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JOINT OPINION ON THE DRAFT LAW ON THE JUDICIAL SYSTEM AND THE STATUS OF JUDGES OF UKRAINE

by
the Venice Commission
and
the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe

Adopted by the Venice Commission
at its 82nd Plenary Session
(Venice, 12-13 March 2010)

on the basis of comments by

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1. Introduction

1. By letter dated 20 July 2009, the Minister of Justice of Ukraine, Mr. Onishchuk, requested an opinion on the draft law of Ukraine "on the Judicial System and the Status of Judges" (CDL(2009)111), prepared and approved by the *Verkhovna Rada's* Judiciary Committee in June 2008. The present draft opinion is jointly prepared with the experts of the Legal and Human Rights Capacity Building Department (LHRCBD) of the Directorate for Co-operation of the Directorate General of Human Rights and Legal Affairs of the Council of Europe.

2. The Venice Commission invited Mr Hamilton and Ms Suchocka to act as rapporteurs. In the framework of the Programme between the European Commission and the Council of Europe on Transparency and Efficiency of the Judicial System of Ukraine, the LHRCBD invited Messrs Gass and Pellonpää to act as rapporteurs.

3. On 16-17 March 2007, the Venice Commission had already given an opinion on two draft laws on the Judiciary in Ukraine (CDL-AD(2007)003). The draft law, subject of the present opinion is a consolidated and amended text of two drafts then considered by the Venice Commission.

4. On 5 February, the TEJSU Project Office[2] in Kyiv and the Venice Commission organised a round table in Kyiv on the draft Law in which Messrs Gass, Hamilton and Pellonpää participated. The present draft opinion is based on the comments by Mr Hamilton (CDL(2009)155) and Ms Suchocka (CDL(2009)156) as well as the joint expertise by Messrs Gass and Pellonpää (DG-HL(2009)2).

5. The present opinion was adopted by the Venice Commission at its 82nd plenary session (Venice, 12-13 March 2008).

2. General remarks

6. Historically, the concept of the independence of the judiciary broke through in the wake of the theory of Montesquieu which postulated a division and separation of the legislative, executive and judicial powers. Seen from this historic perspective it is obvious that autonomous formation of a judgement is the essence of judicial independence. Since the 19th century European countries developed this basic concept in their own constitutional reforms. By the end of the 20th century the "transition" countries of East Central and Eastern Europe adopted this concept, too. Legal and judicial reforms in the sense mentioned above have become a vital part of transition because it provides also the structural framework for social and economic reforms[3]. A viable legal system is needed to attract investments, combat corruption, and protect the basic human rights.

7. The guiding principles of the rule of law require the guarantee of an independent judicial system. This includes a true balance of power between the legislature, the executive and the judiciary, which can ensure an independent position of the judiciary. Independence of the judiciary is a precondition for confidence in and authority and success of the administration of justice. Autonomous formation of a judgement is the essence of judicial independence. In his role administering of justice (court ruling), a judge may not be subjected to any authority,

[2] Office of the Joint Programme between the European Union and the Council of Europe on "Transparency and Efficiency of the Judicial System of Ukraine".

[3] But not only legal and judicial reform is needed; "inherent" factors such as mentality and culture of the legislators, judges etc. have to undergo change.

except the law (created in accordance with democratic principles) and his own conscience and sense of justice. A qualified and effective system of justice and the guarantee of independence of individual judges are absolutely necessary.

2.1. Relevant texts

8. It is against the background of the above considerations that the present draft law "on the Judicial System and the Status of Judges in Ukraine" is being evaluated. In addition to the draft law a document summarising the recommendations adopted by the *Verkhovna Rada* Committee on Judiciary on 16 July 2009 was available. When analysing the Draft law special attention was paid to the internationally recognised principles concerning the role of the judiciary and its independence, as such principles are reflected especially in the ECHR and in the case-law of the ECtHR. In addition, relevant material is:

- The United Nations Basic Principles on the Independence of the Judiciary (29 November 1985);[4]
- The Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe from 13 October 1994 on the Independence, Efficiency and Role of Judges;[5]
- The European Charter on the Statute for Judges (1998);[6]
- The Judges' Charter in Europe of the International Association of Judges 1997 (I.A.J./U.I.M.);
- The Universal Charter of the Judge of the International Association of Judges (1998);[7]
- The Opinions ("Avis") of the Consultative Council of European Judges;[8]
- The Bangalore Principles of Judicial Conduct 2002 ;"[9]
- The Report on Judicial Appointments, adopted by the Commission at its 70th plenary session on 16-17 March 2007 (CDL-AD(2007)028)
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2.2. Degree of detail of the draft Law

9. From the point of view of the technique of legislation one cannot but remark that the Ukrainian legislator prefers a positive approach of making laws, in the sense of a legal "positivism". This means that the legislator tries to mention or to enumerate all the possible facts which can form the elements of a legal rule. Therefore the legal texts are quite voluminous and contain elements which are perhaps not necessary, or which could be delegated to subordinate legislation (e.g. a regulation). One negative effect is certain: the rules are difficult to find and to know, also for the practising judge, and, if the law does not provide for a rule for facts in a certain case (no catalogue of facts is complete) the judge

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4 The United Nations Basic Principles on the Independence of the Judiciary. URL: http://www.abanet.org/rol/docs/judicial_reform_un_principles_independence_judiciary_english.pdf [State: 23.09.2009]

5 URL:http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(94)12.asp

6 European Charter on the statute for judges. Activities for the development and consolidation of democratic stability. European Charter on the statute for judges and Explanatory Memorandum. Strasbourg, 8 - 10 july 1998. URL:http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf [State: 05.01.2007].

7 "Statut du juge en Europe/Judges' Charter in Europe". In: Euroiustitia, Volume 1, 1997. 5. "The Universal Charter of the Judge/Statut universel du juge/Estatuto universal del juez". International Association of Judges. Roma, 1999. URL: http://www.iaj-uim.org/ [State: 05.01.2007].

8 URL:http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/textes/Avis_en.as [State: 22.12.2007].

9 URL: http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/textes/DocsRef_en.as [State: 04.01.2007].

might be feeling completely at sea. Therefore one can ask oneself e.g. whether the provisions in the Draft Law “On the Judicial System and the Status of Judges” in Section IV ("Procedure for Assuming the Office of a Professional Judge of a Court of General Jurisdiction"; Articles 70 to 99) should be elaborated in such a detailed manner or if Article 164 which deals with the right of the judge to receive a loan for housing should be dealt with in this law. All these provisions are made on the level of law (and not in a regulation etc.). There seems to be quite some overregulation.

3. Fundamentals of Organisation of Judicial Power and Delivery of Justice

10. Section 1 of the Draft law contains provisions giving expression to many fundamental principles concerning the judiciary and its organisation. Already in its previous opinion the Commission described these provisions as being for the most part unexceptionable and indeed admirable. It referred to statements both of the independence of the judge on an individual basis and of the independence of the judiciary as a whole. These provisions are largely the same as those previously contained in Articles 1 to 14 of the Law on the Judiciary.

11. A new provision in Article 8 changes the case assignment procedure from one where cases were assigned by court presidents to an automated case assignment system. However, provision is made for judicial specialisation in which event cases can be assigned to specialised judges. Where assignment is made in violation of the new procedures the court panel concerned is to be incompetent. This change should lead to a further strengthening of the independence of judges on an individual level.

12. Article 9 which deals with equality before the law and the court has been expanded to prohibit discrimination on linguistic grounds as well as the other grounds which were formerly in the text. This is to be welcomed in a state where linguistic tensions exist. However, the list of prohibited discriminatory grounds does not mention sexual orientation.

13. As to Court objectives (Article 2), in which rights and freedoms guaranteed by the Constitution and laws of Ukraine are referred to, one may wonder whether it would not be desirable to add a reference to international conventions binding on Ukraine.

14. Article 6.2 provides that, *"[u]nless otherwise specified by the law, no petitions filed with a court by citizens, organisations, or officials in connection with court consideration of specific cases shall be considered if, in legal terms, the applicant is not participant in the court proceedings.*" There is some doubt as to the significance of this provision. If the intention is to say that submissions directed to a court are inadmissible if the person in question lacks standing - as a party or intervener - or other such procedural conditions are not fulfilled, the article seems to give expression to something that should be self-evident in the context and could be dispensed with. This may be another example of the kind of overregulation referred to above in section 2.

3. The system of courts

3.1. Organisation

15. Article 3 of the Draft, included in Section I (“Fundamentals of Organisation of Judicial Power and Delivery of Justice”) contains the basic definition of the court system of Ukraine. Section II contains more elaborate provisions on the creation of courts, types of courts and their compositions.

