

**SUPPORT TO CRIMINAL JUSTICE
REFORM IN UKRAINE**



***COMMENTS ON THE DRAFT LAW OF UKRAINE ON INTRODUCTION OF
AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF UKRAINE CONCERNING
PRACTICE OF LAW***

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Introduction

1. These comments are concerned with the proposed amendments which would be made to the Code of Administrative Justice, the Code of Ukraine on Administrative Offences, the Correctional Code of Ukraine, the Criminal Code and the Criminal Procedure Code by the Draft Law of Ukraine *On Introduction of Amendments to Certain Legislative Acts of Ukraine Concerning Practice of Law* ('the proposed amendments'), prepared by the Cabinet of Ministers for submission to the Verkhovna Rada.
2. The present comments review the compliance of the proposed amendments with European standards, particularly the European Convention on Human Rights ('the European Convention') and the case law of the European Court of Human Rights ('the European Court').
3. The proposed amendments relating to the Criminal Procedure Code are the most substantial and are examined first. Thereafter the proposed amendments relating to the Criminal Code, the Correctional Code of Ukraine, the Code of Administrative Justice and the Code of Ukraine on Administrative Offences are addressed. The comments conclude with an overall assessment of the compatibility of the proposed amendments with European standards.
4. These comments have been based on an English translation of the Law¹, provided by the Council of Europe's Project "Strengthening the Independence, Efficiency and Professionalism of the Judiciary in Ukraine". Their preparation has benefitted from a round table involving key stakeholders held in Kyiv on 2 December 2014 and individual meetings with stakeholders on the same and the following day. They have been prepared under the auspices of the Council of Europe's Project "Support to criminal justice reform in Ukraine", financed by the Danish Government.

Criminal Procedure Code

5. The proposed amendments concerning the Criminal Procedure Code comprise a substantial rewriting of Article 45 and various changes or additions to Articles 47, 58, 63, 66, 75, 115, 120, 216, 220, 223, 246, 262 and 482, some of which complement that rewriting of Article 45.
6. The proposed amendments were not furnished with any explanatory note. Nevertheless, it can be assumed that those relating to the Criminal Procedure Code entail, in particular those relating to Article 45, a departure from the current approach, under which it is envisaged that a defence counsel (lawyer) 'shall have all procedural

¹ The consultants were also provided with the original text of the proposed amendments, which was consulted where the language of the English translation seemed uncertain or required some further clarification.

rights of the suspect, accused whom he defends'², i.e., they are not separately spelled out for lawyers in the Code's provisions.

7. The existing approach regarding procedural rights is in line with the rationale of Article 6 of the European Convention, which treats the role of defence lawyers and their prerogatives as deriving from the fair trial guarantees of those charged with a criminal offence. This approach was thus considered to be appropriate in the Council of Europe opinions produced in the course of the drafting of the Criminal Procedure Code.
8. The proposed shift to a model with a separate, but parallel, formulation of the prerogatives of defence lawyers does not contradict the essence of Article 6 of the European Convention and could be seen as reinforcing them. However, for this to be achieved, there would need to be a high degree of consistency with the formulation of the rights of the suspect, accused and other corresponding provisions of the Criminal Procedure Code. Certainly, any significant discrepancy could be expected to be counterproductive and, instead of reinforcing the rights of the defence, would most probably lead to a weakening of the actual observance of the provisions in the Code on account of the opportunities to manipulate the uncertainties and inconsistencies that have thereby been created. Moreover, such a legal construction would necessarily complicate the structure, language and use of the Criminal Procedure Code.
9. The following comments thus address first the proposed rewriting of Article 45 and then they examine the amendments envisaged for the other provisions of the Criminal Procedure Code.

