

DEMOCRACY AND HUMAN RIGHTS

EXCESSIVE WORKLOAD:

how this affects the independence and integrity of judges

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A judge in the Republic of Moldova examines on average four cases a day. This affects both the quality of justice and the independence of judges.



The current mechanism of access to justice does not allow either the professionals in the system or the litigants to enjoy quality justice.



The justice system requires an increase in the number of judges and support personnel, as well as a gradual redirection of low-value cases to alternative settlement instruments such as mandatory extrajudicial mediation.



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INTRODUCTION

Justice in the Republic of Moldova is influenced by a number of institutional and organizational factors, as well as political ones. The way in which the justice is organized, including the processes in which judges are involved, influences directly the quality of justice. The issue of excessive workload was addressed by the Committee of Ministers of the Council of Europe back in 1986¹. The recommendations include removal of non-legal tasks for judges, establishment of extrajudicial proceedings for separate and low-value procedures, promotion of arbitration, and regular review of the workload in courts to ensure a fair distribution of workload.

The purpose of this policy brief is to highlight and find solutions to one of the major problems facing the judiciary in the Republic of Moldova, namely the overloading or, in other words, the excessive workload of judges.

This analysis presents existing normative framework that regulates the criteria for establishing the number of judges in the courts, the manner of random distribution of files for examination in courts, and the mode of establishing the complexity of criminal, misdemeanour and civil cases. At the same time, for comparison, the policy brief presents the “weighting systems” (measurement) of existing lawsuits in European countries. Case-weights assess the complexity of different types of cases, based on the understanding that one case type differs from the others in their amount of judicial time and the effort required to be processed.

The policy brief analyses the excessive workload of judges and how it indirectly affects the independence and integrity of judges. Overburdening the judge with cases for settlement, beyond human physical capacities, generates a permanent

exhaustion, and consequently leads to the issuance of insufficiently well-founded decisions.

At the same time, the excessive workload causes the unavoidable exceeding of the procedural deadlines for carrying out various actions and makes the judge vulnerable to the inevitable human errors. This situation can be used by the internal decision makers (chair/ vice-chair of the court, Judicial Inspection, Disciplinary Board, Judicial Performance Evaluation Board, Superior Council of Magistracy (SCM)) as a tool to put pressure on the judge.

Excessive workload affects not only the independence and integrity of the judge, but primarily, the fundamental right of citizens to a fair trial, including the right to be tried by an independent and impartial judge, who will judge the case in accordance with the law.

The recommendations of the policy brief are based on the latest report of the European Commission for the Efficiency of Justice (CEPEJ) of 02 July 2020², on the weighting (measurement) of cases in the judicial systems of the Member States of the Council of Europe, including the Republic of Moldova.

In the same vein, the Committee of Ministers draws the attention of European states to the need to implement measures to prevent and reduce excessive workload in courts, measures aimed in particular at a more efficient work organization, improved working conditions and a more judicious distribution of cases, human resources (increasing the number of judges), providing them with auxiliary personnel and necessary material resources.

¹ Recommendation no. R (86) 12 of the Committee of Ministers of the Council of Europe on measures to prevent and reduce the excessive workload of judges, available in English at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900016804f7b86

² <https://rm.coe.int/cepej-case-weighting-rom/1680a0cbe2>

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WHAT THE EXCESSIVE WORKLOAD OF JUDGES IS AND HOW IT CAN BE MEASURED

The 'case-weights' term (or 'weighted caseload') was coined in the United States of America and dates back to the late 1970s. Case-weights assess the complexity of different case-types, based on the understanding that one case type differs from the other in the amount of judicial time and effort required to be processed. The weight of a case can be presented in several manners. Traditionally, case-weights are presented using numerical figures representing the average amount of work-time spent on each case-type, from filing until the day it was resolved. In this respect, case-weights do not refer to the disposition time (i.e. the number of days or years that passed since filing until disposition), but to the actual work-time (minutes and hours) spent on all case-related events in each case-type.