16. As to the creation, or establishment, of courts, Article 6 ECHR provides that a court, in order to fulfil the requirements of that article, must be "established by law". As stated by the (former) European Commission of Human Rights, this means that "the judicial organisation in a democratic society must not depend on the discretion of the Executive, but it should be regulated by law emanating from the Parliament."[10]

17. Against this background, the proposed regulation contains problematic elements. According to draft Article 19 on the Procedure for Creating Courts, "Courts of general jurisdiction shall be created and abolished by the President of Ukraine on the basis of a motion by the Head of State Judicial Administration of Ukraine." On its face the draft law appears to leave the creation and abolition of the local courts, courts of appeal, high specialised courts and the Supreme Court of Ukraine [11] to the discretion of the highest executive organ, the President.

18. Of course, one may say that the President is given the power to create and abolish courts by an act of Parliament, i.e. the law under preparation, and that in this sense there will be a clear legal basis. The law will also fix the types of various courts and contain further provisions defining the basic structure of the court system so as to circumscribe the discretion of the President. Thus the regulation, after all, appears to come some way towards meeting the requirement that courts must be established by law (e.g. Articles 17, 21, 25).[12] Even so, it is somewhat disturbing to see that the basic rule on the establishment (and - what is at least as problematic - abolition) of courts on its face appears to run counter to the fundamental principle adopted by the supervisory organs of the ECHR long ago. The formulation of Article 19 conveys a negative message. If the President expected a negative decision from a court, he or she could even abolish the court to ensure that other judges will deal with the case.

19. Courts should be created by law (an act of Parliament) defining their basic elements, their functions, their number etc. In this question the Constitution does not seems to stand in the way of an approach different from that adopted in the draft law, but the question may be politically sensitive. In any case, it would be preferable for the law to take as a starting point the principle that courts are established by law. The role of the President could be the "executor" of such organic laws, i.e. he could, for example, proclaim in the form of a decree when a law establishing a certain court or a certain set of courts becomes functional or operational.

20. The court system is rather complex, although in earlier drafts it has been even more so (CDL-AD(2007)003, paragraph 18). There are four levels of jurisdiction, although it seems that after cassation proceedings before a high specialised court the Supreme Court would enter the picture only exceptionally (Article 40.2), thus meaning that in practice there would normally be three levels.[13]

21. Even so, the system looks unnecessarily heavy. As high specialised courts are intended as cassation instances, in other words, they would play a role which normally belongs to the

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[10] Zand v. Austria, 7360/76, DR 15, p. 70. This old pronouncement (repeated by the Commission, for example, in *Stieringer v. Germany*, 28899/95, Dec. 25 Nov. 1996) is often cited, as en expression of good law, in legal literature on the Convention. E.g. Harris, O'Boyle et al, Law of the European Convention on Human Rights, 2009 (2nd. ed.), p. 297; Milano, Le droit à un tribunal au sens de la Convention européenne des droits de l'homme, Dalloz 2006, p. 344.

[11] These are named as "courts of general jurisdiction" in Article 17.

[12] As stated by the Commission, e.g. in *Stieringer* (supra note 8), "Article 6 paragraph 1 does not require the legislature to regulate every detail in this area by a formal act of Parliament if the legislature establishes at least the organisational framework for the judicial organisation."

[13] The recommendations of the *Verkhovna Rada* Committee on Judiciary adopted on 16 July 2009 seem to indicate that today high specialised courts act as cassation instances in commercial and administrative procedures, whereas in civil and criminal proceedings that role is played by the Supreme Court.

Supreme Court, one may might ask whether it would not be conceivable to merge the two levels (the high specialised courts and the Supreme Court) into one and thereby hopefully streamline the system by reducing bureaucracy and heavy administration. Under this model the role foreseen for the high specialised courts could be played by specialised sections (or chambers) of the Supreme Court, whereas a differently composed "Grand Chamber" (cf. the ECtHR) of that court could be charged, for example, with the kind of judicial review that is foreseen in exceptional circumstances. As an alternative (or as an additional element) one might consider whether the need for a special review in exceptional cases could be satisfied by a possibility for the specialised cassation chamber/section to relinquish jurisdiction in appropriate cases in favour of the plenary court. This should not be understood as a call for abandoning specialised administrative courts.

22. It should be kept in mind that a very elaborate and complicated judicial system carries with it the risk of prolongation of proceedings. Yet, when faced with allegations of proceedings not conducted within a reasonable time within the meaning of Article 6 ECHR, the ECtHR has always emphasised that the Convention obliges the States parties to "organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time."[14] Thus structural features in a legal system that cause delays are not an excuse under Article 6. Although the Supreme Court is apparently overloaded today, the solution in a longer term can hardly lie in the establishment of additional court levels but in the streamlining of the proceedings and making them more effective. The need for necessary efficiency should be kept in mind also in respect of other parts of the law; as explained further below, the complicated system of judicial self-government may potentially deprive many judges of the time needed for the real judicial work.

23. Given that the complex court structure is set out in the Constitution, this problem should be addressed by way of constitutional amendment.

3.2. Status of judges

24. Section III of the Draft law is entitled "Professional Judges, People's Assessors and Jurors." The section contains several provisions on the general position of judges, emphasising their independence (Article 49), guaranteeing immunity (Article 50), judicial irremovability (Article 55), as well as defining certain basic requirements, such a citizenship of Ukraine as a basic condition for being a judge (Article 54).

25. Most of the provisions of Section III do not give rise to particular comments. The text has been somewhat strengthened by comparison with the earlier text. A new provision in Article 48 states that "pressuring judges, interfering with their professional activities, or influencing judges in any other way for the purpose of preventing judges from performing their professional duties or inducing judges to hand down an unjust decision or perpetrate other acts incompatible with the status of a judge shall be prohibited and punishable in accordance with the law". This is a much clearer text than in the earlier draft. Paragraph 3 of Article 48 entitles a judge to report the existence of a threat to his or her independence to the Council of Judges of Ukraine which is required to urgently verify and examine the report and take necessary action to eliminate the threat.

26. The meaning of Article 49.2 providing that a judge shall not be obliged to give "explanations regarding the merits of cases under his/her consideration, except when required by law" is not clear. For what kind of situations are laws foreseen which would oblige judges to give such explanations? Does the article mean that a judge could under some circumstances be compelled to depart from the secrecy of deliberations? In this

[14] E.g. *Süssmann v. Germany*, judgment of 16 September 1966, Reports 1996-IV, paragraph 55.

connexion it should be mentioned that the Opinion No. 3 of the Consultative Council of the European Judges recommends the establishment of spokespersons or the like to facilitate the information flow from the courts.

27. As to immunity, there is no need that a criminal case against a judge should be initiated only by the General Prosecutor and it is not appropriate that the judges are inviolable and cannot not be detained or arrested prior to indictment without the consent of the Verkhovna Rada. Immunity should not be lifted by Parliament but by the High Council of Justice. Article 126 of the Constitution should be changed in this sense and provide only functional immunity for acts performed in the office, excluding corruption. Pending such an amendment, at least the law should guarantee that the lifting of immunity only takes place on the basis of a judicial recommendation.

28. In a new provision, the judge is given immunity from civil suit in relation to damages caused by his or her decision, action or inaction related to administration of justice. It is provided that liability for court induced damages should be borne by the state. While this certainly represents a valuable protection, it may go too far in giving the judge immunity for such matters as failure to give judgment at all or improper conduct such as giving a judgment as a result of an inducement or bribe, which would be dealt with in criminal and disciplinary proceedings.

29. Judges should be free to join judges associations or unions, although restrictions may be placed on the right to strike (Article 55).

30. There is some overlap between two provisions both of which require the judge to comply with the rules of judicial ethics (Article 56 (4) and Article 58). In a new provision, Article 56 (4)(7) the judge is required to submit to the State judicial administration annually a property status declaration containing information on his income, securities, and other property. This would appear to be a valuable protection against corruption within the judiciary.

31. Finally, the Commission also recommends that there should be an express prohibition on the reduction of salaries imposed only on judges.

4. The appointment of judges

32. Courts not only should be established by law but, for example according to the above-mentioned Article 6 ECHR, they should also be “independent and impartial” (see also Introduction, section 1).

33. As stated in the previous opinion, the “[p]rocedures for the appointment of judges are central to the question of judicial independence in any system” (paragraph 22). Also in Ukraine the system of appointment of judges is bound to reflect upon the independence of the judiciary and the perceptions which the outside world will have in this regard.

34. Independence means independence from the executive and the parties. Courts should also be independent from the legislature except in so far as they are bound to apply laws emanating from the legislative body. While “independence” primarily is a question of absence or presence of organic links between the judiciary and the other poles of public power, “impartiality” is something normally decided in light of the circumstances of a particular case, i.e. a *prima facie* independent court may act partially. However, in light of the case-law of the ECtHR lack of guarantees of independence may easily create an appearance of lack of impartiality as well. Thus in the present context, as in others, it may be difficult to make a clear distinction between the requirements of independence and

impartiality[15]. According to the ECtHR, relevant in the assessment of independence (and impartiality) of a tribunal are "the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."[16].

