UNITED NATIONS HUMAN RIGHTS COUNCIL

SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF MOLDOVA

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Contents

On behalf of:

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Moldova needs an efficient specialized body to fight high-level corruption, but this should not be a specialized court

The justice reforms initiated in the recent years in the Republic of Moldova partially failed. Endemic corruption, political control, selective justice, and poor law enforcement have generated a bleak picture. The lack of prosecutor's proactive approach and continuing political influence in the court system made it impossible to effectively deliver justice and accountability. Even the legal professionals within the system acknowledge this, stating that corruption is present in the justice sector. More than 20% of judges, 40% of prosecutors, and 60% of lawyers consider that the level of corruption from 2011 until the 2020 had not changed or even had increased.

To tackle these challenges, the Moldovan Government announced, among others, the initiative to create specialized anti-corruption courts. Having examined this issue thoroughly, we consider it not appropriate for Moldovan context. Moldova does not have enough cases that require a specialized anticorruption court. According to official statistics, from 2015 through 2019, courts tried 199 criminal cases concerning corruption a year on average. In the same five years, the average annual caseload per judge was 620 cases. According to the concept that lies at the core the judicial map optimization, a court cannot have fewer than nine judges. If decision makers decide to establish an anticorruption court, its nine judges will have the smallest caseload—approximately 22 cases a year each. The initiative involves numerous related risks, which are not likely to help the fight against corruption. It is much easier to put inappropriate influence on a small and known number of judges than on a numerous body of judges who receive cases through information systems.

Given the endemic level of corruption in the Republic of Moldova, we consider that corruption cannot effectively be reduced without prioritizing the fight against high-level corruption. Although the Anti-corruption Prosecution Office (APO) has been set up to fight high-level corruption, it spends lots of effort on petty corruption. This happens because the APO still has the responsibility to lead the prosecution of cases investigated by the National Anti Corruption Center's (NAC). Focusing the APO's mandate on high-level corruption will allow the anti-corruption prosecutors to focus their efforts on important complex cases without having to compromise the quality of their work due to heavy workload.

Recommendations:

1) Strengthening the AOP's capacity to investigate high-level corruption, through allocating sufficient resources to fight high-level corruption and to exclude form its competence to lead of the investigations conducted by NAC. The last power can be transferred to local prosecution offices;

2) Instead of creating a specialized anti-corruption court, specialization of judges from several district courts is a better option. This can be done by amending the Criminal Procedure Code to change the courts' jurisdiction over corruption cases.

Leadership positions in the Prosecution system are not filled in merit-based contests

The new Law no. 3/2016 on the Prosecutor's Office approved in 2016 has considerably changed the way chief prosecutors are appointed and promoted. The purpose of these amendments was to increase the transparency of the process and to ensure their appointment and promotion on merit-based contests basis. To encourage meritocracy even further, the new Law on the Prosecutor's Office has introduced contests for all management and leadership positions within the system. The High Prosecutors Council (SCP) is in charge of organizing the contests.

Despite such efforts, it seems that in practice the new system failed to encourage genuine competition between candidates. In the period of 2017-2018, out of the 47 management positions put up for contest, 31 (66%) were „won" by default by single participants. In the remaining contests, several candidates were registered, but in three contests, the remaining counter-candidates withdrew from the contest in the last moment. In the end, just 13 (28%) of the 47 management positions put up for contest were filled by contests in which two or more candidates participated. The same goes with the contests on the temporary transfer of prosecutors, which are since 2016 the in the competence of the General Prosecutor and usually a single-candidate contest. Before 2016, the prosecutors' transfer was made through competition made by the SCP on a contest-basis. Giving the decisive role in the prosecutors' transfer by the General Prosecutor, this only undermines the independence of prosecutors and the role of SCP.

