NORLAM
THE NORWEGIAN MISSION OF RULE OF LAW ADVISERS TO MOLDOVA

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Ministry of Justice of the Republic of Moldova

General Prosecutor's Office of the Republic of Moldova

Ministry of Foreign Affairs of the Republic of Moldova

Informative note No. 5: *COMMENTS OF THE NORLAM ADVISERS REGARDING CERTAIN ASPECTS OF THE JUSTICE REFORM*

Revision of certain provisions of the Moldovan Criminal Procedural Code

We would in this document offer some comments to issues that have been discussed in the Ministry of Justice Working Group on Revision of the Criminal Procedure Code.

1. Plea Bargaining

Norway does not have a system of plea bargaining. It can generally be said that there is a widespread skepticism to the concept of plea bargaining in Norway. This is mainly due to two factors:

1. The offer of a plea bargain can put a citizen into an impossible dilemma of whether to be convicted innocently, or to risk a more severe sentence.
2. The plea bargaining system in reality transfers judicial power from the courts to the prosecution.

However Norway has two legal institutions that include elements of the plea bargaining system:

1. In less severe cases the prosecution may issue writs, where the suspected/charged person is offered to accept a fine and thereby also accepting responsibility according to the charge. The issue of writs can only be used in cases concerning fines, not to impose prison sentences. If the writ is not accepted, the case is sent to court.

2. The Criminal Code states that a confession of guilt is considered a mitigating circumstance giving the charged/indicted person a reduction of up to 1/3 of the sentence.

We support the position of Ms. Ausra Raulickyte that plea bargain agreements should be limited to the less severe cases.

2. Reasoning of judgments

In Norway a judgment has to be reasoned before being pronounced. Norlam believes that the dispositive part of the sentence should be the result of the reasoning, and not the opposite. We also believe that it is beneficial for judges to finalize the work of writing the reasoning before judgment is passed, in order not to be distracted by other pending cases.

In Norway a reasoned judgment should be passed within three days of the main hearing. In cases of delay a note concerning the reason for the delay must be made in the judgment. Delays are common in complicated cases.

3. Passing judgments *in absentia*

In less serious cases, the defendant may have his case tried *in absentia* under specific conditions:

Section 281. In a case concerning a criminal act in which the prosecuting authority does not wish to propose the imposition of a sentence of imprisonment for a term exceeding one year, the main hearing may proceed even though the person indicted is not present, if his presence is not deemed necessary for the clarification of the case, and the person indicted either

1) has consented to the case being dealt with in his absence, or
2) is absent without it being made clear or shown to be probable that he has a lawful excuse, or
3) has absconded after the indictment was served on him.

If a summons to attend the main hearing has not been served on the person indicted because he has absconded, the main hearing may nevertheless proceed in the case specified in No. 3 of the first paragraph.

A case concerning preventive detention may not proceed in the absence of the person indicted.

In all cases the hearing may proceed when the court finds that it must lead to an acquittal or the summary dismissal of the case.

The convicted person may apply for a retrial if he shows it to be probable that he had a lawful excuse:

Section 282. Any person who is convicted when the main hearing proceeds pursuant to section 281, first paragraph, No. 2, may apply for a retrial if he shows it to be probable that he had a lawful excuse and that he cannot be blamed for failing to notify the court in time. The same applies to any person who is convicted when the main hearing proceeds pursuant to section 281, first paragraph, No. 3, if he shows it to be probable that he had not absconded.

The application must be submitted before the expiry of the time-limit for lodging an appeal and be dealt with by the court that has pronounced the judgment challenged. If the judgment is appealed against, the appeal shall be suspended until the application for a retrial is decided. Otherwise the provisions of sections 308, 309, 318, first paragraph, and 319, second paragraph, shall apply correspondingly.

The application must state the grounds for a retrial. If the application contains no grounds that may lead to a retrial pursuant to the provisions of the first paragraph, the court will immediately pronounce an order rejecting the application. The decision may be made by the president of the court.

If the application is not immediately rejected, it shall be submitted to the opposite party for comment. The application shall be decided by a court order without oral proceedings. The court may, however, obtain further information and carry out a judicial recording of evidence pursuant to the provisions for such recording of evidence outside the main hearing. The provisions relating to defence counsel in section 97, first sentence, shall apply correspondingly. The decision may be made by the president of the court. The parties shall be permitted to comment on the information obtained.

If the convicted person is absent from the retrial without it being made clear or shown to be probable that he has a lawful excuse, the case shall be dismissed and the sentence already pronounced shall remain in force.

Norlam believes that a similar provision could be included in the Moldovan CPC. Provided that a satisfactory right of retrial is given, for instance, based on the model of the Norwegian CPC, we are of the opinion that the provision would be in line with the ECtHR.

4. Witness statement of minors

Minors under the age of 16 are generally not heard as witnesses in criminal cases in Norway, and never in cases concerning sexual felonies. The minor will be heard by a judge separately from the sitting of the court. The judge is assisted by a "well qualified person". Formerly this was often a psychologist, but today the assistant is more often an experienced police officer.

The statement of the minor is generally made to the police officer alone in a room. The statement is followed by the judge, prosecutor and defense attorney through a one-way mirror. These people have the opportunity to pose questions through the police officer. The statement is recorded on video, and follows the case.

