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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**Opinion on the present law
and on the draft law of Ukraine
on the Public Prosecutor's Office**

by Ms H. Suchocka (Member, Poland)

The first remark has to do with the title of the draft law. This is a technicality, but any title is essential by virtue of defining the document under consideration. The submitted draft law on 14 July 2000 is entitled in a way suggesting the introduction of amendments to the existing law on the prosecutor's office. However, the construction and content of the draft law indicate that this is the draft of a completely new law, and not amendments to the text of an existing one. I believe the title is misleading because it suggests that some part of a hitherto binding law is to remain in force, whereas the draft is formulated in such a way as to indicate that the draft law is meant to completely supplant existing legislation. Rewording the title would therefore seem in order.

In its resolution 1244 (2001) on the Honouring of Ukraine's Obligations and Commitments, the Parliamentary Assembly invoked the commitment of the Ukrainian authorities to change the law pertaining to the role and functioning of the public prosecutor's office. The hitherto binding law of 1991 in its basic construction was a throwback to resolutions known from the period of the Soviet state. Although that law had been repeatedly modified, its essence, especially as regards the retention of the so-called general supervision exercised by the public prosecutor's office, evoked serious reservations. Hence the idea to draft a new law on the public prosecutor's office should be evaluated positively. The basic question remains, however, to what extent has the submitted draft severed ties with the prosecution system characteristic of the bygone era and contains new elements of the organisation and functioning of the public prosecutor's office characteristic of a democratic law-abiding state.

It should be noted, however, that preparing a new law on the prosecutor's office is no easy task, especially if it is not to be simply a formality describing existing reality in different words. That has been the experience of individual countries of Central Europe which have grappled with the problem of recasting the office of public prosecutor. In my view, the difficulty is exacerbated by the fact that existing universal as well as European standards of law-abiding states regulating the public prosecutor's office do not accept a uniform model. They do not contain a clearly defined catalogue of principles as is the case with the judiciary, where the principle of independent courts and sovereign judges is a fundamental cornerstone, from which there can be no departure in a democratic state.

For that reason, individual states have greater leeway in regulating both the situation as well as the prerogatives of the public prosecutor. The prosecutor's office may therefore be closely tied to the executive branch of authority, or even be an integral part of it, as is the case in the United States and, to a large degree, also in Austria, Germany and Poland -- an arrangement that does not run counter to the system's democratic nature. But, alternatively, it can be completely separated from executive authority and, together with the judiciary, constitute a joint magistrature, which in Europe seems to be a more widespread model.

Hence the evaluation of a concrete draft in a concrete state cannot confine itself to simply analysing its text but must also take into account the 'environment' in which a given draft has been spawned. In the course of evaluating new legal solutions in states emerging after the collapse of the Soviet Union it has been noted that they must be appraised in their concrete legal environment. The analysis of a concrete draft may not be detached from the institution's tradition under the previous system. It would appear that the substance of the public prosecutor's office is not the best example thereof.

The draft under analysis here clearly aims to detach the public prosecutor's office from the executive branch of authority. Hence its basic assumption follows that broader European trend which some regard as more democratic. That is indicated by Article 4 (p. 2) which states that one of the organisational principles of the Public Prosecutor's Office is its 'independence and

guidance by the Constitution and laws of Ukraine'. That principle has been phrased in the way the independence of the judiciary is traditionally formulated. Nevertheless, the draft under analysis does not constitute a cohesive construction, nor does it clearly specify what model of public prosecutor is involved. It should be noted at this point that simply detaching the public prosecutor's office from executive authority does not automatically guarantee the creation of an efficient and effective prosecutor's organ commensurate with the challenges of a state of law.

Although this is undoubtedly an oversimplification, it should be pointed out that the principle of separating the prosecutor's office from the state administration and creating a separate system of prosecution organs had been one of the cornerstones of the previous political system. That separation, its extensive prerogatives and lack of any supervision had made the prosecutor's office one of the former state's principal instruments of repression.

The question arises -- how deeply are the functioning mechanisms of the previous system's public prosecutor's offices entrenched in the public awareness? Are the guarantees contained in the submitted draft, in particular the principle of balance of power, sufficient to ensure that the present law will not give rise to threats and not re-introduce a system reminiscent of the bygone era. On that score, I have my doubts.