The 'case-related-events' term refers to judicial activities that occur in all case-types and require judicial attention, such as: studying the case (for example, in preparation for court hearings); conducting court hearings (pre-trial, trial and post-trial); drafting orders and judgments (including precautionary orders, final and post-judgments etc.); other case-related activities carried out by the judge or by the court personnel.

The judge's activity can be divided into three broad categories: (a) office activities, (b) court hearings, and (c) other mandatory activities.

a) Office activities

Office activities includes actions at the stage of receiving the case: studying the relevant aspects for making the decision to receive for examination and carrying out other actions necessary at this stage (whether or not the application meets the formal requirements, whether or not the court is competent, etc.); solving various procedural incidents at this stage (requests for exemption from payment of state tax, insurance, etc.); drafting of judgements reflecting these activities (of introducing the cases and preparing them for review or, as the case may be, restituting or refusing the request for summons, admission or rejection of one or another action, publication of

judicial documents (civil, criminal or misdemeanor decisions), as well as logistical actions carried out by the court reporter such as sewing the case, drawing up the docket, drawing up and sending the summonses, as well as other documents.

Some of the tasks listed above are performed by the court reporter and assistant only if the judge has such personnel, and the judge is left with only some of those tasks (studying the documents, reviewing the draft decisions developed by the assistant).

The reality in the Republic of Moldova, however, is that the court personnel – court reporters and legal assistants – is often incomplete. In such cases, the judge is obliged to undertake some or all of these activities on his/her own, which substantially increases his/her workload. The solving of such situations by the court administration at will (providing the judge with a reporter and assistant), in case of bad faith on the part of the chair/ vice-chair of the court, may be, as it is discussed below, a way of influencing the judge.

The office activities also involve actions at the stage of the case in the procedure: studying the substantive materials, identifying and analysing the applicable legislation, as well as the relevant judicial practice (especially in case of new litigation, which the judge did not face before in his/ her practice); resolving various procedural incidents and drafting conclusions, as well as publishing them, as appropriate; issuing court documents to the parties; adding the new materials to the case.

Likewise, some of these actions (drafting of judgment documents, as well as their publication, other logistical actions) are carried out by the court reporter and assistant, if the judge has these auxiliary personnel, but the share of the judge's actual activities (studying of the case, analysis of legislation, identification of a prior opinion) is already substantially increased compared to the previous phase.

Office activities also include drafting of legal acts of disposition, minutes, as well as publishing work: drafting criminal sentences, misdemeanour or civil judgments, drafting judgment documents for case completion (termination of procedure,

ending of case etc.), the publication of the final disposition documents.

b) Activities within court hearings

The activities within the court hearings include:

- activities aimed at respecting the formality and solemnity of the process; activities for resolving various procedural incidents (mainly postponement of hearings, but also others); substantive examination: judicial debates, hearing of witnesses, analysis of documents, pleadings; deliberation.
- post-examination actions: preparation of the case for transmission to the chancellery, adoption of additional documents as appropriate (judgment correction document, additional decision, drafting of enforceable titles etc.).

c) Other mandatory activities:

Other mandatory activities include: examination of requests for recusal, abstention, acceleration of colleagues' cases within 5 days; organizational meetings related to the activity of the court, standardization of judicial practice; compulsory continuous training activities (at least 40 hours per year): training seminars, conferences, as appropriate, working groups, etc.

Most of the time is spent on substantive examination/ judicial investigation (reporting on the civil case/ reading the indictment in criminal cases, hearing the parties, interrogation of witnesses, investigating material evidence). However, the other components also require a lot of time and, implicitly, demand intellectual effort.

Thus, there are three basic variables that influence the workload of the judge: the number of cases, the provision of support personnel, and the technical resources.

The working time remains constant and cannot vary depending on the number of cases: eight hours a day, forty hours a week. Thus, if the number of cases increases, the average time per case automatically decreases. Likewise, if the judge is not provided with auxiliary personnel (court reporter, assistant), the volume of tasks assigned to the judge increases substantially, influencing the average time for the examination and settlement of a case. And if the judge, the court reporter and assistant do not have modern computers, printers and scanners, respectively, their working time is not used efficiently because a lot of time is wasted on writing documents, printing, scanning, etc. depending on the quality of the equipment available to the court.

