

Judicial branch of power in the Republic of Moldova

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General overview of the judicial branch

The formation and consolidation of the Republic of Moldova as an independent democratic country determines the imperative for the practical realization of the separation of powers principle that is a primordial condition for creation and functioning of any law state.

The Declaration of the sovereignty № 148 – XII adopted by the decision of the Parliament of the Republic of Moldova stated that the separation of powers into legislative, executive and judicial forms the main principle for elaboration of a new Constitution and for the improvement of the national legislature including promotion of judicial and law reforms, because the fact was unanimously recognized that the basis of a democratic law state is an independent judicial system that would guarantee justice, liberties and protection of rights for all individuals and legal entities.

The concept of justice, sometimes referred to as jurisdiction, has many meanings.

The first meaning is „the power to decide the conflicts appearing between different law subjects – individuals or legal entities – through law application of laws”.

Still, the term derives from the Latin: „jurisdictio” – a word composed of *jus* (law) and *ducere*(to say, to pronounce), to pronounce law.

This meaning of the concept „justice” – a totality of powers given to the magistrates to resolve a conflict - has been preserved in the modern law.

Justice has its source in the sovereignty of the state that determines the organization of authorities vested with this function – an option of major importance that appeared in the result of a long historic evolution.

Judicial institution vested with power by public or one concerned (individuals or legal entities) has competence to apply the law in case it was violated or wasn't recognized, to annul an invalid act, to condemn a guilty person, etc...

To recognize a person guilty of infringement the law, to fix the modality or a size of the penal punishment constitute the exclusive prerogatives of a judicial institution.

Judicial institutions have power to decide civil cases that arise from civil judicial reports as well as from economic, labor, family, administrative, special procedural reports.

Taking into consideration the meaning, role and attributes of judicial institutions along with other state institutions we can deduce a number of peculiarities that make justice system different from other state branches of power:

1. *Justice is established only by judicial institutions;* (art.114 of the Constitution, art.1 from the Law on organization of judicial system).

Courts, special courts, Courts of Appeal and the Supreme Court are responsible for this function. The discussed peculiarity represents one of the fundamental principles of the system of justice.

2. *Justice is established according to the provided law;*

According to art. 4 of the Law on the organization of judicial system justice is established through:

a. examination and decisions during court sessions of civil cases to defend and exercise the fundamental rights and freedoms of the citizens, their associations, enterprises and organizations.

b. examination during court sessions of penal cases, deciding whether the accused is guilty, what the punishment should be, or how the not guilty should be rewarded.

3. *Justice is established in the name of the law and in strict conformity with the law;*

Art.1, paragraph 2 and art. 5 of the Law on organization of judicial system.

4. *Justice is established according to the provided procedure;*

Strict procedural form represents a complex of successive activities. Due to the fact the activities are coordinated and progressive they project an image of organized activities when the truth is found and fair decision is pronounced by competent institutions.

5. *Legality does not allow decisions imposed by the state or refusal to apply the measures provided by law;*

Only judicial institution can declare a person guilty of committing a crime and has a right to apply penal punishment.

We can also mention that one of the functions of justice, as a form of law activity, is to protect legitimate rights and interests of the citizens and to teach them respect the law.

To enforce the constitutional provisions normative acts were adopted that stipulated for the organizational principles of the work of judicial system in the Republic of Moldova, including:

- law № 541-XIII from July 6, 1995 on the organization of judiciary;
- law № 544-XIII from July 20, 1995 on the judicial status;
- law № 789-XIII from March 26, 1996 on the Supreme Court of Justice;
- law № 947-XIII from July 19, 1996 on the Superior Magistrate Council;
- law № 949-XIII from July 19, 1996 on the college to raise the skills and attest the level of proficiency of the judges;
- law № 950-XIII from July 19, 1996 on disciplinary college and disciplinary responsibility of the judges;
- law № 970-XIII from July 24, 1996 on the judicial economic authorities;
- law № 836-XIII from May 17, 1996 on the system of judicial military authorities.

These laws constitute the legal framework that establishes the system of judicial guarantees to properly execute activities of the judicial branch of power.

They reflect the constitutional principles of separation of powers into legislative, executive and judicial and independence, impartiality and permanency of the judges from judicial authorities. They also provide for the organization of judicial institutions, their competence and judicial procedure.

All those principles define the juridical status of the judge in the Republic of Moldova and make justice one of the independent and impartial branches of state power.

