Strasbourg, 28 May 2008 **CDL(2008)057***

Opinion 467/2008 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

by
Mr Carlos SOUSA MENDES
(Portugal, Expert for the Co-operation Directorate of the Directorate General of Human Rights and Legal Affairs of the Council of Europe)

I - Introduction

I have been invited by the Directorate General of Legal Affairs of the Council of Europe to examine and give my opinion to the draft legislation on the Public Prosecutor's Service of the Republic of Moldova.

After two meetings - first one in 26-27 July 2007 and the second in 15 November 2007 - to discuss the draft law on the Public Prosecutor's Service of Moldova with the Working Group established by the Moldovian General's Prosecutor Office and also with representatives of civil society, the third workshop took place last 7 th April with the objectives:

- *To discuss the latest amendments to the draft Law on Public Prosecution of the Republic of Moldova;*

- *To evaluate until what extend the proposed solutions are in line with the Constitution of the Republic of Moldova (in a view of opinion of the Venice Commission).*

I have already given my written comments about earlier drafts of the legislation and now, that we achieve a single and consolidated text dealing with all issues that before were dealed in three separated texts, it's important to remark that the new draft Law on the Public Prosecutor's Service is much clearer and has taken into account a lot of criticisms, opinions and comments made by the experts.

The new draft law is not only more clear but also, on the whole, more comprehensive and coherent.

Any way because the most part of the provisions of the original three texts remains, I have to insist, and repeat, some opinions already expressed not only in my last written comments but also during the mentioned three workshops.

II - General remarks

1. The draft Law on the Public Prosecutor's Service (LPPS) is divided in 5 titles:

I – Organization of the Public Prosecutor's Service
II – The Status of the Prosecutor
III – Consultative and Self-Administration Bodies of the Public Prosecutor's Service
IV – Auxiliary Personel and the Budget of the Public Prosecutor's Service
V – Final Provisions

2. Before we start our comments, following those five titles, it's necessary to underline that, appreciated in the light of the principles that define the Public Prosecution Service in democratic society governed by the rule of law, the draft LPPS is in accordance with the constant guiding by the *Council of Europe Recommandations (2000) 19* and *(2003) 1604*.
3. Concerning the accordance with the Constitution of the Republic of Moldova, I think that it's possible (and important) to have a definition of the public prosecutor's service on the LPPS saying that the prosecution service is a part of the judiciary.

In the article 1 of the new revised text the Public Prosecutor's Service (PPS) is now defined as «*an institution which represents the general interests of the society and protects the law and order and the citizen's rights and freedoms, carries out guiding of criminal prosecution and exercises it directly, represents the accusation in courts, in accordance with the law*».

The article 124 (1) of the Constitution of Moldova, included in the Third Section (Public Prosecution) of Chapter IX, entitled JUDICIARY, established that «*The prosecution system shall represent the general interests of society, defend the rule of law and citizen's rights and liberties, it shall also supervise and exercise, under the law, the criminal prosecution and bring the accusation in the courts of law*».

The definition of the public prosecutor's office is fundamental not only for the status of PPS but also for the independence and transparency of the judicial system as whole .
As an independent national institution, inside the judicial system, which performs the functions provided for in the Constitution, the Law on Public on the Public Prosecutor's Service, other legislation as well as international treaties (Article 3), the prosecutor's service must also be (and should be, according to the mentioned constitutional provision and systematization) defined – like it was at former draft - as a public institution which activates in the framework of the judicial authority.

4. Likely, as a part of the judiciary, it's important to "underline" that the prosecutor's office is independent in its relations with judicial authority as well as with other authorities.
The reference in Article 2(3) to independence from the authority of legislative and executive powers as well as the influences and interferences of other bodies and authorities of the state needs also, from my point of view, to be complemented with the principle of independence in its relations with judicial authority.

5. The actual definition of prosecutor (article 4) - the "official person by whom the Public Prosecutor's Service exercises its competencies" – is "poor".
Considering that the central function of public prosecutors, as public authorities, is "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 the individual and the necessary effectiveness of the criminal justice system" - article 1 of *Recommendation 2000 (19)*;

And also bearing in mind that "the prosecution system shall represent the general interests of society, defend the rule of law and citizen's rights and liberties» - article 124 (1) of the Constitution of Moldova - it seems that the definition contained at article 1 of the draft Law on the Status of the Prosecutor it was a better one: «*The prosecutor is the official person who, within the limits of prerrogatives set by the Constitution of Moldova, represents the general interests of the society, protects the legal order, citizen's rights and freedoms, conducts and carries out the criminal investigation, represents the accusationin the courts of law, and also exercises other prerrogatives provided by the law, taking in consideration human rights and the efficency necessary for the criminal justice system*».

6. Another issue that I think it's necessary to be revised is the fact that the organization of PPS, as drawn on the draft law, contains too «many» boards covering the same reality: the prosecutor's service and his efficiency.

