



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 21 June 2004

CDL (2004) 060 fin
Or. Engl.

Opinion no. 292/2004

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by
Mr James HAMILTON (Substitute Member, Ireland)

**Endorsed by the Venice Commission
at its 59th Plenary Session
(Venice, 18-19 June 2004)**

GENERAL

1. I have been asked to write an opinion on a draft law amending the Law of Ukraine on the Public Prosecutors Office. The existing law, together with amendments proposed at the time which were not proceeded with, were the subject of earlier opinions by the present writer (7 December 2001) and Ms H Suchocka (11 December 2001), which were adopted by the Venice Commission.

THE PRESENT LAW

2. The existing Law on the Public Prosecutor's Office in Ukraine establishes a very powerful institution. In effect it provides for a Soviet-style "prokuratura". Its functions as described in Article 121 of the Constitution adopted in 1996 are 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

3. 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)

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.

4. The principal conclusions concerning the existing law in the writer's opinion of 7 December 2001 were as follows:

- (i) The law centralises too much executive power in the hands of one institution and even, because of the hierarchical organisation of the Procuracy, in one individual, the Public Prosecutor of Ukraine.
- (ii) The law infringes the principle of the separation of powers. The Prosecutor-General's powers appear to be closely intertwined with the powers of the judicial, executive and legislative branch.

- (iii) The law appears, in some respects, to confer powers on the Procuracy which ought to more appropriately be exercised by the judicial branch and even in some cases enables the Procuracy to set aside judicial decisions.
- (iv) The relationship between the Prosecutor-General and the executive is not transparent nor is it clear that the Prosecutor is independent of the executive.
- (v) The conditions of tenure of prosecutors do not give them appropriate guarantees of independence of the executive and legislative branches of government.
- (vi) The power to represent the citizens' interests is too widely drawn.
- (vii) Article 7 represents a potential threat to press freedom.

I. THE PROPOSED DRAFT LAW

5. 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 2, those of prosecution, representation of the citizen or state, supervision of pre-trial investigation and supervision of criminal judgement and measures restricting liberty, 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))

6. This new function reflects a proposal to amend the Constitution which was put before the Verkhovna Rada of Ukraine in 2003 but rejected. It seems that despite this rejection, 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 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 it is clear that the Prosecutor-General can given binding instructions to the bodies of pre-trial investigation.

7. 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.

8. Furthermore, the draft law continues to envisage a Prosecutors office closely bound up with both the executive and the legislative branches of government and exercising powers which should more appropriately be reserved to the judicial branch.

9. 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.

10. The relationship between the executive and the procuracy remains a problem. The Prosecutor-General is to participate in the Cabinet of Ministries and in local self-government bodies. While in principle it is possible within a democratic system to have public prosecution subordinate to the executive, nevertheless where this is the case 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) 19¹ sets out certain conditions which should be met where this is the case. 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.

¹ 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;

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.

11. It is worth noting that the Parliamentary Assembly of the Council of Europe, in Recommendation 1604 (2003) on the role of the Public Prosecutor's office in a democratic society governed by the rule of law, 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.”

12. 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 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 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).
- (ii) The power to examine applications and complaints about violation of rights of any individual or legal person and to issue a decision. (Article 9).
- (iii) 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 which provides that public prosecutors should not interfere with the competence of the legislative and the executive powers.
- (iv) 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).
- (v) 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.
- (vi) 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 set aside the decision of a court in a criminal matter.

13. Articles 33-35 of the Law confers 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”. On foot of this the Prosecutor appears to have 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.

14. 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.”

15. Article 7, which deals with the independence of the Prosecutor, prohibits “any interference of the ... media ... with the prosecutor’s activity”. This seems to the writer to be a potentially dangerous provision. 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.

16. Despite general statements of principles the provisions in the new draft do not represent an adequate guarantee for the independence of the Prosecutor’s Office. Article 4 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 adverse comment above. The prosecutor is not to be involved in politics (Article 4 and Article 8).

17. Appointment and dismissal of the Prosecutor-General are to be by the President with the consent of the Verkhovna Rada. The grounds on which a prosecutor may be dismissed are now set out exhaustively in Articles 16 and 17. 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 Council of Europe. The five-year term of Office of the Prosecutor-General, together with the possibility he or she will seek reappointment, has the potential to undermine independence². Some subordinate prosecutors are also appointed for five years terms and are dismissible by the Prosecutor-General (Article 15)

² 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.

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 regard were sought due to alleged non-performance of duties, incompetence, misbehaviour, state of health or the results of an attestation. 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 2001 draft law to give some degree of independence to individual prosecutors do not appear in the new draft law.

18. Prosecutors cannot be held criminally responsible or arrested without the consent of the Prosecutor-General (Article 7). 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.

19. 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.

CONCLUSION

20. In summary, I have the following conclusions concerning the draft law:

- (i) Despite some marginal improvement over the existing law, the draft law cannot be regarded as a fundamental reform of the existing Procuracy.
- (ii) 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.
- (iii) 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.
- (iv) The draft law appears to confer powers on the Procuracy which would more appropriately be exercised by the judicial branch.
- (v) The relationship between the Prosecutor and the executive remains entangled and is neither transparent nor can the prosecutor be regarded as independent of the executive.
- (vi) The provisions of Article 7 represent a potential threat to press freedom.
- (vii) The powers to represent the public and assert rights on their behalf are too widely drawn.
- (viii) 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.
- (ix) The guarantees for the independence of the Prosecutor are inadequate and not in conformity with Recommendation Rec (2000) 19.
- (x) There is no independent check on the operation and management of the Prosecutor's Office