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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

JOINT OPINION

ON THE DRAFT LAW AMENDING THE LAW ON THE JUDICIARY AND THE STATUS OF JUDGES AND OTHER LEGISLATIVE ACTS

OF UKRAINE

by
the Venice Commission
and
the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe

Adopted by the Venice Commission
at its 88th Plenary Session
(Venice, 14-15 October 2011)

on the basis of comments by
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1. Introduction

1. By letter dated 1 July 2011, Mr Holovaty, Chairman of the National Commission for Strengthening Democracy and the Rule of Law in Ukraine (consultative body to the President of Ukraine), requested the Venice Commission for an opinion on the draft Law amending the Law on the Judiciary and the Status of Judges (CDL-REF(2011)043). This draft Law is a revised version of the Law on the Judiciary and the Status of Judges of Ukraine (CDL(2010)64), adopted on 7 July 2010 by the *Verkhovna Rada* and signed by President Yanukovych on 27 July 2010.

2. In addition the Commission has also been asked for an opinion in connection to a number of amendments which are made to various legal acts of Ukraine, including the Criminal procedure Code, the Code on Administrative Offences, the Commercial Procedural Code, the Civil Procedural Code and the Administrative Code.

3. The Law was already subject of a joint opinion of the Venice Commission and the Joint Project between the European Union and the Council of Europe entitled "Transparency and Efficiency of the Judicial System of Ukraine" (TEJSU Project), adopted at the 84th Plenary Session of the Venice Commission on 15-16 October 2010 (CDL-AD(026), and a joint opinion on a previous draft was adopted at the 82nd Plenary session on 12-13 March 2010 (CDL-AD(2010)003).

4. The Venice Commission invited Mr Hamilton and Mrs Suchocka to act as rapporteurs for both opinions. In the framework of the TEJSU Project[1], the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe invited Messrs Gass and Lemmens to act as their experts for the present joint opinion (DGHL(2011)14).

5. The present joint opinion was adopted by the Venice Commission at its 88th plenary session (Venice, 14-15 October 2011).

2. General remarks

6. The new draft Law submitted for opinion represents an improvement over previous proposals in this area and addresses many of the recommendations previously made by the Venice Commission. The recommendations which have not been addressed in the new text principally relate to provisions which appear in the Constitution and which therefore cannot be changed without an amendment to the Constitution. These include the role of the *Verkhovna Rada* (parliament) in the appointment and dismissal of judges which the Commission criticized as politicizing the judges, the judges' immunity from prosecution which the Commission has previously criticized and the role of the President in appointing and dismissing judges. The new draft appears to have at least partially reversed the earlier decision to effectively deprive the Supreme Court of much of its jurisdiction and would appear to restore it to its position as the highest judicial body in the system of courts.

7. The earlier Venice Commission joint opinions commented on the technique of legislation in Ukraine which it described as voluminous legislation containing elements which were perhaps not necessary or could be delegated to subordinate legislation as a result of which some of the rules were difficult to find and know, and also referred to the extent to which there was duplication where the same rule was to be found in more than one part of the text. The new text still suffers to some extent from these problems although not as markedly as before. In some

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cases, however, the opposite problem now exists in so far as quite important matters are referred to in the draft although to find them one has to read the procedural legislation. As a result, some of the provisions are difficult if not impossible to follow unless both texts are consulted at the same time. For example, Article 33.2 which deals with the powers of a high specialised court says that "in the events prescribed by the procedural law [the Court may] hear cases as a court of first or appellate instance", but without reference to the relevant procedural law the text in fact tells us nothing about the powers of the High Specialised Court in such cases.

8. Another issue which has not been addressed is the number of levels of court in Ukraine. This was previously commented on by the Commission. It is, of course, appreciated that this could not be changed without constitutional amendment, and the practical difficulties of reducing the number of levels of a court in a system which is up and running are appreciated.

9. A noted improvement in the new draft relates to the provisions concerning discipline and dismissal which are now much more clearly set out and provide clearly for the rights of a judge who has a complaint made against him or her.

10. Finally, the Venice Commission has also been requested to give an opinion on amendments to various legal acts of Ukraine, including the Criminal Procedure Code of Ukraine, the Code of Ukraine on Administrative Offences, the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, and the Administrative Code of Ukraine. These amendments appear to relate principally to the question of automatic assignment of judges to courts, the basis on which jurisdiction can be transferred from one court to another and the solution of jurisdiction conflicts and the question of recusal of a judge. However, it is not really possible to evaluate these laws without reference to the original codes themselves so as to see the context of the provisions. The precise scope of the request is not clear cut, as it may be that it is only the amendments to the Criminal Procedural Code which are in issue. In so far as it is possible to understand them, the substance of the amendments themselves appear reasonable and logical; however, the Venice Commission will not provide a detailed comment on every provision. Indeed, the Directorate of Justice and Human Dignity is currently examining in detail the amendments of the Criminal Procedural Code by way of a legal opinion in the framework of the TEJSU Project.

