CONFIDENTIALITY AND TRANSPARENCY IN THE JUDICIAL INSPECTION WORKS. THE CASE OF THE REPUBLIC OF MOLDOVA

CONFIDENȚIALITATE ȘI TRANSPARENȚĂ ÎN LUCRĂRILE DE INSPECȚIE JUDICIARĂ. CAZUL REPUBLICII MOLDOVA

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Abstract: *The general findings of the present paper refer to the fact that the overall activity of the judicial inspection body is confidential. However, there are also transparent activities, due to the necessity of alignment of the judicial inspection body to the policies of good judicial self-government, that presuppose the openness of public authorities, including the Judicial Authority, towards the society. Thus, the competencies of the judicial inspection body should be exercised in a manner that ensures the balance between confidentiality and transparency, in order to protect the independence and the reputation of judges, as well as the public interest, as an immanent element of the public confidence in the Judiciary.*
Keywords: *Judicial Inspection, confidentiality, transparency*

Rezumat: *Constatările generale ale prezentei lucrări se referă la faptul că activitatea de ansamblu a organului de inspecție judiciară este confidențială. Totuși, există și activități transparente, datorită necesității de aliniere a organului de inspecție judiciară la politicile de bună autoguvernare judiciară, care presupun deschiderea autorităților publice, inclusiv a Autorității Judecătorești, față de societate. Astfel, organul de inspecție judiciară ar trebui să-și exercite competențele într-o manieră care să asigure echilibrul dintre confidențialitate și transparență, în scopul protejării independenței și a reputației judecătorilor, precum și interesul public, in calitate de element imanent al încrederii publice în Magistratură.*
Cuvinte-cheie: *Inspecția Judiciară, confidențialitate, transparență*

Introduction. The particular principles of activity of the judicial inspection body in the legal system of the Republic of Moldova are exposed in the *Regulation on the organization, the competence and the functioning of the Judicial Inspection*. These are: legality, respect of judge`s independence and of the *res judiciata* authority, impartiality, *confidentiality* (the verifications and the conduct of inspection works are realized respecting national and international legal provisions on the personal data; the acts, the documents and any other information regarding the works of the Judicial Inspection are confidential, except those that are of public interest, according to the law) and *transparency* (the objectives of the verifications must be communicated in writing to the controlled persons, before the initiation of the control activity and discussions will be conducted with the controlled persons during the exercise of the verifications. The findings will be communicated to verified subjects at the end of the verifications) [18, Art.2.1-2.5]. There are no other provisions in the legal framework of the Republic of Moldova regarding the principles of activity of the judicial inspection body. There is also a lack of scientific research in the mentioned field at the national level. Our interest is focused on the examination of the applicability of two of the principles listed – confidentiality and transparency of judicial inspection works.

The problem investigated in the present paper is to synthetize the applicability of confidentiality and of transparency principles in the process of exercising of functional competencies by the judicial inspection body, in order to appreciate the level of protection and guaranteeing of the judicial independence, as well as the degree of satisfaction of reasonable public interest.

The purpose of the research is to determine the correlation between the principles of confidentiality and transparency in the judicial inspection activity, taking in consideration that the first one is intended to ensure the independence of individual judges and of the Judiciary as a whole and the second one - to ensure the credibility of the entity concerned through the satisfaction of the reasonable public interest.

Research objectives. In order to realize the purpose of the investigation, we aim to achieve the following objectives: to detect, through the prism of national legal framework, the judicial inspection works that are exercised confidentially and those that are exercised transparently; to appreciate the role of confidentiality and of transparency in the judicial inspection activity; to argue the indispensability of

ensuring a balance between confidentiality and transparency in the activity of the judicial inspection body.

Research methodology. The investigation is mainly based on analysis and synthesis. The prudently used heuristic strategies (the generalization, the particularization, the reformulation of the problem, the reasoning) represent a pillar of a particular approach on the applicability of confidentiality and transparency principles in the activity of the judicial inspection body, referring to the fact that the principles are interdependent, each of them has its own role and the mission of the judicial inspectors is to ensure their realization in a manner in which none of the stakeholders is affected: neither judges or the Judicial Authority, nor the society.