The situation is even gloomier at the General Prosecutor's Office level where none of the 16 contests for leadership positions had more than one candidate wishing to take the leadership post. It is hard to imagine that none of the other over 70 prosecutors in the General Prosecutor's Office aspire for a leadership position.

The large number of contests with a single candidate raises the question whether this was due to lack of a critical number of prosecutors willing to participate or to their reluctance to participate for various reasons. Contests with a single candidate fail to ensure true competition and selection of the best candidate. Moreover, the lack of counter-candidates in the contests could suggest that unwanted applicants were not encouraged to participate. Given the highly hierarchical system of the prosecutor's office in the Republic of Moldova, this scenario cannot be ruled out.

Recommendations:

1) Excluding the General Prosecutor from the SCP will certainly increase the SCP's contribution to guaranteeing the independence of prosecutors and will remove suspicions that he directly influences it. The exclusion of the General Prosecutor is imperative given its broad competencies in relation to prosecutors career, as well as the fact that six members of the SCP are prosecutors;

2) Return to the initial situation of prosecutors' transfer through competition made by the SCP. Giving the decisive role in the prosecutors' transfer by the General Prosecutor only undermines the independence of prosecutors;

3) Ensure in practice that the prosecutors are not afraid to participate in contest for promotion in the prosecution office.

The impact of the National Integrity Authority after 4 years of activity is modest

The impact of the integrity reform launched in Moldova in 2016 largely depends on National Integrity Authority (replacing the National Integrity Commission (NIC). This body is called to check assets and interests of public officials and their integrity. After completing a check-up, the NIA can apply sanctions, request confiscation of assets and ban officials from holding public office. Those subject to verification and sanctions can challenge NIA's decision in courts.

The results of NIA activity for the last four years (2016 – 2020) are modest, while its transparency and efficiency awaits further improvement. According to official statistics, until 31 December 2020, the NIA had issued 532 fact-finding acts. However, only one out of three such acts (354) appeared on agency's official website. In 227 (64%) of these acts, the NIA found a violation of integrity legislation. Only 15 of the 227 violations concerned the failure to declare assets, while most (121) concerned conflicts of interest. Almost half of the inspections took more than six months. Until 2021, the NIA used to verify integrity primarily at the local level: 45% of identified violations involved mayors and councillors and only 3% involved MPs, judges and prosecutors. The workload of NIA was distributed unevenly, since in the period of 2016 – 2020 NIA managed to recruit no more than half of the integrity inspectors, envisaged for the institution (19 out of 43 vacant positions).

Plenty of the fact-finding documents issued by NIA ended up being challenged in courts. Between 1 January 2014 and 30 June 2018, the Supreme Court of Justice issued 37 judgements on integrity cases. In 35% of cases (13 cases) the NIA's acts were annulled. In cases related to high-ranking officials, the NIA fact-finding documents were almost always annulled. This suggests that either high-ranking officials had better lawyers, the irregularities committed by the NIA with regard to them were more obvious or…the judges were more lenient to them.

Recommendations:

1) Develop and promote the amendments to the law on NIA in order to strengthen the mechanisms of control the asset declarations by NIA;
2) Prioritize the efforts of NIA inspectors, so that at least 30% of the controls of wealth and personal interests completed during a calendar year should refer to MPs, ministers, judges, prosecutors, and heads of autonomous public institutions / authorities;
3) Ensure the recruitment process of all vacancies of integrity inspectors;
4) Enhance the uniformity of judicial practice in the case-law concerning integrity issues. Supreme Court of Justice should adopt an opinion on how to apply the integrity legislation uniformly.

Despite evidence of corruption and lack of integrity, not a single judge from Moldova was sanctioned in the last decade

Once a leader of the Easter Partnership bloc and a „success story" for the region, Moldova ranked 82th out of 128 countries, in the 2020 WJP Rule of Law Index, with the lowest score in the "absence of corruption" category, ranking 10th out of 14 at the regional level. The fight against corruption within the judiciary is yet another challenge that sets the bad scores. Despite plenty of efforts, there are records of many of cases

of impunity in which judges in corruption and integrity scandals were set free from accountability.