Article 45

10. The first two parts of the rewritten Article 45 are the same as the existing, and only, two parts of the existing provision, namely, defining when attorneys are to be regarded as 'defenders' for the purpose of criminal³, and extradition proceedings and the imposition of compulsory medical or educational measures, as well as requiring that an attorney for this purpose must have his or her information included in the Single Register of Attorneys of Ukraine without any reference to his or her right to practice law being suspended or terminated. These two parts do not, therefore, give rise to any issues of concern.
11. The remaining five parts to be added provide for an obligation for certain persons and entities to ensure the rights of an attorney and his or her professional guarantees, the rights of the defender in criminal proceedings, the enjoyment of certain other rights, a guarantee of independence for the defender, a duty for public bodies and private

² Part 4 of Article 46.

³ In these the defender acts for the 'suspect, accused, convicted, acquitted' but for brevity reference is henceforward made only to the suspect, accused.

entrepreneurs to comply with his or her lawful demands and the right to involve an assistant.

12. The proposed Part 3 would require that the rights of an attorney and his or her professional guarantees are to be ensured by the operational unit, investigator, head of the preliminary investigation authority, prosecutor, investigating judge and the court.
13. It should be noted that, in the English text at least, the rights with which the provision is concerned are described as those of 'the attorney' rather than of 'the defender' and the obligation established is, therefore, potentially not limited to the rights set out in the other four parts. This may just be a problem of translation, although that does not seem to be the case given the discrete use of 'attorney' and 'defender' in different parts of the proposed amendments).
14. However, although quite a substantial obligation could potentially be being created by this provision, it seems more likely that the latter is only intended to serve an educational purpose for those persons and entities enumerated. Nonetheless, it would be appropriate to clarify what is the particular need for the introduction of this provision into the Code of Criminal Procedure given the very specific rights set out in other new parts of the new Article 45, as well as in other parts of the proposed amendments - including the proposed offence under Article 397 of the Criminal Code directed to putting any kind of obstacles to the activities of a defender, etc.⁴ - and in legislation that is already in force.
15. The proposed Part 4 sets out 19 rights in respect of all stages and types of criminal proceedings.
16. Although the reference to all 'types' would thereby include those proceedings concerned with extradition and the imposition of compulsory medical or educational measures, one right - in paragraph 2 - is specifically concerned with such proceedings, namely, meetings with persons subject to them. However, at least some of the others could be relevant to the conduct those proceedings and are presumably to be applied to them as well.
17. Almost all of the rights correspond to those already enjoyed by the suspect, accused under Article 42 and a number of other provisions of the Code of Criminal Procedure, namely, to have meetings under conditions of confidentiality before the first and subsequent interrogations, to collect and submit evidence, to participate in procedural actions, to ask questions and submit comments and objections in those actions, to use technical means during them, to file motions, to review records of pre-trial proceedings, to have copies of procedural documents and written notices and to

⁴ See paras. 64-69.

challenge decisions⁵, as well as to express a view with regard to the motions of other participants and to examine witnesses⁶ and to initiate investigatory actions, to have access to certain documents and information, to involve specialists and experts, to be notified of meetings, to express opinions and protests in court proceedings, to get acquainted with protocols, to challenge procedural decisions and to initiate their review⁷. Under the unamended Criminal Procedure Code, these rights are those of the suspect, accused and, as already indicated, are exercisable on his or her behalf by the defender in the latter's capacity as such.

18. It is questionable whether merely conferring any of these rights specifically on the defender will actually add anything to the existing fulfilment in respect of them of the obligation under Article 6(3)(c) of everyone charged with a criminal offence to defend himself in person or through legal assistance. However, it is certainly possible that the fact that they are ones enjoyed also by the defender could make it easier in practice for them to be asserted, particularly as defenders are likely to be much more familiar with the operation of the criminal justice system than many persons falling into the category of suspect, accused.