Findings. **Achievement of objectives**. ***Detection of judicial inspection works that are exercised confidentially and those that are exercised transparently***. According to the legislation of the Republic of Moldova, the Judicial Inspection is a specialized body subordinated to the Superior Council of Magistracy (SCM). It is functionally independent and autonomous [11, Art.7 para (1) letter d), art. 7^1 para (1)]. The competencies of the Judicial Inspection are: to verify the organizational activity of courts; to verify the correctness of the distribution of cases for examination in courts; to examine the petitions on issues related to judicial ethics; to verify and examine the complaints on issues that may constitute disciplinary offences committed by judges; to verify the requests on demanding the consent of the SCM regarding the initiation of the criminal proceedings against a judge; to study the grounds for rejecting by the President of the Republic of Moldova or by the Parliament of the candidature proposed by the SCM for the appointment for the position of judge or for the position of Vice-President or President of the court; to verify the execution of the Decisions of the SCM; to receive petitioners in audience [18, Art. 5.1].

After an analysis of the functionality of the Judicial Inspection, through the prism of the applicability of the principles of confidentiality and transparency, we find that the overall activity of the entity concerned is confidential, with some exceptions.

The petitions on issues related to judicial ethics are verified confidentially, taking in consideration the private character of the procedure itself of examination of petitions. The petitioner can invoke cases of non-compliance with ethical norms by a judge. The petition is submitted to the SCM, which adopts the decision [11, Art.4 para 3 letter a)], the judicial inspectors being responsible for the conduct of a primary verification of the circumstances described by the petitioner. The judicial inspector has the obligation to inform the judge about the petition and to require written explanations from him/her. The judicial inspector adopts an informative note in case of detecting of violations of judicial ethics. The petitioner is informed in writing about the result of the examination by an act signed by the President of the SCM [18, Art. 6.1, 6.3-6.6]. So, the procedure at the level of the judicial inspection body is practically confidential, the transparency being ensured at the level of the SCM, whose activity is transparent. The meetings of the Superior Council of Magistracy are public, with some reasonable exceptions [11, Art.8^1 para (1), (2)].

The verification and the examination of complaints referring to facts that can constitute disciplinary offences committed by judges are exercised under the auspices of confidentiality, too. Generally, transparency is one of the principles of the disciplinary proceedings regarding judges [7, Art.2 letter e)]. But the primary investigation of facts and the administration of evidence by the judicial inspection body are not and should not be public. Otherwise, the independence and the impartiality of the judge concerned might be affected, as well as his/her reputation. The judicial inspector also should have conditions to exercise his/her duties impartially and efficiently. The activity of the judicial inspectors during the conduct of preliminary investigations include multiple actions, such as: to require the written opinion of the judge concerned; to draw up the file of the disciplinary case, that comprises the complaint, the judge`s written opinion and all the material and the evidence collected; to make copies of the documents; to require information from the President of the court, from other judges or from other public authorities, office holders or private persons; to require oral or written explanations and additional evidence from the author of the complaint, if necessary [7, Art. 23 para (2) letters b), c), para 3) letters a), b), c)]. All the mentioned actions may be objectively exercised without making them public, until the judicial inspector is able to take a reasoned decision. Afterwards, when the disciplinary case is transmitted to the Disciplinary Board and to the SCM, it may be examined publicly. The same as the meetings of the SCM, those of the Disciplinary Board, are public except the cases when the Board decides itself or at the request of the judge concerned in the disciplinary case the examination in closed meetings, for the respect of public order and of national security or when the protection of private life of the participants of the

disciplinary procedure is required [7, Art. 34].

The verification of the organizational activity of courts represents a means of identification of deficiencies and of establishing the necessary measures for their elimination. The control itself consist of conducting a survey, having discussions with the court management; it targets the verification of all the areas, compartments and sectors of the court`s activity [19, Art. 2, 13, 15, 20]. The control is exercised by the team of judicial inspectors; the participation of any subjects from outside the Judiciary is not provided by the legislation. However, one of the purposes of this kind of control is to ensure transparency in the process of exercising justice and the openness towards the society. In order to achieve this purpose, the final Act of control is published on the web page of the SCM [19, Art. 3, 29].

