Continued support to the criminal justice reform in Ukraine


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# OPINION

# OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW OF THE COUNCIL OF EUROPE

## on the Draft Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine (Regarding ensuring a right to a fair sentence for certain category of convicted persons)"

## (Draft Law of Ukraine No.2033a)

**Prepared on the basis of expertise by:**

**Mr Jeremy McBride and Mr Eric Svanidze**

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*This Opinion examines proposed amendments to the Criminal Procedure Code of Ukraine that would introduce a one off, extraordinary review framework for addressing certain systemic and other serious deficiencies previously ingrained into Ukraine's criminal justice system. The object of the proposed amendments is compatible with European standards but a number of matters require attention. Thus, consideration should be given as to whether there are really compelling reasons for not also conferring the proposed right of appeal on those who are serving sentences for grave crimes. In addition, there is a need to ensure that the proposed framework deals with cases where evidence was obtained through ill-treatment, as well as the lack of an appropriate appeals procedure and various other shortcomings potentially leading to miscarriage of justice. There is also a need for greater specificity as to the existing provisions of the Code applicable to the handling of the appeals and to ensure that the requirements for initiating the appeal procedure take account of the practical difficulties that may be faced by persons still in prison. In a number of instances the formulation of provisions could be improved and certain of points of detail need to be addressed. Furthermore, consideration should be given to the possibility of entrusting the appellate role for all cases to a single court so that they are handled in a consistent manner.*

## A. INTRODUCTION

1. This Opinion is concerned with the Draft Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine (Regarding ensuring a right to a fair sentence for certain category of convicted persons)" ("the Draft Law").

2. The objective of the proposed adoption of the Draft Law is, according to the Explanatory Note prepared by its drafters, to introduce a temporary mechanism for the review of criminal sentences following convictions for grave and especially grave crimes in cases where this occurred "without adequate evidentiary basis, pursuant to the Criminal Procedure Code of Ukraine of 28 December 1960" where the persons concerned "are still serving their sentences, in order to ensure for such persons the right to a legal sentence and the restoration of their rights"[1].

3. The present Opinion reviews the compliance of the amendments proposed to be made to the Criminal Procedure Code of Ukraine ("the Code") by the Draft Law with European standards, particularly the European Convention on Human Rights ('the European Convention'), including Protocol No. 7, and the case law of the European Court of Human Rights ("the European Court"). It also makes suggestions as to how the Draft Law could be brought in to compliance with these standards.

4. The Opinion first addresses the object of the Draft Law and then turn to an article by article examination of the amendments that it proposes. It concludes with an overall assessment of the compatibility of the Draft Law with European standards.

[1] Section 2.

5. Remarks will not be made with respect to provisions in the Draft Law that are considered appropriate or unproblematic unless this might not seem to be so at a first glance or is otherwise necessary for the overall assessment of their compatibility with European standards.

6. *Any recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised.*

7. The Opinion has been based on an unofficial English translation of the Draft Law and its Explanatory Note, which has been provided by the Council of Europe's secretariat. It has also taken account of the Ukrainian text where the language of the English translation seemed uncertain.

8. The Opinion has been prepared on the basis of expertise by Jeremy McBride[2] and Eric Svanidze[3] under the auspices of the Council of Europe's Project "Continued Support to the Criminal Justice Reform in Ukraine" funded by the Danish government.

## B. GENERAL OBSERVATIONS

9. The right of appeal[4] that would be introduced in the event of the Draft Law being adopted is, according to the Explanatory Note, concerned with certain cases in which persons had been convicted and sentenced illegally.

10. Furthermore, as both the Explanatory Note and the Preamble to the Ukrainian text of the Draft Law[5] suggest, the intention is to introduce a one off, extraordinary (*ad hoc*)[6] review framework for addressing certain systemic and other serious deficiencies previously ingrained into Ukraine's criminal justice system.

