thereof.

This policy paper has been prepared with the financial support of Soros Foundation-Moldova under the project "Promoting Efficient Judicial Accountability Mechanisms in Moldova". The opinions expressed in this study belong exclusively to the authors and do not necessarily reflect the position of the donor.

Content

GENERAL ISSUES 3

CONTEXT AND PROBLEMS 3

POSITIVE ASPECTS OF THE DRAFT LAW 5

1. Clearer definition of disciplinary offences 5

2. Providing for a procedure for registration and preliminary verification of complaints 6

3. Increased timeframe for holding judges responsible for disciplinary offences and more severe disciplinary sanctions 6

4. Possibility of withdrawing social benefits when disciplinary proceedings result in removal from office 7

5. Excluding the need to validate disciplinary board decisions 8

6. Selection of disciplinary board members among civil society representatives 9

DRAFT LAW ASPECTS REQIURING IMPROVEMENT 10

1. Termination of disciplinary proceedings 10

2. Introduction of the admissibility procedure 11

3. Draft law does not explain who presents the accusation before the Disciplinary Board 13

4. Appealing SCM decisions on disciplinary proceedings to court 14

SUMMARY OF RECOMMENDATIONS 14

GENERAL ISSUES

Establishing an efficient and transparent mechanism for the disciplinary investigation of judges will contribute to judicial accountability and increased trust of the society in the judicial system. This is also an objective of the justice sector reform launched in 2011.

On 29 October 2013, the Government submitted to the Parliament for consideration a draft law on the disciplinary liability of judges (hereinafter *the Draft Law*), registered in the Parliament under no. 423. This Opinion is prepared by LRCM in the context of the consideration of this draft law by the Parliament.

The Draft Law aims at establishing a mechanism for the disciplinary investigation of judges that is different from the current one that was criticized for the insufficient regulation and confusing character of the competences of the bodies responsible for the disciplinary proceedings. The Draft Law suggests a number of improvements in regard to the disciplinary liability of judges. At the same time, the Draft Law has certain deficiencies that may affect the efficiency of the mechanism of disciplinary investigation of judges, which may be corrected in the Parliament.

This paper refers to the main innovations proposed by the Draft Law. It refers both to the positive aspects and to matters that in our opinion may affect the efficiency of the mechanism for holding judges disciplinarily liable. This paper does not refer to legislative technique matters or to the formulation inaccuracies, mentioned in the Joint Opinion of the Venice Commission and ODIHR of 24 March 2014[2].

CONTEXT AND PROBLEMS

The institution of disciplinary liability of judges is regulated by the Law no.950 on the Disciplinary Board and Disciplinary Liability of Judges of 19 July 1996 (hereinafter *the Disciplinary Liability Law*), the Law no. 544 on the Status of the Judge of 20 July 1995 (hereinafter *the Judge Status Law*), and the Law no. 947 on the Superior Council of Magistracy of 19 July 1996 (hereinafter *the CSM Law*). Also, Art. 123 para. 1 of the Constitution prescribes that the Superior Council of Magistracy (hereinafter the *SCM*) shall ensure application of disciplinary measures against judges.

Although Art. 22 of the Judge Status Law includes a list of disciplinary offences by judges that seems to be exhaustive, Art. 21 of the same Law suggests that judges may be held disciplinarily liable also for other behavior that may harm the interests of the office and the prestige of justice. All the complaints against judicial behavior received by the SCM are assigned for examination to the Judicial Inspection. Starting disciplinary proceedings against judges is the exclusive competence of

[2]The Opinion is available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282014%29006-e.

