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(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON THE PUBLIC PROSECUTORS' SERVICE OF MOLDOVA

adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008)

On the basis of comments by

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1. By letter dated 6 February 2008, the Prosecutor General of Moldova has asked for an opinion on the Draft Law on the Public Prosecutor's Service (CDL(2008)055). The Venice Commission and the Co-operation Directorate of the Directorate General of Human Rights and Legal Affairs of the Council of Europe have prepared this opinion on the basis of comments by Messrs Hamilton (CDL(2008)056) and Sousa Mendes (CDL(2008)057) following a meeting in Chisinau on 7 April 2008, accompanied by Mr Dias Duarte for the Co-operation Directorate and Mr Dürr for the Venice Commission. The Co-operation Directorate had already provided advice on previous versions of the draft. The present opinion makes reference to these versions when appropriate.

2. The present opinion has been adopted by the Commission at its 75th Plenary Session on 13-14 June 2008.

General remarks

3. The consolidation of the previous three drafts (on the Organisation of the Prosecutor's Service, on the Status of the Prosecutor, and on the Superior Council of Prosecutors) is to be welcomed. The decision to consolidate the texts into a single Draft Law on the Public Prosecutor's Service reflects the previous recommendations of the rapporteurs. The new text is much clearer and has taken account of many of the recommendations made.

4. As a general observation, the draft laws appear to be well thought out and comprehensive. It is clear that a good deal of work and thought had gone into the drafting.

5. Despite the consolidation of the text, most of the substantive content of the draft law remains the same as in the original three texts except the consolidation has enabled a certain amount of duplication, or even triplication, to be removed.

6. It should be noted that the Constitution defines the prosecution system as part of the "Judicial Authority" (Chapter IX of the Constitution). This has important consequences for the independence of the prosecution from other state bodies including the courts. Recommendation 2000 (19) of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution makes a clear distinction between the prosecution and judicial functions. The explanatory memorandum states that while the task of both public prosecutors and judges is to apply the law or to see that it is applied, judges do this reactively, in response to cases brought before them, whereas the public prosecutor pro-actively, acts in order to the application of the law. **The independence of the prosecutors from the Judiciary should be made explicit.**

General Provisions – Articles 1-4

7. As compared to the previous versions, there has been one significant change to the definition of the public prosecutor's service which is the fundamental provision underlying the whole text. This raises the fundamental question whether the new draft represents as radical an attempt to reform the prosecution service of Moldova as appeared to be envisaged in the earlier text, which read:

> *"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 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."*

8. It seemed that the effect of this earlier provision was that the basic purpose of the draft legislation was to establish the prosecution service of Moldova as a body whose primary purpose would be that of criminal prosecution and which would no longer operate the elements of general supervision which the prosecution service in Moldova had inherited from the old Soviet *prokuratura* model. This would have resulted in the creation of a public prosecution service which would operate in accordance 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 and in accordance with Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law.

9. At the time, however, there were doubts whether this particular provision would be in accordance with the existing constitutional structure of Moldova because Article 124 of the Constitution of Moldova provides as follows:

> *"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. It is unclear what is meant by representing the general interests of society and defending the legal order, whether this is to be interpreted as requiring the prosecution service to exercise functions of general supervision over and above criminal prosecution, or whether this is merely to be understood as qualifying the way in which criminal prosecution was to be conducted.

11. In Article 1 of the new revised text the function of the prosecutor's office is defined in terms which are almost identical to the provisions of the Constitution. The English version of the new Article 1 of the draft law provides as follows:

> *"The public prosecutor's service is an institution which represents the general interests of the society and protects the law and order and the citizens rights and freedoms, carries out guiding of criminal prosecution and exercises it directly, represents the accusation in courts, in accordance with the law."*

12. The text of the Constitution and the new provision of Article 1 of the draft law can on the face of it be understood in either of two ways. On the one hand, it may be that the reference to representing the general interests of society and protecting law and order is intended to confer a discrete function on the prosecutor's office over and above the business of criminal prosecution. On the other hand, it may be that the correct interpretation is merely that in conducting criminal prosecution the prosecution service is to represent the general interests of society and protect law and order. On the whole, it seems that the former interpretation is the correct one since the existing prosecution service in Moldova continues to exercise certain *prokuratura*-style functions and in the absence of anything in the draft text to indicate that this is to change one can only assume that this will continue to be the case. **If indeed this change represents a retreat from the earlier proposal to confine the prosecutor's office to the function of criminal prosecution this would be a substantial disimprovement in the proposal.** The obvious solution to this problem is an **amendment to Article 124 of the Constitution.**

