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COMMENTS

ON THE DRAFT LAW ON THE PUBLIC PROSECUTOR'S SERVICE OF MOLDOVA

by
Mr James HAMILTON (Substitute member, Ireland)

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General

1. I have been asked by the Directorate General of Legal Affairs of the Council of Europe to examine the most recent revision of the draft law on the Public Prosecutor's Service of Moldova. I have previously written about earlier drafts of the law, most recently in my opinion on 7 August 2007. Subsequent to that I attended a meeting in Moldova on 15 November where a further draft was discussed.

2. The most obvious difference between the 15 November draft and the most recent text is that we now have a single text dealing with all of the issues where formerly there were three separate drafts, a Law on the Organisation of the Prosecutor's Service (Draft ORG), a Law on the Status of the Prosecutor (Draft Status), and a Law on the Superior Council of Prosecutors (Draft Superior Council). The decision to consolidate the texts into a single Draft Law on the Public Prosecutor's Service reflects the opinions of the rapporteurs expressed in our previous written opinions and at the meeting on 15 November 2007. Formerly one sometimes had to consult all three texts in order to find out what the law on a particular matter would be and this was complex and confusing. The new text is much clearer than previously and has taken account of many of the earlier criticisms. I would repeat the observation I made in my written opinion of 7 August 2007 that as a general observation the draft laws appear to be well thought out and comprehensive, that it was clear that a good deal of work and thought had gone into their drafting, and with the new consolidated text this is all the more the case.

3. 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. For the most part the content of the draft remains as it was in the most recent draft three laws which were discussed at the seminar on 15 November. For this reason much of this opinion will repeat views already expressed in the written opinion on 7 August 2007 and at the seminar on 15 November.

General Provisions – Articles 1-4

4. There has been one significant change to the definition of the public prosecutor's service which is the fundamental provision underlying the whole text. According to Article 1 (Draft ORG) the fundamental function of the prosecutor's office was defined 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 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."

5. In my opinion of 7 August I commented that the effect of this 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. I went on to say the intention behind the reform was to create 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.

6. At the time, however, I raised the question of whether this particular provision would be in accordance with the existing constitutional structure of Moldova. 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."

7. In the opinion of 7 August I questioned what was meant by representing the general interests of society and defending the legal order, whether this was to be interpreted as requiring the prosecution service to exercise functions of general supervision over and above criminal prosecution, or whether this was merely to be understood as qualifying the way in which criminal prosecution was to be conducted.

8. 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 already quoted. It may be that the differences between the two texts merely reflect two different translations into English of the same provision. 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."

9. One is therefore immediately faced with 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 texts. This is a question I cannot answer definitively merely from reading the texts; it seems to me that 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, I suspect 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 I can only assume that this will continue to be the case. If I am correct in thinking that this change represents a retreat from the earlier proposal to confine the prosecutor's office to the function of criminal prosecution I would reargd this as a substantial disimprovement in the proposal.

10. 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 I infer 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.

11. 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.

12. 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 whereas the hierarchical model is more commonly found where the prosecution service is regarded as a part of the executive. However, this does not appear to raise a great issue of principle in either case. What is more a matter of concern to me 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). In addition, Article 32(5) and (6) appear to authorize 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? These are matters which require to be clarified. 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? The text is silent on whether the prosecution service of Moldova is to operate the opportunity principle or the legality principle and 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. Apart from questions of principles, it is important from a practical point of view that the extent to which a senior prosecutor can override a junior prosecutor is 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).

13. At the seminar in Chisinau on 7-8 April we 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 I cannot find anything in the text to support this view.

Competency of the Public Prosecutor's Service

14. 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 which have been initiated by the prosecutor 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. 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.

15. 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.

Criminal Investigations

16. Articles 7-12 relate to the conducting and carrying out of criminal investigation and appear to be the same as the previous Articles 5-10 Draft ORG. The 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. I understand the criteria are set out either in the criminal code or in the criminal procedure code but I am not aware of what those criteria are.

17. 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

18. Paragraphs 13 –16 are broadly the same as the old paragraphs 11-14 in Draft ORG. The provisions 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.

19. 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

20. 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.

21. 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 to me 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 we were informed that the prosecutor must refer the matter to a court of law. Furthermore, I do not entirely understand the relationship between Articles 19 and 21.

22. 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 not be done to the exclusion of the right of those persons to take action through relatives or family members or on their own initiative if in fact they are not incapable. 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.