Two main bodies are perhaps enough:

a) one «external» and with a democratic legitimation (elected members and some of them appointed by civil society):
   - a Superior Council of Prosecutors where, when in plenary meetings, all members (ex officio members, elected members and members of civil society) have a seat and also integrated (or sub-divided) with two branches: the qualification board and the disciplinary board. The meetings of qualification and disciplinary sections must be attended, in a rotative system, by a pre-defined number of the members.
b) another «internal», only with consultative competences and directly linked to the Prosecutor General:

- the Board of the Prosecutor's Service with a precise definition, including objectives and competences, in order to assure that is a real consultative body and not a body to be provided with deciding powers.

7. The article 6 - competences of the prosecutor – more than attribution deals with various powers conferred on the prosecution service that, in some cases, are wide and vague and, because of that, need to be better defined with reference to the judiciary authority.
The provision (article 6 (2)) saying that these competences «can be broaded or limited only by the law» doesn't seem to be clear enough in what concerns the judicial safeguard of the rights and liberties.

III – Organization

1. Most countries have accepted the need for criminal justice systems in a democratic society to have a strong prosecution system.
The *Council of Europe Recommendation 2000 (19) on the Role of Public Prosecution 2000 (19)* makes a clear distinction between the prosecution and judicial functions and at the explanatory memorandum it's stated that while the task of public prosecutors as of 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.
Because of that need to have a strong prosecution system and beeing the prosecutions service not only an independent body but also, at same time, part of the judiciary it's important to ensure that the model of organization is suported by clear provisions defining the principles of authonomy, liability and hierarchy.

2. The provisions related with the conducting and carrying out criminal investigations are appropriated to ensure the leading role of the prosecutors and to control actions of the police. However, and because prosecution service and police are close «partners», playing both crucial roles, it seems to me that the prosecutor's empowerment to supervise police investigations – supervision over the legality of the criminal investigations - needs to be clear defined relating to subjects as non-fulfiment or inappropriate fulfilment of professional duties by criminal investigation officers and the «rigth» to initiate sanctioning of violations in these situations (article 9, (2), c)).
Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest. Any way the relationship between these two major players in the administration of criminal justice are very important and must be based in a co-operation.

3. In several national systems we can find the hierarchy in the organisation of the prosecution services has an advantage of unifying proceedings, national and regionnaly, which means more security and justice for the citizens.

The hierarchy - as defined at the article 32 (6) – "*consists in the subordination of the lower level prosecutors to superior prosecutors, according to the provisions of the law, as well as in obligation to enforce and observe orders, dispositions, indications and instructions they receive*".

However the principle of hierarchy is related with the principles of autonomy and responsability or liabilty.

The public prosecutors are not only hierarchically subordinate but they are also authonomous and subject to liability, principle that can be defined as into their being answerable, under the

law, for the fulfilling of their duties and the compliance with the directives, orders and instructions they received.

And because of those principles of authonomy and liability and because there are also limits to the direction powers (article 58 (7)) it's necessary to specify exactly the "limits and borders" of the power of the Prosecutor General to revoke, suspend or cancel acts issued by prosecutors, if they run counter to the law and (article 28 (2) d)). The same for the power of other hierarchically superiors to cancel decisions made by the prosecutor which are appraised as beeing illegal (article 57 (4)).

IV – Status

1. **"**Prosecutors contribute to through their activity to the administration of justice and shall be assimilated to magistrates (..)" – article 2 (1) of the draft Law on the Status of the Prosecutor.

The draft that we are analyzing doesn't define the prosecutor as assimilated to magistrates, on the contrary to what was previously in one of the drafts, and which I believe that it should not be eliminated.
as it was previously in one of the drafts, and believe that it should not be eliminated.

The guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August to 7 September 1990) established that the "prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession "(article 3) and also that "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability." (article 4).

> **Impartiallity, independence, objectiveness, defense of the rule of law and citizen's rights and liberties, all of these are principles and obligations that justify the assimilation as magistrates of the prosecutors.**

2. The Prosecutor General shall be apointed by the Parliament, at the proposal of the Speaker of the Parliament for a mandate of 5 years - article 41 (1).

The Superior Council of Prosecutors examines the correspondence to criteria for candidates to the post of Prosecutor General - article 83 (1) a).

To the post of Prosecutor General can be appointed the person who has a lenght of service in the bodies of Public Prosecutor's Office of at least 15 years – article 37 (2).

These provisions need to be improved because the procedure and also the role of the Superior Council of Prosecutor in this procedure is not clear.

3. The hierarchically inferior prosecutors shall be appointed by the Prosecutor General at the proposal of the Superior Council of Prosecutors – article 41 (5).

Nevertheless such proposal can be refused by the Prosecutor General who only has to inform the reasons for such refusal and if he repeatedly refuses to appoint a candidate proposed by the Superior Council of Prosecutors, the later shall propose another candidate – article 41 (7) (8).

The Superior Council of Prosecutors is the prosecutor's self-administration and representative body that, regarding prosecutor's professional career and between other competencies, examines the correspondence to criteria for candidates to the post of Prosecutor General and his/her deputies.