13. A further significant difference from the earlier draft is that the service is no longer defined as being part of the judicial authority. Under the new text it is not clear whether the prosecution service is to be regarded as a part of the judiciary or, in the manner of the old *prokuratura* as a "fourth power". From the reference in Article 2(3) to independence from the authority of legislative and executive powers it can be inferred that it is not intended to regard the service as being a part of the executive. It is, of course, legitimate to site the prosecution service either in

the judiciary or the executive, and if it is sited in the judiciary then a clear distinction has to be drawn between courts of law and the branch of the judiciary exercising the prosecution power (see in particular paragraphs 17 – 20 of Recommendation Rec 2000 (19) on the Role of Public Prosecution in the Criminal Justice System which deals with the relationship between public prosecutors and court judges).

14. Article 2 sets out the principles upon which the activity of the prosecution service is organised. These are duties to carry out activities in accordance with the law, the duty of transparency, the principle of independence, the principle of the autonomy of the individual prosecutor *"which allows them to take decisions by their own with regard to files and cases under their examination"* and the principle of internal hierarchical control and judicial control. These principles are more fully stated than in the earlier texts.

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.

19. The rapporteurs were 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**. If this is correct it is of course to be **welcomed but** nothing in the text seems to support this view. Such a limitation **should be clearly spelled out in the Law**.

Competency of the Public Prosecutor's Service

20. Article 5 refers to the competencies of the public prosecutor's service. One of the competencies is that of **participating in court trials on 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. If this interpretation is correct it is **to be welcomed**. However, it is not clear whether these civil and administrative cases which the prosecutor may institute are necessarily **related to criminal proceedings** and this perhaps **ought to be made clear**. Among the competencies referred to are the exercise of control over execution of laws in the armed forces. It is not clear whether this can be done without reference to a military judge or tribunal.

21. Article 5(2) also provides for the conferring of other competencies on the public prosecutor's service. Since this is in fact the law dealing with the prosecutor's office **any functions conferred on the prosecutor should be referred to in the draft and should not be contained elsewhere**.

22. Article 6 refers to **various powers** which are conferred on the prosecution service. Some of these are **very far reaching**. They include the power to demand from legal entities, irrespective of their type of ownership, as well as from individuals, documents, materials, data and other information. There is also power to summon any official person or citizen and demand verbal or written explanations. This power can be exercised for the purpose of carrying out criminal prosecution but may also be exercised in relation to any infringements of fundamental human rights and freedoms or violations of legal order. This seems to go much further than a power exercised only for the purpose of criminal prosecution and again appears to be redolent of a *prokuratura* as a "fourth power" operating outside of the constraints of a court of law and carrying out its own system of justice. There is also a power to "freely enter the offices of state institutions, enterprises, irrespective of their type of property, as well as of other legal entities". This presumably includes private companies. In addition to the power of entry there is a power to have access to all documents and materials. Again, what is striking about Article 6 is 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 exercise of many of these powers should indeed be made dependent on a court warrant.**

23. The provision in Article 6(2), which stipulates that the competences of the prosecutor can only be broadened or limited by law is in itself not sufficient to guarantee the judicial safeguard of human rights.

Criminal Investigations

24. Articles 7-12 relate to the conducting and carrying out of criminal investigation. These provisions seem appropriate to ensure that the prosecutors control of the investigative powers is secured. Article 10 empowers the prosecutor to **decide on the exemption from criminal liability of a person "for opportunity reasons"** and it would appear that at least to this extent the Moldovan prosecution authorities are to operate the opportunity principle. It is obviously desirable that a prosecutor should have these powers so as, for example, to give immunity to a witness in return for testimony against a more important participant in crime. However, it is **necessary that criteria for the exercise of this power should be set out**. It seems that the criteria are set out either **in the criminal code or in the criminal procedure code** but rapporteurs are not aware what those criteria are.

25. Article 12 refers to the prosecutor taking measures envisaged by the law in order to restore citizens' legitimate rights that were infringed through the illegal actions of criminal investigation

bodies. It is assumed that in exercising such powers the prosecutor remains at all times subordinate to any court of law which may have seisin of a case and if that is not the case the law should be amended to ensure this. However, since the investigation bodies are subject to the prosecutor's control in the case of an obvious illegality it seems correct that the prosecutor should have power to require the investigation bodies to put right anything that was incorrectly done.