In conclusion, overburdening of judges influences greatly the quality of their work, which in turn, affects the litigant's trust in justice and undermines the independence of the judiciary.

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HOW THE WORKLOAD OF JUDGES CAN BE MEASURED

Initially, case weighting (CW) systems were designed to identify the needs of judges. Over the last forty years, the CW systems have developed and are used effectively in many European countries, including for: determining the number of judges, court personnel, prosecutors and/ or public defenders; support for funding and budgeting applications; distribution of the judicial system personnel within different work units; distribution of cases in courts; setting of productivity quotas and valuation standards; planning of merger/ reduction of work units, etc. The development of case weighting systems can also serve as a basis for further analysis and action, such as: identifying critical issues in court procedures, identifying good practices of judges in case management and planning specific programmes to reduce the length of proceedings.

The European Commission for the Efficiency of Justice (ECEJ) of the Council of Europe have found the following: seven Member States of the Council of Europe reported the exclusive use of a point-based system that gives case types a class to represent the complexity of the case (Hungary, Iceland, Italy, Lithuania, Malta, the Republic of Moldova and Turkey); in the case of three countries, the weighting system combines a point-based method with a working time measurement methodology (Finland and Azerbaijan) or a working time estimation methodology (Estonia). Seven states reported that their weighting systems are based on working time measurements (Germany) or working time estimates (Belgium, Serbia, the Czech Republic and the Netherlands), or a combination of working time estimates and measurements (Austria, Ukraine). Although some Member States weigh their caseload based on various methodologies, they also take other factors into account in estimating the number of judges needed.

Apparently, Armenia, Belgium, Estonia, Hungary, Lithuania, Luxembourg and Romania compare the data on the submission of cases to a judge and then forecast the number of judges needed. Azerbaijan reported the use of a 'complex approach' with data to predict the future trend and population in the jurisdiction. Bulgaria, Cyprus, Northern Macedonia and Slovenia use data on the cases filed, solved,

and pending. The Czech Republic takes into account data on the flow of the cases filed, solved and pending, the length of court proceedings, but also other variables that were not specified. "Their purpose is to identify the overburdened courts and appoint additional judges there."

In Italy, several indicators are taken into account, such as: cases filed and pending, unresolved cases, cases per judge, cases received per 100,000 inhabitants, specific characteristics of the territory of the courts (eg mafia crime rate, etc.).

Portugal uses an 'abstract productivity benchmark' for each judge, based on the court cases, the cases resolved and the length of the proceedings. This benchmark is reviewed every three years and is used to establish the number of judges required in each court.

A similar system seems to be applied in Slovakia, with a certain 'quota' of cases to be solved by each judge. If the number of cases filed exceeds the quota set per judge, establishment of new judge positions is considered.

In Sweden and the Netherlands, each court is allocated a budget, and the chair of the court or the court council decide how to use it to achieve the objectives set, which could mean hiring new judges.

In Switzerland, the variables taken into account in calculating the necessary number of judges per court are: the number of cases filed and resolved per year, the time of settlement, the actual length of proceedings, the length of pending cases, especially those that remain pending for a longer period than two years, the number of cases filed and resolved per judge.

In the Republic of Moldova, according to the Decision of the Superior Council of Magistracy (SCM) no. 175/7 of 26 February 2013 on the approval of the Regulation on the criteria for determining the number of judges in the courts, the following criteria should be taken into account when determining the necessary number of judges: *the degree of burdening of judges in the last three years, the complexity*

of cases, the number of inhabitants in the jurisdiction of the court, the number of specific cases and other specific criteria that affect the activity of the court. According to article 21, paragraph 2 of the Law no. 514 of 06.07.1995 regarding the judicial organization³, a number of 504 judges is established for all courts in the Republic of Moldova, including 33 judges for the Supreme Court of Justice. The total number of judges also includes the number of judges for the courts located on the left bank of the Dniester.