During 2010 – 2014, reportedly some USD 20 billion have been laundered from Russia to various European states, via Moldova, with involvement of Moldovan judges. While a grand investigation has been initiated, leading to the pre-trial arrest of 15 judges and three bailiffs, by 2021, only two judges were convicted. However, their fellow judges prescribed no real sanctions due to expiration of statute of limitations.

In 2016, a judge recently appointed to the Supreme Court of Justice filed a declaration of income, declaring a luxurious SUV (Porsche Cayenne) allegedly purchased at the price of 11.000 lei (~600 EUR). Neither the National Integrity Authority (NIA) or the Judges Disciplinary Board saw a problem in the extremely low price of the car declared.

In 2018, four judges and a judicial assistant were charged in 2018 with participation in a criminal scheme by which they issued multiple court judgments, during both first and appeal courts, in exchange for money. One of the judges was even was captured on tape transmitting the money to another judge. By 2021, all the four judges were acquitted by the first instance court.

In 2019, the Prosecutors Office initiated a criminal investigation against the then Chief of the Supreme Court of Justice under the unlawful enrichment charges. The prosecution rested on a report from the Intelligence and Security Service, which had analyzed the assets and found large discrepancies between the declared legal income and properties, the difference amounting in more than 12 million lei (0.5 million USD). After the searches in the judge's office, the prosecutors had found notes with succinct descriptions from many cases pending before the SCJ or already examined, with the indication of the judges who would be assigned to them and the solutions to be adopted. This ended up in another criminal case being started against the judge.

Following this, the judge filed a letter of resignation from the office of SCJ chief and left the system. The Prosecution further closed both cases.

On 17 May 2021, the NIA found that, a judge at the Chișinău Court, possessed approximately MDL 3,000,000 (150.000 EUR) of unaccounted assets.

Between 2010 and 2020, only one judge charged with corruption was convicted. Immediately after the delivery of the judgement in June 2014, the judge left the Republic of Moldova and went missing.

Recommendations:

1) To the Parliament, Ministry of Justice, and SCM to support and implement a mechanism which ensures a genuine check of assets and integrity of all judges and prosecutors;

2) To the Supreme Court of Justice, to make a thorough analysis of the consistency of judicial practice involving allegations of corruption against judges and prosecutors;

3) To the SCM, to ensure maximum transparency of the trials against judges and prosecutors.

Confiscation of illegal property of public servants

Article 46 of the Moldova's Constitution prescribes that the lawfully acquired property may not be confiscated and its lawfulness acquisition is presumed. The Constitutional Court interpreted the provisions of article 46 of the Constitution in two of its rulings from 2011 and 2013. Also, in 2006, the Parliament requested an opinion from the Constitutional Court on the possibility to exclude the provision of article 46 para. (2) of the Constitution which ensures the presumption of legality of property. The Constitutional Court did not endorse the proposed amendments in 2006 and refused the arguments provided by the Minister of Justice in 2011 on the differentiated treatment of persons holding public positions as opposed to private persons, thereby setting the absolute burden on public authorities to prove the illegal nature of any property owned by public servants. Such a burden makes the confiscation of the property of public servants resulted from corruption illusory, because it is impossible to document every case of corruption committed by the same official.

The confiscation of illegal property of public servants is an increasingly debated subject, particularly because of the widespread phenomenon of extensive assets of public officials, highlighted in journalistic investigations. It is also perceived as an important legislative solution by the new Government. Indeed, the civil confiscation is applied in a number of European states, which Moldova may implement, provided that the Constitution is either amended or the case-law of the Constitutional Court is revised.

