



## NORLAM

THE NORWEGIAN MISSION OF RULE OF LAW ADVISERS TO MOLDOVA

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NORLAM COMMENTS REGARDING SOME OF THE ISSUES ADDRESSED DURING THE PUBLIC DEBATES „REFORM OF THE PROSECUTION OF THE REPUBLIC OF MOLDOVA” DATED 25 MARCH 2011

### CIVIL CASES AND THE PROSECUTION

#### **Introduction:**

The starting point is the Government’s Activity Plan “European Integration: Freedom, Democracy, and Welfare” framework of Public Policy of the Republic of Moldova for 2011-2014. Under the headline “Reform of the prosecution” it is a stated objective to “Change the competences of the prosecution and concentrate them on criminal justice”.

This gives a strong instruction to remove the prosecution’s tasks from advocating civil cases.

At the first Public Debate on 25<sup>th</sup> of March 2011 the issue revealed strong opinions from the participants.

Initially Norlam want to point out that the prosecution’s involvement in civil claims can arise in different situations.

Firstly, as an appendix to a penal case. In Norway this is an additional claim against the perpetrator that is submitted to the court in the main hearing. This happens when the perpetrator by committing the offence also causes material damages, e.g. a burglary causing material damages on a house or on the premises of an entity. Another example is the rapist or sexual abuser that according to the Norwegian system has to pay compensation for non-economical damages to the victims. In our system we are familiar with both compensation for economical damages and non-economical damages for interfering with the sexual or bodily integrity of the victims. The precondition is that the civil claims originate from the criminal

deed. In criminal cases concerning sexual abuse of children, rape and grievous bodily harm, the victims will have their own state appointed lawyer to invoke their claims during the trial proceedings. When the punishment can be determined with an optional fine, compensation can be an additional part of the writ, provided the loss is well documented by the aggrieved party.

Secondly, and as we have learned about Moldova, the prosecution has the duty to advocate civil cases for purposes of protection of state's rights and interests (Art. 71 para (3) of the Civil Procedural Code of the Republic of Moldova).

Norlam want to elaborate further on this second approach.

From the first round of the Public Debates it can be recaptured questions like "what is wrong with this system?" and "many countries have civil tasks for the prosecution". Moreover, there were opinions like "currently, there is no one to replace the prosecution on these tasks", as an argument to keep it as it is.

It is Norlam's opinion that these tasks should be excluded from the prosecutorial duties and that national laws should be amended to obtain the requested reform. We think that today's solution is a reminiscence of the "procuratura" system from the Soviet times.

We will argue our point of view based on the following circumstances:

### **Unfavorable**

The prosecution is well known as the state's accusation body which asks for punishment of individuals or corporations for committing crimes, and to deter persons and others from committing similar crimes. From a human rights perspective it is a national demand to prosecute criminal offences within international conventions and national legislation. Every informed citizen in Moldova knows that the prosecution rules the investigators within the police in concrete cases, with the discretionary power to open cases, apprehended suspects, press charges and file indictments for the courts.

From this it follows that a party in conflict with a state authority will face an unfavorable situation. It will be perceived that the prosecution brings their full range of powers with them in court even though the case itself is a pure civil one. An unfavorable threatening atmosphere for the civil party cannot be avoided. This underlying understanding will be further strengthening by the fact that the prosecution has military ranks. Further on, and especially, if it is the prosecution that is the plaintiff in the case, it will be perceived rather similar to criminal accusations for the defendants. This solution means that the state authorities tilt the balance between two parties in a civil conflict. It should be mentioned, even though the topic is not totally the same, that several decisions from ECtHR concern states using a "procuratura" in civil cases, i.e. a prosecutor representing the state and assisting the courts.

Another argument we have learned about is the perception that in some situations there may be an abuse of the state resources because the prosecutor is not obliged to cover court expenses in civil cases (Art. 72 para 1 of the Civil Procedural Code of the Republic of Moldova). This tilts the balance between the parties, as mentioned above, even more. Moreover, Article 71 of the Civil Procedural Code of the Republic of Moldova simply states “in whose capital fund the state has a share”. Does this mean that if the state has one percent of the stock, the respective corporation benefits from not having to pay court expenses and free advocating at the state’s expense?

### **Need for specialization**

We also would raise the question if the prosecutors working on civil cases are the best juridical experts to settle such legal disputes. Best quality and efficiency calls for continuation and specialization. Civil actions require skills in the civil domain which are far from the prosecutorial tasks in the criminal field. Typical civil claims can be payment of compensation for injuries, enforcement of contracts, ordered to take certain steps or to stop certain activities. On the other hand, criminal cases involve totally different rules concerning burden of proof and proceedings are very complex and demand prosecutors as true educated professionals. It could also be mentioned that before initiating a civil case, the plaintiff makes an overall assessment of the risks involved, due to the fact that court proceedings often result in high expenses. This results often in friendly settlement agreements which call for a very high degree of insight in the field at question.

### **Impartiality**

Judges are state employees but there is no conflict with the principle of impartiality of judges to organize state employees or a state body to advocate on behalf of the state in civil proceedings before the courts. Separation of state powers and judges’ independence secures fair proceedings.

When it comes to the prosecution, the situation may be more complex. In Moldova, there is no tradition to prosecute the state for its activities, departments and entities, in case of violations of the Criminal Code or Contravention Code, e.g. for anonymous and cumulative violations by state employees. In our opinion, activities carried out solely by the state should also be subject to criminal liability, e.g. in Norway the state represented by a police station could be prosecuted as such for maltreatment of an arrested person or other significant lack of following safety precautions in police operations. It’s strongly recommended for Moldova to develop the practice of applying criminal and contraventional liability for legal entities, please see Recommendation of the Committee of Ministers Rec (88) 18 Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities and Recommendation of the Committee of Ministers Rec (81) 12 on Economic Crime.

In this context, it is not normal that the prosecution should carry out activities for the same subject, and, namely, the state, acting both as a civil attorney in civil cases and as a prosecutor

prosecuting the state for shortcomings in the criminal field. Moreover, such a double role for the prosecution would be a solution that would not gain the trust of the citizens.

### **Solutions, - intermediate and long term**

The prosecution should be released from the task of representing the state's interests in civil cases.

For example, within the reform of the prosecution at least one department could be transformed into a civil law department that would be taken out of the prosecution and transferred to other state bodies, as a legal civil department by the Government or in a municipal or regional level.

The most skilled and experienced prosecutors in civil law should be reeducated to represent the state's interests in civil cases both on the republican and municipal/regional level. Municipalities or even regions can be organized to share departments according to the needs in the district. The appointed personnel should be licensed as lawyers. The salary should at least be at the same level as the previous position in the prosecution and follow the same development.

Only the first recruitment should be from the prosecution as part of the reorganization. Further on, the recruitment should be an open competition for all jurists.

The court expenses related to civil claims should be covered both by state authorities/state enterprises and private institutions on equal basis.

### **Resources**

The human resources are already there and so are costs related to salaries. The necessary expenses may be estimated based on the number of civil cases being tried currently and related forecasts.

### **Conclusion**

Norlam believe that exonerating the prosecution from these civil tasks would represent a significant modernization of the prosecution according to the Governmental activity plan, increasing the efficiency and society's trust in the prosecution. By this reform Moldova will gain improvements both in the penal and civil justice system.

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