Participation of the Prosecutor in the administration of justice

26. Paragraphs 13 –16 refer to the power to submit criminal cases to the courts, to represent the state accusation in criminal cases based on the principle of adversarial proceedings, to lodge appeals, to participate in the examination of civil and administrative cases launched on his or her initiative, to exercise control over the observance of the legislation in the process of enforcement of judicial decisions in criminal cases as well as in civil and administrative cases initiated by him or her, and to exercise control over the observance of laws in places of detention.

27. Article 16 provides that where the prosecutor discovers an **illegal holding of a person** in a prison, or a place of preliminary detention, or another institution where coercive measures are enforced, including hospitals in cases of the carrying out of compulsory psychiatric treatment, **to order the immediate release** on foot of an ordinance issued by the prosecutor. It is assumed that this power **is not to be exercised to the exclusion of any similar power in a court** of law to deal with such a matter and it **should be clarified** whether this is the case.

Reactionary acts of the prosecutor

28. Articles 17 – 22 refer to the various "reactionary acts" of the prosecutor. The term "reactionary acts" is perhaps unfortunate in English. Perhaps "reactive" is meant? Article 19 refers to the so-called notification of the prosecutor. This provides that where the prosecutor considers that the crime could bring about other measures or sanctions than those provided for by criminal law he or she should notify the authority or the competent official person with a view to eliminating the violations of law and sanctioning the violations committed by criminal investigation officers or sanctioning the non-fulfilment or inappropriate fulfilment of their professional duties in the course of a criminal investigation.

29. Article 21 deals with the recourse and appeal of the prosecutor. This provides that where in the course of exercising his or her prerogatives the prosecutor discovers illegal acts issued by an official authority or person through which citizens rights and obligations are violated, the prosecutor may appeal against those acts through a recourse. The recourse must be examined by the respective official authority in person within ten days from its receipt and the prosecutor has to be notified of the results of the examination of the recourse in the case of unfounded rejection or failure to examine the recourse. In such a case the prosecutor is entitled to denounce the legal act with the court of law so as to declare it null and void. It is unclear how precisely this latter provision works and whether it simply enables the prosecutor to refer the matter to the court of law for a decision or whether the prosecutor is empowered to overrule the matter directly himself. At the seminar in Chisinau the rapporteurs were informed that the prosecutor must refer the matter to a court of law. **The role of the prosecutor should be limited to make an appeal in cases where he or she is a party to the proceedings.** Furthermore, the relationship between Articles 19 and 21 is unclear.

30. Article 20 refers to the power of the prosecutor, in the course of penal proceedings, to initiate civil proceedings against the accused to secure the interests of the injured party, who is in a state of inability himself or herself to institute a civil action, or to secure the interests of the state. The prosecutor may also **initiate civil proceedings to secure the protection of the**

rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings. It is obviously necessary that there be somebody or institution in any state which can act on behalf of persons under a disability when they are unable to act themselves. However, it is important that this **should only be subsidiary** to the right of those persons to take action through a tutor assigned by court, by relatives or family members or on their own initiative if in fact they are not incapable. Given that the main task of the prosecutor is to represent the interest of the state and general interest, it may also be questioned whether the prosecutor is necessarily the most appropriate person to undertake this function, or whether it might not be more appropriately exercised by a body such as an ombudsman.

31. Article 22 entitles the prosecutor general to apply to the **Constitutional Court** and ask for a ruling on the constitutionality of a law. The ombudsman and members of Parliament can also make such applications although there is no provision in Moldova enabling the private citizen to bring such an application directly. In its Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (CDL-AD(2004)043), the **Venice Commission had welcomed the intention to introduce an individual complaint**. This initiative failed, however.

32. Provided there is also some institution such as the ombudsman capable of acting behalf of the ordinary citizen it is acceptable to confer such a power also on the prosecutor. There would be concerns if it were the situation that only the prosecutor could bring such applications.

