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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION
ON THE DRAFT LAW
AMENDING THE LAW OF UKRAINE
ON THE OFFICE OF THE PUBLIC PROSECUTOR

Adopted by the Commission
at its 60th Plenary session
(Venice, 8-9 October 2004)

On the basis of comments
by
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I. Introduction

1. On 13 February 2004, the Chairman of the Ukrainian Parliament (Verkhovna Rada) requested the opinion of the Commission on the draft Law amending the Law of Ukraine on the Office of the Public Prosecutor (draft No. 3757 of 10 July 2003; CDL(2004)052).

2. Ms Suchocka, member, and Mr Hamilton, substitute member, were appointed to act as reporting members. Their comments (CDL(2004)048 and CDL(2004)060) were endorsed by the Commission at its 59th Plenary Session (Venice, 18-19 June 2004) and transmitted to the Chairman of the Ukrainian Parliament on 22 June 2004. On 16 July 2004 the Prosecutor General of Ukraine provided a written reply to the comments. This reply was made available to the reporting members.

3. The present opinion, which was drawn up on the basis of these comments, was adopted by the Commission at its .... Plenary Session (Venice, ...).

4. The Commission understands that the draft Law amending the Law of Ukraine on the Office of the Public Prosecutor is being further revised.

II. General remarks

5. The existing Law of Ukraine on the Public Prosecutor's Office (Law No. 1789-XII of 5 November 1991, as amended; CDL(2001)119), henceforth referred to as "the existing law", and an earlier draft law, the Law of Ukraine on Introduction of Amendments to the Law on the Public Prosecutor's Office of 14 July 2000 (CDL(2001)120) were already the subject of opinions by Ms Suchocka (CDL(2001)134) and Mr Hamilton (CDL(2001)128).

6. The draft Law amending the Law of Ukraine on the Office of the Public Prosecutor (hereinafter "the draft law") constitutes another attempt to fulfill one of the 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.

7. The draft law has also been analysed in the light of Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to member states on the role of public prosecution in the criminal justice system and Recommendation 1604 (2003) of the Parliamentary Assembly on the role of the public prosecutor's office in a democratic society governed by the rule of law.

III. Analysis of the draft law

a) The constitutional basis of the powers of the procuracy

8. As set forth in earlier opinions, the existing law establishes 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 in 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*

9. 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 the function 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)*

10. 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 (d) 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.

11. The basis of the new draft law remains Article 121 of the Constitution. However, in addition to the four functions set out above in paragraph 7 is added a fifth, 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)

12. 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 Ukraine in 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.

13. Furthermore, while the 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 investigation 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.

14. 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.

b) Other problems concerning the scope of the powers of the procuracy

15. The draft law envisages that the procuracy will retain a considerable number of extensive powers which in a modern democratic system one would expect to be exercisable by a court rather than a prosecutor, or if exercised by a prosecutor to be subject to the supervision and control of a court. These include the following:

(i) The general protection of the rule of law (Article 3) is not properly the task of the prosecutor's office.

(ii) The power to issue orders to all bodies or persons within the state, including an order to appear before the Prosecutor-General to present explanations in relation to any matter which is the subject of the Prosecutor's supervision or investigation. The Prosecutor has the power to order the militia to enforce such an order (Article 5). This provision is extremely dangerous. The scope of instruments with which the prosecutor's office is entrusted in far too broad and it is not specified in what matters and in what proceedings such orders are binding.

(iii) The power to examine applications and complaints about violation of rights of any individual or legal person and to issue a decision. (Article 9).

(iv) Powers to supervise the observance and application of laws. These supervisory powers extend to the compliance of all acts issued by all organs, enterprises, institutions, organisations and officials with the Constitution and laws of Ukraine (Article 45 and 46). The wide scope of these powers would appear to be in contradiction of paragraph 12 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe which provides that public prosecutors should not interfere with the competence of the legislative and the executive powers. Indeed, the powers contained in Articles 43 and 45 of the draft law would normally be dealt with in a democratic state by an ombudsman. Article 45 of the draft law constitutes a development of Article 1.5 and should not be included at all.