19. Nonetheless, although the conferral of these rights specifically on the defender is thus not objectionable in itself and indeed could be beneficial, it will be important that the defender, when exercising them, does not treat them as ones that can be generally exercisable without respecting the wishes of the suspect, accused since the European Court of Human Rights has underlined that "the conduct of the defence is essentially *a matter between* the defendant and his counsel"⁸. It is true that there may be occasions when the interests of justice could justify the defender not following the wishes of a suspect, accused but this should certainly not be at the expense of guaranteeing the effectiveness of his or her defence⁹ nor of the defender informing the suspect, accused, as to the progress of the proceedings against him or her and the steps to be taken in order to assert his or her rights¹⁰.

20. However, it is particularly important to note that the actual formulation of the rights for defenders has not been carefully drafted. In particular, they are not appropriately derived from and do not fully mirror the rights of the suspect, accused and are not appropriately reconciled with other important provisions in the Criminal Procedure Code, as well as with its overall construction. Those set out in the following

⁵ Thus these rights in paragraphs 1, 2, 4, 5, 8, 9, 10, 12 and 13 of Part 4 of the proposed new Article 45 are provided for in paragraphs 3, 8, 9, 10, 11, 12, 14, 15 and 16 of Part 3 of Article 42 of the Criminal Procedure Code.

⁶ These rights in paragraphs 11 and 14 of Part 4 of the new Article 45 are provided for in paragraphs 1 and 3 of Part 4 of Article 42 of the Criminal Procedure Code.

⁷ These rights in paragraphs 3, 6, 7, 15, 16, 17, 18 and 19 of Part 4 of the new Article 45 are provided for in Articles 71, 93, 99, 101, 350 and 364 and Chapters 6, 11, 26 and 31 of the Criminal Procedure Code.

⁸ *Daud v. Portugal*, no. 22600/93, 21 April 1998, para. 38 (emphasis added)

⁹ See *Morris v. United Kingdom*, no. 38784/97, 26 February 2002 and *Sannino v. Italy*, no. 30961/03, 27 April 2006.

¹⁰ See *Hermi v. Italy* [GC], no. 18114/02, 18 October 2006.

paragraphs are the most significant in this regard but not all such deficiencies are discussed.

21. Thus, while introducing under Part 4 the extended list of the rights of defenders that are to be applicable from 'the moment of submission of the documents provided for in Article 50 of this Code to the investigator, prosecutor, investigating judge, court', there is no link made in this provision with, or consequential amendment of, the already cited general provision in Part 4 of Article 46 that gives the defender all the procedural rights of the suspect, accused.
22. Furthermore, there is no modification made to Part 5 of Article 45 so that there is a resulting overlap with this provision, which already specifies that a defence counsel has

a right to participate in interviews and other proceedings conducted with the participation of the suspect, accused person, to confidentially meet the suspect prior to the first interview, without authorization of the investigator, public prosecutor, court, and, after the first interview, to have such consultations without any limitation with regard to the number and length of consultations.

This provision further stipulates that such consultation may take place under visual control of the competent official but in the environment, which precludes wiretapping or listening-in.

23. However, in addition to this overlap, which could prove to be a source of confusion or dispute, it should also be noted that paragraph 2 of Part 4 of the proposed new Article 45 omits to specify the defender's corollary right to have upon the first interview relevant consultations with the accused, suspect 'with no limits as to their number or duration', which is currently stipulated in paragraph 3 of Part 3 of Article 42 of the Criminal Procedure Code.
24. Similarly, Part 4 of the proposed new Article 45 overlooks the right to request protection for the suspect, accused and his or her 'family members, close relatives, property and house, etc.', which is provided for in paragraph 12 of Part 3 of Article 42 of the Criminal Procedure Code.
25. In addition, when specifying in paragraph 4 of Part 4 of the new Article 45 the right to use technical means, including audio and video recording, during the conduct of those procedural actions in which a defender participates, there is a failure to deal with applicability of the limitation clause which is currently attached to the same right already provided for the suspect, accused. Thus, paragraph 11 of Part 3 of Article 42 of the Criminal Procedure Code quite reasonably stipulates that an investigator, public prosecutor, investigating judge, court may disallow the use of such means in the course of a specific procedural action or at a specific stage of criminal proceedings 'in order to prevent disclosure of privileged information protected by law or related to the intimate life of the person concerned' for which a reasoned ruling must be adopted.

