HUMAN RIGHTS COMPLIANT CRIMINAL JUSTICE SYSTEM IN UKRAINE

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An assessment of the Draft Law #2411 ""On Amendments to the Criminal Procedure Code of Ukraine" dated 11 November 2019 for the purpose of aligning the Code with Opinion DGI(2018)07 of the Directorate General Human Rights and Rule of Law of the Council of Europe dated 09 October 2018"

These expert comments prepared
under the auspices of the Council of Europe Project
"Human rights compliant criminal justice system in Ukraine"

on the basis of the peer review expertise by Mr. Jeremy McBride
as a follow-up to the analysis by Mr. Eugene Krapyvin

A. INTRODUCTION

1. This Assessment is concerned with Draft Law #2411 ""On Amendments to the Criminal Procedure Code" dated 11 November 2019 for the purpose of aligning the Code with Opinion DGI(2018)07 of the Directorate General Human Rights and Rule of Law of the Council of Europe dated 09 October 2018"("the Draft Law").

2. The Draft Law has been introduced to the Verkhovna Rada by the Cabinet of Ministers of Ukraine.

3. The present Assessment reviews whether or not the purpose of the Draft Law – namely, alignment of the Criminal Procedure Code ("the Code") with Opinion DGI(2018)07 of the Directorate General Human Rights and Rule of Law of the Council of Europe dated 09 October 2018 ("the 2018 Opinion") would in fact be achieved through the amendments proposed in it.

4. The 2018 Opinion was based on Draft Law of Ukraine No. 7279 on Amending Certain Legislative Acts concerning Simplification of Pre-trial Investigation of Certain Categories of Criminal Offences ("Draft Law No. 7279"). Not all the provisions relating to the Code commented on in the 2018 opinion were adopted in exactly the form seen in Draft No. 7279 but none of the differences are material for the present Assessment.

5. The Assessment has been based on an unofficial English translation of the Draft Law, which has been provided by the Council of Europe's secretariat.

6. The Assessment has been prepared on the basis of peer review expertise by Jeremy McBride[1] as a follow up to the analysis by Eugene Krapyvin[2] under the auspices of the Council of Europe's Project "Human Rights Compliant Criminal Justice System in Ukraine (HRCCJS Project)".

B. THE PROPOSED AMENDMENTS

7. The amendments proposed in the Draft Law take four forms, namely:

(a) entire deletion of provisions (or parts of them) considered problematic in the 2018 Opinion,

(b) modification of such provisions,

(c) consequential changes deriving from a) and b) above and

(d) other matters not dealt with in the 2018 Opinion.

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8. The first group comprises Articles 3.1(7[1]), Article 39[1], 216.11, 218.4, 298.3, 298[1],298[2].2 and 4, 298[3], 298[4].2, 298[5].2, 299.1, 301.1, 2, 4 and 5 and 381.1 and 2.

9. **These amendments would thus be entirely appropriate**.

10. The third group comprises the changes that would be made to Articles 3.1(19), 83, 167, 219.4(1), 290, 294.2 and 3, 298.1 and 314.

11. None of these proposed changes would be problematic.

12. The fourth group comprises Articles 3.1(8) and 95.8 Both would entail small technical adjustments and **neither of them would be problematic**.

13. The provisions of the second group, in respect of which there are modifications relevant to the 2018 Opinion are Articles 3.1(4[1]), 38.3, 40[1], 71, 169.1(5), 214, 217.2, 219.3, 300.1, 301.3, 381.3, 382.1 and these are now considered in turn.

Article 3.1(4[1])

14. The proposed amendment in fact simplifies the definition of "inquirer" by deleting the detailed list of bodies and just retains the more general reference to bodies authorised by the Code to conduct pre-trial investigation of criminal misdemeanours. This avoids the unnecessary duplication with Article 38 and, when taken with other changes, effectively means that there is no longer a separate structure for investigating criminal misdemeanours.

15. The concern expressed in the 2018 Opinion would thus be met by the proposed amendment.

Article 38.3

16. The proposed amendment would delete "inquiry units or" and is thus part of the simplification of structure recommended in the 2018 Opinion. It would thus be appropriate.

Article 40[1]

17. The proposed amendment would delete paragraphs 2-4 which set out powers conferred on an inquirer – about which certain concern was expressed in the 2018 Opinion - and matters relating to their exercise. The effect is to leave the inquirer with the same powers of the investigator.