11. There is however one issue with important implications: whether the Supreme Court has to consider the issue of the appropriate jurisdiction to deal with a matter (for example the amendment to Article 400-28 of the Criminal Procedural Code). It is provided that the court shall consider the issue of the appropriate jurisdiction at its meeting without summoning and notifying the persons participating in the case. It is not clear why the parties to a case should not be heard in relation to any jurisdictional issues. However, as stated, the Commission will not undertake this detailed work as these issues will be studied by another body of the Council of Europe.

3. Fundamentals of Organisation of Judicial Power (Section I, Articles 1 to 17)

12. These provisions are largely unchanged from the earlier text and were previously described by the Venice Commission as being for the most part admirable. Generally this provides a clear text setting out fundamental rules which strongly emphasise the independence of the judges and courts.

13. However, Article 2, in its new version, does not refer explicitly to the rights guaranteed in the Constitution or in the international treaties binding in Ukraine. The more general formula "fundamental rights and basic freedoms" should be completed with a reference to the respect of the national fundamental law and the international law.

14. A new provision which is welcome is Article 6.2, which provides that petitions filed with a court in connection with consideration of specific cases by citizens, organizations or officials who in legal terms are not participants in the court proceedings are not to be considered by the

court, with the exception of petitions to allow participation in the proceedings. This follows previous recommendations made by the Venice Commission.

15. Article 8.2 provides another example of the tendency referred to above where key provisions are not in fact contained in the text but must be looked for elsewhere. The Article provides that judges are to hear cases according to the case assignment procedure. It then goes on to say that the case assignment procedure is established by law. In fact, the law concerned appears in the new amendments to the Criminal Procedural Code and the other codes which provide for an automated case assignment system according to the principle of randomness.

16. Article 14 provides that in the cases and following the procedure prescribed by the procedural law, participants in court proceedings and other persons have the right to challenge court decisions in a court of appeal or a court of cassation as well as having the case reviewed by the Supreme Court. In effect, however, this provision is meaningless because without reference to the relevant procedural laws it states nothing. In fact, it would be possible to have a procedural law which provided for no appeals or cassation whatsoever without infringing this provision. **It should be possible to draft a more meaningful provision without necessarily going into all the detail or even leave it out from the present law.**

17. Article 15.1 provides that cases are to be considered by a single judge or, - in cases prescribed by the procedural law – by a panel of judges, as well as with the participation of people's assessors and a jury. However, no attempt is made to identify the principles which should underlie when assessors or a jury should be used or in what circumstances more than one judge is to be considered appropriate. **Again, some statement of principle would be helpful in this respect**.

18. Notwithstanding the provisions of Article 8.2 already referred to, Article 16 goes on to state that an automated case management system is to operate in general jurisdiction courts based on the principle of randomness and taking into account specialization. It would be preferable to merge Articles 8.2 and Articles 16 so that the rule would be found in a single place rather than having two different provisions dealing with the same matter in different ways.

4. Courts of General Jurisdiction (Section II, Articles 18 to 46)

19. Section II deals with courts of general jurisdiction and is divided into chapters dealing with the institutional framework of the system of courts, the local courts, the courts of appeal, the high specialised courts and the Supreme Court of Ukraine.

4.1. Level of courts

20. There has been no change in the number of levels of courts which, as mentioned above, was criticised in previous Venice Commission joint opinions. The Constitution should be amended to change this.

4.2. Creation and abolition of courts

21. Article 19.1 refers to the specialised courts, but there seems to be some error in the translation as administrative cases are mentioned both as a specialisation in themselves, as something combined with criminal courts and separately as administrative offence cases. Apart from this error, the draft is rather confusing and it would have been easier to divide the courts of general jurisdiction in the four orders, civil, commercial, criminal and administrative.

22. Article 20.1 deals with the creation of courts of general jurisdiction, including by reorganisation. The power of creating courts remains with the President but it is now proposed that he or she will act upon the recommendation of the State Judicial Administration based on a proposal from the Council of Judges of Ukraine. The previous draft which was criticised by the Commission provided for the President to act on a recommendation of the Minister for Justice

based on a proposal from the Chief Judge of the court in question. The new text represents some improvement, **although it is still recommended that the President's role should be the formal one of making the order once the appropriate proposal and recommendation had been made**.

23. Article 20.3 states that the grounds for creation or abolition of a court shall be a change of the system of courts established by the law. In the English text this provision is completely circular and meaningless but it may be a translation difficulty. The remainder of the provision, which refers to the need to improve access to justice or changes in the administrative and territorial divisions, seems to make more sense.