26. The formulation of the right of access documents and other sources of information necessary for the purpose of defence and provision of legal assistance which are held by governmental bodies, local authorities, enterprises, institutions, organizations and associations of citizens in paragraph 6 is in terms of the possibility for the defender to 'get acquainted' with them 'without interference', as well as to obtain copies of them. However, this is introduced without regard to the provision in Part 2 of Article 93 of the Criminal Procedure Code of the right of the defence party to demand and obtain 'objects, copies of documents, information, expert opinions, audit and inspection reports'. Furthermore, that power extends to 'natural persons' and is not expressed to be subject to exception in paragraph 6 for documents which contain classified or confidential information.
27. Moreover, the proposed right to get acquainted in paragraph 6 is also not linked in any way to the other existing possibility under Chapter 15 of the Criminal Procedure Code, namely, to be granted provisional access to objects and documents which could be of significance 'for establishing circumstances in the criminal proceedings concerned'. The latter possibility is open to all parties to the proceedings, which include the legal representative of the suspect, accused¹¹ but it is only exercisable upon a positive ruling by the investigating judge in respect of a motion submitted for this purpose.
28. The inter-relationship of these three provisions should clearly be addressed but, more importantly, the right being proposed for the defender under paragraph 6 seems unnecessarily more limited than that of the defence party under the existing Part 2 of Article 93.
29. Paragraph 12 also deals with the issue of access to documentation, providing that the defender has the right to have
- access to materials of criminal proceedings and to obtain duly certified copies of procedural documents and written communications at *any stage of criminal proceedings*¹².
- Yet, at the same time, there is no amendment to Article 221 of the Criminal Procedure Code, which gives the investigative authorities and prosecutors discretion - often abused - as to early disclosure of all the records of pre-trial investigation on the basis that this would prejudice such an investigation. As a result, there will be two potentially conflicting norms in the Criminal Procedure Code, which is most likely to be to the detriment of the defence.
30. In this connection, it should also be noted that the relevant rights of the accused, suspect on this matter in paragraph 14 of Part 3 of Article 42 of the Criminal

¹¹ Paragraph 19 of Part 1 of Article 3 of the Criminal Procedure Code.

¹² Emphasis added.

Procedure Code - which themselves refer to Articles 221 and 290 - would also remain unchanged.

31. The issue of whether there should be an unfettered right of access to materials of criminal proceedings (particularly at the pre-trial stage) - if this is indeed what paragraph 12 indeed establishes - is a matter for the Ukrainian authorities to determine. However, it should be noted that the majority of jurisdictions do not establish such an exacting standard but subject the right of access to special rules and certain limitations, which have been upheld by the European Court¹³.
32. There is also some overlap between the provisions in Part 4 of the proposed new Article 45 themselves. This is the case, for example, regarding the general rule in paragraph 8 on participation in procedural actions and the special but, in substance repetitive, provision in paragraph 14 for participation in the questioning of prosecution witnesses.
33. The only rights conferred by Part 4 on the defender which might genuinely be new are those in parts of paragraph 8 and in paragraph 15.
34. The aspects of paragraph 8 and 15 that seem to extend the powers or rights of the defence relate to notification of procedural actions, commenting on the conduct of such actions and meetings or communication between judges and public prosecutors without the involvement of the defender.
35. Thus, paragraph 8 firstly introduces a right for defenders 'to be properly, and within the time-limits established by this Code, notified of the date, time and content of *any procedural action*¹⁴, something that is not envisaged for the suspect, accused. It is, of course, entirely up to the Ukrainian authorities to decide whether the introduction of such an advanced standard would be appropriate. However, the feasibility of implementing it with regard to the pre-trial stage seems to be questionable and needs to be carefully weighed. Normally, as the present version of the Criminal Procedure Code envisages, the suspect, accused and his or her lawyers are respectively engaged or notified only of the specific categories of procedural actions and investigative activities that have some immediate bearing on the adversariality of the procedures or might negatively affect efficiency of protection of their rights and guarantees. Going beyond this requirement could impose undue burdens on the conduct of the pre-trial investigation without any corresponding benefit for the conduct of the defence.
36. The second addition by paragraph 8 is to authorise the defender now to submit comments and objections to the conduct of procedural actions that are "written with

