



Strasbourg, 17 May 2006

CDL(2006)032

Opinion 380/2006

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT LAW
ON AMENDMENTS
TO THE CONSTITUTION OF UKRAINE**

**prepared by
the Prosecutor General's Office**

LAW OF UKRAINE
on Amendments to the Constitution of Ukraine

Verkhovna Rada of Ukraine **resolved:**

I. to introduce to the Constitution of Ukraine (Bulletin of Verkhovna Rada of Ukraine, 1996, No. 30; Article 141, 2005, No. 2, Article 44) the following amendments:

1) *to revise Articles 121-123 in the following edition:*

Article 121

Public Prosecution of Ukraine is a unified independent system of judiciary authority and shall be entrusted with:

- 1) criminal prosecution in pre-trial proceedings and prosecution in court on behalf of the State;
- 2) protection of human and citizen's rights and freedoms, state and public interest, as well as the representation of their interests in court as prescribed by law;
- 3) supervision over observance of laws by authorities conducting criminal and pre-trial investigation;
- 4) supervision over observance of laws by authorities and institutions in execution of judgments, as well as in application of the measures of coercion related to the restraint of personal liberty of citizens.

Public Prosecution shall perform other functions prescribed by law.

Article 122

Public Prosecution of Ukraine shall be headed by the Prosecutor General of Ukraine who shall be appointed to the office by the President of Ukraine with the consent of Verkhovna Rada of Ukraine.

As a Prosecutor General may be appointed a person, who is a citizen of Ukraine, who reached forty years, who has a degree in Law, who has an experience in the prosecution service no less than fifteen years, who has lived in Ukraine during past ten years and knows the national language.

The term of powers of the Prosecutor General of Ukraine shall be seven years, upon the termination of which, he may be dismissed from his/her position by the President of Ukraine or appointed to this office in order as prescribed by Part 1 of this Article.

Pre-term dismissal from the office of the Prosecutor General of Ukraine shall be rendered by the President of Ukraine with the consent of no less than two thirds of the constitutional composition of the Verkhovna Rada of Ukraine in cases and on the grounds as prescribed by law.

The Prosecutor General of Ukraine shall yearly inform on the activity of the prosecution authorities the President of Ukraine and Verkhovna Rada of Ukraine.

Article 123

Organization, powers and order of activity of the prosecution authorities of Ukraine are determined by law.

The structure of the Prosecutor General's Office of Ukraine shall be approved by the President of Ukraine.”

2) *to revise Point 9 of Chapter XV “Transitional Provisions” in the following edition:*

“The Public Prosecution of Ukraine shall continue to perform the function of pre-trial investigation under the acting legislation, unless the system of pre-trial investigation is formed, as well as the laws regulating its performance are introduced”.

EXPLANATORY NOTE
to the Draft Law of Ukraine on Amendments to the Constitution of Ukraine

1. Background for the necessity of adopting the law

Upon the entry of Ukraine to the Council of Europe, Ukraine has taken an obligation to change the role and functions of the Public Prosecution by the reform of this institution into authority in line with the European standards (PACE Opinion and Recommendation No. 190 (1995) of 26 September 1995 on application of Ukraine for membership).

Constitution of Ukraine of 1996 has changed the status of the Public Prosecution by assigning the functions fully corresponding to the principles of the Council of Europe. Along with that, in the Transitional Provisions the function of pre-trial investigation and supervision over observance and application of laws is left for an indefinite period. The Venice Commission has expressed its notice on the last function (Opinion on Constitution of Ukraine, adopted at its 30-th Plenary Meeting in Venice on 7-8 March 1997).

In the course of “small judicial reform” in June – July 2001 there have been amendments introduced into the Code of Criminal Procedure and the *Law of Ukraine on Public Prosecutor’s Office*, according to which prosecutors shall be dispossessed of the right to authorize arrest, house and other personal possessions search, and these responsibilities shall be laid upon courts. Public Prosecution shall be also dispossessed of responsibility of supervision over legitimacy of judicial decisions.

According to the evaluation of European party, Ukraine has made no other substantial steps towards the reform if the Public Prosecution under responsibility before the Council of Europe.

On 8 December 2004 Verkhovna Rada of Ukraine has adopted the *Law on Amendments to the Constitution of Ukraine* that constitutionally prescribes for prosecution the function of supervision over the observance of rights and freedoms of a person and citizen, observance of laws in these issues by the executive authorities, local authorities, their officials and officers. The Law has come into force on 1 January 2006.

In the Venice Commission opinion on laws proposing amendments to the Constitution of Ukraine there has been a concern expressed on extension of the Public Prosecution’s powers and it has been stated that this is a step back from the historical traditions of the prosecution in the countries governed by the rule of law.

