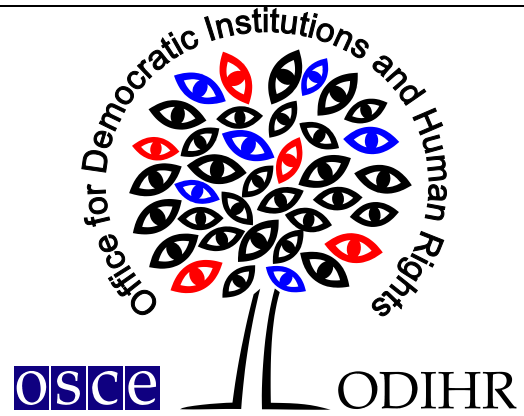


Warsaw, 30 June 2017

Opinion-Nr.: JUD-UKR/298/2017 [RJU/AT]

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OPINION

ON THE LAW OF UKRAINE ON THE JUDICIARY AND THE STATUS OF JUDGES

**based on an unofficial English translation of the Draft Amendments
provided by USAID**

*This Opinion has benefited from contributions made by Prof. Karoly Bard, Chair of the
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Annex: Law of Ukraine on the Judiciary and Status of Judges (provided as a separate document, available at www.legislationline.org)

I. INTRODUCTION

1. *On 5 August 2016, the OSCE Project Co-ordinator in Ukraine received a letter from the High Administrative Court of Ukraine requesting a review of the Law of Ukraine on the Judiciary and Status of Judges of 2 June 2016 (hereinafter, “the Law”). On 23 August 2016, the OSCE Project Co-ordinator in Ukraine forwarded this request to the Director of the OSCE Office for Democratic Institutions and Human Rights (hereinafter, “OSCE/ODIHR”).*
2. *By letter of 2 September 2016, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Law with international human rights standards and OSCE commitments. A background visit by OSCE/ODIHR staff to relevant Ukrainian interlocutors was conducted in February 2017,¹ and the OSCE/ODIHR also consulted this Opinion with the Justice and Legal Cooperation Department, Directorate of Human Rights and Rule of Law of the Council of Europe.*
3. *On 3 May 2017, the Deputy Chairperson of the High Qualifications Commission of Judges of Ukraine sent a letter to the OSCE/ODIHR Director asking for legal expertise on the following questions:*
 1. *Whether the Public Council of Integrity is able to assess court decisions?*
 2. *Whether a candidate is obliged to provide clarifications to the Public Council of Integrity? In what way?*
 3. *Should there be the secured right of a [judge] candidate to be present at the meeting of the Public Council of Integrity during its consideration of available information concerning such a candidate?*
 4. *Can the results of candidates’ tests of moral and psychological qualities and general abilities be public?*
 5. *What role should the public have within the competition procedure? What is proportionate interference of the public in the selection procedures of judges?*
4. *By letter of 24 May 2017, the OSCE/ODIHR Director responded to this request, by referring to the pending Opinion on the Law, and confirming that OSCE/ODIHR will further elaborate on the issues raised by the Deputy Chairperson in the Opinion.*
5. *This Opinion was prepared in response to the above-mentioned requests.*

II. SCOPE OF REVIEW

6. *The scope of this Opinion covers only the Law submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework of Ukrainian judiciary.*
7. *The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements rather than on the positive aspects of the Law. The ensuing recommendations are based on international standards relating to the independence of*

¹ The OSCE/ODIHR team met with representatives of the High Administrative Court, the Supreme Court, the Presidential Administration, USAID, the Reanimation Package of Reforms, the High Qualifications Commission of Judges and the High Council of Justice.

the judiciary, as well as relevant OSCE commitments. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Opinion analyses the potentially different impact of the Law on women and men.²

8. This Opinion is based on an unofficial English translation of the Law, provided by USAID, which is available at www.legislationline.org. Errors from translation may result.
9. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion may not cover all aspects of the Law, and that it does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation of Ukraine in the future.