the SCM members who may rule to start disciplinary proceedings based on the information received from the Judicial Inspection or based on any other information. Disciplinary cases are examined by the Disciplinary Board of Judges which after examining it in an adversarial procedure may impose a disciplinary sanction or may reject the proposal for imposing a disciplinary sanction. Although the Disciplinary Liability Law does not require confirmation of the Disciplinary Board decisions, the SCM Law stipulates that the Disciplinary Board decisions should be validated by the SCM. On the other hand, the Disciplinary Board decision may be appealed to the SCM by the person who filed the proceedings or by the respective judge. The SCM may invalidate the Disciplinary Board decision and adopt another one. Despite the existence of the institution of validation and appeal against Disciplinary Board decisions, the SCM Law does not mention if the SCM should retry the case. In practice, the SCM was examining the issues of validation or appeals against the decisions of the Disciplinary Board in short proceedings, without a direct examination of the evidence. The SCM very often invalidated the Disciplinary Board decisions and adopted its own decisions, amending the disciplinary sanctions, but without reasoning such amendments. Since 2012, the SCM decisions may be appealed to the Supreme Court of Justice (SCJ)only in the part related to the issuance/adoption procedure.

The table below presents information about the complaints filed with the SCM against judicial behavior and the disciplinary proceedings started[3]:

Year	Total complaints	Disciplinary proceedings started
2010	2,236	52
2011	2,104	60
2012	2,320	49
2013	2,577	58

The above figures confirm that in the period from 2010 to 2013 the SCM members started disciplinary proceedings in less than 3% of the total number of complaints filed. In fact, this percentage is even smaller because many of the disciplinary proceedings were started not based on the complaints received by the SCM but based on the information acquired by SCM members from other sources.

Due to the imperfect legislation, insufficient reasoning of SCM decisions and of the apparently mild disciplinary sanctions imposed on judges by the SCM, the society has the impression that the SCM acts as a trade union of judges rather than as a body meant to ensure order among judges. Therefore, in 2011, the European Union experts found that judicial accountability was a priority[4].

For the aforesaid reasons, the JSRS prescribes revising the range of disciplinary offences and the disciplinary proceedings to adjust them to the real situation in the system and to the European

[3]According to the data presented in the SCM activity reports that can be accessed at: http://csm.md/index.php?option=com_content&view=article&id=108&Itemid=130&lang=ro.

[4]See: http://crjm.org/files/reports/EU.assesment.justice.sector.2011.pdf, para. 59-52.

standards (the specific intervention area 1.3.8). The Draft Law was prepared in order to implement the JSRS. It was submitted for endorsement to the Venice Commission and ODIHR. They welcomed the Draft Law but formulated the following main objections:

a) Restrain the possibility of judge removal from office to only serious cases or of repeated commission of disciplinary offences;
b) Regulate by law the criteria for selecting the Disciplinary Board members from the civil society and the mechanism for establishing the commission to select such members;
c) Restrict the right to file a complaint against a judge only to the persons who have a "legit interest"; and
d) Strengthen the role of inspector judges and entitle them to start disciplinary proceedings against judges.

POSITIVE ASPECTS OF THE DRAFT LAW

1. Clearer definition of disciplinary offences

The current legal framework clearly defines the infringements for which judges may be held disciplinarily liable. Although Art. 22 of the Judge Status Law includes a list of disciplinary offences that seems to be exhaustive, Art. 21 of the same Law suggests that judges may be held disciplinarily liable also for other behavior that may harm the interests of the office and the prestige of justice. An exhausting listing of the disciplinary offences of judges is a good practice that is in accordance with the international standards.[5]

The Draft Law provides for a clearer framework on the disciplinary infringements. Art. 4 para. 1 of the Draft Law provides an exhaustive list of 15 disciplinary offences. In order to cover the entire range of possible situations, the last point of para. 1 stipulates that disciplinary infringement can be any other manifestations that harm the professional honor or probity or the prestige of justice. Seven new disciplinary offences have been introduced; five offences that can be found in the current law have been set forth in a different wording, and five other disciplinary offences that are contained in the current law have not been included in the Draft Law. As established in the advisory opinion of the Venice Commission and ODIHR, the wording of some of the disciplinary offences is too vague and must be improved.

The violation of the Judge Code of Ethics does not represent a disciplinary offences as such; however, some of the severe violations of the Code of Ethics are incriminated through the 15 disciplinary offences listed in Art. 4 para. 1 of the Draft Law. In order to ensure observance of professional ethics by judges, we recommend establishing a mechanism for making recommendations to judges regarding their behavior in situations that may raise questions. Such recommendations may be made upon the judges' request or *ex officio* by the SCM, the Judicial Inspection, or the Disciplinary Board. The recommendations should be made public to allow the other judges to learn about them and observe them.

