

## ON PROCEDURAL ACTS ISSUED BY INVESTIGATING JUDGES APPOINTED CONTRARY TO LAW 514/1995

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*Everyone has the right to a fair examination and resolution of his or her case by an independent, impartial, lawfully constituted court acting in conformity with this Code. These guarantees take the form of the constitutional principle of free access to justice, the violation of which is sanctioned by declaring absolute nullity of procedural acts obtained or adopted contrary to this principle. There is sufficient evidence to show that the appointment of investigating judges during the period 2015-2018 was in violation of the provisions of Article 151 of Law No. 514/1995 on the Organization of Judges - that, in the editorial office up to January 12, 2018, which regulated that an investigating judge may hold that dignity only if he has previously held the position of judge for at least 3 years. Unfortunately, these deviations, whether consciously or mistakenly admitted by the Superior Council of Magistracy, have had and will have the most unexpected consequences, because those investigating judges accused of violating the law have committed a series of procedural acts that are thus rendered null and void.*

**Keywords:** law, Constitution, investigating judge, magistrate, Superior Council of the Magistracy, court, nullity.

### CU PRIVIRE LA ACTELE PROCEDURALE EMISE DE JUDECĂTORII DE INSTRUCȚIE NUMIȚI ÎN FUNCȚIE CONTRAR LEGII 514/1995

*Orice persoană are dreptul la examinarea și soluționarea cauzei sale în mod echitabil, în termen rezonabil, de către o instanță independentă, imparțială, legal constituită, care va acționa în conformitate cu prezentul Cod. Aceste garanții îmbracă forma principiului constituțional al accesului liber la justiție, încălcarea cărora este sancționată prin declararea nulității absolute a actelor procedurale obținute sau adoptate contrar acestui principiu. Există suficiente dovezi pentru a demonstra că numirea unor judecători de instrucție în perioada 2015-2018 s-a făcut contrar prevederilor art. 15<sup>1</sup> din Legea nr. 514/1995 privind organizarea judecătorească, în redacția de până la 12.01.2018, care reglementa că un judecător de instrucție poate deține această demnitate, doar în cazul în care a deținut anterior funcția de judecător cel puțin 3 ani de zile. Cu regret, aceste abateri admise conștient sau eronat de către Consiliul Superior al Magistraturii, au avut și vor avea consecințe din cele mai neașteptate, deoarece acei judecători de instrucție numiți contrar legii, au adoptat o serie de acte procedurale care în consecință sunt lovite de nulitate absolută.*

**Cuvinte-cheie:** lege, Constituție, judecător de instrucție, magistrat, Consiliul Superior al Magistraturii, instanță, nulitate.

### SUR LES ACTES DE PROCÉDURE ÉMIS PAR LES JUGES D'INSTRUCTION NOMMÉS EN EXERCICE EN VIOLATION DE LA LOI 514/1995

*Toute personne a le droit de voir son cas examiné équitablement et résolu dans un délai raisonnable par un tribunal indépendant, impartial et légalement constitué qui agira conformément au présent code. Ces garanties prennent la forme du principe constitutionnel du libre accès à la justice, dont la violation est sanctionnée par la déclaration de nullité absolue des actes de procédure obtenus ou*

adoptés contrairement à ce principe. Il existe des éléments suffisants pour prouver que la nomination des juges d'instruction en 2015-2018 a été faite contrairement aux dispositions de l'art. 151 de la loi n° 514/1995 sur l'organisation judiciaire, à la rédaction jusqu'au 12.01.2018, qui réglementait qu'un juge d'instruction ne peut exercer cette dignité que s'il a précédemment occupé le poste de juge pendant au moins 3 ans. Malheureusement, ces déviations consciemment ou à tort admises par le Conseil Supérieur de la Magistrature, ont eu et auront les conséquences les plus inattendues, car ces juges d'instruction nommés contrairement à la loi, ont adopté une série d'actes de procédure qui sont par conséquent frappés de nullité absolue.

**Mots-clés:** loi, Constitution, juge d'instruction, magistrat, Conseil Supérieur de la Magistrature, tribunal, nullité.

