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(VENICE COMMISSION)

COMMENTS ON THE DRAFT LAW OF THE REPUBLIC OF UKRAINE ON THE PUBLIC PROSECUTOR'S OFFICE

by
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1. The submitted draft law constitutes yet another attempt to fulfil the obligation imposed on Ukraine by Resolution 1244 (2001) of the Council of Europe's Parliamentary Assembly (Honouring of obligations and commitments by Ukraine). The resolution points directly to the need to transform the role and functions of the prosecutor's office; and it clearly defines that obligation as a change in the role of the prosecutor's office in relation to the one it played in the former communist state. A democratic state requires a different organisation and a different definition of the mutual relations between the prosecutor's office and other state organs from what existed in the previous system. Every piece of draft legislation pertaining to the prosecutor's office must therefore be analysed in terms of that obligation.

2. The draft legislation on which this opinion is being given marks yet another attempt to prepare a new law on the prosecutor's office. The previous 2000 draft legislation, designed to amend the then existing prosecutor's office act, was also submitted for evaluation to the Venice Commission. The expert opinions presented at that time included a number of detailed critical remarks which indicated the general direction in which changes to solutions pertaining to the prosecutor's office were to go.

3. One gets the impression, however, that the present draft fails to incorporate many of the basic recommendations made at that time. The current draft in essence does not contain any fundamental changes in relation to the aspects of the previous draft that evoked the most doubts and criticism. In general terms, the changes introduced can best be described as 'cosmetic changes', as they have left the basic model of the prosecutor's office essentially unchanged. As a result, the remarks made in reference to the previous legislative draft are still fully pertinent. That being the case, it is difficult to avoid repeating the same critical remarks presented at that time (in 2001).

I. General Remarks

4. The questions posed at that time need to be reiterated, namely to what extent does the model of prosecutor's office proposed by current legislation break with the model of "procuratura" characteristic of the communist period? And, as required by the Council of Europe, does it contain the principles characteristic of the way a prosecutor's office should function in a law-abiding state (democratic state ruled by law)?

5. Those queries give rise to many doubts. One has the impression that the way certain general principles of the draft law are described conforms to the principles characteristic of democratic states. This includes such things as the strongly emphasised principle of independence (Article 4, point 2 - independence and subordination only to the Constitution and laws of Ukraine). Adoption of that principle clearly indicates the choice of a model that does not link the prosecutor's office with executive authority. The chosen model separates the prosecutor's office from executive authority (the government), which is now a more common solution than combining the function of prosecutor general and justice minister. However, the latter solution is also encountered in certain democratic states (eg USA, Austria, Poland). Therefore, it may be assumed that in principle that is the proper direction in which to move.

6. At the same time, I wish to recall what I wrote in my previous evaluation that simply separating the prosecutor's office from the executive authority alone is not a sufficient guarantee of an efficient, effectively functioning prosecutor's office meeting the challenges of a law-abiding state. It should be emphasised that it was precisely in communist states (taking into account all the many differences) that the prosecutor's office, became the state's basic tool of

repression as a result of such separation, its broad scope of authority and its exemption from all supervision. An analysis of the text of the law inevitably evokes the impression that the model of an 'omnipresent', dominating prosecutor's office has persisted in the minds of the authors of the legislation now under review. While invoking the terminology of an independent prosecution organ, they have surrounded it with instruments characteristic of the former period. The role of the prosecutor's organ conceived in this manner does not fit the declared principle of separation of power. Hence, the principle of independence alone is no guarantee of a democratic prosecution model. On the contrary, it may lead to the creation of an all-powerful prosecutor's office, thereby becoming a threat to the democratic functioning of other state organs, including courts of law. An analysis of detailed provisions shows that such fears are not groundless.

