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APRIL 2018

Justice Sector Challenges Undermine the Rule of Law in the Republic of Moldova

POLICY BRIEF

EXECUTIVE SUMMARY

Justice sector reform has continually been on Moldova's agenda since the political changes in 2009, but with very little impact. Moldova's reform of the justice sector has stalled, with many critical areas unresolved regardless of the implementation of the Justice Sector Reform Strategy (JSRS, 2011 – 2017). Even the loss of EU budgetary support caused by unfulfilled commitments in the justice sector did not change the attitude of the authorities. The JSRS was part of the EU-Moldova Association Agenda for 2014-2016. Independence of the judiciary is among the key priorities of the EU-Moldova Association Agenda for 2017-2019, including a series of crucial short and medium-priorities to strengthen judicial independence and accountability. Respect for rule of law is a pre-condition for EU macro-financial assistance to be provided to Moldova, agreed upon in 2017.

Several issues seriously affect rule of law and independence of the judiciary in Moldova. The selection and promotion of judges is still not merit-based, mainly due to selective approach and promotion of several candidates with serious integrity issues. Judges are still nominated for an initial mandate of 5 years, condition that may seriously affect their independence. The Parliament continues to play a dominant role in appointing judges of the Supreme Court, which politicizes the appointment of Supreme Court judges. The Superior Council of Magistracy takes most of the decisions behind closed doors and poorly reasons them. Signs of selective justice became visible, in particular after 2015. This refers to the use of criminal justice against outspoken judges and political opponents, enhanced prosecutorial bias in the judiciary and closed hearings in several high profile cases for no legitimate reasons. The

¹www.crjm.org/en/



This policy brief was developed in the framework of the project „Monitoring implementation of select reform commitments under EU agreements in Georgia, Moldova, Ukraine” implemented with the support of the Soros Foundation-Moldova and the Eurasia Program of the Open Society Foundations. The views expressed in this publication are those of the authors alone and do not represent the views of the Soros Foundation-Moldova or the Open Society Foundations. This policy brief is prepared in the framework of the project “Promoting rule of law in Moldova through civil society oversight”, implemented by LRCM with the generous support of the American people through the United States Agency for International Development (USAID). The contents of the policy brief are the responsibility of the author alone and do not necessarily reflect the views of USAID or the United States Government

public trust in the judiciary decreased in recent years and remains at a low level today, in spite of the implementation of the JSRS during 2011-2017. According to public opinion surveys, the share of distrust in the judiciary was 76% in November 2011 and reached 79% in November 2017.²

Urgent measures to ensure judiciary and law enforcement bodies' impartiality and professionalism are necessary. Only real reforms with proven results can restore the credibility of the justice sector in Moldova. The authorities shall amend the primary and secondary legislation to ensure merit-based appointment and promotion of judges and provide track-record of merit-based appointments and promotion of judges. The legislation and practice changes shall be promoted to ensure an effective disciplinary mechanism for judicial accountability, including an accessible mechanism for public complaints and a functionally independent and accountable Judicial Inspection. The Parliament shall amend the Constitution in line with Venice Commission recommendation to provide important safeguards for judicial independence, in particular by removal of the initial 5-year appointment for judges, changing the composition and strengthening the role of the SCM, as well as removing the Parliament appointment of judges of the Supreme Court). Legislation should be amended to ensure transparency in the decision-making process of the Superior Council of Magistracy. The right to a public hearing and publishing of all court judgments shall be ensured in all cases, except legitimate exceptions. Any selective justice elements shall be excluded, such as the use of criminal justice against political opponents, selective judicial practices, unjustified use of closed hearings and intimidation of independent judges through various legal proceedings, including criminal justice.

INTRODUCTION

A Justice Sector Reform Strategy (JSRS) for 2011-2016 was adopted in 2011.³ In 2016, the JSRS was prolonged for one more year, to allow the implementation of the unfulfilled activities, as well as for drafting a new strategy. The JSRS implementation was part of the EU-Moldova Association Agreement Agenda for 2014-2016. In 2013, EU and Moldova concluded a Financing Agreement through which EU offered EUR 60 million as budgetary support implementation of the justice sector reform strategy. In October 2017, EU announced that it would not transfer EUR 28 million to the state budget of the Republic of Moldova due to the fact that the Moldovan authorities have shown insufficient commitment to reforming the justice sector between 2014 and 2015.⁴ This was an important decisions that should have determined the Moldovan authorities to swift actions and effective reform initiatives. This has not yet happened.

Independence of the judiciary is among the key priorities in the EU-Moldova Association Agreement Agenda for 2017-2019, which includes several key short and medium-term priorities for further reforming the justice sector, in particular for ensuring its independence, impartiality, professionalism and efficiency.⁵ The brief includes information on the following short-term priorities: recruitment and promotion of judges, effective implementation of safeguards for the independence of judges, effective implementation of disciplinary rules for judges and the autonomy of the Judicial Inspection, transparency in the decision-making process of the Superior Council of Magistracy. No progress has yet been achieved in any of these areas.

The 2017 Memorandum of Understanding between EU and Moldova on macro-financial assistance also provides for the respect of rule of law and strengthening of judicial independence by Moldovan authorities as

² Institute for Public Policies, Public Opinion Barometer, November 2011 and November 2017: www.ipp.md.