(v) In conducting supervision over the observance and application of law the Prosecutor-General has the right to enter the premises of any state organ, union of citizens, enterprise, institution or organisation, irrespective of its ownership. The Prosecutor can have access to all documents and materials, including bank documents, can demand that managers conduct checks and inspections, and can summon officials and citizens and demand oral and written explanations concerning violations of the law. (Article 46). Again, these powers exceed the scope of functions accorded to prosecutors in a democratic law-abiding state.

(vi) In conducting supervision the Prosecutor-General can demand the termination of an illegal act (Article 47). It does not appear that any intervention by a court is required to give effect to this.

(vii) The Prosecutor also has powers of supervision over the observance of laws in the course of enforcement of judgments in criminal cases and in the course of application of other compulsory measures imposed by a court. The prosecutor can, amongst other powers, study documents that underlie detention, arrest, or conviction, and is obliged to release persons detained illegally (Article 44). These provisions appear to give scope to the Prosecutor in effect to undermine the decision of a court in a criminal matter.

16. Articles 33-35 of the draft law confer on the Public Prosecutor the right to represent the interests of the citizens or the State in court. The basis for this is very widely drawn: as well as minors and incapable citizens are included all persons "who, for some reason, cannot protect their rights themselves". This appears to give the Prosecutor a right to participate in any legal proceedings where such an interest arises, and to apply to court where necessary and appeal court decisions, as well as to summon persons, demand explanations, seize documents, and charge persons.

17. It is, of course, essential that any legal system has a mechanism to protect the interests of the state, public interests and the interests of persons under a disability such as minors or persons with a mental disability. However, Articles 33-36 appear to go well beyond this. As the Venice Commission commented in its opinion on the Draft Constitution of Ukraine adopted on 17-18 May 1996:

> *"It is recommended that this representation should be limited to cases where the public interest is involved and where 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."*

18. It is also worth noting 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 had the following to say about non-penal law responsibilities of public prosecutors

> *"as to non-penal law responsibilities, it is essential:*
>
> *a. that any role for the prosecutors in the general protection of human rights does not give rise to any conflict of interests or act as a deterrent to individuals seeking state protection of their rights;*

b. that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and

c. 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."

The draft Law is very much at variance with these recommendations.

19. The new draft law therefore fails to address the central problem identified previously in relation to the Prosecutor's Office, that of an over-centralization of power in the hands of the Chief Prosecutor and his Office. In addition to the prosecution power, the power to represent the interests of a citizen or of the State in certain cases, the supervision of observance of laws by investigative bodies and supervision over the execution of judicial decisions and over the restraint of the personal liberty of the citizen, the Public Prosecutor's Office continues to exercise powers of general supervision and the effective control over function of preliminary investigation which, under the terms of the 1996 Constitution, were intended to remain with the Prosecutor's Office only until laws regarding the activity of state bodies in regard to the control over the observance of laws were put into force and the system of pre-trial investigation was formed

c) The independence of the Public Prosecutor's office and its relations with the other state powers

20. Article 4 of the draft law strongly emphasises the prosecutor's independence. It states that the Office is independent and subordinate only to the Constitution and laws. The Office is to carry out its activities independently of other bodies of state power (notwithstanding the close links to other bodies which links are the subject of comment below). The prosecutor is not to be involved in politics (Articles 4 and 8 of the draft law).

21. One may however wonder whether these general statements of principle are adequately reflected in the provisions of the new draft on the appointment and dismissal of prosecutors.