¹³ See, e.g., *Moiseyev v. Russia*, no. 62936/00, 9 October 2008.

¹⁴ Emphasis added.

his/her own hand". This addition does not seem to be particularly significant and is certainly not problematic

37. The addition effected by paragraph 15 is the imposition of an absolute requirement for a judge to withdraw if the attorney becomes aware of a meeting or communication of the prosecutor with the judge held in his or her absence in matters relating to criminal proceedings in which the defender participates.
38. The latter is potentially an important means of disciplining public prosecutors and judges who fail to have regard to the importance of ensuring equality of arms, which is necessarily breached by meetings held by them in the absence of the defence¹⁵.
39. However, although the automatic withdrawal of the judge where such meetings occur would be appropriate where there is a meeting or communication about the particular case in which the defender is involved, the consequence will undoubtedly be to delay the trial in the case concerned. This is not to argue against imposing such a requirement for withdrawal but to underline the need for developing a legal culture that respects the requirements for a fair trial under Article 6 of the Convention as a matter of course.
40. Nonetheless, the formulation of the provision should perhaps be reviewed as the duty of withdrawal applies if a meeting is held in the defender's absence but does not also specify that he or she had not indicated his or her inability to attend after receiving the relevant notification of it (which paragraph 15 also requires be given). It would be inappropriate to have such a strict rule if the defender simply chose not to attend a meeting of which he or she was aware as this could impede the processing of cases.
41. Some of the proposed rights not only overlap with existing provisions in the Criminal Procedure Code but do not add anything to facilitate their realisation in practice. Thus, paragraph 7 of Part 4 of the new Article 45 provides for the right of defenders to involve specialists and experts on matters requiring specialised knowledge and to receive their conclusions, something that is already addressed in Part 2 of Article 71 for all parties to criminal proceedings. However, paragraph 7 does not make any further provision as to how the expenses involved are to be covered.
42. The stipulation in Part 5 that a defender shall also enjoy other rights specified in the Criminal Procedure Code as well as 'the Law of Ukraine "On the Bar and Practice of Law" and other rules of the legislation of Ukraine and international treaties of Ukraine' has no independent content. However, it might be seen as simply serving as a reminder of the other sources of rights for a defender, without any more specific details being provided. Undoubtedly, there could be a degree of uncertainty as to the scope of the rights in the absence of any reference to the provisions concerned -

¹⁵ *E.g., Borgers v. Belgium*, no. 12005/86, 30 October 1991.

especially as failure to respect them could entail liability under the proposed reworded Article 397 of the Criminal Code - but, assuming that those provisions articulate the rights concerned in a clear and precise manner, this addition cannot be regarded as problematic from the perspective of the guarantee in Article 7 of the Convention against arbitrary prosecution, conviction and punishment.

43. It is appropriate for paragraph 6 to underline the independence of defenders as this is a fundamental aspect of the provision of legal representation for the purposes of Article 6 of the Convention¹⁶.
44. Moreover, the stipulation, pursuant to this guarantee of independence, that 'governmental bodies, bodies of local self-government, enterprises, institutions and organizations, officials, private entrepreneurs' should comply with the lawful demands of defenders is also not inappropriate
45. Nonetheless, this particular stipulation overlooks the fact that Part 7 of Article 46 of the Criminal Procedure Code already specifies that

state authorities and local self-government authorities and their officials must obey the legitimate demands of defense counsel.