The Structure of the Prosecutor's Service

33. Articles 23 - 33 deal with the structure of the public prosecutor's office and the personnel of the office. (Note that Article 33 is incorrectly numbered 31.) The main concern with these provisions relates to the question of hierarchy and how the hierarchical principle relates to the principle of autonomy. It seems that questions relating to hierarchy involve two distinct questions. Firstly, there is question of who is more senior to other persons. Secondly, there is the question of what actions of people within the system require to be approved by a more senior person, or are capable of being overruled or countermanded by a more senior person, and on what grounds such a power can be exercised. If there is a power to overrule a decision, is this a power which can be exercised only on the senior prosecutor's own motion, or is the citizen who is affected entitled to appeal to that prosecutor to take such a decision?

34. Under Article 28(3) the Prosecutor General is entitled to issue written orders, resolutions, and mandatory instructions and is also entitled to revoke, suspend or cancel acts issued by prosecutors if they run counter to the law. Articles 32(5) and (6) appear to enable any person within the hierarchy of the prosecution service to issue mandatory instructions to more junior persons. The **prosecutor general's power to suspend or cancel acts** is confined to acts issued by prosecutors which run counter to the law. It would seem from this that the prosecutor general may not override the decision to prosecute or not to prosecute merely because he disagrees with a decision if in fact that decision was taken in accordance with the law but as already stated **the scope of senior prosecutors' powers to override the decisions of their juniors requires clarification**.

35. It is also important that the **scope of instruction 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 the chief prosecutor of a subdivision of the office of the chief prosecutor or of a territorial or specialised prosecutor's office entitled to give such an instruction to the subordinate prosecutors in his office?

36. Is there any provision whereby a review of a prosecutorial decision may be sought? If that is the case, it is important to ensure that the system could not be paralysed. Clearly any system

would be **unworkable where a person affected by a decision could appeal in succession to superior prosecutors all the way up the system to the prosecutor general.**

37. It is because of questions of this sort that it is important to specify exactly what is meant by describing the system as hierarchical. 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 current text gives very little guidance on what the answers are to any of these questions.

38. Article 29 refers to the deputies of the prosecutor general but does not specify how many of these deputies there are to be. The matter is of some importance because it is of relevance to the composition of the Board of the Prosecutor's Service referred to below.

39. Article 32 is an illustration of the problem that can be referred to in relation to questions of hierarchy and autonomy. The article sets out the hierarchy of prosecutorial posts and the hierarchy is one with a great number of different levels. Article 32 (6) states "the hierarchy consists in the subordination of the lower level prosecutors to superior prosecutors, according to the provisions of the law, as well as in the obligation to enforce and observe orders, dispositions, indications and instructions they receive." This provision may have been inserted in response to previous comments of 7 August 2007. However, if every single instruction or decision of any prosecutor can be appealed right up the line to the prosecutor general such that the decision of a territorial prosecutorial can be overridden by the decision of a prosecutor of the level of the court of appeal, which in turn can be overridden by a prosecutor in the general prosecutor's office which in turn can be overridden by the head of a subdivision of the general prosecutor's office, which in turn can be overridden by the deputy of the prosecutor general, which in turn can be overridden by the first deputy of the prosecutor general and which can finally be overridden by the prosecutor general, the system would appear to be highly cumbersome, slow and inefficient.

The Status of the Prosecutor

40. Articles 34-36 deal with the status of the prosecutor and matters which are prohibited. The prosecutor is defined as autonomous, impartial and obliged to abide only by the law. Above, we have already discussed autonomy *vis-à-vis* hierarchical control. **The current draft no longer defines the prosecutor as assimilated to the magistrates, which is regrettable**. Such assimilation can be justified with the prosecutor's impartiality, independence, objectiveness, as well as the defence of the rules of law and human rights.

41. The prohibitions on not having other employment and on conflict of interest, which include prohibition on joining political parties, appear to be appropriate.

The appointment of the Prosecutor

42. In Article 41 it is provided that the Prosecutor General shall be appointed by the Parliament at the proposal of the Speaker of the Parliament. Lower level prosecutors are to be appointed by the Prosecutor General. There is a need for some objective element to the selection process of the Prosecutor General. The former provisions which contained an involvement by the Superior Council of Prosecutors have been dropped. Earlier provisions were criticised as obscure. However, the answer to the problem cannot be just to leave the matter to Parliament. **It is necessary that some committee of technically qualified persons should examine whether candidates for this position have the appropriate qualifications and meet the**

relevant criteria. Article 37 of the draft does set out the criteria for appointment to the post of prosecutor and Prosecutor General. If the initiative is to be with the Speaker then perhaps it needs to be provided that the **Speaker should refer the matter to the Superior Council** who shall inform him or her whether the candidate is qualified and the matter would then go to Parliament to be voted upon. Alternatively, it may be thought desirable to open the position to anyone who wishes to apply for it, leaving the ultimate choice to the Parliament or some other body. There are a number of options which could include the **Superior Council simply giving an opinion on the suitability of all the candidates or alternatively ranking them in order of preference**. However, at present the procedure appears to be somewhat unclear.

