

10-1-2001

Moldova's Criminal Justice System: Criminal Protections, Current Practices, and Proposed Reforms

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Cover Page Footnote

We want to give special thanks to the following organizations for their help in this project: American Bar Association's Central Eastern European Initiative (ABA/CEEI), the Organization for Security and Cooperation in Europe (OSCE) Mission to Moldova, and U. S. State Department, Moldova Desk and Bureau of Democracy, Human Rights, and Labor.

ARTICLE

MOLDOVA'S CRIMINAL JUSTICE SYSTEM: CRIMINAL PROTECTIONS, CURRENT PRACTICES, AND PROPOSED REFORMS

Victor Orindas
Jennifer E. Sooy
*Kathleen A. Sooy**

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* In 2000, we were invited to teach American Criminal Procedure as Visiting Lecturers by the Civic Education Project (CEP) at Moldova State University Law School (MSULS) and Victor Orindas, a Moldovan Criminal Law professor and former prosecutor, was invited by CEP to be an Eastern Scholar to do research. CEP is a private, international, non-profit organization that supports higher education reform in societies engaged in political and economic transition. In addition, it works to develop the capacity of faculty and students in Central and Eastern Europe and the former Soviet Union to teach and carry out research in the social sciences, law and humanities. CEP is affiliated with Yale University and the Central European University in Budapest, Hungary. It is funded primarily by Mr. George Soros. We want to give special thanks to the following organizations for their help in this project: American Bar Association's Central Eastern European Initiative (ABA/CEEI), the Organization for Security and Cooperation in Europe (OSCE) Mission to Moldova, and U. S. State Department, Moldova Desk and Bureau of Democracy, Human Rights, and Labor.

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MOLDOVA'S CRIMINAL JUSTICE SYSTEM: CRIMINAL PROTECTIONS, CURRENT PRACTICES, AND PROPOSED REFORMS

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I. INTRODUCTION

The Republic of Moldova, a former Soviet bloc country, is located east of Romania and west of the Ukraine, near the Black Sea. Historically known as Bessarabia, it was controlled by Romania, Russia, the Ottoman Empire and the former Soviet Union until its independence on August 27, 1991.¹ It adopted a constitution in 1994, and the people rejected unification with Romania the same year. Since its independence, Moldova has been making a transition into a democratic society. It has been working to implement democratic and market reforms.

There is concern about Moldova's future because of the recent Parliamentary elections and selection of a Communist President. Until recently, the people directly elected their President. Then, on July 5, 2000, the Moldovan Parliament amended its Constitution and Moldova became a Parliamentary Democracy. Today, the Parliament has the power to elect the President, and it also has some additional powers, while the President has less authority.²

Parliamentary elections were held on February 25, 2001. Before the election, the Communist Party held slim control over the Parliament due to support from other parties. After the election, the Communists acquired a large majority (71 out of 101 seats), although they received just over fifty

¹ Steven Woehrel, *Moldova: Basic Facts*, Congressional Research Service, *The Library of Congress*, 95-403F, 1 (May 26, 1998).

² N.Y. Times, *Moldova Communists Gain In Elections* <<http://www.nytimes.com/2001/02/25/world/26WIRE-MOLDOVA.html>> (last accessed Feb. 26, 2001).

percent of the vote.³ On April 4, 2001, the Parliament elected the leader of Moldova's Communist Party, Vladimir Voronin, to be President of Moldova.⁴ The Moldovan people appear to have chosen to strengthen their ties with Russia, in hopes of improving their country's economy and living conditions. With the election of Mr. Voronin it appears as though they have made their choice to look eastward for support and to resolve the stalemate with Transnistrian officials.

Moldova is the second smallest former Soviet Republic and also one of the poorest. It is known in all of Eastern Europe and Russia for its excellent wine and champagnes, and its beautiful women. It has an agriculturally based economy. Moldova remains dependent on Russia for its natural gas and oil since it has limited energy resources. Much of its energy shortages are due to the fact that it is unable to pay its energy bill to Russia. In the winter, some Moldovan villagers chop down parts of their orchards for firewood to heat their homes. Villagers often have no heat and electricity and must go to a well for water. City dwellers often experience unpredictable and temporary shortages of electricity and natural gas.

Four million people live in Moldova. The largest ethnic group is the Moldovan group followed by Ukrainians and Russians as well as the Gagauz (a Turkish minority who are Russian speakers); Bulgarians, and Jews round out the population.⁵ There is ethnic tension in Moldova between the Russian speakers and the Romanian speakers.

This tension is illustrated by the fact that shortly before Moldova declared its independence, the Dniestr region (the most industrialized area on Moldova's most eastern border) separated from Moldova in 1990.⁶ The "Dniestr Republic" is largely populated with Russians and Ukrainians. Some Moldovans feared that Moldova would reunite with Romania, and they wanted independence or membership in a Moldovan Confederation.⁷ Conflict broke out in 1992 and a cease-fire was declared the same year.⁸ Units of Russia's Fourteenth Army (operative group of Russian forces)

³ International Foundation for Election Systems ("IFES"), *2001 Parliamentary Elections, Moldova* <<http://www.ifes.md/elections/electionresults/2001parliamentary>> (last accessed May 11, 2001).

⁴ IFES, 2001 Presidential Elections, Moldova <<http://www.ifes.md/elections/electionresults/2001presidential>> (last accessed May 11, 2001).

⁵ Stephen K. Batalden & Sandra A. Batalden, *The Newly Independent States Eurasia, Handbook of Former Soviet Republics* 61 (2d ed., ORYX, 1997).

⁶ Woherel, *supra* n. 1.

⁷ Charles King, *The Moldovans, Romania, Russia, and the Politics of Culture* 189 (Hoover Inst. Press, 2000). See also Woherel, *supra* n. 1, at 2.

⁸ Batalden, *supra* n. 5.

division still remain inside the republic's borders. Today, there exists a truce and on-going negotiations to try to resolve the Dniestr issue and to get Russian troops out of Moldova.⁹

The purpose of this article is to educate American lawyers about the laws on searches, arrests and pretrial detention, interrogations and confessions, accused rights, and the responsibilities of the prosecutor, defense attorney, and judge, in the Moldovan criminal justice system. Also, another purpose is to examine current practices and proposed reforms outlined in the Draft Code of Criminal Procedure ("Draft CPC"). This article does not address the criminal justice system in the "Dniestr Republic."

It is important that American lawyers understand the criminal justice system of former Soviet Republics so they can better appreciate the difficulties these countries face in making the transition from an inquisitorial system of criminal justice to an adversarial system. Moldova is presently making efforts to transform its criminal justice system into an adversarial one. In addition, it is making some progress toward providing the accused with more criminal protections, reducing the power and influence of the prosecutor, strengthening the independence of the judiciary, and working to ensure equality under the law.

II. SEARCHES

A. Current Law

The Constitution of the Republic of Moldova allows the prosecutor and criminal investigation bodies (law enforcement bodies), such as the Ministries of Internal Affairs (the police), Justice, Defense (military forces), and National Security (formerly the KGB) to perform searches in accordance with the law.¹⁰ The Criminal Procedure Code of the Republic

⁹ King, *supra* n. 7. "By the end of the 1990s, the size of the [Russian forces] had decreased considerably, to fewer than 2,500 officers and men. Some military equipment had been destroyed or withdrawn to Russia, but huge stockpiles remained in the arms depot in Cobasna in northern Transnistria." King, *supra* n. 7, at 202. See Woherel, *supra* n. 1. On September 25, 2001, the United States Helsinki Commission held a hearing on the situation in Moldova. The Helsinki Commission found that "the Russian Government has made considerable progress in removing its armed forces and military equipment from Moldova . . . Russian armed forces [are] to be withdrawn by the end of 2002." John Finerty, CSCE staff adviser, United States Commission on Security and Cooperation in Europe, 107th Cong., CSCE Digest <http://www.csce.gov/digest_text.cfm?digest_id=17> (last accessed Dec. 11, 2001).

¹⁰ Mold. Const. art. 25(2). The Moldovan Constitution states: "[s]earching . . . a person shall be permitted only if based on the authority of law." *Id.* "The penal pursuit is conducted by the prosecutor

of Moldova ("CPC"), as in Soviet times, permits the prosecutor to authorize a search of a person, his residence or business.¹¹ In an extraordinary situation, agents can perform the search without the prosecutor's authorization. The prosecutor has to be informed about the search within twenty-four hours. In Moldova, no one can explain clearly which are the extraordinary situations where law enforcement bodies can conduct this type of search. There have been several Moldovan businesses whose offices were searched without a prosecutor's permission because the police considered the situation "extraordinary." Unlike in the United States, the Moldovan prosecutor is neither neutral nor detached. Because he can either play an active role in the search and investigation, or oversee other investigative bodies, it is nearly impossible for the prosecutor to remain impartial and detached.

Under the CPC, three types of searches may be performed during the pretrial investigation. Articles 148-150 of the CPC contain provisions regarding house searches, Article 152 of the CPC addresses searches of persons, and Article 153 of the CPC describes searches of diplomatic officials.