18. The concern expressed in the 2018 Opinion would thus be met by the proposed amendment.

Article 71

19. The combined effect of the proposed amendment to paragraph 2 and deletion of previously added sub-paragraph 4(7) would address the concern in the 2018 Opinion since it would no longer be possible for a specialist to provide conclusions in respect

of on various actions before the entry of information in the Unified Register of Pre-Trial Investigations, thereby potentially precluding the possibility of a suspect participating in such actions.

20. The concern expressed in the 2018 Opinion would thus be met by the proposed amendment.

Article 169.1(5)

21. The proposed amendment would delete the addition previously made regarding return of seized property in cases involving criminal misdemeanours which was regarded in the 2018 Opinion as creating uncertainty as to the applicability to them of the other provisions in paragraph 1.

22. The concern expressed in the 2018 Opinion would thus be met by the proposed amendment.

Article 214

23. The proposed amendments would entail the deletion of additions made to paragraphs 1 and 3. These related to the appointment of the inquirer (and, in particular, by the Head of the inquiry agency) and the conferral of various powers of investigation before the entry of information in the Unified Register of Pre-Trial Investigations, in respect of both of which concerns had been expressed in the 2018 Opinion.

24. The concerns expressed in the 2018 Opinion would thus be met by the proposed amendments.

Article 217.2

25. The proposed amendment would delete the last sentence which precludes the application of Chapter 25 regarding the specifics of pre-trial investigation of criminal misdemeanours. As such it leaves the bulk of the addition that had been the subject of concern in the 2018 Opinion. However, the essential nature of the concern expressed in it related to it being essentially required by the existence of separate investigative structures, which would no longer be the case. Moreover, other proposed amendments already discussed and the proposed deletion of the last sentence in this provision would mean that the same rules of pre-trial investigation apply regardless of whether an offence or criminal misdemeanour is involved.

26. The concern expressed in the 2018 Opinion would thus no longer arise in view of the proposed amendment and the other proposed amendments.

Article 219.3

27. The proposed amendment to paragraph 3 would set as the time-limit for completing pre-trial investigation as 20 days from the serving of the notice of suspicion of a criminal misdemeanours. This removes the unnecessarily complex array of deadlines in the existing provision for criminal misdemeanours and adopts the recommendation of a single deadline of 20 days. It is thus appropriate.

Article 300.1

28. The proposed amendment would delete the addition of the ability to seek explanations, medical examinations and a range of other actions. This would be consequential upon their deletion from Article 214.3 – meeting a concern in the 2018 Opinion – and would thus be appropriate.

29. However, the concern in the 2018 Opinion for a reconsideration of the making of covert investigative (search) actions applicable to all criminal misdemeanours does not seem to have been undertaken. This potentially problematic given that the 2018 Opinion recalled the concern of the European Court of Human Rights about such powers being used in respect of too wide a range of offences.[3]

30. *It would thus be appropriate to limit the range of criminal misdemeanours for which covert investigative (search) actions could be undertaken*.

Article 301.3

31. The proposed amendment would replace a provision dealing with the length of detention by one concerning the disclosure of inquiry records. The content of the latter is entirely appropriate.

Article 381.3

32. No modification is being proposed for this provision. However, the rationale for its retention is questionable as there is no substantive content in it regarding the conduct of proceedings despite its stipulation that "simplified proceedings in cases of criminal misdemeanours shall be conducted" subject to the provisions set forth in it. Nor would this provision make sense if the word "Article" replaced "paragraph" as the only form of simplified procedure is that currently envisaged in paragraph 2, which was considered problematic in the 2018 Opinion and which would, in any event, be deleted by the Draft Law.

33. *There is thus either a need to either provide some substance for this paragraph or to delete the phrase "subject to the provisions of this paragraph"*

Article 382.1

34. The proposed amendment would require the records to be reviewed before passing "sentence".

35. The concern expressed in the 2018 Opinion would thus be met by the proposed amendment.

C. CONCLUSION

36. The proposed amendments in the Draft Law thus, on the whole, do align the Code with the 2018 Opinion.

[3] See *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, at para. 44.

37. Only two issues still require attention. First, the need to reconsider the applicability of covert (investigative) actions to criminal misdemeanours as a whole as stipulated in Article 300.1. Second, in Article 381.3 to either provide some substance for this paragraph or to delete the phrase "*subject to the provisions of this paragraph*".