It is true that certain changes have been introduced. Unlike the law in force to date, the principle contained in Article 1 of the present law has been eliminated from amongst its leading principles. That provision instituted the principle of the public prosecutor's office's general supervision of the way other Ukrainian state organs executed the law, and that had been a cornerstone of the prosecutor's office in the previous system. It entailed the elimination of an administrative judiciary in a communist state, as that role was to be played by the public prosecutor's office. Such a function of the public prosecutor's office undoubtedly runs counter to European standards of a law-abiding state. The absence of that principle among the main provisions of the draft therefore deserves to be positively evaluated. It is certainly a step in the right direction. At the same time, doubts have been raised as to whether Article 50 does not contradict that solution. Although the principle of such supervision has not been mentioned among the leading principles, my impression is that it has not been entirely abandoned. In a certain sense, that principle has been referred to by Article 50 where, in listing the tasks of supervision, it states: 'The Public Prosecutor checks: the conformity of certificates (acts) given out by all enforcement authorities and local self-management, enterprises, establishments, organisations, military management bodies, supervisory bodies and their officials with the requirements of the Constitution of Ukraine, binding laws and normative decrees of the President of Ukraine.' It may not be as clearly specified as it is in the currently binding law of the Council of Ministers and ministers, nevertheless the catalogue of entities subject to such supervision has been phrased in so general a manner that it may provide a basis for expanding interpretation (especially if one takes hitherto tradition into account). Such a formulation must give rise to anxieties that this essentially new draft may retain old solutions not in keeping with what is required of the public prosecutor's office in a state of law. That section, ie the entire chapter (Chapter 6) should be thoroughly revised, as it is unacceptable in its present form.

Many misgivings have also been evoked by Chapter 7, especially its Article 57 regulating the institution of instructions. The conditions under which a prosecutor may avail himself of instructions are too vaguely phrased and give the prosecutor too much freedom of action. The prosecutor is effectively set up in the position of a judge. It is he who decides whether a violation of the law is obvious and can cause significant harm to the interests of an enterprise or establishment and calls on the proper organ to eliminate the infringement. That gives the prosecutor immense authority. The system of instruments available to the prosecutor corresponds

to a role other than that envisaged by the principles of a law-abiding state. Elsewhere in the draft there are other solutions constituting a remnant of the all-powerful public prosecutor's office of the previous period and they may decide the shape and scope of prerogatives currently exercised by the prosecutor. Amongst them I should count Article 3. There are serious doubts as to whether such wording should be retained. Are the activities of the Public Prosecutor indeed aimed at the procession of the sovereign and independent, democratic, social, legal State? The same may be said of part 5 of Article 26, where it is stated that boards of the organs of the Public Prosecutor's Office have the right to hear reports and explanations on legal violations presented by heads of ministries, departments and other organs of the executive and local government... That prerogative is detached from any concrete penal proceedings and, formulated in that manner, constitutes one of the instruments characteristic of the public prosecutor's general supervision.

A number of solutions indicate a contradiction between the pursuit of a new model of prosecutor's office and the role of the prosecutor in the previous system. One such contradiction arises when juxtaposing Articles 6, 7 and 9. Does not the prosecutor's independence and its guarantees so strongly emphasised in Articles 6 and 7 not run counter to Article 9 which allows the prosecutor to take part in sessions of parliament, its commissions and committees, cabinet meetings and meetings of local authorities? As a part of the executive in political systems where the justice minister serves as prosecutor general, he can and in certain situations must take part in sessions of parliament and cabinet meetings. But in view of the separation of powers that seems to arise from the formulation of Articles 6 and 7, Article 9 does not correspond to a prosecutor's organ organised along those lines.

Similar doubts have been raised by Article 11 pertaining to the prosecutor's participation in the legislative process. That is much too wide a prerogative for the prosecutor. The formulation of that provision suggests that in every situation and to every piece of legislation the prosecutor may propose amendments without any limitations, and that would include legislation unconnected with his scope of activities. The phrasing of that provision also clearly suggests its origin in the previous system.

The overall draft leaves one with the impression that its authors do not have a clear vision of the office of public prosecutor. That is attested to by, among other things, weak regulations of investigative activities and the prosecutor's prerogatives in that area. The authors seem unable to decide whether or not to create a separate institution of investigator. (Compare the remarks at the bottom of p. 17.) Whether or not the institution of investigator exists has considerable bearing on the prosecutor's prerogatives. In order to enable the prosecutor's positioning and scope of activities to be properly established, that issue should be resolved at the very outset.

In my view, that reservations presented above indicate the lack of a clear and unambiguous conception of the Public Prosecutor's Office in Ukraine and justify further profound discussion on the target model desired. The adoption of a law in the form contained in the present draft would not be justified.