The Moldovan Constitution outlines limited circumstances for the search of high-level government officials, such as judges, the President, and members of Parliament. Moldovan judges can be searched only after the Higher Council of Magistrates (a supreme administrative organ for judges) permits the search. The President of the Republic of Moldova may be searched after he has been impeached as provided by the Moldovan Constitution.¹² The Moldovan Constitution protects members of Parliament, in most cases, from being searched. In order for law enforcement bodies to search a Member of Parliament, the Parliament of the Republic of Moldova must first give its permission and can only do so

and by criminal investigation bodies . . . within the Ministry of Internal Affairs, Ministry of National Security, Ministry of Defense, Ministry of Justice, Ministry of Finance, Ministry of Environment; Ministry of Labor, Social, and Family Protection, Department of Standards, Metrology and Technical Surveillance." Draft Code of Criminal Procedure of the Republic of Moldova at art. 251 (ABA/CEELI, Draft English translation, 2000) (Mold.). The current Code of Criminal Procedure of the Republic of Moldova permits the prosecutor and the above-mentioned investigative bodies to conduct searches and interrogations in Moldova. Code of Criminal Procedure of the Republic of Moldova at art. 101.

¹¹ Mold. C. Crim. Proc. at arts. 148 - 50.

¹² The Moldovan Constitution provides for the impeachment of a President. It states that "[b]ased on the majority of at least two thirds of the votes cast by its members, Parliament may decide to indict the President of the Republic of Moldova if the latter commits an offense. In such a case it is the Supreme Court of Justice which has the competence to sue under the rule of law, and the President will be removed from office on the very day that the court sentence convicting him has been passed as definitive." Mold. Const. art. 81(3).

after the member receives a hearing by the Parliament.¹³ While the ordinary Moldovan citizen may be subjected to a police search, rarely are their representatives and judges subjected to a police search. Representatives of Parliament and the President, including judges, must be made subject to the same laws as ordinary citizens to increase compliance and respect for the law.

Law enforcement bodies may search a person's home only if they do so according to the rule of law.¹⁴ If they have any information, which confirms that the suspect has items in his home, which could serve as evidence of criminal activity, they may perform a search. Law enforcement bodies do not need "probable cause" to conduct a search. Rather, they only need some evidence that items they wish to search for and seize are connected with a crime. The law (Article 90 of the CPC) requires the opening of an official criminal file before a search be conducted. In addition, the criminal investigator, who is appointed by the prosecutor to investigate the case, documents the reason for the house search in a "special decision" which must get the prosecutor's approval.

The police must conduct their search of a person's home during the day. They may only conduct a search at night in case of a flagrant crime.¹⁵ The law enforcement bodies may search in any place of the residence and also search all persons present. When searching a home the police must be accompanied by two witnesses, known as "assistant witnesses." These two individuals observe the search and they ensure that the police do not plant guns, narcotics, or other illegal contraband in a person's home. This law is supposed to protect individuals against police abuse. This practice is one of the legacies of Soviet era. While the use of two witnesses safeguards an individual from an illegal search, witnesses can be bribed, and thus, the very purpose of their presence at the search is undermined.

In Moldova, the government is responsible for ensuring the privacy of communications, like letters, telegrams and postal deliveries.¹⁶ "By law the prosecutor's office must authorize wiretaps and may do so only if a

¹³ Mold. Const. art. 70(3). "Except in cases of flagrant infringement of law members of Parliament may not be . . . searched . . . without Parliament's assent, after prior hearing of the member in question." *Id.*

¹⁴ Mold. Const. art. 29(1). The Moldovan Constitution states that "[t]he domicile is inviolable. No one may enter upon or stay on the premises of a domicile without the owner's consent." *Id.* Searches . . . in a domicile may be ordered and carried out in accordance with the rule of law." *Id.* art. 29(3).

¹⁵ U.S. Dept. of State, *Country Reports on Human Rights Practices 2000* <<http://www.state.gov/g/drl/rls/hrrpt/2000/eur/index.cfm?docid=870>> (last accessed June 21, 2001). "Except for cases where an obvious offense has been committed, night searches are forbidden." Mold. Const. art. 29(d)(4).

¹⁶ Mold. Const. art. 30.

criminal investigation is underway.”¹⁷ In its Annual Report of 1999, the International Helsinki Federation for Human Rights (“Helsinki Federation”) stated:

“[t]he Moldovan Law on Telecommunications and the Law on Postal Services violated the right to secrecy of correspondence and telephone conversation. They vested the prosecutor with the right to order tapping phones and to open private mail and to confiscate it. Complaints filed against such acts were dealt with by the same body, the Prosecutor’s office.”¹⁸

B. Current Practices

The Moldovan Constitution clearly prohibits searches unless they are conducted in compliance with the law. The U.S. Department of State, however, in its Country Reports on Human Rights Practices of 2000 (“State Department”) found that “in some instances searches are conducted without warrants.”¹⁹ Furthermore, the State Department observed that where the police fail to respect the law on searches, “the Constitution . . . does not specify the consequences if the law is not respected.”²⁰ Unlike the United States, the Moldovan courts do not exclude evidence gathered through an illegal search. They have not adopted the exclusionary rule and it is not a provision in the Draft CPC.²¹ Because there are no legal ramifications for police misconduct for conducting an illegal search, the police lack any incentives to comply with the law. Moldovans can challenge illegal search warrants in court if they believe their house was unlawfully searched.²²

While the Moldovan Constitution protects an individual’s privacy in his mail and telephone conversations, the law currently enables the prosecutor, not a neutral judge, to authorize wiretaps and to open a person’s mail during a criminal investigation. The State Department noted its concern that “[i]t is widely believed that security agencies continue to use

¹⁷ State Department 2000, *supra* n. 15.

¹⁸ International Helsinki Federation for Human Rights, Annual Report 1999, Moldova <<http://www.inf-hr.org/reports/ar99/ar99mol.htm>> (last accessed June 27, 2001).

¹⁹ State Department 2000, *supra* n. 15.

²⁰ State Department 2000, *supra* n. 15. See U.S. Dept. of State, 1999 Country Reports on Human Rights Practices <http://www.state.gov/www/global/human_rights/1999hrpreport/moldova.html> (last accessed on Jan. 13, 2001).

²¹ State Department 2000, *supra* n. 15.

²² Mold. C. Crim. Proc. at art. 196. The U.S. State Department disagrees and states that “[t]here is no judicial review of search warrants.” State Department 2000, *supra* n. 15.

electronic monitoring of residences and telephones without proper authorization.”²³ Furthermore, the State Department explained that “in practice, the prosecutor’s office lacks the ability to control the security organizations and police and prevent them from using wiretaps illegally.”²⁴ In addition, the International Helsinki Federation found that in 1998: “Moldova still lacked a law on personal data and privacy.”²⁵

For example, all of our personal mail was opened. After going to the post office to pick up packages from home, we discovered that our packages had been opened and resealed. Also, on one visit to the post office to pick up a box, we had to go into a separate room while one of the custom’s officials searched our box. Early in our stay, it was brought to our attention that there is absolutely no privacy in one’s personal mail and that one must expect that it will be opened and read before it is delivered, and that any valuables will be removed.

C. Proposed Reforms

The Draft CPC makes it clear that, if enacted, law enforcement bodies will need a search warrant issued by a court in order to search a person and his home.²⁶ Furthermore, they must obtain a court ordered warrant to search a person’s mail or tap his telephone.²⁷ No longer would the prosecutor be able to authorize a search. He would have to request that the court do so. Article 130(3) of the Draft CPC provides that an “investigation judge” will authorize search warrants that must be based on

²³ State Department 2000, *supra* n. 15.

²⁴ State Department 2000, *supra* n. 15.

²⁵ Helsinki Federation, *supra* n. 18.

²⁶ Mold. Draft C. Crim. Proc. at art. 13(7). Article 13(7) of the Draft CPC states that “[t]he search and bodily search . . . of the person can be made without consent of the individual or of his/her legal representative only based on a court decision, except for the cases provided by the present Code.” *Id.* In addition, Article 14(1) of the Draft CPC states that the “[i]nviolability of residence is guaranteed. During the criminal procedure no one has the right to enter somebody’s residence against the will of the individuals living there, except for the cases and in the way provided by the present Code.” *Id.* at art. 14(1). Furthermore, Article 14(2) states that “[s]earches of the residence . . . can be carried out only based on court decision, except for the cases provided in the present Code. In cases of carrying out procedural actions without a court decision, the body authorized to carry out these actions has the obligation within 24 hours since the action was ended, to submit the obtained materials to the court to check the legality of the action.” *Id.* at art. 14(2).

²⁷ Mold. Draft C. Crim. Proc. at art. 16(1), 16(2). Article 16(1) and (2) state that “[t]he right to secrecy of letters, telegrams, and other mail, of telephone conversations and of other ways of communication is ensured by the state. No one can be deprived of or limited in this right. The restriction of the right provided in Paragraph one of the present article will be allowed only based on a court decision under the conditions of the present Code.” *Id.*

“an explained and justified order issued by the penal pursuit body.”²⁸ The investigation judge is not involved in the investigation process.

By transferring the power to issue a search warrant from the prosecutor to a judge, the prosecutor will have his request for a warrant reviewed by an individual not directly connected with the case. However, the Draft CPC does not require that the investigation judge be neutral and detached. In addition, the Draft CPC explains how the law enforcement bodies may conduct a search. They may not search a person's home at night unless “delay is not possible.”²⁹ In addition, when conducting the search, the authorities must show the warrant to the person subject to the search.³⁰ During the search, they can open locked rooms when the subject of the search refuses to open them. However, they must avoid breaking locks, doors and other objects.³¹

It appears as though the Draft CPC does not specify that the search warrants be specific as to the place(s) to be searched. Therefore, this still leaves the law enforcement bodies with full authority to conduct a general search and the accused remains less protected from potential police abuse. Also, the two assistant witnesses need not be present at the search, if the accused gives consent and his attorney is present.³² Furthermore, law enforcement bodies must show all items that are seized by the authorities to the assistant witnesses and to all parties present at the search.³³ Persons present at the search, including the person searched will be able to make objections to the manner in which the search is being conducted, and to have those objections recorded by the law enforcement authorities.³⁴ Finally, it appears if the authorities fail to get the investigation judge's permission to conduct a search, there will be judicial review of that search.³⁵

²⁸ *Id.* at art. 130(3).

