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Abstracting

THE IMPACT OF THE EUROPEAN COURT OF HUMAN RIGHTS ON JUSTICE SECTOR REFORM IN THE REPUBLIC OF MOLDOVA

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Abstract

For this study, I reviewed the judgments of the European Court of Human Rights against the Republic of Moldova and the corresponding reports of the Committee of Ministers from 1997 through 2014. In addition, I interviewed more than 25 lawyers, judges, and human rights advocates. After analyzing the effectiveness of the Court in terms of compliance with the judgments in specific cases (individual measures), I will assess the broader impact of these decisions (general measures) on legal reforms and public policy in the Republic of Moldova. I will evaluate the effectiveness of the decisions of the ECtHR in the context of the implementation of Moldova's Justice Sector Reform Strategy (2011-2015), the Council of Europe's Action Plan to Support Democratic Reforms in the Republic of Moldova (2013-2016), and Moldova's National Human Rights Action Plan (2011-2014). My findings will offer insights into the constraints faced by the ECtHR in implementing its decisions and the impact of the ECtHR on national legal systems.

Keywords: European Court of Human Rights; Moldova; human rights; judicial reform

INTRODUCTION

The Republic of Moldova recently observed the 20th anniversary of Moldova's accession to the European Convention of Human Rights. From the first judgment against Moldova in *Metropolitan Church of Bessarabia and Others*, 45701/99, 27 March 2002 through 2016 the European Court of Human Rights issued 339 judgments involving Moldova (Council of Europe, Statistics). Here I will assess the impact of decisions of the European Court of Human Rights on legal and judicial reform in the Republic of Moldova.

For this study, I reviewed the judgments of the European Court of Human Rights against the Republic of Moldova and the corresponding reports of the Committee of Ministers (responsible for supervising the execution of the judgments) from 1997 (after Moldova ratified the European Convention on Human Rights) through 2014. In addition, I interviewed more than 25 lawyers, judges, and human rights advocates, including the President of the Supreme Court of Justice (and former judge on the ECtHR), the Vice Minister of Justice, and the Government Agent. After analyzing the effectiveness of the Court in terms of compliance with the judgments in specific cases (individual measures), I will assess the broader impact of these decisions (general measures) on legal reforms and public policy in the Republic of Moldova. I will evaluate the effectiveness of the decisions of the ECtHR in the context of the implementation of Moldova's Justice Sector Reform Strategy (2011-2015), the Council of Europe's Action Plan to Support Democratic Reforms in the Republic of Moldova (2013-2016), and Moldova's National Human Rights Action Plan (2011-2014). My findings will offer insights into the constraints faced by the ECtHR in implementing its decisions and the impact of the ECtHR on national legal systems.

EUROPEAN COURT OF HUMAN RIGHTS AND THE REPUBLIC OF MOLDOVA

The European Court of Human Rights (ECtHR) "performs its most important governance functions through the building of precedent-based caselaw." (Keller and Sweet, 14). And the precedent-based caselaw of the ECtHR is constitutionally required to be applied in Moldova's courts.[1] The ECtHR is, therefore, in the position to have a positive impact on improving the human rights situation in Moldova. During the last four years petitioners have filed about 1,000 applications to the ECtHR per year, and

[1] Article 4 of the Moldovan Constitution provides "(1) Constitutional provisions concerning human rights and liberties shall be interpreted and applied according to ...the international treaties Republic of Moldova is party to. (2) In case of inconsistencies between human rights covenants and treaties to which the Republic of Moldova is party, and its internal law, priority shall be given to international regulations." In 1999 the Constitutional Court of the Republic of Moldova adopted a judgment (Number 55) in which it explained how Article 4 of the Constitution would be applied.

Moldova has consistently ranked in the top six countries in terms of per capita filings.[2] Of the 4,500 applications, the ECtHR found that about 1,000 were admissible (Interview with Judge Poalelungi). The average percentage of applications found admissible is 5%, whereas for Moldova that figure is 30% (Interview with Judge Poalelungi). Thus, Moldova's rate of admissible cases is six times higher than that of other developing countries (Interview with Judge Poalelungi). In 2012, Moldova ranked 8th in the raw number of pending cases before the ECtHR allocated to a judicial formation. (ECtHR, Annual Report 2012) Currently there are about 4,000 pending applications by Moldovan citizens before the ECtHR (ECtHR Moldova Country Report).

