

# JUSTICE FIRST

Mobilizing Civil Society to Support Judicial Integrity in the Republic of Moldova

[ #1 ] JANUARY 2021

## THE RULE OF LAW IN MOLDOVA'S AGE OF COVID-19

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The Moldovan government has used threat of the COVID-19 pandemic to justify a wide variety of extraordinary measures which under normal circumstances would be considered illegal. Some of these measures – including restrictions on freedom of movement and public assembly, and suspension of public services and commercial activities – are legitimate and legally-grounded responses to the pandemic that have become common practice around the world. However, other uses of emergency measures have threatened core components of the rule of law; these include the unnecessary weakening of the separation of powers, increasing the risk of corruption, limiting access to justice and imposition of arbitrary punishment for citizens, and restricting the public's access to vital information. While in some cases these excesses were successfully blocked by the courts or civil society activism, they nevertheless reveal the fragility of the rule of law in Moldova. As the fight against the coronavirus continues into 2021, it is vital that the government act quickly to avoid repeating these mistakes.

This brief examines threats to the rule of law in Moldova that have resulted from the misuse of emergency powers by the government during the pandemic. The brief argues that the key vulnerability that gave rise to these threats is Moldova's outdated state infrastructure that fails to effectively share information and limits the transparency of government organs, complicating public accountability and citizen oversight. It presents actionable recommendations for the Moldovan government to address this vulnerability by improving communication with the public and increasing government transparency, accountability, and citizen participation.

### BACKGROUND: DEFINING RULE OF LAW

Although rule of law is a cornerstone of essentially all national and international legal systems, there is no single agreed-upon definition.<sup>1</sup> A useful working definition is provided by the World Justice Project Rule of Law Index, the world's leading source for independent

data on the rule of law.<sup>2</sup> It defines the rule of law as a system which encompasses four universal principles: just laws, accountability, accessible justice, and open government.<sup>3</sup> Each of these principles fell under attack in Moldova during the pandemic, as the ambiguity of emergency powers threatened accountability and legal certainty, expedited procurement protocols reduced



transparency and increased the risk of corruption, unjust and poorly-structured new laws handicapped citizens' access to justice, and restrictions on access to information and abdication of the duty to inform resulted in a non-accessible and closed government.

## AMBIGUOUS POWERS AND LIMITED ACCOUNTABILITY

The coronavirus pandemic and the extraordinary measures taken to combat it have challenged the normal means by which government powers are limited and divided under the law. On March 17, Parliament declared a constitutional state of emergency<sup>4</sup> and passed a bill providing extensive new powers – including a blank check of “other necessary powers” – to the Commission for Emergency Situations and other executive agencies to fight the pandemic.<sup>5</sup> While these decisions allowed the government to intervene promptly and effectively in fighting the virus, they also raised serious concerns regarding the separation of powers and the principle of legal certainty. Opposition deputies appealed against the bill at the Constitutional Court, claiming that the “other necessary powers” clause was ambiguous and allowed the empowered government bodies to exercise both legislative and executive powers, violating the principle of separation of powers. They also argued that since these powers allowed the bodies to impose restrictions to fundamental rights arbitrarily and without notice, they violated the constitutional duty of the state to ensure legal certainty – that is, the principle that the public must be clearly informed of their legal rights and duties.

The Constitutional Court's decision issued in June 2020 ultimately upheld the principle of the separation of powers – limiting the government's ability to exercise legislative and judiciary powers. However, the Court failed to reinforce the principle of legal certainty and citizens' rights to clear and unambiguous laws.<sup>6</sup> Instead of recommending the government clarify its legal framework under the emergency regime, the Court found that the Constitution does not require laws to be absolutely clear in this case, given that the government requires legal flexibility to effectively fight the pandemic. This decision is questionable at best: the constitutional right to legal certainty is an absolute right,<sup>7</sup> meaning it cannot be restricted under any circumstances, including during a pandemic. Moreover, other countries in the region which have implemented states of emergency have explicitly delineated its powers and restrictions.<sup>8</sup> By failing to clearly and accurately communicate the scope and legal justification for its emergency powers to citizens, the Moldovan government is undermining the fundamental rule of law.