And if the Superior Council of Prosecutors is able to examine criteria for the candidates to the high levels of Prosecution´s Services, I can't understand why it can only propose the appointement of the inferior prosecutors when we knows that it occurred after full filling of certain legal conditions and criteria, including the need of graduation from the National Institute of Justice (in case of candidates who are graduates of prosecutor's initial training courses) and after having passed the contest for occupying vacancies in post of prosecutors.

In some specific posts (for instance at military's prosecutor's offices) it's perhaps admissible that the Superior Council of Prosecutors made recommendations for appointment and that the Prosecutor General has the right to refuse the appointment. But the normal system of procedure to the appointement of the inferior prosecutors should remain only under the competence of the body charged of the prosecutor's self-administration

The principle of self-administration and representative body of the prosecutors and also the role of guarantor of prosecutors autonomy, objectivity, impartiality and inviolability demands, from my point of view, that the competencies to appoint, promote, transfer, stimulate, suspend and dismiss prosecutors are exercised by the Superior Council of Prosecutors not as proposals but as responsable and legal decisions.

4. All the proposals on promotion should be a recommendation coming from the hierarchically superior prosecutor or from the Qualification Board and with the Superior Council having the competency to agree or refuse.

5. If in my opinion the idea of awarding any distinctions for success in activity is a good idea, I also must confess that in what concerns to the possibility of "making a symbolic present" (article 60 (1)c)) this idea must be improved, for instance, with a supplementary remuneration. Good performance and merit must be rewarded but not with gifts.

6. Some of the provisions concerning disciplinary violations are vague and susceptible of being misinterpreted or applied in a subjective manner. For instance expressions like «incorrect interpretation or application of legislation», «deliberate violation of law», and «dishonourable attitude» are not only vague but also unspecific.

It seems to me also necessary to specify which are the «violations of the prosecutor ethics» that can «seriously affect the moral image of the prosecutor». Ethics and Disciplinary Liability are not the same and I think there is a need to distinguish quite well between violations of any professional code of ethics and disciplinary account for violation of duties and for behaviours that prejudice the service interest and the image of the Public Prosecution Service.

V – Consultative and Self-Administration Bodies

1. I wonder if it weren't best that the two members of the civil society were elected or selected directly by the Parliament. Nevertheless, I can't understand the reason why they should be proposed by the Board of The Prosecutor's Service.

2. From my point of view the sessions of the Superior Council should be classified in ordinary and extraordinary sessions. The ordinary sessions should occur in a regular schedule, for instance at least one session per month and the extraordinary session whenever necessary when convoked by the President or at least 7 members.

3. It's not quite clear how the decisions shall be adopted through secret vote and at the same time supported with arguments.

How is it possible to support, and justify with arguments, decisions determined by secret votes and concerning discipline, transfer and dismissal, decisions affecting the rights of the prosecutors?

Secret vote shall only be used for elections, for instance election of persons.

It seems necessary to define a delay to submit (and also to appeal) the decision on the disciplinary proceedings, from the moment of the adoption of the decision, to the SPC for validation.

VI – Auxiliary Personnel

1. The management and performance of specialized auxiliary and technical personnel should be taken into account based on managerial principles, strategies and techniques.

2. The ever more complex legal and social realities and the consequent inter-institutional networks faced by the Prosecutor's Services require new, more flexible and plastic organisation structures.

The structure of the Prosecutor's Service, the composition of its bodies as the staff (specialized auxiliary and technical personnel) and organization of the activity of prosecutor's offices must be according to the most important justice management principles.

Any way I suppose that it must be considered how to assure the access by the public and mass media to information related to the activity of Public Prosecutor's Service (article 2 (1))

In Portugal, for this purpose, we have press office that has been set up by the Prosecutor's General Office in 1998 and is under the supervision of the Prosecutor General.

The Recommendation R (95) 12 of the Committee of Ministers to Members States on the Management of Criminal Justice recommends (Appendix, 18) that *«stronger emphasis should be placed on developing better public relations, particularly to address specific needs and concerns of the users of criminal justice, the mass media, the voluntary sector (victim's associations, for example). Citizens and their democratic institutions (parliaments, local authorities)»*

CONCLUSIONS

I - Appreciated in the light of the principles that define the Public Prosecution Service in democratic society governed by the rule of law, the draft Law on the Public Prosecutor's Service is in accordance with the constant guiding by the *Council of Europe Recommendations (2000) 19* and *(2003) 1604*;

II – As an independent national institution, inside the judicial system, which performs the functions provided for in the Constitution, the Law on Public on the Public Prosecutor's Service, other legislation as well as international treaties, the prosecutor's service should also be defined as a public institution which activates in the framework of the judicial authority;

III – Also the definition of prosecutor must be improved and taken into account – as it was defined before – that the prosecutor is the official person who represents the general interests of the society, protects the legal order, citizen's rights and freedoms, conducts and carries out the criminal investigation, represents the accusation in the courts of law, and also exercises other prerogatives provided by the law, taking in consideration human rights and the efficiency necessary for the criminal justice system;

IV – The number of bodies or boards covering the same reality - the prosecutor's service and his efficiency – should be reduced perhaps only to one or two;

V - Some other suggestions of improvement of the draft are mentioned along the report.