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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**  
**ON THE DRAFT LAW OF UKRAINE**  
**ON THE PROSECUTION SERVICE (No. 2491)**

**SUBMITTED TO PARLIAMENT**  
**BY PEOPLE'S DEPUTIES**  
**V. SHVETS, YU. PROKOPCHUK, V. SIVKOVYCH et al.**

**by**

**Mr James HAMILTON (Substitute member, Ireland)**

*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The opinion of the Venice Commission has been sought concerning a new draft law of Ukraine on the Office of the Public Prosecutor which was adopted in first reading on 14 March 2009 by the Verkhovna Rada of Ukraine.

2. 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 the subject of opinions by Mrs. Suchocka (CDL (2001) 134) and the present writer (CDL (2001) 128). A further draft law was the subject of an opinion adopted by the Commission on 8-9 October 2004 (CDL-AD (2004) 038). Yet another draft law was the subject of an opinion of the Commission adopted on 13 -14 October 2006 (CDL-AD (2006) 029).

3. 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).

4. 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.

5. 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)

6. 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.

7. 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."

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

9. "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.

10. 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.

11. 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."

12. In a recent draft law on amending the Constitution 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.

13. 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 emphasize 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."

14. Furthermore, the office is defined as being an independent unified centralized system. The prosecutor's office is now 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.

15. 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 law. The draft law retains the features which were objected to by the Venice Commission in its earlier opinions.

16. For example, 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 centralized in the hands of the Prosecutor General.

17. The extensive powers which are conferred on the prosecutor's office to act without the authority of a court and which were criticized 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. Article 56 gives the public prosecutor power to enter premises of public authorities and local authorities, citizens' associations, enterprises, institutions, organizations whatever their ownership and to have access to documents and materials, and to require their production.

This power can be exercised when carrying out supervision of the observance and application of laws. Given the comprehensive nature of the power to observe to supervise the observance of laws these powers are very far reaching indeed. Furthermore, officials and citizens can be summoned and demanded to give explanations concerning violations of law. 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. Under Articles 61 and 62 failure to obey the prosecutors instructions can give rise to legal liability.

18. Other matters which were criticized previously by the Venice Commission have been retained in the draft. For example, 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 be conferred on prosecutors to the exclusion of the right of a citizen to seize the court directly.

19. 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.

20. 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.

21. In conclusion, this draft law does not represent an advance in the direction of reforming the prosecutor's office of Ukraine in line with democratic standards. If anything, it represents a consolidation of the prokuratura type model and the making permanent of features which were intended to be transitional. In view of the obvious contradiction between this draft law and the recent proposals to amend the Constitution, it would seem that this draft represents a different tendency in Ukrainian society to that which produced the amendment to the Constitution. In the circumstances, therefore, I have not attempted a line by line examination of the law, but have confined myself to commenting on issues which were previously addressed in opinions of the Venice Commission and which have not been remedied by the draft law.