II. Detailed remarks

7. Article 1 defines the tasks of the prosecutor's office. Since those definitions are crucial to further detailed solutions, they raise serious doubts. The scope of functions performed by the prosecutor in light of that article considerably exceeds the scope of functions performed by a prosecutor in a democratic, law-abiding state. It would be difficult to deal in a more detailed manner with points 1-4, since the functions of the prosecutor's office as defined by those points are little more than a faithful repetition of article 121 of the Constitution. In that sense, despite misgivings over the prosecutor's excessively broad scope of power, especially with regards to point 4, where he impinges on the authority of the judiciary, those are executive regulations to the constitution.

8. Point 5, which does not constitute an executive regulation to the Constitution, is wholly unacceptable. On the contrary, the proposal to include such a provision in the Constitution evoked the criticism of the Constitutional Court, which ruled that the scope of authority granted to the prosecutor by that regulation far exceeds the boundaries of the separation of power. That regulation, giving the prosecutor the right to supervise the observance of human and citizens' rights and freedoms and the observance of laws pertaining thereto by bodies of state power, local governments and their officials and functionaries, places the office of prosecutor within the framework of the former model of "procuratura". The prerogatives of the prosecutor thus cross over into the scope of authority of other state organs. The prosecutor's office in a democratic state is not entitled to exercise general supervision over the observance of human rights by other state organs and functionaries. That provision should therefore not be included in the new prosecution act, because, first of all, it is contrary to the legally binding constitution and, secondly, by violating the principle of separation of power, it lays the groundwork for creating an all-powerful prosecutor's office within the system of state organs.

9. Article 3 evokes similar misgivings. The general protection of the rule of law is not the task of the prosecutor's office. That was characteristic of the previous system but does not fit the framework of a prosecutor's office functioning within a democratic state. That regulation has been formulated in the exact same way as that contained in the 2000 draft law.

10. Article 5: This regulation states that legitimate orders issued by the prosecutor shall be obligatory for all bodies, enterprises, institutions, organisations, officials and citizens, and shall have to be carried out (fulfilled) within the time limits specified by the law. That is an extremely dangerous provision. The scope of instruments with which the prosecutor's office is entrusted is far too broad. Orders issued by the prosecutor may not be binding on everyone in general and in every matter. Included as it is amongst the draft's general principles, that regulation is too general. It fails to specify in what matters and in what proceedings such orders are binding. Such

far-reaching obligations should not be imposed on other organs, enterprises and citizens in undefined and legislatively unspecified matters and situations. As a result of being granted such powers, the prosecutor's office becomes a super-authority. It is my conviction that article 5 formulated the way it is should be removed from the law on Prosecutor's Office. Situations in which the prosecutor's decisions are binding should arise out of laws pertaining to concrete judicial proceedings and not have such a sweeping character.

11. Article 7 regulates guarantees of the full independence of the prosecutor. If one adopts a prosecution model which is separate from the executive authority, guarantees of independence are indispensable. In that situation, such a solution is justified. But this article regulates various situations, each of which raises serious misgivings. First of all, the guarantees are formulated too broadly. A cause for alarm is the statement that 'any interference by … the media … shall be prohibited'. There exists the justified fear that such a formulation encroaches upon media freedom. It can provide the basis for too broad an interpretation that could prevent media coverage of matters with which the prosecutor's office is dealing. Undermining the principle of media freedom undermines one of the most basic fundamentals of the democratic order. That formulation already raised misgivings in the previous draft. It should therefore be changed.

12. Other solutions contained in article 7 are also unacceptable. They not only guarantee the prosecutor's independence but allow him to encroach upon areas reserved in accordance with the separation of power for other authorities. This regulation provides grounds to overstep that separation. The prosecutor may at any time participate in sessions of various bodies and commissions. ('In cases the Prosecutor considers it expedient, he or she shall participate in the meetings of these bodies'.) He or she may participate not at the invitation of those bodies but solely on the basis of his or her own will and prerogative. Such guarantees of independence serve to build the prosecutor's special power centre vis-à-vis other organs. In view of the fragility of the democratic system, which has yet to develop properly, a prosecutor's power created as a kind of super-authority within the state is very dangerous to the development of a democratic, law-abiding state.