43. Article 39(6) refers to the power to appeal to a court of law against a decision in relation to vacancies in posts of prosecutors. Appeals have to be lodged within seven days from the announcement of the results which is an improvement on the previous text which allowed for only three days. The Superior Council of Prosecutors has to rule on the appeals within 15 days. There seems to be a power in the Superior Council to extend the period for decision where necessary. (it is assumed this is what "another reasonable period of time needed for complete and objective examination of the appeal" means.)

44. Article 41(5) provides that **inferior prosecutors are to be appointed by the Prosecutor General** at the proposal of the Superior Council of Prosecutors. The Prosecutor General may refuse to appoint a candidate. If he does so repeatedly the Superior Council must nominate another candidate. While this represents an improvement on an earlier draft, the Commission does not support the system whereby the Superior Council makes the recommendation and the Prosecutor General makes the appointment. It seems that there would be much to be said for doing things the other way around. In other words **the recommendation for appointment should come from the Prosecutor General with the Superior Council having the right to refuse to appoint a person but only for good reason**. Of course, this would require an **amendment to Article 125(2) of the Constitution**.

45. The matter could then be subject to appeal to a court of law. Normally one would expect that appointments would be made only of persons who had succeeded in the competitive examination and that they would be made in the order in which the candidates had been successful unless there was very good reason to the contrary.

46. Article 43 refers to assessment of the prosecutor. The system requires an assessment examination every five years. This procedure is somewhat doubtful. It seems that if there is to be continuing assessment of prosecutors then it should take place on an ongoing basis. For example, in Ireland there are twice yearly reviews of every prosecutor by a superior officer and the system is based on a discussion between the employee and the employer who try to reach agreement on how the employee is performing and what training or further development are required. This is intended to ensure that problems are identified at an early stage. It is difficult to justify a system which would allow persons to continue for as long as five years without pointing out that they were not performing satisfactorily and then would confront them with a negative assessment. Of course, in Moldova care has to be taken that a system does not interfere with the proper autonomy of prosecutors. However, it still seems that it **would be appropriate that there be an assessment of the performance of prosecutors at intervals much closer than five years** and that any deficiencies would be referred to and addressed as soon as they arose rather than waiting for such a long interval.

47. There are no particular comments on Articles 45 – 55 dealing with Classification Degrees. Articles 54 and 55 The rights and obligations of prosecutors also seem to be appropriate.

Guaranteeing Prosecutor's Autonomy

48. As already discussed above, the relationship between the reference to autonomy in Article 57 and the hierarchical principle needs further elaboration.

49. Any inviolability needs to be strictly limited. Is consent to lift the prosecutor's inviolability required where there is a flagrant violation of the law?

50. Article 59 deals with **promotion**. Subject to regulations approved by the Superior Council, promotion is decided by superior officers. There is a **need for a greater degree of objective transparency in this process such as recommendation of suitability by an appropriate board.** This needs to be spelled out in the Article. It is not clear who is to appraise "professional and personal achievements" but it **should not be left to the sole discretion of an immediate superior**.

Stimulation and disciplinary liability

51. Article 26 deals with "stimulation" of the prosecutor. This should refer to "rewarding" the prosecutor but this is certainly due to a problem of translation. Stimulation has an entirely different connotation in the English language! It is positive to note that the present draft limits gifts to symbolic presents. Regarding bonus pay it is important is that this is done in a very objective, impartial and transparent manner and perhaps by somebody who is not the prosecutor's immediate superior. There are some doubts about a body which is largely elected by prosecutors exercising such functions.

52. Article 62 deals with **disciplinary violations**. Some of these provisions are somewhat vague and potentially dangerous and could perhaps be used to undermine a prosecutor or to control him. Criterion (b) referring to **unequal interpretation or application of legislation is particularly dangerous**. This seems to be capable of being applied in a very subjective manner. There is a need to distinguish between failure to work and the more subjective assessment of the quality of decisions which are made. If the latter is to be second-guessed unless in a severe case where decisions are patently insupportable then there is a problem with the autonomy of the individual concerned.