24. The number of judges in general jurisdiction courts is now determined by the State Judicial administration, instead of the Minister of Justice, on the basis of the proposal from the Council of Judges (Article 20.4). The role of the Minister of Justice is strongly diminished and this is to be welcomed. The question arises whether this is an issue for an administrative body like the State Judicial Administration, rather than for the *Verkhovna Rada*, as suggested by the Commission in its joint opinion of October 2010 (see CDL-AD(2010)026, para. 16).

4.3. Appointment of judges to administrative positions

25. There are some changes in Article 21, in which it is proposed that the chief judges of the local courts are to be appointed for a three year term, instead of the five-year term established by the current Law. The right to appoint and remove a chief judge from office belongs to the Council of Judges of Ukraine, based on the decision of the meeting of judges of the respective courts. This is an improvement compared to the existing law, which makes the High Council of Justice competent to dismiss chief judges, upon a motion of the council of judges of the relevant court (see Article 32-1 of the Law on the High Council of Justice, to be repealed by the draft law). However, as it was criticised in previous joint opinions of the Venice Commission, the draft Law still does not list the conditions for removal of the chief justice (see CDL-AD(2010)026, para. 19).

4.4. Local courts

26. Article 23(2) provides another example of a provision which cannot be understood without reference to the procedural law (dealing with the authority of local general courts). There appears to be a contradiction between it and paragraph 4 of the same Article in that administrative cases are to be heard in local general courts as well as in local administrative courts.

4.5. On the high specialised courts

27. Article 32.4 refers to plenary sessions of the high specialised court to "address issues listed by this law". This should be clarified.

28. Article 33.1.2 dealing with the powers of the high specialized courts has a provision that these courts can hear cases as a court of first or appellate instance "in the events prescribed by the procedural law" but again no attempt is made to state any general principle and it seems the procedural law could be as inclusive or restrictive as was desired. It should either be deleted or amended.

29. One of the competences of the high specialised courts is to generalise case-law in order to ensure uniform application of the legal principles and norms while adjudicating cases of the respective jurisdiction (Article 33.5). This competence should be read in relation to the role of the Supreme Court, which should be the ultimate guarantor of the uniformity of the jurisprudence of all courts.

30. Article 37.1 deals with the plenary session of high specialised courts. It refers to addressing issues related to ensuring uniform court practice in dealing with cases within the respective

specialised jurisdiction and other matters referred to its authority by this law. There is a similar provision in relation to the plenary session of the Supreme Court in Article 45.2.3 whereby the plenary session of the Supreme Court is to generalise case law in order to ensure equal application of legal principles and norms while resolving cases. It is not clear what procedures are in place to permit the court to hear argument in such cases. Clearly the decisions made in establishing uniform court practices in how to deal with certain cases may have important consequences for litigants and it may be that there should be some procedure, perhaps involving the use of an *amicus curiae* or an advocate general which would have a function of identifying issues and options to be put before the plenary session with a view to assisting the decision.

31. Article 37.2.3 says that the plenary session of a high specialised court shall decide on applying to the Supreme Court of Ukraine regarding submission of a constitutional petition requesting assessment of compliance with the Constitution of certain matters including laws and other regulations of the *Verkhovna Rada*, acts or regulations issued by the President, or regulations of the cabinet of ministers. Article 39.1.2 provides that the Supreme Court shall review cases concerning the application by court of the law or separate provisions thereof contrary to the Constitution of Ukraine. Article 39.1.8 provides that the Supreme Court shall apply to the Constitutional Court of Ukraine on the constitutionality of laws or other legal acts, as well as for the official interpretation of the Constitution and laws of Ukraine. The combination of these provisions is confusing. Moreover, Article 3.2 provides that the Constitutional Court of Ukraine is to be the sole body of constitutional jurisdiction in Ukraine. There seems to be a contradiction between the provisions in Article 3.2 and Articles 37.2.3 and 39.1.2 which envisage certain constitutional issues being referred by the high specialised courts for a decision to the Supreme Court. It is not clear from the text of the draft where exactly the boundary lies between these functions conferred on the Supreme Court and the powers of the Constitutional Court. This boundary of course derives from the Constitution and not the present draft law.

4.6. On the Supreme Court

32. One of the main criticisms directed against the current Law in the previous Venice Commission joint opinions was the drastic reduction of the competences of the Supreme Court. This aspect has changed in the new draft, and the Supreme Court has recovered some of its previous competences. Indeed, according to the draft, the Supreme Court will have the power to review cases in the event of unequal application by courts of the same rule of law in similar legal relations, currently limited to rules of substantive law, and thus also concerning rules of procedural law; a new power is granted, which is the power to review cases allegedly applying the law against the Constitution. The Supreme Court also receives the power to settle jurisdiction disputes between the various orders of jurisdiction. Finally, the Supreme Court has in the draft the competence to ensure an equal application of legal norms and principles (Article 39.1, paras. 1, 2, 4 and 10).