13. Article 10 raises similar misgivings. The Prosecutor General takes part in sittings of the Supreme Court and those of other specialised higher courts. This regulation is very general in nature and is not a right connected to concrete court proceedings. This once again unilaterally empowers the prosecutor to participate in the meetings of another independent organ, the judiciary.

14. A consequence of thus formulated general principles contained in Section I are the provisions contained in the subsequent chapters of the law. They seem to be the logical development of provisions that accord the prosecutor's office the role of a super-authority.

15. Section II regulates the system and organisation of the Prosecutor's offices' activity. That chapter contains regulations constituting the development of the principle of unity and centralisation contained in article 4. The structure of prosecutor's organs separated from other organs is strictly centralised and thereby modelled on the former "procuratura". The prerogatives of the Prosecutor General, who heads such a centralised structure, are exceptionally broad (art.15). In fact, it is extremely difficult even to compare it to the model existing in democratic states, since the prerogatives of the Prosecutor General and his offices greatly transcend the scope of powers which prosecution organs have at their disposal in democratic, law-abiding states.

16. A separate military prosecution organ, which has evoked criticism, has been retained.

17. In accordance with the Constitution, the Prosecutor General is appointed to a five-year term. The Constitution however contains no indication that other prosecutors are to be appointed for a limited period and limits only the Prosecutor General's term to five years. But the law clearly mentions grounds in which the Prosecutor General may be recalled before his/her term in office has elapsed (article 16). Those grounds are methodically enumerated and should be positively evaluated, because they could preclude a recall for political reasons. Also clearly enumerated (article 17) are reasons in which Verhovna Rada of Ukraine may express a vote of no-confidence in the Prosecutor General, as a result of which he/she must step down.

18. The law does not precisely specify the length of the period in which other prosecutors are appointed to serve. Article 22 contains no concrete formulation on the subject. One may assume they are appointed for an indefinite (unlimited) period of service, since in listing the reasons for which (any) prosecutor may be dismissed, article 22 states that 'the prosecutor could be dismissed from his or her post…' whereas with regard to the Prosecutor General, article 16 makes use of the term 'pre-term dismissal'.

19. The scope of prerogatives contained in subsequent articles also raises serious misgivings. The Prosecutor retains all his hitherto supervisory powers (articles 36-46). The scope of that supervision is unacceptable. The Prosecutor has been granted too many prerogatives empowering him or her to undertake preventive activity not connected to concrete proceedings. This is the case with articles 43 and 45. Such issues in a democratic state are dealt with by the ombudsman. Article 45 constitutes a development of the unconstitutional point 5 of article 1 (mentioned above). It should not be included in this law at all. Similarly, the range of instruments available to the prosecutor in exercising supervision, which are extremely broad and varied, is unacceptable (article 46). The Prosecutor has the right to intervene anywhere, including the right to violate bank secrecy - not in concrete criminal proceedings but as part of his right to exercise general supervision. The catalogue of prerogatives contained in article 46 exceeds the bounds of prosecution empowerment granted by democratic, law-abiding states.

20. To conclude, it must be stated that the submitted draft does not fulfil the requirements imposed on Ukraine with regards to changes in the scope and functioning of its prosecution organs. All the prerogatives of the prosecutor, which were to have been transitional in nature, have been enshrined in this draft as prerogatives the prosecutor is to permanently enjoy. The submitted draft has effectively petrified the old model of procuratura dating from another era. Hence, any discussion of detailed principles and resolutions is secondary, since the system of primary principles, according to which the prosecutor's office is to function, first needs to be changed. The prosecutor's office must be enshrined in such a way so as to respect the principle of division of power and the resulting obligations. The prosecution model of the previous era cannot simply be imbedded in a system based on new and different political principles.