The limitation of confiscation to public servants only will not resolve the depth of corruption and subsequent purchase of goods from proceeds of crime, as the corruption schemes involve not only public officials but extend to civilians and this targeted amendment may even further aggravate the involvement of civilians in criminal activity which cannot be demonstrated, with public officials holding minor enrichment advantage and in most cases acting as intermediaries. Coupled with lack of attractiveness in the public sector, including due to low pay-scales, targeting public officials only will not offer the desired solution.

Recommendations:

1) Article 46 of the Constitution must be either amended or the jurisprudence of the Constitutional Court should be revised to set a share of burden of proof for all holders of property and the public authorities, the public authority being called to rhove the disproportionate nature of the assets compared to available legal income and the public servant to justify this discrepancy;

2) The confiscation of assets of public servants should become the main goal of any investigation of a corruption case.

Whistle-blowers protection mechanism still unknown or rarely used

In July 2018, Parliament of the Republic of Moldova adopted the Law no.122 of 12.07.2018 on whistleblowers (hereinafter - the Law), thus establishing a new approach of this anticorruption tool. The purpose of Law is to increase the cases of disclosure of illegal practices and other disclosures of public interest by: promoting the climate of integrity in the public and private sectors; ensuring the protection of whistleblowers against retaliation in the context of examining the disclosures of public interest of illegal practices; preventing and sanctioning revenge against whistleblowers. According to the Law, the National Anticorruption Center (hereinafter - NAC) is responsible for examining the disclosures of illegal practices, and the People's Advocate (hereinafter - Ombudsman) ensures the protection of whistleblowers in the case of external and public disclosures of illegal practices.

The field of whistleblowers is still sensitive, little explored and applied in the Republic of Moldova. Taking into account that the institution of whistleblowers remain new to the Moldovan law and institutional system, from one side public authorities have modest experience on effectively implementing this Law and from another side employees are reluctant to resort to this tool. According to the Report of Ombudsman on the observance of human rights and freedom in the Republic of Moldova in 2020 (pag. 87): " […] *the concept of whistleblower is not known to the general public in the Republic of Moldova, and potential whistleblowers still do not know very well the guarantees of protection, as well as the possibility of using this tool"*.

The implementation during two years of Law 122/2018 highlights several inaccuracies and inconsistencies of the legal norms, as well as in the approach of the responsible institutions. On the side of recording and investigating internally communicated disclosures of illegal practices, there is still insufficient capacity and understanding on the part of employers, the first who investigate integrity warnings and ensure the protection of whistleblowers. The authority for the investigation of external and public disclosures – NAC, has not yet established a consistent and robust practice. Moreover, the investigation of non-corruption disclosures is transferred to the institutions managing those areas (i.e. health, tax, customs, etc.) and in which case the risk of disclosing the identity of the whistleblowers increases and, subsequently, increasing the risk of retaliation.

Under its legal powers (Law 52/2014), the Ombudsman can make recommendations to employers and intervene in lawsuits when whistleblowers are subject to retaliation. Experience shows that the institutions do not always follow the Ombudsman's recommendations and in some cases, the retaliation measures are stepping up.

A challenge is the lack of an "umbrella" authority to ensure the effective implementation of the whistleblower institution by both the investigating authorities (employers / NACs) and the protection authorities (employers / Ombudsman Office), the competences being distributed to a wide chain of authorities.

Recommendations:

1) Strengthening the capacity of authorities to examine and investigate internal disclosures of illegal practices (employers) in the public and private sector, as well as examining the opportunity to expand the circle of institutions which will investigate the external disclosures of illegal practices in the strategical fields (health, customs, tax, state security, environment) etc.;
2) Considering the establishment of the judicial protection mechanism for whistleblowers (protection ordonnances), with a view to a more prompt and effective response to actions of retaliation;
3) The establishment by law of an authority responsible for overseeing the entire chain of institutions involved in the field of whistleblowers: registration, investigation, protection;
4) Examining the appropriateness of setting financial incentives to encourage potential whistleblowers.

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