11. The cases to which the Draft Law's provisions would apply are firstly ones in which the confession or testimony on which the conviction was based had either been obtained in breach of the right to refuse to give it or had been subsequently denounced. In addition, the Draft Law would also be applicable to certain other situations in which the fairness of the evidence relied upon could be impugned: testimony obtained from a suspect when he was just a witness or from a witness who either had a personal interest or had contradicted him or herself; distorted

[2] Barrister, Monckton Chambers, London and Visiting Professor, Central European University, Budapest.
[3] Council of Europe international consultant; former prosecutor in Georgia, deputy minister of justice, member/expert of the European Committee for the Prevention of Torture. Both consultants were members of the Council of Europe group of consultants supporting the drafting and adoption of the new Ukrainian Criminal Procedure Code, Law on the Public Prosecution Service (including the relevant opinion of the Venice Commission), National Anti-Corruption Bureau, State Bureau of Investigation and other related legislative acts.
[4] It is to be noted that the Ukrainian version of the Draft operates with the term 'скарга', which is to be translated as "complaint" rather than "appeal" used in the English version.
[5] Available in Ukrainian only.
[6] It does not replace or exclude the standard possibilities, including provided for by Chapter 34 of the Criminal Procedure Code concerning Criminal Proceedings upon Discovery of New Circumstances.

circumstances that obviously contradicted material evidence that had been examined; and circumstances established through material violation of the right of a person to protection during inquiry, pre-trial investigation or trial.

12. Furthermore, it would also be applicable to cases in which exonerating evidence was rejected or not assessed and the penalty imposed was "obviously disproportionate (too harsh)" or entails an unsubstantiated imposition of life imprisonment[7].

13. As a result, the cases are ones involving widespread abuses that have been reported by human rights defenders and activists and illustrated by findings of violations of the right to fair trial in a number of the judgments by the European Court concerning Ukraine.

14. The convictions in the first two groups of such cases would - if the claims as to the basis on which they were secured are well-founded – in most, if not all instances, be contrary to the right to a fair trial under Article 6(1) of the European Convention, having been obtained in a manner that either violated the right to remain silent and the prohibitions on self-incrimination[8] and the use of torture[9], as well as possibly the prohibition on inhuman and degrading treatment or punishment[10], or because the reasoning was inadequate[11] or because they entailed a violation of Article 18 when taken with Article 6 on account of the misuse of the trial process[12]. Those in which exonerating evidence was rejected or not assessed are ones that might involve an unjustified restriction on the ability to adduce evidence in one's defence[13], contrary to Article 6(3)(d), or a breach of the reasoning obligation previously mentioned. Finally, as regards the cases in which the sentence was allegedly problematic, these could be ones that entailed a violation of the prohibition on unhuman and degrading treatment or punishment contrary to Article 3[14] or of other rights under the European Convention[15].

15. The Explanatory Note suggests that the regular appellate arrangements have been inadequate to remedy such convictions and that, although secured in a manner contrary to the European Convention, it was now too late to challenge them through applications to the European Court because of the six-month rule in Article 35(1). The latter obstacle would also be applicable to any additional complaints concerning such cases that the appellate system failed to fulfil the right of appeal in criminal matters required by Article 2 of Protocol No. 7.

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[7] Article 16-1.
[8] See, e.g., *Yaremenko v. Ukraine*, no. 32092/02, 12 June 2008.
[9] See, e.g., *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17 January 2012.
[10] See, e.g., *Jalloh v. Germany*[10] [GC], no. 54810/00, 11 July 2006 and *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.
[11] See, e.g., S*alov v. Ukraine*, no. 65518/01, 6 September 2005 and *Gradinar v. Moldova*, no. 7170/02, 8 April 2008
[12] See, e.g., *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013.
[13] See, e.g. *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008.
[14] See *Vinter and Others v. United Kingdom* [GC], no. 66069/09, 9 July 2013.
[15] See, e.g., *Murat Vural v. Turke*y, no.9540/07, 21 October 2014 (Article 10).

16. In view of this situation, the Explanatory Note asserts that "no other efficient mechanism is available for review of final sentences in the cases of persons convicted on the basis of fabricated evidence, in gross violation of their right to defence" [16]. The Draft Law is thus envisaged as introducing such a mechanism as "an emergency review procedure of a temporary nature"[17].