### ПРОЦЕССУАЛЬНЫЕ ДОКУМЕНТЫ, ИЗДАНЫЕ СУДЬЯМИ, НАЗНАЧЕННЫМИ ВОПРОКИ ПОЛОЖЕНИЯМ ЗАКОНА 514/1995

Каждый человек имеет право на справедливое рассмотрение и разрешение его дела в разумные сроки независимым, беспристрастным, законно учрежденным судом, который будет действовать в соответствии с настоящим Кодексом. Эти гарантии выражаются в форме конституционного принципа свободного доступа к правосудию, нарушение которого санкционируется признанием недействительными процессуальных действий, полученных или принятых вопреки этому принципу. Имеются достаточно доказательств того, что назначение следственных судей в период 2015-2018 годов было произведено вопреки положениям ст. 151 Закона №. № 514/1995 об организации судоустройства, в редакции до 01.12.2018, которым регламентировалось, что следственный судья может занимать эту должность только в том случае, если он ранее занимал должность судьи не менее 3 лет. К сожалению, эти уклонения, сознательно или ошибочно допущенные Высшим советом магистратуры, имели и будут иметь самые неожиданные последствия, так как назначенные вопреки закону следственные судьи приняли ряд процессуальных актов, которые, следовательно, признаются недействительными.

**Ключевые слова:** закон, Конституция, следственный судья, магистрат, Высший совет магистратуры, суд, недействительность.

#### Introduction

Given the principle of the rule of law, a “court” must always be constituted “according to law”, otherwise it lacks the necessary legitimacy in a democratic society to hear the cases entrusted to it. The general principles and norms of international law and international treaties to which the Republic of Moldova is a party constitute elements of criminal procedural law and directly give rise to human rights and freedoms in the criminal process.

Art. 19 of the Criminal Procedure Code of the Republic of Moldova provides that “every person has the right to the examination and resolution of his/her case fairly, within a reasonable time, by an independent, impartial, legally constituted court, which will act in accordance with this code<sup>1</sup>”, and art. 14.1 of

<sup>1</sup> Codul de Procedură Penală al Republicii Moldova, nr. 122 din 14.03.2003. Monitorul oficial nr. 248-251 din

the Covenant on Civil and Political Rights<sup>2</sup> operates with the notion of “competent, independent and impartial tribunal, established by law”. The European Convention on Human Rights<sup>3</sup> and Fundamental Freedoms refers, in art. 6.1, to an “independent and impartial court established by law”

#### Main ideas of the research

The phrase “according to the law” refers not only to the legal basis of the court’s very existence, but also to the court’s compliance with the specific rules by which it conducts itself (*Sokourenko and Strygoun vs. Ukraine, paragraph 24*). The legality of a court must necessarily cover its composition [Buscarini

05.11.2013.

<sup>2</sup> Pactul cu privire la drepturile politice și civile din 16.12.1966

<sup>3</sup> Convenția Europeană a Drepturilor Omului

vs. San Marino (dec.)). In the guide on art. 6 of the ECHR<sup>4</sup> states that: “Procedures regarding the appointment of judges should not be transferred to the level of internal practice” (ibidem, points 154-156)... “The law” referred to in art. 6 § 1 is therefore not only the legislation relating to the establishment and competence of judicial bodies, but also any other provision of domestic law, the non-compliance of which leads to the participation of one or more judges in illegal cases (*DMD Group, A.S., vs. Slovakia, para. 59*). Failure by a court to comply with the provisions of domestic law basically implies a violation of art. 6 § 1 (*DMD Group, A.S., vs. Slovakia, § 61*).”

A court which, without any explanation, goes beyond its ordinary jurisdiction, deliberately disregarding the law, is not a “court constituted according to law” in the proceedings in question (Sokourenko and Strygoun vs. Ukraine, §§ 27- 28). Thus, a court that examines the merits of the case instead of the competent court is not a “court constituted according to law” (*Aviakompaniya A.T.I., ZAT vs. Ukraine, paragraph 44*).

In the recent practice of the courts in the Republic of Moldova, several situations can be observed in which the courts are constituted contrary to the law, in this case it is about several investigative judges.

According to art. 15<sup>1</sup> of Law no. 514/1995 on judicial organization<sup>5</sup>, in the redaction up to January 12, 2018, it was regulated that: *from among the judges of the court, the judges who will exercise the powers of the investigating judge are appointed. (2) The investigating judge is appointed by the Superior Council of the Magistracy with its consent, upon the proposal of the president of the court, from among the judges who have been active as a judge for at least 3 years, for a term of 3*

*years, without the possibility of serve two consecutive mandates.* This rule was amended by the Parliament of the Republic of Moldova only on January 12, 2018 by excluding from the Law the phrase: “... from among judges who have been active as a judge for at least 3 years, for a term of 3 years...”