33. However, as long as the Supreme Court does not regain its general competence as a cassation court, it still has not fully recovered its role. The relationship between the Supreme Court and the high specialised courts still raises some concern, mainly regarding Articles 33.5 and 39.10. The difference between the role of the high specialised courts "to ensure uniform application" and the competence of the Supreme Court "to ensure equal application" should be clarified. The opinion of the Venice Commission is still valid in this respect (CDL-AD(2010)003, paras. 20 and ff)

34. Articles 39 and 41 provide a number of further examples of provisions which are meaningless in the absence of the reference to the procedural law. The same comment applies relating to some attempt to define principles as to the jurisdiction of the Supreme Court, leaving the detail to be worked out by the procedural law.

35. The number of judges of the Supreme Court is increased from 20 to 40, with ten judges representing each specialised jurisdiction (administrative, civil, commercial and criminal). This increase reflects the changes in the Supreme Court's competences and is therefore welcome.

36. Article 40.2 provides that the Supreme Court shall sit in plenary session to address issues specified by the Constitution of the draft law itself; Article 40.3 provides when the Supreme Court will sit in panels of judges coming from a specific order of jurisdiction. This provision gives the impression that the Supreme Court may sit in "mixed" panels to decide on all the other issues, although the amendments to the procedural codes seem to establish that the Supreme Court can decide issues only when two thirds of its members are present. This needs to be clarified and made coherent. In former joint opinions the Commission referred to the problems and the little usefulness of having the Supreme Court generally to decide cases in plenary session (CDL-AD(2010)026, para. 26).

5. Status of professional judges, people's assessors and jurors (Section III, Articles 47 to 61)

37. Article 47.5 states that a judge shall not be obliged to provide any explanations regarding the merits of cases under his or her consideration. When giving a reasoned decision, a judge does provide explanations regarding the merits of cases. Therefore, something needs to be added to this provision such as the words "except when giving the judgment of the court".

38. In general, it should be noted that a coherent reasoning is the essence of the work of any judge. The work of the judge is not only to decide between alternatives or to arbitrate but to come to such a conclusion through stringent reasoning. It is not enough to cite legislative provisions and then to come to a decision. The judge must coherently link the law with the facts of a case and provide clear arguments why a case has been decided in a given case. Not doing so is clearly a violation of the right to a fair trial under Article 6 of the European Convention on Human Rights.

39. Article 48 deals with judicial immunity. Again, these very strong provisions regarding judicial immunity have been previously criticised by the Venice Commission. However, they derive from the Constitution, which should be changed in this respect.

40. Article 53 deals with incompatibility requirements and prohibits judges from engaging in other work except for teaching, scholarly or creative activities out of court hours. This provision is very tightly drawn. For example, there is no exception made for participation in international intergovernmental bodies, or domestic commissions of inquiry or, for example, working groups which might be established to make recommendations. Whether a Ukrainian judge could be a member of the Venice Commission remains, for example, uncertain. **It should be explicitly mentioned that judges have the right to be members of national or international associations of judges, entrusted with the defence of the judiciary in the society.**

41. The language of the judicial oath mentioned in Article 55 is overly broad and could lead to indiscriminate sanctions of judges or removal from office by those who oppose the decisions of judges, although Article 116.1 limits that risk (with respect to removal from office) to a certain extent. The standards to which judges must hold themselves in the oath are vague. They should be narrowed and tied to well-defined principles, the Constitution and the laws of Ukraine.

42. Articles 57-62 deal with people's assessors and juries. There is no attempt to state in what circumstances courts are to sit with assessors or juries and again it would have been appropriate to try and state some general principles. The whole matter is left to the procedural law. It does not seem clear from the text how people's assessors are to be selected. How does one become an assessor? Does one have to apply for the position? Has one to be interviewed or are assessors selected at random? How many people are to be assessors? What qualifications are required? It would seem that because assessors sit with professional judges effectively as judges, they are in a somewhat more powerful position than jurors and it seems

as if they are intended to be more an elite group than jurors who presumably are to be selected at random from the entire population. However, none of this is made clear. It is true that in Article 58.4 there is a list of matters which disqualify a person from being an assessor or juror, but it is not clear whether any person who is not so disqualified is to be on the list. Furthermore, it is not entirely clear what the role of an assessor is when he or she sits as a member of a court panel together with a judge, whether the role of assessor is to be confined to the adjudication of fact, or whether he or she also has a role in determining the law notwithstanding that the assessor is presumably not a lawyer.

43. In Article 59 it is stated that a court is not to engage people's assessors and jurors in a particular case more than once a year. Presumably what is meant here is that no particular juror or assessor is to be summoned more than once a year and this may be a translation difficulty in the English text.

