NORLAM
THE NORWEGIAN MISSION OF RULE OF LAW ADVISERS TO MOLDOVA

MISIUNEA NORVEGIANĂ DE EXPERȚI PENTRU PROMOVAREA SUPREMAȚIEI LEGII ÎN MOLDOVA
50, Vasile Alecsandri str., MD 2012, Chisinau, Moldova
Phones: (+373-22) 27 43 30, 83 81 92, 83 81 93, Fax: (+373-22) 27 43 30

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To the Ministry of Justice of the Republic of Moldova

COMMENTS TO THE "STRATEGY FOR JUSTICE SECTOR REFORM 2011-2015"

Norlam would like to offer its comments to the Ministry of Justice' "Strategy for Justice Sector Reform 2011-2015" ("Strategy document"). Initially we will also offer some comments on the "Assessment of Rule of Law and Administration of Justice for Sector-Wide Programming, Moldova Government of April 2011" ("Assessment Report").

We would like to state that the members of Norlam are practitioners working on a regular basis with colleagues in Moldova within the fields of courts, prosecution, lawyers, probation and prison. Norlam works exclusively in the field of criminal justice. Our main focus is on the European Convention of Human Rights and the relevant European standards. In our comments we will focus on what we as practitioners see as the crucial issues. Accordingly, some issues will be commented on extensively, while others will not be touched upon.

After a general introduction, we will follow the same numbering system as in the Strategy document.

The Assessment Report

We note that the Assessment Report has been prepared by highly qualified experts based on an extensive research. The wide perspective and the clear wording of the report make it an excellent basis for Moldova's work on the strategy.

In general, the report corresponds to the observations that we have made while working in Moldova from 2007. We share the view of the experts, and the view of the Ministry of Justice, that the Moldovan judiciary faces fundamental challenges.

However, we would like to note that in our contacts with our Moldovan colleagues we have registered over the last four years an increased level of knowledge and a change of attitude on several issues. Many professionals hold high professional skills. It seems to us, however, that

conservative thinking and old traditions may be a hindrance to reform. We feel that appropriate attention should be given to individual integrity and competence during the implementation of the new strategy. All in all, it would be fair to say that Norlam has a somewhat more positive view of the Moldovan judiciary than the Expert team.

The key issues from the Norlam's point of view.

Our comments are based on what we believe to be key issues:

1. We believe that no judiciary can function in an appropriate manner if it is not free from corruption. It must be a prime objective to do away with corruption in the Moldovan judiciary, while respecting the requirements of due process.

2. Statistics prepared by CEPEJ show that court and prosecution budgets in Moldova per capita are the lowest in Europe. We believe that this will be the case also in other fields of the judiciary. We believe that more economic resources to the judiciary are necessary in order to give the professionals better functioning working conditions.

3. When working on implementing jurisprudence from ECtHR, we hear on a regular basis that the situation in Moldova is "special" and that "Moldova is not ready for this or that reform". Accordingly, it is invoked that "Moldovan solutions" should be sought. We disagree. Moldova is a full member of the Council of Europe, with the rights and obligations that follow.

4. We believe that in several areas there is an increasing gap between the knowledge of Moldovan professionals and their daily practice. There is a clear and understandable reluctance to act against national law (in situations when it is not in compliance with the international legal provisions), instructions from superiors and old traditions. Old habits die hard. We believe that there needs to be a change of mindset in the Moldovan judiciary, with an emphasis on the individual responsibility to respect European standards.

5. It is our opinion that Moldovan laws within the field of criminal justice generally are up to European standards, although we have identified some areas where we believe that Moldovan laws are incompatible with the ECtHR jurisprudence. However, we believe that there is a lack of uniform practice of the laws.

The Strategy document

In our opinion, the Strategy document is a comprehensive document that reflects the challenges described in the Assessment Report in an appropriate manner. The structure of the Strategy document, with precise description of intervention areas, deadlines, responsible institutions and indicators makes it a useful platform for common efforts by the stakeholders.

We also believe that the definition of the seven pillars of the justice sector is a useful basic structure of the document. We agree that pillars IV and V are crucial to the success of the strategy, and that these areas deserve to be singled out for special attention. Pillar VI, *Observance of Human Rights*, also reflects a major concern that should be a driving force in the strategy.

It is our general opinion that there is not enough focus on the role and importance of lawyers in the Strategy document. Lawyers, and the Union of Lawyers, are essential as a driving force in the strategic planning of the judiciary. We will comment on this more specifically below.

PILLAR 1. The Judicial System

Specific comments

1.1.4. ***Introduction of an adequate, consequent and sustainable budgeting mechanism for the judicial system, able to increase the financing of the system***

In our opinion, an adequate budgeting mechanism for the judicial system is a pre-condition for the success of the work on raising the standard of the judiciary system. While an increase of budgets may be difficult in the short term, we would strongly advocate that the investment will be highly profitable in the long term. It is our firm conviction that a well-functioning judicial system is of vital importance for the functioning of Moldova's economy, including the possibility of attracting foreign investors (we refer to pillar V).

