OPINION

On the draft Law on the evaluation of performances and the career of judges

The Institute for European Policies and Reforms (IPRE) and the Center for Legal Resources of Moldova (CRJM) present their opinion on the draft Law on performance evaluation and the career of judges published on the website of the Ministry of Justice on January 3, 2020.

In this opinion we will only refer to the aspects that, in our opinion, represent major deficiencies of the project. Due to their large number, we considered it unnecessary to come up with specific recommendations on each article in the draft law. However, we reserve the right to come up with additional recommendations after the draft law will be improved.

I. Limitation of the evaluation to judges

Although the informative note to the draft law is not yet published in an adapted version, it seems that the purpose of the draft law is to eradicate corruption from the courts and dismiss the judges who have done political justice. The mechanism for such an exercise is extremely complex, and the efforts made for it are very large. At the same time, corruption and political justice were not characteristic only for the judges, but also for the prosecution, the National Anticorruption Center (NAC), etc. On the other hand, recourse to this extreme and exceptional mechanism is permissible only if the existing mechanisms to fight corruption are not functional and there are no grounds to believe that in the near future, they will become fully functional. The exclusion of prosecutors and other actors from the justice system indicates on the expectations that the existing mechanisms to fight corruption are currently functional. There are many suspicions that the state of affairs is actually much worse. At the same time, the extraordinary evaluation can be applied only once and it is limited in time. After the evaluation is completed, the mechanisms to fight corruption in the justice sector should operate independently and efficiently.

The draft law suggests the evaluation of judges only. Applying the evaluation only to them cannot ensure that after completing the integrity assessment, there will no longer be endemic corruption in justice, and that the mechanisms to fight corruption in justice will work independently and efficiently. For this to happen the evaluation must be extended to:

a. Prosecutors (mainly on the chief prosecutors, anti-corruption prosecutors and those of the General Prosecutor's Office);

b. On all the members of the SCM (not only the judges, as stipulated in article 31 paragraph (5) of the draft law) and on all the members of the Superior Council of Prosecutors;

c. On the management of NAC, the National Integrity Authority and the National Institute of Justice;

d. On integrity inspectors.

The Minister of Justice has repeatedly stated that a similar mechanism for evaluation of prosecutors could be created if the judges' evaluation will be successful. We do not find this approach correct for the following reasons:

a. The fragmentation of the evaluation mechanism may not be beneficial, as it substantially hinders the process of creating evaluation bodies and increases the risk of political involvement. At the same time, the number of potential integer and professional evaluators is not that large;

b. The evaluation of all the legal actors must be done by the same body, to ensure that the same evaluation criteria are applied and their practical application is consistent;

c. The evaluation of the prosecutors after the judges' evaluation could compromise the entire evaluation mechanism, because the anti-corruption prosecutors and those holding the leading positions must be evaluated first, to ensure that immediately after the evaluation they begin to fight corruption effectively.

II. The suggested mechanism of evaluation of judges

The draft law suggests a different mechanism of evaluation of judges than the one announced by the Ministry of Justice in September 2019. Essentially, the mechanism proposed by the latest version of the draft law is an adaptation of the current mechanism of evaluation of judges, which, within 6 years since it was implemented, has not reduced corruption in the judiciary nor the dependence of justice from politicians.

The draft law suggests the establishment of a Monitoring Commission (hereinafter the MC), which will have three functions: (i) select the members of the first Evaluation and Judges' Career Board (hereinafter EJCB), (ii) monitor the work of the first EJCB, and (iii) issue opinions and recommendations to the EJCB at the request of EJCB members or at the request of the MC members.

We are firmly convinced that in order to ensure an efficient and independent mechanism for extraordinary evaluation, a fundamental revision of the proposed concept is needed, through the following:

III. Increase the independence of the bodies involved in the process of monitoring, both from the politicians and from the evaluated persons

a. Independence from the politicians

According to art. 7 of the draft law, the Committee on legal issues, appointments and immunities of the Parliament (hereinafter CLIAI) will pre-select 5 members of the MC, and the development partners will propose the other 5 members. The latter will be appointed in Plenary Session of the Parliament. The draft law does not provide for a transparent and merit-based procedure for the selection of the 5 members of the MC by the CLIAI. The draft does not provide for a specific quorum for the appointment, that is to say the appointment will thus take place with the simple majority of votes of the present members of Parliament

(MPs). The law also does not provide for the voting of all candidates in bulk; thus, it is possible to vote some candidates and reject others. A similar procedure is envisaged for the appointment of 3 of the 10 members of the EJCB.