44. Article 62 envisages that people's assessors and jurors are to be paid compensation for the period of their service. This is in principle a very welcome provision but in practice may well create an inhibition to the use of jurors on a wide scale. It is certainly likely to be expensive if juries are commonly used.

6. Procedure for Assuming the Office of a Professional Judge of a Court of General Jurisdiction (Section IV, Articles 62 to 79)

45. These articles deal with the legal requirements for judicial candidates, the procedure for appointing to judicial positions, the role of the Qualifications Commission of Judges in appointments, and the procedure for lifetime election to a permanent judicial position. These provisions represent a substantial improvement from previous texts and set out very clearly the criteria for appointment and, apart from the continued involvement of the *Verkhovna Rada* and the President in appointments, provide for a much more transparent and clear procedure than the current law.

46. Under the scheme set out in Article 62.1 concerning requirements for judicial candidates, the newly-appointed judge has to be 25 years of age with higher legal education and at least three years' service in the legal profession, as well as ten years' residence in Ukraine and command of the state language. All of these seem to be reasonable requirements. It would seem that this provision in Article 62.1 merely relates to the initial appointment to a local court, mainly in the light of the decision of the Constitutional Court of 5 April 2011 on the constitutionality of several provisions of Law No. 2453-VI (No. 3-rp/2011). Article 62.2-4 then provides that a judge of the court of appeals has to have five years' service as a judge in a local court, a judge of a high specialised court has to have at least five years' service as a judge of a Court of appeals, and finally a judge of the Supreme Court must have served five years in a high specialized court. The system therefore requires an orderly progression through all four levels of court before one can become a judge of the Supreme Court, service of at least 15 years as a judge being the minimum, and this would only apply to somebody who had always been promoted as soon as they had served five years at any particular level of court. This may be a slightly over-rigid system and that some greater flexibility might be considered.

47. Article 67 deals with checks into the integrity of candidates (see also Article 64.1, points 6 and 7). Organisations and citizens may provide information about a candidate's integrity to the Qualifications Commission of Judges, but it is now expressly provided that the candidate for a judicial position is entitled to study such information, provide explanations and contest or deny the information. This represents an improvement of the earlier texts, as the Venice Commission had already stated that "*Submitting a candidate's performance as a judge to scrutiny by the general public, i.e. including by those who have been the object of unfavourable rulings, constitutes a threat to the candidate's independence as a judge and a real risk of politicisation.*" (CDL-AD(2010)026, para.60). "*This highly questionable feature is not compensated by the fact that the candidate will have the right to have access to the information received by the High Qualifications Commission and to comment on it although this right in itself is a good thing*. (CDL-AD(2010)026, para. 61)."

48. The Qualifications Commission of Judges is required to conduct a competition and select candidates taking into account their rating. Where candidates have equal rating the candidate with the longer record of service is to have the advantage. The Qualifications Commission then sends to the High Council of Justice recommendations for appointment. Under the existing law the High Council of Justice would have had power to ignore the recommendations. Under the new draft their power is confined to ensuring that the procedures followed by the Qualifications Commission have been in order and when they verify the procedure they submit a motion to the President of Ukraine for appointment of the candidate to a judicial position (Article 70.6). **It would be preferable if it were made clear that the President's role is simply a formal one of making the appointment which is requested as it is not clear whether he has some discretion in relation to the matter.**

49. The initial appointment of a judge is for a period of five years. **The Venice Commission has previously expressed the opinion that this is too long a period for a person to be a temporary judge.** The draft has not addressed the issue. The main substantive problem, so criticized by the Venice Commission, remains: there are two categories of judges, those appointed on a temporary basis and those elected for life time. In the joint opinion of October 2010, the Commission recommended that "*the existence of a five-year probationary period established in Article 126 of the Constitution should be eliminated or at least reduced, for example, to no more than two years. The Constitution should therefore be amended in this regard"* (CDL-AD(2010)026, para. 44). During the first temporary appointment, judges have less room for independence from the political power, both executive and legislative. It should be ensured that judges in these temporary positions cannot be appointed to deal with major cases with strong political implications.

50. Where a judge wishes to be appointed to a lifetime position he or she must apply for this at least three months before the expiry of his or her tenure of office. The Qualifications Commission of Judges then makes a recommendation whether to appoint the judge permanently. An important new provision is contained in Article 76 under which it is made clear that the candidate's failure to comply with Articles 53-55 and 62 is to be the only basis to refuse the recommendation of a candidate for election to a lifetime position. This is a very welcome provision.

51. The possibility to appeal to the High Judicial Council against the decision of the Qualifications Commission of Judges is abolished. However, a candidate who is not recommended can appeal to the High Administrative Court (according to draft Article 171-1 of the Code of Administrative Procedure), which should assure a real judicial review.