35. The Draft foresees the President and Parliament as authorities competent to appoint judges. As a point of departure this is not problematic. Appointment of judges by the executive is acceptable, indeed, relatively normal. To the extent that the Constitution imposes appointment by Parliament, at least special precautions are needed to guarantee that in such appointment procedures the merit of the person is decisive, not political or the like considerations. Therefore Recommendation No R(94) 12 of the Committee of Ministers of the Council of Europe stresses that when the national system allows judges to be appointed by the executive there should be, for example, the following safeguards:

I. A special independent and competent body to give the government advice which it follows in practice; or
II. the right for an individual to appeal against a decision to an independent authority; or
III. the authority which makes the decision safeguards against undue or improper influences.

36. This applies *mutatis mutandis* to situations where Parliament elects judges. Questions arise as to whether the proposed legislation gives sufficient protection against undue political influences. Thus the composition of the High Qualification Commission of Ukraine still seems somewhat problematic, although there apparently have been some improvements since the previous opinion (CDL-AD(2007)003, paragraph 22). It seems that the body is to a certain degree less politicised. It is composed of 15 members. A majority of them (8) are judges. There are also two members appointed by the *Verkhovna Rada*, two by the President and one by the Minister of Justice. Positively, contrary to the previous draft, the present text clearly states that People's deputies and members of the Cabinet of Ministers may not be members of a qualification commission.

37. While according to Article 102, the majority of the Commission are judges, the question remains whether it is wise and necessary that one third of the members are appointed by the executive and legislative branches. An intended presence on the Commission of members representing President, the *Verkhovna Rada* and the Minister of Justice would cast serious doubts, at least on the level of appearances, on the independence of the High Qualification Commission and does not respect the separation of powers. The risk of considerations based on the candidates' merits being influenced by political considerations appears obvious.[17] This risk seems even more important, when seen in connection with other features of the appointment process discussed in the following sub-sections. The following sections first deal with initial appointment and, secondly, with appointment to permanent positions as judges.

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[15] e.g. *Salov v. Ukraine,* judgment of 6 September 2005, para. 82

[16] e.g. *Ninn-Hansen v. Denmark*, Decision on Admissibility of 18 May 1999

[17] The influence of politicians in the appointment of judges is not unknown in other countries either, but the international trend seems to go in the direction of such influence decreasing. See Heuschling, Why Should Judges be Independent?, in Constitutionalism and the Role of Parliaments (Ziegler, Baranger & Bradley, eds.), Oxford and Portland 2007, p. 199 at 218 ("The interference of politicians in the appointment of judges has not entirely vanished, but ist impact has been progressively diminished.").

4.1. Initial appointment

38. The procedure for the first appointment to the post of a judge is that the High Qualifications Commission of Judges of Ukraine announces a competition. Candidates apply for recommendation for appointment. The High Qualifications Commission conducts a competition and makes a decision which it sends to the High Council of Justice. The High Council of Justice considers the recommendation and makes a submission to the President of Ukraine who makes a decision. According to Article 81 (3), if the President rejects the submission he has to issue a justified order. Even within the present constitutional framework, the discretionary powers of the President should be curbed by limiting him or her to verify whether the necessary procedure for selection and appointment has been followed by the High Qualification Commission and High Council of Justice. The decision of the President of the Republic would therefore have the effect of a "notary".

39. Initial appointment as a judge is for a five-year term, apparently intended as a kind of probationary period. "Setting probationary periods can undermine the independence of judges" (CDL-AD(2007)003), paragraph. 26). This rule is based on Article 126 of the Constitution, which should be amended. If probationary periods are considered indispensable, they should not exceed two years. A period of five years cannot be regarded as acceptable. Such a period would mean that an important number of judges would at any given period of time be under uncertainty about their future. Their situation is worsened by the fact that in order to be finally elected to a permanent position they have to face what may be - or at least to an outsider may seem to be - a politicised procedure in Parliament (see below 5.2.). The system leaves the probationary judges for too long a period in a situation in which they do not have sufficient guarantees against outside pressures - or in which at least an appearance of potential pressures may be created.

40. Pending amendment of Article 126 of the Constitution, the appointment to a permanent position upon the expiry of the five year period should be formulated in the law as a main rule[18] from which derogation should be possible only on conditions similar to those which allow the dismissal of a permanent judge.

41. Article 77 which deals with the decision of the High Qualification Commissions on the recommendation of a candidate is even less transparent than the earlier draft. It is no longer provided that the candidate with the best exam result is to be preferred and that in the case of an inequality a candidate who is an existing judge is to be preferred. Instead, a new provision simply empowers the High Qualifications Commission to make its decision "based on the results of the testing and consideration of other information on the candidates". The Commission is therefore free to disregard the result of the testing depending on whatever other information it chooses to take into account. It is also expressly provided that the Commission may decide to recommend several candidates for the same judicial position. If they do this, on what basis is the President to make a decision? Article 77(4) provides for an express right of an appeal against a decision of the High Qualification Commission to the High Council of Justice and this provision for an appeal is to be welcomed.

42. Already in its earlier opinion, the Commission criticised that the High Qualifications Commission can take into account "other documents" (Article 73 (1) (9)). – What are these other documents? Article 75 deals with the "qualification examination". Where there is a complaint by a candidate the High Qualifications Commission can cancel the results of the exam with regard to the complainant and order a new or an additional exam in respect of that candidate (Article 75.7 Status). This seems a very unusual provision. Article 74.4

[18] Cf. *Stieringer v. Germany* (*supra* note 8) In which the then German system is described, inter alia, with reference to the fact that "[p]robationary judges have to be appointed as permanent judges after five years of service at the latest".

permits the High Qualifications Commission to collect information about he candidates and instruct others to do so and allows organisations and citizens to submit information about the candidate. Finally, before recommending a candidate for appointment, the High Qualifications Commission can take account not only of the exam and medical certificate but also of an interview and "other information" which defines the candidate's "level of professional knowledge, personal and moral qualities" (Article 77 (2)). What kind of information? What kind of procedure regulates the collecting of this kind of information? What is the state of knowledge of the candidate about this information? This provision is not in line with European standards and goes against the transparency of the whole process of selection of judges.

43. Apart from initial appointment, similar questions arise about other stages of a judge's advancement – for example, Article 85 (2) (12) refers to "other documents which might be indicative of the applicant's fitness for judicial work" where permanent appointment is concerned, and Article 84 (2) which permits the High Qualifications Commission to consider "other materials" before recommending a candidate to permanent appointment. Taken together these provisions raise the fear that extraordinary interventions could take place in the process.

4.2. Election to a permanent post

44. Article 90.2 provides that the decision on election to a permanent post shall be taken by a majority of the constitutional composition of the *Verkhovna Rada*. This is a kind of qualified majority as proposed by the Venice Commission. Despite this improvement there are still strong doubts about the role of Parliament in the election of judges. The Commission's previous remarks remain valid: *"the parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge" (CDL-AD(2002)026, § 22). Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, it would be necessary to change Article 128 of the Constitution."*

45. The election process is susceptible of being highly politicised. Democratic as it may seem at first sight, a process involving intensive questioning by Parliamentarians may create the image of judges being dependent on the views of the legislature in a manner not compatible with the separation of powers needed in a democracy. Independence of judges means that judges must feel free to render also decisions that are sometimes unpopular with the politicians or which certain persons do not like. In the minds of some judges the prospect of being scrutinised by politicians who dislike those decisions or being subjected to a campaign of "petitions" by citizens and others (Article 87) who feel disgruntled by the judge's decisions may have a "chilling" effect and impact the judge's independence. Even in case of those judges who uphold their integrity the outside appearances may be such as to put in question their objective independence. That a judge later may have to work under the threat of being subjected to similarly politicised dismissal procedure (below paragraph 6) is likely to create a picture of a judiciary which somehow is at the mercy of political forces, quite in breach of the principle of judicial independence. The appearance of the system not providing guarantees against undue influences is aggravated in case a five-year probationary period precedes the first permanent appointment in the way foreseen in the draft law.

46. First appointment to a permanent position is also comparable to promotion. According to the Recommendation No R (94) 12 "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career should be based on merit, having regard to qualifications, integrity, ability and efficiency." This means that

political and the like considerations are inadmissible. The proposed regulation gives rise to a suspicion in the mind of an outside observer that political considerations do play a role in the appointment of judges in Ukraine.

47. The procedure foreseen for the permanent appointment of judges should be amended, by removing the involvement of Parliament through an amendment of Article 128 of the Constitution. In the absence of such amendment, the independence of the High Qualification Commission should be strengthened. Alternatively, the decisive say in the election of judges could be entrusted to a High Council of Judges having a pluralistic composition, with a substantial part if not the majority of the members being judges elected by their peers. In this spirit, the questioning by Parliament should be excluded. The role of petitions from natural and legal persons (Article 87) should be eliminated altogether as far as the election process is concerned.

