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Expert Opinion

on the Draft Criminal Procedure Code of Ukraine

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I. Introduction

The Expert Opinion evaluates the English translation of the Ukrainian Draft Criminal Procedure Code (version of 10 March 2009) that was made available by the Council of Europe.

Upon a special request by the Council of Europe, this Expert Opinion will only offer a summary review of the Draft. Without going into details the Expert Opinion will ask whether the Draft is generally in line with the European Convention on Human Rights and Fundamental Freedoms as well as the standards of fairness that are generally accepted by European criminal justice systems. Only a few instances will be pointed out where a provision of the Draft needs to be reconsidered.

II. General Evaluation of the Draft

Keeping in mind that the present criminal justice system of Ukraine is still based on a mainly Soviet-style, authoritarian criminal procedure code, it must be said that the Ukrainian National Commission for Strengthening Democracy and the Rule of Law which prepared the Draft has gone a long way towards introducing a fundamental reform. The Draft proposes to replace the antiquated, inquisitorial and prosecutor dominated system with a modern, adversarial and human rights oriented process. Effectiveness and efficiency of criminal justice administration are fairly balanced with the rights of the defence and the protection of the individual.

The Draft is organized in a system that can generally be found in modern continental European codes. With few exceptions, the language of the Draft is clear and easily understandable. Following continental European tradition the Draft mainly uses general and abstract legal terms rather than burdening its provisions with a great number of details.

To make these general evaluations better understandable the following comments will address a number of typical characteristics of the Draft. The comments will, at the same time, point out some shortcomings in the Draft.

III. Typical Characteristics of the Draft

1. Chapter on General Principles – Articles 6 - 27

Following the model of other formerly Socialist countries the Draft lists general principles that are to serve as road signs for criminal proceedings (Articles 6 – 27). The general principles include, among other things, clauses on the protection of individual rights and fundamental freedoms that can be found in Articles 5 and 6 of the European Convention. To make sure the protection of individual rights and adherence to standards of fairness will be without exception Article 6 (2) of the Draft states that the principles specified in Articles 6 - 27 will not be exhaustive.

To enforce the protection of individual rights the Draft provides for the exclusion of illegally obtained evidence. While under Article 10 (3) of the Draft any illegally obtained evidence must be excluded, Article 79 (1) requires a “serious violation of human rights and fundamental freedoms” for exclusion. To provide for fundamental fairness of criminal justice administration as well as from a practical point of view it would seem appropriate to exclude evidence only in cases of a “serious” violation of individual rights. Article 62 (3) of the Ukrainian Constitution provides, however, that “(a)n accusation shall not be based on illegally obtained evidence”. Thus, Article 79 of the Draft is not in line with the Constitution. This problem must be solved.

If understood correctly, Article 20 (1) provides, without exception, for the principle of obligatory prosecution. Under Articles 21 (1) and 35 (2), the prosecutor’s activities are, again without

exception, guided by the principle of discretionary prosecution. Also Articles 394 on “agreements” refer to vast discretionary powers of the prosecutor. This discrepancy between the two principles should be taken out.

2. Adversarial Procedure and Fact-Finding

a) Article 19 (1) states in general language that the new Ukrainian procedure will be adversarial rather than inquisitorial. Adversarial elements govern not only the trial but also pre-trial proceedings.

Articles 312 – 360 that refer to the trial explain in a convincing way how the parties will introduce evidence and question witnesses. Like in other countries that have recently adopted an adversarial trial model, the judge in the new Ukrainian trial will not simply function as an arbiter who will solely supervise the activities of the parties. Article 315 (1) of the Draft rather provides that the judge at the trial aims “at ensuring the ascertainment of circumstances”, i. e. finding the facts.

As a consequence of this fact-finding power, the judge at the trial may, after examination of the witness by the parties has been finished, ask additional questions (Art. 339 (10)). Unlike judges in adversarial trials of other countries, the Ukrainian judge will, however, not be authorized to introduce an additional witness or an additional expert who was not called by one of the parties. Thus the Draft seems to follow the adversarial model in a rather radical way. It must be asked whether this restriction of the judge’s fact-finding power is what the Ukrainian reformers wish to have.

b) As far as could be ascertained, the Draft does not state whether and to what extent the judge who will run the trial will be authorized, prior to the trial, to inspect the “dossier”, i.e. the record of the pre-trial investigation. In a typical adversarial trial, the judge who has to decide on guilt and innocence is expected to come to the trial not knowing beforehand what is in the dossier. On the other hand, the fact-finding obligation of the trial judge (Art. 315 (1)) might require the judge to inspect the dossier in order to get prepared for his or her job of finding the truth. As this is an important issue the Draft should clearly state whether or not the judge will before the trial be authorized to inspect the dossier.

c) Article 87 (2) is in line with continental European tradition by providing for the principle of free evaluation of evidence. Under Article 87 (1), however, an important exception from this principle is stipulated. The provision states: “No one evidence shall have probative value”. This seems to be a step back towards the ancient rules of evidence that required, among other things, testimony of two trustworthy witnesses for conviction. From a systematic point of view, this isolated exception from the principle of free evaluation of evidence does not seem to be justified. From a practical point of view, Article 87 (1) will, above all, pose problems in rape cases where there is often only the testimony of the raped victim.

