Council of Europe
Conseil de l'Europe

European Union
Union européenne

JOINT PROGRAMME
BETWEEN THE COUNCIL OF EUROPE AND THE EUROPEAN COMMISSION
ON INCREASED INDEPENDENCE, TRANSPARENCY AND EFFICIENCY
OF THE JUSTICE SYSTEM OF THE REPUBLIC OF MOLDOVA

Strasbourg, 27 July 2009 DGHL (2009) 13

Assessment report on the new Law on the Public Prosecution Service of the Republic of Moldova

For more information, please contact:

Legal and Human Rights Capacity Building Division Directorate for Co-operation Directorate General of Human Rights and Legal Affairs (DG-HL) Council of Europe F-67075 Strasbourg CEDEX France	Tel: + 33 3 88 41 24 37 Fax: + 33 3 88 41 27 36 Website: www.coe.int/justice e-mail: info.assistance@coe.int

In case of discrepancy between the English and the Moldovan version of the present expert opinion, the English version shall prevail.

Table of contents

COMMENTS

by

Mr Jorge Dias Duarte
Prosecutor
(Portugal)

Comments on the new Law on the Public Prosecution Service of the Republic of Moldova

Foreword

1. The present opinion, drafted on the basis of the analysis of the above-mentioned law expresses the knowledge, experience and personal understanding on the topic of the expert, and is not in any way constructed as committing the Council of Europe.

2. Nevertheless, and naturally, the given opinion is based on the Council of Europe's standards on the subject, and tries to demonstrate whether the Moldovan legislation concerning the Public Prosecutor's Office does comply with those standards – namely with the principles established by the Council of Europe in Recommendation Rec(2000) 19, on the Role of Public Prosecution in the Criminal Justice System, as well as in Recommendation 1604(2003) on the Role of the Public Prosecutor's in a Democratic Society Governed By the Rule of Law.

3. Also, when necessary, the given opinion points out some aspects that, as I see it, should be considered, in order to strengthen the real autonomy – both external and internal – of public prosecutors when carrying out their duties.

4. Although taking into consideration the previous CoE expertises[1], this opinion expresses my personal understanding of the final version on the above-mentioned Law, and whether it can – or cannot – be considered as a "new tool" to help strengthen the independence, transparency and efficiency of the justice system of the Republic of Moldova.

5. It must also stated that the comments, remarks and/or suggestions that follow, above all, are aimed at some of the solutions adopted, which I do believe can and must be improved in the Law under comment.

[1] Namely, the previous expertises of Mr. James Hamilton and Mr. Sousa Mendes, whose work I fully subscribe to; I must also emphasize the commitment of Mr. Valeriu Gurbulea, the General Prosecutor of the Republic of Moldova to the working group created to assess the previously existing laws and bylaws on the Public Prosecutor's Office, and to draw up its the new concept

I – Introduction

6. According to Principle 1 of Council of Europe **Recommendation Rec(2000)19** of the Committee of Ministers to member States on the Role of Public Prosecutors in the Criminal Justice System[2], ""Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of individual and necessary effectiveness of the criminal justice system".

7. **Recommendation 1604 (2003)**[3], on the Role of the public prosecutor's office in a democratic society governed by the rule of law, clearly refers to: (IV.) "… The interests of justice in effective and efficient disposal of cases, along with the interests of both the defendant and the injured party, are best served by a system allowing discretion in the decision to prosecute…". Also in respect with the role of the public prosecutor's office on the criminal field, the very same Recommendation refers to the Committee of Ministers Recommendation Nº R(87)18, concerning the simplification of criminal justice[4], whilst considering that the principle of discretionary prosecution should be universally adopted.

8. It must also be mentioned that, with respect to non-penal responsibilities, Recommendation 1604 (2003) clearly states (cfr. paragraph 7.v):

   a) that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights;

   b) that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and

   c) *that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effectives bodies established to discharge any other functions*.

9. Bearing in mind these fundamental texts, we must also be aware that Article 124 of the Constitution of Republic of Moldova still provides that "The office of the Prosecutor General represents the general interests of society and defends legal order, as well as the rights and freedoms of citizens: it also conducts and implements the enforcement of justice and represents the prosecution in courts of law, in conformance with the stipulations of the law".

10. In line with this principle, enshrined in the Fundamental Law, Article 1 of the Law now under appraisal, rules as follows:

    "The Public Prosecutor's Office is an autonomous institution within the system of judicial authorities which, within the limits of its authority and competence, protects the general interests of the society, the legal order and the rights and freedoms of

[2] Adopted by the Committee of Ministers on 6 October 2000 at the 247th meeting of the Ministers´ Deputies.

[3] Adopted by the Standing Committee, acting on behalf of the Assembly, on 27 May 2003.

[4] Adopted by the Committee of Ministers on 17 September 1987, at the 410th meeting of the Minister's Deputies.

citizens, conducts and exercises criminal prosecution, represents the prosecution in the courts of law, in accordance with the provisions of law".

11. It is now clear that a significant change has occurred in the definition of the public prosecutor's service[5], clearly stating that :

- "The Public Prosecutor's Office shall conduct its activity on the basis of the principle of legality" – cfr. Article 2§1;
- "The activity of the Public Prosecutor's Office is transparent…" – cfr. article 2§2;
- "The principle of independence shall exclude the possibility of subordination of the Public Prosecutor's Office to the authority of the legislative and the executive powers, as well as the possibility of influence or interference from the behalf of other bodies and state authorities in the activity of the Public Prosecutor's Office" – cfr. article 2§3;
- "The prosecutor shall organise and conduct his/her activity on the basis of the principle of autonomy, which …. offers to him/her the possibility to independently take decisions in the examined cases and matters" – cfr. article2§4, and that
- "In the activity of the Public Prosecutor's Office the internal hierarchical control and the judicial control shall be the principles that ensure the exercise by the hierarchically superior prosecutor of the right to verify the legality of the decisions issued by the hierarchically inferior prosecutor, as well as the possibility of appeal in a court of law of decisions and procedural actions of the prosecutor" – cfr. article 2§5.