22. Appointment and dismissal of the Prosecutor-General are to be by the President with the consent of the Verkhovna Rada. The grounds on which the Prosecutor General may be dismissed are now set out exhaustively in Articles 16 and 17 of the draft law. This represents a better guarantee than the existing law under which the Verkhovna Rada can dismiss for any reason. But there is still no independent and impartial review of the proceedings to remove the Prosecutor-General, as recommended by Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe. The five-year term of office of the Prosecutor-General (Article 15 of the draft law), together with the possibility he or she will seek reappointment, increases the risk that the Prosecutor General will take decisions according to political expediency and not based on purely legal considerations . Some subordinate prosecutors are also appointed for five years terms[1] (it is assumed that this refers only to prosecutors working in the prosecutor general's office but this should be clarified) and are dismissible by the Prosecutor-

[1] Article 15.2 provides : "The Prosecutor-General of Ukraine and the prosecutors subordinated to him or her shall hold their offices for 5 years." The scope of the phrase "The Prosecutor-General of Ukraine and the prosecutors subordinated to him" is not clear.

General (Article 15) for a number of stated grounds (Article 22) but it is not clear if these grounds are exhaustive. Again there is no provision for independent review which would be important if removal were sought due to alleged non-performance of duties, incompetence, misbehaviour, state of health or the results of an attestation.

23. The ambiguity of the draft with respect to the independence of the procuracy is however not the prime concern with respect to the model of prosecution developed in the draft law. The principle of independence alone is no guarantee of a democratic prosecution model. Indeed, it can lead to the creation of an all-powerful prosecutor's office which is a threat to the democratic functioning of other state organs, including courts of law. It was precisely in communist states that the prosecutor's office became a tool of repression as a result of such separation, its broad scope of authority and its exemption from all supervision. The draft law continues to envisage a prosecutor's office closely bound up with both the executive and the legislative branches of government and, as set forth above, exercising powers which should more appropriately be reserved to the judicial branch.

24. The draft law, in Article 10, continues to provide for participation by the Prosecutor-General in meetings of the legislature, the executive and judicial bodies. So far as the legislature is concerned this participation is to be at the invitation of the Verkhovna Rada or its committees, but it would nevertheless be desirable to define the limits in which such participation may be exercised, for example, in order to present reports or answer questions, if this is the case. It would, however, be undesirable that a Prosecutor-General should have power to initiate legislation or participate in parliamentary debates. Similarly, the nature of participation in the plenary sessions of courts should be defined so as to make it clear that the Prosecutor-General is not exercising any judicial function, assuming this is in fact the case.

25. The Prosecutor-General also has the right to participate in the Cabinet of Ministries and in local self-government bodies (Article 10 of the draft law). In addition, Article 7 of the draft law provides that where the prosecutor considers it expedient, he or she shall participate in meetings of any commissions, committees and other collective bodies established by the bodies of executive power, representative bodies, local self-government bodies or the President of Ukraine. Such rights serve to build the prosecutor's power vis-à-vis other state organs and create a sort of super-authority within the state which is very dangerous to the development of a democratic, law-abiding state.

26. Under Council of Europe standards, the public prosecutor's office may either be subordinate to the executive or independent. However, adequate safeguards must be in place to ensure the transparency of any exercise by the Government of prosecution powers. Paragraph 13 of the Committee of Ministers of the Council of Europe's Recommendation Rec (2000) 19[2] sets out

[2] Paragraphs 13 and 14 of Recommendation Rec (2000) 19 are as follows:

13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:

a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;

b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;

c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;

certain conditions which should be met where the prosecutor's office is part of or subordinate to the executive. Paragraph 14 deals with the situation where the prosecution is independent of the Government. It is not, however, clear that the conditions of either paragraph are met. In particular, the Prosecutor-General's participation in meetings of the Cabinet of Ministers of Ukraine combined with his power to issue instructions to more junior prosecutors leads to a situation which is neither transparent nor is it clear that the Prosecutor is acting in an independent way, notwithstanding the guarantees for the independence of the Public Prosecutor's Office contained in Article 4 of the draft law.

27. The strong position of the Prosecutor's office is also reflected in a number of other provisions justified in the draft by the need to protect the independence of the office. Prosecutors cannot be held criminally responsible or arrested without the consent of the Prosecutor-General (Article 7 of the draft law). While some protection of prosecutors from arbitrary or abusive process emanating from another organ such as the police might be desirable, it would be preferable if any limitation on the power to commence a criminal process was subject to judicial control. It is not clear whether or how criminal proceedings against the Prosecutor-General can be initiated as the draft law makes no provision for such an eventuality.

