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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# COMMENTS ON THE DRAFT LAW ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE CONCERNING THE PROKURATURA[1]

**by**

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[1] *Draft Law prepared by the General Prosecutor's Office.*

1. The opinion of the Venice Commission has been sought concerning a number of proposed amendments to the provisions in the Constitution of Ukraine concerning the Public Prosecutor's Office.

2. The Prosecutor's Office has been the subject of previous opinions of the Venice Commission, most recently in its Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor of 8-9 October 2004 (CDL-AD (2004)038).

## The Existing Constitutional Structure

3. As set forth in earlier opinions, the existing law establishes the Prosecutor's Office as a very powerful institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic law-abiding state. In effect it provides for a Soviet-style "prokuratura". The Constitution adopted in 1996 describes in Article 121 the functions of the procuracy as follows:

*(a) Prosecution in court on behalf of the State:*
*(b) Representation of the interests of a citizen or of the State in court cases determined by law;*
*(c) Supervision of the observance of laws by bodies that conduct detective and search activity, inquiry and pre-trial investigation;*
*(d) Supervision of the observance of laws in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of personal liberty of citizens.*

4. The 1996 Constitution also contains a transitional provision in the following terms:

*"The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over observance and application of laws and functions of preliminary investigation, until the laws regulating the activity of state bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect."* (Chapter XV, para. 9)

5. It was intended, therefore, when the 1996 Constitution was enacted, that the functions of supervision over observance and application of the laws generally (apart from the cases referred to in Article 121 (c) and 9d) of the Constitution) and the function of preliminary investigation would only remain with the procuracy in the short term. Since the Transitional Provisions preserved the current procedures for arrest, holding in custody and detention of suspects and for examination and search of a dwelling place or other possessions for a five year period (Chapter XV.13) it would seem that these powers were not intended to remain with the procuracy for more than five years.

6. In 2004 a new clause was added to Article 121 which conferred a fifth function on the Prosecutor as follows:

*"to supervise over the observance of human and citizens' rights and freedoms, and the observance [of] laws on these matters by bodies of state power, local self-governments, their officials and functionaries."*

(Article 1(5) of the draft law)

7. In its opinion in 2004 the Venice Commission was highly critical of this provision. I quote:

*"This function, which does not constitute an executive regulation to the Constitution, is unacceptable. It reflects a proposal to amend the Constitution which was put before the Verkhovna Rada of Ukrainein 2003 but which hitherto failed to get the required majority. In its opinion on the draft amendments to the Constitution (CDL-AD(2003)19) the Venice Commission urged the Verkhovna Rada not to adopt this amendment and in its opinion on the same draft amendments the Constitutional Court of Ukraine questioned its compatibility with the principle of separation of powers. Nevertheless it is proposed in the draft law to confer this function on the Prosecutor's Office. If this is done it will represent the making permanent of a considerable element of the Prosecutor's function which, according to the transitional provisions of the Constitution, was intended to be temporary only.*

*Furthermore, while transitional provisions envisaged that the Prosecutor-General would no longer carry-out pre-trial investigation but merely supervise it, the provisions of the new draft envisage a control by the Prosecutor's Office over pre-trial investigations which goes far beyond mere supervision. Under Articles 37-39 of the draft law it is clear that the Prosecutor-General can give binding instructions to the bodies of pre-trial investigation.*

*The draft Law therefore provides the procuracy with powers beyond those envisaged by the Constitution and has to be regarded as an attempt to reverse the decision taken when adopting the constitution in 1996 to reduce the powers of the Prokuratura over a period of five years.*

8. Nevertheless, the proposal to amend the Constitution was adopted despite the strongly-expressed opinion of the Commission.

## THE PROPOSED CHANGES

9. The changes now proposed constitute a further attempt to fulfil obligations imposed on Ukraine when it became a member of the Council of Europe (see Opinion No. 190 (1995) of the Parliamentary Assembly on the application by Ukraine for membership in the Council of Europe as well as several subsequent resolutions and recommendations of the Parliamentary Assembly on the Honouring of obligations and commitments by Ukraine, most recently Resolution 1346(2003) and Recommendation 1622 (2003)). All these texts emphasise the need to transform the role and functions of the public prosecutor's office to bring it into line with European democratic standards.