The appointment of the members of the MC and the EJCB with the simple majority of the present MPs is insufficient to ensure their political independence. Moreover, the lack of clear procedures and criteria for the selection of the 5 members of the MC and 3 members of the EJCB, coupled with the lack of the requirement to vote in them in bulk, does not ensure sufficient independence of these members from politics. These persons represent 50% of the MC and 30% of the EJCB. These facts raise considerable doubts on the political independence of the entire commission and the evaluation process itself, given that the EJCB adopts the promotion decisions with 6 votes (art. 25 paragraph (1) of the draft law). We propose that the appointment by Parliament should take place:

a) Based on a public competition and a pre-selection based on merit;

b) The selection is to be made by a body that is not politically controlled, such as a committee of experts;

c) The quorum for the appointment of members should be greater than 50% of the number of elected members, in order to ensure that persons affiliated with the ruling majority can be blocked by the opposition (see, for a similar recommendation, the last opinion of the Venice Commission, issued at the request of the authorities of the Republic of Moldova). The draft law provides in art. 12 paragraph (2) that the members of the EJCB from among the civil society will be elected by a vote of 61 MPs. However, this requirement does not seem to be enough to give a blocking vote to the opposition for politically promoted candidates, given that the current Government was voted by 62 MPs;

d) Vote in the Parliament of all the pre-selected candidates in bulk, as well as a few substitute members who will fill the vacant positions that may arise for various reasons;

e) Exclude the possibility of revocation of the members of the MC by the Parliament (art. 7 paragraph (7)). The revocation can only be made at the proposal of the MC.

b. Independence from the evaluated persons

Article 7 paragraph (3) of the draft law stipulates that the 5 members of the MC preselected by the Parliament must be former or current judges. 6 out of 10 members of the EJCB, the body that will carry out the evaluation, are elected by judges until the beginning of the evaluation process. A member of the EJCB is appointed by the National Institute of Justice (NIJ). As it is recognized that external evaluation aims to combat critical and endemic issues in justice, the right to select the evaluators to be evaluated (including the NIJ leadership) compromises from the beginning the entire evaluation mechanism. The experience of Ukraine and Albania also confirms that involving judges in the evaluation bodies is not a good idea and causes multiple risks of conflict of interest. In Albania, it was expressly forbidden by law for judges in office or who have recently resigned to be part of the evaluation bodies.

The draft law stipulates that both the MC and the EJCB will not have separate secretariats formed by the MC and the EJCB themselves, which are made available to them (employed) by the SCM (art. 7 paragraph (11) and art. 17 paragraph (2)). The draft law does not expressly provide where the bodies that will carry out the evaluation will be located, but art. 17 paragraph (1) of the draft law provides that the technical support of the EJCB is provided by the SCM. The draft law provides in art. 17 paragraph (2) that the EJCB will be assisted by a secretariat employed by the SCM, composed of at least 3 persons. Based on the evaluation criteria for integrity, even in the light version of the current draft law, the workload to prepare files is far too big for 3 persons. Given the high workload of the evaluation, the small staff allocated, as well as the fact that the SCM members themselves will be subject to evaluation, will decisively affect the independence and efficiency of the evaluation process.

The draft law provides in art. 26 paragraph (4) that the EJCB decisions on the failure to pass the evaluation will not lead to the dismissal of the judge. This will require the decision of another body, the Judges' Disciplinary Board, to be issued following a disciplinary procedure. This fact in itself undermines the evaluation mechanism, as the Disciplinary Board or, de facto, the Judicial Inspection may block any dismissal of judges who did not promote the evaluation. If after the integrity assessment it has already been found that the judge is not integer, it is not clear why there is still a need for a decision in this regard, especially since the EJCB decisions can be appealed to the SCM and subsequently to the Special Appeal Board of the Chisinau District Appeal Court (SAB).

Best practices suggest that evaluation decisions should not be appealed to judges who should be subject to evaluation, with special courts being set up for this purpose. According to art. 31 paragraph (6) of the draft law, the decisions on the evaluation of judges will be appealed initially to the SCM, and later to the SAB. It is not clear from the draft law how the decisions on the evaluation of the CSM members will be challenged! It is obvious that appeal to the SCM is not possible. Also, the draft law does not foresee whether the decisions of the SAB will be irrevocable. Art. 26 paragraph (5) of the draft law states, however, that the appeal is made pursuant to the provisions of the Administrative Code. The administrative code provides that the decisions of the courts of appeal are appealed at the Supreme Court of Justice (SCJ). The appeal of the decisions of the SAB to the SCJ is illogical, as long as all the judges of the SCJ must undergo the evaluation.