1.1.5 ***Increased efficiency with respect to management and strategic analysis of budgeting issues***

and

1.1.6. ***Improved practical guidelines and regulations on the administration and management of the courts***

Experience from Europe shows that professional management, including handling of funds, is vital in the justice sector. There is always room for improvement, even with limited funds.

1.1.7 ***Establishment of clear and transparent criteria for the recruitment, appointment and promotion of judges***

The transparent recruitment of judges serves two purposes. First of all, choosing the most competent candidate is important in itself. Secondly, transparent recruitment also serves to raise the respect of the judges and of the courts.

In our opinion, the independence of justice demands that judges should be appointed for life. However, mechanisms should be established to allow dismissal of judges who clearly do not uphold minimum standards, for instance due to clear incompetence or serious unethical behavior, such as corruption. In these cases due process must be respected at all times. In Norway a judge can only dismissed by a court decision.

1.1.10. ***Introduction of norms and mechanisms excluding the possibility of courts to go beyond the limits of their judicial powers and to make judgements via which they assume the functions of the legislative and executive powers***

This issue raises serious questions.

Our understanding of the competence of the Parliament and the courts is that the Parliament passes the laws, and the courts interpret the laws in individual cases.

The Supreme Court has the role of securing uniform practice in the courts according to the Law on the Supreme Court of Justice, Art. 1 para (2). This is a necessary function of the

Supreme Court in any nation. Therefore, it is the obligation of the Supreme Court to establish a practice for the lower courts to follow, within the frames set by the Parliament through legislation.

Obviously, it must be within the power of the courts to rule in favor of citizens and companies and against government if this is found to be in accordance with the law and the uniform practice of the Supreme Court.

In our opinion, the natural limit of the courts' competence is to decide upon individual cases. General directives on the understanding of the law – given outside individual cases – are, in our opinion, outside of the competence of the courts.

We believe that it is of vital importance not to limit the Supreme Court's power to create uniform practice through judgments and decisions in individual cases.

See also 1.2.5. below.

1.1.11. ***Strengthening the self-administration capacities of the judiciary, through a revision of the role and competencies of the Superior Council of Magistrates and its subordinated institutions***

We agree with this suggestion. In our opinion – and based on our tradition – we believe that the Superior Council of Magistrates should be independent of other governmental bodies, and that, for example, the General Prosecutor and the Minister of Justice should not be members. Instead we would suggest prominent members of civil society.

1.1.12. ***Ensuring that parties have equality of arms within the criminal procedure***

It is the opinion of Norlam that true and effective equality of arms is essential. This topic is treated in more detail below.

1.2.5. ***Creation of a mechanism ensuring the uniformity of the judicial practice***

1.2.7. ***Increased efficiency of the Procedural Law achieved through the revision of the appeal system and distribution of competences between courts along the horizontal axis***

and

1.2.8. ***Simplifying and clarifying the appeal system (examination terms, court decision making and grounds for appeals)***

It is the opinion of Norlam that a mechanism ensuring the uniformity of judicial practice is a vital element in the ongoing reform. We agree that this requires a reform of the appeal system. It is necessary to limit the case load of the Supreme Court of Justice to cases of a principal nature, i.e. cases that may define the understanding of the legislation.

We believe that a system of uniform practice will serve several important purposes:
- A unified practice is in itself of value to the citizens,
- A unified practice will increase the efficiency of the lower courts
- A unified practice allows the Supreme Court to interpret cases from the ECtHR for the use of the lower courts
- A unified practice reduces the risk of corruption because judges in lower courts will be obliged to follow the practice of the Supreme Court

We believe that this reform should be given high priority.

See also 1.1.10. above.

1.2.10. *Revision of the operation of the instruction judge institution in view of its inclusion into the common Law judicial body as specialised judges in this respective issue*

We support a revision of the role of the instructional judges, who, in our opinion, should be incorporated into the ordinary corps of judges. Judgments at the ECtHR and international reports clearly indicate that, at present, pre-trial detention cases are not heard in accordance with the jurisprudence of ECtHR.

1.2.12. *Streamlining the examination of cases in courts (reasonable terms, summons procedure, written procedure in a civil case etc.)*

and

1.2.13. *Introduction of consecutive court hearings during case examinations in view of ensuring the continuity principle and the celerity of court proceedings*

Norlam strongly supports the suggestion of streamlining cases in court, with an aim to conduct Consecutive Main Hearings as a main rule. We consider this issue to be one of the most important court reforms. We would particularly underline the need to reform the summoning system. In this connection, we quote from 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:

> *"It seems that the problem of procrastination of examining of the criminal cases is not so much due to the imperfection of the internal legislation, but due tothe management of the judicial system and the attitude of the involved subjects. In most cases, the representatives of the institutions and prosecutor's office blame each other of the created situation. A different aspect of the problem is non-appearance of witnesses, although in our opinion, it is an exaggerated statement that the adjournment of hearings is determined by their non-appearance. 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."*

We are convinced that a proper summoning system, combined with effective functioning refunding of expenses to witnesses, are of paramount importance to make the courts function in an effective and appropriate manner. We believe that such a reform requires:

- changes in the legislation
- increased budgets
- a reform of attitude among judges, prosecutors, lawyers, and indeed the public.