³ Adopted by the Moldovan Parliament on 25 November 2011 (Law no. 231), in force from 6 January 2012.

⁴ See for details: https://eeas.europa.eu/headquarters/headquarters-homepage/33723/moldova-eu-cuts-budget-support-programme-justice-reforms_en.

⁵ Chapter 2.2 Political Dialogue, Good Governance and Strengthening Institutions, EU-Moldova AA, 2017-2019.

pre-conditions for the EU assistance, as well as a special conditionality regarding the composition and independence of the Superior Council of Magistracy (SCM, action 28). As outlined below, a draft law to amend the Constitution has been registered with the Parliament regarding the SCM role, but it still needs to be adopted. Increasing trends of selective justice significantly affect the rule of law in Moldova.

According to public opinion surveys, the share of distrust in the judiciary was 76% in November 2011 and reached 79% in November 2017.⁶ According to a national survey conducted in December 2017 for the Superior Council for Magistracy⁷, 81% of the general population did not trust the judiciary. The survey included a booster sample only for persons that had court experience in the last two years. Surprisingly, the results are very similar, 81% of those that had contact with the courts did not trust the judiciary. This is an alarming result, as usually the level of trust of persons that had contact with courts is higher than that of the general population. The trust in the Government and Parliament is even lower (85-86% of the general population and 91% of those with prior court experience), confirming a general distrust of the population in main state institutions. The results regarding the judicial system are particularly alarming in the context of the Justice Sector Reform Strategy implementation during 2011-2017. The same survey indicates that 75% of the general population and 83% of those with court experience perceive that justice sector is corrupt. 73% of the general population and 77% of those with court experience believe that the courts will convict an ordinary person of a crime, though innocent, and at the same time, a similar high percentage (79% and 80% correspondently) posit that the courts will exonerate a rich person that is surely guilty. exclude that the courts can declare not guilty an ordinary person charged with a crime that he or she didn't commit. The incidence of such responses, especially among the respondents with court experience, confirms that the perception about selective justice is widespread among court users and the general population. Thus, urgent measures are necessary to boost the impartiality of the judiciary and law enforcement bodies, and their professionalization. Only such efforts can restore the public trust in the justice sector.

MAJOR ISSUES OF CONCERN

This brief highlights seven key issues that need to be addressed immediately if Moldova is to restore at least some level of trust in the justice sector and ensure basic prerequisites for a rule of law based society. This requires both legislative and implementation measures.

1. A comprehensive policy framework for justice sector reform is not yet in place.

The Justice Sector Reform Strategy (JSRS) was implemented from 2011 to 2017. Significant progress was achieved, mostly on the technical and resources levels, such as established full audio-recordings of court hearings and random assignment of cases functioning in all courts,⁸ or increased number of court staff (judicial assistants per each judge, with three assistants per judge for the Supreme Court) and higher salaries for judges and court staff, including improvements of several laws. However, much needed qualitative improvements are still lagging behind, particularly regarding the system of appointments and promotion of judges, reasoning of court judgments and judicial accountability. A new

⁶ Institute for Public Policies, Public Opinion Barometer, November 2011 and November 2017: www.ipp.md.

⁷ Survey conducted for the Superior Council of Magistracy by Open Justice, USAID funded program, and Increased Efficiency, Accountability and Transparency of Courts in Moldova (ATRECO), EU funded project, 2018, available at: http://crjm.org/wp-content/uploads/2018/02/Brosura_finala_compressed.pdf.

⁸ Random assignment of cases is functioning in all courts, but the system is vulnerable to manipulations. The Integrated Case Management System, through which random assignment is done, shall be adjusted to exclude the current vulnerabilities.

law on prosecution service was adopted in 2016, but qualitative changes have yet to come. Contrary to positive expectations from the Strategy, in the past two years selective justice has become a serious issue.

Moldova entered into 2018 without a new strategic document for reforming the justice sector. Partially, this resulted from the changes of the leadership of the Ministry of Justice (MoJ) at the end of December 2017. Only on 30 January 2018, the new Minister of Justice⁹ announced several short-term directions for justice sector reform¹⁰ to be carried out in 2018. These include positive initiatives like amending the legal framework to ensure merit-based appointments and promotion of judges, improved disciplinary procedures, amendments to reduce abusive pre-trial arrests, reform the Supreme Court of Justice (SCJ) and improved transparency of courts. Given the electoral year in 2018, it is unlikely that most of them can be fulfilled unless the MoJ shows excellent effectiveness and receives full support from the parliamentary majority. This also refers to several important pending draft laws that MoJ should promote (noted below). Above all, the MoJ has to develop a new justice sector strategy addressing all the existing deficiencies, to advance it in the Parliament prior to elections, and to ensure the continuity of freshly started reforms irrespective of the 2018 elections' outcomes.