[5] See Opinion of CCJE no.3(2002), para. 63-65.

2. Providing for a procedure for registration and preliminary verification of complaints

The Disciplinary Liability Law does not prescribe a procedure for filing the complaints of judge disciplinary offences with the SCM. Taking into account that the disciplinary proceedings may be started by the SCM members, it seems that the complaints against judge behavior filed with the SCM are examined according to the Law on Petitions. This practice is questionable since the legal regime of petitions is different from that of disciplinary liability complaints. Examining a complaint under the Law on Petitions cannot lead to disciplinary proceedings or to an in-depth investigation of the circumstances.

The current procedure is problematic also due to the fact that the Judicial Inspection does not have a clearly determined role in the disciplinary procedure. On the one hand, the investigation of disciplinary cases is part of its mandate and, on the other hand, the Inspection cannot start the disciplinary proceedings or present its position in the Disciplinary Board proceedings. Only when the Disciplinary Board considers it necessary can it request the Inspection to add the information the latter found during the preliminary verification. As a result, in practice there is a gap between the complaint verification procedure conducted by the Judicial Inspection and the examination of the case by the Disciplinary Board.

The Draft Law solves the current problem with the complaint filing procedure, providing a clear procedure for filing complaints against disciplinary offences, and strengthens the role of the Judicial Inspection in investigating disciplinary cases. Art. 21 of the Draft Law stipulates that all the complaints against disciplinary offences are registered and transmitted for examination to the inspector judge. The Draft Law describes in detail the manner of examination of such complaints and excludes their examination according to the Law on Petitions. Also, the Draft Law makes it the task of the Judicial Inspection to verify all the complaints and allows it to return the complaints that do not comply with the form or content requirements (Art. 22 para. 1) or to reject the clearly groundless complaints (Art. 22 para. 2). A returned complaint does not exclude the possibility of filing another one after the flaws have been removed. A rejected complaint excludes such a possibility. However, the decision of the inspector judge to reject a complaint must be reasoned and can be appealed within 15 days to the Disciplinary Board. This is an important provision, aimed to prevent potential abuses by the Judicial Inspection.

The Draft Law does not allow inspector judges to start disciplinary proceedings and establishes a rather complicated mechanism for starting the disciplinary proceedings. We consider this to be a significant deficiency of the Draft Law and are proposing below how to remedy it (section on matters to be improved).

3. Increased timeframe for holding judges responsible for disciplinary offences and more severe disciplinary sanctions

According to Art. 11 of the Law on Disciplinary Liability, the timeframe for holding someone disciplinarily liable is one year from the commission of the act. The Draft Law increases this timeframe to two years. The current law provides for an exception from the one-year timeframe. If the illegality results from a court judgment, the one-year timeframe shall be calculated from the

date when the judgment of the hierarchically higher or international court became final and not from the date when the act was committed. The Draft Law provides that in such case the timeframe for holding one disciplinarily liable shall be one year. In view of excluding arbitrariness, the Draft Law also provides that in such situation, holding someone disciplinarily liable cannot take place in more than five years from the commission of the act. The provisions of the Draft Law on the timeframes for holding judges disciplinarily liable are salutary.

Art. 19 of the Law on Disciplinary Liability provides for the following disciplinary sanctions: warning, reprimand, severe reprimand, and removal from office. Chief judges and deputy chief judges can also be removed from their offices. The new Draft Law suggests excluding the sanction "severe reprimand" because it is practically identical to the sanction "reprimand" and does not constitute an adequate individualization of the sanction. Instead, the sanction "reduction in salary" was added. This sanction implies reducing one's monthly salary by 15% to 30%, for a period of three months to one year.

The regulations proposed by the Draft Law on Disciplinary Sanctions are salutary and we support them. Excluding severe reprimand is justified because it does not present any clear difference from the reprimand. Reduction in salary as a disciplinary sanction against judges is used in other countries as well, e.g. in Austria, France or Romania. The Venice Commission and ODIHR suggested that this sanction be imposed only for deliberately committed infringements. The Draft Law could be adjusted in this sense.