²⁹ *Id.* at art. 133(1).

³⁰ *Id.* at art. 133(3). Article 133(3) states that “[b]efore starting to do a search . . . the penal pursuit body is obliged to show the respective order to the person who is subject to a search or seizing. The person will sign to confirm his/her being acquainted with the order.” *Id.*

³¹ *Id.* at art. 133(7). Article 133(7) of the Mold. Draft C. Crim. Proc. states that “[d]uring search, . . . the penal pursuit agent has the right to open locked rooms and storehouses, whenever the owner refuses to open them voluntarily. S/he will nevertheless avoid breaking locks, doors and other objects, if this is not necessary.” *Id.*

³² Generally, two assistant witnesses have to be present to assure the impartiality of the search. *See Id.* at art. 132(1).

³³ *Id.* at art. 133(6).

³⁴ *Id.* at art. 132(5).

³⁵ *See id.* at art. 130(4). Article 130(4) of the Draft CPC states that “[i]n cases when no delay is possible, a search may be done based on an explained and justified order without having an

III. ARRESTS/PRETRIAL DETENTION

A. Current Law

1. Issuance of an Arrest Warrant

In Moldova, arresting a suspect is considered an exceptional measure because the arrest infringes on the rights of a person and restricts his presumption of innocence. Preventative arrest is made in cases where punishment for a crime is imprisonment for more than one year.³⁶ This constitutes eighty percent of the crimes under the CPC. Suspects who allegedly commit minor crimes are prosecuted under the Code of Administrative Offenses ("Administrative Code"). Law enforcement bodies need an arrest warrant for a home and street arrests unless the suspect is caught while committing the crime. In that case, the police may apprehend the suspect for twenty-four hours and obtain an arrest warrant.³⁷

In 1998, the Moldovan Parliament passed a law that gave the judges of the Sector Courts (the lower trial courts) the responsibility of issuing arrest warrants. Previously, prosecutors issued arrest warrants.³⁸ The police or the prosecutor may ask a judge to order the arrest of a suspect as a preventative measure.³⁹ In order to approve an arrest, the judge must determine whether evidence exists or any reasonable indicators are present that demonstrate the individual has committed a crime that requires

authorization from the judge. In this case the investigation judge is to be informed within twenty-four hours time in a written form about the search and grounds for it are indicated. The investigation judge decides the legality of this procedure action." *Id.*

³⁶ Mold. C. Crim. Proc. at art. 6. In addition to preventative arrest, the CPC lists seven other types of preventative measures that include an obligation not to leave the area, a personal guarantee, such as when a person guarantees the good behavior of the accused, a guarantee of an organization, supervision of the administration of the military when the accused is a soldier or an officer in the army, release on bail (effective since February 15, 2001), and release under court supervision (effective since February 15, 2001). *See id.* at art. 73. There are some cases in which preventive arrests occur for crimes with a punishment of less than one year. *Id.* at art. 73(1). The Moldovan Constitution states that "[i]ndividual freedom and personal security are declared to be inviolable." Mold. Const. art. 25(1). "Searching, detaining in custody or arresting a person shall be permitted only if based on the authority of law." *Id.* art. 25(2). No individual can be detained and arrested except in cases indicated by the law and in the way established by the Criminal Procedure Code. Mold. C. Crim. Proc. at arts. 73, 78, 104.

³⁷ Mold. C. Crim. Proc. at art. 104.

³⁸ Amendments #95-XIV on the Art. 78(1)(1) or Art. 78(1)(4) CPC from 7-16-98.

³⁹ Mold. C. Crim. Proc. at arts. 78, 78(1), 78(2). The police or prosecutor's request to order an arrest must include motives and grounds justifying this preventative measure, and the presentation of any documents that support grounds for arrest or substantiate a motive for committing the crime. *Id.* at art. 78(1).

imprisonment for more than one year (this is similar to probable cause) and if the suspect could hide from law enforcement bodies.⁴⁰ Also, a person can be detained, and later arrested, if a weak suspicion exists for serious crimes such as treason, espionage, terrorism, other crimes against the state, rape, murder, robbery or racketeering.⁴¹ In these cases, a prosecutor will have to prove only probable cause to confirm the suspicion that the suspect has committed such a serious crime. In addition, the prosecutor will not have to prove that the suspect could escape from justice, could prolong criminal activity or pressure the witnesses.⁴² Article 7(1) of the Moldovan Criminal Code lists the serious crimes for which the courts will usually issue an arrest warrant.

The judge will review the evidence in a court session that is closed to the public. The prosecutor, a prison official, the victim, the suspect and his attorney are permitted to attend the hearing.⁴³ After the judge reviews the evidence and determines whether the correct legal procedures were followed, he issues his decision whether to authorize an arrest.⁴⁴ The judge will only arrest a person if the prosecutor proves that the suspect is a danger to society and his arrest promotes justice.

The accused, the prosecutor or the police can appeal to a higher court, a Tribunal, to reverse the judge's ruling regarding the issuance of an arrest warrant.⁴⁵ The Tribunal may agree with the accused and order his release; agree with the prosecutor and reverse the lower court judge's decision and require the issuance of an arrest warrant. The decision of this court is final.⁴⁶

Unlike the United States, Moldova has a process known as a holding of a

⁴⁰ *Id.* at art. 78(2).

⁴¹ *Id.* at art. 78.

⁴² *Id.*

⁴³ *Id.* at art. 78(1). The suspect may be absent from the hearing if he is wanted, abroad, or in hiding from the police and the court. *Id.* After the suspect is brought to court, he will be informed of the charges against him and his right to appeal the judge's decision to issue a warrant for his arrest. *Id.*

⁴⁴ The judge issues a motivated session brief that contains his decision to authorize an arrest or to decline to issue an arrest order. In issuing a decision to authorize an arrest, a judge is required to review all the materials which serve as a ground for the preventative arrest, to verify whether the law regarding the starting of the criminal procedure and the holding of the suspect was observed, whether the suspect is of age to be subject to criminal prosecution, whether the crime requires a punishment of more than one year, whether the evidence obtained was done in conformity with the law, whether the isolation of a person is absolutely necessary, and whether the law does not establish a special procedure of arrest for this type of person. *Id.* at art. 78(1).

⁴⁵ Mold. C. Crim. Proc. at art. 78(2); Mold. Const. art. 25(4). See State Department 2000 *supra* n. 15.

⁴⁶ Mold. C. Crim. Proc. at art. 78(2) (1).

suspect. Before a judge issues an arrest warrant, police authorities can hold a suspect for up to twenty-four hours.⁴⁷ On July 6, 2001, the Moldovan Parliament established a seventy-two hour holding. During this time, the prosecutor is required to collect material evidence that supports the need for an arrest warrant. The CPC states that a standard similar to probable cause is needed in order to detain a person under police custody.⁴⁸ During this time, the prosecutor has to decide whether to submit a request for an arrest warrant or to release the suspect.

The Moldovan Constitution requires that a "person detained in custody or arrested shall be informed without delay of the reasons for his detention or arrest as well as the charges made against him, which may only take place in the presence of a lawyer either chosen by the defendant or appointed *ex officio*."⁴⁹ The suspect or the accused must be informed within three hours of the nature of the crime he is alleged to have committed in a language he can understand.⁵⁰

While in police custody, a suspect is encouraged to confess his guilt in exchange for a promise that the judge will take into consideration his sincere regret and collaboration with authorities and impose a lighter sentence.⁵¹ Once the suspect confesses his guilt during pretrial hearings, he often does not want to confess his guilt to the judge. He often argues that the police pressured him to incriminate himself. The authors of the Draft CPC are trying to improve the current situation by introducing plea-bargaining.

2. Pretrial Detention

Once a person is arrested in Moldova, his case must go to trial within thirty days unless the crime involves a punishment of fifteen years, up to twenty-five years or for life.⁵² Upon the request of the criminal investigation officer, the prosecutor may ask the judge who issued the preventative arrest order to prolong the term of arrest for up to six

⁴⁷ Mold. Const. art. 25(3). See Mold. C. Crim. Proc. at art. 104 (providing twenty-four hours for a legal holding). In July 2000, Amnesty International reported that the Moldovan Constitutional Court held that police could keep a suspect up to seventy-two hours before bringing him to the courts to decide whether to issue an arrest warrant. Amnesty International Report, 171 (2001).

⁴⁸ Mold. C. Crim. Proc. at art. 104.

⁴⁹ Mold. Const. art. 25(5).

⁵⁰ Mold. C. Crim. Proc. at art. 6.

⁵¹ Criminal Code of the Republic of Moldova at arts. 37(8), 37 (9).

