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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

Adopted by the Venice Commission
at its 79th Plenary Session
(Venice, 12-13 June 2009)

on the basis of comments
by
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I. INTRODUCTION

1. By letter dated 18 May 2009 the Minister of Justice of Ukraine, Mr Mykola Onishchuk, asked the Venice Commission to examine the draft law of Ukraine on the office of the Public Prosecutor as approved on 14 March 2009 in the first reading by the Verkhovna Rada of Ukraine. An English translation of the text of the draft law (CDL(2009)085) was sent to the Commission on 26 May 2009.

2. At its 79th Plenary Session on 12 to 13 June 2009 the Commission started its consideration of the draft law in the presence of Minister Onishchuk. Opinions critical of the draft were expressed. Minister Onishchuk underlined that the draft was supported neither by the Ministry of Justice nor by the President and asked the Commission to provide an opinion as soon as possible in view of the forthcoming further consideration of the draft by the Verkhovna Rada. Mr Hamilton and Ms Suchocka were appointed as rapporteurs and the Commission authorised the rapporteurs to send a preliminary opinion to the Ukrainian authorities prior to the next session of the Commission on 9 to 10 October.

3. The present Preliminary Opinion is based on comments by Mr Hamilton (CDL(2009)106) and Ms Suchocka (CDL(2009)107). Additional comments will be provided by an expert of the Directorate General of Human Rights and Legal Affairs of the Council of Europe, Sir Henry Brooke.

II. GENERAL COMMENTS

4. The existing law of Ukraine on the Public Prosecutor's Office has been the subject of opinions by the Venice Commission on a number of occasions. The law of 5 November 1991 and a draft law of 14 July 2000 were commented upon by the two rapporteurs (CDL (2001)128 and 134). A further draft law was the subject of an opinion adopted by the Commission on 8-9 October 2004 (CDL-AD(2004)038). Proposed constitutional amendments on the office of the public prosecutor were examined in an opinion of the Commission adopted on 13 -14 October 2006 (CDL-AD(2006)029).

5. The Venice Commission has in its previous opinions been highly critical of the law concerning the public prosecutors' office in Ukraine. It has described the law as establishing the prosecutors' office as *"a very powerful institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic, law abiding state"*. It has described the office as in effect a Soviet-style "prokuratura" (CDL-AD(2006)029 at paras 3 and 4). It should be noted that, when joining the Council of Europe, Ukraine undertook the commitment that *"the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards"*.

6. This commitment obliges Ukraine to move away from the model of the Soviet-type "prokuratura". The "prokuratura" system in the Soviet period has been described as follows¹:

"The prosecution of criminal cases in court represented only one aspect of the procuracy's work, matched in significance throughout much of Soviet history by a set of supervisory functions. In a nutshell, the procuracy bore responsibility for supervising the legality of public administration. Through the power of what was known as "general supervision", it became the duty of the procuracy to monitor the

¹ Solomon and Foglesong *The Procuracy and the Courts in Russia: A New Relationship?* In East European Constitutional Review Vol 9 No 4 Fall 2000; quoted in document CDL-AD(2005)014, at 5.

production of laws and instructions by lower levels of government; to investigate illegal actions by any governmental body or official (and issue protests); and to receive and process complaints from citizens about such actions. In addition, the procuracy supervised the work of the police and prisons and the pre-trial phase of criminal cases, and, in particular, making decisions on such crucial matters as pre-trial detention, search and seizure, and eavesdropping. Finally, the procuracy was expected to exercise scrutiny over the legality of court proceedings. Supervision of trials gave the procurators at various levels of the hierarchy the right to review the legality of any verdict, sentence, or decision that had already gone into effect (after cassation review) and, through a protest, to initiate yet another review by a court. Even more troubling, the duty to supervise the legality of trials meant that an assistant procurator, who was conducting a prosecution in a criminal case, had an added responsibility of monitoring the conduct of the judge and making protests. This power placed the procurator in the courtroom above both the defence counsel and the judge, in theory if not also in practice.”

7. The draft law confirms the character of the public prosecutor's office as an institution following the model of the Soviet "prokuratura". None of the major criticisms made by the Venice Commission in its earlier opinions of 2001, 2004 or 2006 have been taken on board in this new draft law. The draft law retains the features which were objected to by the Venice Commission in its earlier opinions. The present opinion, therefore, refrains from a detailed, article by article, consideration of the text and focuses on a number of major issues.

