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Association for Participatory Democracy

Briefing for the second round of the EU-Moldova Human Rights Dialogue
Issue: Justice Reform in Moldova
Date: 24 March 2011
Submitted by: Legal Resources Centre from Moldova[1] and the Association for Participatory Democracy ADEPT[2]

Issue:

The justice system in Moldova is in need of reform. The problems are various, including poor legal framework, dysfunctional institutions, lack of professionalism of the human resources, corruption and lack of funding. The Government has declared the justice reform as one of their priorities for the governing period of 2011-2014. We welcome most of the activities indicated in the Government Program. However, we disagree with the approach towards implementing these reforms, in particular lack of preparatory phase for the reforms, the exaggerated speed of announced legislative amendments, lack of a strategy for reform and lack of a coordinating body to oversee the reform process. Rushed reforms might worsen the already difficult situation in the justice system. Therefore we call on EU to urge the Moldovan Government to rethink the approach towards implementation of the justice reform.

Background:

Moldovan justice system struggled since 90's with the Soviet background and the need for reform in compliance with international and European standards, a struggle that is still on-going. The main cross-cutting issues of the system are human resources, independence and corruption.

Judicial system:

Judiciary went through a comprehensive reform since 1995, both legislative and practice changes were implemented. However, after the 2002 process of "mass cleansing" reported by the Moldovan Association of Judges, during which seven judges lost their posts and the President of the country refused to renew the mandates of 57 other judges,[3] many of the initiated reforms have been significantly curtailed. Judicial independence became an acute problem, which led to further corruption and lack of accountability.

To date judicial independence in Moldova is severely affected both institutionally and by individual judges who do not think of themselves as independent. The general public's level of trust in the justice system remains low.[4] A recent survey indicates that around half the people going to court in Moldova each year

[1] The Legal Resources Centre is a registered public association that seeks to contribute to raising the awareness of the authorities about and to the eradication of human rights problems; strengthening an efficient, transparent, fair and credible judiciary; creating a culture of respect for human rights; developing public policies on observance of human rights. The LRC current main activities are focused on the implementation of human rights treaties and reforms in the justice sector. Further information will be available on www.crjm.org (the website is under construction and will be launched in May 2011).

[2] The Association for Participatory Democracy ADEPT is a public, non-governmental, not-for-profit and politically non-affiliated organization based in Moldova. It is an independent centre of analysis and consultation on the decision-making, political, electoral and socio-economic processes in the Republic of Moldova and in the wider region. ADEPT's mission is to promote the democratic values and support citizen active participation in public affairs. Further information is available at www.e-democracy.md

[3] International Commission of Jurists, Moldova: The Rule of Law in 2004, Report of the Centre for the Independence of Judges and Lawyers, Annex I, at 6 (2004); the Parliament Declaration regarding the state of affairs in the Judiciary and the measures necessary for improving the situation in the judiciary), adopted by Parliament decision no. 53 of 30 October 2009, also refers to the „elimination from the judiciary, in 2002-2003, of a considerable number of honest and qualified judges, based on political criteria, and promotion of candidates obedient to the government".

[4] Barometer of Public Opinion of November 2010: only 1.4% of the population has „a lot" and 23.7% „some" trust in the justice system, Institute for Public Policy, Moldova.

compromise the case in which they are involved by a bribe.[5] At the same time, some specialists have highlighted that during the past year, the political discourse regarding judges's corruption has intensified, which might have also contributed to raising the public's perception about very high corruption among judges.[6]

The new Government installed in 2009 has taken several steps to improve the functioning of judiciary, some of which were appropriate and other less so. In September 2010 the Government adopted the Action Plan for implementing the concept for judiciary funding, which should improve the budget-making process within judiciary and increase in judges' remuneration. There has been observed an increase in the transparency of courts due to a higher number of decisions published on the courts' websites as a result of improvement of technical endowments (computers, software) allocated to courts from the foreign aid. However, the way the decisions are published should be improved to ensure an adequate search function. In addition, many of the decisions are still not published, especially at the Chisinau Court of Appeals. The Ministry of Justice prepared a proposal for abolishing the specialized economic courts, which appear to be the most corrupt courts in the country and are not responding adequately to the needs given their concentration in the capital of the country. Although a long-needed step, the Parliament did not vote this initiative due to lack of quorum, which passed a detrimental message to the judiciary and the society.