d) Under Article 58 (1) (3) the “witness shall have the right to waive giving explanations, testimonies in respect of himself/herself, his/her family members and close relatives”. It must be expected that this provision will seriously impede the fact-finding process. To find out whether a witness is trustworthy, parties must ordinarily have the right to ask questions referring to the personal and family background of a witness. To protect the privacy of a witness it seems sufficient to rephrase Article 58 (1) (3), so it will state that questions attacking the honour of the witness or referring to the private and intimate life of the witness or his/her family may be asked only if absolutely necessary to ascertain the truth.

e) The Draft is obviously based on the idea that the adversarial system requires the exclusion of hearsay evidence – an idea that is often advocated by American lawyers. Articles 90 – 92 of the Draft address problems of hearsay; they define what is considered to be hearsay and in which cases hearsay shall be admissible. The Articles forget, however, to clearly state the general rule

that hearsay is ordinarily inadmissible. As the Articles on hearsay are part of the "General Provisions" referring to the total of the proceedings, the Draft must also explain that hearsay is only to be excluded at the trial.

Except for English law, there seems to be no other European criminal justice system that provides for the general exclusion of hearsay. The Ukrainian Draft is, of course, free to follow the Common Law model. It must be expected, however, that Ukrainian practice will face considerable problems when working with Articles 91 and 92 which provide for a great and not always easily understandable number of instances where hearsay will be admissible. Experience in Common Law countries proves that problems of hearsay and its exceptions give rise to many controversies in the courtroom and on appeal.

f) Another consequence of the adversarial idea seems to be reciprocal pre-trial disclosure. Under Article 260 (6), the prosecutor who has disclosed the prosecution evidence to the defence can request the defence to disclose the evidence it plans to introduce at the trial. Article 260 (6) provides, however, that he defence is not required to disclose evidence that the prosecutor "can use to prove the guilt of the accused". If understood correctly, the defence must reveal everything to the prosecutor except those things the prosecutor would really like to have. It is not clear how this will work in practice.

There is the additional problem that the defence does not always know in advance whether evidence the defence considers favourable to the accused might not be used by the prosecutor to prove the accused's guilt. Therefore, the obligation of the defence to disclose "favourable" evidence could easily turn into a violation of the privilege against self-incrimination.

3. Jury Trials – Articles 403 - 429

Following the model of other formerly Socialist countries the Draft plans to introduce jury trials for "crimes of grave and especially grave severity" (Article 403 (3)). The reason for this reform is the general distrust of public authorities, including the judges, and the problem of pervasive corruption. In general, the jury trial the Draft proposes is well designed. There are, however, a number of important open questions that should be answered by the Draft.

a) Article 411 (6) provides that when selecting jurors "parties may put questions to a juror". It is left open whether the presiding judge is also authorized to ask questions. In view of the judge's overall duty to guarantee the fairness of the proceedings one should think about permitting the judge to find out on his or her own initiative whether a juror should be challenged.

b) Under Article 416 (1), (2), the presiding judge together with the parties prepares the list of questions to be decided by the jury. The Draft does not state whether this will be done in the presence of the jury. As jurors could easily be influenced by the discussion between the judge and the parties, it is suggested that the jury should be absent during the formulation of the questions.

c) Article 417 (1) explains what must be included in the summing up. The judge must, among other things, "explain basic rules for the evaluation of evidence". It remains unclear whether this includes "basic rules" for evaluating the evidence of the individual case to be decided by the jury. There are jurisdictions where the judge is authorized to evaluate the evidence that was presented in the individual case. In other jurisdictions the judge may only explain the general rules of evidence, such as the presumption of innocence or the requirement of proof beyond a reasonable doubt. As these rules are listed at the end of Art. 417 (1), the additional reference to "basic rules" needs clarification. There can be no doubt that the judge who is authorized to evaluate the evidence of the case that is before the jury can exercise a considerable influence on the verdict.

d) Artticle 418 (4) provides that jurors may not disclose "thoughts expressed during deliberations". This does not forbid jurors to disclose how they voted. There is no country where jurors – and

judges – are permitted to reveal to anyone how they voted. Accordingly, Art. 418 (4) must be changed, so everything said and done during jury deliberation will be kept secret.

e) Article 420 (2) permits jurors to add to their answers in the verdict an "explaining word or phrase which discloses the substance of the answer given". It is not clear what the purpose of this provision is.

Under Article 425 (2), a verdict of guilty "does not preclude the judgement of acquittal… if the jury established in its verdict appropriate circumstances specified by law of Ukraine on criminal liability". It must be asked how this provision can be brought in line with Article 420 (2). The Draft seems to propose a kind of special type of verdict where the jury gives reasons for its decision. If the Draft wishes to introduce such verdict, it must address a number of questions:
- 1) How is the judge expected to instruct the jury about the possibility of giving reasons for the verdict?
- 2) If the judge is, under Article 422 (2), authorized to draw the jury's attention to controversies in the verdict, is the judge expected to argue with the jury about the reasons they have added to their verdict?
- 3) Does the foreman of the jury always have to add the reasons when announcing the verdict?