The verification of the correctness of the distribution of cases for examination in courts was established as a competency of the Judicial Inspection in 2018, through the Law no. 137 [8, Art. III]. There are no specific provisions regarding the way of exercising this competency but it is a component of the competency of verification of the organizational activity of courts. So, the applicability of the principles of confidentiality and of transparency in relation with this aspect of functionality of the judicial inspection body is similar to those established earlier.

The requests of the Prosecutor General on demanding the consent of the SCM regarding the initiation of criminal proceedings against a judge are first verified by the judicial inspection body. The judicial inspector will draw up an Informative note containing the following main elements: the description of the facts invoked in the request; references to analyzed documents (files, registers, explanations); circumstances found after the verification; the existence or the absence of the circumstances that exclude the examination of the request by the Superior Council of Magistracy; conclusions. The Informative note and all the collected material is transmitted to the SCM that will examine the request in a closed session. The Decision is communicated to the judge concerned and to the author of the request [17, Art. 9.3, 9.4, 9.5, 9.9]. It must be reasoned and is published on the official web page of the SCM, with the anonymization of the data about the judge`s identity [9, Art. 19 para 4^1)].

It is rather easy to notice that procedure of examination by the judicial self-governing bodies (by the SCM and the Judicial Inspection) of the request regarding the initiation of criminal proceedings with respect to a judge is confidential, in order to protect the reputation of the judge, especially in cases when the criminal accusation is unfounded. The principle of transparency is applicable only to the publication of the Decision of the SCM on the agreement or disagreement of initiating criminal proceedings with respect to a judge (with the anonymization of the data of identification of the judge).

In relation with *the competency of studying the grounds for rejecting by the President of the Republic of Moldova or by the Parliament of the candidature proposed by the SCM for the appointment for the position of judge or for the position of Vice-President or President of the court* the verifications at the level of the judicial inspection body is confidential, too. The judicial inspector has to verify the circumstances invoked in the opinion of the President of the Republic of Moldova or of the Parliament and to draw up an Informative note; it is transmitted to the SCM that is responsible for the adoption of the final decision [18, Art. 8.2, 8.3].

The situation was much more complicated when the Opinion on rejection of the candidate was based on consultative opinions of the Security and Intelligence Service of the Republic of Moldova. The latter exercised the competency of verification of judges and of candidates for the position of judge under the *Law on verification of office-holders and candidates for public office* [12]. In that circumstances "the Judicial Inspection had to expose, in a great measure, on the dates presented by the Security and Intelligence Service, on the existence or the absence of risk factors in the judges' conduct. The concerned judge had the right to give explanations on the indicated circumstances and didn't have the possibility to examine all the documents or the evidence about the existence of any alleged risk factors, due to the rules of strict confidentiality specific to the activity of Security and Intelligence Service as a control body. So, the judge could not prepare a qualitative defense and the Judicial Inspection, as the primary institution involved in the process of analysis and control within the Judiciary, could not exercise objective and complex verifications" [4, p.58]. The confidentiality of the verification process – in relation with the conspiracy principle specific to the activity of the Security and Intelligence Service [10, Art. 3] - was to the detriment of the judge concerned, whose right to a fair trial was directly violated.

The legal provisions regarding this competency of verification of the judges and the candidates for the position of judge by the Security and Intelligence Service were declared unconstitutional on 15.12.2017 through the Judgement of the Constitutional Court of the Republic Moldova [5]. It is essential

for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent [16, Para 48]. At present, the Judicial Inspection and the SCM are the only authorities with competencies to verify the candidates for the position of judge, President or Vice-President of court (with the remark that the Judicial Inspection does not exercise competencies in the selection, the appointment and the promotion of judges; it only conducts preliminary verifications of the candidates).The initial verifications are exercised by the judicial inspection body confidentially. But the candidates concerned have the possibility to examine all the pertinent documents when the Informative note of the Judicial Inspection, together with the attached data, is transmitted to the SCM.