2. The system for selection and promotion of judges has deficiencies.

Merit-based appointments and promotion within the judiciary system is a serious problem, highlighted from 2014-2017.¹¹ The Council of Europe assessment of the level of implementation of the JSRS 2011-2016 has also concluded that the intervention area regarding selection and evaluation of judges has not been achieved, particularly as a result of disregarding procedures, selective approaches, and issues with candidate's integrity, despite adopting formal criteria and legal framework.¹²

The first major shortcoming refers to inadequate selection and appointment criteria for judges, and the lack of a coherent unified methodology applied by the Selection and Career Board. Practically, among currently used criteria there are aspects of little relevance for judiciary activity such as scientific or academic background or candidate's personal motivation that attributes significant points (almost one quarter) in the evaluation. This type of criteria encourages a less objective and more discretionary evaluation of candidates, hindering a fair merit-based assessment.

Secondly, the Superior Council of Magistracy (SCM) selects or promotes judges overlooking the points awarded by the Selection and Career Board, and without reasoning its decisions. Such a system creates grounds for suspecting rigged selection of judges. Between January 2013 and May 2017, only 115 out of 150 judges proposed by the SCM for appointment were selected based on contests with more than two participants. 83 candidates out of 115 proposed in contests (or 72%) were candidates who scored lower than others. SCM did not provide any reasoning for ignoring the scores. During the same period, 5 out of 12 judges promoted to the Supreme Court based on contests (or 42%) had lower scores than other contestants. These figures prove that either the judges were not appointed /promoted based on merits or that the appointment /promotion rules are inadequate.

Thirdly, the SCM organizes a selection process (contest) for each vacancy in the judiciary system, without using a transparent system that would clearly list all available vacancies, the names of the contenders and publishing the final outcomes of the selection contest. This means that the candidates

⁹ Minister Alexandru TANASE, appointed at the end of 2017. He resigned in March 2018 and was replaced by Minister Victoria IFTODI, appointed on 19 March 2018, who committed to continue the announced reforms.

¹⁰ Document available in Romanian at http://justice.gov.md/public/files/Document_de_concept.pdf.

¹¹ See for details Public Policy Document: Selection and Promotion of Judges: Challenges and Needs, Legal Resources Centre from Moldova, 2017, available at <http://crjm.org/wp-content/uploads/2017/12/CRJM-Selectia-si-cariera-jud-2017-ENG.pdf>.

¹² Justice Sector Reform Strategy of the Republic of Moldova, Review of Implementation, Assessment and Recommendations, Council of Europe, Directorate General Human Rights and Rule of Law, 5 December 2017, available at https://crjm.org/wp-content/uploads/2018/02/Moldova-JSRS_assessment.pdf, para. 125.

can apply simultaneously for several positions at different courts. The same candidates can be rejected for some courts and accepted later for other courts. This lack of transparency and clarity of rules encourages corrupt practices and develops a sort of dependency of the candidates on the SCM. This severely undermines the meritocracy principles and impedes correct and professional judges from entering the judiciary, which ultimately negatively impacts their independence and the public trust in the judiciary.

The need for merit-based appointments and promotion in the judiciary is recognized as a problem both by MoJ and the SCM. A draft law proposed in September 2017 by the MoJ aims at solving the above mentioned deficiencies, but it needs further improvement. It provides for periodic organization of contests for selecting and promotion of judges as opposed to organization of contests for each vacancy, higher weight to National Institute of Justice (NIJ) studies and judges' performance evaluation in the selection and promotion criteria, in this way limiting the discretionary criteria for selection. At the same time, the draft law does not clearly extend the principles proposed for selection to promotion of judges, the NIJ studies and performance evaluation of judges' weight could be increased, the SCM functioning could be improved by more transparent organization of its sittings and by improving the way of publishing its decisions. The Parliament should adopt the draft law in May-July 2018, before the electoral campaign for the 2018 parliamentary elections begins.

2. Constitutional amendments to strengthen judicial independence are necessary.

Under the Justice Sector Reform Strategy (JSRS) 2011-2016, extended for 2017, the Moldovan authorities undertook to amend the Constitution to strengthen judicial independence.¹³ A draft law in this regard was registered with the Parliament in 2016, but did not receive the necessary number of votes within one year of the registration and, hence, became null and void¹⁴. A similar new draft law was initiated, subjected to public consultations and adopted by the Government in 2017. On 5 December 2017 the Constitutional Court provided a positive opinion on the draft law and on 27 December 2017 the Ministry of Justice asked the Venice Commission to provide an opinion on the draft law. On 18 January 2018, the draft law was registered with the Parliament (draft law no. 10).

The draft law includes the following main amendments: a) the President of the country will appoint all judges (currently the Parliament appoints the judges of the Supreme Court, which contributes to politicization of judicial appointments); b) the 5-year probationary period for appointment of judges is annulled¹⁵, and c) the role of the Superior Council of Magistracy (SCM) is expressly defined as "the guarantor of independence of the judicial authority" and the mandate is extended from 4 to 6 years, prohibiting a consecutive appointment for another term. The composition of the SCM is changed. It shall be composed of judges, constituting "an important part of the SCM" and civil society representatives (instead of law professors), with no ex-officio members.¹⁶

The Venice Commission concluded that the proposed amendments are generally positive and in line with the applicable standards.¹⁷ Regarding the appointment of the Supreme Court judges by the President instead of the Parliament, the Venice Commission recalled its Report on Judicial Appointments according to which the "involvement of parliament in the process may result in the politicization of judicial appointments. In the light of European standards the selection and career of judges should

¹³ The amendments are also part of the implementation of the National Action Plan for the Republic of Moldova - EU Association Agreement for the period of 2017-2019.