II – Comments on the solutions adopted on the new Law on the PPS

I – Although the fact that it was repeatedly discussed (and as underlined during several preparatory meetings and/or seminars on the new law on the PPS) the meaning of the expression "**interests of the society**", which, according to article 1, the Public Prosecutor's Office is supposed to protect is not clear to me"..

12. In fact, not only Council of Europe **Recommendation Rec (2000)19** refers to "public interest…", as the new law on PPS also refers to (or adopts) different expressions, which, obviously, cannot mean the same. For instance, while article 5§1.a) refers to "public interest", article 35§1 rules that "...prosecutors shall refrain from any activity related to the exercise of his/her duties in cases when he/she assumes that there is a conflict between his/her interest, on the one hand, and the public interest, of justice or the protection of the general interests of society on the other hand …".

13. Comparing these two articles it is obvious that the expressions "**public interest**" and "**general interests of society**" (or "**interests of society**") do not (cannot) mean exactly the same thing.

[5] In fact, the earlier text reads as follows:"The Prosecutor's Office is a public institution which activates in the framework of the judicial authority and which, in the name of the society and in the public interest, ensures the observance of the law when the violation thereof calls for a penal sanction, and which protects the law and order and the citizens' rights and freedoms".

14. In this case, I believe that some clarification is still needed, in order to avoid the use of this(these) "open expression(s)", which can be interpreted in various ways, at different times or by different prosecutors, according to the vague interests, as this uncertainty may also lead to unwanted discretion.

15. I would rather have a clear definition on the possible meaning of the expression(s) "public interest" ("interests of society") and I think that it should not be left to the General Prosecutor's (or to the Superior Council's in the GPO) "power" to interpret or to define, at any given moment, what the meaning of such a "vague" expression is.

II – According to article 2§4 ruling, "The prosecutor shall organise and conduct his/her activity on the basis of the principle of autonomy, which …. offers to him/her the possibility to independently take decisions in the examined cases and matters".

16. On the other hand, paragraph 5 of the very same article rules that "in the activity of the Public Prosecutor's Office the internal hierarchical control and the judicial control shall be the principles that ensure the exercise by the hierarchically superior prosecutor of the right to verify the legality of the decisions issued by the hierarchically inferior prosecutor, as well as the possibility of appeal in a court of law of decisions and procedural actions of the prosecutor".

17. Although fully sharing the point of view that a hierarchical organisation can represent an "added value"[6], it seems to me that the new law still grants too much power to the General Prosecutor and to higher level (or "higher ranking", to adopt military terminology) prosecutors regarding "lower level" prosecutors, and I fear that such a situation might undermine the idea of autonomy of hierarchically inferior prosecutors.

18. It is a fact that article 56§2 rules that "on decision-making the prosecutor shall be autonomous in the conditions provided by the law[7]", also being a fact that, according to §3 of the very same article, "… the prosecutor may request that an order should be given to him/her in written", and "the prosecutor shall be entitled to refuse to implement an order which is obviously illegal or which runs counter to the prosecutor's judicial consciousness, and he/she can file a protest against such order with the prosecutor hierarchically superior to the one who has given the order".

19. Nevertheless, we are still facing a law – or a system – in which the General Prosecutor him/herself (as well as the hierarchy on the GPO "mechanism") still plays a major role not only in appointments, but also in the career's management of each and all prosecutor(s), which can represent a "major obstacle" for any prosecutor to "dare" to question his/her superior's orders or "instructions".

[6] Namely by enhancing the possibility of having similar solutions to similar problems, or, to put it in a more appropriate way, by ensuring real equality of all citizens if and when facing court/prosecutorial proceedings.

[7] It must be clearly stated that, according to article 33§1, "in the exercise of his/her duties the prosecutor shall be autonomous, impartial and shall abide by the law only"; article 2§4 also rules that "the prosecutor shall organise and conduct his/her activity on the basis of the principle of autonomy, which is ensured by the procedural independence and judicial control and offers him/her the possibility to independently take decisions in the examined cases and matters". From my point of view, this wording could also be improved, as I think that prosecutors must have more than just the "possibility" of taking independent decisions – in fact, when performing their duties, prosecutors are supposed to abide only by the law, acting with the strictest respect for the principles of legality and objectivity.

20. Furthermore, we are talking of a system that is still showing the typical scars of military institutions – cfr. articles 44 to 52 – thus meaning that the weight of hierarchy can be really much heavier than it is already in any other system.

21. Consequently, I must emphasise that it should be clearly ruled that **any order should and must be always given in written**; it must also be clearly ruled that **such orders must be integrated in the file which it refers to**, in order to ensure transparency.

22. **Furthermore, general instructions** – those given to several cases and not to any given and particular case – **must be given in written form and must be given as much publicity as possible.**

III – Article 2§5 rules that "in the activity of the Public Prosecutor's Office the internal hierarchical control and the judicial control shall be the principles that ensure the exercise by the hierarchically superior prosecutor of the right to verify the legality of the decisions issued by the hierarchically inferior prosecutor, as well as the possibility of appeal in a court of law of decisions and procedural actions of the prosecutor".

23. Article 31 clearly rules that "prosecutors listed in descending order shall be hierarchically superior to the prosecutors indicated after them" – cfr. 4 – and that "the hierarchically superior prosecutor can exercise any function of subordinate prosecutors" – cfr.§5.

24. It is also clear that "the hierarchy consists in the subordination of the hierarchically inferior prosecutors to the hierarchically superior prosecutors, as well as in the prosecutor's obligation to enforce and observe orders, indications and regulatory instructions received from the hierarchically superior prosecutors" –cfr. article 31§6.

25. As mentioned in my previous comment, and without knowing if, for instance, the Criminal Procedure Code brings any light on this subject, I still find that it should be made clear in which circumstances and on what grounds hierarchically superior prosecutors can "exercise any function of subordinate prosecutors".

26. In fact, with such an open solution as the one that results from article 31§5, it would seem that, in any given case, any hierarchically superior prosecutor could decide to – without any explanation – "take over" a file and issue a decision on it, and then hand it back to his/her hierarchically inferior colleague, who would have no way of reacting to such a "strange" way of proceeding.

27. I believe this example clearly shows the need for clarification (not of the concept of hierarchy itself, but on the way in which hierarchical power is carried out), making it transparent to everyone what cases, on what grounds and with which effects, a hierarchical intervention can take place.