Article 31 para. (7) stipulates that the SCM will establish the SAB, which will have the competence to examine the appeals against the decisions issued by the SCM. The SAB is formed by the SCM and reviews the SCM decisions, which is a clear conflict of interest. Moreover, the SAB consists of judges from the first level courts, formed after the evaluation of the members of the SCM and the respective selected judges. Without questioning the independence of the current judges in the judicial system, many of them could be working as judges less than 5 years, so dependent on the decision of the SCM to appoint them until they reach the retirement age. The restriction of access to the position of judge in the SAB to the judges of the first level courts is not justified. Another issue that raises doubts about the independence of the SAB is the fact that it will be created by the SCM within 5 months from the entry into force of the law, that is, until the evaluation of the SCM members! On

the other hand, considering the current informal mechanism of "coordinators" or "curators" on the part of the SCJ or the Courts of Appeal to the first level courts, which continues to be informally applied in the judicial system of the Republic of Moldova, as well as the risk of bias in examining the files of the colleagues in the system, we recommend the formation of a separate Appeal Board at the level of the courts of appeal from persons who did not act as judges. In view of the highlighted conflict of interests, in no case should this body be created by the SCM.

Based on the arguments mentioned above, we recommend:

a. Excluding the possibility for judges in office or those who have resigned in the last 3 years to be members of the MC or EJCB;

b. Amend the process of creation of the body which will evaluate the judges. They could be voted in bulk by the Parliament, being preselected in the manner suggested in the previous section;

c. Creation of a separate secretariat of the MC and the EJCB, to be formed by and subordinated to them. It should not be physically located at the headquarters of the SCM or other authorities subject to assessment or be submitted in any other way, including from the administrative point of view (signing of leave orders, payment of salaries, etc.) to the SCM or to the chairman of the court where the Appeal Board is formed, as it will also be subject to extraordinary evaluation;

d. The dismissal of the judge for not having promoted the evaluation should take place *de juris*, immediately after the evaluation decision is final. The evaluation procedure should not be duplicated by a disciplinary procedure;

e. The draft law must provide for a procedure to challenge the decisions on the evaluation of the SCM members, which, logically, cannot be challenged at the SCM;

f. The SAB must be appointed in block by the Parliament, together with the MC and the EJCB. There must be a separate secretariat be located in different premises of the Chisinau District Appeal Court to protect the members of the EJCB;

g. The decisions of the SAB should be irrevocable.

IV. The fairness of the evaluation procedure

Unlike the draft law made public in October 2019, which provides for the publicity of the judge's hearing procedure, the new draft law introduces the confidentiality of the entire procedure (see art. 14 paragraph (2) letter d) and art. 23). The draft law stipulates that the judge's interview is not public (art. 21 paragraph 1), and the information obtained during the evaluation is confidential. In Albania and Ukraine, the interviews have so far been public, with the aim of increasing public confidence in the evaluation process. It is not clear why the draft law operates with the confidentiality of the procedure.

If the EJCB has a mandate for selective evaluation, based on a random mechanism, then this mechanism is selective and does not correspond to the principles set in the draft law, in this case, the principle of equal treatment, provided for in Article 18 lit. g) from the draft law. Judges cannot be evaluated at random, because their importance is different. It is logical that the judges of the SCJ, the judges holding the management positions and those of the courts of appeal should be evaluated first. However, the succession of the evaluation of

judges of the same categories must be left to the discretion of the Evaluation Board that will conduct the evaluation.

Although the law establishes the MC with the purpose of monitoring the process of evaluation of judges, it does not establish clearly what will it manage. The only clear competence provided by the draft law is the adoption of opinions and recommendations for the EJCB. This is clearly insufficient. The law does not regulate whether the members of the MC have unlimited access to the evaluation files and the EJCB meetings, if they can challenge its or SCM's decisions, etc. The MC is a tool meant to guarantee the smooth functioning of the evaluation process. The reduction of the CM's function to issuing recommendations and opinions cannot be rationally explained.

Based on the arguments mentioned above, we recommend:

a. Amendments of the draft law to ensure the public nature of the interview of the judge and exclude the confidential character of the information from the evaluation file;

b. Exclude the provision that requires the random establishment of the judge evaluation order by the EJCB;

c. Clear regulation in the law of the status of the MC, granting it the right to have access to any documents in the evaluation file and to any meetings of the EJCB, as well as to challenge the decisions of the EJCB and the SCM related to the evaluation.

V. Evaluation criteria

It seems that the authors of the draft law have introduced all the criteria currently existing in the Law on the evaluation of judges. Articles 19, 21 and 24 of the draft law refer to both the assessment of integrity and professional activity. It creates confusion. The criteria for assessing integrity go beyond those currently provided by law. The mere fact of the impossibility to justify the sources of property must be the basis for dismissal. The current legislation does not provide for such a ground for dismissal. It just compels the judge to declare the property, not justify it. Moreover, the experience of Albania and Ukraine showed that when assessing integrity, criteria other than those provided by Moldovan law were taken. It is unlikely that evaluating judges based on criteria that are already in the law will lead to another result. Therefore, the criteria for assessing integrity must be revised based on the experience of Albania and Ukraine.