The appreciation of the role of confidentiality and of transparency in the judicial inspection activity. The judicial inspection body has two main missions through the prism of applicability of the principles of confidentiality and of transparency: 1) as part of the judicial self-government, the judicial inspection body has to protect and guarantee the independence and the impartiality of judges and of the Judiciary as a whole; 2) as part of the Judiciary, the judicial inspection body has to contribute to ensure the credibility of the judicial system through its openness forward the public.

The mission of protecting and guaranteeing the independence and the impartiality of individual judges and of the Judiciary is achieved through the respect of the principle of confidentiality in relation with the exercise of the competencies analyzed above. For instance, the confidentiality of the examination of the complaints on issues regarding judicial discipline and of the verification of the requests of the Prosecutor General regarding the initiation of criminal proceeding in respect of a judge is absolutely justified. According to the *Basic Principles on the Independence of the Judiciary*, a charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge [2, Para 17]. "The purpose of this provision is to protect the reputation of the individual judge, and that of the judicial system as whole, from unwarranted damage in cases where the charge or complaint is ultimately found to have been without foundation. This principle of confidentiality […] necessarily applies to the initial investigation (whether criminal or disciplinary in character), as well as any preliminary procedural step aimed at determining whether the complaint or charge is sufficiently well grounded to warrant a full hearing" [6, p.74].

It is also noticeable that the judicial inspection body has competencies of analysis, verification and control in particular areas of manifestation of Justice and is responsible for exercising initial investigations, the final decision on the case – at the stage of the examination by the judicial self-governing authorities – being adopted by the SCM. Usually, the activity of the judicial inspection body is limited to the examination of documents, conducting a survey when necessary (during the verification of the organizational activity of courts), taking explanations from the judge concerned or the author of the petition or of the complaint. The judicial inspectors work independently [18, Art. 6.2, 7.1, 8.2, 10.7, 10.9] and only the organizational activity of courts is verified by a team of judicial inspectors [19, Art. 10]. The members of the Judicial Inspection do not organize their activity in sessions; in such conditions, to ensure the transparency of the process of verification and control itself is rather complicated. Instead, the subsequent verifications carried out by the SCM or by the Disciplinary Board (in cases of examination of complaints on issues regarding judicial discipline) may be public (the general rule) or confidential (the exception), their activity being conducted in sessions.

Ensuring the credibility of the judicial system. The judicial inspection body exercises preliminary verifications, the final decisions being adopted by the SCM. However, the role of the judicial inspection body in ensuring the openness and the transparency of the judicial self-governing system cannot be neglected. The transparency of the activity of the Judicial Inspection is ensured through the publication of the Plans of control and of the Acts of control adopted as a result of the verification of organizational activity of courts [19, Art. 6, 29]. The first way to make judicial institutions more accessible is to introduce general measures to inform the public about courts' activities [15, Para 10]. In our opinion, it is a way of enhancing professional communication between the Judiciary and the society. "Professional communication with the outside world in relation not only to judicial activities but also to organizational matters increases transparency and thus reinforces trust in the judiciary. Proactive communication can in some cases serve to counter negative reports on court activities in the media and so prevent the undermining of confidence" [13, p.13].

General information regarding the activity of the Judicial Inspection is included in Annual Reports of activity, placed on the web page of the SCM. The organization of the audience of petitioners at least

twice a month [18, Art. 13.1, art. 5.1 letter i)] is another aspect of the applicability of the principle of transparency in the activity of the Judicial Inspection.

In relation with the disciplinary proceedings with respect to a judge, the *International Commission of Jurists* state that "the principle of confidentiality will not necessarily automatically apply to a disciplinary hearing on the merits, where other important interests in respect of the administration of justice and the rights of the complainant must be taken into consideration. […] Presumably the principle of confidentiality applies to the bodies responsible for conducting the proceedings but not necessarily to the complainant in so far as he or she may make public statements about the allegations or the fact of having made the complaint. Restricting the right of an alleged victim of human rights violations or corruption to express himself or herself publicly about the violations or the fact of having made the complaint, or punishing the person for having done so, would seem difficult to justify in relation to the person's freedom of expression" [6, p.74].