It is also worrying how the Parliament modified the text of art. 15<sup>1</sup> of Law no. 514/1995 (by excluding the phrase “... from among the judges who have served as a judge for at least 3 years, for a term of 3 years...”). Respectively, by Government Decision no. 977 of November 15, 2017, the draft law was approved and presented to the Parliament for the amendment and completion of some legislative acts, which aimed to create the position of *deputy chief of the secretariat of the Chisinau Court*. Thus, Law 315/2017<sup>6</sup> in the original version did not provide for the exclusion of the phrase “... from among judges who have been active as a judge for at least 3 years, for a term of 3 years...”. In fact, in the first and second reading (according to the transcripts of the Parliament) the deputies voted for the draft Law no. 315/2017 amending Law no. 514/1995 by creating the position of *deputy chief of the secretariat of the Chisinau Court*, and in the final version of the law it is legislated in a surprising way and in violation of the Parliament Regulation that the sentence from art. 15<sup>1</sup> of Law no. 514/1995 - “... from among the judges who have been active as a judge for at least 3 years, for a 3-year term...” - is excluded (without the Parliament having voted knowingly for this amendment).

Despite the requirements established by art. 15<sup>1</sup> of Law no. 514/1995 in the wording until January 12, 2018, although the magistrate V. B. was appointed to the position of judge by the decree of the President of the Republic of

<sup>4</sup> [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ROM.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_ROM.pdf)

<sup>5</sup> Legea nr. 514/1995 privind organizarea judecătorească, publicată în Monitorul Oficial nr. 58 din 19.10.1995.

<sup>6</sup> Legea nr. 315 din 22.12.2017 privind modificarea și completarea unor acte legislative. Monitorul Oficial nr 7-17 din 12.01.2018.

Moldova no. 1712 of **08.05.2015**<sup>7</sup> for a period of 5 years, shortly after, by CSM (*Superior Council of Magistracy*) Decision no. 798/32 of 22.11.2016 V.B. is appointed investigating judge for the Buiucani Court, Chisinau municipality for a term until December 31, 2016. This appointment to the position of investigating judge of a magistrate who had not previously worked as a judge for at least 3 years, was carried out contrary to the provisions of art. 15<sup>1</sup> of Law no. 514/1995 on judicial organization, that is, the court was established contrary to the law.

By the same Decision of the CSM (*Superior Council of Magistracy*), the young magistrate A.N., who had also been appointed as a judge by the Decree of the President of the Republic of Moldova in 2015, was also appointed as an investigating judge. Later, by the CSM Decision no. 932/38 of 27.12.2018 the same magistrates are extended their duties as **investigating judges** for a new mandate (covering the period 01.01.2017-31.12.2017) in the newly created court (Chisinau Court, Buiucani headquarters). And on **19.12.2017** CSM issues another decision with no. 836/37 appointing for the third consecutive time the judges A. N. and V. B. **for a period of 2 years, as investigating judges**. This state of affairs was confirmed by the CSM by letter no. 595 of March 9, 2022, indicating as the basis the editorial of article 15<sup>1</sup> of Law no. 514/1995 regarding the judicial organization for 2022, but not the one in force at the date of issuing the decisions described above.

In the criminal case *I.R.*, these magistrates issued a series of decisions by which they authorized the carrying out of special investigative measures, postponed the notification of the recognition order as a suspect and found compliance with the legal requirements in the process of carrying out the

interceptions and the surveillance of the person whose is charged with the crime of influence peddling, as follows:

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-6871/2017 of 27.12.2017 which authorized the extension of the special investigative measure – interception (Vol. I, page 65 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-366/2018 of 25.01.2018 authorizing the extension of the special investigative measure – interception (Vol. I, page 74 of the criminal case);

The conclusion of the investigating judge (and the court mandate) V.B. no. 11-365/2018 of 25.01.2018 by which the extension of the special investigation measure-the interception (vol. I, tab 108 of the criminal case) was authorized;

The conclusion of the investigating judge (and the judicial mandate) A.N. no. 11-6443/2017 of 01.12.2017 which authorized the special investigative measure – interception (Vol. I, page 127 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) A.N. no. 11-6889/2017 of 28.12.2017 which authorized the extension of the special investigative measure – interception (Vol. I, page 137 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-300/2018 of 23.01.2018 which found compliance with the legal requirements when conducting the interception (Vol. I, page 151 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-84/2018 of 10.01.2018 which authorized the extension of the special investigative measure – documentation with technical means (Vol. I, page 164 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-

<sup>7</sup> Decretul Președintelui Republicii Moldova nr. 1712 din 05.08.2015 privind numirea în funcție a unor judecători. Monitorul Oficial nr. 206-210 din 07.08.2015.