Not less important is the fact that beginning with June 20, 2003 new legislative framework adjusted to the international standards was applied, and namely:

- **Penal code** - adopted on April 18, 2002 and published on September 13, 2002;
- **The code of the penal procedure** – adopted on March 14, 2003 and published on June 7, 2003;
- **Civil code** – adopted on June 6, 2002 and published on June 22, 2002;
- **The code of civil procedure** – adopted on May 30, 2003 and published on June 12, 2003, **all those codes were applied beginning with June 12, 2003.**

These are general dispositions, without which the judicial branch of power cannot be called the supreme power of a law state.

Organization and functions of the judicial branch of power

In order to determine the constitutional status of the judicial branch it is necessary to take into consideration the following factors: organization and functions of the judicial system; the status of judges; constitutional guarantees referring to the independence of justice system.

We are convinced that actual reflection of the judicial power in the title Public authorities needs the chapter Judicial authorities, because one section refers to the judicial institutions, the second – to the Superior Magistrate Council and the third - to the Office of Public Prosecutor.

From the MEMORANDUM referring to the basic principles of the state structure of a united state, point 13 stipulates for judicial power, and namely to execute civil, administrative, and penal justice within the frameworks of the Federation there should be, according to the federal organic law, the Federal Supreme Court of Justice, Courts of Appeal, courts of first appeal.

It follows that the federal organic law will determine the organization and functions of the judicial institutions on the whole territory of the federation, that is, there will be a single judicial system. It is not necessary to give the subjects of the federation the right to organize the judicial system by themselves.

There should be a single judicial system because:

guarantee the protection of human rights is an obligation of a state, not only of a subject of the federation;

the state is responsible for the judicial errors, it is not the responsibility of a subject of the federation;

the access to the international institutions is guaranteed by the federal constitution and this is the responsibility of the state to deal with the international institutions, while the subject of the federation is not a subject of the international law.

From things mentioned in the MEMORANDUM Referring to the main principles of the state structure of a united state justice is established only by the judicial institutions according to the provided procedure, that is, the organization of the judicial process is done according to the stipulated legislative procedure (civil and penal) that means application of certain stages and methods for examination of penal, civil, economic, administrative cases to find the truth and follow the law.

The stages of the judicial procedure represent the steps the court should follow. These stages permit essential overall evaluation as a possibility to correct the errors and evaluate the situation and evidence.

At present the stages of the judicial process in the Republic of Moldova are stipulated by the Law on Judicial organization that should be taken into account by the future organic federal law in this sphere.

The realization of the first stage of the judicial process – first trial is obligatory for all cases that reached the judicial institutions; the further stages might take place only in case when those concerned are not satisfied with the decision of the court of first appeal.

It follows the organization of the judicial process has three stages:

1. first trial;
2. court of appeal;
3. second trial; for some cases or cases of the second stage of the judicial process:
 1. first trial;
 2. second trial for other categories of cases depending on the litigation and the judicial institution where the case got the first trial.

The first trial (first appeal) takes place with the participation of the parts and other participants. As a result the judicial institution resolves the essence of the litigation passing sentences (in penal cases) and decisions (in civil cases). The decisions of the first trial are not ultimate and can be appealed or reexamined.

The examination of the appealed case is done by the hierarchically superior court made of three judges with the participation of the parts in the result of the attack on the decision of the court of first appeal, within a period of time provided by law. The decision of the court of appeal can, in its turn, be attacked within a provided by law period of time that leads to the liquidation of the decision of the court of first appeal.

Examination of the case in the second trial implies verification of the litigation from the point of view of legality of the decisions passed by the court of first appeal or by the court of appeal. The examination is done by the superior judicial institutions with the participation of the parts of the litigation. The decisions made during the second trial are ultimate.

However, there are other stages stipulated by law to examine the cases in which ultimate judicial decisions are challenged. Those stages are:

a. *examination of the decision of the court of second appeal that leads to the annulment of the decision* made only by the Supreme Court of Justice in the result of attack on the ultimate irrevocable judicial decision by the Prosecutor General and the parts through the intermediary of a lawyer in order to eliminate judicial errors clearly expressed by the law. The taken decision annuls judicial decision pronouncing a new decision or sending the case for reexamination to another institution in case it would accept it.

b. *examination in revision* is done by the court of first appeal (in penal cases) as well as by the hierarchically superior institution (in civil cases). Examination in revision presupposes examination of new evidence and solution of the case. In case the appeal for revision is accepted judicial institutions annul or modify the preceding decisions through sentence (in penal cases) or decisions (in civil cases).