In response to several cases lost at the European Court and unprofessional statements regarding the role of media by the President of the Supreme Court of Justice (SCJ), the Parliament voted his dismissal in breach of the procedure provided by law,[7] which was later on declared unconstitutional by the Constitutional Court. Statements and decisions of the representatives of executive and legislature regarding judiciary fuelled bitter criticism and reactions by the president of the SCJ, who described the actions as interferences with judiciary. As a result, the conflict between legislature and executive, on the one side, and the SCJ representatives, on the other side, has deepened in 2010.

Judicial accountability is not really functioning in Moldova. Reprimanding procedures have been initiated against a few judges, including in relation to April 2009 events. However, the disciplinary proceedings for judges are too cumbersome, providing four layers of examining a disciplinary case (Disciplinary Board, Supreme Council of Magistrates, Court of Appeal and Supreme Court of Justice) and the internal procedure within the Superior Council of Magistrates (SCM) is incoherent. This leads to tergiversation in examining the disciplinary offences and facilitates judges' impunity. Judicial disciplinary proceedings need revision in order to improve efficiency and provide a similar number of levels of jurisdiction as for ordinary cases. With a goal to increase judges' accountability, in July 2010 the Parliament adopted several amendments to the Law on the status of judges, including regarding disciplinary proceedings. A few disciplinary offences were added to the law. The introduction of the offence "breach of an imperative norm as a disciplinary offence" is welcome, as this should give the chance to depart from the dangerous practice adopted by the SCM of not examining any complaint regarding a judge whose judgment has not been quashed by a higher court.[8] At the same time, a few disciplinary offences are contrary to judicial independence. For example, the offence "issuing of a judgment which was later recognized by the ECtHR as a judgment which violated fundamental human rights and liberties" is not appropriate as it may infringe judicial independence. It is too restrictive if applied literally, as there may be cases which imply different interpretations of the law or controversial issues with no clear answer. The law must either provide discretion when applying this offence or general criteria according to which this offence would be applied.

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[5] Redpath Jean, Victimization and public confidence survey: Benchmarks for the development of criminal justice in Moldova, Soros Foundation Moldova, Chisinau ("Imprint Plus"), 2010, p.36, available at http://www.soros.md/files/publications/documents/Victimisation%20Survey.pdf

[6] Studiul „Combaterea corupţiei: între retorică electorală şi politici guvernamentale", pag.38, http://www.alianta.md/uploads/docs/1300377553_Studiucoruptiepostelectorala_14.03.2011.doc

[7] The law requires the SCM proposal for dismissing the president of the SCJ. The Parliament voted the President of the SCJ dismissal without the proposal of the SCM, arguing that the position of the president of the SCJ is an administrative function, which did not require the SCM proposal and hence the Parliament vote did not amount to an interference with the independence of judiciary.

[8] See the decision of the SCM no. 280/19 as of 22 June 2010 regarding the appeal of the Disciplinary Board' decisions of 21 May and 11 June 2010, which concerned three SCJ judges.

Selection of judges and presidents of courts by SCM is not transparent and often based on subjective criteria.[9] Selection of judges continues to be done through two parallel systems of initial examination, namely the National Institute of Judges and the Qualification Board of the SCM. This creates different qualifications of judicial candidates, different expectations and increases the public funds. Initial examination should be done by a single body. The procedure of nomination of judges is rather confusing. This led to nomination by the SCM of a candidate which did not receive the highest appreciation at the Qualification Board of the SCM. The attestation and training of judges are also lacking behind best international practices and should be improved. Promotion of judges is subjective as well, being at the sole discretion of the SCM members, who do not need to motivate their choice according to the current law.[10]

Tergiversation of cases and breaches of the reasonable time requirement are still a problem within the system, which is due to a combination of factors, in particular cumbersome proceedings (unnecessarily complex civil, criminal and contraventional / administrative offences procedures), high case-loads at some courts or judges, poor summoning procedures (due to which witnesses do not appear in court or give up after several postponements of the hearings) and poor court administration. Of particular concern is lack of a court manager / administrator position within the court system, which would take the administrative burden from the president of the court and would ensure proper management of resources.