48. Rather radical changes are needed to the draft in order to make it compatible with European standards. Such changes seem not to be impossible in so far as Article 128 of the Constitution leaves the modalities of the appointment procedure to the law. The Venice Commission found positive elements in this respect in draft amendments, on which it gave an opinion in 2009 (CDL-AD(2009)024).

49. To sum up, the role of the *Verkhovna Rada* should be removed by way of constitutional amendment. In the absence of such a change, its involvement should be made mainly ceremonial. The decisive say in the election of judges should be entrusted to an independent body composed by a majority of judges or with a substantial element of judges elected by their peers (High Qualification Commission or a differently composed High Council of Justice), which would make a proposal normally to be followed by the *Verkhovna Rada*. The latter could be left with the possibility of departing from the proposal but this should be possible only exceptionally and with a qualified majority (say, 4/5). However, even such a change might require a constitutional amendment.

4.3. Judicial promotion

50. Section V and VI (Articles 93-98) deals with "Qualification Attestation of Professional Judges", which is based on qualification attestation. This basically involves certification that judges are fit to advance from one level to the next and the procedures are under the control of the High Qualifications Commission. In its earlier opinion the Commission stated that it was very important that the criteria for making assessments were very clearly stated and were such as not to infringe the principle of individual judicial independence.

51. While the criteria are not set out in the new text, a new provision provides that the methods for evaluating a judge with a view to conferring each of the qualification ranks are to be approved by the High Qualifications Commission of Judges and by the Council of Judges of Ukraine (Article 96 (7)). In addition, the decision of the High Qualifications Commission on attestation may be appealed to the High Council of Justice (Article 98 (6)). These new provisions represent an improvement in the text but of course whether the procedure will work fairly will depend on what exactly is in the document setting out these methods which has yet to be adopted.

52. That said, these provisions appear to give a basis for an acceptable procedure, provided the qualification Commissions guarantee fair proceedings. In this respect what was said in the previous section on the need to strengthen the judicial nature of the High Qualification Commission or to replace its role with that of a differently composed High Council of Justice remains valid.

5. Disciplinary liability and dismissal (removal) of judges

5.1. Disciplinary liability and disciplinary proceedings

53. The Commission notes with satisfaction that several critical remarks made in the previous opinion (CDL-AD(2007)003, paragraph. 34 and onwards) seem to have been taken into account. Thus certain grounds for disciplinary liability which existed in the older draft law on the status of judges ("evidently unqualified solution of the case", "systematic ignoring of position of high-level courts regarding application of legal norms", (see CDL-AD(2007)003, paragraph 34) are not included in Article 111 of the present draft.

54. Other positive elements are that a provision on the right of representation of the judge has been added (Article 114.8, cf. CDL-AD(2007)003, paragraph 36), and now there is also a right of appeal to a court (Article 117.4). Even so, the impression is that rights of the members of the Disciplinary Commission play a more prominent role than the defence rights of the "accused" (the person subjected to disciplinary proceedings). A whole article (Article 124) of some detail is devoted to the former issue, whereas the latter is regulated in one paragraph of Article 114. As to the right of appeal to the court, the competent court(s) is (are) not specified, nor whether they have full jurisdiction or whether there are limitations in this respect. Should a first instance court examine disciplinary matters concerning Supreme Court judges? At which stage of the proceedings can an appeal be made, after the decision has been taken by High Council of Justice, as a kind of third instance, or before, instead of sending it to High Council of Justice ? The text is very imprecise and the level of generality as regards this important issue is striking in view of the very detailed nature of many other parts of the draft law.

55. What is still not satisfactory is the vague reference to "immoral act" as a ground for disciplinary sanction, without a requirement that such an act has to be unlawful. Of course, there is the general requirement that account should always be taken of the "nature of the offence", Article 115.2 but this point should be absorbed by "violation of rules of judicial ethics".

56. There has been some improvement in the composition of the disciplinary commission in that it is now to consist of 15 persons of whom 8 are to be judges to be appointed by the Congress of Judges of the Ukraine. Members of the executive and legislature may not be members of the disciplinary commission. The principal change in organisation is that three member panels can decide on the admission of complaints. It is provided that meetings of the disciplinary commission are to be held in public. A meeting of the Commission must now be attended by at least two thirds of its members whereas previously the text provided for a bare majority. On the whole these provisions represent an improvement on the text.

57. It is difficult to see why the President, the *Verkhovna Rada* and the Minister of Justice should have representatives in the Disciplinary Commission of Judges of Ukraine (Article 119). It seems that the approach according to which the executive and the legislature should always be represented in bodies in whose work judicial considerations should play a paramount role somehow reflects a distorted idea of "checks and balances".

58. Consequently, the Disciplinary Commission of Judges of Ukraine (Article 118) should not include representatives of the President, the *Verkhovna Rada* or the Minister of Justice. Although neither members of the Cabinet of Ministers nor People's Deputies are eligible (paragraph 2), the presence of members "representing" the executive and the legislative powers once again disrupts the separation of powers in a manner that is not compatible with the independence of judiciary. On the other hand, the appointment of members by the Congress of Lawyers and the Council of Higher Law Schools and Scientific Institutions of

Ukraine is not only acceptable but probably a good thing in so far it brings in two important legal reference groups which have legitimate interest in the judiciary and its quality.

59. It is welcomed that the drafters took up a recommendation from the Venice Commission by providing an appeal to a court against disciplinary sanctions not only for a "violation of the procedure of execution of disciplinary proceedings" but as a full appeal. However, there is still a lack of substantive regulations concerning the rights of judges in the disciplinary procedure. The new wording is very laconic and imprecise and a number of questions arise. When can the decision be appealed, at which stage of the procedure? After the decision on a complaint has been taken by High Council of Justice, as a kind of third instance, or before instead of making a complaint to the High Council of Justice? It seems that paragraphs 1-3 somehow contradict paragraph 4.

5.2. Removal/dismissal of judges

60. Section VIII of the Draft law deals with the removal of a professional judge of a court of general jurisdiction and related issues. Grounds of removal seem to include both reasons based on the judge's culpable behaviour, such as his/her conviction of a criminal offence (Article 135), and circumstances in connection of which no condemnable behaviour needs to be attributed to the judge (such as reaching of the retirement age, Article 131). Increased clarity in the Section could be achieved by way of making a clearer distinction between the two kinds of situations which arguably should merit different types of proceedings. It appears that a permanent judge who wishes to resign on the basis of duly certified health problems (Article 132) is subjected to the same kind of proceedings as his/her colleague who has been convicted of a criminal offence. One may wonder whether this is necessary and correct.

61. According to Article 129: "A judge of a court of general jurisdiction shall be removed (...) by the body which appointed or elected him/her, upon a motion the High Council of Justice".

62. This is a problematic provision. As indicated earlier, appointment of judges by the executive (President, Government) is acceptable and, indeed, normal. Even appointment by Parliament is as such in no way *per se* incompatible with Article 6 ECHR or the idea of rule of law, either (e.g. the open cited case of *Ninn-Hansen*). After all, judges of the ECtHR are elected by a Parliamentary Body, the PACE.

63. However, the situation is very different when it comes to the dismissal of judges. Independence of a court above all means independence from the executive and the legislature (as well as, of course, from the parties). While appointment by the executive does not endanger such independence (which is mostly needed after the judge has assumed his/her functions), the power of the executive and/or the legislature of also removing (that is, dismissing) a judge gives cause to concern.[19] However, this provision comes from the Constitution (Article 126), which should be amended.

64. On the level of the law alone, it may not be possible to take a totally different stand. In these circumstances it would be all the more important to try to build into the law additional

[19] It should be noted that although, as a historical remnant, for example the British Parlaiment retains the power of removing judges, such a power is in practice not applied at all. See Lord Phillips of Worth Matravers, The New Supreme Court of the Untied Kingdom, in Da mihi factum, dabo tibi ius, Supreme Court 1809-2009, Helsinki 2009, p. 15 at 18 ("Although judges were appointed by the King and exercised powers delegated by the King, they soon acquired a fierce independence. This was underwritten by Parliament in 1700 when it passed a statute, the Act of Settlement, which provided that judges should be appointed for so long as they should be of good behaviour and could only be removed if both Houses of Parliament agreed that they should be. In the whole of our history no High Court Judge has been removed from office. The independence of the judiciary is crucial to the rule of law.").

safeguards for the independence of the judiciary. A main issue is the question of removal (by the *Verkhovna Rada*) of judges elected for a lifetime position (although some of the considerations put forward apply to other judges and their removal, as well).

65. Additional safeguards could relate to: 1) grounds of dismissal (removal), 2) the procedure before the decision-making body (*Verkhovna Rada*) and 3) the decision-making itself by that body (whether by simple or qualified majority).

66. Some of the proposed grounds seem to be very vaguely or widely defined (see also CDL-AD(2007)003, paragraph 45). Thus one may ask whether the breach of any incompatibility requirements, or any conviction (Article 135) regardless of the nature of the offence (a minor speeding offence?) in question should be sufficient for removal, as Article 133 appears to suggest. Sometimes the fulfilment of the relevant ground of removal seem to lead mandatorily to dismissal (Article 133: "shall"), sometimes the relevant provision appears to give more discretion to the decision-maker (Article 134: "may").