In 2003, in the Republic of Moldova as a consequence of the judicial reform the principal normative acts, Civil Code, Code of the civil procedure, Penal Code, Code of the penal procedure were adopted, other normative acts, the Law on the organization of judiciary, the Law on the economic judicial institutions, the Law on the military judicial institutions were modified.

Currently the system of the judicial institutions of common law is made of:

- judges
- Courts of appeal
- the Supreme court of Justice;

The system of economic judicial institutions:

- local economic court
- the Economic Court of the Republic of Moldova reorganized in the Economic Court of Appeal , and
- the Economic College of the Supreme Court of Justice was established.

The system of military judicial institutions remained unchanged.

Another similar example can be found in Romania that is also a sovereign independent unitary indivisible state with a republican form of government. The only distinction is the name of the Supreme Court; the system of judicial institutions in Romania is:

- courts;
- Courts of Appeal;
- the High Court of Cassation and Justice.

The principles of the activity of judicial power

The notion of law in general and justice in particular represents a theoretical category comprising many practical implications. The word „principle” comes from Latin „beginning”, „fundamental element”. The

principles of justice confer judicial bodies a proper physiognomy and governs their activity. They are clearly expressed in the Constitution or result from other normative acts. The fundamental principles of justice are very important from the following perspectives:

- in the condition there is no law provided for the resolution of the judicial case the judicial institutions should resort to analogy with rights and apply the fundamental principles;
- the fundamental principles define justice revealing peculiarities and characteristic traits;
- they are stipulated by the Constitution of the Republic of Moldova in the Law on the organization of judiciary and other laws that make up the system of interdependent and mutually correlated principles.

From the point of view of systematization, the principles were classified according to different criteria.

According to the sphere of application there are general, branch, inter-branch and some specific to the law branch principles.

There is also a classification of the principles in organizational and functional.

The organizational principles stipulate for the ways of establishing judicial institutions, those functional – for the procedure to establish justice.

Judicial system should be based on and function according to the following principles:

- **the principle of legality** that is a fundamental of the activity of all state bodies called to assure the respect towards law and meet the demands of a democratic state that are primordial conditions of the activities of judicial institutions being stipulated by the Constitution of the Republic of Moldova in art. 114 that says: „Justice is established in the name of law only by the judicial institutions”, art. 5 of the Law on the organization of judiciary.

-**establishing justice only by the judicial institutions.** According to art. 115, paragraph 1 of the Constitution „Justice is established by the Supreme Court of Justice, Courts of Appeal and courts”.

-**the principle of equality before the law and judicial authorities** is manifested through:

- * justice is established by the institutions in consent with all people.
- * all people are equal before the law and procedural rules and are subjects to the same laws.
- * participants have equal rights before the judicial authorities.

-**independence, impartiality and permanency of the judges,**

This principle is enshrined in the Constitution (art.116, par.1) and the Law on the status of judges nr.544-xii from 20.07.1995 (art.1,par.3).

-free access to justice (art.20, Constitution),

These normative acts recognize the right of individuals and legal entities to free access to justice in order to satisfy material and other interests in consent with public interests according to laws and rules of social life.

-publicity of judicial debates.

Publicity of judicial debates is guaranteed by the Constitution in art. 117, it says that all sessions are public, with the exception of cases provided by law.

-the right to defense represents one of the fundamental rights of the citizens.

- ways of attack in the process of establishing justice,

Justice cannot be achieved through a single examination that is why dissatisfied part using ways of attack can appeal the case to the hierarchically superior court (art.119, the Constitution of the Republic of Moldova). Appeal and reexamination are ways of ordinary attack.

-the language of the procedure and the right to interpreter.

According to art.13 of the Constitution of the Republic of Moldova the official language is Moldovan language.

This principle excludes inequality and discrimination based on nationality. The use of native language is another plus that excludes the situation when an accused does not understand the essence of the accusations and cannot defend himself / herself because s/he does not know the official language.

- the Constitution and organic federal laws determine and regulate judicial system;
- the establishment of justice by judicial institutions only;
- the prohibition to form other exceptional institutions;
- the independence of judges and their subordination to the Constitution and federal laws;
- permanency and inviolability of the judges;
- the judge can be relieved of the post according to the provisions of the federal laws;
- judicial system is financed only by the federal budget, etc...