⁵² Mold. C. Crim. Proc. at art. 79(1).

months.⁵³ Since December 1999, the Moldovan Parliament can prolong the pretrial period from six to twelve months. The Moldova Constitutional Court held that a Tribunal judge and Court of Appeals judge could no longer order the accused to be held up to nine or twelve months respectively prior to trial.⁵⁴ The Court held that this practice violated the Moldovan Constitution.⁵⁵

The defendant may appeal the decision of the trial court judge to delay the trial to a Tribunal judge. The Tribunal judge will determine the legality of prolonging the term of preventative arrest.⁵⁶ In addition, the trial court judge can revoke an arrest warrant at the request of the police, prosecutor, accused or the defense attorney.⁵⁷

Until very recently, Moldova did not provide bail for the accused. Prior to February 15, 2001, a family member or a friend of the accused, could personally guarantee that once released, the accused would return for trial.⁵⁸

B. Current Practices

The President, parliamentarians and judges are generally immune from prosecution in Moldova. The communists ran on a platform to remove immunity for members of Parliament, but nothing has been done so far.

⁵³ *Id.* at art. 79. Upon the demand of the criminal investigation officer, the prosecutor can ask the judge to prolong the date for the trial. The judge takes into consideration the danger of the accused to the public, the need to protect public order, the accused's potential to pressure and influence witnesses, and whether the accused will hide from authorities. *Id.* If the court refuses to prolong the arrest term, the accused will be released immediately at the date when the initial term expired (the initial term is thirty days). *Id.* "The Constitution permits pretrial detentions for an initial period of thirty days, which may be extended up to six months. Detentions of several months are fairly frequent. In exceptional cases, Parliament may approve extension of up to twelve months . . . According to figures provided by the Ministry of Justice, 3,477 persons of a total prison population of 9,449, were held in confinement awaiting trial at years end (these statistics do not include persons held in Transnistria)". State Department 2000, *supra* n. 15.

⁵⁴ Official Monitor, #1-4, 2000 (Mold. Const. Court Dec. 1999). The Moldova Constitutional Court invalidated the provisions of Article 79 of the Code of Criminal Procedure that permitted tribunals to prolong the term of arrest up to nine months and by the appeals court for a period of up to twelve months. *Id.*

⁵⁵ Mold. Const. art. 25(4).

⁵⁶ Mold. C. Crim. Proc. at art 78(2).

⁵⁷ *Id.* at art. 82.

⁵⁸ *Id.* The bail could be settled by the court only for the accused without criminal records (antecedents), for crimes that could be punished no more than ten years in prison, and if the accused will assure the court that he will pay damages to the victim. In addition, the accused must pay the bond between 5400 and 900,000 lei depending on what type of crime he has committed. Mold. C. Crim. Proc. at art. 79(1)-(4).

There has been no mention of lifting immunity for the President of Moldova.⁵⁹

Human rights groups and the State Department report that, although there are constitutional protections in place, there have been instances in which the police have not followed the law or they have used the Administrative Code to circumvent the requirements of an arrest warrant.

In 2001, the State Department noted in cases of preventative arrest that “[t]he 24 hour limit is not always respected, especially if the person is arrested late on Friday or on the weekend.”⁶⁰ Also, the Helsinki Federation stated that “[a]rticle 25(5) of the Penal Procedure Code stipulated that the ‘reasons for detention or arrest should be given immediately’ in the presence of a legal representative. However, the police typically did not follow this provision.”⁶¹ In addition, although the accused has a right to counsel once he is detained and charges are brought against him, “[m]any lawyers point out that access to a lawyer generally is granted only after a person has been detained for 24 hours.”⁶² The State Department noted that if a defendant cannot afford an attorney, one will be provided by the local bar association. Since the Moldovan Government, however, cannot pay the ongoing legal fees, the defendant does not have adequate legal representation.⁶³

There are reports that, to avoid meeting the requirement that a judge issue an arrest warrant within twenty-four hours (the Parliament approved seventy-two hours, although the President has not yet promulgated the approval into law), police detain individuals under the Administrative Code.⁶⁴ As earlier mentioned, this statute concerns minor crimes. Police can therefore detain individuals for refusing to identify themselves to the

⁵⁹ Telephone Interview with Daniel Ross, Moldova Desk Officer, Bureau of European Affairs, U. S. State Department (July 13, 2001). Under the Moldovan Constitution members of Parliament are immune from prosecution “[e]xcept in cases of flagrant infringement of law members of Parliament may not be detained for questioning, put under arrest, searched or put on trial without Parliament’s assent, after prior hearing of the member in question.” Mold. Const. art. 70(3). The President is immune unless “[b]ased on the majority of at least two thirds of the votes cast by its members, Parliament may decide to indict the President of the Republic of Moldova if the latter commits an offense. In such a case it is the Supreme Court of Justice which has the competence to sue under the rule of law, and the President will be removed from office on the very day that the court sentence convicting him has been passed as definitive.” *Id.* art. 81(3). “Judges may be punished as provided for under the rule of law.” *Id.* art. 116(5).

⁶⁰ State Department 2000, *supra* n. 15.

⁶¹ Helsinki Federation, *supra* n. 18.

⁶² State Department 2000, *supra* n. 15.

⁶³ State Department 2000, *supra* n. 15.

⁶⁴ Helsinki Federation, *supra* n. 18.

police authorities without a court order.⁶⁵ The Helsinki Federation stated in 1998, "the police and the Department for combating crime frequently arrested individuals under Article 176(6) of the Code of Administrative Sanctions for outrage, or for resisting police, to give themselves more time to get sufficient evidence for more serious charges against suspects."⁶⁶

In 2000, Amnesty International observed that "[p]olice officers continued to resort to administrative detention in order to detain suspects arbitrarily."⁶⁷ Individuals held for minor crimes under the Administrative Code do not have the "rights to a public hearing, to be represented, and to present their own defence [sic]. Such cases were routinely examined in the absence of the defendant."⁶⁸ For example, in April 2000, students who protested against the increases in the cost of bus transportation to and from school were charged under the Administrative Code with "participating in an unauthorized assembly and 'shouting abusive words or slogans in public places.'"⁶⁹ Police detained four hundred students and no official charges were filed. Later these students were released.⁷⁰

A trial of a minor offense under the Administrative Code is very different from a criminal trial. The first difference is that the participation of the prosecutor is not obligatory. The prosecutor, however, has the right to participate in any administrative case or to control the legality of the courts' decisions on administrative cases and he may appeal a judge's decision to a higher court whenever necessary. Usually, a trial of administrative cases takes place without the prosecutor and without the defense attorney. All the evidence in this kind of case, however, consists of a police report and a written explanation from an offender and some witnesses; no investigation is performed. In some petty offenses such as disrespect for the court or for offending the judge, the fine will be expressed in the court's decision without any written record or explanation.⁷¹

For some minor crimes, the Administrative Code provides arrest for a maximum of thirty days. For example, a person could be arrested for ten

⁶⁵ Helsinki Federation, *supra* n. 18.

⁶⁶ Helsinki Federation, *supra* n. 18.

⁶⁷ Amnesty Int'l. 2001, *supra* n. 47 at 171.

⁶⁸ Amnesty Int'l. 2001, *supra* n. 47 at 171. Under the Code of Administrative Offenses, petty crimes are not considered crimes and do not create criminal records in the offender's personal history.

⁶⁹ Amnesty Int'l. 2001, *supra* n. 47.

⁷⁰ State Department 2000, *supra* n. 15. "Press reports alleged that Ministry of Interior police used excessive force against the students. . . . [t]he Chisinau municipal [P]rosecutor's [O]ffice was investigating the incident at year's end." *Id.*

⁷¹ Mold. C. Admin. Offenses at art. 200(7)-(8).

days for not executing an order of a policeman or for fifteen days for minor hooliganism or for fifteen days for drinking alcohol in public places.⁷² People say that sometimes police use violations of the Administrative Code in order to arrest people who are suspected of serious crimes, and then they intimidate the offender to confess to a more serious crime. However, any minor offender can invite an attorney to represent him in an administrative trial. An indigent person has no right to government appointed counsel in this type of proceeding.

Various human rights groups observe that there is more abuse of detainees held under the Administrative Code and the CPC. There have been reports of ill treatment and physical and psychological torture during these detentions.⁷³ These individuals are moved from one prison facility to another and the lack of registration in some cases creates greater opportunities for police abuse and ill treatment of detainees.⁷⁴ “The risk of arbitrary detention and ill-treatment was increased in July [2000] when the Constitutional Court reportedly ruled that police could keep suspects in custody for up to seventy-two hours before bringing them before the courts to decide whether arrest warrants should be issued.”⁷⁵

After its visit to Moldova in October, 1998, the Council of Europe’s European Committee for the Prevention of Torture (“CPT”) issued its finding and recommendations regarding the practices in detention centers. The Council urged Moldovan Government officials to provide fundamental protections against ill treatment of detained persons, including those individuals held for Administrative Code violations.⁷⁶

In 2000, the Moldovan Parliament held hearings on the new criminal and civil codes and on the Code on Punishment for Minor Offenses, also called the Administrative Code.⁷⁷ The Draft CPC requires that any individual

⁷² *Id.* at arts. 164, 174.

⁷³ Helsinki Federation, *supra* n. 18. “There were reports of ill-treatment and torture in order to extract confessions during such periods of administrative detentions.” Amnesty International Report, 170 (2000). Also, “[t]he police occasionally beat and otherwise abused detainees and prisoners.” State Department 2000, *supra* n. 15.