Despite the existence of the latter provision, there is no proposal for any corresponding changes to it, adding only further to the scope for confusion being engendered by the proposed amendments.

46. However, it should be noted that the duty is stated in the English translation as being applicable to 'private entrepreneurs' rather than to 'enterprises', the term found in paragraph 6. Unless this is just a matter of translation, it would be appropriate to ensure consistency in terminology.
47. The provision in Part 7 for an attorney to have an assistant who can work with the case materials and obtain copies of court documents, as well as lodge procedural documents related to the case, is an appropriate recognition of the manner in which legal practices operate. Furthermore, the condition that the assistant's information must be entered into the Single Register of Attorneys of Ukraine is a sufficient guarantee against possible abuse of the competences that this provision confers.

Article 50

48. The proposed amendment to this provision is to word Part 3 as follows:

1. The powers of a defender to participate in the criminal proceedings shall be confirmed by a warrant.

¹⁶ *Morris v. United Kingdom*, no. 38784/97, 26 February 2002.

This may be just a translation error as there is no current Part 3 and the text seems to be actually concerned with Part 1. However, although this is a matter that needs to be clarified, the use of a warrant to confirm the power of participation is probably slightly more straightforward than the present formulation in Part 1 of Article 50¹⁷ and could help avoid disputes about the authority to act on behalf of the suspect, accused.

Articles 58, 63 and 66

49. The proposed amendments to these provisions are all to the same effect, providing that attorneys representing injured parties, civil plaintiffs and witnesses in criminal proceedings shall 'have the same guarantees and procedural rights as attorney-defender, except for the exercise of procedural rights that are directly related to' those categories of persons. The provision of these guarantees and procedural rights to the attorneys concerned should facilitate the effective representation of these persons and is thus appropriate.

Article 75

50. The proposed addition of a new paragraph 6 to Part 1 extends the circumstances in which an investigating judge, judge or juror may not participate in criminal proceedings to situations in which he or she met or communicated with the prosecution party on matters relating to the criminal proceedings in the absence of the defender who was participating in them. This addition is pursuant to the stipulation paragraph 15 of Part 1 of the new Article 45 on automatic withdrawal where there has been such a meeting or communication and facilitates its implementation. This provision is not inappropriate.

Article 115

51. The proposed addition of new Parts 8 and 9 relates to the calculation of time limits in respect of 'the urgency of performing of any act or making a decision' and 'the timeliness of performing of any act'. The former concerns the provisions in Articles 53, 223, 233 and 250 of the Criminal Procedure Code and the latter relates to Article 40.
52. The effect of the additional parts is to give precision to terms as to the meaning of which there can be much debate and the respective deadlines of 12 and 24 hours that are stipulated are not inappropriate.

Article 120

53. The proposed addition to Part 2 provides for the resolution of the question of the reimbursement of the fees of the representative of a victim, civil plaintiff and civil defendant who provides legal aid under contract to 'be made by the court in the form

¹⁷ '1. Defense counsel's authority to participate in criminal proceedings shall be confirmed by: 1) the certificate of the right to engage in legal practice in Ukraine; 2) an order, agreement with defense counsel or a power of attorney issued by a body (institution) authorized by the law to provide legal aid at no cost'.

of adoption of a decision in the criminal proceedings under the rules of the Civil Procedural Code of Ukraine'. This does not seem an inappropriate approach for such a matter.

Article 216

54. The effect of the addition to Part 4 of this provision is to charge investigators from units of the State Bureau of Investigations of Ukraine with the responsibility for undertaking any pre-trial investigation into crimes allegedly committed by attorneys. This change, removing attorneys from the competence of regular investigators, could be an additional guarantee against improper pressures and thus reinforce the independence of attorneys. It is, thus, not inappropriate in principle but it remains to be seen how the new agency functions in practice so that no conclusive judgement with respect to the value of this addition is possible.