The analysis of the principles let us conclude that judicial institutions should assure human rights protection, should be an independent unique system guaranteeing stability of judicial sentences and decisions, possibility to correct judicial errors and respect towards judicial procedure on all levels.

An issue of the participation of citizens in the process of establishing justice is debated. The suggestion was advanced by Tiraspol. We think

the institution of assessors proved to be inefficient but we still believe we could introduce the trial by jury in the Republic of Moldova.

The status of the judge

According to the Constitution of the Republic of Moldova, the Law on the status of the judge and other normative acts judges of the judicial institutions are independent, impartial and permanent. They are appointed by the President of the Republic of Moldova on the recommendation of the Superior Magistrate Council. The President and the judges of the Supreme Court of Justice are appointed by the Parliament on the recommendation of the Superior Magistrate Council.

According to point 13.3 from Memorandum judges of the judicial institutions of first and second trial in the Subjects of the Federation are appointed according to the laws of the Subjects of the Federation.

We have an opinion that judges in the federation should be appointed by the President of the Republic of Moldova on the recommendation of the Superior Magistrate Council. There could be created a chamber near the Superior Magistrate Council that would be responsible for the selection and nomination of judges to the Subjects of the Federation. The Superior Magistrate Council should play the decisive role.

Judge is a person vested with constitutional powers to establish justice on a professional basis. Judges have plenipotentiary powers guaranteed by laws to establish justice. The demands and dispositions of the judges are obligatory for individuals and legal entities. Non-fulfillment leads to bringing to account.

Judge is a principle factor in the process of establishing justice and human rights protection.

Being a key-character in a law state the judge's main task is to decide whether the authority acted according to its judicial status within limits recognized by law and whether individuals based their activities on subjective rights or legitimate interests.

The activity of the judges can be controlled by the hierarchically superior institutions that exercise this function when they examine the case.

In the system of the separation of powers of a law state the judge in order to execute his / her functions should be independent and subordinate the law only.

The independence of judges presupposes high professional level of responsibility and morality of the judge. In this sense independence and impartiality of the judge should be guaranteed by the state *de jure* and *de facto*.

A judge is not independent if his / her promotion, rights, material and socio – cultural necessities as well as financial compensations are the result of discretionary will of other powers of the state.

Functions of the judge are incompatible with any other public or private function with the exception of didactic or scientific activity. The judge also cannot be a deputy in the Parliament or a councilor in public local authorities, to be member of a party or other socio – political organizations whose activities are of a political or business character. These provisions guarantee supplementary independence of the judges and prevent the conflict between public and private interests.

The role of the Superior Magistrate Council in guaranteeing the independence of the judicial branch of power

The Constitution of the Republic of Moldova from 1994 created a new body – the Superior Magistrate Council vested with important powers to assure nominations, missions, promotion and disciplinary measures towards the judges. This organism functioned in Basarabia (former part of Romania) during years preceding World War II.

To make clear the nature of this body the provisions are stipulated in art.1 of the Law of the Republic of Moldova on the Superior Magistrate Council nr.947 from 19.07.1996 that can be taken as a basis in future federal organic law.

According to the mentioned text „Superior Magistrate Council is an independent body formed to regulate the organization of the functioning of judicial system and is a guarantee of the independence of judicial authorities. Superior Magistrate Council exercises judicial auto - administration.”

Functional autonomy of the Superior Magistrate Council is determined by the competences stipulated in art. 4 of the law, namely:

1. recommends the President of the Republic of Moldova or Parliament on the nominations, shuffle, promotion or dismissal of judges, chairmen, deputy chairmen of the judicial institutions;
2. have a right to shuffle judges in other institutions of the same level and temporary dismiss from the office;
3. take the judicial oath;
4. solve the case of judge's resignation including assistance within the legal frameworks;
5. guarantees inviolability of the judge;

6. approve the program on professional training of the candidate for the office of the judge, designates a judge who would act as a trainer;
7. declare valid the decisions of the college that acts to raise the proficiency and of the disciplinary college;
8. examine appeals against the decisions made by proficiency and disciplinary colleges;
9. present proposals on the location, area of judicial institution and the number of judges in those institutions to the Parliament.

Superior Magistrate Council functions as a collegial body and exercises its powers in plenary sessions convoked on the initiative of the President or of at least three its members. It executes its functions publicly so as to exclude the possibility of the examination of the problem during closed meetings. The decisions are adopted by the majority votes of the members of the Council. In case of parity, the decision will be taken in favor of the judge.