By the end of 2016, there were 339 judgments against Moldova, finding more than 50 types of violations: 124 (37%) involved the Right to Fair trial, 106 (31%) involved Protection of Private Property, and 80 (24%) involved Inhuman or Degrading Treatment (ECtHR, Overview: 1959-2016). More than half of the judgments against Moldova are in the area of criminal procedure and criminal law, torture and ill treatment (Interview with Judge Raisa Botezatu). The below graphic prepared by the ECtHR represents the allocation of the types of ECtHR judgments against Moldova (ECtHR, Statistics):

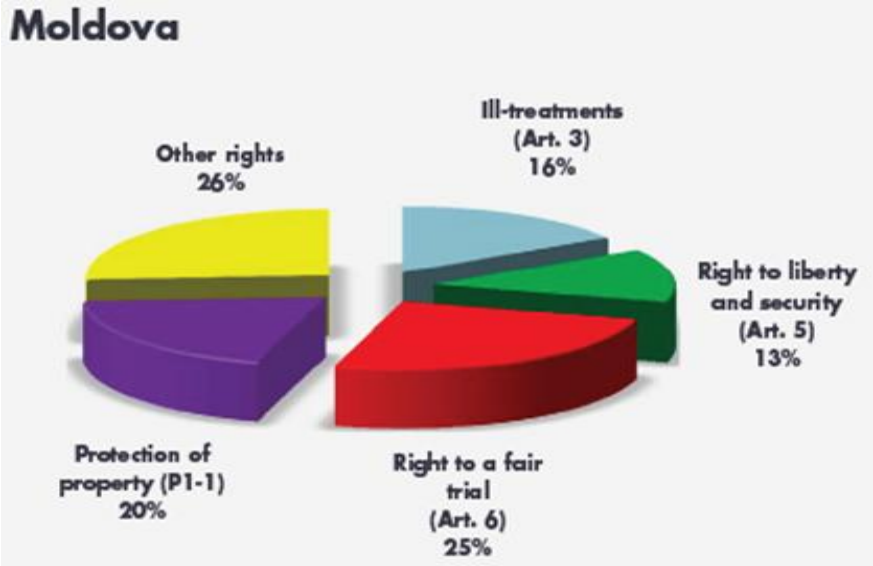


Figure 1. Types of ECtHR Judgments against Moldova

More than two million euros in just satisfaction was awarded in these cases in the last six years (ECtHR, Department for the Execution of Judgments, Moldova Country Fact Sheet, 2017).

[2] In 2009, Moldova ranked 3rd (behind Georgia and Liechtenstein), in 2010 Moldova ranked 6th, in 2011 Moldova ranked 3rd, and in 2012 Moldova ranked 6th. European Court of Human Rights Annual Report.

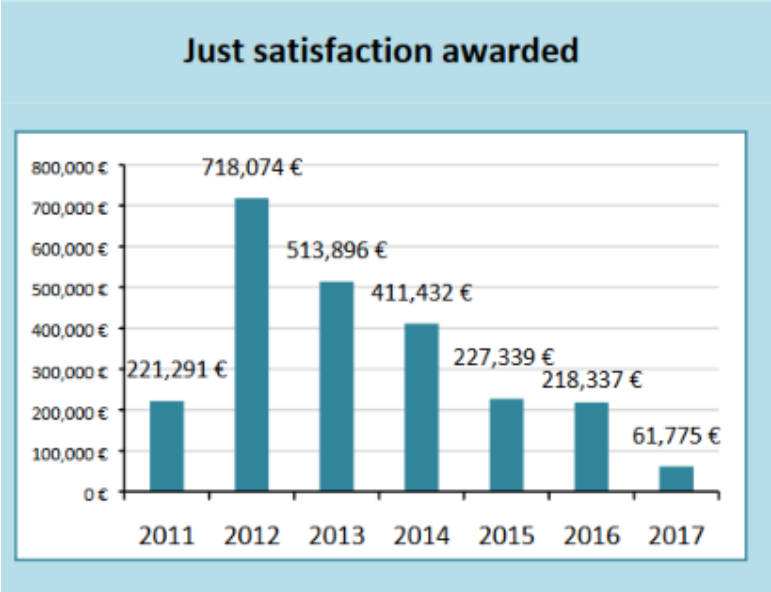


Figure 2. Moldova: Just Satisfaction Awarded 2011-2016

Whether and how these decisions are implemented and the extent to which these ECtHR precedents can affect legal and judicial reform in the Republic of Moldova is the subject of my long-term study. Judge Poalelungi (former judge on the ECtHR, current Chief Justice of the Supreme Court of Moldova) believes that Moldova is a positive example for other states, pointing out that Moldova has a stronger record of implementation than states like Russia and Turkey. However, recent headlines have claimed that "Moldova ranks in list of countries that mostly delay ECHR judgment execution." (Interview with Judge Poalelungi).