⁷⁴ Helsinki Federation, *supra* n. 18. In 1999, Amnesty International reported that “[i]nadequate procedures for registering detainees contributed to difficulties in obtaining access to them. In some cases the authorities failed to acknowledge that detainees were in police custody.” Amnesty Int’l. 2000, *supra* n. 39, at 170.

⁷⁵ Amnesty Int’l. 2001, *supra* n. 47, at 171.

⁷⁶ E-mail from Moldovan Helsinki Comm. For Human Rights, Report on Respect of Human Rights in the Republic of Moldova (Including Transdnistria Region), January 2000-January 2001 (February 2001).

⁷⁷ State Department 2000, *supra* n. 15. The Draft CPC was passed in the first reading in the Moldovan Parliament. The new president, according to law, will have to approve the new law after Parliament passes it. At this time, a joint group of national and international experts has been

detained be treated with dignity, be free of physical and mental abuse, and be informed of his rights in the presence of his defense attorney.⁷⁸ Also, under a plea bargain agreement, the accused could plead guilty in exchange for a milder sentence requested by the prosecutors. There is concern that Moldovans, as citizens of a former Soviet state, would prefer to go to trial and not participate in a plea bargain arrangement. They may want to remain silent and let the government prove the guilt of the defendant.⁷⁹

IV. INTERROGATIONS/CONFESSIONS

On February 12, 1999, the Moldovan Parliament passed a law that amended the CPC to provide the suspect or the accused with the rights to make a non-incriminating confession for his defense and to immediate counsel.⁸⁰ The suspect is told that he has the right to make statements and not to incriminate himself rather than the right to remain silent. He is not informed directly of his right to remain silent. The police encourage the suspect or accused to talk to them and to answer their questions.

Before that date, the law permitted police to interrogate someone first as a witness and later use his statements could be used against him as a suspect. Today, an individual may choose to answer police questions as a witness or refuse to answer police questions in order not to incriminate himself.

The Moldova Constitution does not provide directly for the right to remain silent. The Moldovan Constitutional Court, however, has held that international human rights agreements ratified by Moldova have the status of constitutional provisions.⁸¹ As a result, the right against self-

established to work on the final version of the draft, taking into account all the recommendations that were formulated in the expertise reports of the Council of Europe and of the ABA/CEELI.

⁷⁸ Mold. Draft C. Crim. Proc. at art 13(4). Article 13(4) states that: "[s]uspects can be held for up to seventy-two hours before an arrest warrant is issued by the judge." *Id.* This appears to codify the Constitutional Courts earlier decision regarding preventative arrests.

⁷⁹ *Id.* at arts. 505-10. The sentence bargain is the only type of plea bargain agreement in Moldova's Draft CPC.

⁸⁰ Parliament amended Article 41 and Article 42 of the CPC on February 12, 1999. After February 12, 1999, the investigator, prosecutor, and judge have to inform the defendant about his right against self-incrimination at all the phases of the criminal proceedings and assure the protection against possible outside pressure from the criminals. Because this provision was introduced recently, it is not yet common practice.

⁸¹ Article 4(2) of the Moldova Constitution provides for the supremacy of international agreements over internal laws. Moldova has ratified the European Convention for the Protection of Human Rights and the Fundamental Freedoms of the Council of Europe and they came into effect on September 12, 1997. Under Article 4(2) of the Moldovan Constitution, "[w]herever disagreements appear between

incrimination, the right to a presumption of innocence and other guarantees of a fair trial, are embodied indirectly in the Moldova Constitution and judges may apply them *ex officio* at trial.

Since February 2000, an individual is entitled to have counsel immediately after apprehension or arrest. Police must inform the suspect of his rights and he has to answer police questions during the first and follow up interrogations if he does not choose to remain silent. Article 46(5) of the CPC was not amended, however, and the suspect or the accused may have his attorney present during the first interrogation but the attorney may only passively observe the police questioning of his client. The attorney may not advise his client during this first interrogation by the police.⁸²

During any subsequent interrogation by police, the defense counsel may provide advice and assist his client throughout the remaining legal proceedings. In the past, the suspect or the accused only had a right to counsel after the first interrogation by police. While the defense counsel may only listen to police questions, he may at least learn the direction of the investigation and may later assist his client, if the client does not make an incriminating statement during the first session.

The problem with current reforms of the CPC is that one section of the CPC may provide broader criminal protections, yet other sections of the same law will drastically curtail those new rights. In this case, although the suspect has a right to counsel during the first interrogation by police, he may not exercise this right in any way because his lawyer is only an observer of the proceedings.

In 1998, the CPT recommended that Moldovan Government officials “work out a code of conduct for interrogations.”⁸³ Amnesty International stated in 1999, “[t]here were reports of ill-treatment and torture in order to extract confessions during . . . administrative detentions.”⁸⁴ Suspects held for Administrative Code violations do not have criminal protections because they are not considered criminals.

Under the Draft CPC, a person has the right to refuse to give incriminating depositions to law enforcement authorities.⁸⁵ Also, “no one can be forced to testify against oneself or against one’s close relatives or to

conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations.” Mold. Const. art. 4(2).

⁸² Mold. C. Crim. Proc. at art. 46(5).

⁸³ Moldovan Helsinki Committee, *supra* n. 76.

⁸⁴ Amnesty Int’l. 2001, *supra* n. 47.

⁸⁵ Mold. Draft C. Crim. Proc. at art. 22(2). The Draft CPC states that “[a] person to whom the penal pursuit bodies proposition to give incriminating depositions against oneself or against one’s close relatives has the right to refuse to give such depositions and cannot be made liable for this.” *Id.*

admit one's guilt."⁸⁶ As a witness, an individual may "refuse to testify in a case when [he] is the only person that could be suspected to have committed a crime; [and] not to answer questions meant to obtain incriminating information against himself or [his] close relatives regarding a crime."⁸⁷

V. TRIAL

A. Role of the Prosecutor

In Moldova, there is a Prosecutor General, District Prosecutors, Sector Prosecutors and city and specialized prosecutors. The Prosecutor General is appointed by Parliament upon the recommendation of the President.⁸⁸ In July, 2000, the Moldovan Parliament reduced the power and responsibilities of the Prosecutor General's office. The Prosecutor's General office can no longer supervise the implementation of laws, but it can continue to prosecute criminal cases, present formal charges before court and protect the rule of law and civil freedoms.⁸⁹ In addition, Parliament passed a law placing the Prosecutor General's Office under the Judiciary Branch; it is now "an independent body under the Supreme Council of Magistrates."⁹⁰

Although the Moldovan Parliament has made progress by reducing the power of the prosecutor's office and placing it under the auspices of the Judiciary Branch, it continues to maintain some of its 'procuracy' responsibilities. Under the Czarist and Soviet regimes, the prosecutor's office, or procuracy as it was known, was 'the eye of the Czar' and later of the communist party bosses.⁹¹ The prosecutor was responsible for

⁸⁶ *Id.* at art. 22(1).

⁸⁷ *Id.* at art. 93(10).

⁸⁸ Mold. Const. art. 125(1). The Prosecutor General chooses the public prosecutors and they serve for five years. *Id.* art. 125(2)-(3). Under the Moldovan Constitution, the "Prosecutor General and public prosecutors exercise control over the exact and uniform enactment [sic] of laws of public administration authorities, by juridical and physical entities and their associations, while defending legal order, the rights and freedoms of citizens and supporting the enforcement of justice under the law." *Id.* art. 124 (1).

⁸⁹ State Department 2000, *supra* n. 15.

⁹⁰ State Department 2000, *supra* n. 15.

⁹¹ Peter H. Solomon, Jr. & Todd S. Foglesong, *The Procuracy and the Courts in Russia: A New Relationship?* 9 E. Eur. Const. Rev. 105, 106 (2000), *See e.g.* Inga Mikhailovskaya, *Feature: The Procuracy and its Problems, Russia*, 8 E. Eur. Const. Rev. 76, 98-104 (1999). Peter the Great created the position of Procurator General in Russia in 1722 to reassert greater control over the government. *Id.*

supervising the implementation of the laws; investigating illegal actions of the public officials; protecting citizens from public officials' misconduct; supervising the work of police and prisons; making decisions regarding pretrial detention, searches and seizures and eavesdropping; and supervising the legality of court proceedings.⁹²

As the supervisor of the legality of court proceedings, the procurator could review the legality of a verdict, sentence or decision and ask the court to review the case again.⁹³ The procurators were given the responsibility of prosecuting a criminal case, monitoring the conduct of the judge and protecting the defendants' rights at trial. As a result, the procurator had a higher status and more political power than the judges and the courts.⁹⁴ The power of the procurator "led inexorably to the pattern of judicial subordination to the interests and needs of the procurators in the courtroom."⁹⁵ In addition, during the Soviet period, an individual who suffered harm by a public official could turn to the procuracy for help rather than to a court. The procurator would issue a protest to the public official whose conduct harmed a citizen.⁹⁶

During the trial the prosecutor reads the indictment against the accused, presents his evidence and calls his witnesses to the stand. Witnesses come

at 98. The Procurator General was called "eyes of the ruler." *Id.* at 99. It was also known as the "supreme supervisor of legality." "The Procurator-General is probably unique among government officials. . . . He combines the functions of the Danish Ombudsman with those of the English Attorney-General, the Inspectors of the Constabulary, the director of Public Prosecutors, the Office of Solicitor, the Home Secretary, the Permanent Secretary to the Treasury, and a public health inspector. And he adds to them a number of peculiarly to his own." Peter Archer, *Communism and the Law, A Background Book* 43 (The Bodley Head LTD 1963).