Article 220

55. Part 1 of the former is to be reworded as follows:

The motions of the defense party, the injured party and his/her representative or legal representative about the performance of any procedural actions, inaction and procedural decisions shall be examined by the investigator, prosecutor within no more than three days from the date of their submission; the latter shall allow them if the relevant grounds therefor are present

56. Although this does seem materially different from the existing provision¹⁸, the mentioning of 'inaction' and 'procedural decisions' in addition to 'procedural actions' should be useful since it extends and specifies the scope of appealable issues.

Article 223

57. The additions to this provision would limit covert and other investigative action with respect to premises owned or used by attorneys. Thus, it is prohibited to enter their living premises, places of practice (whether at home or elsewhere) and vehicles to conduct an inspection, search or other investigative action and to tap their telephone conversations, There is also a prohibition on personal searches of attorneys and the search and seizure, as well as the copying, of their correspondence, documents and electronic media used for the provision of legal assistance and to track them and to control their information systems. Furthermore, there is a stipulation requiring a search or inspection of an attorney's residence or the premises where he or she practices law - which would require them to be entered notwithstanding the prohibition just noted - to be conducted only with the presence of a representative of the regional bar council and, in the absence of that, for any data obtained to be inadmissible as evidence.

¹⁸ Thus, the existing Part 1 provides: 'Investigator, public prosecutor shall be required to consider a motion of defense, victim and his representative or legal representative requesting the conduct of any procedural actions, within a period of no more than three days after filing and satisfy such if adequate grounds exist'.

58. However, it should be noted that the additions being proposed are not accompanied by any amendment to the existing stipulation in Part 6 of Article 46 that 'documents related to the defense counsel's performing his duties may not be inspected, seized, or disclosed by the investigator, public prosecutor, investigating judge, court without defense counsel's consent'.
59. Nonetheless, while the extensive protection which the additions establish is more exacting than the European Court has required with respect to such measures taken against lawyers (and, indeed, is also stricter than the provisions in Part 3 of Article 482 of the Criminal Procedure Code governing their use with respect to members of the Verkhovna Rada), the requirement of the presence of a bar council representative is a safeguard that is considered important by the European Court to ensure that these measures do not unjustifiably encroach upon the confidentiality of communication between lawyers and their clients¹⁹. As a result, the effect of these additions at least gives effect to the requirements of Articles 6 and 8 of the Convention but probably exceeds them because of the very broad protection they afford to attorneys. The latter, however, could be at the expense of the effective investigation of criminal offences. Certainly lawyers are not above the law, even though their particular role in the administration of justice requires particular care in the handling allegations that they have committed offences.

Article 246

60. The addition to this provision confirm the absolute prohibition on conducting any covert investigatory (search) actions with respect to attorneys, including their homes and other property, As already noted, this goes beyond the requirements of Articles 6 and 8 of the Convention and could run counter to the interests of the administration of justice and the protection of the rights of others. It might be more appropriate to permit such actions under very restrictive conditions, including approval by particularly senior judges.

Article 262

61. The addition to this provision involves a further prohibition on the inspection, search and seizure, as well as the copying of correspondence, documents and electronic media used for the provision of legal assistance. It also requires one again the presence of a representative of the regional bar council during a search or inspection of an attorney's residence, other possessions or premises where he or she practices law. These additions serves to protect the confidentiality of communications between lawyers and their clients and are not inappropriate.

Article 482

¹⁹ See, e.g., *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007, *André and Others v. France*, no. 18603/03, 24 July 2008, *Robathin v. Austria*, no. 30457/06, 3 July 2012 and *Michaud v. France*, no. 12323/11, 6 December 2012.

62. The addition to this provision requires criminal proceedings against attorneys to be conducted in accordance with the Criminal Procedure Code and the Law of Ukraine “On the Bar and Practice of Law”. This is not inappropriate.

