Strasbourg, 7 December 2001

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CDL (2001) 128

English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Opinion on the present law and on the draft law of Ukraine on the Public Prosecutor's Office

by Mr J. Hamilton (Member, Ireland)

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1. I have been asked to provide an opinion both on the present law and on the draft law of Ukraine on the Public Prosecutor's Office. In doing so I have merely examined texts. I have no means of knowledge of how the law is observed in practice. I have attempted to evaluate the law in the light of the Committee of Ministers of the Council of Europe's Recommendation Rec (2000) 19 on the role of the public prosecution in the criminal justice system.

The present Law

2. The existing Law on the Public Prosecutor's Office ("the Law") 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: -

   (i) Prosecution in court on behalf of the State;

   (ii) Representation of the interests of a citizen or of the State in court in cases determined by law;

   (iii) Supervision of the observance of laws by bodies that conduct detective and search activity, inquiry and pre-trial investigation;

   (iv) 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 present Law on the Public Prosecutor's Office dates from 1991 and has been amended six times since, most recently in July 2001.

5. The procuracy is established by the Law as a uniform and centralised system, with prosecutors at different levels in a hierarchical organisation ultimately responsible to the Prosecutor General. The entire system is "based on the principle of subordination of junior public prosecutors to higher ones". (Article 6 (1)). The Prosecutor General is appointed and

dismissed by the President with the consent of the Parliament. The term of office of the Prosecutor General and other subordinate public prosecutors is five years. Article 7 of the Law guarantees the independence of the prosecutors from interference by the executive, media and political organisations.

6. Despite the provisions guaranteeing the independence of the prosecutors, the conditions of tenure of public prosecutors do not give adequate guarantees for their independence. Article 5 of Recommendation Rec (2000) 19 provides that prosecutors should have reasonable conditions of tenure, and that disciplinary proceedings should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review. Not only the Prosecutor General but also subordinate public prosecutors have a term of office of five years (Article 2). In the case of the Prosecutor General this is a constitutional requirement. All prosecutors can be reappointed. The short term of office combined with the possibility of reappointment at all levels undermines independence. Since the Prosecutor General is appointed to the office by the President upon consent of the Parliament a Prosecutor General who wishes to be reappointed will be under pressure to act in a manner which conforms to the wishes of both the President and Parliament. Under Article 15(3) the Prosecutor General has the responsibility for appointments generally in the Office of the Prosecutor General. He also determines the procedure for promotion and dismissal.

7. The Law does not give adequate guarantees against the wrongful dismissal of the Prosecutor General. Article 2 provides that the Parliament "can discredit the Prosecutor General of Ukraine, which results in his dismissal from the Office." Certain grounds on which this may be done are set out in Article 2 but these do not appear to be exhaustive and in effect there seems to be no limitation on the Parliament's power to dismiss. The Law does not appear to provide guarantees against the wrongful dismissal of subordinate prosecutors despite detailed provisions concerning other aspects of their terms and conditions of service contained in Part IV of the Act.

8. There is no independent check on the operation and management of the Public Prosecutor's Office. There is a Board established by Article 14 but it consists of the Prosecutor General and a number of senior prosecutors most of whom are appointed by him. Under Article 18 its powers are consultative only.

9. The procuracy has a considerable number of extensive powers which in modern democratic systems 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 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 8)

   (ii) The power to examine applications and complaints about violation of rights of any individual or legal person and to issue a decision. (Article 12). This decision may now be appealed to a court as a result of the Decision of the Constitutional Court of Ukraine of 30.10.1997 No. 5-3П; previously an appeal did not lie in all cases.

(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, the observance of laws on human rights where the law does not provide any other way to protect them, and laws concerning economic and international relations, protection of the environment and customs law. (Article 19). 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 public prosecutor 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 19).

(v) In conducting supervision the prosecutor can deliver injunctions to eliminate "obvious violations" of the law. (Article 19 (4)(bis)). These are subject to immediate execution (Article 22) but can be appealed to a higher prosecutor or to a court.

(vi) In conducting supervision the prosecutor can lodge a protest against an act which contradicts the law. This protest has the effect of terminating the validity of the act. If the protest is rejected the prosecutor can apply to court and the introduction of such an application (not a ruling on it by the court) terminates the validity of the act (Article 21). Protests can be lodged against acts of the executive and its officials, enterprises, institutions, organisations and public unions. (Article 19 (1)(bis)).

(vii) Certain senior prosecutors can issue warrants for the detention and expulsion of foreign nationals and stateless persons (Article 27).