We strongly support the concept of Consecutive Main Hearings while underlining that we do not suggest a return to the old Soviet system of continuous hearings *stricto senso*. Under the proposed concept, there will generally be only one main hearing in each case, allowing postponements only when this is strictly necessary.

We believe that a system of Consecutive Main Hearings will serve several important purposes, such as:

- increased efficiency in courts,
- the judges will be less dependent on police documents
- improved quality of main hearings, all evidence is presented in one process
- increased transparency, public may follow proceedings as one process
- reduced risk of corruption due to higher efficiency and increased transparency.

PILLAR 2. Criminal Justice

General comments

Norlam complements the many good initiatives concerning the prosecution.

The three aspects we consider as the most important are:

1) To strengthen the role of the prosecution in the investigation phase, playing a crucial and necessary role as rule of law guarantor from the very first police investigation activity. This role of the prosecution authorities is important because this phase may have impact on the demand of legality and the given rights of freedom and privacy for the citizens (Art.3, 5, 6 and 8 in the ECHR) (see comments to 2.1.3 and 2.1.4)

2) The Moldovan prosecutorial activities should be limited and defined to supervision of the criminal policy and the handling of criminal cases, meaning being in position to lead the investigation from the time of occurrence of suspicion of violations of the penal law and to efficiently prosecute such deeds in courts. The prosecution must be relieved from the burden of advocating civil cases and examination of civil petitions from citizens (see comments to 2.2.4.)

3) The hierarchical system must be structured in two or three clear defined levels in the hierarchical structure to serve internal prosecutorial decision making based on the severity of cases. Within this system prosecutors must be secured internal independence in the decision making process and notoriety of prosecutors' decisions must be secured in writing in the case files (see comments to 2.2.8.)

Specific comments

2.1.3. ***Clarification of the role and competencies of the prosecutor's office and of the other criminal investigation bodies, including the role of defense (legal and institutional framework)***

We consider the clarification of competence and role of prosecution and criminal investigation bodies as one of the most important issues. In short, increased role for the prosecution in the investigation and the diversity in the competence of operational and criminal investigation must be replaced with one criminal investigation covering the entire investigation. This means reorganization of the investigation structure within MIA. See our comments under 2.1.4.

One specific topic for the discretional rights for the prosecution is the competence to release the detained person from pre-trial detention without a decision from the instructional judge. If the legal conditions for pre-trial detention are no longer fulfilled, it is the duty for the prosecution to immediately initiate release of the detained person.

This does not happen in Moldova. To maintain the pre-trial detention without necessary legal foundation is not only a violation of national law but also Art. 5 of ECHR. What happens in Moldova is that a detained person may stay in pre-trial detention during the whole term applied by the instructional judge and the prosecution does not have the legal power to release this person. To give the prosecution the right to release from pre-trial detention before term in such occasions will clearly define the prosecution's role and responsibility to safeguard rule of law and human rights. It will also underline the strict demand for the prosecution to continuously supervise the legality of all investigation steps in the pre-trial phase and to immediately act according to new circumstances in the case.

On the other hand, assigning this power to the prosecution will not represent a dramatic increase of power because the prosecution as it is today can refrain from requesting prolongation of pre-trial detention, so that the release will take place at the expiry of the term of pre-trial detention regardless of the opinion of the court. The very unfortunate situation now is that the detainee's rights are violated in most of the occasions when it is no longer strictly necessary to maintain the detention or when other legal demands for pre-trial detention are no longer fulfilled. The judge's consent in such situations is an unnecessary formality which may result in violation of the strict demand for immediate release. It should be mentioned that the Norwegian prosecution has the right and strict duty to release in such situations regardless which court instance initially established or confirmed the pre-trial detention period.

2.1.4. *"Streamlining the operative investigation and criminal investigation procedures (ratio between activities to be carried out by operative investigation bodies and the one carried out by criminal investigation need to be clarified)"*

The prosecution must supervise and be in position to conduct all investigation done by the police and secure legality in all such activities. Police activities that otherwise would represent a violation of the given rights of freedom and privacy call for strict legality that must be supervised by the prosecution. This concerns not only apprehensions but is equally important for special investigation methods such as telephone control and tape recording from the privacy. This strict demand for legality comes in force regardless of the fact that the information will not be later used as evidences in court, regardless of the fact that the information will not be used in the investigation, regardless of whether or not the activity will be kept secret for the citizen. This is an activity with impact on the freedom of the citizens and it is the duty of the prosecution to secure the strictly requested legality for all such activities.