Another positive aspect of the Draft Law is that it establishes different consequences for different sanctions. For example, the timeframe of action of the warning is one year and the timeframe of action of reprimand is two years. According to Art. 7 para. 5 of the Draft Law, during the action of a disciplinary sanction, the judge cannot be transferred, appointed as chief judge or deputy chief judge, or promoted to another court. The Draft Law (Art. 7 para. 5) also proposes that the judge who has been sanctioned by removal from office should not be able to be elected or appointed for five years to a position within the SCM or its subordinated bodies or work at the National Institute of Justice either in administrative positions or as trainer. For judges dismissed from the position of chief judge or deputy chief judge, the Draft Law proposes a two-year interdiction from the day the disciplinary sanction was imposed on appointment or promotion as chief judge or deputy chief judge. A differentiation of the consequences of the disciplinary sanctions is important for the clarity of the legal framework and individualization of the sanctions to be imposed in each case depending on the circumstances.

4. Possibility of withdrawing social benefits when disciplinary proceedings result in removal from office

When a judge honorably resigns from office, he receives a generous one-time allowance and a special pension. According to the 2012 amendments to the Judge Status Law, if a judge is dismissed from office as a result of disciplinary proceedings, he shall not benefit from the allowances he would benefit from in case of honorable resignation.

The current legislation does not provide for any impediments in resignation by the judges who have been started disciplinary proceedings against.[6] At the same time, according to the current legislation, disciplinary proceedings may be started only against an active judge. That is why in the past years the SCM/Disciplinary Board was suspending the disciplinary proceedings against the judges who resigned after the disciplinary proceedings had been started against them. As a result, the effect of the 2012 amendment was seriously affected. Moreover, afterwards those judges had the right to be accepted virtually unconditionally to the legal profession[7], which seriously affects the image of the legal profession.

Art. 7 para. 1 of the Draft Law stipulates that the disciplinary sanctions can also be imposed on resigned judges, and para. 6 of the same Article stipulates that if the sanction of removal from office is imposed on a resigned judge, his resignation allowance shall be withdrawn and his special pension shall be recalculated. These provisions solve the practical problem described in the previous paragraph.

5. Excluding the need to validate disciplinary board decisions

According to Art. 21 of the SCM Law, the Disciplinary Board decisions must be validated in order to become effective. This provision raises the issue of whether the Disciplinary Board ought to exist at all. On the other hand, the European standards recommend dividing the body of judicial self-administration that deals with the administration of the system from the body that examines the disciplinary offences[8], in order to avoid too much concentration of competences in one body. Hence, the existence of the Disciplinary Board is in line with the European standards. However, maintaining this body without giving it the right to make decisions that would unconditionally produce effects is unjustified.

On the other hand, the practice of having the decisions validated by the SCM has been a problematic one because the SCM does not validate the decisions automatically but can change a decision of the Disciplinary Board without having the substance of the case retried and, as a rule, without explaining the reasons for its decision. Moreover, in practice there have been incidents when a Disciplinary Board decision was invalidated although it had not been appealed.[9] Such a practice creates confusion both for the Disciplinary Board and for the judges and parties.

---

[6]For more details, see the Monitoring Report "Transparency and Efficiency of the Superior Council of Magistracy of Moldova in 2010-2012", pages 62-63, prepared by the Legal Resource Center of Moldova.

[7]According to Art. 10 of the Law on the Legal Profession, the persons having length of service of more than yen years as judge, upon their request, can be accepted to the legal profession without having to take an exam or undergo internship. According to the judicial practice, the fact that the judge upon resignation has disciplinary proceedings pending before him does not represent an obstacle for his acceptance to the legal profession.

[8]See e.g. the Kiev Recommendations on the Judicial Independence in Eastern Europe, South Caucasus and Central Asia, the OSCE Office for Democratic Institutions and Human Rights and the Research Group Max Planck Minerva on Judicial Independence.