17. Although such a mechanism cannot be regarded as being required by the European Convention in respect of cases that can no longer be the subject of applications to the European Court, it should be borne in mind that Article 3 of Protocol No. 7 does envisage the payment of compensation in cases where a final conviction is reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

18. Moreover, the re-opening of a case that has already become final will not result in the proceedings concerned as entailing a breach of the prohibition in Article 4 of Protocol No. 4 on being tried or punished twice if this is done because there is evidence of new or newly discovered facts or there has been a fundamental defect in the previous proceedings which could have affected the outcome[18]. This is one of the exceptions to the legal certainty principle that is read into the right to a fair trial under Article 6(1) of the European Convention[19] and which requires that, where a court's judgment has become final, the ruling should not be called into question.

19. It should also be noted that the Explanatory Report to Protocol No. 7 suggested that any re-opening of proceedings in favour of a convicted person and any other changing of the judgment to his or her benefit would not be precluded by this prohibition on double jeopardy[20].

20. The object of the Draft Law can thus be considered to be compatible with European standards.

21. There is, however, no formal obligation to re-open cases with final judgments in case of discovery of a fundamental defect. As a result, European (and international) standards leave it the domestic authorities and laws to identify the specific grounds, procedural format and scope for reviewing and re-opening such cases where the judgments have become final[21]. Only new proceedings, after the reopening has been granted, can - in their turn - be regarded as concerning the determination of a criminal charge to which the requirements of Article 6 of the European Convention are applicable[22].

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[16] Section 1.
[17] *Ibid.*
[18] See, e.g., *Nikitin v. Russia*, no. 50178/99, 20 July 2004 and *Hakkar v. France* (dec.), no. 43580/04, 7 April 2009.
[19] See *Bujnita* v. *Moldova*, no. 36492/02, 16 January 2007, at paras. 20-24 with further references.
[20] Paragraph 31.
[21] See paragraph 23 of the Explanatory Report to Protocol No. 7.
[22] See *Nikitin* v. *Russia*, no. 50178/99, 20 July 2004, at para. 60.

22. There are several considerable limitations in the Draft Law on the possibility of re-opening judgments that have become final.

23. In particular, this will only be possible where those judgments involve convictions for especially grave crimes. Moreover, it will only be possible in the case of prisoners who are still serving their sentence of imprisonment and then just until 31 December 2018. Nonetheless, even with these limitations, the Explanatory Note suggests that it will be applicable to the cases of more than 8,500 convicts[23].

24. However, it should be noted that there are certain differences between the mischief said to be being addressed in the Explanatory Note and the formulation of the provisions in the Draft Law itself. Thus, unlike the latter, the Explanatory Note refers to the cases of concern being not just those involving especially grave crimes but also those involving grave ones. In addition, the Draft Law does not explicitly refer to the use of evidence obtained through treatment contrary to Article 3 of the European Convention[24], the lack of appropriate appeals procedure and other shortcomings noted in the Explanatory Note as potentially leading to miscarriage of justice in many cases.

25. *In view of this divergence between the Draft Law and the Explanatory Note, it would be advisable to consider extending the applicability of framework being established to remedy serious miscarriages of justice and to procedures to handle them, as well as to make a more thorough estimate as to the number of potential beneficiaries of the right of appeal being established*.

26. It should also be borne in mind that Ukraine's obligations under Protocol No. 7 to the European Convention extend also to the requirements in Article 3 concerning the provision of compensation for miscarriage of justice where a conviction is reversed on the ground of a new or newly discovered fact. Furthermore, the conduct of any compensation proceedings will need to be handled in a manner that takes account of the requirements of the presumption of innocence under Article 6(2) of the European Convention[25].

## C. ARTICLE BY ARTICLE ANALYSIS

*Article 16-1*

27. The limitation of the new right of appeal against conviction to "cases of especially grave crimes" means that it would not necessarily apply to all the cases in which convictions have been secured or penalties have been imposed in a manner contrary to the European Convention.