## RISK OF CORRUPTION

The constitutional state of emergency also empowered the government to spend significant funds for medication and medical equipment on very short notice, increasing the already high<sup>9</sup> risk of corruption.<sup>10</sup> Transparency in public procurement had been severely compromised even before the pandemic, as a 2019 law temporarily exempted procurement of medical supplies from use of the Mtender electronic procurement system through January 1, 2021<sup>11</sup> for technical reasons.<sup>12</sup> The coronavirus emergency served as a catalyst for the further deterioration of transparency related to public procurement of medical equipment, as the Commission for Emergency Situations introduced a series of new exceptions from public procurement and financial transparency laws.<sup>13</sup> Under the new rules, public procurement of coronavirus-related medication and medical devices was to be conducted by the Center for Centralized Public Procurement in Healthcare through direct negotiations, without the need to invite competing tenders. In addition, the process of settling complaints related to these procurements could be carried out only in writing, without open hearings or verbal arbitration before the National Agency for Settlement of Complaints. These provisions made it possible to accelerate urgent purchases, but also made it much easier for corrupt or otherwise disadvantageous transactions to occur. Many purchases made under the new rules were questionable and raised media attention;<sup>14</sup> in one high-profile example, the Center for Centralized Public Procurement paid nearly double market price for a shipment of COVID-19 tests, which the National Agency for Public Health's director justified by the high urgency and low volume of the shipment relative to other countries' orders.<sup>15</sup>

In another notable instance in April, the Center for Centralized Public Procurement in Healthcare decided to start accepting offers for tenders by e-mail rather than sealed envelopes on the grounds of reducing the risk of infection from physical contact.<sup>16</sup> This provision eliminated the transparency safeguards which had existed in the old system, for which suppliers had the opportunity to be present when the envelopes were opened. This new system made it possible for officials to manipulate the tender process, whether by deleting certain email tenders or by sharing information about competing offers with favored bidders to give them an unfair advantage. After intense criticism from civil society, the Center decided to reverse this decision after only three days.<sup>17</sup>

The authorities' appetite for extralegal measures in public procurement remained even after the constitutional state of emergency expired in May 2020. Days after it ended, Parliament passed a Law further expanding exceptions to procurement processes during a public health state of emergency.<sup>18</sup> Compared

to a constitutional state of emergency, which can be declared only by Parliament, a public health state of emergency provides authorities with a more limited scope of emergency powers, but can be declared and extended unilaterally by the Public Health Commission. The public health state of emergency went into force on May 16 – one day after the constitutional state of emergency expired<sup>19</sup> – and has been repeatedly extended since; as of December 2020, it is scheduled to continue through mid-January 2021. Among other things, the Law reduced the time period for tenders, increased the cost threshold for purchases requiring a public tender, and allowed public offices to ignore the duty of invitation to tender in extremely urgent cases. The Law also allows the government to select the format of tender requests, allowing officials to bypass Mtender or similar systems and accept offers electronically.

## UNJUST LAWS AND ARBITRARY FINES

Harsh measures implemented haphazardly by Moldovan authorities during the emergency also challenged the fairness and clarity of the law. At the beginning of the constitutional state of emergency,<sup>20</sup> Parliament passed a law punishing “failure to comply with measures of prophylaxis, prevention and/or fight of epidemic diseases”<sup>21</sup> with steep fines of 22,500 – 25,000 lei (about 1,300 – 1,450 USD) for individuals and 50,000 – 75,000 lei (about 3,000 – 4,300 USD) for organizations. Similar laws have been passed in many countries, including in Moldova's neighbours Romania and Ukraine;<sup>22</sup> however, in Moldova the extreme scale of the fines and insufficient government communication regarding their implementation drew accusations from the political opposition,<sup>23</sup> business sector,<sup>24</sup> and civil society<sup>25</sup> that they were used more as a tool to increase budget revenues than reduce the risk of infection.<sup>26</sup> Given that the average monthly salary of a Moldovan citizen is approximately 8,000 lei (about 460 USD), the minimum individual fine is roughly the equivalent of three months' salary. More vulnerable parts of the population – including pensioners, people with disabilities, and the unemployed – fared even worse. In one widely-publicized case, an elderly woman received a fine amounting to the equivalent of two years of her pension for the crime of breaking quarantine to go to the store for bread.<sup>27</sup>