53. Article 64 talks about the accountability of prosecutors where there has been severe negligence. However, **there should be personal liability on prosecutors only if they have acted in bad faith or in some very improper manner**, such, for example, as taking decisions while under the influence of alcohol or drugs.

Transfer, delegation, assignment, removal and dismissal of prosecutors

54. Articles 65-68 refer to transfer, delegation, assignment, removal and dismissal of prosecutors. Again these matters are to be on the proposal of the Superior Council and the decision is to be taken by the Prosecutor General subject to the Superior Council's overriding power. The same comments apply in relation to these matters as made earlier in relation to appointments and promotions.

State Protection and Social Security

55. These provisions seem appropriate. Article 70 prohibits diminution in the salary of prosecutors which is a valuable guarantee for independence. Article 69(5) provides for compensation for expenses incurred by prosecutors.

Consultative and self-administration bodies of the public prosecutor's service

56. In general it can be said there seem to be too many boards, some of which overlap in their activity.

The Board of the Public Prosecutors Service

57. Articles 76-80 deal with the Board of the Prosecutor's Service. Article 76 defines the Board as a consultative body. It has an external element and benefits from democratic legitymacy. However, Article 80 still describes the Board as making decisions. These two provisions appear to be in contradiction. Either the Board is to be consultative or a decision-making body. **The Prosecutor General should have the ultimate responsibility and power to take decisions** and a **board** of this sort **should be recommendatory** rather than decision-making. A body with recommendatory powers only can be put in a very strong position if it is entitled to publish its recommendations and thereby force the Prosecutor General to disclose the reasons why he rejects them if that be the case. 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 is a decision-making one then a body composed of the senior officers of the service is appropriate.

58. Article 77 is silent as to the manner in which other prosecutors who are to be on the Board are to be elected or selected. As already remarked, there is no provision stating how many deputies the Prosecutor General is to have and the question of how many other prosecutors would be on the Board would depend on this issue since the provision requires that the total membership should be limited to nine persons.

The Superior Council

59. Articles 81-99 deal with the Superior Council of Prosecutors. It is described in Article 81 as the prosecutor's self-administration and representative body and as the guarantor of their independence and impartiality. It consists of 12 members. The Prosecutor General and the Chairman of the Superior Council of Magistrates are members *ex officio*. **Two members of civil society** are elected by the Board. It would however be **preferable to have them elected or selected by Parliament**.

60. So far as concerns the election of the other members, the two members from the General Prosecutor's office and the six members from the territorial and specialized prosecutors' offices, it is not stipulated whether these are elected separately by their own offices or all together in a general meeting of prosecutors. Presumably, however, the latter would not work since the larger offices would be in a position to outvote the smaller.

61. Article 83 deals with the competences of the Superior Council. It examines the suitability of candidates for appointment to the posts of Prosecutor General and his deputies, makes proposals to the Prosecutor General for the appointment, promotion, transfer, temporary transfer, delegation, stimulation (this word should be translated into English as reward), sanctioning, suspension or dismissal of prosecutors. It also organises contests for filling vacancies and the selection of candidates for vacancies. It proposes the appointment of prosecutors to the Council of the National Institute of Justice. It approves the strategy for the prosecutors' training and examines appeals against decisions of the qualification and disciplinary boards. It produces an annual report.

62. **The election of the chairman by of the Council by its members is welcomed** (Article 85).

63. Article 97 refers to the procedure for adopting decisions. The basic provision is that decisions should be adopted through a direct vote, and should be supported with arguments. Presumably what is meant by their being supported with arguments is that they are to be reasoned decisions. Presumably this vote is to be in open as it is hard to see how a secret vote could produce a reasoned decision.

64. Article 98 provides for **appeals against decisions of the Superior Court Council of Prosecutors to a court of law**. It is not clear whether this appeal is by way of a **full re-hearing on the merits or whether it is merely a procedural appeal** on grounds of excess of jurisdiction, failure to observe proper procedures or the like. This **should be clarified**.