[23] Section 6.
[24] See further the discussion of Article 16.3 in paras. 48-49 below.
[25] See, e.g., *Asan Rushiti v. Austria*, no. 28389/95, 21 March 2000 and *Allen* v. *United Kingdom*, no. 25424/09, 12 July 2013.

28. However, this limitation is not problematic since, as has been seen, there is no requirement to provide an appeal confirmation for such cases. Moreover, there does not seem to be any violation on the prohibition on discrimination – whether contrary to Protocol No. 12 or Article 14 in connection with any right under the European Convention or its other Protocols – since the differential treatment of convictions involving especially grave crimes and ones involving other crimes might be seen as having a legitimate aim and not being disproportionate in that the focus is on particularly serious abuses affecting persons still serving prison sentences.

29. Nonetheless, as already noted[26], there is a discrepancy between the Explanatory Note and Draft Law on this issue and it is conceivable that some persons are also still serving sentences of imprisonment for grave crimes imposed on a basis that is incompatible with the requirements of the European Convention.

30. *Consideration should thus be given as to whether there are really compelling reasons for maintaining the exclusion those who are serving sentences for grave crimes from the possibility of exercising the right of appeal that would be created pursuant to the Draft Law.*

31. Furthermore, there does not seem to be any good reason for limiting the possibility of appeals for the various reasons specified in the Draft Law to guilty verdicts since the rationale for allowing them would be equally applicable where rulings that have imposed compulsory medical measures are subject to the same deficiencies and abuses with which it is concerned.

32. *The scope of the Draft Law should thus be amended accordingly*.

33. The stipulation that the new right of appeal would not affect any other procedure for appeal is, of course, entirely appropriate.

*Article 16-2*

34. The stipulation that the general provisions in the Code regulating the conduct of appeals would – subject to any specific provisions in the Draft Law – be applicable to this new right of appeal might also be entirely appropriate.

35. However, more detailed indications as to the particular provisions applicable under this framework would seem to be required because many of the articles and norms from Chapter 31 of the Code are evidently irrelevant (e.g., Article 435) or are still confusing and could create difficulties in the practice. Thus, the general stipulation that they are applicable "with regard to the specific features set forth in paras. 16-1 to 16-11 of this Section" is too broad and insufficient.

36. *There is a need, therefore, for greater specificity as to the provisions intended to regulate the conduct of the appeals that the Draft Law would allow.*

[26] See para. 24 above.

37. However, the exclusions proposed in the second paragraph of this provision as to who can participate in reviewing the convictions covered by the new right of appeal are not problematic. This is because they would preclude the possibility of complaints about a possible lack of impartiality since they concern previous involvement in the cases being appealed or being a close relative or family member of such persons[27].

*Article 16-3*

38. This provision provides that the new right of appeal – allowing for the re-opening of changing of final judgments - would be based upon six grounds relevant to the merits of a conviction and two relevant to the sentence that was imposed following the conviction.

39. As regards the former and as previously noted[28], only some of the grounds are clearly linked to the object which the Explanatory Note states for the Draft Law.

40. The first concerns possible breaches of the prohibition on self-incrimination and of the right to remain silent. It is not inappropriate to limit such breaches to ones involving the convicted person as the fairness of his or her trial can also be affected where these involve other persons[29]. Nonetheless, the current wording that refers to a "violation of the right to refuse to give testimony or clarifications about themselves" needs to be improved precisely because it is still unclear to what extent the right to remain silent and the right not to incriminate oneself apply to witnesses and participants other than actual or potential suspects or accused in the criminal procedure.

41. Furthermore, the reference to "other evidence that proves beyond a reasonable doubt the guilt of the convicted person" in the introduction to the first paragraph of the present provision, the wording would seem to render the later phrase "or which was not proven during the trial" concerning instances of denouncing initial statements (testimonies) redundant.