10. The changes now proposed may be summarized as follows:

1) The system of prosecution, which remains a "unified" system, is to become the "independent system of judiciary (sic) authority".

2) The power of prosecution is redefined to include a specific reference to criminal prosecution in pre-trial proceedings.

3) Instead of "supervision" of the observance of human and citizen's rights and freedoms is a reference to "protection" of those rights and freedoms.

4) The very general reference to supervision of the observance of laws on human and citizens rights and freedoms by State institutions is deleted. Chapter XV para 9 of the Transitional Provisions will no longer contain a reference to general supervision. The power of supervision over laws by authorities is confined to three matters, i.e.,
   supervision over observance of laws by
   i) authorities conducting criminal and pre-trial investigation,
   ii) authorities and institutions in the execution of judgments and
   iii) authorities in application of the measures of coercion related to the restraint of personal liberty of citizens.

5) The prosecutor is to retain the function of representing the interests of citizens in court in relation to their rights and freedoms "as prescribed by law".

6) Other functions may be conferred on the Public Prosecutor.

7) The Prosecutor General's term of Office is extended from five to seven years which is renewable.

8) Qualifications for office are prescribed.

9) The President can no longer dismiss the Prosecutor General on his sole initiative but only with the consent of two-thirds of the Parliament "in cases and on the grounds as prescribed by law."

10) The Prosecutor General is to report annually to the President and parliament.

11) The structure of the Prosecutor General's Office is to be approved by the President.

12) The limitation on the period during which the function of pre-trial investigation may be exercised by the Prosecutor is being removed. In effect this can continue indefinitely.

## THE TRANSFER OF THE PROSECUTORS OFFICE TO THE JUDICIARY

11. In principle there is no reason why the Prosecutor's Office should not be regarded as a branch of the judiciary rather than the legislature, and this is of course the situation in many countries. It is also the case that while many countries operating a judicial model have a system under which individual prosecutors are attached to particular courts and

operate independently of other prosecutors in the same way the individual judge in his or her own court is independent of other judges, there are examples of states where the prosecution is both organized in a hierarchical structure and a part of the judicial branch – for example, in the Netherlands.

12. Where there is a centralised system of prosecution, as proposed in Ukraine, it is important to respect paragraph 10 of Recommendation (2000) 19 of the Council of Europe which provides that

*"All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, and adequate internal procedure should be available which may lead to his or her eventual replacement."*

13. If the Prosecutor's Office is to be a part of the judicial branch it is necessary to establish a clear distinction between the prosecutors and court judges. Paragraph 17 of the Council of Europe's Recommendation Rec (2000)19 on the Role of Public Prosecution in the Criminal Justice System provides as follows:

*"State should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular, states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge."*

14. The explanatory memorandum to Rec (2000)19 comments further on this issue as follows:-

*"The committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status and certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterised by mutual respect, objectivity and the observance of procedural requirements."*

15. In its opinion CDL-AD(2002)26, para 25, the Venice Commission observed as follows:-

*"Judicial power is devolved exclusively upon the courts. The Prosecutor is a party to criminal cases and has nothing to do with the Judicial power. If the Prosecutor is counted as part of the Judicial power, the defense lawyer ought to have a similar status. The rule that the Prosecutor's Office is an agency of the Judicial power ought in other words to be removed. The Prosecutor's Office may thus, (…) be classified as a part of the judicial system, but not as part of the Judicial power."*

16. The danger of confusion between the role of public prosecutors and court judges is increased where the prosecutor is conferred with functions of supervision. While the prosecutor will no longer have as extensive powers of supervision as exist at present,

nevertheless important powers of supervision will remain. Is he or she to exercise these to the exclusion of the courts? For example, does the power to supervise observance of laws by authorities conducting criminal investigations, or applying measures which restrain the personal liberty of citizens enable the prosecutor to exercise an exclusive competence in these areas? Does his power to "protect" human rights mean that the Prosecutor General and his or her office rather than the courts are to have competence in this area? If it were to be so it would be an unacceptable result. At the very least the present text is unclear on the matter and leaves open the possibility that a law could be introduced allowing such a result.