III. EXECUTIVE SUMMARY

10. The Law is, overall, in line with international standards. Its efforts at increasing transparency in the judiciary as well as its emphasis on streamlining the judicial system and ensuring the unity of jurisprudence in Ukraine are welcome. At the same time, it is recommended to review the possible consequences of the abolition of the current Supreme Court and High Courts, including the removal of judges. In particular, the procedure by which judges may be removed should be fair. Any such removal should only take place in extremely serious cases, always bearing in mind the potential impact of such removals on the independence of the judiciary as a whole. Measures taken to reform the judiciary should also strike a careful balance between accountability and the independence of the judiciary.
11. Overall, judicial reform is a long-term process which, although it has a legislative component, also involves reform in practice, including changes in the culture within the judiciary and the interaction between the judiciary and other branches of government. Generally, the somewhat complicated institutional and functional set-up of the processes within the Ukrainian judiciary contemplated by the Law should be monitored regularly, to ensure that they fulfill their intended aims, while always assessing to which degree they result in increased public expenditures, lengthier judicial proceedings, increased bureaucracy and thus, potentially, new and various corruption practices.
12. In order to further improve the compliance of the Law with international human rights standards and OSCE human dimension commitments, the OSCE/ODIHR makes the following key recommendations:
 - A. to introduce a mechanism to only permit appeals to the Grand Chamber in cases involving matters of principle or of particular public importance, or where a gross injustice is caused to the petitioner; [par 36]
 - B. to ensure that when judge dismissals are pronounced by the High Council of Justice pursuant to Article 20 of the Final and Transitional Provisions of the Law (or following disciplinary proceedings pursuant to Article 57 par 2 of the Law on the High Council of Justice) are subject to appeal, the Supreme Court can fully examine the merits of the case; [pars 58 and 88]

² See par 32 of the OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

- C. to ensure that chief judges do not act as investigating judges during the pre-trial stage, and to also adapt the wording of the Criminal Procedure Code accordingly; [pars 24-25]
- D. to clearly state in the Law or in secondary regulation that the results of the written and oral evaluation of already appointed judges, as opposed to judge candidates, are treated confidentially; [pars 61-62]
- E. to reconsider the creation of the Public Council of Integrity and consider other modalities for involving civil society representatives in the evaluation of judges, or alternatively substantially reform the Council, while ensuring at a minimum that its role is only advisory and that the evaluated judge has the right to explain/defend him or herself during its sessions; [pars 68-76 and 80]
- F. to amend Article 106 of the Law to ensure that judges' disciplinary liability is limited to intentional acts and to acts of *serious* negligence, to remove the reference to the non-compliance with ethical norms as a ground giving rise to disciplinary liability and to clarify that a decision of the ECtHR could, depending on the circumstances, lead to the initiation of disciplinary proceedings, but would not replace the need for such procedures; [pars 83, 87 and 89] and
- G. to introduce provisions to ensure that the relative representation of each gender is taken into account when judicial appointments and appointments to various representative and specialized bodies within the judiciary are made. [par 91]

Additional recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards and OSCE Commitments on the Independence of the Judiciary Applicable in Ukraine

13. International standards on judicial independence are found in a range of international instruments and documents. Overall, the independence of the judiciary is a prerequisite for the right to a fair trial, which is protected by Article 6 of the European Convention on Human Rights (hereinafter, "ECHR").³ It provides that everyone is entitled to a fair and public hearing "[...] by an independent and impartial tribunal established by law". This right is elaborated further in the jurisprudence of the European Court of Human Rights (hereinafter, "ECtHR"), which has also recognized the principle of irremovability of judges as a corollary of the independence of judges.⁴ Article 14 of the International Covenant on Civil and Political Rights (hereinafter, "ICCPR")⁵ also provides, in the context of the right to a fair trial, that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

³ The *Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms* entered into force on 3 September 1953. The Convention was ratified by Ukraine on 11 September 1997.

⁴ See e.g., European Court of Human Rights (ECtHR), *Urban and Urban v. Poland* (Application no. 23614/08, judgment of 30 November 2010), par 45 and the cases cited there, <<http://hudoc.echr.coe.int/eng?i=001-101962>>.

⁵ The *International Covenant on Civil and Political Rights* (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966) entered into force on 23 March 1976. This Covenant was ratified by Ukraine on 12 November 1973.