⁹² Solomon & Foglesong, *supra* n. 91, at 105-06. In exercising his duty of general supervision, the procuracy "watches the whole of public administration, from ministers, through the various soviets, to the officials who confront the public. . . . Like the Ombudsman of the Scandinavian countries, he is concerned not merely with breaches of the law but with all cases of unfairness to individuals. Unlike the Ombudsman, he is also expected to report cases of inefficiency, resulting in wastage or lower production." Archer, *supra* n. 91, at 48. Also, it appears that during the Soviet period that the procuracy also was responsible to the Communist Party for the carrying out of party policies. Archer, *supra* n. 91, at 48.

⁹³ Solomon & Foglesong, *supra* n. 91, at 106.

⁹⁴ Solomon & Foglesong, *supra* n. 91, at 106.

⁹⁵ Solomon & Foglesong, *supra* n. 91, at 106.

⁹⁶ Stephen Holmes, *Feature: The Procuracy and its Problems, Introduction*, 8 E. Eur. Const. Rev. 76, 77 (1999). "Lenin created what was to become the Soviet procuracy to help impose the communist party's will on a reluctant and unruly society." *Id.* at 76. The purpose of this institution was to hold public officials accountable and to guarantee laws were enforced. *Id.* "The Soviet procuracy was an instrument of centralization. (Lenin recycled this piece of Czarist debris to help him reassert control over runaway soviets, people's courts, and city officials.)" *Id.* at 78. "The procuracy has evolved differently in different countries of the region. But some common patterns can, as usual, be observed. The long term goal of procuracy reform is everywhere the same: to denude the office of some of its functions and to reassign them to other bodies, including courts, criminal investigators, and ombudsmen." *Id.* at 77.

into the courtroom one at a time. Under the Draft CPC, witnesses will have to take an oath.⁹⁷ The defendant will not be required to take an oath except when he pleads guilty.⁹⁸

The prosecutor may appeal the judge's sentence if he believes it is not severe enough. In addition, if the judge reduces the charge against the defendant after listening to the evidence, the prosecutor may later appeal the decision. For example, if a defendant is charged with premeditated murder, and if the judge holds that he did not commit that crime and therefore gives the defendant a lesser punishment, the prosecutor may appeal the sentence.⁹⁹ The appellate court usually sends the case to another lower court judge for his review or it can issue another sentence. In addition to prosecuting the case, the prosecutor continues to be responsible for defending the rights of the defendant at trial.

Under the Draft CPC the prosecutor's responsibilities in court include presenting an indictment on behalf of the state, presenting evidence collected during the investigation, presenting an opinion on the defendant's crime and punishment, dropping charges and initiating appeals.¹⁰⁰ Also, a conflict of interest does not arise if he prosecutes a criminal case even when he has participated in the criminal investigation.¹⁰¹

B. Role of the Defense Attorney/Accused Rights at Trial

In Moldova, the defendant has the right to counsel at trial and through

⁹⁷ Mold. Draft C. Crim. Proc. at art. 113. "Before being heard the witness makes the following oath: I swear to tell the truth and not withhold anything of what I know. So help me God." *Id.* (internal quotation omitted).

⁹⁸ *Id.* at arts. 508-13. Currently, the defendant is not required to take an oath. He can say anything he wants to say, but later he can change his story and there are no repercussions for making false statements. Mold. C. Crim. Proc. at arts. 41-42.

⁹⁹ Mold. C. Crim. Proc. at art. 307. In Moldova, the prosecutor does not supervise the judge's behavior in court. The fact that he can appeal a judge's sentence cannot be understood to mean that the prosecutor supervises the judge. Also, when the law states that the prosecutor protects the defendant's rights, it means that the prosecutor will make objections if defendant's rights are violated at trial. *Id.* at art. 217. In addition, the prosecutor will appeal the sentence if he considers the sentence illegal. *Id.* at art. 307.

¹⁰⁰ Mold. Draft C. Crim. Proc. at art. 54(1)-(9). "A prosecutor is an official person assigned . . . to lead and carry out penal pursuit and to submit the accusation document to the court on behalf of the state . . ." *Id.* at art. 8(28). As under current law, the Draft CPC provides that the prosecutor is just a participant in the criminal trial. He supervises the activities of the police and other law enforcement bodies during the pretrial investigation but he cannot do the same regarding the court. *Id.* at arts. 188-89.

¹⁰¹ *Id.* at art. 55(2).

the appeals process.¹⁰² If the defendant cannot afford to hire a private attorney, the Moldovan Government will provide him with a court appointed one.¹⁰³ There are many attorneys in private practice in Moldova. Today, a private criminal defense bar exists in Moldova where once it was just a novel idea. While there are private attorneys available to represent criminal defendants, many Moldovans simply cannot afford one.

The problem with court appointed attorneys is that the government, given the country's present economic circumstances, cannot afford to pay their legal fees. As previously mentioned, the State Department noted that "[b]ecause the state is unable to pay ongoing legal fees, defendants often do not have adequate representation."¹⁰⁴ Furthermore, "[p]rosecutors occasionally use bureaucratic maneuvers to restrict lawyers access to clients."¹⁰⁵ If the defendant is found guilty through his attorney's incompetence, he cannot appeal his conviction. His only recourse is to contact the local bar association and register a complaint.¹⁰⁶

The Draft CPC preserves the defendant's right to counsel both at trial¹⁰⁷ and during the appeals process,¹⁰⁸ as well as his right to have a court appointed attorney if he is indigent.¹⁰⁹ In addition, this proposed law protects the defendant's right to waive his right to counsel¹¹⁰ and to have incompetent court appointed counsel removed.¹¹¹

Under the current law and in the Draft CPC, the rights and obligations of the defense attorney in a criminal case are outlined. Some of his responsibilities include explaining to the defendant his rights, preparing

¹⁰² Mold. Const. art. 26(1). "The right of defense is guaranteed." *Id.* The Moldovan Constitution states that "any interference with the defense . . . shall be punished by the authority of law. *Id.* at art. 26(4). See State Department 2000, *supra* n. 15; Mold. C. Crim. Proc. at arts. 43-44.

¹⁰³ Mold. Const. art. 26(3). "Throughout the trial the parties have the right to be assisted by a lawyer, either chosen or appointed ex officio." *Id.* See Mold. C. Crim. Proc. at arts. 43-44.

¹⁰⁴ State Department 2000, *supra* n. 15.

¹⁰⁵ State Department 2000, *supra* n. 15.

¹⁰⁶ Mold. C. Crim. Proc. at art. 45. Defendants have no right to waive their right to counsel or to have incompetent court appointed counsel removed if, due to a physical or mental disease, they cannot tell wrong from right. *Id.*

¹⁰⁷ Mold. Draft C. Crim. Proc. at art. 19(3).

¹⁰⁸ *Id.* at art. 71(1), 71(10). Article 71 states that "[t]he participation of the defender in criminal procedure is compulsory . . . in the first instance appeal . . ." *Id.*

¹⁰⁹ *Id.* at art. 19(5) "In the case when the suspect, the indicted, the defendant do not have financial means to pay a defense attorney, he will be assisted for free by a pro bono attorney." *Id.*

¹¹⁰ *Id.* at art. 73 (outlining the accused's right to waive his right to counsel and describing how he can waive this right).

¹¹¹ *Id.* at art. 74(2). This section states that: "[t]he appointed lawyer who participates in the criminal procedure can be removed from the procedure if the person s/he defends has reasonable motives to doubt the competence and good faith of the lawyer. Regarding this, the client can submit a request for the removal of the lawyer." *Id.*

materials in the case and submitting evidence in court.¹¹² The defense attorney, in order to prepare his case, has the right to know with which crime(s) his client is charged.¹¹³

In order to prepare his client's defense, currently the defense attorney may obtain the investigator's evidence, including witness lists and expert testimony. Also, he may ask the investigator to contact witnesses and consider evidence obtained by the defense. The investigator, however, may refuse to accept this evidence if the evidence is immaterial to the case. If it is exculpatory evidence, the investigator must accept it.¹¹⁴

Under the Moldovan Constitution, the accused is presumed innocent until found guilty.¹¹⁵ However, "[t]he prosecutor's office has undue influence which undermines the [defendant's] presumption of innocence."¹¹⁶ Current law and the Draft CPC recognize the defendant's presumption of innocence but require that a defendant's guilt be proven.¹¹⁷ The Draft CPC states that guilt of the defendant cannot be based on suppositions.¹¹⁸ Furthermore, the Draft CPC, as does current law, requires that the judge weigh doubt of defendant's guilt in his favor when the judge decides the case.¹¹⁹

The defendant, under Moldovan law, has certain protections at trial. He has a right to a public trial,¹²⁰ the right to an interpreter both at trial and

¹¹² Mold. C. Crim. Proc. at arts. 46, 176. See Mold. Draft C. Crim. Proc. at art. 70 (explaining the rights and obligations of the defense).

¹¹³ Mold. C. Crim. Proc. at arts. 46, 176; see Mold. Draft C. Crim. Proc. at art. 70(1).

¹¹⁴ Mold. C. Crim. Proc. at art. 181. The investigator is required to explain in writing why he refuses to accept evidence obtained by the defense. *Id.*

¹¹⁵ Mold. Const. art. 21. "Any person accused to have committed an offense shall be presumed innocent until found guilty on legal grounds, brought forward in a public trial . . ." *Id.*

¹¹⁶ Freedom House Country and Territory Reports 2000 <<http://www.freedomhouse.org/research/freeworld/2000/countryratings/moldova2.htm>> (last updated Oct. 31, 2000). "In practice, prosecutors' recommendations still carry considerable weight and limit the defendant's actual presumption of innocence." State Department 2000, *supra* n. 15.