67. As to the procedure, the investigation before the *Verkhovna Rada*, involving the possibility of intensive questioning by members of Parliament (Article 143.4), examination of "citizens' petitions" (Article 140.3) gives the impression that the whole process may be politicised and as such not well compatible with the position of judges. While the draft law provides that judge's explanations must be heard, it remains silent as to whether he or she can call or question witnesses. There is no mention of the judge having the right to question or confront his or her accuser. These matters were commented on in the Venice Commission's earlier opinion but have not been addressed.

68. When this is combined with the similar features in the appointment process concerning permanent posts (see above and the previous opinion CDL-AD(2007)003, paragraphs 27-28), one may doubt whether the system is conducive to creating "guarantees against outside pressures" and "appearances of independence" as required, e.g., in the case-law of the ECtHR. The mere possibility of such a procedure of removal may have a "chilling effect" on certain judges' work and thereby affect their independence, or at least create negative appearances concerning the independence of the judiciary. The centre of gravity of an investigation leading to a removal should lie in the procedure before the High Council of Justice, the *Verkhovna Rada* playing a role of a more passive decision-maker. If the High Council of Justice is composed as referred to in paragraph 47 above, and if proceedings before it in removal situations were of judicial nature, the system could be construed to meet the requirements of the rule of law, provided the role of the Verkovna Rada is limited to that of a formal decision-maker, as distinct from the inquisitorial powers it is now intended to have. As in connection with permanent appointments, hearings before *Verkhovna Rada*, if any, should be limited to such as take place in a committee.

69. However, Article 131 of the Constitution at present provides for a High Council of Justice which contains politically appointed representation in which judges are a minority. This is very unsatisfactory and will hopefully be corrected in connection with future constitutional reforms. If not, one solution whereby the election procedure could be strengthened in the spirit of the independence of judges could be a rule according to which any dismissal (or rejection of permanent election for that matter) should be submitted for confirmation by the Supreme Court. There is much to say even for the proposition that judges should never be dismissed but by a judicial decision.

70. Finally, in case the legislative body retains the power of dismissing judges it might be considered whether at least in some cases (for example, if the High Council of Justice has not been unanimous in proposing removal), the decision by the *Verkhovna Rada* should not be made by a qualified majority (for example 4/5) but probably even such a change would

require a constitutional amendment. If constitutional amendments were undertaken rather profound changes would be required.

6. Judicial self-government

6.1. General Remarks

71. The draft Law "On the Judicial System and the Status of Judges" contains detailed provisions on the question of "judicial self-government" in Section IX (Articles 147 to 160). This section is divided into two chapters. Chapter 1 deals with "General Principles of Judicial Self-government", Chapter 2 with "Meeting of Judges and Conferences of Judges". Article 147.1 of Chapter 1, states that to resolve issues "of internal operations of the courts of Ukraine, there shall exist judicial self government that is collective resolution of the said issues by professional judges"(Article 147.1).

72. According to Article 147.2 "Judicial self-government shall be one of the most important guarantees of the autonomy of courts and of the independence of judges." Moreover it says that the "activities of the bodies of judicial self-government shall serve to facilitate the creation of adequate organisational and other conditions essential for normal operation of courts and judges, to assert the independence of the court, to ensure the protection of judges against interference in judicial activities, as well as to raise the level of staff management quality within the court system."

73. Article 147.3 states that "issues of internal court operations shall include those of organisational support for courts and for judges' activities, social protection of judges and their families as well as other issues which are not directly related to the administration of justice."

74. Article 147.4 mentions objectives of the bodies of judicial self-government which include participation of judges in determining the requirements associated with personnel, financial, logistical and other support for courts as well as dealing with matters pertaining to the appointment of judges and their discipline, stimulating judges, ensuring the organisational unity of the operation of judicial bodies, protecting the courts against interference in their operation and supervising the organisation of the operation of courts.

75. Judicial self-government, as defined in Article 147, is seen, on the one hand, as a central element for the protection of one of the core principles governing the judiciary, that of judicial independence. The judge has to be free from influence not only from the other branches of government (institutional independence) but also in relation to society. Moreover an individual judge must be independent in making his or her decision (personal independence); he or she must be independent from other persons, inside and outside the judiciary. On the other hand the text of Article 147 makes it clear that judicial independence is not the only value to be promoted by the idea of judicial self-government. It intends also to create proper and efficient organisational and other conditions essential for the operation of courts and judges and to raise the quality of judicial work.

76. Moreover it also seems to be intended that a kind of democratic control by the judges as a whole over the operation of the judiciary is sought after. The idea behind this proposal was, among others, to curb the power of the court presidents who some felt had too much power over the ordinary judges (see CDL-AD(2007)003).

77. Though the attempt to provide for democratic control is quite far-reaching and does not appear to be expressly required by any of the international instruments relating to the judiciary (see CDL-AD(2007)003, para. 50) judicial independence implies that the judge

must be protected against the possibility of pressure and other influence not only by the executive and legislative powers of state, by media, business enterprises, popular opinion etc. but also against influence from within the judiciary itself. Therefore as the relationship between the judges on the one hand and the presidents of courts, the Superior Councils of Justice where they exist and the Ministry of Justice, on the other hand is concerned, it is essential that such a relationship is properly structured and regulated so as to ensure that the independence of the individual judge is not affected.

78. It is widely acknowledged that the administration of the judiciary should be carried out by the judiciary itself or by an independent authority with substantial representation of the judiciary, at least where there is no other established tradition of handling that administration effectively and without influencing the judicial function.[20] Therefore a system of democratic participation of all judges in making decisions may well make sense, especially in a judicial system in which presidents of courts of appeal used to have a lot of competences (including the right to lower or increase the salary) which sometimes have been misused; even though there is no such requirement in the international instruments to provide for such a system. Indeed, in most legal systems many of the matters which are crucial to the functioning of the judiciary such as the allocation of work between courts and decisions as to where judges sit and the hours they work, etc, would be decided by senior judges such as the Chief Justice or Presidents of courts and not necessarily by bodies democratically elected by the whole body of judges. The European Charter on the Statute for Judges envisages a process of consultation for judges, but not necessarily of decision making.[21] If this system does effectively protect judicial independence and if it really contributes to or permits an effective operation of the court system as a whole it should be introduced or, as it is already actually used in practice (though without being fixed in statutory law), maintained.[22]

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20 See: CONCLUSIONS of the 1. Study Commission of the International Association of Judges, Recife 2000. http: //www.iaj-uim.org/old/ENG/frameset_ENG.html "1. Judicial independence is independence from any external influence on a judge's decisions in judicial matters, ensuring the citizens impartial trial according to law. This means that the judge must be protected against the possibility of pressure and other influence by the executive and legislative powers of state as well as by the media, business enterprises, passing popular opinion etc. But it also implies guarantees against influence from within the judiciary itself. […] 3. The proper administration of the judicial system must create and ensure the conditions necessary for judicial independence. This includes appropriate remuneration and security of office. However, the judge and the judiciary as a whole have an obligation to ensure the effective handling of the workload and the management of resources. Among the matters which could compromise the independence of the judge are an excessive workload, insufficient resources for the fulfilment of the judge's duties, the arbitrary imposition of quotas and assignment of cases, procedures and criteria for promotion. Where a judge's work is evaluated, it must be done in a manner which does not undermine his independence. For example it may be dangerous to evaluate the work of a judge by reference to the percentage of decisions which were reversed on appeal. […] 5. As regards the relationship between the judges on the one hand and the presidents of courts, the Superior Councils of Justice where they exist and the ministry of justice, on the other hand, it is essential that such a relationship is properly structured and regulated so as to ensure that the independence of the individual judge is not affected. In this context it should be emphasised that presidents of courts must be judges. Furthermore the administration of the judiciary should always be carried out by the judiciary itself or by an independent authority with substantial representation of the judiciary; at least where there is no other established tradition of handling that administration effectively and without influencing the judicial functions."

21 "Judges are associated through their representatives and their professional organisations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare." (Article 1.8)

22 "However, it is also immediately possible to considerably improve the situation by putting an end to political influencing of the judiciary and by activating the efforts of the bodies of judicial self-government and the Supreme Court of Ukraine with regard to protection of the independence of judges. A positive example of such opportunity coming true is the set of changes in the procedure of appointment of chief judges and their deputies in courts. In the absence of relevant statutory laws the Council of Judges of Ukraine invoked the Constitution of Ukraine and assumed responsibility for these functions. The results of the study of judicial independence in 2008 show a noticeable diminishment of politicians' influence on this aspect of justice as compared to last year. Moreover, the absence of political manipulations during appointment of judges to administrative positions in courts created a healthier climate of independence of judges within courts. The

79. The Venice Commission's previous opinion made recommendations in relation to the judicial budget, in particular that an autonomous body with substantial judicial representation should play a significant role in presenting and defending the judicial budget before parliament. This recommendation has not yet been adopted in the new draft.