Moreover, the Republic of Moldova is consistently one of the main states with cases under enhanced supervision by the Court. Cases require "enhanced supervision" due to the nature of the problem (these cases also include those concerning urgent individual measures)." (Department for the Execution of Judgments of the ECtHR, Statistics).

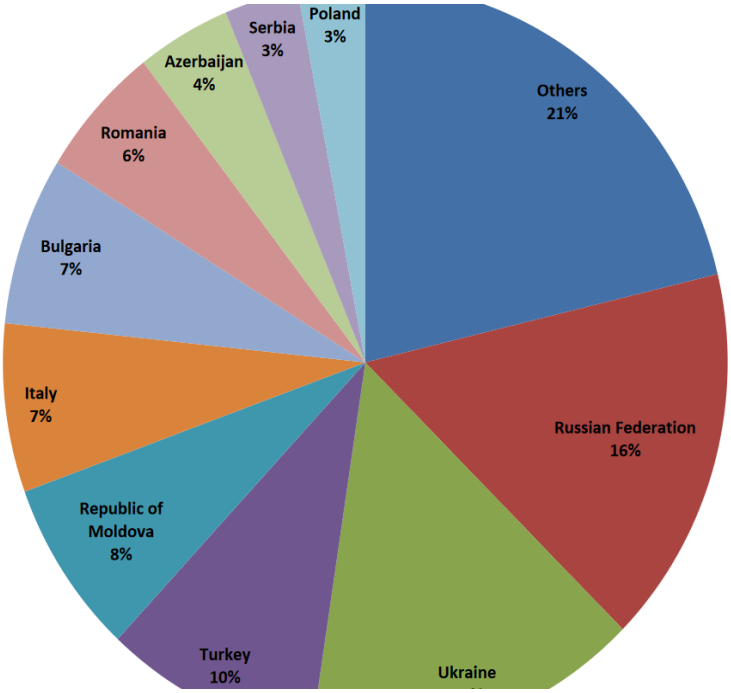


Figure 3. Main States with Cases under Enhanced Supervision 2015

The main issues before the Committee of Ministers requiring ongoing supervision include the following: actions of security forces (use of force and effectiveness of investigations), conditions and lawfulness of detention medical care), lawfulness of detention and related issues, breaches to the right to liberty and security in the context of unlawful detention, enforcement of final domestic judgments, domestic violence, and the right to peaceful assembly (ECtHR, Department of Execution and Judgment, Moldova Country Fact Sheet). The Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights issued a report in 2012 "Implementation of Judgments of the European Court of Human Rights: Republic of Moldova, Poland and Romania" in which it drew attention to the "difficult situation of non-implementation of judgments" of the ECtHR in a number of states [including Moldova] in which (major) structural problems have led to repeat violations." The following year, the Commissioner for Human Rights of the Council of Europe visited Moldova, and in his report he explained that "the non-enforcement or delayed enforcement of final judicial judgments issued by national courts has been identified by the European Court of Human Rights in a pilot program as being the most significant problem in the Republic of Moldova in terms of the number of applications pending before the Court. The Commissioner urges the Moldovan authorities to take resolute steps to address this structural problem at the

domestic level through a speedy and effective remedy which secures adequate and sufficient redress." (Muiznieks, 2013).

Reflecting on the high number of cases filed before the ECtHR from Moldova, Judge Poalelungi, President of the Supreme Court of Justice of the Republic of Moldova, explained that it "tells us about the malfunction of the judicial system in general, and the lack of trust of Moldovan citizens to the judicial system." The large number of filings also reflects the work of an active cohort of well-trained lawyers who are bringing these cases to the ECtHR. One Rule of Law expert noted that among Moldovan lawyers there is an awareness of the court in Strasbourg and a "waking up to the opportunity to bring cases before the ECtHR." (Interview with Judge Dag Brathole). I interviewed many of these lawyers, who work for NGOs such as the Human Rights Embassy, the Legal Resource Center, Lawyers for Human Rights, and Promo-LEX.