28. At the same time, such clarifications could help preventing any "deviated trends" of (mis)use, (even by hierarchy) of the legal powers prosecutors are entrusted with, thus also enhancing the citizens' and society's protection.

IV – It also seems to me that, in this new Law, public prosecutors still have too much power, namely when not conducting criminal investigation.

29. In fact, according to article 6, and "in order to exercise the authority of the Public Prosecutor's Office, prosecutor, in accordance to the law, shall be entitled to:

a) demand submission of documents, materials, statistical data, and other information from legal entities and natural persons;

b) ….

c) summon any person and demand oral or written explanations in the course of criminal prosecution or with regard to infringements of human rights and fundamental freedoms, as well as in the case of violation of the legal order;

d) have free access to the premises of state institutions, of economic agents, and of other legal entities, as well as to their documents and materials".

30. Although having said that these "competencies" shall be carried out "in accordance to the law" [and I do not know which law(s)/bylaw(s) is(are) referred here], I do find the powers given to the prosecutor rather far reaching and too "invasive", since we are not referring to criminal investigation.

31. In fact, the "prosecutor's competencies in the conduct of criminal investigation" are laid out in article 9, "bridging", among others, the Criminal Procedure Code.

32. Consequently, I am still convinced that the new law is, still, in this regard, too far reaching.

V – All the situations referred to are even more "dangerous" in a system in which, according to me, the Prosecutor General still holds too much power.

33. In fact, and among other competencies/powers, the General Prosecutor shall:

- appoint hierarchically inferior prosecutors and exercise, either directly or through his/her deputies or subordinate prosecutors, control over the activity of prosecutors – cfr. article 27§2.b);
- issue written orders, ordinances and methodological and regulatory instructions, which are mandatory for enforcement, approve regulations – cfr. article 27§2.c), and
- withdraw, suspend or cancel acts issued by prosecutors, should these run against the law – cfr. article 27§2.d).

34. As far as can I see, all these competencies[8] should not belong to the General Prosecutor him(her)self, but should be within the Superior Council of Prosecutors´ competencies, which would, then be the "main body" in the GPO's structure, and be entitled to, if necessary, "assess" the General Prosecutor – and consequently, the entire hierarchy within the GPO – thus increasing internal legitimacy, without interfering, in anyway, with the concept of hierarchy (which, on my opinion, must be preserved).

[8] As far as I see it, the same goes, as well, to most competencies referred in the article 27§2.

VI – I agree with article 15§1, but it seems to me that §2 should also refer to those situations of "illegal psychiatric treatment" and not only (as it happens to be the case with the English version of the Law) to "detention" (which appears to refer only to "criminal situations"): in fact, prosecutors should also be entitled to immediately release any person submitted, with no grounds provided by the law (or, even worse, against legal grounds), to psychiatric treatment.

35. I must also refer to what appears to be a material error (it may have occurred when the law was being translated): in fact article 15§2 refers "… that could prove the legal detention…", when it seems to me that it should refer "…. that could prove the **il**legal detention…".

VII – In my opinion, clarification is needed too on how specialised prosecutor's offices, referred in article 25, are (or can be) established.

36. Although the decision of establishing this kind of office belongs to the Prosecutor General – cfr. article 26º§2.e) – this is not clear. Consequently, nothing is said also about the reasons for creating these structures, who takes the decision, nothing is said about the reasons why prosecutors are appointed to (or dismissed from) these specialised offices…

37. As specialised offices, they will surely deal with most sensitive matters, thus making the need for transparency that must rule any decision regarding its creation, resources that they will – or not – receive, as well as the criteria to appoint/remove prosecutors to/from these specialised offices even more imperative.

VIII – Another "sensitive" subject is the wording of article 36§1.d), which refers to the requirements for the appointment to the position of prosecutor, ruling that being a graduate of the initial training of prosecutors of the National Institute of Justice is one – along with others – requirement for a person to be appointed to the position of prosecutor.

38. On this topic, one must be aware that, according to article 22§1 of the Law on the National Institute of Justice (NIJ), "initial training shall be a compulsory condition for appointment to the position of judge or prosecutor from the moment of approval by the Council of the results of graduation of the first trainees of the Institute"[9], and that the original wording of article 6 of the Law of the Status of Judges – allowing, up until now, various possibilities for being appointed as a judge – was supposed to loosen the legal force of the graduation of first class of trainees from the NIJ (cfr. LP247-XVI of 21.07.06, MO 174-177/10.11.06, art. 796)[10].must also be taken into account.

39. Nevertheless, the reality is that we do have now a dual system of accession to the position of judge and/or prosecutor, for which there is a 20% quota admissibility to the position of judges and prosecutors for non-graduates from the NIJ, thus allowing the appointment of people with "professional experience" as judges and/or prosecutors.

[9] I must also mention that, in every meeting regarding the NIJ, the Moldovan participants always said that every article regarding the appointment of both judges and prosecutors would be adapted to this new reality.

[10] Moreover, the situation should be, as far as I see it, the same when referring to the appointment of prosecutors.

40. I do recognize that this system could represent a “pragmatic” (or practical) solution, but I do not feel very comfortable with it, namely when we are talking about a system in which the appointment of both judges and prosecutors is still far from being as transparent as we would like it to be.

41. Moreover, I fear that this solution would worsen the “lack of transparency”, since we cannot be sure that the 20% quota will be filled – i.e., those who would be appointed on the basis of their “previous professional experience” – were appointed (to the positions which allowed them to gain “professional experience”) only because of their intrinsic worth, and not because they belonged to an “inner circle of people with influence”.

42. Keeping this risk in mind, the only suggestion I have is that the greatest attention must be given in order to ensure that there will be no room for the potential “perversion of the system” – namely by adopting mechanisms in order to avoid the possible “temptation” to increase in the future this 20% quota, on the basis of the alleged lack of quality of the NIJ’s trainees, and/or on the basis of the NIJ’s lack of capacity to “supply” enough candidates to the existing vacancies.

43. I must also mention that it does not seem to me completely senseless that even persons appointed on the basis of their previous professional experience should receive some kind of training – even if only for a short period of time – since we are talking about people coming from a wide range of different professions, and this would allow them to receive a new and “refreshed” vision of their future professional duties.