17. The best solution in the writer's opinion would be to confine the prosecutor's powers to those of criminal prosecution. In this connection it may be noted that in Recommendation 1604 (2003) on the role of the Public Prosecutor's Office in a democratic society governed by the rule of law the Parliamentary Assembly of the Council of Europe considered it essential

*"that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function."*

18. If any powers of supervision over state bodies are to remain with the prosecutor it should be made absolutely clear that this does not detract from the ultimate power of the courts to rule on how those state bodies behave and that it is the courts and not the prosecutors who have the final say in the matter.

## CRIMINAL PROSECUTION IN PRE-TRIAL PROCEEDINGS

19. I see no difficulty in conferring this function on the prosecutor.

## PROTECTION OF HUMAN AND CITIZENS RIGHTS AND FREEDOMS

20. If the prosecutor is to have any role in this area it should be confined to appearing before a court of law to argue on behalf of the public as a whole or on behalf of those citizens who are unable to assert their rights themselves. As the Venice Commission observed in its opinion on the Draft Constitution of Ukraine (17-18 May 1996)

*"It is recommended that this representation should be limited to cases where the public interest is involved and whether there is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask for State assistance or not."*

21. Even more fundamentally the current draft, as already noted, does not exclude the possibility that the prosecutor could be conferred with a competence in this area to the exclusion of the courts. Such a result would be unacceptable.

## SUPERVISION OVER OBSERVANCE OF LAWS

22. The removal of the existing general power of supervision of laws is to be welcomed as a step in the right direction. However, very significant powers of supervision remain, of which the most significant relate to the restraint the personal liberty of citizens. As already noted it would be unacceptable if this means that the prosecutor can decide on such matters to the exclusion of the courts. The prosecutor's powers must be subject in all cases to the power of the court to make a final determination in such matters.

## OTHER FUNCTIONS

23. The provision enabling "other functions prescribed by law" to be conferred on the prosecutor is far too wide. At the very least if it is to remain it is necessary to specify what the nature of such functions might be. The provision would be better deleted. Presumably even without such a clause other functions could be conferred on the prosecutor provided there was no constitutional obstacle to doing so, but the problem with the draft provision is that it seems to authorize the conferring of any function on him or her without any limitation whatsoever.

## TERMS OF APPOINTMENT

24. The specification of qualifications for the office of Prosecutor General is welcome. It is noted that he or she must have at least fifteen years experience within the prosecution service so that an outside appointee such as a judge or a law professor would not be eligible unless having had such experience. There are arguments both for and against such a provision. The requirement to have lived in Ukraine during the previous ten years is, however, problematic. Is this continuous residence? Why is it necessary at all? Why exclude people who have worked abroad for a period?

25. Appointment as Prosecutor General is by the President with the consent of parliament. It would be desirable to have also an input from a technical, non-political body. In its opinions CDL-INF(1996)2 and CDL(1995)73 at II.11 the Venice Commission observed as follows:-

*"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government. It might consist of the occupants for the time being of some or all of the following positions:*

- *The President of each of the courts or of each of the superior courts*
- *The Attorney General of the Republic*
- *The President of the Faculty of Advocates*
- *The civil service head of the state legal service*
- *The civil service Secretary to the Government*

- *The Deans of the University Law Schools"*

26. The power to reappoint the Prosecutor General might be seen as a curb on his or her independence, since a Prosecutor General nearing the end of seven years may wish to curry favour with the President and parliament. However, the provision is not unusual. The fact that two-thirds of the Verkhovna Rada must support his dismissal and that the grounds for possible dismissal must be prescribed by law give strong guarantees against arbitrary dismissal.

## THE STRUCTURE OF THE OFFICE

27. This is to be approved by the President of Ukraine. It is not clear to the writer exactly what is envisaged. It would seem, moreover, that such a matter would normally be set out in legislation. It is clear that the existing provisions, under which the Prosecutor General may determine how many officers he or she employs needs amendment.

## CONCLUSIONS

28. The proposed reforms represent a substantial move in the right direction. Nevertheless there is a need for greater clarity as to the respective role of the courts and the prosecutors, particularly in the areas of human rights, personal liberty and the powers of supervision which are to remain with the prosecutor. The principle of subordination of the prosecutor to the courts needs to be clearly stated. This necessity is all the greater by virtue of the proposal that the prosecutor's office should become a part of the judicial branch of government which in the absence of a clear boundary between the role of the courts and the prosecutors could give rise to dangers.