¹⁴ Under art. 142.3 of the Constitution, constitutional amendments shall be adopted within one year from the registration with the Parliament.

¹⁵ The current system of appointing judges for an initial mandate of 5 years and only afterwards for life tenure creates unnecessary risks for judges' dependency on the appointing body, subsequently diminishing judges' independence.

¹⁶ Currently, the SCM is composed of 12 members, out of which 6 are judges, of all three court levels, elected by their peers, 3 law professors, appointed by the Parliament, and 3 ex-officio members: the Minister of Justice, the Prosecutor General and the President of the Supreme Court of Justice.

¹⁷ See Venice Commission, Opinion on the draft law on amending and supplementing the Constitution of the Republic of Moldova (Judiciary), CDL-AD(2018)003, 19 March 2018, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)003-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)003-e).

be ‘based on merit, having regard to qualifications, integrity, ability and efficiency’. Elections by parliament are discretionary acts, therefore even if the proposals are made by a judicial council, it cannot be excluded that an elected parliament will not self-restrain from rejecting candidates. Consequently, political considerations may prevail over the objective criteria.”¹⁸ In addition, the President can veto only once the proposal of the SCM. Hence, the Commission concluded that shifting the competence of the appointment of the judges of the Supreme Court to the President is likely to contribute to depoliticizing these appointments. It remains to be seen if this amendment will have the expected practical outcome.

The Venice Commission recommended that the draft law be clarified by determining in a clear manner the part of the judges in the SCM, recalling the Council of Europe standards that require that at least half of the members should be “judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.”¹⁹ The Venice Commission also recommended that the method of selection of the SCM members from civil society be clarified. The draft law excludes all *ex-officio* members of the SCM. The Venice Commission mentioned that there are no common standards on the membership of these *ex officio* members in the judicial council. At the same time, the presence of the *ex officio* members allows for the SCM to be a formal forum of exchange of views between the different stakeholders that enables regular consultations on the functioning of the judiciary. Hence, if the *ex-officio* members are excluded, other channels of institutional dialogue should be established at the legislative level. The exclusion of the Minister of Justice from the SCM was not included in the version of the draft law subjected for public consultation. This exclusion is questionable, since the real necessity is to limit the Minister’s participation in decision-making regarding judges’ career. As a member of the SCM, the Minister can play a positive role by ensuring cooperation, as well as “checks and balances” between judiciary and executive powers.

The draft law should be improved by determining in a clear manner the part of the judges in the SCM. The other two amendments can be implemented either by constitutional amendments or by secondary legislation, as long as they follow strictly the Venice Commission recommendations. Constitutional amendments are recommended, in order to ensure that the secondary legislation does not fall behind the standards. However, secondary legislation would also be acceptable if it is promoted in parallel with the constitutional amendments. Any substantive amendments of the draft law would require a new Constitutional Court opinion, which is usually provided within a short time limit. The draft law can be adopted no earlier than 6 months (18 July 2018) and not later than one year (18 January 2019) since its registration with the Parliament (18 January 2018). The Parliament should adopt the law in July 2018, before the electoral campaign for the 2018 parliamentary elections begins, in order to avoid missing again the legal timeline for adopting the amendments.

4. The mechanism of disciplinary responsibility of judges contains flaws.

The current mechanism of disciplinary responsibility of judges is not effective. It provides a limited role for Judicial Inspection to present the accusation and disciplinary case of a judge before the Disciplinary Board and contains insufficient provisions to keep Judicial Inspection accountable for its work in disciplinary cases. At the same time, this mechanism allows extensive discretion to Judicial Inspection in declaring inadmissible the disciplinary complaints at the beginning of the proceedings.²⁰ In addition,

¹⁸ See for details Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028, 22 June 2007, available at <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e>.

¹⁹ Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities, para 27.

²⁰ Disciplinary proceedings can be started either by the Judicial Inspection *ex-officio*, or following a complaint. Judicial Inspection has 10 days to dismiss the manifestly ill-founded complaints. All other complaints have to be proceeded through the admissibility panels of the Disciplinary Board and can be appealed to the Disciplinary Board. However, the Judicial Inspection dismisses a high number of complaints as manifestly ill-founded, including outside of the legal deadline of 10 days. For example, in 2015, the Judicial Inspection dismissed 72% of all complaints as manifestly unfounded, in 2016 – 81% and in 2017 – 83%. These dismissals can be appealed only to the admissibility panels and never reach the Disciplinary Board. The Judicial Inspection’s decisions to dismiss the disciplinary complaints as manifestly ill-founded are not published.

Judicial Inspection is fully dependent on SCM as it is the SCM that elects all members of the Judicial Inspection, with no competence of the head of the Judicial Inspection in the selection process of the judicial inspectors. The Judicial Inspection does not have a separate administrative staff or budget, all being allocated by and directly administered by the SCM. The quality of Judicial Inspection investigations is often questionable. This is due both to limited human resources available to the Judicial Inspection, as well as lack of will to carry out thorough and independent investigations. The disciplinary procedures are cumbersome and unjustifiably long, partially because it involves five bodies able to examine a complaint and quash the decision of the previous body. This mechanism was introduced by the law no. 178, adopted in 2014 (in force in January 2015), and actually ignored the Venice Commission's opinion on the draft law that is still valid²¹.