The argument that the collected information will not be used as evidence in court, as an excuse to carry out such activities without prosecutorial supervision is, nevertheless, an untenable argument. The activity as such calls for strict demand of legality. This means that the difference between operational investigation and criminal investigation should be removed. This is the solution, for example, in Romania, Germany and Norway. The wording "operative activities" in the police should be reserved for all other activities in the police except investigation.

It should be especially mentioned that applying special methods that demand legality unavoidably means opening (registration) of a criminal case as well, with the prosecution responsible for the legality, even if the case is still on a secret investigation stage at that time. The competences of the instructional judges must be invoked by the prosecution and the necessary permission for the activity obtained according to law. – Evidence obtained on this stage serves as evidence in court provided that it is collected under the procedural safeguards in the Criminal Procedure Code.

For more information about our advice on the interaction between the prosecution and investigation body, please see Attachment 1 "Investigation management". For more information on the difference between the police intelligence work and investigation on case level, please refer to Attachment 2 "When is a criminal case opened?", Chapter 3 – "What is the border line between police intelligence work and opening of criminal cases?"

2.1.5 *Amendments to the Criminal Procedure Law to exclude the existent contradictions between the Law and the standards for the protection of human rights and fundamental freedoms*

Concerning the pre-judicial phase Norlam has on several occasions stressed the need for amendments in the CPC Art. 307 regulating what documents should be attached to the prosecution's motion to court requesting pre-trial detention. The last sentence of para (1) of the said Article provides that "Materials confirming the grounds of detention shall be attached to the motion".

In our opinion this does not fulfill the ECtHR demands. We believe that all case documents must be presented to the instructional judge and made accessible for the defense attorney. The defense attorney must even on this stage be in position to prepare and conduct the defense according to such basic principles as equality of arms and adversarial hearing. Only "supporting documents" for pre-trail detention will not substantiate these demands. Likewise, the control of legality that is the role of the instructional judge cannot be conducted based only on the prosecutor's selection of supporting documents. It must be the prosecutor's opinion in the motion to the court that the circumstances that speak against the use of pre-trail detention do not outweigh the circumstances that speak in favor of applying this measure. In this respect, it is crucial that both the judge and defense have access to documents that speak against pre-trial detention. If not, the legality control is conducted by the prosecution and not by the court as demanded according to national legislation and ECHR. For the rare occasions when a document must be kept secret for the protection of investigation at the time of the pre-trial detention hearing, this must be decided upon by the court.

On this topic, please see attached Norlam's letters of 24 May 2011 and 28 July 2010 regarding Articles 307, 308 and 66 of the Moldovan CPC, with references to jurisprudence from Strasbourg (Attachment 3 and Attachment 4, respectively).

In addition, please see 2.1.4 above on the suggested increase of competence of the prosecution in pre-trial detention cases which also calls for amendments in the CPC.

2.2.1. ***Revision of the procedure for the appointment of the General Prosecutor and his deputies and establishment of clear and transparent criteria for the selection of candidates to these functions (Superior Council of Prosecutors – President of Moldova); Appointment of the General Prosecutor for a long period of time with no possibility to be appointed for a new mandate***

In the Norwegian tradition and according to the tripartite separation of power principle, the prosecution belongs to the executive power. For this reason the King in Council (Government) is the one appointing the GP and all other prosecutors in the higher Norwegian prosecution service (the prosecution in the two highest levels). In principle, the King in Council is the highest prosecution in Norway, but since the establishment of the GP's office in 1889 the Government has never influenced any of the GP's decisions in concrete cases. The interaction between the Government and GP is that the GP carries out the Government's priority in their policy, e.g. strengthening the rights of minors and victims in domestic violence cases. The GP reports back on the major developments in the criminal field and reports the need for changes to obtain an efficient fight against criminality, e.g. reports on the increased number of pre-trial detention inmates in Oslo necessitate more prison places, a problem that the Government as the executive power must solve. Based on this, the GP in Norway does not give annual reports to the Parliament, but keeps the Government and the Ministry of Justice updated on the major development and tendencies in the criminal field. Many important statements as the GP's strategy document concerning directives and objectives for the coming year are made public.

The Parliament in our tradition has the law giving and parliamentarian control functions. Not only the Minster of Justice but also the GP can be summoned to give explanations in public hearing in the Parliament on the greatest and most important issues. Especially should be mentioned hearings in the Control and Constitution Committee and/or Justice Committee in the Parliament as obvious supervisors of big national issues and how the institutional powers are being carried out.

One advantage with not having the GP appointed by the Parliament may be that the Parliament may have a more critical approach when the GP is to answer their questions. Likewise, the parliamentarian statements may be more direct and critical, and severe misconduct may have political consequences according to acceptable parliamentarian play rules.

If the Superior Council of Prosecutors gains the competence to list the candidates, a question could be if the Council should be extended to some point for the purpose of appointing GP and deputies. This can be done to secure others than people in the prosecution as relevant candidates, e.g. judges and lawyers.