[9]For more details, see the Monitoring Report "Transparency and Efficiency of the Superior Council of Magistracy of Moldova in 2010-2012", quoted above, pages 60-62.

The Draft Law excludes the institution of validation of Disciplinary Board decisions. The SCM claims that validating the Disciplinary Board decisions is necessary because this derives from Art. 123 of the Constitution that lists, among the SCM competences, ensuring judge appointment, transfer, deployment, promotion and imposition of disciplinary sanctions against judges. The authors do not see a constitutionality issue in excluding the validation of Disciplinary Board decisions. The Constitution does not state that the SCM shall impose disciplinary sanctions but only shall 'ensure' their imposition. The Disciplinary Board operates under the SCM and the latter ensures its operation. The constitutional provision was introduced to ensure the independence of judges. The independence of the Disciplinary Board was never questioned. Moreover, disciplinary boards issue decisions that generate effects without validation by the SCM in Italy or Spain. Validation is neither stipulated by the current Disciplinary Liability Law. Moreover, the 2012 amendments to the SCM Law and to the Law on Judge Selection, Career and Promotion that underlay the creation of the Judge Performance Evaluation Board and of the Judge Selection and Career Board do not provide any more the validation of their decisions by the SCM, although Art. 123 of the Constitution refers also to the appointment and promotion of judges by the SCM. Accordingly, we salute and support the cancelation of the institution of validation of Disciplinary Board decisions, as proposed by the Draft Law.

6. Selection of disciplinary board members among civil society representatives

The current Disciplinary Liability Law stipulates that the Disciplinary Board is to be made up of ten members, five of whom should be judges elected by their colleagues and five should be university lecturers. Two of the five lecturers are to be appointed by the SCM and three - by the minister of justice. The current legislation does not provide that the appointment of lecturers should take place on a contest basis or establish specific requirements to the university lecturers.

The Draft Law stipulates that the Disciplinary Board should be made up of five judges and four non-judges. The four non-judges do not have to be university lecturers but can be any representative of the civil society who has had irreproachable reputation and experience in the legal area for at least seven years. The four members of the civil society should be appointed by the minister of justice on public contest basis. The contest is to be organized by a special commission who is made up also of appointed members of the SCM. However, the Draft Law does not contain details about the number of members of the commission or the number of members appointed by the SCM.

The composition of the Disciplinary Board, as stipulated in the Draft Law, increases the control of the judicial power over the Board. Unlike the current composition of the Board, the Draft Law stipulates that most of the Board members should be judges (5 out of 9). The spirit of corporatism develops in any professional circle, including among judges. In order to reduce the risk that Disciplinary Board decisions are affected by corporatism, the suggestion was that four of the nine members to not be judges but to be appointed by the minister of justice. However, in order to ensure the independence of the four representatives of the civil society, it was established that the minister of justice should virtually have no discretion in appointing them. The four candidates are to be appointed by a special commission to include also persons appointed by the SCM. The participation of persons appointed by the SCM in this commission reduces the risk of manipulation of the contest. The contest it to be made public, which would further reduce the risk of

manipulation. Moreover, the minister of justice would be able to appoint civil society representatives who are not dependent on the state administration. In such circumstances, one would not be able to say that the appointment of four members of the Disciplinary Board by the minister of justice does not pursue a legit goal or determines this body's dependence. On the contrary, the provisions of the Draft Law ensure the independence of the Disciplinary Board better than the provisions of the current law.

The Venice Commission and ODIHR have supported the inclusion of four civil society members in the Disciplinary Board. According thereto, the participation of the civil society in the board would ensure transparency and involvement of the community in the disciplinary proceedings. This would also help fight the risk of corporatism. Nor did the Venice Commission and ODIHR have objections to having four members appointed by the minister of justice, provided the minister's task was formal and limited to confirmation of the candidates proposed by the selection commission. Although this is the essence of the mechanism, the Draft Law does not expressly regulate this, and therefore, this deficiency is to be removed. Also, the law is to regulate in detail the composition and operation of the commission to select the Disciplinary Board members.