6.2. The institutions of judicial self-government

80. Article 148 of the draft law provides that there are four organisational forms of judicial self -government:

- Meetings of judges
- Conferences of judges
- The Congress of Judges of Ukraine
- The Council of judges of Ukraine
- In addition some of these bodies may also create executive bodies (e.g. the Congress of Judges of Ukraine)

6.3. Meetings of judges

81. Meetings of judges have to be gatherings of judges of the relevant court at which they discuss issues of internal operation of the court and take collective decisions on the issues discussed (Article 149.1). These meetings can take place on all four levels of courts. The general rule provides for meetings to be convened by the relevant president of the particular court either upon his or her initiative or upon the demand of one-third of the total number of judges of the particular court (Article 149.2). According to Article 149.5 meetings of judges have to discuss issues concerning the internal operation of the court and its staff and make decisions on these issues which have to be mandatory for execution. They also have to hear reports of judges holding administrative posts and of the head of the court staff. [23]

82. Furthermore they have to approve the procedure for establishing panels of judges to consider cases and for determining the presiding judge and the order of substitution of judges in case of their absence. They have also to approve the procedure and schedule for judges' vacations (Article 149.5.4). Meetings of judges of local and appellate courts must take place at least once every six months, and meetings of judges of the Supreme Court and the High Specialised Courts at least once a year. The meetings of the justices of the Supreme Court of Ukraine and of the High Specialised Courts can in addition submit proposals for consideration by the Congress of Judges of Ukraine, elect delegates to that Congress (Article 150.5.1). According to Article 150.4, meetings of judges of the Supreme Court and the High Specialised Courts "shall discuss issues related to internal operation of the court or the performance of individual justices or court staff members and shall take decisions which shall be binding on the justices of the court". It is assumed that the reference to "the performance of individual justices" means the workload etc. of individual judges rather than anything pertaining to the actual decisions they make, as otherwise this provision would infringe a key element of the independence of the individual judge from his

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polled judges, prosecutors and defence lawyers believe that the level of respect for the independence of judges on the part of chief judges went up by 15 to 20 %, while the influence of chief judges on the professional careers of other judges also became much smaller. The experts assume that a decrease in the political pressure on the High Council of Justice (even in the absence of the required constitutional amendments concerning its composition) resulted in a growth of credibility of this important constitutional body and its activity." *Monitoring of Judicial Independence in Ukraine.2008***.** Edited by Andriy Alyeksyeyev. Centre for Judicial Studies. Kyiv: 2008, p. 3.

[23] It is not clear however if these "Meetings of Judges" replace the actual existing regional "Judicial Councils".

or her judicial colleagues (see Bangalore principles in footnote 7, or the Conclusions of the 1st Study Commission of the International Association of Judged [IAJ/UIM]), footnote 20). Meetings of judges have quite substantial powers. Meetings of judges can submit proposals on the settlement of issues which arise concerning the relationship between the judiciary and other bodies of the state power and also issues relating to legislation.

6.4. Conferences of Judges

83. Conferences of judges are dealt with in Articles 152 - 154. They are defined as gatherings of representatives of courts (delegates) at which they discuss the operation of their courts and take collective decisions on the issues discussed. The question arises as to the respective competence of the conferences and the meetings as it is not clear from the text which one is to prevail if there is a difference between the two as to a question relating to the operating of courts. Again conferences are to hear reports of executive bodies established by them as well as relevant departments of the State Judicial Administration. Conferences can also hear reports of the members which it sends to the relevant territorial qualifications commission. Like meetings they can also submit proposals to other state bodies. The conference elects delegates to the Congress of Judges of Ukraine (Article 152.8). It can take decisions binding for its respective council of judges and judges of the respective courts (Article 152.3).

84. According to Article 152.4, the Conference of Judges determines the quantitative composition of the Council of Judges of Ukraine and elects its members. On the other hand Article 159 says that the Council of Judges of Ukraine shall be elected by the Congress of Judges of Ukraine. It is not clear where the competence for election lies.

85. It seems from the context of the draft law that conferences exist only at the level of local courts and courts of appeal. So far as the Supreme Court and the High Specialised Courts are concerned a single body, that of the meeting, appears to fulfil the same functions which for the lower courts are filled both by the meetings and conferences.

86. In order to be valid, a conference must be attended by at least two thirds of the total number of delegates. It may also be attended by other judges who are not delegates (Article 154.1). The delegates to the conference are elected by the meetings (Article 154.2). The conference is to take place at least once a year (Article 153.1). The conference may also be attended by representatives of bodies of the state power, local self-government authorities, educational and scientific institutions, law enforcement bodies, and civic organisations. Only delegates may vote (Article 154.7). According to Article 159.2 it is up to the Congress of Judges to elect the council.

6.5. The Congress of Judges of Ukraine

87. The Congress of Judges of Ukraine is the highest body of judicial self-government (Article 155.1). It hears a report by the Council of Judges of Ukraine on performance of tasks by bodies of judicial self-government and on the state of funding and organisational support of the operation of courts. According to Article 156.1, the Congress meets once every three years. It is convened by the Council of Judges of Ukraine. An extraordinary Congress of Judges of Ukraine may be convened upon the demand of at least one-third of all the conferences of judges or upon demand of the meeting of judges of the Supreme Court. The Congress may be attended by a large number of people, including the President of Ukraine, the People's Deputies of Ukraine, the Commissioner for Human Rights of the *Verkhovna Rada*, members of the High Council of Justice, representatives of the cabinet of ministers of Ukraine, other bodies of the state power, representatives of scientific and educational establishments and institutions, civic organisations, and other persons who may be invited to participate (Article 156.3).

88. It is not clear whether these persons are entitled to participate fully in the Congress (although presumably they are not entitled to vote). However, the principles of the separation of powers would suggest that these persons should have only an observer status unless on specific request for some specific purpose.

89. Should the Council of Judges of Ukraine fail to convene the Congress of Judges of Ukraine, an organising committee shall be set up and convene an extraordinary congress as required by Article 156.1. As already pointed our in the previous opinion, it is difficult to see what is the "*raison d'être*" is behind this provision. It seems strange that the draft law might envisage that a body consisting primarily of senior judges would deliberately flout a legal provision which requires convening a Congress. It is difficult to see how such a question would arise unless there was some *bona fide* dispute over the validity of a request for the calling of an extraordinary Congress. In such a case the difficulty would probably have to be resolved by a court of law.

90. Delegates to the Congress of Judges of Ukraine are elected by conferences of judges (Articles 152.2.4; 157.1) in the case of the local courts and courts of appeal, and by meetings of judges in the case of the Supreme Court and the High Specialised Courts (Articles 150.5.2; 157.1). A meeting of judges of the Constitutional Court of Ukraine shall elect three delegates to the Congress.

91. The powers of the Congress of Judges of Ukraine are extensive. It can appoint and dismiss the Justices of the Constitutional Court of the Ukraine in compliance with the Constitution and the law (Article 155.2.3). It appoints members of the High Council of Justice and can decide on the termination of their offices (Article 155.4). It can appoint members of the High Qualifications Commission of Judges of Ukraine (Article 155.2.5) and of the Disciplinary Commission of Judges of Ukraine. It can take decisions binding for all bodies of the judicial self-government and all professional judges (Article 155.3). The power to take decisions binding on all professional judges needs to be qualified so as to ensure that it is compatible with the independence of the individual judge.

92. In addition, the Congress of Judges of Ukraine hears reports from the Council of Judges of Ukraine, as well as from its representatives on the various other bodies. It also hears reports from the head of the State Judicial Administration of Ukraine which is the executive body tasked with providing support for the courts. It can pass a no-confidence vote motion against the in Head of the State Judicial Administration of Ukraine (Article 155.2.2).

6.6. The Council of Judges of Ukraine

93. During the period between the Congresses of Judges of Ukraine the functions of judicial self-government are to be performed by the Council of Judges of Ukraine (Article 159.1). The Council of Judges is elected by the Congress of Judges of Ukraine (Article 159.2). The Council's function is to organise control over the enforcement of decisions taken by the conference and settle issues concerning the convocation of the next conference (Article 159.5). It also exercises control over the activity of the State Judicial Administration concerning the work of the relevant court. It hears a report from the head of that department regarding the work of the court (Article 159.6.3). It considers issues of legal and social protection of the judges (Article 159.6.2).

94. It can also submit proposals regarding resolution of court operation issues to the bodies of state power. Decisions taken by the Council of Judges of Ukraine are binding on all bodies of judicial self-government and on judges holding administrative posts in courts (this refers to presidents and deputy presidents of the courts). A decision of the Council of Judges of Ukraine may be cancelled by the Congress of Judges of Ukraine (Article 159.7).