On top of the high fines, the burden of the law was made steeper by the decision of the Commission for Emergency Situations to reduce the window to register appeals from the usual 15 days to only 48 hours.<sup>28</sup> During the emergency regime, many appeals were filed and rejected between the 48-hour and 15-day marks – a clear indication that citizens were not properly informed about the new rule.<sup>29</sup> The arbitrary reduction of the window for appeal, combined with inadequate public communication, effectively barred citizens

from exercising the right to appeal and, by extension, threatened their access to justice. Moreover, neither the law nor the Commission's decision precisely defined the legal details regulating the fines, such as whether the burden of proof should fall on the authorities or the appellant upon appeal. This created confusion among judges implementing the law, resulting in erratic proceedings and inconsistent judgments.<sup>30</sup>

Eventually, the Constitutional Court struck down the 22,500 lei (about 1,300 USD) minimum fine<sup>31</sup> on the grounds that the extremely small range of fine amounts under the law made it impossible for judges to impose a proportional punishment for each case.<sup>32</sup> The fines were reduced to the still considerable but much more reasonable 2,000 – 5,000 lei (about 115 – 300 USD), and citizens who received the initial high fines were granted the opportunity to appeal.<sup>33</sup> The Court also resolved the lack of clarity regarding the burden of proof question, declaring unambiguously that it rests solely on the authorities. Nevertheless, this measure and its consequences revealed how easily poorly-worded legislation and ineffective public communication can threaten Moldova's rule of law.

## LIMITED RIGHT TO INFORMATION

In a recent report, experts Slava Balan and Vladyslav Stegnyy argued that several government actions justified under the constitutional state of emergency limited media freedoms by restricting access to information of public interest.<sup>34</sup> A series of highly controversial government decisions impacting citizens' access to information were made in the first days of the constitutional state of emergency. On March 18, the Commission on Emergency Situations extended the deadline for government agencies to respond to freedom of information requests from 15 to 45 days,<sup>35</sup> complicating longstanding problems regarding the government's duty to provide information to the public and independent media.<sup>36</sup> A few days later, the Information and Security Service (ISS) unilaterally blocked access to more than 50 websites for supposedly “promoting fake news about coronavirus evolution and protection and prevention measures.”<sup>37</sup> Finally, on March 24, the Audiovisual Council issued a decision requiring media organizations to only present the government's official position in their coverage of the pandemic and prohibiting journalists from expressing their personal opinions on related topics.<sup>38</sup> All three of these decisions faced severe criticism by the media community, civil society, and the Ombudsman; however, only the decision of the Audiovisual Council was successfully revoked.<sup>39</sup>

According to international and Moldovan law, the right to information is not absolute, and can be limited if the restrictions are demonstrated to be adequately

provided for by law, necessary, and proportionate to the situation. Consequently, several countries have implemented similar restrictions to those seen in Moldova, including extended wait times for processing information requests.<sup>40</sup> Nevertheless, none of the aforementioned decisions in Moldova meet the necessary criteria of legitimate limitations of the right to information, as neither the Commission<sup>41</sup> nor the ISS<sup>42</sup> provided clear and detailed legal justifications for their decisions. Furthermore, the limitations are contrary to the stated purpose of the emergency powers, as Parliament's justification for providing government organs like the Commission with emergency authority over the media was to maximize the public's access to objective, timely information about the emergency.<sup>43</sup> Restrictions and delays on public access to information explicitly contradict this rationale, especially given the quick perishability of information during a rapidly-developing pandemic.<sup>44</sup>

In addition to issuing these excessive and illegitimate restrictions on information, the authorities fell short of their own obligation to effectively inform the public of their actions. For example, at the beginning of the constitutional state of emergency, the Commission issued new regulations on an almost daily basis, but never presented an explanation of its overall strategy to manage the crisis or what it intended to achieve through its measures. Further, while the government created a section on its website dedicated to posting new regulatory updates on the coronavirus response, it made no effort to translate the complex language of these legal acts into simple and understandable guidance for citizens. To date, the Commission for Emergency Situations and the Public Health Commission have collectively issued more than sixty regulations related to the pandemic;<sup>45</sup> however, without a proper explanation of their content, a non-specialist audience – including government officials<sup>46</sup> – may struggle to understand and follow them, creating substantial legal uncertainty and inconsistent implementation.