42. *The formulation of this first ground thus needs to be revised in order to meet these concerns.*

43. The second ground concerning a testimony obtained from a person who was first a witness is formulated in such a way as to extend to instances when the incriminating statements are made not under this status but also when they are made for the first time during subsequent questioning as suspect or accused, which is not really – at least without other factors - the mischief to which the Draft Law is directed.

44. It would thus be more relevant for this ground to be concerned only with the witness statements of persons who subsequently "became suspect or accused" rather than all

[27] See, e.g., *Chesne v. France*, no. 29808/06, 22 April 2010 and *UTE Saur Vallnet v. Andorra*, no. 16047/10, 29 May 2012.
[28] See para. 24 above.
[29] See, e.g., *Lutsenko v. Ukraine*, no. 30663/04, 18 December 2008.

statements by such persons who had formerly been witnesses. The formulation in sub-paragraph 2(6) of Article 87 of the Code provides a useful guide in this regard.

45. *The formulation of this ground should thus be revised accordingly*.

46. The third and fourth grounds concern the reliability of the evidence, namely, on account of the possible bias of the persons giving it and of possible contradictions. However, while the case of contradictions in an individual's testimony – as referred to in sub-paragraph (2) – may be relatively easy to discern, the reference to "distorted circumstances that obviously contradict the material evidence examined by the court" is undoubtedly in need of some elaboration. In particular, the concept of "distorted circumstances" is far from clear – is it referring to the factual findings ascertained in the contested guilty verdict (judgment) or something else? - and neither is the basis on which these are to be established.

47. *There is thus a need to clarify what is meant by "distorted circumstances" and how these are to be established*.

48. The fifth ground in referring to "circumstances established on the basis of the evidence obtained through material violation of the right of a person to defence during inquiry, pre-trial investigation or trial" appears to have the potential to cover convictions based on evidence obtained not only through torture and inhuman or degrading treatment or punishment but also through self-incrimination, incitement to offend and illegal eavesdropping. This is not problematic in itself but the formulation lacks precision and it would be more helpful if this ground were framed more explicitly, adopting the style of provisions such as those in sub-paragraphs 2(1), (2) and (4) of Article 87 of the Code.

49. *There is thus a need to ensure that this provision is framed in such a way that it explicitly covers at least the use of evidence obtained through torture and inhuman or degrading treatment or punishment and incitement to offend*.

50. In general, all five grounds should embrace derivative evidence - i.e., real and other proofs - recovered or assembled on the testimony or circumstances concerned[30].

51. *This should thus be expressly stated in the present provision*.

52. The sixth ground relevant to merits concerns a situation in which the court entered a judgment of conviction and did so while rejecting a motion for adducing the evidence that exonerated the convicted person or while failing to assess it in its judgment. Both situations have the potential to involve a violation of the European Convention,

[30] The context/case-specific deliberations on admissibility of real evidence suggested in *Gäfgen* v. *Germany* [GC], no. 22978/05, 1 June 2010 should not be interpreted extensively in the situations being addressed by the Draft Law.

whether as regards the inability of the defence to adduce evidence[31] or the failure to give a reasoned judgment[32].

53. However, the fact that there was a motion for adducing evidence does not mean that its rejection was necessarily unfounded as the supporting submissions might not have been sufficiently substantiated.

54. *It would thus be more appropriate to specify in this ground that the rejection of the motion was "unfounded".*

55. In respect of the first five grounds, the success of an appeal would turn not just on them being established but also on the 'absence of any other evidence that proves beyond a reasonable doubt the guilt of the convicted person'. In principle, this corresponds to the well-established quality of the irregularities required to establish a violation of the right to a fair trial. In Article 4(2) of Protocol No. 7 they are referred to as "fundamental defects". Thus, the case law of the European Court suggests that a violation of Article 6 will arise where the deficiencies or irregularities affect "the outcome of the case" [33], "the essence of the right"[34] or "the overall fairness of the trial"[35] and so on. The same rationale of differentiating between a formal approach and the essential negative consequences can be deduced in the tests applied for assessing fairness of admissibility of hearsay evidence, the use of undercover agents and other special investigative or procedural techniques and approaches[36].