In September 2017, the MoJ initiated a draft law on judiciary, including for implementing the 2014 Venice Commission recommendations regarding the mechanism of judicial responsibility of judges. The draft law only partially tackles the problems in the system by introducing provisions on disciplinary offences and the work of the Disciplinary Board. However, no amendments are proposed for improving the disciplinary procedure and clarifying the role of the Judicial Inspection in these proceedings, providing sufficient checks and balances throughout the disciplinary procedures. Legislative amendments are necessary to improve the system of disciplinary responsibility of judges.

5. Transparency and accountability of courts are negatively affected by excessive anonymization of court judgments.

In particular, since 2016, the courts started using anonymization of court judgments (using "XXX" instead of names) for names of the parties involved in the trial, including the legal entities, and, in some cases, even hiding the names of judges, prosecutors and state authorities. Such practices contradict the standards on data protection and represent a severe barrier for investigative journalists. A regulation adopted by SCM in October 2017 on publishing of court judgments allows publishing the names of the parties as a rule, with exceptions for protection of personal data, including for the protection of minors. On 22 February 2018, the SCM sent a written note to all courts, reminding them of the new regulation that requires publication of the names of the parties as a rule, with limited exceptions, and publication in all cases of the names of the judges, prosecutors, lawyers and legal entities. The 2017 regulation and the SCM proactive approach are positive developments. On the other hand, the National Center for Data Protection initiated a draft law in October 2017 that proposes the anonymization of all court judgments as a rule, irrespective of the case type (e.g. corruption case). If adopted, this law can impede journalists and civil society from effectively monitoring cases of public interest (eg. cases related to the 2014 banking fraud). In a state of endemic corruption, including in the judiciary, anonymizing court judgments would also become a huge impediment to effectively fight corruption. The respective draft law has not yet been finalized and sent to the Government.

6. Transparency in the decision-making process of the Superior Council of Magistracy (SCM)

The SCM is a public body in charge of judicial self-administration. The quality of SCM functioning and decisions is essential for the entire judicial system, given the large competences that the SCM has. However, the

²¹ See for details Venice Commission and ODIHR, Joint Opinion on the draft law on the disciplinary liability of judges, CDL-AD(2014)006, 24 March 2014, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)006-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)006-e).

procedure by which decisions are taken and the poor reasoning of SCM decisions significantly reduce SCM's transparency. All SCM decisions are taken in closed sessions, where no one except the SCM members participates, similar to the adoption of court decisions (the so-called procedure in "deliberation"). The SCM is the only collegial public institution where decisions are taken behind closed doors. Neither the Parliament, nor the Government have such closed procedures, with their adversarial discussions and decisions taking place in public, with limited exceptions. The Superior Council of Prosecutors (SCP) does not take decisions in deliberation either. Moreover, the law does not require the provision of the exact number of votes in the SCM decisions, neither the number of votes "pro" and "against". The decision often includes a general statement that it has been adopted by the majority of members, which is impossible to verify for the parties concerned. In addition, the reasoning of the SCM decisions is generally poor or does not exist. If the SCM continues taking the majority of decisions behind closed doors and with insufficient reasoning, the public's perception of the judiciary will continue to deteriorate. The SCM example is also very important for the judiciary as a whole, and one cannot expect courts and individual judges to act with responsibility, transparency and offer well-reasoned decisions when the body that represents the system, ignores such basic rules.

²² First instance court judgments of 27 June 2016, maintained by appeals court on 11 November 2016 and on 22 February 2017, the Supreme Court rejected his appeal, in written procedure.

²³ On 21 June 2016, just six days before issuing the sentence in Mr. Filat's case, SCM adopted a new Regulation on publishing the court decisions, according to which decisions on the cases examined behind closed doors are not to be published on its website. The previous regulation, dated from 2008, did not provide such a limitation and all court decisions were published. The new SCM regulation, mentioned below, maintains the same rule.

²⁴ Billion "theft" refers to the disappearance of approx. 1 billion USD from Moldovan banking sector, including the nearly a third of the National Bank Reserves, or the equivalent of 15% of Moldovan GDP, within several years, with the information publicly released at the end of 2014. For a detailed explanation of the issue see <http://www.transparency.md/2016/12/20/radiography-of-a-bank-fraud-in-moldova-from-money-laundering-to-billion-fraud-and-state-debt/>.

²⁵ According to NAC, Chirtoacă has given instructions to the deputy mayor Nistor GROZAVU, who was chairman of the Commission for selecting companies to implement the parking project in Chisinau, to sign the contract with a certain company without the approval of the Municipal Council.

²⁶ According to NAC, between 2012-January 2017, the Municipality of Chisinau, represented by its mayor Chirtoacă, concluded 81 agreements that provided the monetary value for apartments that the municipality was supposed to provide following court decisions. NAC claims that the apartments were supposed to be provided for temporary use while in official position and not for private property, hence the conclusion of the respective agreements was illegal.