In our opinion, GP should be appointed for a time period of at least 6 years. Since the first Norwegian GP was appointed in 1889, the average time spent in this position has been 9,5 years.

2.2.3. *Capacity building for the Superior Council of prosecutors in view of ensuring an efficient administration of the prosecutor's office bodies*

When it comes to capacity building of the Superior Council of Prosecutors, we support the idea of strengthening this Council and increasing its independence by allocating own budgetary means.

Recently, there has also been a discussion about granting to prosecutors of the status of magistrates.

If this should be a solution, we will advise not to join together the Magistracy for Judges and Prosecutors. This is also our strong point of view to the suggestion to reorganize the Superior Council of Magistracy for purposes of creating a bi-cameral body with one department for each profession. Norlam underlines that this would create the image of the prosecution and judges as a connected "brotherhood", thus reducing the trust of the civil society, which will continuously question the impartiality of, especially, judges. One unfortunate situation exists already in Moldova because the majority of instructional judges, in fact, are recruited from the prosecution. Maybe, the most important argument against this solution is the tripartite separation of power principle, the lawmaking, executive and judicial powers. The prosecution belongs to the executive power, while the courts belong to the judicial power which must be free from any impact from the executive power.

2.2.4. *Establishment of clear competences of the prosecutor's office bodies (excluding participation of the participation of the prosecutor to a civil procedure and examination of petitions)*

It is our strong opinion that the prosecutorial activities must be limited into the field of criminal justice which means that the prosecution must be released from other tasks still existing as reminiscent from soviet times, such as advocating civil cases on behalf of the state interests.

This raises the question if intermediary solutions should be developed. If so, such intermediary solutions should only exist within certain strict deadlines for the purpose of transferring these powers to other specialized authorities. Further on, it should be considered if it is necessary to strengthen the existing institutions such as the child welfare system, and welfare system in general. Presumably, the current prosecutorial involvement in these areas may hamper the development of these institutions.

When it comes to the prosecution advocating civil cases on behalf of state interest, please see our recommendations given in the Informative note No. 1 "Civil cases and the prosecution" (Attachment 5).

2.2.5. *Examination of the opportunity of liquidation of the specialized prosecutor's offices (military, transportation, anti-corruption prosecutor's office, as well as the prosecutor's office under the court of appeal and the Chisinau municipal prosecutor's office*

In general, we support the idea of simplifying the organizational structure of the prosecution authorities. However, according to an obvious demand for a clear hierarchical system we raise the question if such a simplification will ensure the necessary "second level" in the hierarchical system, situated between the hierarchically inferior prosecution authorities and the General Prosecutor's Office. If this is the solution, the main tasks on this second hierarchical level should be handling of pending criminal cases in general, and not just certain special categories of cases.

On the other hand, a separate unit for investigation of accusations against police officers and prosecutors should be created, not only for corruption but for all allegations of misconduct on duty. This unit should be led by appointed full time prosecutors and investigators with no parallel positions and recruited as independently as possible from prosecution and investigation authorities. The unit should be subordinated only to the GP's office as the highest in the hierarchy. Romania and Norway may inspire to solutions in this respect.

2.2.6. *Examination of staff requirements of the prosecutor's office institutions (development of the design of the prosecutor's robe)*

In Norway judges, lawyers and prosecutors now use black robes in court. The difference is that the judges' robes have velvet collars and the lawyers' and prosecutors' robes have silk collars.

2.2.8. *Ensuring an internal independency of prosecutors. Excluding the possibility of hierarchical superior prosecutors to make certain illegal instructions. Re-examination of the procedure authorizing the actions of hierarchical inferior prosecutors by the hierarchical superior prosecutors (regulation on challenging the illegal instruction)*

It is Norlams' opinion that the hierarchical system must be developed into two or three very clearly defined levels to serve internal prosecutorial decision making based on the severity of cases. Prosecutorial decisions cannot be overruled on the basis of being a senior or superior within the same office or department.

A higher level in the prosecutorial hierarchical system will be in position to overrule a decision from a lower level provided that this is made in writing and added in the criminal case files, within legal limitations based upon certain time frames and notification of the decision to the person under suspicion. Overruling in favor of the suspect will not have these limitations, but must, however, be done in due consideration of the victim's rights.

Prosecutors must be secured internal independence in the decision making process and the notoriety of prosecutors' decisions must be secured in writing in the case files. This means that no one can have or attempt to have any impact on the prosecutor's decision, neither from seniors, superiors in the prosecutor's department, or anyone from the hierarchical system above. This duty and right of the prosecutor do not mean that he is prevented from seeking a second opinion from a colleague, but only to the extent the appointed prosecutor wants this, and not as a general rule.

An overview of the organization of the prosecution in Norway is given in Attachments 6 and 7, including the principle of competence according to severity of the case and the principle of "following the direct line in the hierarchy".