To ensure a consistent application of the judges evaluation criteria, we recommend excluding general references to the regulations in force and establishing the defining criteria for integrity assessment. Among the relevant examples that could be the basis for assessing the integrity of the judge are:

a. The declared assets should not exceed the available legal income;

b. The obtained income should respect the fiscal and tax legislation;

c. The incurred costs of life should not exceed the available legal income;

d. The declared income and assets should not be less than the available income and assets;

e. The judge should not have any active restrictions on the position he/she is serving.

Additionally, the obligation to comply with the integrity legilsation, including the criteria mentioned below, will be applied to the *members of the families* of the evaluated judges, within the meaning and extent established by Article 2 definitions for the term of *close person* in Law no. 133/2016, as well as to divorced spouses. This provision is essential in the sense of establishing the financial sources, assets and other elements of wealth, as defined in Law no. 133/2016, especially when the property is camouflaged by its transfer to relatives or other close persons.

At the same time, the provisions of article 21 para. (5) and the provisions of article 24 do not reconcile, as the evaluation of the professional activity takes place in fact based on the ordinary evaluation criteria established in the current Law no. 154/2012. Moreover, the extraordinary professional evaluation can only take place at the initiative of the SCM, as stipulated in article 24 para. (6) of the draft law, while Article 21 para. (5) of the draft law provides for the consecutiveness of the evaluation, where the evaluation of the professional activity takes place after the promotion of the integrity evaluation. Once Article 13 of the draft law stipulates the competence of the EJCB to evaluate the judges, and Article 21 para. (2) provides for the consecutiveness, the provisions of art. 24 paragraph (6), on one hand, and of art. 13, 21 para. (2) and 24 para. (6) on the other hand, are conflicting as they establish competences to initiate the evaluation for both the EJCB and the SCM.

The professional evaluation criteria provided for in Article 19 point 2 of the draft law actually reproduce the existing criteria of the current Law no. 154/2012 and which are further detailed in the SCM Decision no. 212/8 of 05.03.2013 on the approval of the Regulation on the evaluation criteria, the indicators and the procedure for evaluating the performances of the judges, especially points 8-11 of the Regulation. Ordinary professional evaluation, established in Law no. 154/2012 is to be kept as an ordinary evaluation mechanism. On the other hand, the extraordinary professional evaluation, which is part of the extraordinary evaluation of the judges, which implies first of all the integrity evaluation, and later the evaluation of the professional activity, should focus on: justifying the decisions issued by the evaluated judge and the consistency in the application of the law, including in the cases when the evaluated judge uses a similar legal motivation and on similar cases issued clearly opposite decisions. The difficulty of the extraordinary evaluation in the sense of the extraordinary evaluation of the judges, not in the sense of the extraordinary professional evaluation, regulated at the present moment by the provisions of article 13 of Law no. 154/2012, by establishing the same criteria, as suggested by article 19 p. 2 of the draft law will only delay the functioning of the EJCB and will not achieve the expected results.

VI. Other important aspects

The extraordinary evaluation of judges can only take place if there is a broad political consensus, the true intention of the politicians to give up the influence on justice, the full involvement of development partners and of the civil society and a massive popular support. All these conditions must be cumulative. In the absence of these preconditions,

there is minimal chance that any evaluation will be successful. On the contrary, triggering this process in the absence of at least one of these conditions will either spread chaos into the judicial system without any tangible improvement, or even increase the influence of the executive or the legislative over justice. On the other hand, the application of this mechanism will make it impossible to re-apply it in future decades, even if the previous exercise was not a success. The signatory organizations are not sure that the above conditions to initiate the procedure of evaluation of judges are met.

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The Legal Resources Centre of Moldova (CRJM) is a non-commercial organisation that contributes to strengthening democracy and the rule of law in the Republic of Moldova, with an emphasis on justice and human rights. CRJM is an independent and apolitical analytical centre (think-tank) with rich experience in: analysing the activity and reforming the justice system; human rights reporting; strategic standing at the European Court of Human Rights (ECtHR); equality and non-discrimination; promoting reforms for a favourable environment for civil society organizations.

The mission of the CRJM is to promote independent, efficient and responsible justice, respect for human rights, a favourable environment for civil society and democracy. In these areas problems with systemic impact are analysed, brought to the public agenda, solutions are proposed, abuses are tackled and partners are mobilised systemic changes.

The Institute for European Policies and Reforms (IPRE) was established in March 2015 as an independent, non-profit and apolitical analysis and research centre. It was created by a team of national and international experts, former government officials and career diplomats.
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The mission of IPRE is to accelerate the European integration of the Republic of Moldova by promoting systemic reforms, enhancing participatory democracy and strengthening the role of citizens in national and local decision-making processes.

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