4. "Measures to Ensure Criminal Proceedings" (Articles 129 – 196) and "Pre-Trial Proceedings" (Articles 197- 306)

With few exceptions, the Draft regulates the various measures and actions involving an invasion of privacy in an acceptable way. Pre-trial detention and the other measures involving an invasion of privacy are carefully restricted, so individual rights are adequately protected. As a general rule, invasions of privacy must be authorized by the judge. Everyone whose rights have been invaded by an investigative or compulsory action can bring a complaint (Articles 276 (1), (2); 281 (1)).

There are, however, a number of provisions that need clarification.

a) From a systematic as well as a practical point view it must be asked whether the provisions involving an invasion of privacy are always arranged in a plausible way. To give only one example, provisions on "Provisional Seizure of Property" (Articles 153 – 155) and "Attachment of Property" (Articles 156 – 161) are placed in Chapter 13 of the Draft on "Provisional Access to Objects and Documents". On the other hand, provisions on "Entering…" and "Search…" (Articles 212 – 215) can be found in Chapter 18 of the Draft on "Investigative (Detective) Actions). Still another provision on searches seems to be included in Article 245 (1) on "Inspecting Publicly Inaccessible Places". It is suggested to rearrange the provisions on seizure and search, so it will become better visible to criminal justice authorities under what conditions such measures can be carried out.

b) Some provisions seem to be overlapping. Provisions on the seizure of property can be found in Articles 156 - 161, Article 216 (5), and, if correspondence is concerned, Article 235 (4) (2). Careful scrutiny of the different provisions on seizure cannot reveal why they are placed in different parts of the Draft. It would seem advisable to harmonize these provisions.

c) Article 154 (1) provides that "everyone who has lawfully apprehended a person…may provisionally seize property". This provisions is too narrow and, at the same time, too wide. It is too narrow because it authorizes the citizen only to seize objects but not to conduct a search. The provision is too wide because it authorizes the citizen to search not only the person but also the car and the whole house of the apprehended person. In view of this it is suggested to rephrase the provision, so it will authorize the search of the apprehended person and the seizure of objects found on this person.

d) Today, police generally rely on a number of covert, computer assisted investigative actions. Police search for wanted persons by scanning personal data with the help of computers. Border police electronically store personal data to let them run against other data bases in order to detect crimes. Police use technical means, for example GPS based monitoring, to locate a person or a vehicle.

It is not clear whether and to what extent such activities are covered by some of the provisions of Chapter 19 of the Draft on "Covert Investigative (Detective) Techniques" (Articles 224 – 252). At the same time, it must be assumed that Ukrainian police rely on this kind of investigation techniques. The problem is that such techniques involve infringements of individual rights. Therefore, it is suggested to amend the Draft, so it will include the relevant provisions and, thus, restrict the investigating power of the police.

5. Suspect's Rights during Interrogation – Articles 40 (3) (4); 203 (5); 253 (2) (2)

Articles 40 (3) (4) and 203 (5) provide for the suspects rights to remain silent and to have counsel during interrogation. The Articles do, however, not include a requirement that the suspect must be advised of his or her right to remain silent. This gap is closed only by Article 253 (2) (2) which provides for a comprehensive advising of the suspect's rights. Thus, under the Draft, the suspect's protection during interrogation is in conformity with general European standards. It would seem advisable, however, to integrate the suspect's right to be informed of his or her rights in one Article of the Draft. This would, above all, be helpful to police officers who have to question a suspect.

According to Article 40 (1) the suspect is a person who has been "notified" by the prosecutor that he or she is suspected of having committed a crime. Article 107 (1) requires a notification to be made in writing. If the provision is understood correctly, a person whom a police officer actually suspects of having committed a crime is not an official "suspect" as long as no "notification" in writing has been issued by the prosecutor. Consequently, such person has no right to remain silent, to have counsel and to be advised of his or her rights. Police will be free to interrogate without any restrictions. There can be no question that this will seriously compromise the rights of the person who has not yet been made an official "suspect". Adhering to such a "formal" concept of the "suspect" would hardly be in conformity with the requirements of the European Convention. It is, therefore, suggested to provide for the protection of the alleged criminal before he or she has been made an official suspect.

IV. Conclusion

In conclusion it can be said that the Draft has laid a well designed and generally acceptable foundation for a new Ukrainian criminal procedure code.

On the other hand, it cannot be overlooked that there are still some weak parts in the Draft. Most of the problematic points don't seem serious, so it should be possible to make quick corrections. At the same time, it appears that the Draft needs some overall fine-tuning. Irrelevant and repetitious provisions should be taken out, contradicting provisions should be harmonized, and obvious gaps should be closed.

After this will have been done there will be no objection to transferring the Draft to the political level to start the official reform process.