23. Article 22 entitles the prosecutor general to apply to the Constitutional Court and ask for a ruling on the constitutionality of a law. I understand that 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. I think that 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 on the prosecutor. I would have concerns if it were the situation that only the prosecutor could bring such applications but I have been assured that this is not the case.

The Structure of the Prosecutor's Service

24. 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.) My main concern with these provisions relates to the question of hierarchy and how the hierarchical principle relates to the principle of autonomy. It seems to me 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?

25. 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.

26. It is important that all these matters should be clarified. 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 specialized prosecutor's office entitled to give such an instruction to the subordinate prosecutors in his office? 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 by giving persons affected a right to demand a review of decisions rather than a right to request a review of decisions. 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.

27. It is because of questions of this sort that I think 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 of inferior prosecutors 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.

28. 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.

29. Article 32 is an illustration of the problem that I refer 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 the comments I made in my previous written opinion 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

30. 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. I have already discussed autonomy vis-à-vis hierarchical control. The current draft no longer defines the prosecutor as assimilated to the magistrates. 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

31. 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. I think 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. I had criticized those earlier provisions as obscure. However, I do not think the answer to the problem is 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.

32. 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. (I assume this is what “another reasonable period of time needed for complete and objective examination of the appeal” means.)

33. 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, I do not support the system whereby the Superior Council makes the recommendation and the Prosecutor General makes the appointment. It seems to me 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. 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. I would be somewhat concerned about giving the power of nomination to a representative body such as the Superior Council particularly if it takes its votes in secret and may be open to influence from elected prosecutors.

34. Article 43 refers to assessment of the prosecutor. The system requires an assessment examination every five years. I am somewhat doubtful about this procedure. It seems to me if there is to be continuing assessment of prosecutors then it should take place on an ongoing basis. For example, in my own country 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 their proper autonomy of prosecutors. However, it still seems to me 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.

Classification Degrees

35. Articles 45 – 55 deal with these. I have no particular comments on these articles.

The rights and obligations of prosecutors

36. Articles 54 and 55 seem to me to be appropriate.

Guaranteeing Prosecutor's Autonomy

37. The reference to autonomy in Article 57 is better than the earlier references to independence but the relationship between these provisions and the hierarchical principle needs further elaboration.

38. I have already commented on the inviolability of the prosecutor and I think 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?

39. 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

40. Article 26 deals with "stimulation" of the prosecutor. This should refer to "rewarding" the prosecutor. Stimulation has an entirely different connotation in the English language! I had some doubts about the idea of making expensive presents to prosecutors as rewards and note that only symbolic presents are now to be allowed. 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. Again I would have doubts about a body which is largely elected by prosecutors exercising such functions.

41. 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. I would be a little nervous about criterion (b) referring to unequal interpretation or application of legislation. This seems to me to be capable of being applied in a very subjective manner. I think 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. I am not sure why public expression of agreement with the decision of a colleague should be regarded as a disciplinary matter although I would accept that public expressions of disagreement may well be thought improper as likely to undermine the colleague concerned.

42. Article 64 talks about the accountability of prosecutors where there has been severe negligence. I would be doubtful about imposing any personal liability on prosecutors unless 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

43. 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. I have the same comments in relation to these matters as made earlier in relation to appointments and promotions. A change in the new text is that Parliament can no longer dismiss Deputy Prosecutors-General on the proposal of the Superior Council of Prosecutors.

State Protection and Social Security

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

The Board of the Public Prosecutors Service

45. Articles 76-80 deal with the Board of the Prosecutor's Service. Article 76 defines the Board as a consultative body. 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. My personal view is that the Prosecutor General should have the ultimate responsibility and power to take decisions and that 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, I would have thought it likely that it would 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.

46. 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

47. 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. 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.

48. 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.

49. Article 85 provides that the Council elects its own chairman. This is an improvement on the earlier text.

50. 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.

51. 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

52. 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 specialized 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 sanction. If suspension is an issue they may refer the matter to the Superior Council of Prosecutors.

53. I think 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 not allow him to vote (Articles 111(2) and 113). I think 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. There is an appeal to the Superior Council and thereafter to the courts.

The Qualification Board

54. 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

55. Article 131 dealing with principles for election is to my mind 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 to me 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

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

Conclusion

57. 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 recommendations of the rapporteurs have been adopted. 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. 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.