56. It is to be presumed, therefore, that due to the intensity and character of the abuses, the flawed criminal procedure and the rule of law in general (as suggested in the Explanatory Note), the drafters intend to apply higher standard and introduce more formal/simplified grounds for determining whether convictions should be set aside. This more favourable approach from the perspective of those convicted is not problematic as far as European standards are concerned.

57. The first of the two grounds relating to penalties is based upon the notion of them being "obviously disproportionate (too harsh) to the crime committed, including the penalty of life imprisonment imposed for an inchoate crime". This is not, in principle, an inappropriate criterion since proportionality is a legitimate principle by which sentencing decisions can be guided. However, given that the impugned sentence is presumably still one authorised by law, it is unclear what exactly will be the reference points for determining whether or not a particularly penalty is too harsh.

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[31] See, e.g. *Matysina v. Russia*, no.58428/10, 27 March 2014.
[32] See, e.g., S*alov v. Ukraine*, no. 65518/01, 6 September 2005 and *Gradinar v. Moldova*, no. 7170/02, 8 April 2008.
[33] *Nikitin* v. *Russia*, no. 50178/99, 20 July 2004, at para. 56.
[34] *Khodorkovskiy and Lebedev* v. *Russia*, no. 1082/06, 25 July 2013, at para.586.
[35] *Ibid*, at para. 599.
[36] See, e.g., *Al-Khawaja and Tahery* v. *the United Kingdom* [GC], no. 26766/05, 15 December 2011, at, paras. 126-165 and *Teixeira de Castro* v. *Portugal*, no. 25829/94, 9 June 1996, at paras 31-39.

58. In this regard it should be noted that the Code already provides for the possibility of changing a judgment on account of "the inconsistency of imposed punishment with the gravity of criminal offense and the personality of the accused"[37], for which some useful additional elaboration is also provided[38]. The latter has the benefit of requiring account to be taken of the convicted person's personality, which is not mentioned in the present provision. It may be that there are existing guidelines on sentencing that might be invoked for the purpose of assessing proportionality but, in their absence, there is a risk of arbitrariness and inconsistency in the approach to appellate rulings.

59. *There is thus a need to elaborate a basis for assessing what is "obviously disproportionate (too harsh)" if none already exists.*

60. The second ground is not problematic since the criterion is much clearer, namely, the imposition of life imprisonment without substantiating the impossibility of imposing a penalty for a definite period. This is unproblematic as it simply involves the failure to explain the choice made between two sentencing options.

*Article 16-4*

61. The stipulation in the first two paragraphs of this provision that an appeal should be determined by the court of appellate instance within whose territorial jurisdiction the convicted person is serving his or her sentence – except where it had previously heard the case – has the merit of potentially facilitating access to justice in a practical sense[39].

62. However, that advantage might be outweighed by the importance of ensuring a consistent approach to the handling of all the cases to which the temporary provisions are envisaged as applying.

63. As already noted, the Explanatory Note was unable to specify the precise number of cases likely to be involved but refers to a suggestion by human rights activists that about 100 of the 1,509 persons serving life imprisonment have been sentenced "illegally" and a similar ratio might be expected to apply to estimated total of 8,500 persons serving sentences of more than 10 years. In view of the significant number of cases potentially involved, consistency might be more readily achieved by centralising rather than dispersing appellate decision-making.

64. *In these circumstances, consideration might be given to the possibility of entrusting the appellate role for all cases to a single court and transferring the appellants to a nearby prison for the duration of the proceedings.*

[37] Article 409.2.

[38] Thus, Article 414 provides that: "Inconsistent with the degree of gravity of criminal offense and the personality of the accused shall be recognized such punishment that, while not going beyond the scope established by the relevant article (paragraph of article) of the Law of Ukraine on criminal liability, in its type and size is clearly unfair because of its leniency or its severity".

[39] Reaffirmed in cases where the appellate court with territorial jurisdiction is barred from determining the appeal because of its prior role; in such cases the court is to be the one "which is geographically closest to the place of serving the sentence".