All the decisions of the SCM can be challenged in court, under the *Administrative Code of the Republic of Moldova* [1, Art. 191 para (3)]. Public hearings at this phase of examination – as an element of the right to a fair trial through the prism of *European Convention on Human Rights* [3, Art. 6 para (1)] - represent the general rule and exceptions are accepted only in specific situations provided by law.

Arguments in favor of the indispensability of ensuring a balance between confidentiality and transparency in the activity of the judicial inspection body. Considering the above, the interaction between the principle of confidentiality and the principle of transparency in the activity of the judicial inspection body is immanent. It should be a precondition of guaranteeing the independence of individual judges and of the Judiciary, as well as the credibility of the judicial system, including the judicial self-government, through the propagation of openness and of transparency of the judicial entities.

The independence of judges, in a globalised and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts [16, Para 9]. Judicial self-governing bodies are entrusted to protect and to guarantee the independence of judges. Respecting the confidentiality of preliminary proceedings on issues regarding judicial ethics, judicial discipline, the initiation of criminal proceedings with respect to a judge, the verification of the candidates for the position of judge or for the position of President or Vice-President of court through the prism of their correspondence with the exigencies of the position are necessary means of protection of the independence of judges through mechanisms of judicial self-governance. The transparency of the preliminary verifications may undermine judicial independence and judges may become vulnerable, especially in cases of unfounded complaints or unfounded criminal charges.

On the other hand, one of the main features of public authorities, including the Judiciary, is transparency. Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary, transparency in the actions undertaken by this Council must be guaranteed. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self protection and cronyism within the judiciary [16, Para 91]. The national Judicial Inspection, subordinated to the SCM, should align to the rules and strategies of good judicial self-government and prudently ensure the transparency of its works, *prudently* representing that the Judicial Inspection should simultaneously care about the protection of judicial independence and of the reputation of judges in the process of conducting preliminary verifications.

The transparency of the judicial system is closely correlated with the public confidence in the Judiciary. "Having the confidence of the public is of fundamental importance for the judiciary" [20, p.2106]. "Nowadays, be a judge is to be visible. No state can hide the courts. […] Formerly founded on silence and discretion, confidence in justice finds today its justification in the transparency of the revealed faults and the reality of the sanctions which are inflicted on prosecutors or judges who do not act properly" [14, p.256].

As we have synthesized in the present paper, the national inspection body ensures the transparency of its works, the limitations being absolutely reasoned.

Thus, the indispensability of respecting a balance between confidentiality and transparency in the judicial inspection activity is justified from the point of view of judicial independence, as well as from

that of social confidence in the Judiciary. The members of the society are entitled to know general data on the organization and on the functioning of the judicial system. The openness of public authorities is an immanent element of the Rule of Law and of the public policies on protection of Human Rights. As a consequence of ensuring a balance between confidentiality and transparency are respected both judicial independence and the public interest.

Discussions and conclusions. The overall activity of the national Judicial Inspection is confidential, considering its particular role of an entity exercising preliminary verifications on issues regarding judicial ethics, judicial discipline, initiation of criminal proceedings against judges, organizational activity of courts. However, general information regarding the verifications and the controls conducted by the judicial inspection body is communicated to the public through Annual Reports of activity, Plans and Acts of control, which are published on the web page of the SCM; the audiences of the petitioners are also means of materialization of the public character of the judicial inspection activity. Thus, the Judicial Inspection should organize its activity in such a manner that the balance between confidentiality and transparency is ensured.

In conclusion, the problem investigated in the present paper has been solved: the applicability of confidentiality and of transparency principles in the process of exercising of functional competencies by the judicial inspection body has been synthesized, through the appreciation of the level of protection and guaranteeing of judicial independence, as well as the degree of satisfaction of the reasonable public interest. Both judicial independence and the public interest (as part of the public confidence in the Judiciary) are important values in a democratic society and should be protected by public authorities, including the Judicial Authority.

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