## CONCLUSIONS AND RECOMMENDATIONS

The COVID-19 pandemic has clearly put the rule of law in Moldova to the test. The health crisis and the government's response, particularly during the constitutional state of emergency spanning from March through May 2020, has highlighted and aggravated longstanding problems in the Moldovan legal system, including poor communication, ambiguous separation of powers, legal uncertainty, failures of due process, corruption, unjust laws, and low access to information. As this brief has demonstrated, the government's limited transparency and poor communication with the public are major contributors to these problems that should be addressed. Although the constitutional

state of emergency which created the opportunity for the most egregious violations is no longer in force, with the coronavirus crisis and accompanying public health state of emergency continuing into 2021, the use – and possible abuse – of emergency powers will continue into the foreseeable future. Moving forward, Moldova's government must act now to ensure the rule of law is more faithfully upheld than it has been since the outbreak of the health crisis. To address these problems, this brief recommends that the state take strong steps to better integrate information and communication technology into governance processes, increasing the amount of information delivered to the public and the accessibility of that information. This increased transparency will clarify citizens' rights and obligations vis-à-vis new laws and make it easier for civil society organizations and independent media to uncover corruption and manipulation of the legal system. To begin this transition, the Moldovan government should:

### **Improve public-facing communication on legal changes**

Proper communication on new rules and regulations is essential to avoid confusion, especially when they concern restrictions on human rights. For example, better communication about changes to the appeal deadline for fines on pandemic-related violations could have avoided undermining citizens' right to appeal.

### **Increase the precision of legislation**

More precise laws are essential to avoid legal uncertainty. This is particularly important if these laws restrict human rights, given the absolute and fundamental right of citizens to be informed of their rights and obligations. The fact that judges and public officials have struggled to interpret several new laws passed under the states of emergency is a clear sign they are not adequately detailed and precise. More elaborate and accurate due process laws, or additional official information published about them, could prevent accidental violation of the law or erratic and inconsistent decisions by courts.

### **Keep it simple**

Political measures and legal documents should always come with simple explanations to make them easily understandable for non-specialist audiences; this is particularly true during a health crisis when public cooperation is necessary. When introducing new measures, the government should present its overall strategic plan and future expectations, as well as ensure easy access to more detailed information and easily accessible guidance on topics most relevant to citizens.

### **Improve online information delivery**

Government websites provide an easy, intuitive, and administratively low-effort way of providing information to the public. Posting more information on government-affiliated websites and apps, streamlining

the information request process with the use of digital tools, and providing informational services and trainings to government employees to utilize and maximize the benefit of online services would make it easier to deliver large amounts of official information to the public and the media, thereby improving communication, limiting the opportunity for corruption, and combatting fake news. The Citizen's Government Portal<sup>47</sup> is one such successful initiative that should be expanded.

### Notify citizens directly

Citizens should not need to actively monitor government sources to understand their rights and responsibilities under the law. The government could reduce this undue burden on citizens by sending automatically-generated notifications by e-mail, SMS, mobile applications, instant messaging, and/or other communication channels to actively inform the public of important changes in law, regulations, and public services.

### Improve two-way communication

The government should establish ways for citizens and journalists to easily contact authorities to request information, clarifications and explanations, and also to provide input in the form of feedback, information, or ideas. These connections will help citizens avoid confusion about new measures and will provide the government with opportunities to gather useful feedback.

### Fix and universalize Mtender

Mtender provides a great opportunity to ensure the transparency of public procurement. The Electronic Governance Agency, which oversees MTender, should be offered more financial and political assistance to iron out the technical limitations which currently prevent MTender from being used for procurement of medication. In addition, to ensure transparency in all stages of the procurement process, legal requirements on MTender's use should be expanded to include all procurement-related procedures, such as dispute settlement and handling complaints.

### Integrate electronic services

Dozens of separate governmental information services for different departments and government organs currently exist. Integrating and coordinating these into a single service will make it easier for citizens to find the information they need.

### Engage with civil society and independent media

Civil society and independent media continue to play a key role during the crisis to ensure the rule of law is upheld. The government should create an independent supervisory authority chaired by civil society and independent media representatives to observe the implementation of all of the above measures, and to ensure that future reforms are structured to benefit the rule of law rather than political or elite interests.

## ENDNOTES

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The Justice First policy brief series is a gift of the United States Government, funded by the U.S. State Department Bureau of International Narcotics and Law Enforcement Affairs under the project "Mobilizing Civil Society to Support Judicial Integrity in the Republic of Moldova" and implemented by Freedom House. The opinions, findings and conclusions stated herein are those of the authors and do not necessarily reflect those of the US Government or Freedom House.



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