2.2.9. *Re-examination of accountability rules for prosecutors and exclusion of general immunity of prosecutors*

General immunity of prosecutors should be removed. However, it could be debated if the position of prosecutor should gain additional employment protection compared with the presumably general labour protection in the legislation.

2.3.1. *Implementation of modern methods of criminal investigation and prosecution (information technics, modern expertise, etc.)*

To be more efficient and perform better is an ongoing demand for investigation- and prosecution authorities in all countries. For instance, the interaction between the prosecution and investigators in telephone communication tapping must be developed and the presentation of the findings of these cases in court must invoke the defendant's rights to equality of arms and adversarial hearing. In Norway, it is police officers from the investigation that give the audio and visual presentation as witnesses of the findings in the court main hearing. Experiences and illustrations in this domain from the Norwegian police and prosecution authorities could be of interest for Moldova.

2.3.4. *Improving the professional skills of the pre-judicial phase actors through the latter's specialization*

Practice shows that there is a need for specialization both in the investigation and prosecution of certain cases, such as economical cases, for instance. In Norway, we have special units for such cases as organized crime, cyber-crime, war crimes, money laundering, corruption, serious tax and fraud cases.

Specially appointed police investigators are trained in the domain of sexual abuse of children and domestic violence.

Concerning the Norwegian specialization of prosecution, please see our Informative Note No. 6 and, namely, "The Norwegian National Authority for the Investigation and Prosecution of Economical and Environmental Crime" and "The National Authority for Prosecution of Organized and Other Serious Crime".

2.4.1. *Electronic filing and dissemination of complaints charging crimes*

We suggest having an internal electronic data-base handling program for criminal cases, with prosecutor having access to all cases he/she is appointed to, being able to conduct the investigation through the system and make his/her decisions in the data system. Documents given the "finalized" status cannot be amended or deleted from the system later on. There must be a constant updating from the paper version of the case files and the data case files,

e.g. external documents such as letters and forensic reports must be scanned into the data case files and given the same document number.

The right to have complains assessed should be limited, for more details please see Informative Note No. 6.

2.5.1. *Continuous liberalization of penal policies through use of sanctions and prevention and non-custodial measures*

2.5.2. *Decriminalization of the Penal Law*

2.5.4. *Strengthening the justice system for minors, also through specialization of actors involved in this system*

For Norlam sections 2.5.1, 2.5.2. and 2.5.4 are very much interrelated. Especially the juveniles and first-time offenders should be treated as individuals offering the best possibility for re-socialization into the society. We know that very serious and cruel deeds can be committed by juveniles. However, this fact should not diminish the softer approach for the majority of offenders of this category.

Norlam will strongly emphasize the need for special concerns for the juveniles and the first-time criminals of young age. However, traditionally we are skeptical when it comes to a high degree of specialization, because all actors in the justice system should be capable to offer the youngsters this special attention, while such specialization would decrease flexibility and could result in unsolved competence questions. What about a perpetrator being less than 18 years old at the time of the deed and more than 18 years old at the time of the main hearing? What about a 19 year-old boy with a maturity of a 15 year-old? What about a first-time offender with the age of 18 years and one day at the time of the crime? Further on, we raise the question if it is not so that the professional actors would benefit from experiencing contrasting cases as well, as a part of their professional skills and life experience? To experience dealing with a “professional criminal” who has been convicted many times before gives a striking contrast to the “little boy” appearing in court for the first time.

2.5.4 *Strengthening the justice system for minors, also through specialization of actors involved in this system*

We believe that integrated courses for prosecutors and lawyers are a good idea, but, in our opinion, the efficiency and benefit will increase significantly if judges are also included in the courses.

PILLAR 3. Access to justice and enforcement of judgments

A central supporting component of the law is that everyone should have equal access to justice. Lawyers have become those people in society that can help the general population ensure they have fair access to the justice they are seeking. In addition to this, lawyers have a role in participating in building the society. This role is in addition to their work with concrete cases. During their work lawyers will identify shortcomings of the legal system and will have suggestions for improvements.

We are convinced that the Moldovan lawyers must be an integrated and important part of the development of the Moldovan justice system. Justice in the legal system is safeguarded by a balance between the parties. Currently the Moldovan legal system lacks elements of this balance and changes are needed in order to have a just and effective system. This balance must also be present in the planning of major changes in the legal system. The lawyers' participation in the reform process is important in order to avoid that budgetary and efficiency arguments prevail over the interest of humanism, justice and human rights.

3.1 *Strengthening the system of State Guaranteed Legal Assistance*

In this context, the system of ex-officio lawyers must be revised to increase their quality and efficiency and make it desirable for a larger group of lawyers to participate as criminal lawyers for the general public, and not only for those defendants who are able to pay themselves.

We suggest introducing internal rules in the prosecution authority giving guidelines how the defence shall be given effective access to all documents in the case. The prosecution's budget must be strengthened in order to buy copy machines, paper and hire staff to automatically provide a copy of all documents to the defence in pre-trial detention cases.