28. Moreover, article 7 of the draft law, which deals with the independence of the Prosecutor, prohibits "any interference of the … media … with the prosecutor's activity". This is a potentially dangerous provision. There exists a justified fear that such a formulation encroaches on media freedom. Care must be taken to protect the media's right to criticize the prosecutor; where this oversteps what is lawful by, for example, causing prejudice to a forthcoming trial, it should be dealt with only by way of a judicial decision.

29. The draft law does not provide for any independent check on the operation or management of the Public Prosecutor's Office. Article 26 establishes advisory boards but they are staffed entirely from within the Prosecutor's Office and their function appears to be to consider violation of legislation by other state authorities.

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d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

- *to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution:*
- *duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels:*
- *to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognizance of it and make comment:*

e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received:

f. instructions not to prosecute in a specific case should in principle be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and scope of the independence of the public prosecution is established by law.

30. Taking these provisions together, it cannot be stated that the draft law makes the procuracy subordinate to other parts of the executive. Rather, the procuracy appears to be more powerful than other executive bodies and outside any independent control. This is a matter of particular concern since the procuracy envisaged by the draft is not a body with clearly and narrowly described powers strictly based on law but a body which can get involved in all kinds of issues and which is linked to the other state powers in a not entirely transparent way.

d) The structure of the procuracy and the concentration of powers in the hands of the Prosecutor General

31. The concerns concerning the scope of powers of the procuracy and the links with other state bodies are reinforced by the strong emphasis of the law on the principles of unity and centralisation of the procuracy. The provisions of Section II of the draft law develop these principles contained in its Article 4 and provide that the structure of prosecution organs separate from other organs is strictly centralised and modelled on the former "prokuratura". The powers of the Prosecutor General, who heads such a centralised structure, are exceptionally broad (see the long list of powers in Article 15 of the draft law) and not limited to ensuring a harmonised approach with respect to the application of the law.

32. The combination of a hierarchical system with the short five-year term and the power to appoint and dismiss centralises a great deal of power with the Prosecutor-General and leaves no independence in the hands of the individual prosecutor. Proposals which appeared in the earlier 2000 draft law to give some degree of independence to individual prosecutors do not appear in the new draft law.

33. All power within the procuracy is thereby clearly concentrated in the hands of one individual, the Prosecutor-General. Having regard to the excessive powers of the institution as a whole, he or she becomes one of the most powerful persons in the country.

34. A separate military prosecution organ under the authority of the Prosecutor-General, which has evoked criticism, has been retained (see Article 21 of the draft law).

IV. Conclusion

35. Despite some marginal improvement over the existing law, the Commission considers that the draft law cannot be regarded as a fundamental reform of the existing procuracy, for the following reasons:

(i) The draft law continues to centralise too much power in the hands of the procuracy and the Prosecutor-General, and in particular has failed to divest the procuracy of functions intended only to be transitional.
(ii) The draft law continues to infringe the principle of the separation of powers. The Prosecutor's powers remain entwined with those of the legislative, executive and judicial branches.
(iii) The draft law appears to confer powers on the procuracy which would more appropriately be exercised by the judicial branch.
(iv) The relationship between the Prosecutor and the executive remains entangled and is not transparent.
(v) The provisions of Article 7 represent a potential threat to press freedom.

(vi) The powers to represent the public and assert rights on their behalf are too widely drawn.

(vii) The draft law continues to confer powers and responsibilities on the Prosecutor which go beyond the function of prosecuting criminal offences and defending the public interest through the criminal justice system, and which are inappropriate to confer on the Public Prosecutor.

(viii) The position of the Prosecutor is not in conformity with Recommendation Rec(2000)19.

(ix) There is no independent check on the operation and management of the Prosecutor's Office