DRAFT LAW ASPECTS REQIURING IMPROVEMENT

1. Termination of disciplinary proceedings

The Draft Law gives exclusive right to a panel of 3 members of the Disciplinary College (the admissibility panel) to refuse starting the disciplinary proceedings.[10] The decision to start or refuse starting the disciplinary proceedings must be made based on the materials submitted by the Judicial Inspection. We think that giving exclusive competence to the panel of 3 members of the Disciplinary Board to refuse starting the disciplinary proceedings when the Judicial Inspection requests it, would greatly hinder the Board's work. This procedure has been introduced to protect those who filed the complaints from Judicial Inspection abuses. We think this procedure is not justified and suggest renouncing this initiative and giving to the Judicial Inspection the competence to terminate the disciplinary proceedings, even after ten days, for the following reasons:

a) <u>The procedure does not constitute an efficient mechanism for defending the rights of the person who has filed the complaint:</u> The admissibility panel can examine the case prepared by the Judicial Inspection also in the absence of the person who has filed the complaint and without additional verification. In such circumstances, having in mind the high number of complaints against judge behavior filed annually with the SCM, it is unlikely that the panel would have an opinion different from that of the inspector judge. Furthermore, if the inspector judge is of bad faith, he may reject the complaint at any time, within ten days from its receipt;
b) <u>Failure to allow that the procedure be terminated by the Judicial Inspection is illogical:</u> It is true that the inspector judge can reject the clearly groundless complaints within ten days.

[10]Except for the complaints that do not follow the form requirements or that are clearly groundless, when the inspector judge can terminate the procedure. For more details see Art.22 of the Draft Law.

However, it is hard to explain why he would not be able to reject a complaint if initially the complaint did not seem groundless but after thorough verifications the facts stated in the complaint were found to not be true. The ECHR had previously a procedure similar to the one proposed in the Draft Law. In 2011, in view of enhancing efficiency, the idea of having a panel of three judges examine the cases that had no chances of succeeding was renounced;

c) The procedure would not permit the Disciplinary Board to focus on the truly important cases: The Disciplinary Board members do not work permanently. According to the statistics shown in the table below, more than 2,000 complaints of disciplinary offences are examined per year. A considerable part thereof is not clearly groundless. Examining several hundreds of cases by the admissibility panels would require increased efforts from the Disciplinary Board members. To recall that in the past years the Disciplinary Board has examined up to 70 cases annually and the Board members noted that their work in the Board was a considerable workload for them;
d) The Judicial Inspection load would be increased: Having dismissed the proceedings that do not have chances of success by the admissibility panel would require increased efforts from the Judicial Inspection;
e) The decisions of the Judicial Inspection can be appealed: If the Judicial Inspection is given the right to refuse starting disciplinary proceedings, it would be possible to appeal its refusal to the Disciplinary Board that would be able to examine the appeal in plenary meeting or in a panel of three members. In case of illegality, this can be removed by the Board itself or instructions may be given to the Judicial Inspection on their removal.

Accordingly, we recommend introducing the right of the Judicial Inspection to terminate the disciplinary proceedings at any stage thereof until the case is transmitted to the Disciplinary Board, with the possibility of appealing such decision to the Disciplinary Board or to a Board's panel.

2. Introduction of the admissibility procedure

In the current legislation the admissibility procedure in disciplinary proceedings is missing. Nonetheless, the legislation provides for a cumbersome procedure of starting disciplinary proceedings. According to Art. 10 of the Disciplinary Liability Law, only the SCM members have the right to initiate disciplinary proceedings. If the disciplinary proceedings are initiated against a member of the SCM or of the Disciplinary Board, they can be initiated only on the initiative of at least three SCM members. The holders of the right to initiate the disciplinary proceedings can initiate them either based on a complaint or based on individually acquired information. The Judicial Inspection only has the role to verify the complaints received by the SCM. The recommendations of the inspector judge are not mandatory for a SCM member. As a rule, the complaints filed with the SCM are not discussed at the SCM meeting but are made the task of a SCM member that coordinates the work of the inspector judge responsible for the complaint. In case the SCM member responsible for the complaint refuses to initiate the disciplinary proceedings, the person who filed the complaint shall be notified through a letter signed by the SCM member, which usually contains a short reasoning. Due to this cumbersome procedure, in the past years, the SCM members initiated disciplinary proceedings in less than 3% of the complaints received (for more information, see the table below).