PILLAR 6. Respect for human rights in the justice sector

6.4. Strengthening the probation system and the penitentiary system

When it comes to Probation, we have the following general comments:
In most of Europe there has for several years been focus on alternatives to prison and the resocialization process for former prisoners carried out by the probation service. It is a general opinion that punishment should not be more severe than necessary and that serving punishment in the community can give better results for preventing new crimes. For most countries this political understanding has been followed by a transfer of punishment serving from prison to probation.

Therefore, we propose that this idea should also be clearly stated in the Strategy document, for instance, by introducing a separate strategic direction in the Pillar 2 THE CRIMINAL JUSTICE having the following wording: *2.6 Increase the percentage of non-imprisonment punishments in the total criminal punishments and streamline their enforcement.*

In addition to this general comment, Norlam has the following concrete comments to the specific intervention areas:

Diminish Prosecution's control over Probation
In June 2011 we wrote a letter to the Ministry of Justice of the Republic of Moldova and to the General Prosecutor's Office of the Republic of Moldova where we proposed to considerably diminish Prosecution's control over Probation. This will increase the Probation Service's independence and the system will get closer to western European countries and standards. This can be included into ***2.2.4 – Establishment of clear competences of the prosecutor's office bodies.***

6.4.3. ***Strengthening partnerships between the probation service and other public or private organizations, members of civil society, families and communities to promote rehabilitation and social inclusion***

Norlam strongly supports this intervention, we do however allow us to mention that our experience from Norway is that partnerships must be started/initiated at the top level, and later go down to the sub-levels. For the public services this usually means that cooperation agreements must be first made on Ministry level and then on operating level. If this is taken into the Strategy document it will make 6.4.3. a little more concrete and binding.

Recruitment of probation workers
The Strategy document has in **6.4.5** an action for ***employment policy and recruitment system for the prisons***. There should also be a concrete policy for the Probation Service, and the opinion of Norlam is that this plan should give the Central Probation Office the authority regarding recruitment of probation officers. In addition, it must be assessed if the Probation Service recruits the right competence, if the service is able to keep their staff or if the turn-over is too high, and to value the level of the salaries.

Training at the National Institute of Justice
Under the section *Outcome* it is mentioned *increased capacity of the NIJ in the field of continuous training of probation counselors*. We support this as a desirable result, but it is difficult to see which concrete action in the plan will be supporting this result.

Funding of the Probation Service. It is for Norlam a fact that the funding of the Probation service is not sufficient. Actually, the lack of resources and proper working conditions restrict Probation in fulfilling their tasks, for example, it seems to be a regular problem that probation has limited resources for transportation to the beneficiaries. Into this picture it also comes that probation today does not have enough computers, computer software systems or electronic archives which are a natural part of a modern, efficient probation service.

Regarding Prison system we would like to make a few general comments and/or propose measures which are not mentioned in the Strategy document, as follows**:**

1. Decentralization of the prison system

a) More autonomy at the prison level, increased decision power for the Governors. This should be introduced in parallel with comprehensive trainings on management, including by raising the recruitment and promotion requirements for this position;
b) Empowering the Director General and/or the Prison Governor to take decisions on the transfer of prisoners from one prison to another (regardless of the type of prison) will allow a more efficient separation of criminal groups, but also a progressive transfer for high security (closed prisons) to low security (semi-closed prisons), hence a better transition to freedom (serving the last third of the punishment in an open prison)[1].
c) Giving prisons the legal power to employ prisoners directly in paid work would allow for a more extensive occupation of convicts, but also a more efficient use of the time spent in prison. It is well-known that the infrastructure of the prisons is severely damaged, why aren't prisoners given the possibility to renovate the buildings? This type of work is a usual practice in Norway.
d) This reform should be followed by a stricter control over the criminal subculture and the informal prisoner leaders having the final goal to eradicate this vicious tradition.

2. ***Change the prisons' infrastructure from big rooms (dormitories) into cells or small rooms of maximum 8 persons***
   a. The reconstruction implies significant costs, therefore, we consider that employing the prisoners in this work will be a win-win solution;
   b. The possibility to separate prisoners, and, namely, the motivated and disciplined ones from those having a negative influence would allow the prison to better control the criminal subculture, but also would allow having a differentiation based on the behavior, motivation for change and not on the hierarchy imposed by the informal leader. A Policy of eradicating the criminal subculture should be developed by the Ministry of Justice.
   c. For security reasons, the number of inmates in dorms should not exceed 6-8 in each room. The possibility to have your own cell, or, on the contrary, to live with others can be applied as a motivation measure/reward for good behavior and respecting the rules of the prison. The prisoners must be risk assessed regularly and individually and also given the opportunity to progress in the prison (from bad to better sectors).