52. Unfortunately, the decision on appointing someone to a lifetime position is then sent to the *Verkhovna Rada* for a decision (Article 78). This has previously been criticised by the Venice Commission's opinions although of course it has a constitutional basis. The problem is that the *Verkhovna Rada* seems to have power to decline to appoint somebody and this does not have to be by a reasoned or justified decision.

53. The new Article 79, which concerns the transfer of a judge elected for a lifetime position to another court is welcome, as the *Verkhovna Rada* is no longer involved in the process and any promotion is granted by the Qualifications Commission of Judges on the basis of the ranking in a qualification exam.

7. Guarantee of Proper Qualification Level of a Judge (Section V, Articles 80 to 91)

54. Under Article 82 there are changes to the composition of the Qualifications Commission of Judges. There is no longer to be an appointee from the Minister for Justice and under the new provision seven of the 11 members are judges appointed by the Congress of Judges as against six at present. **The removal of the Minister for Justice's nominee from this important body is a welcome development.** Article 83 provides for the election of the seven judges to the

Qualifications Commission of Judges by the Congress of Judges. Unfortunately, the provision states that the judges should be appointed in an open or secret ballot. It would be preferable if this provision specified that there should be a secret ballot. There is no nomination procedure laid down and it is not clear how many persons are required to nominate somebody for election to the Qualifications Commission of Judges. Similarly, in Article 85, the Qualifications Commission of Judges is to elect the Head of the Commission, the Deputy Head and the Secretary "in an open or secret ballot". Again it would be preferable to specify that the ballot should be secret.

8. Disciplinary liability of a judge (Section VI, Articles 92 to 110)

55. **This chapter has been almost entirely rewritten and now provides good guarantees for the fairness of disciplinary proceedings against judges.** The grounds for disciplinary action against a judge (Article 92) now contain two new provisions, the use of judicial status in order to receive illegal material gain, and expenditure by the judge or his family which exceeds their income. These are valuable improvements in the provisions. Article 94 provides for two different procedures for opening the proceedings. Firstly, any person who is aware of a violation by a judge of requirements regarding his status or official responsibilities or a violation of the judicial oath of office has the right to file a complaint. In addition, a member of the disciplinary body may initiate disciplinary action based on information disclosed in the media. The text is a little unclear because these two procedures are treated in the text as if they were one notwithstanding that there are some differences.

56. The procedures for the acceptance of the complaint and its verification are set out in Article 95 and are much more detailed than under the existing law. There are very clear provisions requiring the applicant to be notified of the decision to return the complaint without further consideration or to transfer the complaint to the High Council of Justice. This person has extensive powers of inquiry. After the inspector reports then a panel of three members of the disciplinary body decides whether to open the case or to dismiss it (Article 96). If the case is opened there is a hearing to which both the complainant and the judge are invited and which their representatives, witnesses and other interested parties can also attend if necessary (Article 97).

57. Article 99 establishes a list of five possible sanctions. This scale makes it possible to respect the principle of proportionality. The sanctions for disciplinary breaches include warning, reprimand, strict reprimand, temporary suspension from office and in case there is a decision that the judicial oath has been violated this may lead to the initiating of proceedings to dismiss the judge. There is an appeal from the decision to the High Council of Justice. Article 100 does not make it clear whether the appeal is a full appeal including grounds of substance or procedural only but it is clear from Article 116 that a full appeal is envisaged since the High Council of Justice upon the disciplined judge's complaint may check the facts that became grounds for applying the disciplinary sanction. The recommendation made by the Venice Commission in its previous joint opinion, that the law should clearly spell out the relationship and the differences between the appeals to the High Council of Justice and the High Administrative Court (see CDL-AD(2010)026, para. 77), remains valid.

58. Under the draft a new body called the Disciplinary Commission of Judges is to be established (formerly the High Qualifications Commission exercised the function of disciplinary proceedings in relation to judges of local and the appellate courts). It seems preferable that these two functions should be separated as now proposed. The Disciplinary Commission consists of 11 members, seven appointed by the Conference of Judges, two by the Higher Law Education establishments, one by the Ombudsman of the *Verkhovna Rada,* and one by the *Verkhovna Rada*. The *Verkhovna Rada* may not, however, appoint one of its own members or a member of the Government (Article 104.6). It would be preferable that the list of persons excluded from membership of this committee would also include prosecutors.

59. Article 104.1 wrongly refers to the Congress of Judges electing six members. This should be seven. There are no procedures set out regarding nomination for the position. Article 104.5

is in error in referring to the Chairman of the State Judicial Administration as this person does not appoint a member of the Disciplinary Commission. This is probably an error in copying the corresponding provision relating to the High Qualifications Commission which is similar.

60. The hearings of the Disciplinary Commission of Judges are generally open and public (Article 106.4). This is to be welcomed. There is still a possibility to have closed sessions when there are state secrets protected by law. There may be other valid reasons to hold sessions partially in private, for instance when the private life of a third party would be disclosed during disciplinary proceedings (see Article 6 § 1 of the European Convention on Human Rights). It is recommended to add at least the protection of private life to the grounds for closing the doors.