In Parliamentary Assembly of the Council of Europe Resolution No. 1466 (2005) of 5 October 2005 on Honouring of Obligations and Commitments by Ukraine has expressed concern that the reform of the public prosecution has become a step back in connection with the constitutional changes of 8 December 2004. As item 11.vi of the Assembly Opinion No. 190 and point 9 of the Transitional Provisions of the Constitution of Ukraine 1996 demand to change the role and functions of this institution. Such proposals are expressed in the Parliamentary Assembly Resolution No. 1604 (2003) on the role of Public Prosecution in a democratic society governed by the rule of law.

Furthermore, PACE reminds of its Resolutions No. 1346 (2003) and 1364 (2004), where it has stated that it is necessary to apply all the provisions of acting Constitution of Ukraine and to take into consideration the Venice Commission Recommendations in introducing amendments to the Constitution of Ukraine.

Parliamentary Assembly expresses deep regret that constitutional amendments of 8 December 2004 contain the provisions, which the Venice Commission has repeatedly recognized as such, that do not correspond to the principles of democracy and the rule of law, in particular, concerning powers of the Public Prosecution.

In its Recommendation No. 1722 (2005) on honouring of obligations and commitments by Ukraine Parliamentary Assembly of the Council of Europe has proposed Ukrainian authorities to present for evaluation of the Council of Europe experts, such as the Venice Commission, new projects of constitutional amendments, law drafts on the reform of the Public Prosecution etc.

With the aim of providing a corresponding honouring of obligations and commitments by Ukraine, that result from its membership in the Council of Europe, achievement of compliance with the Copenhagen political criteria in gaining membership in the European Union, and considering PACE Resolution No. 1466 (2005) and Recommendation No.1722 (2005) of 5 October 2005, with the Decree of the President of Ukraine of 20 January 2006 No.39 the Action Plan for Honouring by Ukraine of its Obligations and Commitments to the Council of Europe has been approved.

Subpoint 1, Point 1 of the Plan prescribe before 1 April 2006 to prepare the Draft Law on Amendments to the Constitution of Ukraine considering Venice Commission opinions and point 14 of the PACE Resolution No. 1466 (2005) of 5 October 2005 that determines amendments to the Chapter defining the status of the Public Prosecution.

2. Objectives of adopting the law

The aim of development of *the Draft Law of Ukraine on Amendments to the Constitution of Ukraine* is the necessity of assignment of constitutional status of the Public Prosecution of Ukraine in line with the international principles and standards on the role and place of the public prosecution in a democratic society with the view of historical traditions, real state of national and social development of Ukraine.

The Draft Law shall be aimed at solving the issue of the place of the Public Prosecution of Ukraine in a common system of power distribution, defining its functions, the order of appointment to the office, establishing requirements to the person who can hold this office.

3. General characteristics and principal draft provisions

Draft proposes to amend Articles 121-123

In particular, in **Article 121** to define that Public Prosecution of Ukraine shall be a unified independent system of judicial authority and shall be entrusted with: criminal prosecution in pre-trial proceedings and prosecution in court on behalf of the State; protection of human and citizen's rights and freedoms, state and public interest, as well as the representation of their interests in court as prescribed by law; supervision over

observance of laws by authorities conducting criminal and pre-trial investigation; supervision over observance of laws by authorities and institutions in execution of judgments, as well as in application of different measures of coercion related to the restraint of personal liberty of citizens. Public Prosecutor's Office of Ukraine shall perform other functions prescribed by law.

Public Prosecution is a unified independent system of judicial authority.

Under Article 6 of the Constitution of Ukraine the state authority in Ukraine is performed on the basis of its division into legislative, executive and judicial.

At the same time, the place of Public Prosecution in the system of state authorities is not defined in the Principle Law that constitutes challenge of breaking of the abovementioned principle in the definition of powers of the Public Prosecution (what has been noticed by the Council of Europe experts more than once).

In the world there are different approaches in the definition of the place of the Public Prosecution in the system of state authorities. Thus, in Estonia, Austria, Poland, and Germany the Public Prosecution belongs to the executive branch of power, in Venezuela, Columbia, and Luxembourg – to the legislative branch.

Along with that, in modern democratic countries there is a tendency of **allocation of Public Prosecution usually to the judicial branch of power**. This way has been chosen by most of the post socialist countries, such as Azerbaijan, Armenia, Georgia, Kazakhstan, Moldova, Russia, Latvia, Lithuania, Bulgaria, and Romania, except such democratic countries as Belgium, Italy, Greece, Spain, the Netherlands, Finland, Portugal, and France.

It has been proposed to refer the Public Prosecution of Ukraine to the judicial branch of power, as the functions of the Public Prosecution are directly connected with performance of justice. Together with that, it will foster depoliticization of the system of the Public Prosecution, as well as it will ensure certain guarantees for its independence.