III. THE FUNCTION'S OF THE PUBLIC PROSECUTOR'S OFFICE

8. Article 121 of the Constitution of Ukraine adopted in 1996 described 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, enquiry 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 contained 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)

10. It was intended, therefore, when the 1996 Constitution was enacted that the functions of supervision over observance and application of the laws generally 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, remand 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 5 years.

11. 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 humans and citizens’ rights and freedoms and the observance of laws on these matters by bodies of state power, local self-government, their officials and functionaries.”

12. In its opinion in 2004 concerning the corresponding provision in the law on the public prosecutor’s office the Venice Commission observed as follows:

“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 transitional provisions envisage 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.

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.”

13. In a recent draft law on amending the Constitution of Ukraine presented by the President of Ukraine, it has been proposed to remove this fifth clause which was added in 2004. This amendment to the Constitution was welcomed by the Venice Commission its opinion of adopted on 12-13 June 2009 (CDL-AD(2009)024). The Venice Commission stated (at 95):

“Particularly positive is the proposal to abolish the competence of the prosecutor (always strongly criticised by the Venice Commission), “to supervise over the respect for human rights and freedoms and over how laws governing such issues are observed by executive authorities, bodies of local self-government and by their officials and officers”. This provision is a typical example of a reminiscence of the old system of the Soviet prokuratura. The proposal to eliminate this provision from the Constitution of democratic Ukraine is therefore very welcome and an important step towards the fulfillment of the commitment of Ukraine towards the Council of Europe “the role and functions of the Prosecutor’s Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards;”

14. Notwithstanding this proposed amendment to the Constitution, the draft law on the Office of the Public Prosecutor goes in the opposite direction and proposes to retain this fifth function of the prosecutor’s office. This is obviously intended to be a permanent feature of the prosecutor’s office, according to this draft. There is no suggestion that this power is to be transitional. The

whole tenor of the law is to emphasise this power. For example, the first article of the law refers to the fundamental function of the prosecutors' office as follows:

"The Office of the Public Prosecutor of Ukraine ... performs the functions entrusted thereto in the field of protection of human and citizens' rights and legitimate interests and interests of the state and the society against illegal encroachments."

15. Some Ukrainian representatives argue that such a wide role of the prosecutor is justified by the weakness of other institutions in protecting human rights. This situation creates a kind of vacuum for individual persons wishing to defend their rights. Opinion N° 3(2008) of the Consultative Council of European Prosecutors on the "Role of prosecution services outside the Criminal Law Field" does indeed not exclude a role of the prosecutor's office in the field of human rights. It states that *"The role of public prosecution services and the extent of its competences, including the protection of human rights and public interest, are defined by the domestic legislation of member States. The presence or absence and extent of non penal functions of public prosecutors are deeply rooted in the cultural heritage, the legal tradition and the constitutional history of nations."*

16. In the opinion of Consultative Council of European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of "prokuratura". This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards.

17. The Venice Commission, therefore, maintains its position that a role of the prosecutor to protect human and citizen's rights and freedoms should be limited to specific, clearly and narrowly defined cases. In its Opinion on the draft Law of Ukraine amending the Law on the Public Prosecutor (CDL (2004)038, at 17.) the Venice Commission stated: *"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 State assistance or not"*. One can find a similar "warning" in PACE Recommendation 1604(2003) on the role of the Public Prosecutor's office in a democratic society: *"as to non-penal law responsibilities, it is essential 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."* The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office².

18. Therefore the whole Chapter 13 of the draft seems unacceptable. It is a kind of rebuilding of the old system of the supervisory role of the prosecutor's office with a very wide competence of the prosecutor. Art. 54 describes the subject matter of supervision: 1) *compliance of the regulations issued by public authorities and local authorities, officials and officers thereof and related to human and civil rights and freedoms with requirements of the Constitution and laws of Ukraine;* 2) *observance of laws on personal immunity, social and economic, political, labour, personal human and civil rights and freedoms, protection of their honour and dignity.* This role of prosecutor is far too wide.

² See also the report by Varga on Role of the Public Prosecution Service outside the Field of Criminal Justice, at IV.3 (CCPE-Bu (2008)4 rev.)