9. Removal from office of a judge (Section VII, Articles 111 to 124)

61. The removal of a judge must still be carried out by the President or the *Verkhovna Rada*. This is a provision which has previously been criticised by the Commission but it has a constitutional origin (Article 126.5), which should be amended. Unfortunately, as long as it remains the potential for politicisation will be there.

62. A number of the provisions relate to relatively routine matters such as the removal of a judge due to the expiry of his or her term of appointment where he has not applied for a lifetime position, or the removal where a person reaches retirement age, is in poor health, or is dead.

63. A critical provision is Article 116, which deals with the removal of a judge for violation of the oath of office. Not any violation of the oath is a ground for removal from office: Article 116.1 provides that such violation can lead to removal only if the violation is of such a nature that it prevents a person from further occupying the position of a professional judge. This condition is welcome, as it should exclude removals for relatively minor reasons, based on arbitrary interpretations of the wording of the oath (see Article 55). Article 116.3 further provides that the decision to present a motion on the judge's removal from office as well as the decision that the violation of the oath does not prevent the judge from further occupying the position of a professional judge shall be taken by a two-thirds majority. **Presumably what is meant here is that a decision to seek removal requires a two-thirds majority, while it is not necessary that a decision not to seek removal also is taken by a two-thirds majority, as this could otherwise lead to deadlock.**

64. The decision of the High Council of Justice must contain a statement of facts and reasons justifying their opinion on the violation of the oath (Article 116.4). They then present their motion for removal to the President or the *Verkhovna Rada* as the case may be (Article 116.5). Article 116.6 states that the President of Ukraine on the basis of the submission by the High Council of Justice shall issue a decree on the judge's removal with obligatory reference to the respective motion by the High Council of Justice. Article 116.7 states that the *Verkhovna Rada* based on the motion shall pass the resolution on the judge's dismissal with the obligatory reference to the respective motion. It would seem from this drafting that it is intended that the President and the *Verkhovna Rada* will not have discretion in relation to the matter.

65. Article 116.8 deals with the situation where the High Judicial Council does not agree with the Disciplinary Commission of Judges' opinion. In that case it returns the matter to the disciplinary body for it to choose another disciplinary sanction. However, this provision goes on to say that if after that time the Disciplinary Commission of Judges repeat their opinion, the High Council of Justice is required to present a motion on the judge's dismissal. This seems rather peculiar as in effect the body appealed against can then overrule the decision of the appellate body. As such, the provision does not fit well in the system provided by the draft law and should be deleted

66. Article 117 deals with the removal of a judge due to entry into legal force of a judgment of conviction against him or her. Again, this repeats a constitutional provision (Article 128.5, item 6, of the Constitution). It seems somewhat harsh that a judge would appear to be removable for even the most minor infraction (for example, if he or she is guilty of a minor traffic offence).

Indeed, Article 145, which deals with the pensions of retired judges, appears to suggest that a retired judge must lose his or her pension if a conviction against the judge enters into force. Unless under Ukrainian law the term "conviction" refers only to major crimes, this seems unduly harsh.

67. Article 122.5 deals with the situation where the decision on the removal of a judge elected to a lifetime position is not voted for by the majority of the *Verkhovna Rada*. The provision provides that re-voting shall be conducted. Presumably the *Verkhovna Rada* can continue to refuse to vote for the removal indefinitely and the resolution has to be put before them indefinitely, but the provision does not contribute to solve the problem.

10. Judicial Self-Government (Section VIII, Articles 125 to134)

68. In previous joint opinions, the Commission was critical of the over elaborate structure of judicial self-government. The new proposal is simpler than the current Law. There are now to be three institutions of self-government, meetings of judges of the courts, the Congress of Judges of Ukraine, which is to take place every two years, and the Council of Judges of Ukraine which is to exercise certain functions in the interim period between congresses. The Congress has very important functions, including the election of the Constitutional Court, and appointments to the Qualifications Commission of Judges and the Disciplinary Commission of Judges. The Congress of Judges consists of 360 judges elected by their peers from the different levels of court. Of these 200 judges are from the local courts, 120 judges from the Courts of Appeal, 30 judges from the high specialized courts and 10 from the Supreme Court.

69. Generally speaking these provisions seem to be appropriate. Concerning Article 127.5.1 item 1, which refers to meetings of judges of local and appellate courts, these apparently can discuss the performance of specific judges and take decisions on these issues binding for the judges. This does not appear to be an appropriate provision. Judicial independence requires that judges should not be subjected to peer pressure in relation to any specific cases. Article 127.5.2 also provides that the judges' meetings of the Supreme Court and the high specialised courts have the same powers. This should be deleted or at least clarified to make clear that pressure may not be brought on a judge concerning an individual case.