This list of problems is not exhaustive. We only highlighted the most serious problems in our view within judiciary in order to emphasize the complexity of the problem and, consequently, the need for a similarly complex response. The system needs a good evaluation and a well-thought strategy for reform, which would consider the different problems and best options to solve the respective problems, rather than a piece meal approach that later on might prove erroneous.

Other actors of the justice system:

The prosecution service still struggles to identify the adequate role of the prosecutor office and the way it positions itself in the justice system, especially the extensive powers of the prosecution service beyond criminal justice. At the end of 2010 an working group was created to reform the prosecution office, which included only prosecutors.

The Bar suffers from lack of organization, leadership and vision. Quality of services of both private and legal aid lawyers is questionable and the Ethics and Discipline Commission is hardly coping with the number of complaints. At the same time, it is now courageous enough to apply sanctions. At the end of 2009 the Ministry of Justice initiated a series of amendments to the Law on Bar, which were materialized in a republished law that entered into force in September 2010. The main amendments of the law consist of changes to the organizational structure of the Bar. The amendments to the Law on Bar were done in a very short time, which did not allow sufficient consultation of the draft law and explanations to the main target of the changes - the lawyers themselves. It is hoped that the changes will bring results, however the way the Statute of the Profession was adopted (copied from Romania with little analysis and consultation of the Bar members) suggests that no practice changes will be achieved soon, at least not unless the Bar leadership changes its position and takes an active role in improving the legal profession.

The legal aid system is covering only criminal legal aid, as the Law on state guaranteed legal aid provides that the right to legal aid in non-criminal matters be implemented from 1 January 2012. Even when provided, the quality remains an issue, mostly because of poor quality of services within the Bar and the unattractive fees paid by the state for legal aid. Access to a lawyer at police stations is delayed, in spite of clear regulations of calling and appointing a lawyer to every arrested person, irrespective of his/her

[9] For example, in respect of the President of the SCJ elections that should take place shortly, on 24 March 2011 we have submitted a public request to the SCM to make public the list of candidates and their CVs, as well as other relevant documents regarding their integrity; inform the public in advance of the date and time of the SCM meeting regarding the election of the President; organize public hearings where all candidates would present their vision regarding the judicial system, the necessary reforms and the steps they will take if elected; and urged the SCM to provide a motivated decision regarding the selected candidate.

[10] Several judges have raised these concerns during the Annual Meeting of Judges of 19 February 2011.

financial status, within 3 hours from arrest. For example, in 2010, only 10% of people called to or detained by police were allowed to call a defence attorney.[11] Since the adoption of the Law on state guaranteed legal aid (2007), no action has been undertaken by the state in order to implement the primary legal assistance at the level of communities, although provided by law. The need for legal empowerment is acute. Administration of the legal aid system is also problematic. Lack of legal personality of the National Legal Aid Council undermines its operation, budgeting process and management of legal aid budget, which until now is established solely by the Ministry of Justice.

Police was the least reformed institution since 90's and became one of the closest institutions during the Communist regime of 2001-2009. The new Government declared the reform of police as a priority at the end of 2009. To date a new strategy for police was developed and is expected to be implemented. Although the reform and the concept for reform are *per se* necessary and acknowledged as important, the implementation plan is very ambitious and sets very short timelines, which might undermine the success of the entire reform.

The effectiveness of both civil and criminal procedures is questionable, especially from the prospective of the balance between ensuring the rights of the parties and the reasonableness of the time and public funds criminal investigation and trial requires.

Despite some progress in eradicating corruption, it remains pervasive and deeply entrenched in the justice system. The implementation of the National Strategy for Preventing and Combating Corruption has continued, the majority (about 90%) of measures stipulated in previous plans for the implementation of the Strategy (2005, 2006 and 2007-2009) have been accomplished. Some objectives of the Strategy, such as the improvement of the legal framework in compliance with the requirements of international law, the increase of transparency in the activity of public institutions, activation of civil society and private sector in preventing were implemented partially or significantly. Nevertheless, the basic objective of the Strategy - to ensure the rule of law -was not achieved. With external support (EU) the evaluation of the implementation of National Anti-Corruption Strategy has been initiated in order to develop a new Strategy. A new draft was adopted, which is still not promoted. Although the verifications have been initiated regarding the abuses committed by representatives of previous governance, their effects are not tangible. The attitude of law enforcement bodies is inadequate and does not bring about efficient results (insufficient cooperation, poor quality of the prosecution, formal attitude, abuses). The action plans for implementing the National Anti-Corruption Strategy target too little the private sector and justice sector, while the internal assessments (surveys) and external ones (reports, indicators) found fluctuating trends and a quite high level of corruption spread. The political will is declared but is not clearly shown yet.