7. Selective justice is taking roots

Closed hearings are increasingly used in high profile cases. Closed hearings in high profile cases, visible since 2016, set dangerous precedents and create pre-conditions for selective justice, reducing significantly the judiciary's accountability. This refers to the case of the ex-prime-minister Vladimir FILAT, sentenced for passive corruption and traffic of influence,²² entirely examined in closed hearings. Only the decision of the Supreme Court was published, although anonymized ("XXX" was used instead of names of legal entities and parties).²³ Two other notorious cases related to the "billion theft"²⁴ were examined entirely behind closed doors. The first case is that of Veaceslav PLATON, a businessman sentenced for a fraud that led to the "billion theft". The second case is that of Ilan SHOR, mayor of Orhei and former President of the Board of the Economy Bank of Moldova, one of the banks involved in the "billion theft". The judgements in the Platon and Shor cases are not published. The secrecy in which the trials mentioned above were conducted deprived the public of the right to learn about the "billion theft" case, which has had disastrous effects on national economy and public welfare since late 2014 and provoking protests of thousands of people in 2015. There were no legitimate reasons to hear all these cases behind closed doors. This was perhaps done to shield the ruling party and/or other participants in the "billion theft".

Criminal justice is used for exercising pressure on political opponents. The way in which the cases of Dorin CHIRTOACĂ, the former mayor of Chisinau municipality and the first deputy chairman of the Liberal Party (LP), were handled raised concerns of selective justice. The first case initiated against him involves accusations of traffic of influence²⁵, publicly announced on 25 May 2017 when officers of the National Anticorruption Centre (NAC) apprehended the then mayor, and the second one refers to the breach of official authority²⁶, publicly announced in September 2017. Both cases are pending. The first case was initiated shortly after the leadership of the Liberal Party refused to support the change of the electoral system as proposed by the Democratic Party of Moldova. During the period when both cases were instituted, Mr. Chirtoacă remained under home arrest and was released only on 10 November 2017.

During the first case, at the request of the prosecutor, a judge of Chişinău court removed the ex-mayor's lawyers from the case, allegedly because they would have delayed carrying out procedural actions and would have intentionally created impediments to the conduct of criminal investigations. The Criminal Procedure Code does not allow removing defence lawyers in such circumstances. The Bar Union of the Republic of Moldova qualified it as an abuse in July 2017, and requested the General Prosecutor's Office to take all necessary measures to prevent such abuses in the future.

At the prosecutor's office request, the court swiftly suspended Chirtoacă from his mayor's office in July 2017, in order to prevent him from influencing the witnesses, while his deputy Mr. Grozavu replaced him, despite being under similar criminal charges. Unlike in the case of Chirtoacă, the mayor of Orhei, Ilan SHOR, sentenced²⁷ by the first instance court to seven years and six months of imprisonment, was not suspended from the mayor's office neither during the criminal investigation, nor after his conviction. In September 2017, the judges rejected Mr. Chirtoacă's request to be allowed to attend an event of the Congress of Local Public Authorities of Europe, where he serves as deputy chairperson. However, the courts allowed the mayor of Orhei, Ilan Shor, to go for a visit to Strasbourg on 6 October 2017. These two cases show different approaches applied to similar cases by judiciary and prosecution office.

There are worrying trends regarding the use of criminal justice to pressure local leaders to adhere to the ruling party, the Democratic Party. According to a journalistic investigation published on 3 November 2017²⁸, between 2013 and 2017 the prosecutors initiated over 100 criminal cases regarding mayors and regional ("rayon", administrative units of secondary level) presidents. Local leaders from the opposition were the most targeted. For instance, in 2013-2014, the National Anticorruption Centre conducted 51 criminal cases regarding local mayors. Almost half of them were members belonging to the Liberal Democratic Party and one third to the Communist Party.²⁹ The journalists received information from the National Anticorruption Centre (NAC) in the beginning of 2015, prior to local elections of 2015, and submitted information requests for information as of 2017. The NAC, Anticorruption Prosecution Office and the Ministry of Interior refused to provide information on investigations involving local leaders as for 2017. In an interview of January 2018³⁰, the Executive Director of the Congress of Local Authorities of Moldova (CALM) emphasized that the interest for the local leaders increased after the introduction of the uninominal constituencies (mixed voting system). According to him, the local mayors are politically dependent due to unfinished financial decentralization reform. Around 600 out of total 898 mayors are members of DPM, exceeding the number of the mayors associated with ruling party when the country was run by the Communist Party. At the meeting with the US Ambassador to Moldova, on 28 February 2018, the representatives of CALM reported that the high number of criminal cases against mayors incites fear among local administration authorities.

A recent case of the mayor of Ghelauza village, Nicolata MALAI, under criminal investigation since November 2017 for irregularities related to public tenders, raises serious concerns. The respective mayor, elected on Liberal Party lists, was allegedly proposed to adhere to the Democratic Party 2017, but she refused. Soon after, she was apprehended and then placed under house arrest. However, on 12 March 2018 home arrest was replaced with pre-trial arrest, allegedly for refusing to provide statements to the prosecutor's office.³¹ It is questionable whether her placement under pre-trial arrest was sufficiently justified, in the context of her being the only parent present in Moldova taking care of a 9 year old daughter. The case is pending.