We enclose the main legal provision on this matter in the Norwegian CPC

Section 239. In the case of an examination of a witness who is under 14 years of age or a witness who is mentally retarded or similarly handicapped in cases of sexual felonies or misdemeanours, the judge shall take the statement separately from a sitting of the court when he finds this desirable in the interests of the witness or for other reasons. The judge shall in such cases as a general rule summon a well-qualified person to assist with the examination or to carry out the examination subject to the judge's control. When it is possible and due consideration for the witness or the purpose of the statement does not otherwise indicate, the examination shall be recorded on a video cassette and if

[19] See footnote 6, section 55, No. 4. (Translator's note)
[20] See footnote 2, section 12. (Translator's note)
[21] See footnote 3, section 18. (Translator's note)

necessary on a separate sound recorder. On the same conditions the defence counsel of the person charged shall as a general rule be given an opportunity to attend the examination.

The same procedure may also be used in cases concerning other criminal matters when the interests of the witness so indicate.

When the witness's age or special circumstances so indicate, the judge may decide that instead of or prior to an examination pursuant to the first paragraph the witness shall be placed under observation. The provisions of sections 152, 153 and 159 shall apply correspondingly to such an observation. The third sentence of the first paragraph of this section shall apply correspondingly.

Examination pursuant to the first paragraph and observation pursuant to the third paragraph shall be carried out no later than two weeks after the criminal offence has been reported to the police, unless special reasons indicate that the examination and/or observation should be carried out later.

The King may prescribe further rules relating to the procedure for examinations conducted separately from a court sitting and for observations.

5. Private Criminal Cases

Aggrieved parties may raise private criminal cases if the case is not prosecuted by the public authorities. The main provision concerning this right is found in the Norwegian CPC art. 402:

> **Section 402.** Pursuant to the provisions of this chapter an aggrieved party may institute a private prosecution in the case of:
> 1) a criminal act that is not prosecuted by the public authorities,
> 2) a criminal act that is not prosecuted by the public authorities unless this is considered necessary in the public interest,
> 3) other criminal acts if the prosecuting authority has refused to comply with an application for public prosecution or has, contrary to the provisions of section 69 or 70, abandoned a prosecution that has been commenced.
>
> A case of defamation shall be treated as a case to which No. 2 applies even if it only relates to a declaration that a statement is null and void.

This right is rarely used. In accordance with the CPC, the aggrieved party is given a right to insight into the case documents, and may use these as a basis for the case. Broadly speaking, the aggrieved party takes the place of the prosecutor in private criminal cases.

6. Release from pre-trial detention

Pre-trial detention represents an exception from the right to liberty and security. Pre-trial detention is only allowed if it is "reasonably considered necessary", cfr. ECHR art. 5 nr. 1 (c) it follows from this that if the reason for the pre-trial detention is removed due to new circumstances during the period of detention, the detained person shall be released at once.

The Norwegian CPC art. 187 a regulates this situation:

> **Section 187 a.** A person who is remanded in custody shall be released as soon as the court or the prosecuting authority finds that the grounds for the remand in custody no longer apply, or when the time-limit for the custody has expired.

To our knowledge no provision exists in the Moldovan CPC that would allow the prosecutor on his own to release the person from pre-trial detention. We would suggest that a similar provision should be introduced in the Moldovan CPC.

7. Summoning of parties and witnesses

In our opinion, Moldova does not have an adequate summoning system. The problems concerning summoning seem to be based on three major factors:

1. The legislation on summoning is unclear.
2. There is no system of agents for summoning, and the postal system is inadequate.
3. Moldovan courts and prosecution offices have insufficient funds for summoning.

The legal problem is i.e. found in the Moldovan CPC art. 351 nr. (4) and (5):

> "(4) When scheduling the case for trial, the court shall oblige that the parties ensure the presence in the court on the date set of the persons entered on the lists submitted by them.

> (5) Should one of the parties fail to ensure the presence of any of the persons on the list submitted, he/she may file a request that these persons be summoned by the court."

Norlam notes that there exists a disagreement between the courts and prosecution in Moldova as to which body has the responsibility in regards to summoning of witnesses. This disagreement is commented on in the "Study on comprehensive analysis of the legislative-institutional reasons of sentencing of the Republic of Moldova by the European Court of Human Rights (ECHR), written by Rotaru/Dolea/Cretu (2009), page 45:

> "There are also issues of procedural nature which provide for the obligation of the parties to present evidence. Although the obligation of presenting evidence is placed on the parties, the court summons also the witnesses, and in case of their non-appearance, it could sanction them with a judicial fine or could order bringing them forcefully. In the opinion of some judges, the prosecutor has the obligation to ensure the presence of the witnesses. Lack of clear provisions in the criminal procedure legislation creates such confusions."

Norlam suggests that the Moldovan CPC should be amended in order to clarify the responsibility of summoning.

We would suggest that the court should have the final responsibility for summoning of witnesses and parties, but that the court is given the power to order the prosecution to summon witnesses, including the witnesses named by the defense.

Based on Norwegian experience, we suggest that police officers should be used to summon witnesses, acting at governmental agents and instructed by the prosecutor, in accordance with the Moldovan CPC art. 6 nr. 2.

Dag Brathole

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