For example, the Legal Resource Center is an NGO specialized in litigating cases before the ECtHR. The LRC conducts trainings for judges and for prosecutors. They also translate judgments of the ECtHR into Romanian, the state language. There were more than 4,000 text pages to translate into Romanian between 2006 and 2010 (Interview with Vlad Gribincea). Similarly Lawyers for Human Rights, founded in 2001, organizes trainings for judges and lawyers, translates judgments against the Republic of Moldova into Romanian, and strategically brings cases and represents litigants before the ECtHR (Interview with Vitale Zama). The Human Rights Embassy, an offshoot of Amnesty International, has trained more than 180 lawyers to be human rights defenders and how to bring good applications before the ECtHR (Interview with Lela Metreveli). Currently, they are implementing a program of electronic education for lawyers in human rights from five CIS countries. It is a one-year distance learning course for 125 defense lawyers from five countries, 25 of whom are from Moldova. The Human Rights Embassy is now focusing on domestic courts and training defense lawyers how to use international standards and the ECHR before domestic courts and encouraging Moldovan judges to apply ECtHR precedents (Interview with Lela Metreveli).

The ECtHR developed a Case Law Translation Program, a 4-year program initiated to translate leading cases selected by the Court's Bureau into 12 target languages, including Romanian) with the support of the Human Rights Trust Fund (HRTF).[3] According to the 2016 Council of Ministers report, this program produced more than 3,500 translations before it ended in 2016 (Council of Ministers, 2016 Annual Report). A stakeholder survey found that more than 90% of the respondents were satisfied with the translations and that more than 90% had the opportunity to use the translations in legal practice, education and training, or in decision-making (Committee

[3] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Montenegro, Republic of Moldova, Serbia, the Former Yugoslav Republic of Macedonia, Turkey and Ukraine. See Council of Europe Committee of Minsters. 2016 Annual Report. http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf

of Ministers Annual Report 2016). Now that this program has concluded, domestic agencies will need to continue the work of translating or summarizing significant caselaw handed down by the ECtHR.

Those interviewed for this study were in agreement that there are no longer delays in Moldova's making payments of just satisfaction pursuant to the ECtHR's Individual Measures. However, there was less confidence in whether changes in laws and policies are being enacted and implemented pursuant to the ECtHR's General Measures are able to bring about deep reform.

As a leading human rights lawyer in Moldova explained, it is "not a question of change of legislation but of the mentality of judges. The *laws* are more or less in line with standards of the ECHR; the problem is with the *application* of the laws." (Interview with Vlad Gribincea). Judge Raisa Botezatu, who has served as a judge in Moldova for more than 30 years (including service as President of the Supreme Court of Justice and working closely with the Council of Europe to prepare a report about the compatibility of Moldova's laws with the European Convention on Human Rights prior to its ratification in Moldova) lamented that "Unfortunately we did not and still do not have a willingness to do strong and deep reform." (Interview with Judge Botezatu).

Justice Sector Reform

Insofar as a bulk of the filings before the ECtHR deals with criminal due process and the administration of justice, justice sector reform is needed to improve the human rights situation in the Republic of Moldova. A number of groups have been working with the government of Moldova over the last 20 years to improve the justice sector and to establish a stable rule of law environment: the American Bar Association Rule of Law Initiative (ABA ROLI), the Norwegian Mission of Rule of Law Advisors to Moldova (NORLAM), the U.S. Agency for International Development (USAID), and the OSCE have been most active partners in these endeavors.

Examples of their projects include the USAID donation of computers and software to provide for randomized case management (while the system does not address corruption directly, it is expected to improve transparency), ABA ROLI's conference on strengthening precedent in Moldova and their work preparing and printing casebook that includes the most important cases Moldovan criminal law and criminal procedure (a reference manual for lower court judges and prosecutors) and NORLAM's trainings for judges about the importance of the ECtHR caselaw and how to apply in their decisions (Interviews with Ina Pislaru, USAID; Judge Richard Grawey, ABA ROLI; Judge Torolv Groseth, NORLAM).