Since 2013 and until now, the SCM has not updated these data, it has not requested an increase in the number of judges, although according to its own Regulation mentioned above, it should update the situation in the judicial system every three years. According to the statistical data published annually on the website of the Superior Council of Magistracy⁴, during 2018, a judge in the Supreme Court of Justice received an average of 43 cases per month; a judge in the Courts of Appeal – 45 cases; and a judge in the courts of first instance – 66 cases. During the reporting period, a total of 303,750 cases were submitted to court proceedings, including 241,835 new cases registered in 2018 and 61,915 outstanding cases unresolved at the beginning of the reference period. Out of the total number of cases pending during the reporting period, the courts examined 240,440 cases and materials, which represents a settlement rate of 79.2 percent.

During 2019, a judge in the Supreme Court of Justice solved on average 43 cases per month; in the Courts of Appeal – 44 cases; in the national courts – 69 cases. During the same reference period, there were a total of 309,307 cases in the court proceedings, including 245,997 new cases registered in 2019 and 63,310 cases pending, unresolved until the reference period. Of the total number of cases under settlement during the reporting period, the courts examined 239,736 cases and materials, which represents a settlement rate of 78 percent.

During 2020, a judge in the Supreme Court of Justice solved on average 39 cases per month; in the Courts of Appeal – 37 cases; in the national courts – 54 cases. During this period, a total of 294,084 cases were under settlement in the court proceedings, of which 217,630 new cases were registered in 2020, and 76,454 cases were pending, unresolved by the beginning of the year. Of the total number of cases under settlement in 2020, the courts examined 211,950 cases, which represents a settlement rate of 72 percent.

According to the statistics provided by the Agency for the Administration of Courts (AAC) for 2020⁵, the average an-

nual workload of a judge in the courts of first instance accounted for 765 cases, in the courts of appeal – 478 cases, and in the SCJ – 465 cases. At the same time, there are major discrepancies in some courts. For example, a judge in the central headquarters of the Chisinau court had an average of 875 cases, while the average load in the Leova headquarters of the Cimishlia court accounted for 1045 cases. In the case of the Comrat court, Vulcaneshti headquarters, given only one single judge, the number of cases accounted for 1696.

If we estimate 215 working days of a judge per year, the average workload per day of a judge in the Central headquarters of the Chisinau court is over four cases per day, a workload that cannot be physically covered by one judge. In practice, judges set court hearings on all working days, including several cases at the same time. If all the parties show up at the hearing, the judge is not able to examine the positions of all parties in due time.

The specific nature of the judge's work requires, as mentioned above, an important part related to the analysis of the relevant legislation. In the context of the Republic of Moldova, changes in the legal framework are frequent and important. Only in the last three years there have been adopted such acts as amendments to the Civil Code, the Administrative Code, the Audiovisual Code, as well as multiple laws governing new areas, including those arising from Moldova's commitments under the Association Agreement with the European Union. Important new regulations are due to enter into force in the near future, including the new Customs Code adopted by Parliament in its final reading in August 2021.

Under these conditions, the work of getting informed and analysis of new legislation, but also the participation in continuous training activities within the National Justice Institute are significantly affected, which can lead to multiple human errors, which is subsequently perpetuated in the justice system at the level of Court of Appeal and the Supreme Court of Justice. The high rate of retrial judgments is an additional proof that judges are faced with a workload that exceeds their physical capacity.

The statistical data presented above show that the judicial system should be supplemented with at least another 25 percent of judgeships to ensure the efficient functioning of the system (at 100 percent), without taking into account the human factor (resignations, dismissals, maternity leaves, suspensions, detachments, etc.).