¹¹⁷ Mold. C. Crim. Proc. at arts. 41, 56; see Mold. Draft C. Crim. Proc. at art. 10(1)-(2). Article 10(1)-(2) states that "[a]ny individual accused of a crime will be considered innocent until his/her guilt is proved in the way provided by the present Code through a legal public trial, during which all the guarantees necessary to the defense were assured and found by a definitive court decision. No one has to prove his or her innocence." *Id.*

¹¹⁸ Mold. Draft C. Crim. Proc. at art. 10(3). The Draft CPC states that "[c]onclusions on the guilt of the individual for the commission of a crime cannot be based on suppositions." *Id.*

¹¹⁹ *Id.* (stating that, "[i]n proving somebody's guilt all doubts that cannot be eliminated under the conditions of the present Code will be interpreted in favor of the suspect, indicted, defendant"). See Mold. C. Crim. Proc. at arts. 55-57.

¹²⁰ Mold. Const. art. 21. "Trials generally are open to the public." State Department 2000, *supra* n. 15. Under the current CPC, criminal trials are open to the media. Mold. C. Crim. Proc. at art. 12.

when reviewing documents in preparation for trial,¹²¹ the right to present evidence,¹²² the right to confront witnesses¹²³ and if found guilty, the right to appeal his conviction.¹²⁴

What makes the Moldovan criminal trial unlike an American criminal trial, is that both the defendant and victim are permitted to cross-examine the prosecutor's witnesses.¹²⁵ Also, the victim can appeal the defendant's sentence in hopes that the judge will impose a harsher sentence on the defendant.¹²⁶ Furthermore, all criminal cases must go to trial in Moldova, unless the victim and defendant agree not to go forward with the case, and the judge dismisses it (e.g., in a spousal rape case).¹²⁷ The defendant has no right to a trial by a jury of his peers; all criminal trials are bench trials. Due to a lack of funding for both facilities and personnel, there is a large backlog of cases at both the Tribunal court and Higher Appeals court levels.¹²⁸ Also, because the defendant cannot negotiate a plea agreement with the prosecutor, the burden on the court is further increased. If the Draft CPC is adopted, the defendant will be able to "conclude a plea agreement,"¹²⁹ would significantly reduce the backlog in the courts.

When discussing police interrogations, the accused has no express protection against self-incrimination. The judge, at his discretion, can comply with international law and provide this protection to the defendant. Any incriminating statement made during the first interrogation can be used to impeach the defendant's testimony at trial. If the defendant chooses not to testify at trial the prosecutor may introduce his incriminating statements as evidence against him.¹³⁰ As mentioned previously, under current law, if the defendant chooses to testify, he is not required to take an oath to testify truthfully. Furthermore, the Draft CPC ensures that the

¹²¹ State Department 2000, *supra* n. 15. "If the majority of the participants agree, trials may take place in Russian or another acceptable language instead of Moldovan/Romanian." State Department 200, *supra* n. 15.

¹²² State Department 2000, *supra* n. 15.

¹²³ State Department 2000, *supra* n. 15.

¹²⁴ State Department 2000, *supra* n. 15. The defense attorney has some additional rights at trial. He can call his own witnesses and introduce evidence. Mold. C. Crim. Proc. at art. 222. The beginning of the trial he can ask the court to question additional witnesses or to accept other evidence. *Id.* at art. 246.

¹²⁵ Mold. C. Crim. Proc. at arts. 251, 253, 255.

¹²⁶ *Id.* at art. 307(3).

¹²⁷ *Id.* at art. 94. There are some cases when reconciliation is possible and these types of cases are enumerated in Article 94 of the current CPC. Spousal rape is one such case. *Id.* at art. 102.

¹²⁸ State Department 2000, *supra* n. 15.

¹²⁹ Mold. Draft C. Crim. Proc. at art. 68(10). Article 68(2), 68(10) of the Draft CPC state that "the indicted has the following rights . . . to admit guilt and to conclude a plea bargaining agreement." *Id.*

¹³⁰ Mold. C. Crim. Proc. at art. 250.

defendant is not forced to testify against himself or his family members at trial or to admit guilt.¹³¹ In addition, the Draft CPC preserves his right to speak in court, to reply,¹³² and to have the final word.¹³³

At the end of the trial, the defendant may raise his concerns about the prosecutor's evidence and presentation of his case. The defendant's counsel may not make evidentiary objections during the trial. He is permitted, however, to make objections with the judge's permission. Because there is no exclusionary rule that Moldovan judges must apply to illegally gathered evidence, all evidence is admissible. Under the Draft CPC, it appears as though the defense attorney may raise objections at trial and have them included in the court record.¹³⁴

The judge is not bound to take any notes because this is the duty of the clerk of the court to take the minutes of the trial. The judge and court clerk sign the minutes of the trial. In addition, the statements made by the witnesses in court and of experts are also recorded by the clerk, signed by the person who made the statement, and attached to the minutes. Current law provides the prosecutor and the defense attorney an opportunity to appeal the content of the minutes of the hearing if their recollection of the case is different.¹³⁵ The Draft CPC preserves both the prosecutor's and the defense counsel's rights to challenge the court record on appeal.¹³⁶

C. Role of the Judiciary

1. Independence of the Judiciary

The President, upon the recommendation of the Higher Magistrates Council, appoints Moldovan judges.¹³⁷ The Parliament chooses the President of the Court and the members of the Supreme Court of Justice

¹³¹ Mold. Draft C. Crim. Proc. at art. 22(1). The Draft CPC states that "[n]o one can be [forced] to testify against oneself or against one's close relatives or to admit one's guilt." *Id.*

¹³² *Id.* at art. 68(24); see Mold. C. Crim. Proc. at arts. 249, 266, 267.

¹³³ Mold. Draft C. Crim. Proc. at art. 68(25); see Mold. C. Crim. Proc. at art. 267.

¹³⁴ Mold. Draft C. Crim. Proc. at art 68; see Mold. C. Crim. Proc. at arts. 230, 246, 266.

¹³⁵ Mold. C. Crim. Code at art. 307. Also, Article 229 of the current CPC requires both the chairman of the hearing and the court clerk to sign the minutes. *Id.* at art. 229.

¹³⁶ Mold. Draft. C. Crim. Code at art. 340.

¹³⁷ Mold. Const. art. 116(2). The Higher Magistrates Council "performs the appointments, transfers, promotion of judges, as well as disciplinary actions against them." *Id.* art. 123. Eleven magistrates serve on the Higher Magistrates Council, including the Minister of Justice, President of the Supreme Court of Justice, the President of the Court of Appeal, the President of Business Audit and the Prosecutor General. *Id.* at art. 122(2). The Supreme Court of Justice chooses three additional people to serve on the Council and the Parliament chooses three university professors. *Id.* art. 122(3).

upon the recommendation of the Higher Magistrates Council.¹³⁸ After passing an entry examination, these judges serve for five years until they are re-appointed.¹³⁹ Under the Moldovan Constitution, judges are “independent, impartial, and irremovable under the law.”¹⁴⁰ As mentioned earlier, Moldovan judges are immune from prosecution.¹⁴¹

In the former Soviet Union, the courts were primarily responsible for prosecuting criminal cases and resolving civil disputes concerning divorce, alimony, inheritance, housing and labor issues.¹⁴² Because of the power and influence of the procuracy, the courts were given limited responsibility and financial support. As a result, there was a lack of public respect and financial resources from the government.¹⁴³ Judges were dependent on financial favors from ministries and local government officials, including Communist Party bosses, in order to support themselves.¹⁴⁴ In exchange for these favors, these officials influenced judicial behavior.¹⁴⁵ Also, Soviet judges faced pressures by the Ministry of Justice and the higher courts to avoid acquittals in order to get re-appointed, receive bonuses and maintain their professional reputations.¹⁴⁶

Since the end of the Soviet era, there have been efforts to increase judicial independence in the former Soviet Union and its newly independent republics. The Russians have introduced a jury trial in some areas in order to “break up the cozy relationship between the judges and the procurators which had sustained for decades the accusatorial bias of the Soviet criminal justice.”¹⁴⁷ Although Moldova continues to have bench

¹³⁸ *Id.* art. 116(3).

¹³⁹ *Id.* at art. 116(2). After fifteen years on the bench, judges will be re-appointed to serve until they reach retirement age. *Id.* “This provision for judicial tenure is designed to increase judicial independence.” State Department 1999, *supra* n. 20.

¹⁴⁰ Mold. Const. art. 116(1). The Moldovan Constitution also states that “[j]udges may be punished as provided for under the rule of law.” *Id.* art. 116(5). It is very rare that judges are removed from bench.

¹⁴¹ Interview with Daniel Ross, *supra* n. 59.

¹⁴² Peter H. Solomon, Jr. & Todd S. Foglesong, *Courts and Transition in Russia, The Challenge of Judicial Reform* 6 (2000).

¹⁴³ *Id.* at 7-8.

¹⁴⁴ *Id.* at 6.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 7.