IX – One word also regarding the wording of article 18§3, when it rules that, within one month of the receipt of the notification of the prosecutor, the notified institution or the responsible official person (after taking “tangible” measures and/or after the application of sanctions – shall communicate in writing the results/outcome of the actions taken to the prosecutor.

44. Since nothing is said on what happens if such a communication does not occur – or if it occurs after the given deadline – and without knowing if any legal solution is provided for elsewhere, it seems to me that this situation needs to be clarified in the law now under comment.

X – Finally, it also seems to me that, in cases as those ruled in article 19, citizens should also be entitled to react (as individuals and/or as NGO's, etc.) to administrative acts that violate their rights and/or freedoms.

45. Such a possibility could/should go side-by-side, for instance, with the protest filed by the prosecutor, but I find critical to ensure that the protest filed by the prosecutor does not exclude the possibility of similar (re)actions from citizens regarding administrative acts.

III – Conclusions

46. As stated in my previous comments, and although I truly think that the new Law on the Public Prosecutor's Office reveals that a great deal of work and thinking has been done on the topic, I still feel the need to "share" my apprehension on some of the adopted solutions.

47. In fact, and as already expressed on several occasions/meetings/seminars, it seems to me that the Prosecutor General still holds too much power/competencies (which should belong, according to me, to the Superior Council), as he/she is still, on several issues, considered "the most powerful person" in Moldova.

48. This situation is also the result of the fact that the General Prosecutor still holds quite a wide range of powers dealing with the appointment and career management and even dismissal of his/her deputies – with all the risks this situation implies – when this responsibility should be entrusted to the Superior Council, which, in many (too many?) aspects is still regarded mainly (if not only) as a consultative body, with almost no real power.

49. I am still (as expressed before, but referring to article 39§4 of the previous draft) seriously worried about the wording of article 36§1.d), which may represent the risk of completely undermining the scope of the Law on the National Institute of Justice.

50. This "situation" would be, undoubtedly, a serious setback to the recently implemented system on judicial training and appointment both of judges and prosecutors.

51. I do understand that there are constitutional "constraints", but despite all the efforts that have brought us to this stage, I must confess that I am not sure yet if the new Law on the Public Prosecutor's Office of Moldova is the result of a real will for change, as I believe it should be. Otherwise, (and this would be dramatic), the law under comment would be nothing more than a mere "face-lift", with some minor "changes" to a really powerful institution, which would keep its "core" powers unchanged, with no real changes to the previously existing model.

52. After participating in several rounds of discussions on the new law on PPS of the Republic of Moldova, examining several consecutive versions of the draft and referring so many times to those possible solutions that would bring the Moldovan

public prosecution service closer to the Council of Europe standards, I am of the opinion that this Law represents to a big extent a “lost opportunity”. To this end, the fact that the Moldovan authorities have not responded to the most important recommendations from the Opinion of the Venice Commission on the draft Law on PPS, of 19 June 2008, suggests a great deal.

53. As it stands, I do believe that the most urgent attention must be given to the results of the implementation of the new Law on Public Prosecutor’s Service in the near future.

June 2009

COMMENTS

by

Mr James Hamilton
Director of Public Prosecutions
(Ireland)
Member of the Venice Comission in respect of Ireland

Comments on the new Law on the Public Prosecution Service of the Republic of Moldova

1. The opinion of the Venice Commission has been sought in relation to a draft law on the Public Prosecutor's Office in Moldova. The draft is dated 25 December 2008.

2. The reform of the prosecutor's office in Moldova has been an ongoing project. I wrote opinions on previous drafts on 7 August 2007 and 21 April 2008 at the request of the Directorate General of Legal Affairs of the Council of Europe. The Venice Commission gave its opinion on a previous version of the draft law on 19 June 2008 (CDL – AD (2008) 019).

3. The newly revised text has addressed some of the issues identified by the Venice Commission in its 2008 opinion. In respect of a number of other matters which were considered problematical, the text is not substantially changed. The principal change to the text from the previous draft is that the prosecutor's office is now to be sited within the judicial branch of government. The observation I made in my previous comments, to the effect that the draft laws appear to be well thought out and comprehensive and that it was clear that a good deal of work and thought had gone into their drafting, still stands. Having said that, however, a number of criticisms of the text still remain.

General Provisions – Articles 1 - 4

4. As already mentioned, a significant change to the general provisions in the text is that the prosecutors' office is now to be part of the judiciary as had been intended in earlier drafts than that in 2008. This is a welcome development. However, I would repeat the comment previously made, that it is necessary to make it clear that there is a separation between the function of prosecuting magistrates and court judges and in this regard the provisions of Recommendation 2000 (19) of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution should expressly be given effect.

5. The fundamental definition of the prosecutor's office's function set out in Article 1 now reads as follows:

   "The public prosecutor's office is an autonomous institution within the system of judicial authorities which, within the limits of its authority and competence, protects the general interests of the society, the legal order and the rights and freedoms of citizens, conducts and exercises criminal prosecutions, represents the prosecution in the courts of law, in accordance with the provisions of the law."

   This represents a move away from the previous draft which had clearly established that the primary purpose of the prosecution service was that of criminal prosecution. In the present text, this function of criminal prosecution only ranks fourth in the objects of the prosecution service . In this regard, the draft reflects closely Article 124 of the Constitution of Moldova which provides:

   "The Office of the Prosecutor General represents the general interests of society and defends legal order, as well as the rights and freedoms of citizens; it also

conducts and implements the enforcement of justice and represents the prosecution in courts of law, in conformance with the stipulations of the law."

6. Regarding the previous draft, I raised a question whether it was really possible to change the function of the prosecutor's office without amending the Constitution. It is unfortunate that the intention now seems to be to retain the constitutional provision, thus retaining elements of the old Soviet-style idea of "general supervision" whereby the primary function of the office is the protection of the general interests of society, the legal order and the rights and freedoms of citizens rather than business of criminal prosecution.