364/2018 of 25.01.2018 which authorized the extension of the postponement of informing the suspect I.R. of the order recognizing him as a suspect from 01.12.2017 (Vol. III, tab 162 of the criminal case);

Pursuant to art. 251 para. 2) CPP<sup>8</sup> (Criminal Procedure Code): “*violation of the legal provisions related to the competence according to the matter or according to the quality of the person, to the notification of the court, to its composition and to the publicity of the court session, to the participation of the parties in mandatory cases, to the presence of the interpreter, the translator, if they are mandatory according to the law, attracts the nullity of the procedural act*”. In turn, art. 6 para. 1) The CPP (Criminal Procedure Code) defines the procedural document as: “*the document that records any procedural action provided for by this code, namely: ordinance, minutes, indictment, conclusion, sentence, decision, judgment, etc.*”.

All these ordinances and conclusions are hit with absolute nullity because on the date of their issuance magistrates V.B and A.N. they could not be legally constituted in their capacity as investigating judges, because they had not previously worked as judges for at least 3 years, nor could they be appointed as investigating judges for the 3<sup>rd</sup> consecutive term.

Consequently, any person has the constitutional right to have his/her file examined by a legally constituted court, and the procedural documents, conclusions - adopted by a court constituted contrary to the provisions of art. 15<sup>1</sup> of Law no. 514/1995 on judicial organization are struck by absolute nullity and cannot be used as the basis of a court sentence, regardless of what it is.

At the same time, all *the evidence* acquired on the basis of these illegal conclusions

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<sup>8</sup> Codul de Procedură Penală al Republicii Moldova, nr. 122 din 14.03.2003. Monitorul Oficial nr. 248-251 din 05.11.2013

adopted by the two investigating judges who held this capacity contrary to Law no. 514/1995 (edition up to January 12, 2018), are to be excluded from the file, as having been acquired contrary to the legal procedure and with the authorization of a court constituted illegally and unconstitutionally. Consequently, if the conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-364/2018 of 25.01.2018, which authorized the extension of the postponement of informing the suspect I.R. of the order recognizing him as a suspect, are struck by absolute nullity, then the criminal case (which is currently pending before the Chisinau Court) is to be terminated, because the criminal investigation body violated the provisions of art. 63 CPP (Criminal Procedure Code) (the quality of being a suspect has ceased by law), a fact that generated the nullity of the indictment order against the defendant.

In such an interpretation, it is concluded that the prosecutor's order by which I.R. was recognized as a suspect, the right has expired until he is recognized as accused, and the indictment order is struck with absolute nullity, and all acts and actions of the criminal investigation body carried out after the expiry of the legal term for holding the person as a suspect, they are null and void.

Article 20 of the Constitution represents the founding block of the democratic system, in which any person has the right to effective satisfaction in case of violation of his/her rights. The first paragraph defines the scope of application of the article for “*any person*”. The semantic interpretation of the notion “*any person*” unequivocally foresees that the action of the constitutional article extends to all citizens, foreigners or stateless persons. In addition to this general notion, the article contains notions that explain the application of the article to any person who has legitimate rights - here, the rights enunciated in the Constitution or in the international instruments to which the Republic of Moldova is a party.

### Conclusions

In the end, we consider that the appointment of the investigating judges during the years 2015-2018 contrary to art. 15<sup>1</sup> of Law no. 514/1995 regarding the judicial organization represents a violation of the provisions of art. 20 of the Constitution and of art. 6 of the European Convention, because the state was not able to ensure the legal constitution of a court (in this case, being the investigating judge). Although some members of the CSM (*Superior Council of Magistracy*) have raised these violations at one time, and art. 15<sup>1</sup> of Law no. 514/1995 was partially modified by excluding the phrase: “... among the judges who worked in the position of judge at least 3 years, for a mandate of 3 years ...” However, the CSM has again appointed magistrates V.B. and A.N. as investigative judges for the third consecutive term (in December 2017), despite the fact that a magistrate can be an investigative judge for at most two consecutive terms.

This serious deviation from the way of constituting the instructional courts, creates the premises of an insecurity of the legal relations and hits with absolute nullity the procedural documents issued by these instructional judges, and the persons to whom the legitimate rights and the free access to justice were damaged, in the case of an illegal conviction, ECtHR can

be addressed to request the conviction of the Republic of Moldova and to obtain accordingly the trigger to review the criminal proceedings. At the same time, there are several cases before the Chisinau Court that are to be terminated in accordance with the provisions of art. 63, 251, 275 par. 9) CPP (Criminal Procedure Code) because the investigative judges mentioned above and constituted as such contrary to the law, issued procedural documents that are struck by absolute nullity, which consequently excludes the possibility of continuing the criminal prosecution of the person.

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