95. The Council consists of 33 members elected by the Congress with quotas fixed for each of the separate courts. Proposals for candidates are submitted by conferences or meetings of judges as well as by individual delegates of the Congress. The Council of Judges elects its own chair, deputy chair and secretary as well as a *presidium*. Task and competences of the Council are the following (Article 159.6):

i To develop and provide for the implementation of measures to ensure judicial independence and improvement of the organisational support for the operation of courts.
ii To consider issues of legal protection of judges, social protection of judges and their families and take decisions to this effect.
iii To exercise control over the organisation of courts work and activities of the State Judicial Administration of Ukraine, and to hear reports from court presidents and officials of the State Judicial Administration of Ukraine about their activity.
iv To review complaints of judges on the presidents of courts and other officials, as well as other information from judges concerning threats to their independence, and take appropriate actions based on the results of the consideration, notify competent bodies of the grounds for criminal, disciplinary or other liability, make public statements of behalf of the judiciary about facts of violation of judicial independence, send relevant reports to international organisations.
v To approve normative case-loads (rate per judge) in courts at all levels.
vi To hear reports on the work of members of the High Qualifications Commission of Judges of Ukraine and the Disciplinary Commission of Judges of Ukraine.
vii To submit proposals regarding resolution of court operation issues to bodies of state power and bodies of local self-government
viii To suspend decisions of regional councils of judges that do not comply with the Constitution and laws of Ukraine or that run counter to the decisions of the Congress of Judges of Ukraine.
ix To suspend the powers of a judge (Article 146.1)

96. Again, these are very powerful functions and given that the Council is a permanent body whereas the Congress meets only every three years one would anticipate that the real power is likely to rest with the Council (or indeed with the *praesidium* of the Council) rather than with the Congress itself.

97. The organisation of judicial self-government as laid down in this draft law is highly complex, sometimes even confusing. In respect of some of the functions in question there

will now be three bodies, the meetings, the conferences and the Council of Judges of Ukraine, which are conferred with similar or even identical functions all of which are binding[24]. While there are provisions for decisions being overridden by a higher body, the Council of Judges of Ukraine, the scope for internal judicial politics and manoeuvring appears tremendous.

98. Furthermore, while *prima facie* the whole system appears to be extremely democratic, the existence of a number of bodies all exercising similar if not identical functions dilutes the authority of any one of them. In these circumstances, one would have to take great care to ensure that what appears to be an extremely democratic system does not in practice create very weak institutions which are capable of being overridden by much stronger institutions within the state.

99. Therefore one can argue whether it wouldn't be much more reasonable to revise the whole system of self-government and consider establishing an independent High Council of Justice with a majority or at least a substantial quota of judges (see e.g. the Hungarian High Council of Justice where there is a majority of judges). The best protection for judicial independence, both "internal" and "external", might be assured by a High Council of Justice, as it is recognised by the main international documents on the subject of judicial independence. Such a High Council of Justice could also be in charge of judicial training.

6.7. The State Judicial Administration of Ukraine

100. Judicial self-government is not viable without self-administration. Therefore another body mentioned in the draft law has to be taken into consideration: The State Judicial Administration of Ukraine. The competences of the State Judicial Administration of Ukraine are far reaching (Article 177). It is an executive body with a special status which provides organisational support for the operation of courts of general jurisdiction (except the Supreme Court and the high specialised courts). The officials of the State Judicial Administrations are public servants (Article 177.3). The regulations on the State Judicial Administration shall be approved by the Cabinet of Ministers of Ukraine. The Head of the State Judicial Administration is appointed and dismissed by the Cabinet of Ministers of Ukraine on proposals submitted by the Prime Minister in coordination with the Council of Judges of Ukraine.

101. As compared to the previous text, the provisions on the State Judicial Administration are mostly unchanged. The head of the State Judicial Administration is no longer responsible for appointing and dismissing the heads of staff of courts. This results in the strengthening of judicial independence and is to be welcomed. The State Judicial Administration is no longer responsible for ensuring the independence and immunity of judges. However, there is considerable overlap in a number of the powers with those reserved to the judicial self-government.

102. The State Judicial Administration shall "study the practical aspects of operation of courts, develop and submit, in the manner prescribed by the law, proposals on ways to improve that practice" (Article 178.2); "ensure necessary conditions for raising the professional level of judges and court staff" (Article 178.5); "organise the keeping of court statistics, case management, and archiving; supervise the state of case management in courts o general jurisdiction" (Article 178.7); perform the functions of the main distributor of funds of the State budget of Ukraine.."(Article 178.9); "assist the Council for Judges of

[24] cf. Article 149.5.1 [Meetings of Judges] with Article 152.2.1 [Conference of Judges] and Article 159.6.3 [Council of Judges], all dealing with "operation of courts"

Ukraine in determining caseload norms for judges in courts of all levels and in working out proposals on the number of judges in respective courts…" (Article 178.20) etc.

103. The competences of the State Judicial Administration of Ukraine, mentioned above, are far reaching. It is obvious that they might infringe or even violate the principles of judicial independence in a way which fundamentally contradicts international standards. The discussions at the Round Table showed that one of the main reasons to create such a special body originally seems to have been to replace an executive body by a judicial one; but this idea has not been followed in the latest draft. The new body is an executive body and could develop into a new Ministry of Justice**.** A clear distinction must be made between the roles of the Ministry of Justice and the State Judicial Administration. It should be part of the judicial branch as a fundamental element of judicial self-government and therefore of judicial independence. Consequently, the State Judicial Administration should come under the control of an independent body of judicial self-administration.

104. It is also hard to understand why on the one hand the Higher Courts of Ukraine have their own Judicial administration (to support the operation of the courts), which is reasonable from the point of view of judicial independence, but on the other hand the courts of general jurisdiction (district courts and courts of appeal) are "operated" by an executive led body (State Judicial Administration, Article 177.1). The officials of this body are public servants (Article 177.3), i.e. dependent on the executive. This organisation contradicts the principle of the separation of powers and judicial independence (as laid down in all the relevant European and international legal instruments).

6.8. Conclusions on judicial self-administration

105. There are substantial doubts about the effectiveness of a procedure which establishes judicial self-government bodies on so many levels. The scope for “judicial politics” seems rather big. While important functions are conferred on the bodies of judicial self-government the dispersal of these powers through many bodies seems to lead to a potentially confusing situation where different bodies would exercise the same powers. In this regard the effectiveness of any of the bodies may be called into question.

106. The existence of these bodies would seem to have considerable potential to undermine the effective administration of the courts by the presidents and deputy presidents of the different courts and by the permanent staff in the State Judicial Administration of Ukraine. In effect these officials have to report and are answerable to quite a variety of persons. This may, on the one hand, mean that they are not all that answerable at all. On the other hand important functions such as the allocation of cases and case-loads are conferred to democratically elected bodies. One can doubt whether such a system can be effective.

107. As the wish to limit the power of the presidents of courts is understandable and a limitation even necessary, considering a certain degree of misuse of presidential powers in the past, one can argue though whether the draft law shows the right way to do it. The complete exclusion of presidents from the bodies of self-government may tend to create a confrontational atmosphere. In this regard, a provision allowing court presidents to attend without voting might be considered. An alternative method of limiting the undue power of presidents would be to appoint them for a limited term of office only and, as to the case adjudication, to adopt an abstract case adjudication system.

108. There are considerable doubts about the efficiency of the proposed system of judicial self-government notwithstanding its aspirations to be highly democratic. It makes no sense to establish overlapping representative bodies of the judiciary. A much simpler and perhaps more effective system might be to create a single body such as a High Council of Justice,

perhaps with sub-committees for specialised functions. It should be provided for that such a body has a pluralistic composition, with a substantial part if not the majority of the members being judges elected by their peers. However, such a solution would require an amendment to the Constitution.

109. Finally, once a court president and deputy president of a court are elected they should be allowed to serve out their terms unless they are guilty of misconduct. To subject them to the control of an elected body which can remove them at any time is not a recipe for allowing them to make difficult decisions where these are necessary.

7. Judicial training

110. The subject of judicial training is closely related to the status of judges and judicial independence. Article 10 of the UN-Basic Principles on the independence of the Judiciary (1985) stipulates: ”Persons selected for judicial offices shall be individuals of integrity and ability with appropriate training or qualifications in law.” The European Charter on the Statute for Judges states: ”The statute ensures by means of appropriate training at the expense of the state, the preparation of the chosen candidates for the effective exercise of judicial duties” (Article 2.3). Furthermore it stipulates that “an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary ensure the appropriateness of training programmes and of the organisation which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties” (Article 1.3). Finally, Opinion No. 4 of the Consultative Council of European Judges holds that “the judiciary should play a major role in or itself be responsible for organising and supervising training” (para. 16).

111. The draft does not say anything about the institution of judicial education that will carry out continuous training of initially appointed judges as well as of those elected for lifetime. Article 57.3 simply states: ”A judge first appointed to a judicial position shall be required to take two-week training annually. A judge holding a lifetime judicial position shall be required to take two-week training not less than once every three years.”