Moldova's legal system is based on the civil law tradition, so judge's decisions are not to be precedent-based. Yet Moldovan judges are expected to apply the precedents of the ECtHR, which creates this predicament: Moldovan judges are bound by precedents of the judges of the ECtHR in Strasbourg, but not decisions made by Moldova's Supreme Court of Justice in Chisinau. The principle of justice inherent in the Common Law tradition of *stare decisis* is that similarly situated litigants will be treated similarly. Many reformers in Moldova have concerns about the lack of uniform judicial practice and worry about the many occasions when the same judges apply different solutions in similar cases (Interview with Vitale Zama). One human rights lawyer explained that "There needs to be legal certainty -- parties should know what will happen in a case." (Interview with Vitale Zama). This can be ensured when judges are using legal reasoning and applying precedents. The President of the Supreme Court of Justice is working to encourage changes at the national level to improve the overall judicial process, one of which is to try to combine civil law with common law tradition, specifically to give the Supreme Court of Justice the ability to issue Advisory Opinions to offer clarifications for lower courts (Interview with Judge Poalelungi). This would provide for the uniform application of the law and would be a way to introduce the concept of precedent into the Moldovan legal system (Interview with Judge Poalelungi).

There is a massive judicial reform effort underway in Moldova – the Justice Sector Reform Strategy – developed and implemented by the Ministry of Justice. In 2011 Moldova's Parliament adopted legislation that embarked on a major Judicial Reform Strategy that was accompanied by a detailed action plan (a timeline with measurable goals that would be implemented within five years, by 2015). "Determining factors" for embarking on this strategy, as outlined in the Strategy, included the following: a significantly low level of public confidence in the judicial system's effectiveness and fairness, aspirations to join the EU, the perception of the high degree of corruption in the justice sector, and the creation of a favorable environment for economic growth and attraction of investments (Justice Sector Reform Strategy). The overall objective of the Strategy "is to build an accessible, efficient, independent, transparent, professional justice sector, with high public accountability, consistent with European standards and ensuring the rule of law and protection of human rights." (Justice Sector Reform Strategy). Specific objectives of the Strategy include the following:

- Strengthen the independence, accountability, impartiality, efficiency and transparency of the judiciary;
- Streamline the process of pre-trial investigation and prosecution, as needed to safeguard human rights, ensure individual security and reduce the level of crime;
- Improve the institutional framework and processes that ensure effective access to justice:

- effective legal aid, examination of cases and enforcement of court decisions within a reasonable time, upgrading the status of some legal profession s related to the justice system;
- Promote and implement the principle of zero-tolerance to corruption in the justice sector;
- Implement measures that will allow the justice sector to contribute to the creation of a favorable environment for sustainable economic development;
- Ensure effective observance of human rights within judicial practices and policies;
- Coordinate and define powers and responsibilities of key actors within the justice sector and ensure cross-sectoral dialogue.

The Justice Sector Reform Strategy and Implementation Plan has seven pillars, according to the Ministry of Justice website:

Pillar I. The Judicial System,
Pillar II. Criminal justice,
Pillar III. Access to justice and enforcement of court decisions,
Pillar IV. The integrity of actors operating in the justice sector,
Pillar V. The role of the justice system in economic development,
Pillar VI. Human rights in the justice sector,
Pillar VII. Well-coordinated, managed and accountable justice sector.

The Ministry of Justice formed Working Groups for each pillar to develop and to monitor the progress of reform. The action plan is driven by EU assistance. There are different stakeholders monitoring progress with each of the pillars. NORLAM, for example, is monitoring Pillar 2 (Interview with Judge Groseth).

The reform plan is quite ambitious. Many interviewees expressed skepticism that all goals associated with all seven pillars could be implemented within five years, but there was optimism that this Justice Sector Reform and Action Plan could lead to significant improvements in judicial administration in Moldova.

In 2013 the Commissioner for Human Rights of the Council of Europe issued a call to action in the form of a release titled "Judicial Reform needs to be accelerated in the Republic of Moldova." (Commissioner for Human Rights, 2013). While noting that "[t]he Justice Sector Reform Strategy for 2011-2016 is a major undertaking" in the right direction, Commissioner Muiznieks also emphasized that "the reform process needs to be supported by adequate funding and concrete political measures." (Commissioner for Human Rights, 2013). The Commissioner also noted that "[t]he budget of Moldovan courts is twenty times less than the median of Council of Europe member states and judges are not properly shielded from undue political pressure." (Commissioner for Human Rights, 2013).

Moreover, the Council of Europe Committee on Legal Affairs and Human Rights noted that "[d]espite some positive measures, corruption remains wide-spread and the perception of corruption remains high, with the judiciary perceived as the branch most affected by this phenomenon." (Committee on Legal Affairs and Human Rights, 2017).