²⁷ The sentence refers to the damages and money laundering activity through non-performing loans contracted from Banca de Economii (the billion theft's case).

²⁸ Independent Centre for Journalism: <https://anticoruptie.md/ro/investigatii/justitie/primari-penali>.

²⁹ The journalists received information from the National Anticorruption Centre (NAC) in the beginning of 2015, prior to local elections of 2015.

³⁰ Interview of 15 January 2018, available in Romanian at <https://www.europalibera.org/a/interviu-viorel-furdui-primari-an-electoral-moldova/28977091.html>.

³¹ See for details <https://www.zdg.md/stiri/stiri-justitie/cna-despre-primara-de-ghelauza-care-si-a-pierdut-cunostinta-in-sala-de-justitie>.

Criminal cases used to intimidate outspoken judges or promote prosecutorial bias. Criminal cases against judges constitute a severe form of intimidation, with potentially grave consequences for the judicial independence for the years to come. This trend is exemplified by the case of Judge Domnica MANOLE who is prosecuted for a judgment, issued in April 2016, obliging the Central Electoral Commission to allow a national referendum on introducing direct elections of the President of the country. The judge gave an interpretation of a constitutional article due to contradictory provisions of the Constitution regarding the necessary conditions for organizing a referendum, with no judicial precedent on this matter. The Supreme Court annulled Judge Manole's judgment, while also interpreting the Constitution. The referendum initiative approved by Judge Manole was called by an opposition party and denied by the ruling Democratic Party. The Superior Council of Magistracy (SCM) authorized the criminal investigation against Judge Manole on 31 May 2016.³² The judge appealed the SCM decision to the Supreme Court, which rejected the appeal after almost one and a half years, on 7 December 2017, keeping criminal investigation ongoing. Such lengthy proceedings raise serious questions about the fairness of the proceedings.

In separate proceedings, on 4 July 2017, the SCM dismissed Judge Manole on the basis of risk factors highlighted in an opinion issued by the Security and Intelligence Service (SIS)³³ and inappropriate third party communication³⁴. The judge appealed the dismissal decision to the Supreme Court in July 2017. In parallel, the judge asked the President not to issue the dismissal decree until the case is solved by the Supreme Court. However, the President issued the decree dismissing the judge shortly after the SCM decision. The judge contested the decree too, but the courts declined to examine it, claiming lack of jurisdiction. Judge Manole challenged the constitutionality of the legal provisions allowing for periodic verification of judges by SIS before the Constitutional Court. The Supreme Court suspended the examination of judge Manole case until the decision of the Constitutional Court. On 5 December 2017, the Constitutional Court³⁵ declared the provisions allowing SIS to periodically verify judges as unconstitutional, since they affect judicial independence. **This ruling is very important for strengthening the judicial independence in Moldova.** Based on this ruling, Judge Manole requested the SCM to revise its decision on her dismissal. The SCM rejected the request in February 2018. The case is still pending before the Supreme Court of Justice.

³² Criminal investigations against judges, except for corruption related cases, can be initiated by the prosecution office only with the SCM authorization.

³³ At that time, legislation provided for periodic mandatory verification of judges by SIS and judge Manole was due for such verification in 2017.

³⁴ Communication of her separate opinion to a TV station in a defamation case concerning the Speaker of the Parliament, before the case was irrevocable.

³⁵ The press release in English is available at <http://constcourt.md/libview.php?l=en&idc=7&id=1104&t=/Media/Noutati/Verification-of-judges-by-the-Security-and-Intelligence-Service-unconstitutional/>.

³⁶ Data on acquittal rate according to the Prosecution General Office annual reports for 2009 – 2017, available at www.procuratura.md.

Apart from her judgement on referendum, Domnica MANOLE is known for publicly expressed critical positions regarding the functioning of the SCM and the state of judiciary, particularly the case of the Russian money-laundering scheme involving Moldova and various EU countries. The actions taken by the authorities against this judge raise serious concerns about the position of judges who are critical of the leadership of the judiciary. The message sent to other judges is that of obedience and hierarchical subordination. It is an outrageous case of harassment of a judge by various legal proceedings. The outcomes of the case will have a significant impact on judicial independence in Moldova.

The prosecutorial bias in the judiciary is quite strong in Moldova, a remnant of the soviet regime where the prosecution was stronger than judiciary. The low acquittal rate is one indicator in this respect. In 2017 the acquittal rate was the lowest since 2009, when the communist party domination was ended. In 2009 the acquittal rate was of 2,1%, while in 2017 it was 1,65% at first instance level and 1,5% at appeal courts level³⁶. The criminal cases against judges should be analysed in this context. In this respect, another problematic criminal case was initiated at the beginning of 2017