At the same time, the above analysis shows that judges manage to examine on average 76 percent of cases annually. It should be noted, however, that they do not meet the quality standards, as the cases are examined at an ex-

³ https://www.legis.md/cautare/getResults?doc_id=124908&lang=ro#

⁴ https://csm.md/files/Statistica/2020/12_luni/Calitatea/Statistica_judicaria_2020.pdf

⁵ Information on the workload per court in 2020, available at: <https://aa.j>

[justice.md/files/document/attachments/3.Volumul%20de%20lucru%20per%20instanta%2012%20luni%202020%20%281%29.pdf](https://www.justice.md/files/document/attachments/3.Volumul%20de%20lucru%20per%20instanta%2012%20luni%202020%20%281%29.pdf)

tremely fast pace so as not to violate deadlines, as judges are under constant stress due to the excessive number of cases and the time it takes to settle them.

These 76 percent transformed into cases represent about 230,000 cases per year settled by about 400-450 active judges (50-100 posts being vacant/ suspended). This means that each judge examines about 550-600 cases annually. Based on the 200 working days per year (365 days minus Saturdays and Sundays, annual leave, public holidays, medical leave, etc.), ie 1600 working hours (8 hours per day), it results that

a judge from the Republic of Moldova can allocate from his/ her working time only 2 hours and 30 minutes per case (1600 hours/ 600 cases). Obviously, this is not enough, that's why the judges allocate their free time for the settlement of cases, working on days off, holidays or sacrificing the family time. This situation causes permanent stress to the judges. Moreover, due to the overwork, even if judges are willing to solve as many cases as possible, the quality of judgments leaves much to be desired. This speaks for the quality of justice in the Republic of Moldova and partly explains the very low level of trust of the population in justice.

3

HOW THE EXCESSIVE WORKLOAD OF JUDGES AFFECTS THEIR INDEPENDENCE AND INTEGRITY

The professional and personal integrity of the judge is a key element in ensuring the efficient functioning of the judiciary.

The professional activity of a judge consists of two important elements: *legal competence*, which is formed in a very well-organized way, and *psychological competence*, which is currently formed, for the most part, spontaneously. The psychological competence of judges, manifested by the communicative skills of process management and self-regulation skills, is, on the one hand, an essential element for preventing the emotional exhaustion of judges and maintaining their health, and on the other hand, a mechanism for increasing confidence in courts.

On the other hand, the ability of the judge to carry out his/her professional activity ethically, free from undue influence and manifestations of corruption, respecting the public interest, the supremacy of the Constitution of the Republic of Moldova and the law, is the complex personal ability, which is largely determined by the psychosomatic health and psycho-emotional state of the judge.

The importance of the judge's psycho-emotional state is determined by the negative effects of the professional stress on the justice.

If one of the stages of the decision-making process (information gathering, the processing and interpreting the information and the decision-making) or even all of them take place under conditions of chronic stress, it is very likely that the judge will make wrong decisions, which could have serious consequences both at the personal level (eg the court decision on the dissolution of the marriage) and at the country level.

For judges, the most important stress factor (61.45 percent), which negatively affects the state of somatic and mental health, is the volume of work that is constantly increasing⁶.

Excessive workload causes insufficient time and most judges

fail to examine all cases on time (according to statistical reports, in the Republic of Moldova, the average monthly load for a judge exceeds 55 cases, in some cases reaching even 90-95 cases per month), the judge working up to 10-12 hours a day.

A medical study conducted in 2009⁷ showed that most judges (77,26 percent or 282 of 365 participants in the study) mentioned limitation of the adaptive capacities in situations of psycho-emotional stress, both in daily conditions and during the professional activity. This is manifested by anxiety, often feelings of fear (panic attacks), sleep disturbances (frequent awakenings, difficulty falling asleep, insomnia, fatigue on waking).

As to the determinants of this situation, the judges have mentioned primarily the large volume of work. Under these conditions, the work capacity decreases, the cognitive-analytical properties are reduced, which can seriously influence the decision-making capacity of judges⁸. The assessment of the degree of depression by the Hamilton test made it possible to assess the presence and degree of depression among judges, as well as the factors responsible for initiating and maintaining this condition.

According to the score, 24.11 percent of judges reported mild depression, 11.51 percent – moderate depression and 5.21% – significant depression (Distribution according to the degree of depression – professional overload – 61.45%)⁹.

The data obtained show that 40.83 percent of judges issue court documents in a state of depression largely caused by professional overload.