112. The draft does not say anything either about the term of training for judicial work in a specialised higher law school of fourth level of accreditation (Article 72.1).

113. According to Article 75.1 of the draft the testing of a candidate “for a judicial position shall consist in the applicant’s taking of a qualification examination and being interviewed.” The draft does not determine the way in which a qualification examination shall be carried out.

114. The draft does not say anything about funding of the training, nor does it say anything about the training institutions and their link to the judiciary.

115. In relation to training, Article 56 (3) obliges a judge to take appropriate training rather than simply giving the judge a right to training. This appears appropriate though one can ask oneself whether training of judges should not be made compulsory.

116. A further change is that the State Judicial Administration is no longer responsible for the training of judges. The new text does not contain an equivalent of Article 91 of the Law on the Judiciary in the earlier draft which dealt with the National School of Judges of Ukraine. From earlier references in the texts it appears there is a body known as the Council of Higher Law Schools and Scientific Institutions of Ukraine who appoint a member to the qualifications commissions of judges. As well as to the Disciplinary Commission. However,

the question of judicial education and training does not appear to be dealt with in the new text.

117. The State Judicial Administration and judicial training must be part of the judicial branch. It should be controlled and supervised by an independent body of judicial self-administration, such as a High Council of Justice, composed as set out above.

118. To meet European standards the provisions of the draft concerning the training of judges, the training institutes etc. should be revised.

8. Conclusions

119. The Commission welcomes the two separate laws being merged and that some of its earlier recommendations were followed. In particular, the system of automatic case assignment is a welcome progress. However, other serious reservations have not been addressed. Having said that, it does seem that most of the changes which have been made are positive and should be regarded as improvements in the text. A number of problems stem directly from the Constitution and it seems that present constitutional provisions are an obstacle for an independent Judiciary in line with European standards. **The Commission recommends to confine judicial reform not to the legislative level but to undertake a profound constitutional reform, aiming to lay down the solid foundation for a modern and efficient judiciary in full compliance with European standards.**

120. The present opinion does not deal with all the provisions of the draft Law "On the Judicial System and the Status of Judges" but concentrates on some major problems, especially from the point of view of the independence of judges and of the judiciary. The system envisaged for the appointment and removal of judges contains very problematic features in that it appears to allow politicisation of the process in a way which is difficult to reconcile with the requirement of separation of powers and the independence of the judiciary. The proposed system of judicial self-government has likewise given rise to very critical comments. In both respects the development of an independent High Judicial Council with a majority or a substantial element of judges elected by their peers into a central body would be a development in the right direction.

121. There are fundamental problems in the system envisaged for the appointment and removal of judges. The proposed role of the *Verkhovna Rada* in removal proceedings (as well as in those concerning the appointment to a permanent post) is not compatible with the independence of the judiciary. As stated in Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) on Standards concerning the independence of the Judiciary and the Irremovability of Judges, the judiciary must be independent of the executive and the legislature, “which involves freedom from inappropriate connection with and influence by these bodies.” (paragraph 11). The role foreseen for *Verkhovna Rada* in both the appointment and removal proceedings precisely creates the impression of inappropriate connections and influence which affects negatively the independence of the judiciary as a whole. It may not be possible to overcome the problems with changes here and there; instead the system as a whole might have to be reconsidered. The Venice Commission identified some positive elements it its opinion on draft constitutional amendments of 2009 (CDL-AD(2009)024).

122. The system of judicial self-government is too complicated. There are too many institutions: meetings of judges on different levels, conferences of judges, the Congress of judges of Ukraine, council of judges of respective courts and Council of Judges of Ukraine which is a different organ than the High Council of Justice The structure should be simplified to be effective. This pyramid structure can become an obstacle for building a real self-

government and the scope for "judicial politics" seems enormous. The dispersal of powers through many bodies seems to lead to a potentially confusing situation where different bodies would exercise the same powers.

123. Consequently, the Commission recommends:

1. The decision on the establishment of courts should not be a competence of the President but be made by law enacted by Parliament. Pending a constitutional amendment in this sense the President could be limited in his or her discretion.
2. The complex court structure should be simplified by way of constitutional amendment.
3. The Constitution should provide only functional immunity for acts performed in the office. On the level of the law, the procedure for the lifting of immunity should be simplified.
4. Judges should be free to join judges associations or unions, although restrictions may be placed on the right to strike.
5. There should be an express prohibition on the reduction of salaries imposed only on judges.
6. Even within the present constitutional framework, the discretionary powers of the Head of State should be curbed by limiting him or her to verify whether the necessary procedure for selection and appointment of judges have been followed by the High Qualification Commission and High Council of Justice.
7. Pending amendment of Article 126 of the Constitution, the appointment to a permanent position upon the expiry of the five year probationary period should be formulated in the law as a main rule.
8. In the appointment procedure the High Qualifications Commission should not be allowed to take into account "other documents", which are not specified.
9. The procedure foreseen for the permanent appointment of judges should be amended, by removing the involvement of Parliament through an amendment of Article 128 of the Constitution. In the absence of such amendment, the independence of the High Qualification Commission should be strengthened.
10. The role of the *Verkhovna Rada* in judicial appointments and dismissal should be removed by way of constitutional amendment. In the absence of such a change, its involvement should be made dependent on proposals by independent bodies and the investigation before the *Verkhovna Rada* should be removed.
11. An autonomous body with substantial judicial representation (possibly a reformed High Council of Justice having a pluralistic composition, with a substantial part if not the majority of the members being judges elected by their peers) should play a significant role in presenting and defending the judicial budget before Parliament.[25]

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[25] Compare: International Association of Judges /IAJ): Conclusions General Report. the Role and Function of the High Council of Justice or Analogous Bodies in the Organisation and Management of the National Judicial System (Vienna 2003) **"**Whereas: A majority of the countries who submitted reports have a High Council of Justice or an analogous body; others do not have such body; in many countries that have such bodies a significant proportion of the membership consists of judges elected by their peers or judges appointed by virtue of their office; in a significant number of countries the High Council of Justice or an analogous body plays a major role in the appointment, promotion, discipline or training of judges as well as budgetary matters; the independence of the judiciary is not a privilege of judges but a right of citizens in a democracy based on the Rule of Law; the First Study Commission of the IAJ concludes:

- A High Council of Justice may be a means of strengthening the independence of the judiciary and the judges in carrying out their judicial functions. Therefore it is important that a High Council or analogous body enjoys a strong degree of independence or autonomy from other governmental powers.
- Where a High Council of Justice or analogous body is not structured in such a way that promotes and protects the independence of the judiciary there is always a danger that it may undermine that independence.

12. The system of judicial self-administration is much too complex and should be simplified. As the competences of the respective bodies are sometimes overlapping they should be revised and clearly fixed.
13. Instead of different bodies of self-government, a single body, such as a High Council of Justice established as referred to above (with sub-commissions for specialised functions, if necessary) should be established.
14. The High Council of Justice should have a pluralistic composition, with a substantial part if not the majority of the members being judges elected by their peers (constitutional amendment required).
15. The State Judicial Administration and judicial training must be part of the judicial branch. For this purpose, professional training of judges, as was proposed in Article 91 of the earlier draft Law on the Judiciary, which dealt with the National School of Judges of Ukraine (or the equivalent of it) should be provided. It should be controlled and supervised by an independent body of judicial self-administration, such as a High Council of Justice.
16. Court presidents should not be completely excluded from bodies of self-government. Elected Court (vice-) presidents should serve out their terms (unless found guilty of misconduct).

124. In addition to problems of substance, the law should be somewhat more concise. Although the degree of detail of the drafting largely depends on national traditions and falls within the national discretion, there seems to be some overregulation.

125. All in all, although the draft Law contains many positive features and is an improvement as compared with the previous two drafts, substantial redrafting is needed. Following the discussions in the framework of a Round Table held in Kiev (5 February 2010), the existing draft can serve as a basis for the final text. The development of the text needs some time and effort, but a few months further delay probably would be tolerable considering that the new law is likely to serve as an important yardstick for the evaluation of the state of the rule of law in Ukraine for many years to come and in many arenas.

126. The Venice Commission and the Human Rights Capacity Building Department remain at the disposal of the Ukrainian authorities for any further assistance.

- It is essential that a High Council of Justice or analogous body has a majority of judges among its members. Such judges should be elected by their peers or be members by virtue of their specific judicial office but not be selected by the government or parliament.
- In any case, such a body should be a means by which a buffer is placed between the judiciary and the other powers of government so that it can protect the judiciary from undue influence from those powers rather than be an instrument of it.
- A High Council of Justice or an analogous body of the judiciary should play a major role in the appointment, promotion, discipline or training of judges.
- The independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources. (Vienna, November 12th, 2003, 1st Study Commission: Stephan Gass, John L. Murray, Gerhard Reissner)