The European Commission High Representative of the Union for Foreign Affairs and Security Policy took note of some reforms adopted pursuant to the 2011-2016 strategy (Implementation Report 2017). For example, "a reform of the judicial map was adopted in 2016, which reduces the number of courts. This should lead to better case management, efficiency and savings thanks to specialization of judges. A new version of the Integrated Case Management System is currently being developed to eliminate manipulation of cases." Moreover, the European Commission noted in its Implementation Report that "a new law on the Prosecution Service entered into force in August 2016, in line with Venice Commission recommendations. It is meant to strengthen the independence of the prosecution service. The reform aims to limit the powers of the prosecution service, reduce the number of prosecutors and increase their salaries."

However, Freedom House cautioned that judicial reform "proceeded slowly in 2016" and cited the concern about the appointment procedure for judges "in terms of candidates' integrity." (Gotisan, 2017). "At the same time, intimidation of judges who do not conform to political orders also posed a problem. The most prominent example was Judge Dominica Manole who faced criminal proceedings after ruling in April that the Central Election Commission's refusal to organize a constitutional referendum as petitioned by 'Dignity and Truth' had been illegal." (Gotisan, 2017). And, while "several law packages and initiatives were adopted, including a law on the prosecution and reforms of the National Anticorruption Center (NAC) and National Integrity Commission (NIC), for most of the reforms their implementation and enforcement are being stalled to preserve political influence over the institutions concerned." (Gotisan, 2017). "While several lower-level laws have been adopted (concerning probation, lawyers, notaries, and so on), high-level reforms have been drawn out or intentionally halted." (Gotisan, 2017).

The stakes are high for the Government of the Republic of Moldova: if the schedule in the Action Plan is not followed and the deadlines not met, then the monetary aid will cease. As one stakeholder said, they are trying to bring about reform by using "carrots, not sticks." (Interview with Judge Groseth). Unfortunately, in 2017 the European Commission said it was "suspending €28m of aid earmarked for judicial reform in Moldova, because the country was not reforming its justice system." ("Poor Moldova," *The Economist*, 2017). "Reform of Moldova's judicial sector has stagnated. Positive steps, like the parliament's first reading of a new law on the prosecutor's office,

or the 2012 establishment of a National Commission of Integrity to deal with conflicts of interest and declaration of assets, have been offset by political interests' blocking legislation and preventing the consolidation of strong institutions and practices. There is a clear unwillingness among the competing political elites to implement necessary reforms." (Freedom House 2016). When reflecting on 25 years of Moldovan independence, one commentator lamented: "The iconic failure of Moldova's transformation is the complete politicization of the judiciary." (Calus).

CONCLUSIONS: THE ECtHR AND JUSTICE SECTOR REFORM IN THE REPUBLIC OF MOLDOVA

Moldova recently observed the 20th anniversary of its accession to the European Convention of Human Rights. While Moldovan courts are constitutionally required to apply the precedents of the ECtHR, when evaluating the effectiveness and the capacity of the ECtHR to serve as an impetus for judicial reform in Moldova over the course of the past two decades, a grim picture emerges.

Given the struggle to combat corruption, the continuing political crises, the turmoil caused by the recent banking scandal, "the country's deep political crisis triggered instability that pushed reforms into the background." (Calus).

The ambitious plans to reform the judiciary appear to have stagnated. Perhaps a "second generation" of reforms can be implemented. One analyst concluded that "Holistic strategy in the first generation justice sector reform did not accomplish their ambitious goals; prioritization of more modest objectives is critical for the success of the second generation [of justice sector reforms]." (Boskovic, 2015).

The Council of Europe, in summarizing the challenges to reform acknowledged Moldova's progress in "bringing its legislation and institutions in line with European standards since it joined the Council of Europe in 1995." (CoE, "Action Plan for the Republic of Moldova 2017-2020). However, the CoE noted that the continued political crisis has been slowing down the implementation of reforms, concluding that "[t]he challenges to complete reforms lie mainly with lack of public trust in the judicial system, lack of transparency and accountability of the political process, wide-spread corruption, inefficient public administration at central and local levels and insufficient institutional capacity in certain areas." (CoE, Action Plan). Nevertheless, the CoE declared that the Council of Europe and Moldovan authorities are determined to work together to "ensure effective implementation of existing legislative frameworks and to enhance capacities of national institutions to bring the country's legislation and practice closer to European standards in order to promote human rights, strengthen rule of law and ensure democratic principles of governance." (CoE, Action Plan). 

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