The Disciplinary Board

65. Articles 100-115 deal with the Disciplinary Board. Article 105 refers to the right to institute disciplinary proceedings before the Disciplinary Board. The Disciplinary Board is a body set up by the Superior Council for the purpose of examining prosecutors' disciplinary accountability. The right to institute disciplinary proceedings according to Article 105 belongs to any member of the Superior Council of Prosecutors, to chief prosecutors of subdivisions of the Prosecutor General's office, and to territorialized and specialised prosecutors. While the Prosecutor General is not expressly mentioned he is of course *ex-officio* a member of the Superior Council of Prosecutors. The matter must then be examined by the internal security section of the Prosecutor General's office who have to verify the grounds for holding the prosecutor accountable. The Disciplinary Board then examines the matter and may apply disciplinary sanctions. If suspension is an issue they may refer the matter to the Superior Council of Prosecutors.

66. There are some difficulties with these procedures. **If a member of the Superior Council of Prosecutors has initiated the proposal then clearly that person should not vote on the proposal** or take part in the decision made by the Superior Council. However, the present text does allow him or her to vote (Articles 111(2) taken together with 113) and it seems that this would be the case even for the person accused. It is important to ensure that people who can initiate disciplinary proceedings do not themselves participate in making the decision as it is necessary that such decisions are made by a fair and impartial tribunal even though there is an appeal to the Superior Council and thereafter to the courts.

The Qualification Board

67. Articles 116-130 provide for the establishment of a Qualification Board for the purposes of promoting 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 correspondence to the requirements of the post held. It is responsible for organising the capacity exam for candidates for the post of prosecuting. It is also responsible for organising the assessment exam.

Elections

68. Article 131, dealing with **principles for election**, seems **not very clear**. The election is described as taking place according to the proportional representation principle but subsection (6) seems to be talking about a system of election based on a plurality of votes rather than proportionality. It is hard to see how an election of individuals can be described as proportional.

It is not clear what is meant by subsection (5) which refers to a list containing a minimum of 10 persons. Does this mean there must be at least 10 candidates for each position?

The Budget

69. Article 140 provides that the prosecutor's service is to have its **own budget which is to be approved by the Parliament**. It appears that this is an **appropriate provision and is a good guarantee for the independence of the prosecutor's service**.

Conclusion

70. The draft law is, on the whole, clear, coherent and comprehensive. The substitution of the earlier three draft laws represents a substantial improvement. A number of the previous recommendations of the rapporteurs have been adopted.

71. A major remaining problem is the need to clarify to what extent the individual prosecutor has autonomy in decision-making or is subject to hierarchical control. In particular, it should be clear in what circumstances the prosecutor's autonomy can be overridden by a senior prosecutor.

72. The change in the definition of the public prosecutor's service in Article 1, while it aligns it more closely to the Constitution, appears to be a step away from changing the service into a service operating in accordance with the principles of a democratic society under the rule of law by removing elements of the *prokuratura*-style prosecution system which still exist. The best solution would be to amend Article 124 of the Constitution.

73. In addition, in order to further improve the text the following recommendations can be made:

- Any "supervisory role" of the prosecutor should be limited to make an appeal in cases where he or she is a party to the proceedings.
- The choice between the opportunity principle and the legality principle should be clearly specified.
- The powers of Article 6 to request information and to inspect premises are too far reaching and should be made dependent on a decision b a judge.
- The powers of the prosecutor to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings should at most be subsidiary only.
- For the appointment of prosecutors, there are a number of options which could include the Superior Council simply giving an opinion on the suitability of all the candidates or alternatively ranking them in order of preference.
- A recommendation for appointment of a prosecutor should come from the Prosecutor General with the Superior Council having the right to refuse to appoint a person but only for good reason. This would require an amendment to Article 125(2) of the Constitution.
- It would be appropriate that there be an assessment of the performance of prosecutors at intervals much closer than five years.
- The promotion of prosecutors requires a greater degree of objective transparency such as recommendation of suitability by an appropriate board. This should not be left to the sole discretion of an immediate superior.
- The disciplinary criterion of "unequal interpretation or application of legislation" is dangerously vague and could be used to exert pressure on a prosecutor.
- There should be personal liability on prosecutors only if they have acted in bad faith or in some very improper manner.
- Two members of civil society are elected by the Board. It would be preferable to have them elected by Parliament.

- If a member of the Superior Council of Prosecutors has initiated a proposal for a disciplinary action then that person should not vote on the proposal or take part in the decision made by the Superior Council.

74. The Venice Commission and the Co-operation Directorate of the Directorate General of Human Rights and Legal Affairs remain at the disposal of the authorities of Moldova for further assistance.