The Draft Law excludes the stage of starting the disciplinary proceedings but introduces the procedure of admissibility of the disciplinary proceedings and transfers the exclusive right of starting disciplinary proceedings from the SCM member to a panel made up of three Disciplinary Board members. The three-member panel of the Disciplinary Board is to decide, based on the materials submitted by the Judicial Inspection, whether the case is worth examining in first instance by the Disciplinary Board or whether there is no reasonable doubt that a disciplinary offences has been committed. It seems that this procedure was introduced to prevent abuses by the Judicial Inspection.

The authors of this paper do not support the admissibility procedure prescribed by the Draft Law and propose renouncing it. Our position is resumed to the fact that any complaint that has not been rejected by the Judicial Inspection for form reasons or for being clearly groundless is to be examined by the Disciplinary Board. Our position is based on the following reasoning:

a) The proposed procedure makes it harder to examine disciplinary cases: In any serious disciplinary case there will be two decisions, which will inevitably require increased efforts. The ECHR had a similar procedure until 1998. It was renounced in favor of an enhanced mechanism of examination of complaints;
b) Inspector judges are independent: According to pts. 3.1-3.3 of the Regulation on the Organization, Competence and Operation of the Judicial Inspection[11], the inspector judges enjoy inviolability similar to judges and are elected by the SCM on a contest basis. In order to become inspector judge, one must have irreproachable reputation and length of service of at least 7 years. Hence, there are safeguards for the independence of the inspector judges against undesired interventions from outside;
c) The admissibility procedure cannot efficiently protest against abuses: The Judicial Inspection operates under the SCM. Therefore, it is hard to suppose that it will try to put pressure on the judges. However, if such things do happen, they cannot take place without the SCM knowing about it, since the judges can complain to the SCM at any time. In case the SCM tolerates the situation, it is little likely that the judge would be offered adequate protection by the Disciplinary Board, having in mind that most likely the case will later be examined by the SCM;
d) The admissibility procedure does not protect in any way the restriction of a judge's rights: Only the disciplinary sanctioning, and not starting of the disciplinary proceedings or declaring their inadmissibility, may influence a judge's rights or career. On the other hand, all the investigations are finalized before examining the admissibility;
e) The examination of admissibility, as proposed in the Draft Law, would be influenced in a determinative manner by the Judicial Inspection: The admissibility panel would examine the case prepared by the Judicial Inspection also in the absence of the person who filed the complaint and without additional verifications. In such circumstances, looking at the high number of complaints against judge behavior received annually by the SCM, it is unlikely that the panel would have an opinion different from that of the inspector judge;

[11]See Regulation on the Organization, Competence and Manner of Operation of the Judicial Inspection, approved by Decision of the Superior Council of Magistracy no. 89/4 of 29 January 2013.

f) There is the risk of incompatibility of the inadmissibility panel to participate in examining the case in first instance: According to the existing judicial practice, the judges who previously participated in proceedings, even if they had not expressed their opinions about the substance of the case (e.g. in authorizing pretrial measures or examining the appeals against such measures), are not accepted to examine the case in first instance.

We suggest excluding from the Draft Law the stage of examination of the admissibility of the complaint as well as excluding the admissibility panel.

3. Draft law does not explain who presents the accusation before the Disciplinary Board

According to the ECHR case-law, the disciplinary proceedings examined by boards similar to the Disciplinary Board, established through the Draft Law or by the SCM, fall under Art. 6 §1 ECHR.[12] Hence, the disciplinary proceedings are to take place in adversarial conditions. On the other hand, without an adversary procedure, establishing the truth becomes substantially harder and this may lead to unfair trial as a whole.