Recently announced reform initiatives (February 2011):
At the beginning of 2011 the Ministry of Justice invited several NGOs to participate in several working groups, including Creation of the National Council for Justice Reform; working group on justice map reorganization; working group on civil procedure reform; working group on criminal procedure reform; working group on prosecutorial reform.

We welcome this initiative and have agreed to participate in the respective working groups. We welcome most of the issues proposed by the Minister of Justice on the agenda for these working groups. However, we disapprove the short timeline[12] allocated for the legislative reform and the approach taken, namely separating legislative reform from other practical measures that need to be taken in parallel. The time is too short to allow for a meaningful public consultation process and for discussing the issues for reform with the judiciary.

The failed Government initiative to abolish the specialized economic courts and the failed dismissal of the President of the SCJ are two important signals that should not be underestimated: many of the judges

[11] 2010 Victimization and public confidence survey (cited above).
[12] According to the Minister of Justice, the legislative amendments should be adopted by the Parliament until June 2011.

involved in the current system prefer the state of affairs as it is and have sufficient political clout and support to block any progressive reforms. Other judges are resisting the reforms due to fears of interference with their independence.

Although representatives of the judiciary are included in the working groups mentioned above, they do not seem willing to change the system substantially, but rather make cosmetic amendments and mostly in the favour of the judge. In order not to compromise the entire intention of the justice reform, we called on the Government to reconsider its approach and plan first for developing a strategy for reform, based on evaluation of the current state of affairs within the justice system and particularly judiciary.[13] Moreover, the funds allocated for judiciary in the 2011 draft law on state budget are not sufficient for supporting the changes intended by the Ministry of Justice, e.g. assignment of court clerks to each judge.[14]

Based on the above, we call on EU to raise the following issues within the EU – Moldova Human Rights dialogue:

1. Development of a strategy for reforming the justice system before initiating legislative reforms. The strategy should be based on an evaluation of the main problems in the justice system, their impact, an analysis of various solutions and an argumentation of the chosen solutions, as well as an implementation plan;
2. Establishment of adequate time-limits for the elaboration and implementation of the Strategy and reforms of the justice system;
3. Creation of the National Council on Monitoring the Justice Reform, which would include representatives of the civil society and where political representatives should not have the majority votes. The National Council should preferably be established at Government or Parliament level and not at the Ministry of Justice level, because it will include issues affecting other institutions of an equal footing with the Ministry of Justice and they might be less willing to cooperate;
4. Conduct regular donor meetings in the justice field in order to ensure sufficient resources and avoid duplication of efforts;
5. Setting up clear requirements and procedures for declaration of assets by public officials, judges, prosecutors, police officers as well as an effective mechanism for verifications and sanctioning. Creation of the Independent Ethics Commission should be a priority. Until the new mechanism is in place, assess the way assets are currently declared in the justice system;
6. Consolidate the institutional capacity of the National Legal Aid Council and its territorial offices in the context of extension of state guaranteed legal aid system also for non-criminal cases;
7. Provide financial and logistical support for extending the currently piloted paralegals to provide primary legal assistance at community level for poor community members;
8. Review the timeframe for implementing the police concept for reform in view of extending it in order to ensure quality and avoid superficial steps and mistakes;
9. Encourage and support the Bar to develop professional standards and take the necessary measure for improving quality of legal representation, including legal aid;
10. Reform the Prosecution Service by excluding the functions not related to criminal justice and ensuring a real independence of the prosecution office.

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[13] See the public statement by Legal Resources Centre and ADEPT regarding the adopted Government Plan for 2011-2014, 14 January 2011.
[14] See the public statement by Legal Resources Centre and ADEPT regarding the draft law on state budget for 2011, 4 March 2011.