

## ACHIEVEMENTS AND FAULTS IN REFORMING THE JUSTICE SECTOR OF THE REPUBLIC OF MOLDOVA: 2012 - July 2014

### Executive summary

Since the change of government in 2009, justice reform was among the top priorities in activity programs of all three Government from Chisinau. Although it contains ambitious initiatives, Justice Sector Reform Strategy for 2011-2016 (JSRS) was adopted only in November 2011, more than two years after the change of government. Due to the fact that the Action Plan for implementation of JSRS entered into force with delay, real implementation of the Strategy started only in June 2012. On the other hand, it seems that in the process of implementation of JSRS, Moldovan authorities relied less on their own resources and too much on external assistance. In 2012, there were extremely limited budgetary resources for implementation of JSRS. Shortage of funds delayed the implementation of many activities from the JSRS. The European Union started to support financially the implementation of JSRS in only 2013. Until then the main supporter of the reform was the US Government.

Prosecution service of the Republic of Moldova resembles more the Soviet type prosecution service, with broad powers, which are vaguely regulated by the law, and with a strong hierarchical subordination. There are many prosecution offices in the country with a small number of prosecutors while the staff assisting prosecutors is insufficient. On the other hand, the number of hierarchically superior prosecutors is very high. The powers of the prosecution service, which are too broad, do not make the institution to focus on the main task of a European-type prosecution service - criminal justice. Even if politicians have publicly and constantly declared that they support reform of the prosecution service, in more than 20 years since country's independence, the prosecution service was not reformed substantially. In 2013, a Working Group was created to elaborate the Concept of reforming the prosecution service and the draft amendments to the legislation for implementing this Concept. The Concept and the draft law were elaborated in November 2013. However, the Parliament adopted the Concept only in July 2014, while the draft law was not even discussed so far. The delay in reforming the prosecution service represents, probably, the main outstanding arrear in the implementation of the JSRS. Because of this arrear, EUR 1.8 million from budgetary support provided by the European Union for reforming justice system were lost.

District courts with small number of judges are expensive to maintain and do not provide proper environment for professional growth of judges. Out of 44 district courts of the Republic of Moldova, 29 have less than seven judges, and the workload of judges from different district courts varies by several times. The change of the judicial map represents the first area of intervention provided by the JSRS. In 2014, at the request of the Ministry of Justice, CRJM has launched the Study on optimization of the judicial map in the Republic of Moldova. The Study recommends rethinking of the judicial map by merging and liquidating a number of district courts and courts of appeal in order to enhance the quality of justice and efficient administration of public funds. It seems that the Government has not decided yet how to optimize the judicial map. However, in the summer of 2014, the Government has initiated the liquidation of one court of appeal, apparently, in order to combat corruption. Liquidation of district courts as a tool for combating corruption in the judiciary is not an appropriate measure. Optimization of the judicial map should be implemented only through systemic and long-lasting actions.

A new system of performance evaluation of judges was introduced in 2012 to further increase judges' professionalism. Introduction of this system is a positive step. At the same time, the system of performance evaluation of judges was introduced with some serious deficiencies that can diminish the original intentions. The workload of the performance evaluation Board is very high, affecting its quality, while some evaluation criteria are difficult to assess objectively.

After more than two years of debates, a new law on disciplinary responsibility of judges was adopted in 2014, after the Government assumed political responsibility for implementation of the law. The law contains a number of positive innovations. However, the mechanism for investigating disciplinary offences is very complicated, the fact that can block the activity of the Board responsible for examination of disciplinary cases. Although Venice Commission and OSCE/ODIHR provided their opinion on this draft law, none of their recommendations have been accepted.

Investigative judges (IJ) are specialized judges authorizing prosecutor's requests for conducting criminal investigation actions, special investigation measures and requests for application of procedural coercive measures (e.g. search, wiretapping, seizure of goods, preventive arrest etc.) and are responsible for examining complaints against the actions of criminal investigation bodies. There is a general perception that, because IJ are former prosecutors or criminal investigation officers, they give a too broad margin of discretion to prosecutors and do not react the illegalities committed during criminal investigation. Their activity was often criticized by the European Court of Human Rights (ECtHR). In 2012, the institution of IJ was reformed. Nevertheless, legislative framework and SCM practice may undermine this reform.

By the Law no. 153 of 5 July 2012, the SCM powers in respect of administration of justice system were consolidated. One of the major changes represents the SCM competence to establish the number of judges each court, based on the total number of the positions of judges per system. In 2013, observance of the principle of random distribution of cases was set as SCM priority. SCM has tightened the rules related to random distribution of cases. In 2013 SCM has made several changes in the Integrated Case Management Program (ICMP). In 2013, the failure to comply with the provisions related to random distribution of cases was invoked in two disciplinary proceedings initiated against judges.