In the disciplinary proceedings before the Disciplinary Board there should be a person to present the case and the legal classification of the facts mentioned in the complaints i.e. to plead in favor of admission of the complaint similar to the accusation in a criminal case. The Draft Law does not require the inspector judge to present the case before the Board (see Art. 34 of the Draft Law) but requires the presence of the representative of the Judicial Inspection at the Disciplinary Board meeting (see Art.31 para.1 of the Draft Law). The Draft Law only stipulates that the Disciplinary Board member responsible for the case shall present a report (see Art. 34 para. 3 of the Draft Law). However, it is not clear whether the Disciplinary Board member in his report should only present the facts of the case or should also try to fulfill the role of accusation. In the first case, the adversarial principle is not ensured. In the second case, this principle is ensured; however, in such case the Disciplinary Board member responsible for the case would not be able to participate in the deliberations and in adopting a solution in the case. The law does not forbid the Disciplinary Board member responsible for the case to participate in deliberation or in the voting. Therefore, we presume he will not perform the role of accusation. In fact, this gap can also be found in the current Disciplinary Liability Law and, at present, the Disciplinary Board member responsible for the case does not fulfill the role of accusation.

The burden of accusation cannot be put on the author of the complaint because he may be a nonprofessional, it was not him who did the investigation, and also because there may exist the predilection of certain persons to transform the proceedings into a public settlement of accounts with the judge. In such circumstances, it would be normal for the inspector judge responsible for the case to be the one presenting the accusation before the Disciplinary Board. This would not be an excessive burden for him because he already knows the case well and, anyway, there should be a representative of the Judicial Inspection present at the Disciplinary Board meeting.

---

[12] See the case *Olujic vs. Croatia*, 5 February 2009, para.37-43; *Aleksandr Volkov vs. Ukraine*, 9 January 2013, para.87-91.

Accordingly, we recommend amending the Draft Law to stipulate that a case should be presented by the inspector judge in the examination by the Disciplinary Board.

4. Appealing SCM decisions on disciplinary proceedings to court

Art. 39 of the Draft Law stipulates that Disciplinary Board decisions shall be appealed to the SCM. According to Art. 40 of the Draft Law, a SCM decision on the disciplinary proceedings shall be appealed to the SCJ. The Draft Law does not set out how the SCJ would examine the appeal against the SCM decision. However, Art. 25 of the Law on SCM stipulates that SCM decisions can be appealed to the SCJ only in the part that refers to the issuance/adoption procedure. We are aware that limiting the SCJ competence could be justified for appointment or promotion procedures. However, it is difficult to explain the implicit interdiction, introduced by the SCM Law, of the SCJ to examine the substance of the disciplinary case. We recommend the Draft Law to provide for an exception from the general rule and allow the SCJ to examine the substance of the disciplinary case, including the proportionality of the sanction imposed.

SUMMARY OF RECOMMENDATIONS

1. The legislation should provide for the mechanism that would make recommendations to judges about observing the Judge Code of Ethics. Such recommendations could be made on the judge's request or *ex officio* by the SCM, the Judicial Inspection or the Disciplinary Board. The opinions are to be made public, so that the other judges also learn about them and observe them. This recommendation does not refer only to this Draft Law but is to be implemented by amending a number of other legal acts;
2. Art. 10 para. 3 of the Draft Law must expressly set out that the minister of justice is the one to appoint the members of the Disciplinary Board as proposed by the selection commission. He may refuse appointing the proposed candidate only if the person is incompatible with Disciplinary Board membership. Also, the law is to regulate in detail the composition and operation of the commission to select the Disciplinary Board members;
3. The text of the disciplinary offences as formulated in the Draft Law is to be adjusted in accordance with the Opinion of the Venice Commission and ODIHR of 24 March 2014;
4. Exclude the stage regarding the admissibility of the complaint and exclude the admissibility panel;
5. Give to the Judicial Inspection the right to terminate the disciplinary proceedings at any stage before transmitting the case to the Disciplinary Board, by making a reasoned decision that may be appealed to the Disciplinary Board or to a panel of the Board;
6. Introduce into the Draft law an obligation for the inspector judge responsible for case to present the position of the Judicial Inspection before the Disciplinary Board;
7. The Draft Law should provide for an exception from the general rule and allow the SCJ to examine the substance of the disciplinary case, including the proportionality of the sanction imposed during the disciplinary proceedings.