⁶ (Luban-Plozza B., Pöldinger W., Kröger F., Psychosomatic diseases in medical practice. The revised 4th edition, 2000, Medical Publishing House, Bucharest.)

⁷ The personality peculiarities of the judges in the conditions of permanent professional stress. Bucun Nicolae, doctor, university professor, Mereuț Ion, doctor, university professor, Rotaru Ghenadie, Nicolae Testemitanu State University of Medicine and Pharmacy, 28.12.2009.

⁸ Ibidem.

⁹ The personality peculiarities of the judges in the conditions of permanent professional stress. Bucun Nicolae, doctor, university professor Mereuța Ion, doctor, university professor Rotaru Ghenadie, State University of Medicine and Pharmacy "Nicolae Testemitanu", 28.12.2009.

4

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

- a. Judges' workload is far beyond their physical capacity. The average load of **4 cases per day per judge** is not realistic in the conditions of onerous requirements for the civil/criminal/ contravention process, including restricted terms;
- b. the current legal framework does not favour the use of alternative solutions of compulsory extrajudicial mediation for certain cases, including the low-value cases;
- c. the legal framework specific to the areas that generate a high volume of low value litigation (payment of invoices, litigation within Condominium Co-owners Associations) is excessively onerous;
- d. the degree of occupation of support personnel for judges (court reporters, assistants) is low and the fluctuation of court personnel is high due to lack of attractiveness and low salaries;
- e. The Integrated Case Management Programme (IMP) does not provide for the distribution of personnel within the courts located in the same venue in order to balance the number of cases and ensure an approximately similar level of judges.

Recommendations

- Gradually increase the number of judges to ensure an acceptable workload, based on days dedicated to hearings, but also to research and substantiation of decisions. This increase can ensure, at least for the beginning, a reduction in the annual judges' burden from an average of 765 cases to 450-500 cases. In practical terms, this increase in the number of judges would ensure 10 judges per 100,000 inhabitants instead of 6 judges per 100,000 inhabitants. By comparison, in Lithuania, Latvia, Luxembourg, Germany, Poland, the Czech Republic, Slovakia, Austria, Hungary, Croatia, Romania, Macedonia, Serbia, Slovenia, Montenegro, Greece and Bulgaria there are more than 20 judges per 100,000 inhabitants¹⁰;
- Increase attractiveness of the positions of court reporter and judge assistant by revising and at least doubling the salaries for these positions;
- Revise the current mechanism for evaluating the judges' workload based on the work evaluation grid developed by the SCM;
- Legal regulation and promotion of alternative solutions of mandatory extrajudicial mediation for certain cases, including low-value ones;
- Establish psychologist positions in courts in order to assist the judges but also support the personnel (court reporters, judge assistants) who face burnout at work in the workplace;
- Revise the mechanism of access to justice for litigants, including the establishment of discouraging state fees for repeated litigations; adjustment of state fees for proceedings that can be carried out extrajudicially if there is no dispute (eg. dissolution of marriage).

¹⁰ <https://rm.coe.int/overview-avec-couv-18-09-2018-en/16808def7a>

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It is necessary to increase the number of judges in the courts of the Republic of Moldova to ensure an acceptable workload, based on days dedicated to hearings, but also to research and substantiation of decisions. The gradual increase in the number of judges can take place on the account of available vacancies but also by increasing the number of court personnel.



The positions of court reporter and judge assistant are unattractive. Revising and at least doubling the salaries for these positions would make them more attractive and reduce the administrative burden on judges in the absence of such support personnel. Occupation of posts of court reporter and judge assistant can contribute to an efficient justice and effective organization of the justice system.



The current mechanism for evaluating the effort of judges based on the workload evaluation grid developed by the SCM is outdated. The revision of the criteria for assessing the workload of judges will contribute to a fairer assessment of the judges' work- especially on less applied procedures such as examining appeals against decisions issued by other judges or challenging the actions of bailiffs - and balance the workload of all judges in the court system, regardless of their specialization or place of work.

Further information on the topic can be found here:
www.fes-moldova.org