65. The third paragraph of the present provision – which states that there is an entitlement to appeal against conviction in the case of an especially grave crime seems to be inappropriately located and insufficiently formulated. Thus, it is strange to come after the article dealing with the grounds of appeal and all the more so as it does not actually specify any grounds of appeal.

66. *It would, therefore, be more appropriate to place this provision at the beginning of Article 16-2, with some appropriate revision to the text of that provision's first paragraph.*

67. The deadline envisaged for appealing -31 December 2018 – seems sufficient so long as the adoption of the Draft Law occurs in the course of 2017.

68. *However, the deadline should possibly be advanced/adjusted to take account of the actual date on which the Draft Law is adopted.*

*Article 16-5*

69. As with the similar stipulation in Article 16.2, the general reference to some regular provisions of the Code being the basis for the execution of appeals is too broad to be helpful, with the result that confusion and unnecessary difficulties will be created[40].

70. *There is a need, therefore, for greater specificity as to the provisions intended to regulate the execution of the appeals with which the Draft Law's provisions would be concerned.*

71. The stipulation in the second paragraph that "Evidence that was not submitted or examined in court shall be indicated in the appeal without having to specify the reasons of failure to submit or examine" is concerned with the appeal submission. This would seem to excuse the appellant from having raised relevant matters in proceedings or to allow him or her not to set out the reasoning for the court refusing to examine evidence that was actually submitted.

72. The former might be justified, particularly if the circumstances had made it difficult to advance a particular aspect of the defence case. However, the latter does not seem warranted since a refusal by a court to examine certain submissions might actually have been well-founded and the appeal court ought to be aware of the reasons so that it can make its own assessment as to their merits.

73. *There is thus a need to clarify the actual effect of this provision and, in particular, whether the appellate court must still consider whether there was a well-founded basis for not considering certain evidence.*

[40] See paras. 34-35 above.

74. However, it could prove difficult for some of convicted persons concerned to meet the requirement in the third paragraph that the documents substantiating or confirming a complaint should be attached to an appeal.

75. *In order to facilitate the process, it would thus be appropriate for this provision to be modified so as to envisage the alternative possibility of those appealing being able just to indicate the date, court and other relevant information about the contested judgment (ruling) and the other documents being invoked.*

*Article 16-9*

76. The stipulation in this provision as to the mandatory participation of a defence counsel in appeals partially reflects the wish expressed in the Explanatory Note that such counsel shall act as a filter "designed to prevent abuse of the right of appeal". However, it is also appropriate as all the grounds of appeal are of sufficient complexity to make the assistance of a lawyer essential for a convicted person to be able to present his or her case effectively. It also accords with the approach of the European Court as to the sort of cases in which legal representation in appeals is necessary pursuant to Article 6(3)(c) of the European Convention[41].

77. However, taking into account the overall spirit and context of the Draft Law and its objectives, it would be advisable to envisage that the entire framework that would be established by it is fully covered by the free legal aid scheme.

78. *This provision should thus so stipulate*.

79. It would be more appropriate in the first paragraph to refer to Article 16-3 and not para. 16.3.

80. *The foregoing concern should thus be addressed*.

*Article 16-10*

81. The exception provided for in the first paragraph of this provision to a ruling on an appeal being based on testimony directly taken during the trial – absence because of death or severe physical or mental illness and the whereabouts of the person not being established through the necessary measures of inquiry – will satisfy the European Court's understanding as to what constitutes a good reason for the non-attendance of a witness and thus comply with the specific requirements of Article 6(3)(d) of the European Convention regarding the examination of witnesses, as well as the more general ones under Article 6(1) for a fair hearing[42].

[41] See, e.g., *Boner v. United Kingdom*, no. 18711/91, 28 October 1994 and *Twalib v. Greece*, no. 24294/94, 9 June 1998

[42] See, e.g., *Ferrantelli v. and Santangelo v. Italy*, no. 19874/92, 7 August 1996 and *Isgrò v. Italy*, no. 11339/85, 19 February 1991.