(viii) 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). The provisions appear to give scope to the prosecutor in effect to set aside the decision of a court in a criminal matter.

10. Article 36 of the Law confers on the public prosecutors the right to represent the interests of the citizens or the State in court. The basis for this, in relation to citizens, is said to be the inability of citizens to do so themselves because of physical of financial conditions or other well-founded reasons. 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.

11. 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, Article 36 appears to go well beyond this insofar as these powers can apparently be exercised on behalf of individuals whose disabilities relate to physical or financial conditions. 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."

12. The existing Law provides, in Article 9, that the Prosecutor General and his deputies are entitled to participate at the sessions of the Parliament and its organs, in the Cabinet of Ministers, on boards of the ministries and other central bodies of the executive. By virtue of Article 42 they are obliged to participate in sessions of the Plenary Supreme Court and the Plenary Arbitration Court of Ukraine. Likewise less senior prosecutors participate in councils at local government level and in sessions of presidia of regional and local courts.

13. The Public Prosecutor is thereby established at a senior level in the legislative, executive, and judicial branches of government. This appears to be an infringement of European standards in relation to the separation of powers. In particular, these arrangements are not consistent with Recommendation Rec (2000) 19, paragraph 17 of which provides that states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.

14. The relationship between the executive generally and the procuracy also appears to be extremely problematic. 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 Recommendation Rec (2000) 19[1] sets

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

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

a. the nature and 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.

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.

15. 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 7 of the Law.

16. Article 7, while seeking to protect the independence of the prosecutor, prohibits "interference" by the media with his functions. This, unless suitably qualified, could potentially be used to justify restrictions on the freedom of the press to investigate and report the activities of the procuracy.

17. Participation by the public prosecutors in meetings of legislative bodies also seems to be open to objection in principle and to be inconsistent with paragraph 12 of Recommendation Rec (2000) 19, which provides that public prosecutors should not interfere with the competence of the legislative and executive powers.

18. In summary, the existing Law on the Prosecutor General's Office seems to me to be open to criticism on the following grounds: -

(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'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 more appropriately to 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 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.

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

<u>The new draft law</u>

19. Amendments to the Law on the Public Prosecutor ("the Draft Law") have been introduced in the Parliament. I have been furnished with an informal translation into English. While the text of the translation reads reasonably well up until Article 44, the translation into English from Article 45 on is difficult to follow and even incomprehensible in places. These later provisions cover a number of important matters, including the supervisory function of the prosecutor. It is therefore impossible to comment on these provisions in any detail.

20. By way of general comment, the most obvious feature of the Draft Law is that it continues to centralise a great deal of power in the hands of the Public Prosecutor's Office which will, under the draft law, continue to be a Soviet-style "prokuratura". Despite the express intention of Chapter XV of the 1996 Constitution that the functions of general supervision and preliminary investigation were to remain with the procuracy only on a transitional basis these functions remain with the Public Prosecutor's Office. (Article 1). The draft law cannot, therefore, be regarded as a fundamental reform.

21. There are a number of aspects of the Draft Law which represent an improvement on the existing position from the viewpoint of conformity of the law to European norms. These relate principally to the independence of the prosecutor. Unfortunately, in the absence of a real attempt to disentangle the prosecutor's powers from those of the judicial and executive branches these changes would in themselves not necessarily improve the situation and indeed could tend to strengthen an institution which is already too powerful. The positive features are as follows: -

(i) Article 4 expressly provides that organs of the Public Prosecutor's Office exercise their authority independently of other state organs and of public and political organisations and movements, and act publicly. Any kind of interference by, amongst others, public authorities, media, political parties and public unions is prohibited by Article 6. I will, however, return to the reference to "the media" below in paragraph 21. (x). This provision goes on to provide that the public prosecutor adopts decisions "independently and individually on the basis of law and own convictions proceeding from the principle of equality of all persons before the law". While a higher prosecutor can demand and proceed with the examination of any case under consideration of a subordinate, Article 6 provides that he cannot force him to act contrary to his own view. Article 30 provides that "nobody has the right to force the public prosecutor to take in a case an attitude contrary to law, his legal conscience and personal belief".

(ii) The public prosecutor cannot be called to criminal responsibility or arrested without the permit of the Prosecutor General. (Article 6). However, while some protection of the prosecutor 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 criminal process against a prosecutor was subject only to judicial control. The draft also appears to give a complete immunity to the Prosecutor General.