Independence of the Public Prosecution in performance of responsibilities is a decisive principle in its activity that fully corresponds to international standards. According to this principle the prosecutors perform their responsibilities exclusively on the grounds of implementation of the Constitution of Ukraine and laws effective on its territory irrespective of other bodies of state authority, officials, as well as decisions of political organisations, public societies. The independence of the prosecution bodies shall be guaranteed by the order of appointment to the office of the Prosecutor General of Ukraine and prosecutors, by the order of their dismissal from the offices, by organisational structure of the prosecution bodies, by the order of their financing, by the level of material and social security of the Public Prosecution officers.

Unity of the Public Prosecution means that in Ukraine there is only one system of authorities entrusted with execution of the prosecutorial functions. All the authorities perform their responsibilities according to common principles and rules. Organisational management of the prosecution authorities is conducted by corresponding prosecutors on the basis of unity.

Criminal prosecution in pre-trial proceedings and prosecution in court on behalf of the State.

The function of the criminal prosecution is the principle one and decisive for the prosecution authorities, that is directly prescribed by international norms and standards on the Public Prosecution, in particular by the Committee of Ministers of the Council of Europe Recommendation (2000) 19 and PACE Recommendation 1604 (2003) on the role of the Public Prosecution in a democratic legal society.

This function is typical for countries with a developed legal system (USA, Italy, Germany, France, and Portugal). This way has been chosen by most of the post soviet countries (such as Armenia, Georgia, Kazakhstan, Kyrgyzia, Lithuania, Russia, and Hungary).

Along with that, the range of responsibilities in criminal proceedings is defined by the legislation of criminal procedure and has its own peculiarities in different countries.

Thus, in some countries the abovementioned function contains the stages of the pre-trial investigation, judicial inquiry and service of sentence (Finland, Portugal, Italy, Kazakhstan), and in other – it is restricted by the function of pre-trial investigation (Latvia, Lithuania, Azerbaijan, Byelorussia, Armenia, Georgia, Kyrgyzia, Moldova, Uzbekistan, Romania, Russia).

Prosecution in court on behalf of the state is an obligatory stage of the criminal proceedings; therefore, it is proposed to leave its reference in the text of Constitution.

Protection of human and citizen's rights and freedoms, state and public interest, as well as the representation of their interests in court as prescribed by law.

It is proposed to transform the function of supervision for observance and application of laws (point 9 Chapter XV, Transitional Provisions of the Constitution) into the function of protection of human and citizen's rights and freedoms, state and public interests and to consolidate it with the existing function of representation of interests of a citizen or a state in court (point 2 Article 121 of the Constitution). Along with that, the function of supervision for observance of human and citizen's rights, observance of laws in these issues by executive authorities, authorities of self-government, their officials and officers (point 5, Article 121 of the Constitution).

The proposed function under its prescription, content and objective does not contradict the international norms and standards in the sphere of human rights and is common among prosecution authorities in many European countries. In this definition it acquires the characteristics of an additional mechanism of human rights protection, guaranteed by the Constitution of Ukraine, acting legislation and commonly accepted norms of international law, in particular by Universal Declaration on Human Rights, declared by the United Nations General Assembly on 10 December 1948 and by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950.

The absence of legislation on providing free of charge legal assistance for citizens, high workload of judges, numerous cases of adopting illegal judicial decisions, duration of the process of continuation of the judicial legal reform and other objective factors that would not allow in a proper way to provide an access for the citizens to protection of their rights. In particular, this issue refers to citizens with low-level income, invalids, and minors. This causes the necessity for existence of different mechanisms for human rights protection by governmental institutions, including Public Prosecution.

Similar function of state and public interests, human and citizen's rights protection is performed by the Public Prosecution in Azerbaijan, Byelorussia, Armenia, Kazakhstan, Kyrgyzia, Moldova, Russia, Tajikistan, Turkmenia, Uzbekistan, as well as by Public Prosecutions of Latvia, Lithuania, Bulgaria, Hungary, Poland, Romania, Slovak Republic, Croatia. There have been no comments made by the European structures expressed, however they most of the abovementioned countries are the members of the European Union.

The change of formulation of the function of the Public Prosecution on **supervision over law observance by authorities conducting criminal and pre-trial investigation** is conditioned by uselessness of definition at the constitutional level of the stages of the criminal process and the absence of clear boundaries between different forms of investigation, especially with a view of ongoing reform in this sphere.

