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COMMENTS ON
THE DRAFT LAW ON THE PUBLIC PROSECUTION OFFICE
AND
THE DRAFT LAW ON THE COUNCIL OF PUBLIC PROSECUTORS
OF “THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”

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Opinion on the draft laws on Public Prosecutors' Office and on The Council of Public Prosecutors (Republic of Macedonia)

The Council of Europe has requested an opinion concerning the two draft laws.

The following remarks are based on my general knowledge and experience as a prosecutor since 1988 and my work since 1993 in the Office of the Director of Public Prosecutions of Denmark, currently as Assistant Deputy Director and head of the International Division. More specifically the assessment takes a starting point in Recommendation Rec (2000) 19 on the Role of Public Prosecution in the Criminal Justice System adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and its explanatory memorandum. Furthermore Human Rights standards from the European Convention on Human Rights have been taken into consideration when drafting this opinion.

General remarks

There are in Europe great differences in the institutional position of the public prosecutor from one state to another. The relationship to the executive and legislative powers is often a crucial issue, but these relations can be arranged in different ways, as long as the solutions are able to secure a proper institutional balance and basic respect for democracy and the rule of law.

The two draft laws are mainly about the organisational issues of the prosecution service and not about the case work which I suppose is regulated elsewhere.

Generally assessed I find the basic organisational choices made in the two draft laws, establishing a specific structure for the Prosecutors Office and its relations to Parliament and government, to be in conformity with the standards laid down in Rec (2000) 19. Public prosecution may be part of or subordinate to government (pr. 13 of the recommendation) or independent of the government (pr. 14) as stated in this case in article 2 of the draft Law on the Prosecutors' Office.

Article 5 of the same draft clearly underlines – along the same lines - the basic requirements to public prosecution in a democratic state.

The introduction of a Council of Public Prosecutors is known in many states (though with different functions) and can help to secure independence of prosecutors if the powers and composition of the Council are adequate. This generally seems to be the case according to the two drafts.

The drafts are both very detailed – something which is not the case in any state. How much detail is needed depend largely on legal traditions and expectations in society.

As to the specific provisions of the drafts I have the following comments:

Law on Public Prosecutors' Office

Art. 27 (2). It is not said directly in the article that information can be passed only if no confidentiality requirements are violated hereby. Perhaps this goes without saying, but it could be considered to have this limit clearly stated in the article.

Art. 29 (3). It could be questioned how well these tasks of the Ministry of Justice go with the independent position of the Public Prosecutor's Office. As to the powers related to general matters there are perhaps reasons that could justify these tasks in spite of what is said in article 2 of the draft (compare this to Rec (2000) 19 pr. 13 c), which is about instructions of a

general nature, but in a system where the prosecution is not independent of government.) As to diligence in the work of the Public Prosecutor's Office, examination of writs and complaints from citizens regarding the work and related issues the role of the Ministry is not clearly defined in the text. One could ask, what reactions or sanctions could be the result of the intervention of the Ministry. Intervention in specific cases requires special safeguards as stated in Rec (2000) 19 pr 13 d). I think this paragraph puts a question mark against the independence of the Public Prosecutor's Office.

Article 34 (6, 8, 9 and 11) The powers of the prosecutor to demand information seem very far reaching. On the basis of how other European legal stems operate and in the light of article 8 of the European Convention of Human Rights it would be logical that the courts should play a role in this regard, a role which is not mentioned in the text. There should anyhow be effective and sufficient guarantees in the legal framework governing these situations against possible abuse of access to information, searches etc. Another issue which is not mentioned is the problem related to self-incrimination (art. 6 of the Convention.) I think these issues should be clarified in the text.

Article 36 (3). I agree with the provision, but I wonder why it is limited to the use of firearms. It could be seen as reasonable that an ex-officio procedure should be started whenever a person has died or suffered heavily bodily injury as a result of police intervention or whilst the individual was in police custody. The means that led to this unfortunate situation are of less importance. Article 2 and 3 of The European Convention on Human Rights and Strasbourg case law generally implies an obligation for states to carry out thorough investigations in such cases.

Article 40 (3). The time frame of 30 days seems quite limited. The scope of article 40 as a whole is a little unclear to me, although it is self-evident that the prosecutor must take action quickly within his field of competence.

Article 43 (3). It must be borne in mind that giving the right to decide the numbers of prosecutors to the Council implies that the possibilities for superior prosecutors to perform effective management of their offices will be limited. This is, anyhow, a basic problem of the division of powers between the Council and The Prosecutor's Office.

Article 45. The whole system and its very well defined requirements as to seniority seems quite rigid and is not necessarily promoting effective management.

Article 48. The bans on holding prosecutors liable seem quite absolute. Are there any possibilities to correct wrongdoing by prosecutors apart from criminal cases against prosecutors or disciplinary action, which will be decided by the authorities themselves ? It could be seen reasonable that a citizen could go to the courts and have their ruling as to their legal position at least before the prosecution service as such. Article 6 of the European Convention generally gives a right to access to court. I agree by the way that law suits against individual prosecutors are not generally a way forward.

Article 56 (1). The right to advancement stands as an absolute right. Not all prosecutors may qualify to advancement, but such prosecutors could nevertheless then invoke this article.

Article 58. It could be considered to add in the beginning of this article, that the exercise of the rights should be related to the duties of the prosecutor.

Article 62 (3). I am not sure whether it is clear enough what is a trade association or some other legal association that is established in order to gain some benefit. It must be clear what activity a prosecutor should not engage in.

Article 63 (2). In line two the word “to” should be added after “benefits”.

Article 65 and 66. The difference between dismissal and cease of term of office is not clear to me. Furthermore, it should be taken into account that in many states normally any kind of prison sentence means that a prosecutor is no longer qualified as a prosecutor. It is quite important thus to protect the reputation of the whole prosecution service.

Article 69-71. These articles are to some extent quite vague. It is difficult to describe all situations in detail and there must, in my view, be some room for mistakes or failures by prosecutors without a need for actual sanctioning, but perhaps references to other documents, codes of conduct or similar texts could be helpful.

Article 73. The meaning of “a written warrant” is not clear.

Article 88 (4). The reference to paragraph 4 in the first line should be to paragraph (3).

Law on the Council of Public Prosecutors

Article 14 (1) last indent. What council member is this provision referring to ?

Article 15 (1). The reference to article 13 must be wrong.

Article 35 (3). The same problem arises as in the other draft law on the Prosecutor’s Office as to the somewhat lenient approach to some prison sentences. (See **article 48** as well).

I hope the comments could be useful in the process leading to the approval of the drafts. As stated initially the drafts are generally a good basis for future work of the prosecution service in the Republic of Macedonia.