82. However, it should be borne in mind that there will still be a need to demonstrate that sufficient efforts have actually been made to trace a witness who does not respond to a summons to attend a court hearing.

83. Furthermore, a good reason for non-attendance will not by itself be a sufficient reason for upholding a conviction regardless of whether that evidence was the sole or decisive basis for doing so; there must also be counterbalancing factors in order for a trial or appeal to be considered fair, with their extent depending on the weight of the evidence of the absent witness. These include approaching that evidence with caution, the availability of corroborative evidence supporting the untested witness statement, the existence of an opportunity to question the witness during the investigation stage and the opportunity for the appellant to give his or her own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses. The more importance that is attached to that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair[43].

84. The need for counter-balancing factors is not, of course, limited to the appeals under consideration but applies in all cases where rulings rely to some extent on the evidence of an absent witness.

85. *There is a need, therefore, to be sure that not only is there an adequate basis in the Code for applying such counterbalancing factors but that appropriate use of them has also been developed in practice and that the case-specific context provides an opening for fair and proper assessment of the reliability of the testimony of the absent witness. Moreover, it will be important for appellate courts to be reminded of these requirements where the testimony of an absent witness is taken into account in the course of their judgments.*

86. At the same time, by analogy to the rules on admissibility of hearsay testimonies suggested in Article 97.4 of the Code, the possibility could be envisaged of lifting the need for counterbalancing factors either upon agreement of the parties or upon the motion of the appellant where the prosecution could be regarded as responsible for the circumstances under which the person concerned could not have been examined.

87. *This provision should thus so stipulate.*

*Article 16-11*

88. Pursuant to the fifth paragraph, the changing of a sentence, quashing it partially or in full or delivering a new one would render invalid all other judicial decisions within the case concerned. However, taking into account that these decisions could also include civil claims adjudicated within the same framework, there is a need to make it clearer whether or not this rule is intended also to apply to them.

[43] *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015. See also *Ter-Sargsyan* v. *Armenia*, 27 October 2016, app. 27866/10, at paras.44-64 with further references

89. *The intended applicability of the present provision to decisions relating to civil claims thus needs to be clarified.*

90. It is appropriate to provide in the eighth paragraph that no change or reversal of a sentence or any new sentence should entail a deterioration in a person's situation as that would undoubtedly entail the appeal giving rise to a violation of the prohibition in Article 4 of Protocol No. 7 on being tried twice.

91. Furthermore, the general stipulation in the ninth paragraph as to the legal consequences of acquittal – namely, that the person concerned 'shall be deemed as exonerated' – is inadequate as it does not exhaust and sufficiently address the compensation-related obligations and requirements under Article 3 of Protocol No.7[44].

92. *Appropriate provision governing compensation should thus either be included in the Draft Law or reference should be made to any existing legislative provisions that can be regarded as providing for this in a manner satisfying the requirements of Article 3 of Protocol No. 7.*

## D. CONCLUSION

93. As has already been indicated the object of the Draft Law is compatible with European standards. There are, however, a number of matters that require attention.

94. In the first place, it would be appropriate to consider whether there are really compelling reasons for maintaining the exclusion from the applicability of the Draft Law's provisions of convictions in respect of grave crimes.

95. Secondly, it would be appropriate to ensure that the Draft Law also deals with cases where evidence was obtained through treatment contrary to Article 3 of the European Convention, as well as the lack of an appropriate appeals procedure and the other shortcomings noted in the Explanatory Note as potentially leading to miscarriage of justice.

96. Thirdly, there is a need for greater specificity as to the existing provisions under the Code that will apply to the handling of the appeals envisaged pursuant to the Draft Law.

97. Fourthly, there is a need to ensure that the requirements for initiating the appeal procedure take account of the practical difficulties that may be faced by persons still in prison.

[44] See para. 17 above.

98. Fifthly, in a number of instances the formulation of provisions could be improved so that their scope is sufficiently clear and a number of points of detail need to be addressed.

99. Finally, consideration should be given to the possibility of entrusting the appellate role for all cases to a single court so that they are handled in a consistent manner.