The change of name of the **function of supervision over observance of laws by authorities and institutions in execution of judgments, as well as in application of different measures of coercion related to the restraint of personal liberty of citizens** has been evoked by the factor that acting edition (Point 4 Article 121) gives grounds for false interpretation that Public Prosecution performs supervision over courts in execution of judgements, which has been noticed by the Council of Europe experts. Together with that, it is proposed to expand supervisory powers of the Public Prosecution not only in execution of judgements in criminal cases, but in other categories of cases (civil, economic and administrative). With the view of real state of execution of judicial decisions the prosecutorial supervision has to become an additional guarantee (along with the judicial control) of human rights, citizen's freedoms and state interests.

According to acting legislation the Public Prosecution performs coordination of the law enforcement bodies' activity in crime combating, international legal assistance in criminal matters (extradition and criminal investigation transfer, develops the system and methodology of integrated record and statistical report on crimes, solving and investigation of crimes, legal enforcement etc. These functions are subordinated to the principle functions; however they do not coincide with them. Their reflection in the Constitution is unnecessary and, therefore it is proposed to define that **Public Prosecution performs other functions as prescribed by law.**

Article 122 of the Constitution prescribes to specify the order of appointment to the office and dismissal from the office of the Prosecutor General of Ukraine, to define requirements to the person who can be appointed to the office.

The order of appointment and dismissal of the Prosecutor General of Ukraine has to guarantee the realisation of such a determinant principle as independence of public prosecutors.

With this aim, it is proposed to abolish the institution of passing a no-confidence motion to the Prosecutor General by Verkhovna Rada of Ukraine, which according the opinion of the Council of Europe experts is a form of political responsibility that contradicts to the status of the Prosecutor General. In addition, existing order of dismissal of the Prosecutor General gives Verkhovna Rada better priority than the President possesses that disrupts the balance of constraints and integrity between different types of state authority.

The definition of requirements to the candidates to the office of the Prosecutor General of Ukraine, as prescribed by the Constitution regarding judges, should guarantee high professional level of the candidate and specialized knowledge in the prosecution bodies.

Current period of five years of the powers of the Prosecutor General of Ukraine, according to opinion of the Council of Europe experts, does not provide an appropriate impartiality and independence from political powers and should be prolonged. Therefore, it is proposed to determine it into the term of seven years (in Kyrgyzia, Lithuania, Bulgaria this term is seven years, in Macedonia, Slovenia, Portugal – it is six years. In Ukraine the term of powers of the members of the Higher Justice Board, except those, who are the members under their office, is six years, and the term of judges of the Constitutional Court of Ukraine is nine years without right to be reappointed).

It is proposed to distinguish the order of dismissal of the Prosecutor General from the office in connection with the end of the term of his/her appointment and preterm dismissal. In the first case the Decree of the President of Ukraine would be enough, and in the second case the joint resolution of the President and qualified majority of the parliament is needed. The cases and grounds for a preterm dismissal of the Prosecutor General should be defined by Law that would also serve as an additional guarantee for a proper fulfilment of his/her work responsibilities.

The order of appointment and dismissal from the office of the Prosecutor General, as well as peculiarity of his/her legal status shall be defined by the forms of external control over his/her activity. With a view of abovementioned circumstances, it is proposed to define in the Constitution that **the Prosecutor General of Ukraine shall yearly inform on the activity of the prosecution authorities the President of Ukraine and Verkhovna Rada of Ukraine.**

It is proposed to amend **Part 1 Article 123 of the Constitution of Ukraine** with the word “powers” that would reflect the subject of laws regulating the activity of the state authorities. This approach is used regarding the executive authorities (Part 2 Article 120 of the Constitution).

It is proposed to amend the abovementioned Article with Part 2, which would define that ***the structure of the Prosecutor General’s Office of Ukraine shall be approved by the President of Ukraine.*** Currently the Prosecutor General’s Office of Ukraine is almost the only state authority, where its chief is empowered to approve the structure and number of

the officers. The definition by the President of the structure of the Prosecutor General's Office shall foster stability of the prosecution authorities' activity and approve skilled officers.

4. The state of regulatory background in this sphere of legal regulation

The Constitution of Ukraine, Law of Ukraine *On Public Prosecutor's Office*, procedural and other legislation.

5. Financial and economic background

In adopting the *Law of Ukraine on Amendments to the Constitution of Ukraine* there is no necessity for additional financial expenditures for the State Budget of Ukraine.

6. Prognosis for social, economic and other effects of the law adoption

The adoption of the Law will form necessary legal grounds for consistency of the prosecution authorities of Ukraine in line with international principles and standards on the place and role of public prosecution in a democratic society, as well as it will ensure honouring by Ukraine of its obligations and commitments to the Council of Europe (PACE Opinion and Recommendation No. 190 (1995) of 26 September on application by Ukraine for membership of the Council of Europe).

Prosecutor General's Office of Ukraine