IV. OTHER ISSUES

The role of the prosecutor's office in the system of state powers

19. The office is defined by Article 1 of the draft as being an independent unified centralised system. The prosecutor's office is no longer sited either in the judicial system or in the executive. It would seem that it is to be regarded as a type of fourth power.

Hierarchy and structure of the office

20. While Article 6 of the draft law purports to guarantee the independence of the individual prosecutor, Article 19 of the draft establishes a highly hierarchical structure under which the prosecutor general can issue orders and instructions and appoint and dismiss prosecutors. In the circumstances it is hard to see how any individual prosecutor can truly be regarded as independent. Under Article 23, which deals with the appointment and dismissal of prosecutors, no provision is made for any independent review of this function which remains entirely within the discretion of the Prosecutor General. These procedures do not accord with the recommendations of the Council of Europe in Recommendation 2000(19) on the Role of Public Prosecution in the Criminal Justice System. In effect all the functions are centralised in the hands of the Prosecutor General.

21. Articles 17 et seq. of the draft propose to maintain the structure of the Office of the Public Prosecutor. Article 17 not only preserves the comprehensive structure of military prosecutor's offices but mirrors the structure of government as a whole. This is a typical Soviet type approach where a prosecutors' office was primarily concerned with acting as a watchdog on the public administration.

Powers of the public prosecutor's office

22. The extensive powers which are conferred on the prosecutor's office to act without the authority of a court and which were criticised in previous Venice Commission opinions are all retained. For example, under Article 9 orders of the Public Prosecutor are binding upon all public authorities, and all citizens can be required to appear before the public prosecutor upon his or her summons and to provide explanations. In the case of non-appearance without a valid excuse an official or a citizen may be brought before the prosecutor by the militia. Officials and citizens are liable under law for failure to carry out the lawful orders of the public prosecutor.

23. Article 56 gives the public prosecutor power to enter premises of public authorities and local authorities, citizens' associations, enterprises, institutions, organisations whatever their ownership and to have access to documents and materials, and to require their production. The prosecutor can request that decisions, instructions, orders and other acts and documents be produced for verification and obtain information on the status of legality and measures to ensure it. These powers can be exercised when carrying out supervision of the observance and application of laws. Given the comprehensive nature of the power to supervise the observance of laws, these powers are very far reaching indeed.

The public prosecutor's office and the courts

24. Under Article 39 the representation of citizens' interests in court is still a function of the prosecutor. The Venice Commission has in the past observed that this function should only be conferred on prosecutors in cases where citizens are unable to act on their own behalf by reason of disability or some other such cause, and in no case should it be conferred on prosecutors to the exclusion of the right of a citizen to seize the court directly.

25. The prosecutor is given extensive powers over the courts system. For example, under Article 41 the prosecutor can challenge decisions even in cases he did not appear in. Under Article 36 the prosecutor has power to require the production of court documents. He is given the power, in case of detecting violations of citizens' rights during trial of a case in court, to take

measures to restore the violated rights. One would have thought that this would be a function of the court itself and not the prosecutor.

Pre-trial investigation

26. While the Constitution refers to the prosecutor as supervising the procedures of search and investigation, in fact the prosecutor is effectively in charge of the investigation and not merely supervising it. Under Articles 48-49 the Prosecutor General is given power to carry out investigations himself.

Drafting issues

27. The proposed draft should not be accepted even from the purely technical point of view. Articles 87 and 89 (3 pages) go into far too much detail for a law.

CONCLUSIONS

28. To sum up, the present draft, which is not supported either by the Minister of Justice or the President, does not intend to reform the present functioning of the prosecution service in Ukraine which was inherited from the Soviet "prokuratura" system. It is rather an attempt to preserve the status quo and to put an end to reform efforts undertaken on the basis of the 1996 Constitution of Ukraine.

29. None of the major criticisms made by the Venice Commission in its earlier opinions of 2001, 2004 or 2006 have been taken on board in this new draft law. The draft law retains the features which were objected to by the Venice Commission in its earlier opinions. The prosecutor's office would remain a very powerful and excessively centralised institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic country. The draft does not bring Ukraine any closer to complying with the commitment towards the Council of Europe that *"the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards"*. The draft should therefore be withdrawn.

30. A comprehensive reform in line with the country's commitment to the Council of Europe would require, first of all, constitutional amendments such as those recently proposed by the President of Ukraine and, thereafter, an entirely different new law.