7. I also raised a question whether it would be possible to read the references to protection of general interests, legal order and citizens' rights as being matters which could be regarded as merely ancillary to criminal prosecution rather than as stand alone objectives. The present text leaves it somewhat unclear to what extent this is intended to be the case. For example, notwithstanding Article 1, when one comes to Article 5 of the text, which deals with the authority of the public prosecutor's office, it is stated that:

   "The Public Prosecutor's Office shall in the name of the society and of public interest, insure the enforcement of the law, protect the legal order and the rights and freedoms of citizens when the violation thereof entails the application of criminal sanctions."

   The remainder of that article deals primarily with the question of criminal prosecution although it also allows for the participation of the prosecutors office in civil and administrative cases where court proceedings have been commenced on its initiative. On the whole, therefore, the tendency of Article 5 seems to be to interpret the public interest and citizens' rights functions of the prosecutor's office more within the context of enforcing penal sanctions than with a more general role of the general supervision of society. However, the text is not altogether clear on this point and I remain of the opinion that Article 124 of the Constitution continues to represent an obstacle to a full reform of the prosecutor's office bringing it into line with European standards.

8. Article 2 deals with the principles of organization of the activity of the office. It refers to the public prosecutor's office as conducting its activity on the basis of the principle of legality. By this I take it is meant that the office is to conduct its activity in accordance with law. A later article in the draft, Article 10, allows the prosecutor to take a decision to exempt persons from criminal liability and apply alternative measures to criminal prosecution and in that sense it seems that the opportunity principle rather than the legality principle is to apply in Moldovan criminal law. Article 2 also refers to the transparency of the office, and the principle of independence of the office from other bodies within the state, including the legislative and the executive powers.

9. Article 2 also refers to the principle of autonomy of the individual prosecutor. It refers to the procedural independence and judicial control and the possibility of the prosecutor to take decisions independently in particular cases. However, paragraph (5) of Article 2 then goes on to refer to the internal hierarchical control in the public prosecutor's office and the principles that ensure the exercise by the hierarchically superior prosecutor of the right to verify the legality of decisions issued by the hierarchically inferior prosecutor, as well as the possibility of appeal in a court of law of decisions.

10. This issue was the subject of previous critical comment by the Venice Commission which has not bee addressed. In its previous opinion of 19 June 2008 the Commission addressed these questions as follows:

"15. The hierarchical model is an acceptable model although it is perhaps more common where prosecution services are sited within the judiciary for the individual prosecutor to be independent. The hierarchical model is more commonly found where the prosecution service is regarded as a part of the executive. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty. However, this does not appear to raise a great issue of principle in either case. What is more a matter of concern is the obvious contradiction between the principle of the autonomy of the individual prosecutor referred to in Article 2(4) and the principle of hierarchical control referred to in Article 2(5).

16. In addition, Article 32(5) and (6) appear to authorise all superior prosecutors to override the decisions of those junior to them. It needs to be made very clear in what circumstances the prosecutor's autonomy can be overridden by a senior prosecutor. On one reading of Article 2(5) one might assume that it is only if the prosecutor's decision is incorrect or illegal that a superior prosecutor can override it. But what is meant by incorrect? Is it enough for a senior prosecutor to decide that he or she would have made a different decision or must the junior prosecutor have acted outside the scope of his or her authority? The latter alternative is clearly to be preferred and this should be clarified in the text.

17. Also from a practical point of view the extent to which a senior prosecutor can override a junior prosecutor needs to be spelt out very clearly. Any provision spelling out the circumstances in which the decision of the junior prosecutor may be overridden would require to respect the provisions of Article 10 of Recommendation Rec 2000 (19).

18. The text is careful to make it clear that in addition to the possibility of a senior prosecutor overruling a junior one, a court of law may also be used to contest a prosecutor's decisions and actions of a procedural character. Again, it is not clear how far this extends. Can a court of law compel a prosecutor to institute a prosecution? Can a court of law restrain a prosecutor from prosecuting? These issues are of course linked to the question whether the prosecution service of Moldova is to operate the opportunity principle or the legality principle. This is a matter which ought to be specified in an article which deals with the principles upon which the activity of the service is based."

11. The provisions in Article 32(5) and (6) are now to be found unamended in Article 31(5) and (6) of the new draft. The problems previously identified by the Venice Commission remain. At a seminar in Moldova in April 2008 I was informed by representatives of the Moldovan prosecutor's office that the power to give instructions extended only to general instructions but not to giving instructions how to deal with particular cases. However, I can find no express provision to this effect and if this is indeed the case it should be made clear in the body of the text. It is necessary that there be express provisions setting out precisely what is the basis on which instructions can be given, and whether these are confined to cases where the senior prosecutor considers that the junior prosecutor has misapplied the law rather than to cases where the senior prosecutor simply takes a different view. Again, in its earlier opinion the Venice Commission commented on the problems which could be created if a person affected by a prosecutor's decision has a right to appeal that decision to a superior prosecutor. It is not clear from the text whether this is the case. Again, this is a matter which should be addressed. If it is the case that a person may appeal to senior prosecutors right up the line then this would have a potential for slowing down the system and making it very inefficient.

The Scope of Activities and Competence of the Public Prosecutor's Office

12. I have already referred to Article 5 which appears to place an emphasis on the function of public prosecution notwithstanding what is contained in Article 1 and in Article 124 of the Constitution. Article 5 also refers to participating in court trials in civil and administrative cases but this appears to be limited to proceedings in which the prosecutor is a party and does not appear to confer any right to intervene in private litigation. This provision was previously welcomed by the Commission. However, the Commission also commented that it was not clear whether such civil and administrative cases were necessarily related to criminal proceedings and suggested that this should be made clear. This has not been done. There is a reference to exercising control over law and order in the armed forces and the Commission previously questioned whether this could be done without reference to a military judge or tribunal. This matter has not been clarified either.

13. The reference previously contained in this Article to the possibility of conferring other competencies on the public prosecutor's office, which was criticized by the Commission, has been deleted. This is to be welcomed.