against Judge Dorin MUNTEANU, with the SCM's approval, for refusing the prosecutor's request to prolong the preventive arrest of a defendant. Several civil society organizations have expressed their concern with such a negative precedent undermining the judicial independence.³⁷ The judge contested the SCM's consent to initiate the criminal case against him before the Supreme Court. The judge also challenged the constitutionality of several provisions of the Law on the SCM regarding the latter competence in examining the requests for criminal investigations against judges. In its judgment of 27 June 2017, the Constitutional Court declared the provisions according to which the SCM was not supposed to look into the quality and authenticity of the materials presented by the prosecution when issuing the SCM's consent for criminal investigations against judges unconstitutional. This was an important judgment raising the role and responsibility of the SCM regarding criminal investigations against judges. In December 2017, the Supreme Court dismissed the judge Munteanu's appeal to the SCM decision that approved the criminal investigation against him. The Supreme Court did not go into the merits of whether the SCM fulfilled this obligation when issuing the consent regarding the investigation of judge Munteanu, but limited itself to examine the procedural matters of the SCM decision and concluded that the SCM's consent was issued according to the law. The criminal case of judge Munteanu was sent to the first instance court and is still pending.

CONCLUSION AND RECOMMENDATIONS

Independence and accountability of the judiciary is significantly undermined in Moldova. Important legislative amendments have been lagging behind in the past two years, and new worrisome trends of selective justice became more visible. Moldovan authorities should take several immediate measures to increase public trust in the judiciary, to ensure that Moldova judges can effectively uphold the rule of law. The Moldovan authorities should develop and adopt a new Strategy to continue the implementation of initiated reforms, not fulfilled under the previous JRSJ 2011-2017. Given Moldova's backsliding on justice reform in the last few years, a strategic document is crucial for outlining a national vision for justice reform before requesting any foreign assistance. The latter should only be made available if the government demonstrate a clear commitment to reform and deliver on its outstanding obligations in line with Association Agreement and European standards.

Recommendations for Moldovan authorities

The following measures are recommended as a priority for advancing justice reform:

 **Ensure merit-based appointment and promotion of judges through revising the selection and promotion criteria in line with international standards and best practices. Legislation should provide that the best-scored applicants have the right to choose from the list of vacant positions, periodic contests (2-3 times per year) for all vacancies in the judiciary system should be introduced, and a track record of merit-based appointments and promotions of judges should be provided.**

 **Adopt the draft law no. 10 on Constitutional amendments regarding the judiciary, registered with the Parliament on 18 January 2018, in line with the Venice Commission opinion on the draft law.³⁸**

³⁷ See for details the public statement of 1 February 2017 available in Romanian at <http://crjm.org/wp-content/uploads/2017/02/17-01-31-CRJM-apel-Dorin-Munteanu.pdf>.

³⁸ Provisions regarding the initial 5-year appointment for judges, composition of the Superior Council for Magistracy and appointment of judges of the Supreme Court.

- 🔍 **Amend the legal framework on disciplinary responsibility of judges with a view to strengthen the objectivity, efficiency and transparency of the system and ensuring full independence and adequate competences for Judicial Inspection.**
- 🔍 **Ensure effective transparency of courts by duly implementing the right to a public hearing in all cases, except the legitimate exceptions, and publishing of full court judgments, especially in high profile cases. Court judgments should be anonymized strictly according to the exceptions provided by law.**
- 🔍 **Amend the Law on Superior Council of Magistracy by excluding the provisions that regard the adoption of decisions in closed sittings. The SCM is to issue decisions in closed sittings only when case circumstances justify examining the whole matter behind closed doors or when the SCM examines the complaint in a disciplinary case (acting as a quasi-judicial body). The SCM should include the exact number of votes in its decisions and provide an adequate reasoning of its decisions.**
- 🔍 **Ensure a fair and timely examination of Judge Manole and Judge Munteanu cases, in line with national law and international standards on judicial independence. The SCM should examine every case to see whether the Prosecutor General has substantiated the requests for criminal investigation of judges for issuance of an illegal decision (art. 307 of the Criminal Code) and not provide consent for unsubstantiated requests.**
- 🔍 **Refrain from using criminal justice as a tool of intimidation against political opponents.**

Recommendation for the European Union

Moldovan authorities failed to show sufficient will for justice sector reform, which endangers all other reforms. Therefore, we call on the EU not to resume any justice sector budget support unless the Moldovan authorities show evidence-based improvements and fulfillment of the key short-term priorities included in the EU-Moldova Association Agenda, in particular:

- 🔍 **Amend the primary and secondary legislation to ensure merit-based appointment and promotion of judges and provide track-record of merit-based appointments and promotion of judges;**
- 🔍 **Amend the legislation to ensure an effective disciplinary mechanism for judicial accountability, including an accessible mechanism for public complaints and a functionally independent and accountable Judicial Inspection;**
- 🔍 **Amend the Constitution in line with Venice Commission recommendation (remove the initial 5-year appointment for judges, change the composition and strengthen the role of the SCM and remove the Parliament appointment of judges of the Supreme Court);**
- 🔍 **Amend the legislation to provide for transparent decision-making process of the Superior Council of Magistracy;**
- 🔍 **Ensure transparency of courts by ensuring the right to a public hearing and publishing of all court judgments, except legitimate exceptions;**
- 🔍 **Effectively implement the safeguards of judicial independence and equal application of the law, including by excluding any selective justice elements.**

We also call on the EU to continue following closely the individual cases that deepen and expose significant dysfunctions of the justice system.