(iii) Article 16 provides that the Prosecutor General can be dismissed <u>only</u> at his own request, because of his health condition, which has to be confirmed by a medical certificate, or entry into force of a verdict of guilty. This represents a substantial

advance on the present law in terms of guaranteeing the Prosecutor General's independence. No mechanism is, however, provided to determine the choice of medical examiner or to settle disputes over his medical condition.

(iv) Under Article 17 the Parliament can also require the Prosecutor General's resignation by passing a vote of no confidence. The grounds for this are specified and are presumably intended to be exhaustive, although this is not clear in the English text. They are termination of his citizenship or departure abroad permanently, or a guilty verdict, or termination of a criminal investigation due to "non-justifying circumstances". I am not sure what this latter term means.

(v) The grounds on which other public prosecutors can be dismissed is set out for the first time (Article 22). Assuming the grounds are intended to be exhaustive, which is not clear, they appear to be in order except for ground (5) "as a result of examination" which I take it means the prosecutors are subject to being examined as to their legal knowledge or competence. This could be open to abuse. There is still no provision for independent review of dismissals.

(vi) While the Boards continue to operate as before, a Guidance Council is established which can make recommendations and other proposals regarding improvement of organisation as well as legislation (Article 27). This represents a limited advance in the direction of providing some independent accountability of the Office of the Public Prosecutor.

(vii) There has been some clarification as to the circumstances in which the public prosecutor may represent the interests of citizens (the law begins by speaking of protection of "juveniles, disabled persons and individuals with limited capabilities, as well as disappeared, socially vulnerable persons, where these interests are not being protected" (Article 34).

22. However, despite these generally positive matters, most of the other elements of the existing law which are referred to in the earlier part of this opinion remain. In particular I note the following aspects of the draft law: -

(i) The principle of unity and centralisation of the Public Prosecutor's Office remains (Article 4) and all other public prosecutors remain subordinate to the Prosecutor General (Article 15).

(ii) The term of office of the Prosecutor General is still five years (Article 15) and he can be reappointed. It is not clear to me what is now the term of office of subordinate prosecutors.

(iii) The Prosecutor General continues to appoint and dismiss the most important of the other prosecutors and to determine the rules applicable to all prosecutors in respect of their appointment and promotion (Article 15).

(iv) The public prosecutors continue to participate in Parliament, its committees and commissions, the Cabinet of Ministers, local government authorities, and courts (including the Supreme Court) (Article 9).

(v) The public prosecutors retain an involvement in the legislative process. The legislature must examine the Prosecutor General's proposals (Article 11).

(vi) The prosecutor retains a number of powers of an apparently judicial nature, including the power to issue orders of a binding character addressed to all natural or legal persons (Article 5) and the power to require all citizens to appear before him and present explanations, which can be enforced by force if necessary. He can terminate the enforcement of a judgment, ruling or resolution of a court for a period of three months (which puts him in a superior position to the court) (Articles 33 and 37, which appear to be a duplication of the same provisions). He can demand various materials, documents, and reports from a wide range of bodies, not all of them organs of the state, summon officials and citizens and require them to give written and oral explanations about violations of rights (Article 36).

(vii) The public prosecutor retains the power of supervision over organs conducting searches, inquiries and pre-trial investigation. This includes the power to terminate "illegal" resolutions of a court authorising searches: Article 39(9).

(viii) The prosecutor retains a power to supervise observance of the laws in the course of enforcement of criminal cases (Articles 45-46) and observance of laws relating to restriction of personal freedom (Articles 48-49) and over the observance and application of laws generally (Articles 50-58). The translation into English of much of these Articles is unfortunately virtually incomprehensible but the Articles in question appear to contain sweeping powers (see, for example, Article 51).

(ix) The public prosecutor retains the power to detain and expel non-nationals (Article 49).

(x) Article 6, while seeking to protect the prosecutor's independence, prohibits "any kind of interference" of the media in the activity of the Public Prosecutor's Office. This continues the provisions of Article 7 of the existing Law and could be used to justify interfering with press freedom to investigate and report. Similarly, the reference to political parties and public unions in the provision, unless carefully drafted, have the potential to be used to stifle dissent and debate.

23. In summary I have the following conclusions on the Draft Law:-

(i) Despite some positive features, 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 executive and judicial branches in particular.

(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) Despite improvements in the rules relating to the tenure of prosecutors generally the length of tenure of the Prosecutor General allied with the possibility for him or her to seek re-appointment infringes the independence of the Prosecutor General. In addition the proposed immunity from criminal process of the public prosecutor gives rise to problems.

(vii) The provisions of Article 6 represent a potential threat to press freedom.