In 2012, legislative amendments were adopted to improve the system of court management and the quality of judges' activity. New positions of head of court's secretariat were created and, starting with 2013, each judge is assisted by a legal assistant. In 2014, each judge from district courts was assisted by two persons: a clerk and an assistant. At this field, Moldovan judges can only be envied by judges from other European countries

Until 2013, draft budgets of district courts were elaborated by the chairpersons of courts and sent to the Department of Judicial Administration of the Ministry of Justice (DJA), the fact that dissatisfied SCM. Since 2014, DJA is no longer involved in the management of court budgets, and this task has been totally taken over by the SCM. On the other hand, 2012-2014 years were marked by considerable increase of budget allocations for the court system. In 2013, the budget of courts increased by 57% compared to 2012 and in 2014 - by 44% compared to 2013. In addition to the spectacular increase of the budget of the courts, the justice system also benefited from considerable external assistance.

Generating exact and complete statistical data on criminal justice is a problem in Moldova, because there is no integrated record of such data in the country. Keeping statistics on criminal prosecutions is traditionally assigned to the Ministry of Interiors (Mol). However, the data of the Mol does not include information concerning criminal investigations carried out by other bodies. Moreover, Mol is accumulating information only until finalization of the criminal investigation, i.e. it does not have information about the fate of criminal cases submitted for court examination. JSRS envisages a uniform method of collecting and analysing statistical data related to criminal justice. Regretfully, by September 2014, this activity was still not implemented. Until 2013, statistical reports on the activity of courts were submitted and stored on paper by the DAJ. Although ICMP has a powerful statistical module, until 2013 it was not generating reliable data, because only few courts were introducing in the ICMP information about all cases.

Following the 2012 legislative amendments, SCM has introduced clear criteria for the evaluation of the activity of judges and selection of candidates who wish to become judges or judges who want to be promoted. However, SCM does not feel obliged to follow the score awarded by the Selection Board. In several decisions, SCM did not indicate the reason or criteria that served as the basis for the appointment or promotion of judges, despite the fact that other candidates were proposed for appointment or promotion than candidates who accumulated the highest score. Such practice erodes the trust of judges in the SCM.

Judges in the Republic of Moldova cannot be prosecuted, detained, arrested or searched without the SCM consent. On 5 July 2012, legislation was adopted allowing criminal prosecution and of judges without the SCM consent at the initiative of the General Prosecutor and only in cases of suspicion that acts of passive corruption and traffic of influence were committed. In other cases, the SCM consent is still required. Although the law envisages that SCM shall examine request of the General Prosecutor within maximum five days, examination of the request in relation to judges Eugeniu CLIM, Aureliu COLENCO, Valeriu HARMANIUC and Ala NOGAI is pending for several weeks already.

Until 2012, the appeal system in Moldova was quite complicated. It included many exceptions under which certain criminal and civil cases were examined on their merits by the courts of appeal. As a result, the work of the courts of appeal was hindered, and practitioners were confused about the competence of examination of certain cases, especially administrative cases. According to amendments introduced in the Civil Procedure Code and Criminal Procedure Code in 2012, all cases are examined on their merits by the district courts. However, a number of special laws, which envisage the right of courts of appeal to examine cases as first instance court have not been amended so far. Moreover, instead of narrowing the competence of the SCJ in civil cases, the 2012 legislative amendments have expanded its competence.

JSRS envisages creation of a mechanism that would guarantee uniformity of judicial practice and observance of the principle of legal certainty. The 2012 legislative amendments allow the SCJ to effectively unify judicial practice. During 2012-2014, the SCJ was quite active in issuing recommendations for judges, designed to make the judicial practice uniform. However, these recommendations are not always observed. Sometimes, the SCJ itself deviates from its own recommendations.

Insufficient reasoning of court decisions, regardless of the court, was and remains, probably, alongside corruption, the most serious problem of the Moldovan judicial system. The magnitude of this problem stems from cases lost by the Republic of Moldova at the ECtHR. The size of court decisions increased lately. However, description of the positions of the parties often represents the largest part of the court decision. Grounds on which judges are basing their solutions are usually spelled laconically and without touching upon all the key issues of the case. SCJ has tolerated or even generated such practices. However, in the past two years, the SCJ started to motivate better its decisions, although the number of poorly motivated SCJ decisions is still very high.