14. The Commission previously criticized Article 6 which confers very far reaching powers on the prosecutor's office. These included the power to demand from legal entities, irrespective of their nature as well as from individuals, documents, materials, data and other information. There was power to summon any official person or citizen and demand verbal or written explanations. Such a summons can deal with infringements of human rights and fundamental freedoms as well as cases of violation of the legal order. It is clear that this power is not confined to the purpose of criminal prosecution and was criticized in the Venice Commission's previous opinion as being redolent of a prokuratura type system of justice. There is also a power to have free access to the premises of state institutions, of economic agents, and of other legal entities, as well as their documents and materials. This would include private companies. In its previous opinion the Commission commented that it was striking that all of these powers appear to be exercisable by the prosecutor without reference to a court of law, without the necessity to obtain a warrant or to have the approval of a judge. The Commission gave it's opinion that the exercise of many of these powers should indeed be made dependant on a court warrant, but the present draft does not address these concerns and the provision remains as it was.

Criminal Investigations

15. Articles 7 to 12 deal with criminal investigations. As previously noted, the Moldovan prosecutor is entitled to apply alternative measures to criminal prosecution and to this extent Moldova appears to apply the opportunity principle rather than the legality principle. The Commission's previous opinion gave a general welcome to these provisions relating to criminal investigations which were regarded as appropriate. A question was, however, raised as to whether or not the power in Article 12 to ensure the effective protection of witnesses and to restore the rights of persons which are infringed by illegal actions of the criminal investigation bodies could be exercised without recourse to a court of law. Of course, since the investigation bodies are subject to the prosecutor's control in any case it seems appropriate that he should be able to put right anything which has been done wrongly but nonetheless the question should be one in which a court of law has jurisdiction if necessary. It is not clear from the draft that that is the case.

Participation of the Prosecutor in the Administration of Justice

16. Article 14 deals with the prosecutor's competences in civil cases and permits him to participate in trial proceedings where the civil or administrative proceedings were launched on the initiative of his office or in which the participation of the prosecutor is provided by the law. The text does not make it clear what the limitations on this are. Article 15 gives a prosecutor control over the observance of laws in detention facilities, but the Commission's previous query as to whether these powers to order release of a person are to be exercised to the exclusion of any similar power in a court of law has not been addressed in the draft.

The Acts of the Prosecutor

17. Articles 17 to 21refer to various acts which the prosecutor may take. Article 18 provides that where during the exercise of his or her duties, in cases where the prosecutor considers that an illegal act could entail other measures or sanctions than those provided by the criminal law, he or she may submit to the competent authority or official a notification on the necessity of eliminating infringements of the law, sanctioning the investigation officers or employees of the bodies concerned, withdrawal of immunity, and can issue a notification on elimination of the infringements to the appropriate institution or official for immediate examination. The institution or person concerned is to take concrete measures with regard to the elimination of the infringements of law set out in the notification. There is no reference to having to seize of court of the matters referred to in Article 18 and it seems that they are self-executing. Article 19 deals with protest filed against an administrative act. This confers a power to issue a protest where the prosecutor detects illegal administrative acts of normative or individual nature issued by an authority or an official which violate the rights and freedoms of the citizen. The protest must be examined by the appropriate authority within ten days and the results of the examination communicated to the prosecutor. If the person concerned rejects or does not examine the protest the prosecutor can then bring the matter before a court.

18. It is unclear to the writer exactly what the relationship between Articles 18 and 19 is or whether Article 18, if not complied with, then requires the prosecutor to bring the matter before a court of law. This should be clarified.

19. In a previous draft there was a provision which referred to the power of the prosecutor to initiate proceedings against the accused to secure the interests of an injured party who is unable himself or herself to institute a civil action, or to secure the interests of the state, or to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons in a poor state of health. This Article, which had been criticized by the Commission, appears to have been deleted from the current text.

20. Article 21 allows the Prosecutor General to apply to the Constitutional Court for a ruling on the constitutionality of laws or decrees of the President or decisions and ordinances of the Government. It is understood that the Ombudsman and members of parliament can also make such application although there is no right of individual complaint. The Commission previously indicated its agreement that it was appropriate for the Prosecutor General to have such powers provided that institutions such as the Ombudsman had similar powers.

The Structure of the Prosecutor's Service

21. Articles 22 to 32 deal with the structure and personnel of the prosecutor's office. In its previous opinion the Venice Commission raised concerns about these provisions centring on how the hierarchical principle related to the principle of autonomy. It was pointed out that it was unclear what actions required to be approved of by a more senior person, or were capable of being overruled or countermanded by a more senior person and on what grounds such a power could be exercised. If there was a power to overrule a decision, was this a power which could only be exercised on the senior prosecutor's own motion or was a citizen affected entitled to appeal to the senior prosecutor to take such a decision? It was pointed out that the Prosecutor General could issue written orders, ordinances and methodological and regulatory instructions which were mandatory for enforcement, and that he could withdraw, suspend or cancel acts issued by prosecutors, should these run counter to the law. It would seem from this that the Prosecutor General might not override the decision to prosecute or not to prosecute merely because he disagreed with that decision if in fact the decision was taken in accordance with the law. However, it was also pointed out that the scope of senior prosecutors powers to override the decisions of their juniors required clarification. This clarification has not been provided in the new draft.

22. It was also suggested that the scope of possible instructions should be made clear. For example, is the Prosecutor General entitled to issue an instruction that no prosecution for a specific offence ought to be commenced without his personal sanction? Is any other prosecutor within the system entitled to give such an instruction? Is there any provision whereby a review of a prosecutorial decision may be sought? As already commented on, if that was the case it would be important to ensure that the system could not be paralysed by a person appealing in succession to superior prosecutors all the way up through the system to the Prosecutor General. The comment was made that because of questions of this sort it was important to specify exactly what was meant by describing the system as hierarchical. As was pointed out:

"The important thing is to specify what exactly is the power of instruction given to anybody within the system, to whom exactly this power is given, what precisely is the scope of authority of individual prosecutors, when they may make decisions on their own initiative, which decisions require to be approved by a more senior prosecutor, which decisions may be reviewed or set aside, and by whom and on what grounds."

Unfortunately, the new draft does not clarify any of these questions.

23. Notwithstanding the proposition that the Prosecutor General's power to withdraw, suspend or cancel acts extends only to matters which run counter to the law, Article 31(4), (5) and (6) contains the following provisions which seem to give a much more general power to issue instructions in relation to pretty well anything.