70. In relation to Article 130, which provides for a number of persons to be present at the Congress of Judges (including the President of Ukraine, the speaker of the *Verkhovna Rada*, and the Minister for Justice), it is not clear why politicians should be present at these meetings. The presence of politicians may well lead to political pressure being brought. While it is specified that the invited persons may not participate in the voting, it is not clear why their presence is necessary at all.

71. Draft Article 131 provides for a new system for the election of delegates to the Congress of Judges. The Venice Commission has previously recommended a proportionate representation of the various orders of jurisdiction (CDL-AD(2010)026, para. 96). The same comment could be made here concerning the representation on the basis of the meetings of judges.

11. Support for the Professional Judge (Section IX, Articles 135 to 141)

72. There is only one minor comment in relation to any of this, which is that Article 135.8 appears very strange in that judges can be given additional monthly payments for work involving access to state secrets. This seems a somewhat extraordinary provision. It is unclear how often judges have to have access to state secrets and in what circumstances and if this means that they are being provided with information which is not freely available to the parties. In order to increase their revenue, judges might even be interested to relate cases to state secets. Such bonus payments are inappropriate.

12. Status of a retired Judge (Section X, Articles 142 to 145)

73. The only comment would be in relation to the possibility of a former judge losing his or her pension if he is convicted of an offence (see above).

13. Organisational Support for the Operation of Courts (Section XI, Articles 146 to 159)

74. This section provides for a State Judicial Administration which is required to provide organisational support for the operation of the courts and has substantial powers in relation to budgets. It seems that the provisions for control of this body and reporting by this body to the judges are very weak. The reporting provision is in Article 151 which provides that the State Judicial Administration reports to the Congress of Judges. This body only meets every two years and is incapable of exercising day-to-day control over the State Judicial Administration. The appointment of the head of the State Judicial Administration is to be by the Council of Judges of Ukraine, a body of 37 elected judges who are responsible for various matters in the interim period between congresses. It seems that a much more effective method of ensuring judicial supervision would involve reporting, not to the Council of Judges who are not a body exercising executive functions in relation to the courts but are essentially a representative body for judges, but rather to the chief judges of the different levels of courts (compare Article 153.4, items 5 to 9, and Article 154.3, items 1, 2, 4 and 5). Under the proposals as they stand it seems that the Head of the State Judicial Administration could well be a person subjected to very little effective control by the judiciary.

75. Article 152.1.5 provides that the State Judicial Administration, together with the relevant high specialised courts and the Supreme Court, supervises the state of case management in local and appellate courts. From the point of view of judicial independence, it would not be acceptable if a body of an administrative nature could control the case management of lower courts. It is therefore recommended to change the wording.

76. Concerning Articles 153.4 and 154.3 on the powers of the Head of the State Judicial Administration and the territorial offices of the State Judicial Administration, there is an effort to respond to previous criticism and to avoid the possible interference with judicial independence, through the provision that these powers are exercised on the basis of a submission of the relevant chief judge, in consultation with the chief judge or (exceptionally) with the consent of the chief judge.. However, it would be better if the internal organisation of the courts were entirely in the hands of the courts themselves.

Conclusion

77. The draft text submitted includes a number of important improvements compared with the current law, in particular the strengthening of judicial independence in a number of areas, the restoration of a number of important competences of the Supreme Court, and the organisation of disciplinary proceedings. The transfer of control over the State Judicial Administration to the Judiciary is welcomed, as is judicial control over training for judges.

78. However, there are still fundamental problems in the system envisaged for the appointment and removal of judges, notwithstanding the fact that improvements have been made. In particular the role of the *Verkhovna Rada* is deeply problematical, as well as the existence of temporarily appointed judges and the role of the President in the creation and abolition of courts.

79. The Venice Commission is aware that the most serious criticism of the draft Law stems from the Constitution. Therefore, as pointed out in previous joint opinions, the Constitution should be amended in several respects: 1) in particular on the role of the *Verkhovna Rada* in relation to the appointment and removal of judges, which should be excluded; 2) on the composition of the High Judicial Council, which should provide that a majority or at least a

substantial part of the members are judges elected by their peers and should provide guarantees for a pluralistic composition of the members not belonging to the judiciary and 3) on the judges' immunity, which should be lifted not by the *Verkhovna Rada* but by a truly independent judicial authority.

80. The Venice Commission welcomes and encourages the intention of the Ukrainian authorities to take further steps for the improvement of the legislation on the status of judges and the judiciary and expresses its readiness to assist in this respect. The draft amendments under current consideration is a positive step which should be further pursued.

81. The Directorate of Justice and Human Dignity stands ready to further assist the Ukrainian authorities in improving the legislation on the judiciary and the status of judges.