Criminal Code

63. The amendment to the Criminal Code relates to the existing offence under Article 397 of interfering with the lawful activity of a defence attorney or legal agent. This would be replaced by a new offence of 'putting any kind of obstacles to the activities of a defender, attorney or representative of a person in the course of provision of legal assistance or violation of the guarantees of their status as established by law, any form of the breach of attorney-client confidential information or any other confidential information protected by law'.
64. As with the existing offence, there is provision for enhanced penalties where the offence is committed by a person using his or her official position.
65. The level of the penalties remain the same, namely with fines of up to 200 tax-free minimum individual incomes (500 in the case of officials), restriction of liberty for up to three years and (for officials only) deprivation of the right to occupy certain positions or to engage in certain activities for up to three years.
66. There is no question that there is a need to protect the ability of defenders to discharge their responsibilities. It is not clear what, if any problems were encountered in applying the current provision, which is eminently clear and certain in its prohibition of interference with their lawful activity.
67. However, the proposed is much vaguer in its reference to 'any kind of obstacles', 'violation of the guarantees of their status' and 'any form of the breach of attorney-client confidential information'. Certainly, it does not seem that there is not generally adequate provision in the existing law as to what are 'lawful activities', although there is some potentially useful supplementation in the other aspects of the proposed amendments. The formulation of the offence now being proposed potentially runs counter to the need for foreseeability as to the scope of the criminal law since the language used is capable of leading to overbroad interpretation of particular provisions and gives rise to the consequent risk of a violation of Article 7 of the Convention.
68. It would, therefore, be appropriate to review the need for the rewriting of Article 397 and to ensure that a much more precise formulation is used.

Correctional Code of Ukraine

69. The proposed amendment to Part 2 of Article 8 provides that a convicted person shall be guaranteed the right to legal assistance and thus entitled to use the services of attorneys.
70. Such a provision is potentially capable of securing access to justice for such persons, as required by Article 6 of the Convention.
71. In at least some instances, there will be a need for the costs of legal assistance to be borne by the state²⁰ and, as it is understood that legal aid has been made available to convicted persons since 25 October, this should help make this addition meaningful in practice. It is certainly appropriate as a matter of principle.

Code of Administrative Justice/ Code of Ukraine on Administrative Offences

72. The proposed amendments to Parts 2 of both Articles 16 and 56 of the Code of Administrative Justice provide respectively for legal assistance and representation in the cases governed by these Code to be provided by attorneys.
73. The proposed amendment to Part 5 of Article 58 of the Code of Administrative Justice and the rewording proposed for Article 271 of the Code of Ukraine on Administrative Offences provide for the manner of confirming the powers of an attorney and for his or her entitlement to involve an assistant.
74. Apart from the fact that the manner of confirming powers strangely uses formulations similar to that being replaced in the amendment proposed for Article 50 of the Criminal Procedure Code, these changes are potentially useful steps to bringing proceedings under these Codes more into line with those under the Criminal Procedure Code and thus averting the potential for violations of Article 6 of the Convention.

Conclusion

The general intent of the proposed amendments is to advance and reinforce the legal framework and operation of the Bar, the legal profession and the efficiency of services provided by individual lawyers, which is welcome. However, the proposed amendments to the Criminal Procedure Code should be reviewed so that a higher degree of consistency between the formulation of the proposed rights for defenders and those of the suspects, accused and other relevant provisions is ensured. Moreover,

²⁰ See, e.g., *Ezeh and Connors v. United Kingdom* {GC}, no. 39665/98, 9 October 2003.

further reflection is required as to the appropriateness of introducing unfettered access to materials of criminal proceedings, a notification obligation for all the procedural actions to be carried out at the pre-trial stage, as well as of the scope and level of immunities applicable to lawyers and related procedural restrictions that are being proposed. Furthermore, it might be more appropriate to defer proceeding with these amendments so that they can be considered and adopted together with other proposed amendments to the Criminal Procedure Code that are currently under examinations. This would ensure a more coherent approach to the reform of this key element in the criminal justice system.