Specific comments to the intervention areas 6.4.4 - 6.4.8.:

6.4.4. ***Strengthening the system of submission and review of complaints regarding the activity of probation services and penitentiary system***

Norlam welcomes the Ministry's initiative to improve the system of submission and examination of complaints. We are available to provide assistance in this field, given the fact that we have studied this problem and cooperated on this segment with the Department of Penitentiary Institutions (DIP). It should be mentioned that an efficient handling of complaints also depends on the decentralization of decision-making process (please, see point 1 above). Thus, contesting a decision taken by the prison administration should, mandatorily, be examined first by the issuing body, and only afterwards, if the solution is not satisfactory, the petition should be submitted to hierarchically superior bodies (to DIP).

6.4.5. ***Revising the employment policy and recruitment system for penitentiary institutions***

[1] According to the concept of «gradual release »

Norlam supports a general increase in staff at all levels of the prison system, especially of those who will work directly with inmates. In Moldova, in average, only 20% of the prison employees get in contact with prisoners, only half of which are involved in correctional/educative work. Compared to European standards, there is no doubt that the number of qualified personnel (who can work on changing the criminal's behavior and thinking) is insufficient, and this can be critical for the reform process.

We propose introducing a new intervention domain – **Reorganization of staff and revision of services**. The tasks and duties of different categories of staff (especially, the educative and regime services) must be revised in order to allow the engagement of more staff in activities with inmates. The focus should be not only on static security but also on the dynamic one[2]. The Norlam's Rule of Law Advisers recommend introducing the concepts of dynamic, static and organizational security in the training curriculum of the prison staff.

Coming back to the criminal subculture problem, we consider that, currently, due to an insufficient number of officers, the staff cannot influence the mass of convicts, and subsequently, do not have the capacity to implement qualitative changes.

We also support the revision of the early retirement age because this would allow having more experienced staff in the system, and will shift the main motivation factor for employment.

Comprehensive demilitarization of the prison system should be a separate intervention area in the Strategy document (6.4.9., for example) because it is a very complex process. We would like to draw attention to the fact that demilitarization does not mean only/necessarily excluding the uniforms, but rather changing the culture of the organization, the management style and the existing unfavorable traditions. The observance of laws should prevail over blind execution of orders.

6.4.6. ***Promoting and implementing ethical standards within the probation service and the penitentiary system***

Norlam sees the importance of implementing ethical manuals (guidelines) for Probation and Penitentiary. Moreover, a Norlam expert has been invited to participate in a working group created within DIP for changing the Ethical Code.

6.4.7. ***Developing and implementing rehabilitation policies, including individual planning of sentence enforcement and creating a progressive advanced regime of detention, supporting cognitive (behavioral) programs***

and

6.4.8. ***Providing educational occupational and other social activities for detainees***

Norlam supports the idea of rehabilitation, social integration policies and sentence plan for all inmates, however, giving new tasks to certain categories of staff should be done in parallel with the revision of the current tasks, please see our comments to the intervention area **6.4.5**. and, namely, our proposal - reorganization of staff and revision of services' competences. In

[2] See European Prison Rules as of 2006, rule 51.2 and rules 74-75.

order to illustrate what we mean, we can give the following example: the individual sentence planning was introduced in 2008, but we notice that implementation is not as qualitative as one would wish it to be because one single chief of sector has to fill in 40-100 such sentence plans, along with many other tasks. In Norway, any ordinary first rank officer (personal contact officer) is responsible for only 4-6 inmates for whom he/she makes the Sentence Plan.

Creating a system for differentiation of prisoners can be introduced as a separate intervention area (6.4.10., for instance), because it provides for a profound revision of the current detention regimes, as follows:

a) Improving the registration process upon arrival, developing a classification system and placing prisoners in different sectors depending on the assessment of their needs and risks;
b) Establishing some criteria for differentiation of inmates based on which the prisoners will be regularly and individually assessed and given the opportunity to progress in prison according to their merits (the sectors should have a differentiated regime);
c) Revision of the existing regimes, giving to the prison the possibility to shorten the initial regime period, especially when the pre-trial period was excessively long, because this means detaining people in stricter conditions than it's necessary.
d) Opening more low-security prisons (open type) in order to allow for a better transition to freedom.
e) Granting leaves from prison more frequently, especially, for inmates with a good behavior and in connection with preparation for release from prison.

When it comes **to implementing cognitive programs**, we think they are an important rehabilitation tool, however, we do not think they should be given a high priority before basic elements/requirements are in place, such as: work (workshops) for convicts at an acceptable level (in 2010, only 25% of the convicts were provided with paid work), vocational courses and possibility to continue secondary education in prison, more meaningful occupations, individual and regular assessment of prisoner's behavior, workshops that provide expertise of prisoner's professional capacities (diplomas) allowing him/her to perform the same activity in the community. This conclusion is based on experiences from Norway.

This document has been prepared by the following Norlam Rule of Law Advisers: Dag Brathole, judge, Jogeir Nogva, public prosecutor, Hans-Gunnar Stey, probation expert, Espen Rinnan, defense attorney and Kim Ekhaugen, expert in penitentiary systems.

Best regards,

Dag Brathole,

Head of Mission