¹⁴⁷ Eugene Huskey, *Russian Judicial Reform After Communism, In Reforming Justice In Russia, 1864-1996, Power, Culture, and the Limits of Legal Order* 325, 334 (Peter H. Solomon, Jr. ed., 1997). “By taking the decision on a verdict out of the hands of the professional judge, jury trials ensured that the court hearing would not be merely a cursory review of the results of the preliminary investigation but a fully adversarial contest between sides. . . . According to [Sergei] Pashin, ‘[i]n a jury trial the procurator does not simply press charges; he has to prove the accusation.’ Relieved of responsibility for

trials, it has made efforts to reduce the Executive Branch's influence on the courts by placing the General Prosecutors office under the Judiciary Branch and by requiring judges to take specialized training courses to increase their professionalism.¹⁴⁸

In 2001, the State Department asserted that "the executive branch has exerted undue influence on the judiciary ... [however], [t]here were continuing indications during the year that judicial independence was increasing."¹⁴⁹ Despite this fact, judges remain susceptible to bribes, and this interferes with judicial independence. "Many observers believe that arrears in salary payments also make it difficult for judges to remain independent from outside influences and free from corruption.¹⁵⁰ In 1999, there were "credible reports that local prosecutors and judges extorted bribes for reducing charges or sentences."¹⁵¹

Prior to July 1, 1995, under Article 3 of the CPC, a panel of judges was required to order a criminal case opened in the event of a violation of law. Today, the prosecutor, not the judiciary, initiates criminal cases. In addition, the CPC was amended to exclude the judge from investigating criminal cases.¹⁵²

2. A Judge's Responsibilities at Trial

The judge issues his decision on the basis of the evidence presented by both parties.¹⁵³ The primary responsibility of a judge during trial is to remain impartial. However, the judge may ask questions of the witnesses and prior to trial he may study the investigator's evidence in the case.

the verdict, the judge is insulated from attacks by executive institutions and is therefore more likely to preside impartially over the proceedings." *Id.*

¹⁴⁸ State Department 2000, *supra* n. 15. "Beginning during the year, judges being considered for reappointment were required to take a specialized training course at the Judicial Training Center. At the end of this training, they are tested. The Superior Council of Judges evaluates the test and the results are considered when making reappointment decisions. This process was designed to increase the professionalism of the judges." State Department 2000, *supra* n. 15.

¹⁴⁹ State Department 2000, *supra* n. 15.

¹⁵⁰ State Department 2000, *supra* n. 15. "There is evidence that some prosecutors, judges, and law enforcement officials accept bribes." Freedom House Country and Territory Reports 2001 <<http://www.freedom-house.org/research/freeworld/2001/countryratings/moldova2.htm>>

¹⁵¹ State Department 2000, *supra* n. 15.

¹⁵² Amendments to the CPC from July 1, 1995, establish that the prosecutor is the official person who has to bring the accusation in court. The new law required that the prosecutor participate in all criminal cases on behalf of the state. Before that time, the judge could try a criminal case without a prosecutor. Before July 1, 1995, the judge could bring the accusation and interrogate the defendant and the witnesses without the participation of the prosecutor in many cases.

¹⁵³ Mold. C. Crim. Proc. at arts. 271-72.

The prosecutor and the defense attorneys can actively participate in influencing the judge's decisions throughout the trial. For example, the attorneys will talk with the judge regarding the order of witnesses, and if later there are additional witnesses or physical evidence not in the investigator's report, they may ask the judge to bring the witness into court or to admit the additional evidence. The judge may accept or reject these proposals. In rejecting certain suggestions of the parties, the judge must explain his decision.

When the judge interferes in the case, he must be careful not to infringe on the rights of the defendant.¹⁵⁴ The defendant and his counsel should use the opportunities that the law offers to improve the defendant's case.

During trial, the judge is required to be neutral. In questioning the defendant, the injured party or the witnesses, the judge should phrase the questions in an impartial way. Also, if the judge takes the part of the prosecutor or defense attorney during the criminal trial, he violates the principle of impartiality, and is excluded from judging the case.

The judge must listen to the prosecutor and defense counsel and examine all the evidence in the case in order to make a decision regarding the guilt or innocence of the defendant. The judge is unable to decide whether the accused is guilty or innocent unless all the circumstances of the criminal case are minutely examined and verified. The written decision of the judge is based on the evidence presented and his own convictions regarding the case. It is read at the end of the trial.

3. Proposed Reforms

In the Draft CPC, there are no new provisions concerning the role of the judge at trial. Under the Draft CPC, either a panel of three judges or one judge will hear a criminal case.¹⁵⁵ If a life sentence may be imposed on a defendant, a panel of three judges must hear the case.¹⁵⁶ In an extremely serious case, the defendant may request a three-judge panel.¹⁵⁷ Also, judicial independence is preserved by requiring that . . . "judges are independent and they obey only the law. Judges try criminal cases in compliance to the law and in conditions that exclude any pressure exerted

¹⁵⁴ *Id.* at art. 14. Article 14 of the CPC does not expressly state that a judge must be careful not to infringe on the rights of the defendant, but this Article is interpreted by some judges to require judicial care regarding the defendant. Many judges, however, are not in agreement with this interpretation.

¹⁵⁵ *Mold. Draft C. Crim. Proc.* at art. 30(1).

¹⁵⁶ *Id.* at art. 30(3).

¹⁵⁷ *Id.* at art. 30(4).

upon them.”¹⁵⁸ They must oppose all attempts to pressure them.¹⁵⁹ “Exercising pressure on the judge in trying criminal cases for the purpose of influencing the issuing of the court decision imposes criminal accountability in accordance with the law.”¹⁶⁰ The Draft CPC also prohibits judges from playing an investigative role in the criminal process. Under Article 25(3), “the court is not a penal pursuit body, does not act in favor of the prosecutor or the defense and expresses only the interests of the law.”¹⁶¹

VI. OBSERVATIONS AND CONCLUSION

In a society where students can bribe their professors for higher grades, it is no surprise that the police, prosecutors, judges and other public officials are subject to similar pressures. Wealthy individuals can get reduced sentences, gain release from prison or pay indigent people to take their place in prison. The western world is not free from the temptation of bribes, but in Moldova, as in other former Soviet states, it is culturally acceptable.

In Chisinau, the capital of Moldova, some policemen stand along the street and wave down expensive looking cars, or cars with out of city plates, in order to get additional “fees” to supplement their low salaries. Also, after nine p.m. in the evening, police may legally stop pedestrians on the sidewalks, ask them for their identification and ask follow up questions. Foreigners who are dark skinned are more frequently stopped because the police are concerned that they are Chechens.

This is a country where the public does not want to draw the attention of the police. If there is trouble, they avoid seeking the assistance of the police unless it is necessary. Moldovan officials are still learning to achieve the balance between preserving order and permitting individual freedom. Trust between the public and government will take time to establish.

The Moldovan Government must provide Moldovan citizens with greater criminal protections, establish a more adversarial system to determine the innocence or guilt of a defendant, promote equality under the

¹⁵⁸ *Id.* at art. 27(1).

¹⁵⁹ *Id.* at art. 27(3).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at art. 25(3).

law and enforce anti-corruption laws even-handedly, if Moldova is going to become a more democratic and truly free society.

The following are suggestions for additional reforms of the Moldovan criminal justice system: 1) reduce corruption through education and by increasing the salaries of judges, prosecutors, and law enforcement, 2) ensure the courts can protect individual liberty, 3) strengthen the defense bar, 4) continue to reduce the power of the Prosecutor General, 5) secure the rights of the defendants so they will have an express right to protection against self-incrimination, 6) permit defense counsel to advise clients during the first police interrogation, 7) require the issuance of a search warrant by a neutral magistrate, 8) prohibit the practice of holding of a suspect, 9) provide those accused of minor crimes with criminal protections and 10) remove immunity from prosecution from all high level office holders to ensure equality under the law.

Although Moldova is not yet a truly free society, the country has made slow, but somewhat steady progress particularly in the last three years, in reducing the power of the prosecutor, improving judicial independence, and providing greater criminal protections for its citizens. It is important to appreciate that in former totalitarian states even small steps toward reform of the criminal justice system are significant. Moldova is a nation that does not have any history of democratic institutions. It is very slowly learning to respect the importance of the rule of law.

While Parliament's top priority is economic legislation to address the country's economic crisis, the adoption of the proposed Criminal and Criminal Procedure Codes remains an important part of its agenda. The ABA/CEEI predicts passage of both Codes by next summer¹⁶²

There is a great deal to be done in reforming the Moldovan criminal justice system to protect its citizens from abuse of the police and to make the courts truly independent from outside influences. The successful adoption and implementation of these proposed criminal reforms will depend on the Moldovan citizens themselves, and to an even greater extent on their new Communist government.

¹⁶² E-mail from Diana Pinzescu, Department of State, American Embassy, Moldova, to Jennifer Sooy (Dec. 19, 2001) (copy on file with *University of Dayton Law Review*). "Both the Criminal Code and the Criminal Procedure Code have passed first reading. Nothing has been reviewed from the Criminal Procedure Code in parliamentary session preparatory to passage in a second reading." E-mail from Sandra Brito, Department of State, American Embassy, Moldova, to Jennifer Sooy (Dec. 19, 2001, 12:14 p.m.) (copy on file with *University of Dayton Law Review*). In December 2001, the Parliament considered numerous articles of the Criminal Code in a second reading. *Id.* "The second reading of the Criminal Procedure Code will only start after the Criminal code is adopted, but will enter into effect both at one time." E-mail from Diana Pinzescu, *supra*.