"(4) Prosecutors listed in descending order shall be hierarchically superior to the prosecutors indicated after them.

(5) The hierarchically superior prosecutor can exercise any function of subordinate prosecutors.

(6) The hierarchy consists in the subordination of the hierarchically inferior prosecutors to the hierarchically superior prosecutors, as well as in the prosecutors' obligation to enforce and observe orders, ordinances, indications and methodological and regulatory instructions which receive [sic] from the hierarchically superior prosecutors."

The Status of the Prosecutor

24. Articles 33 to 35 deal with the status of the prosecutor. These provisions were discussed in the previous opinion. The writer draws attention to the prohibition of prosecutors from involvement in political parties or organizations or taking part in political activities. This has been the subject of debate within the Venice Commission in relation to other prosecution services on a number of occasions. The writer would certainly be of the view that in the current state of Moldovan society this prohibition is appropriate and acceptable. However, it may well be something which should be kept under review in the future.

The Appointment of the Prosecutor

25. The Prosecutor General is appointed by the Parliament on the proposal of the speaker of Parliament. The Venice Commission's previous opinion suggested that there should be some committee of technically qualified persons to examine whether candidates for this position had the appropriate qualifications and met the relevant criteria. There is no such provision and the new text does not address this question. It could be a function of the Superior Council.

26. Under the previous draft, inferior prosecutors were to be appointed by the Prosecutor General at the proposal of the Superior Council of Prosecutors. An earlier draft contained a provision permitting the Prosecutor General to refuse to appoint a candidate. This does not appear to have been continued in the new draft. The present draft simply states that the hierarchically inferior prosecutor shall be appointed by the Prosecutor General at the proposal of the Superior Council of Prosecutors.

27. Article 42 provides for a system of performance appraisal. This takes place every three years. The previous draft provided for an assessment examination every five years which was criticized by the Venice Commission as being too long a period. The Commission considered it appropriate that there be an assessment of the performance of prosecutors at intervals much closer than five years. The law appears to be rather short on detail as to how this appraisal is to be carried out other than to state that the prosecutor is to be certified by the Qualification Board.

Rights and Obligations of the Prosecutor

28. Article 53 deals with the rights of the prosecutor. He or she is declared to be entitled to examine causes in cases related to the exercise of his or her duties and to make decisions within the limits of his or her competence. Again, this is closely interlinked with the whole hierarchical/autonomous question. He or she has a right to be considered for promotion, to be remunerated appropriately, to chose a field of training, to join professional organizations, to have access to his or her professional file, to be informed about decisions of concern to him or her, to be given protection, to be provided with adequate working conditions, to be compensated in cases where he or she has suffered a prejudice in relation to the exercise of duties and to make effective use of social guarantees.

29. The prosecutor is obliged to perform his or her duties in conformity with the Constitution and the laws, to comply with the rules of professional conduct, to submit declarations on income and property, to observe the regime of restrictions and incompatibilities, and to implement the provisions of normative acts adopted within the public prosecutor's office. These provisions appear to be appropriate ones.

The Safeguard of the Prosecutor's Autonomy

30. Article 56 deals with safeguarding the prosecutor's autonomy. Again, the question of hierarchy and autonomy arises. The prosecutor is described as autonomous in decision making but the orders of a hierarchical superior prosecutor given in writing and in conformity with the law are to be binding on subordinate prosecutors. The prosecutor may request that an order should be given to him or her in writing. This provision is welcome and accords with Recommendation (2000) 19. The prosecutor is entitled to refuse to implement an order which is obviously illegal or which runs counter to the prosecutor's judicial consciousness (this should read conscience), and he or she can file a protest against such an order with the prosecutor hierarchically superior to the one who has given the order. However, should the prosecutor's decision be found illegal, it may be cancelled on grounded reasons by the head of the subdivision. Again, there seem to be a number of contradictions with other provisions of the law in all of this but the tendency in this Article is towards the view that it is only illegal decisions of the prosecutor which may be overruled.

31. Under Article 57 the prosecutor and his dwelling place or office are inviolable but may be entered after an initiation of criminal prosecution. The prosecutor cannot be subjected to disciplinary liability for expressing an opinion during the criminal prosecution or for a decision he or she has made. Criminal prosecutions against the prosecutor may be initiated only by the Prosecutor General. Criminal prosecution of the Prosecutor General can be initiated only by a prosecutor appointed by the Parliament at the proposal of the Speaker. These provisions appear appropriate. However, there is a provision for immediate release of a prosecutor suspected of having committed an administrative offence in Article 57(6). It is not clear why this should be so.

32. Article 58 deals with promotion. A proposal for promotion may be made by the hierarchically superior prosecutor or the Prosecutor General or his deputies, or the Superior Council of Prosecutors. Regulations on the procedure for promotion are to be approved by the Superior Council. The actual promotion is made by the hierarchically superior prosecutor.

Incentives and Disciplinary Liability

33. Article 59 deals with incentives. The earlier draft was criticized for not providing that incentives be awarded in an objective, impartial, and transparent manner, perhaps following a recommendation by somebody who is not the prosecutor's immediate superior. Under the new proposal the incentives are to be applied by an order of the Prosecutor General at the proposal of the Superior Council of Prosecutors. This seems an appropriate provision.

34. With regard to disciplinary violations, the earlier text was criticized on the basis that some of the violations of discipline were drafted in a rather vague or satisfactory manner. The new draft has been tightened up considerably. So far as concerns individual liability of prosecutors, Article 63 (3) makes it clear that personal liability of the prosecutor arises only where he or she performs his or her duties in bad faith.

Transfer, Delegation, Assignment, Removal and Dismissal of Prosecutors

35. Article 64 to 67 deal with these matters. Any decision in this area is to be made by the Prosecutor General on the proposal of the Superior Council. Provision is made for an appeal to a court of law.

