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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
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by

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1. The proposed draft law was adopted in First Reading by the Verkhovna Rada of Ukraine, March 2009. This draft is prepared as an executive law to the existing Constitution. The regulation of the current Constitution on Procuracy has involved strong criticism of the Venice Commission, especially art. 121 p. 5 added by the Law of 8 December 2004.

Point 5 states that Procuracy is entrusted with “supervision 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”. Ukrainian authorities argued that such a wide role of prosecutor derives from the weakness of other institutions in protection of human rights. This situation creates a kind of vacuum for individual person to defend his/her rights.

The opinion N° 3 (2008) of the Consultative Council of European Prosecutors on the “Role of prosecution services outside the Criminal Law Field” does not exclude the role of prosecutors 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.”

2. In the opinion of CCEP the element of constitutional history and legal tradition of given country was strongly pointed out. But the question arises how can be defined the legal tradition as regards the institution of public prosecutor in Ukraine. There is no democratic legal tradition in Ukrainian system what concerns prosecutor’s office. The only existing historical model is the soviet model of procuratura.

There is no different constitutional tradition of this institution in Ukraine. For that reason, the role of prosecutor in the area of human rights can be modeled only on the old experience of the soviet procuratura, which does not seems to be the best model to be followed to achieved the goal to built democratic prosecutor office. It was then one of the main obligations put on the Ukrainian authority in the moment of its entrance to the Council of Europe to build the status of the Public prosecution of Ukraine in line with the international principles and standards in a democratic society. Soviet model was strongly criticized in many opinions given by the Venice Commission as not meeting the democratic criteria. (Opinion on the draft Law Amending the Law of Ukraine on the Office of the Public Prosecutor, CDL(2004)083).

3. The wide right of the prosecutor to protect human and citizen’s rights and freedoms, state and public interest has also always raised doubts. It was often a concern of Venice Commission. In its Opinion on the draft Law of Ukraine amending the Law on the Public Prosecutor (CDL (2004)038, para. 17.) the Venice Commission states: *“ 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 office¹.

¹ See also Varga’s report p. IV.3 (CCPE-Bu (2008)4 rev.)

4. For that reason in Venice Commission opinions it was always strongly stressed to eliminate p. 5 art 121 of the Ukrainian Constitution, to limit the power of the prosecutor. The elimination of p. 5 could give a new impulse to reform the prosecutor office in Ukraine and help “to abandon” the old model of omnipotent procuratura. In its opinion adopted during the last meeting on the draft Law on amending the Constitution (CDL(2009)098), p. 95 reads as follows: “particularly positive is the proposal to abolish the competence of the prosecutor 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”...The proposal to eliminate this provision from the Constitution of democratic Ukraine is therefore very welcome and is an important step towards the fulfillment of the commitment of Ukraine towards the Council of Europe”. Taking into account the last decision of the Venice Commission it is impossible to accept positively the draft on the office of the Public Prosecutor, because it is going against the European standards.

5. The draft proposes to maintain the whole structure of the Office of the Public Prosecutor. A lot of critics involves art. 17. Beside the proposal to preserve the whole structure of military prosecutor’s office there are also proposal to keep, such a specific for the soviet system institutions, like transport and environmental prosecutor’s offices.

6. The role of prosecutor regulated by Chapter 13 should not be accepted. 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 honor and dignity.* This role of prosecutor is too wide in the light what has been said above. Art. 56, p.3 gives to the prosecutor a power of a very strong interference in the activity of different enterprises, whatever their ownership is. It is not acceptable. I do not like to enter into details, because in my opinion the chapter 13 should be deleted.

7. I would like to quote here once again the description of the functions of prosecutors in the system of soviet procuratura, done by the Venice Commission.²: “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 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

² In its Opinion on the Federal Law on the *prokuratura* (Prosecutor’s office) of the Russian Federation, document CDL-AD (2005)014

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.” The system of prosecutor’s office proposed now by the draft is very close to this negative description. So for that reason it should be changed and the draft in the version proposed now should not be accepted.

8. The proposed draft should not be accepted even from the purely legislative point of view. Art. 87 and art. 89 (3 pages) seems to be rather a wide comment that legal provision.

9. Concluding I am of the opinion that this law should be strongly amended or even rejected. The main problem is to change the idea of the omnipotence procuratura. Till now the basis for such a role still exists in the Constitution. For that reason the amendments to the Constitution are needed. In Ukraine there are series of new proposal concerning changes (amendments) to the Constitution. Taking this into account, there must me done a new constitutional basis for the prosecutor office and only in such a situation a new law on the prosecutor’s office can be proposed.