Until 2013, judges in the Republic of Moldova had the lowest salary among the Council of Europe member states. Corruption in the justice system cannot be abolished without providing civil servants with an income that would enable their decent living. Salaries of judges were increased in two stages, in 2013 and in 2014, by more than 100%. Salaries of judges will further increase by 10% in 2015 and by 10% in 2016. Judges also receive annually material assistance in the amount of one monthly salary and an bonuses that should not exceed one monthly salary in the course of a year. The practice of providing bonuses to judges is discouraged by the Venice Commission.

Until 2013, judges had low salaries; however they enjoyed considerable pensions and allowances. At the age of 50 years, the judge was acquiring the right to a special pension in the amount from 55% to 80% of the average monthly salary of a judge in office, which was paid regardless of whether the judge resigned

or continued to exercise his/her office. Moreover, the pension was recalculated if the salary of judges increase. The Law on the Status of Judge also envisaged the right of judges to unique dismissal allowance, which was equal with his average monthly salary multiplied to the number of years worked as a judge. Although salaries of judges increased in 2014, most of judges' benefits were preserved. Only dismissal allowance of judges was reduced by 50%. Reduction of this allowance determined 39 judges to resigned before the entry into force of the law concerned. Massive exodus of judges endangered activity of some small courts, where 2-3 judges left (e.g. District courts Briceni and Rezina). The activity of the Comrat Court of Appeal was completely blocked.

On 23 December 2013, Parliament passed the Law no. 326, which increased criminal penalties for corruption. Although corruption offenses are punished more severely, limiting the interdiction for public officials to hold public offices could significantly reduce the effect of these provisions. Harshening the sanctions for corruption in December 2013 is welcomed. However, the ban for public officials convicted for corruption to hold public offices for maximum 15 years is too mild and it should be introduced for a longer period of time or even for life.

The Law on testing professional integrity was adopted on 23 December 2013 in order to combat corruption within the state structures. Although the text of the law has undergone positive amendments in the Parliament, some of its provisions can significantly diminish, or even contravene to the purpose of adopting the law. For instance, members of Parliament and Government do not fall under this law.

Moldovan judges cannot be criminally prosecuted, detained, arrested or searched without the consent of the SCM. Prosecutors and the Ministry of Justice claim that this procedure hinders the fight against corruption among judges. The new legislation adopted on 5 July 2012 allowed criminal prosecution and criminal liability of judges without consent of the SCM, at the initiative of the General Prosecutor, and only for suspicions of committing acts of passive corruption and traffic of influence. SCJ challenged this legislation in the Constitutional Court. On 5 September 2013, Constitutional Court declared these provisions constitutional, with exception of the legislation allowing for detention, forced bringing, arrest and search of the judge without involvement of the General Prosecutor. In July 2014, Government proposed to the Parliament to apply all coercive measures against judges only with the consent of the General Prosecutor or of the first-deputy General Prosecutor. Money laundering and illicit enrichment were also added to the offenses for which consent of the SCM is not required. After Government assumed political responsibility on 21 July 2014, this initiative became a law and came into force on 8 August 2014.

The fight against corruption would be illusory without effective mechanisms of investigating individual cases of corruption. Investigation of corruption cases is a difficult and delicate process, and collection of evidence is especially complicated. In such cases evidence can often be collected only through special investigation measures, especially, through interception and recording of communications. On 28 June 2013, Parliament adopted the Law no. 158, in force from 19 July 2013, which excluded the possibility of prosecutors to intercept suspects without informing them in advance. In such circumstances, special investigation measures have no effect. On 29 April 2014, Parliament adopted the Law no. 39, in force from 27 June 2014, restoring the legislation to the situation existing prior to 28 June 2013.

In addition to tightening penalties for corruption, professional integrity testing and simplifying immunity of judges, some other anti-corruption measures have been introduced, such as limiting the ex-parte communication of judges, the polygraph checking of the candidates for the position of judge and prosecutor, extended confiscation and illicit enrichment. Although the introduction of these measures is saluted, they contain deficiencies that can make them inefficient. For example, the current text of the Criminal Code makes effective implementation of extended confiscation practically impossible.

Constitutional Court has examined the constitutionality of a number of initiatives envisaged for implementation of JSRS. The activity of the Constitutional Court from the recent years can be criticized by some and praised by others. It is however indisputable that, starting with 2011, Constitutional Court has become much more proactive, especially when it comes to the interests of judges. Given the importance of some rulings of the Constitutional Court for the judicial reform and for combating corruption, four rulings of the Constitutional Court are analysed in details in this Study, namely: the ruling that declared liquidation of specialized courts unconstitutional, the ruling that examined the decrease of judges' pensions, ruling on the interpretation of the presumption of legality of property, and the ruling on the immunity of judges.

The list of topics that deserved to be analysed in this Study is bigger than 30. These issues can be subject of our analysis in the next Study, which will be elaborated by the CRJM in 2015.