State Protection and Social Security

36. The earlier opinion approved of these provisions.

Consultative and Self-Administration Bodies of the Public Prosecutors Service

The Board of the Public Prosecutor's Service

37. This is now dealt with in Articles 75 to 79 of the draft. The criticisms made in the earlier report, which centre on the contradiction between the statement that the Board is a consultative body and the reference to it making decisions have not been addressed. In its earlier opinion the Commission considered that the Prosecutor General should have the ultimate responsibility and power to take decisions and the Board's powers should be recommendatory only. It was also considered that if a body were purely recommendatory it should be composed of senior persons from outside the prosecutor's office who could bring expertise to bear rather than subordinates of the Prosecutor General who might be expected in any event to follow the wishes of the Prosecutor General. On the other hand if the body was a decision making one then a body composed of the senior officers of the service would be appropriate.

The Superior Council of Prosecutors

38. This is dealt with in Articles 80 to 97. The Superior Council is the representative and self-administration body of prosecutors. It is intended to act as guarantor of their independence, objectivity and impartiality. It is composed of 12 members. The Prosecutor General, the President of the Superior Council of Magistrates and the Minister for Justice are *ex-officio* members. Five members of the Superior Council of Prosecutors are elected by acting prosecutors by secret, direct and free vote, comprising two members from among prosecutors of the general prosecutor's office and three members from among prosecutors of territorial and specialized prosecutor's offices. Four members of the Council are to be elected by the Parliament from among titular professors by majority vote of the elected members of Parliament, on the proposal of at least 20 members of Parliament. This represents an improvement on the earlier text. It would probably be desirable if the parliamentary component were elected by a qualified majority so as to avoid a simple "winner takes all" situation which could tend to politicize the Superior Council. Alternatively, the Parliament could elect four members by a system of proportional representation.

39. Article 95 refers to the procedure for adopting decisions. Decisions are to be adopted by direct voting and shall be, depending upon the case, justified. It is not clear what are the mechanics of producing a reasoned decision in something which is governed by a vote. One possibility would be for alternative viewpoints to be set out in writing and the Council to be invited to adopt one or other of them. Alternatively, those voting for a measure might be invited to set out in writing their reasons for the choice. The mechanics of this may require some consideration.

40. The Superior Council has a number of very important functions. Firstly, with regard to the professional career of prosecutors it examines candidates' compliance with the requirements of the position, requests data necessary to solve issues falling within its competence, makes proposals to the Prosecutor General in relation to appointment, promotion, transfer, delegation, secondment, incentives, suspension or dismissal of prosecutors, organises competitions for filling positions and selects candidates for vacancies. It proposes the appointment of prosecutors to the Council for the National Institute of Justice which is concerned with training, approves the strategy for training of prosecutors, examines appeals against the decisions of the Qualification Board and the Disciplinary Board, and examines citizen's complaints on issues concerning prosecutor's ethics. There is provision for appeal to a court of law against the decisions of the Superior Council. It is not clear whether this appeal is by way of a re-hearing on the merits or whether it is merely a procedural appeal. Despite the Commission's earlier opinion this issue has not been clarified in the re-draft.

The Qualification Board

41. Articles 98 to 112 deals with the Qualification Board. Its purpose is to promote state policy in the field of selection of persons for work in the prosecutor's service, assessing the level of prosecutor's professional skills and training and their compliance with the requirements of the post held. It is provided that the qualification board is to consist of 11 members. Nine of these are to be elected by the prosecutors (Article 1 to 9) and two are to be law professors appointed by the Superior Council.

The Disciplinary Board

42. Articles 113 to 128 deals with the Disciplinary Board and disciplinary procedures. The Board consists of nine members elected by prosecutors at their general assembly (Article 129). It examines cases on the disciplinary liability of prosecutors. The right to initiate disciplinary proceedings is vested in any member of the Superior Council of Prosecutors, Chief Prosecutors of sub-divisions of the General Prosecutor's Office and with territorial and specialist prosecutors. Disciplinary proceedings against members of the Superior Council or of the Qualification or Disciplinary Board may be commenced on an initiative of at least four members of the Superior Council of Prosecutors. Disciplinary sanctions must be applied within six months from the finding of a violation.

43. Article 120 provides that the prosecutor concerned is to be given the grounds for holding him in breach of disciplinary rules and giving him an opportunity to give written explanations. The Disciplinary Board must examine disciplinary cases in the presence of at least two-thirds of its members. The case has to be examined within one month of the date of its delivery. The prosecutor who is held liable must participate in the proceedings. If he fails to attend without justification the board is entitled to make a decision. The person initiating the disciplinary proceedings is also entitled to participate in the examination. Other prosecutors have the right to attend the session. A decision is adopted by a majority vote. A member of the board who has initiated the proceedings shall not participate in voting. The decision is to be issued in writing and signed by the chairperson of the session. The decision has to be submitted to the Superior Council for validation. There is an appeal to the Superior Council of Prosecutors and a further appeal to an administrative court. After application of a disciplinary sanction if there is no other sanction applied within one year the disciplinary sanction is considered annulled.

Elections

44. The previous opinion of the Commission criticized some of the provisions relating to elections to the Superior Council and the Boards. These provisions have now been removed.

The Budget

45. Article 138 provides for the budget of the public prosecutor's office to be financed from the state budget and approved by the parliament in accordance with the law on the budgeting process.

Conclusions

46. As was stated in the previous opinion the draft law is on the whole clear, coherent and comprehensive.

47. A number of technical problems in the earlier draft have been corrected or dealt with. However, a substantial number of the criticisms made by the Commission its opinion of 19 June 2008 have not been dealt with. In particular, the failure to clarify the extent to which the individual prosecutor has autonomy in decision making or is subject to hierarchical control remains a problem and the draft is still somewhat contradictory in relation to this question. It is necessary to be clear in what circumstances the prosecutors autonomy can be overridden by a senior prosecutor.

48. The prosecution continues to exercise substantial power to intervene in the life of citizens and enterprises alike without even needing a warrant or approval from a court. This needs to be addressed.

49. The extent to which the prosecutor's office continues to exercise functions outside the sphere of criminal prosecution remains unclear. The failure to amend the constitution in this regard is to be regretted. Article 1 still seems to place the emphasis of the Prosecutor's General role on matters other than criminal prosecution, and in this respect the draft represents a disimprovement on the 2008 text. However, Article 5 appears to row back somewhat from this position and to establish prosecution as the principal function. Again, these contradictions need to be resolved. The decision to site the prosecutor's office within the judiciary is to be welcomed.

June 2009