



COE273094

Strasbourg, 12 March 1996

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96/869

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CDL (96) 14  
Or. Eng.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**COMMENTS**

**ON THE DRAFT CONSTITUTION OF UKRAINE**

**THE STATE PROSECUTION**

by

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Prague, 27 February 1996

## Comments on the Draft of the Ukrainian Constitution

### The State Prosecution

*The State Prosecution was common feature of all so called Soviet legal systems, in the former Czechoslovakia and all other former Eastern bloc countries. But it faced a major problem. On the one hand it had to appear to be from the legal point of view independent on the other hand, it had to be easily politically controlled. The state Prosecution was infiltrated by the Communist Party.*

*It was a semi-military organization headed by the Prosecutor General, who was empowered to give orders to any subordinated procurator or to all of them. He also had the power to assume any case.*

*The soviet Procuratura supervised the observance of laws of the other authorities, including courts or administrative organs. The rights and duties of individuals were also under the omnipotent protection of the State Prosecution. The State Prosecution was empowered to take legal action at court or via an administrative authority especially in criminal and administrative proceedings. As regards civil proceedings the*

*State Prosecution could take legal action in cases that were foreseen by law. If a civil case was taken to court the State Prosecution had the power to intervene in this case as a protector of the observance of laws. The State Prosecution could also appeal from the judgment.*

*Everyone, legal persons or individuals, was obliged to give anytime an explanation to the State Prosecution or to submit documents to it.*

*With relation to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms the totalitarian type of procuratura has had to be completely transformed. Human rights and fundamental liberties could not be under the protection of the State Prosecution, they must be under the protection of independent, impartial tribunal. Everyone is namely entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. No other authority could sub specie this principle supervise or control legality. The fundamental objective of the State Prosecution is to act on behalf of the state in criminal, in pretrial and trial proceedings. However procurator governs pretrial proceedings, and in trial proceedings procurator is a party to an action in much the same way as an attorney at law.*

*The transformation might be done in two ways. The first*

*aspect is organizational and the second is systematic.*

*It is hardly acceptable for the State Prosecution to be headed by the Procurator General, who is appointed by the President of the Republic upon consent of the Parliament, if he or she has the power to bind subordinated procurators directly or if he or she has the power to assume any case directly. The fact that the Prosecutor General is a powerful political figure means the position could be opened to dangerous abuse.*

*In transforming the system it is better to create a system of relatively independent prosecuting authorities which will copy the court system. It is necessary for the higher authority to control the lower one directly. However the highest authority could not directly control the lowest one. In this way, the system of prosecution is protected against direct political intervention or influence.*

*The draft of the Ukrainian Constitution set up the independence of any other bodies or officials (article 121). The organization and operation of the Office of the Procurator of Ukraine are designated by law. The new law faces the challenged limiting the direct influence of the Procurator General to the procurator on the lowest level.*

*From the systematic point of view the procuratura could not*

*represent the interests of the citizens. It is part of the executive power. The prosecution could represent the interest of the state or public interest. It is not the independent authority and nor could it not be. Prosecutors are subordinated, appointed by the Procurator General but the judiciary is the only independent power entitled to protect the rights and freedoms of all subjects of law within scope of the private law.*

**Conclusion :**

There are reservation to the article 120, paragraph 2, because of the broad power of the State Prosecution out of scope of the public law. The key article is the article 125. The new law will show the definit character of the Ukrainian State Prosecution.

  
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