14. OSCE commitments also protect the independence of the judiciary. The 1990 Copenhagen Document provides that participating States will ensure “the independence of judges and the impartial operation of the public judicial service” (par 5.12). This was further elaborated in the 1991 Moscow Document, in which the participating States committed to “respect the international standards that relate to the independence of judges” (par 19.1) and “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice”. OSCE participating States also committed to a number of more specific obligations prohibiting improper influence on judges (par 19.2 i), guaranteeing tenure and appropriate conditions of service (par 19.2 v) and ensuring that the disciplining, suspension and removal of judges are determined according to law (par 19.2 vii).
15. Beyond these binding international obligations, a range of soft-law standards have been developed to provide further guidance on their implementation. These include UN texts,⁶ Council of Europe recommendations,⁷ opinions of the Consultative Council of European Judges⁸ (hereinafter, “CCJE”), the European Charter on the Statute for Judges,⁹ as well as the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (hereinafter, “Kyiv Recommendations”).¹⁰ Of particular relevance here is the 2014 report of the UN Special Rapporteur on Independence of Judges and Lawyers on the concept of judicial accountability.¹¹
16. At the same time, this Opinion will also take into account various reports on judicial independence issued by the European Commission for Democracy through Law of the Council of Europe (hereinafter, “Venice Commission”), including the 2007 Report on Judicial Appointments¹² and the 2010 Report on the Independence of the Judicial

⁶ *UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>; UN Human Rights Committee, *General Comment 32 on Article 14 of the ICCPR: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) (hereinafter, “UNHRC General Comment No. 32”), <http://tbiinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/32>; *Report of the UN Special Rapporteur on the independence of judges and lawyers*, A/HRC/11/41, 24 March 2009 (hereinafter, “2009 Report of the UN Special Rapporteur”), <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/11/41&Lang=E>>.

⁷ Council of Europe (CoE), *Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges* (adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers’ Deputies), subsequently superseded by *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities* (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies) (hereinafter, “CoE Recommendation CM/Rec(2010)12”), <<https://rm.coe.int/16807096c1>>; Consultative Council of European Judges (CCJE), *Magna Carta of Judges*, Strasbourg, 17 November 2010, CCJE (2010)3 Final, <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1707925&direct=true>>.

⁸ CCJE, *Opinion No. 1 on Standards concerning the Independence of the Judiciary and the Irremovability of Judges* (2001), 23 November 2001, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)> (hereinafter, “CCJE Opinion No.1”); *Opinion No. 3 on the Principles and Rules governing Judges’ Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality* (2002), <[https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3)> (hereinafter, “CCJE Opinion No. 3”); and *Opinion No. 17 on the Evaluation of Judges’ Work, the Quality of Justice and Respect for Judicial Independence* (2014), <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2256555&Site=COE&direct=true>> (hereinafter, “CCJE Opinion No. 17”).

⁹ *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe, [DAJ/DOC (98)23] (hereinafter, “European Charter on the Statute for Judges”), <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>>.

¹⁰ The *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), hereinafter, “Kyiv Recommendations”, were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence. The Kyiv Recommendations are available at <<http://www.osce.org/odihr/KyivRec>>.

¹¹ UN Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul, *Report on Judicial Accountability*, 28 April 2014, UN Doc. A/HRC/26/32, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/32>.

¹² European Commission for Democracy through Law (Venice Commission), *Report on Judicial Appointments (2007)*, CDL-AD(2007)028-e, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e)>.

System (Part I: the Independence of Judges);¹³ the Opinion will likewise make reference to previous opinions adopted by the OSCE/ODIHR and/or the Venice Commission on these issues.

2. General Comments

2.1 Reform of the Judiciary in Ukraine

17. In recent years, Ukraine has engaged in a multitude of reforms with respect to its judiciary. (Draft) legislation on the administration of justice, the judicial system and the status of judges in Ukraine, as well as implementing regulations, have been reviewed and evaluated several times by international expert fora, including ODIHR and the Venice Commission.¹⁴ Many of the recommendations made have been implemented by the competent authorities, in particular in amendments to the Constitution that were adopted in 2016. This includes, among others, Article 131 on the High Council of Justice, which stipulates that half of the members of the High Council shall be judges appointed by their peers. Also, the previously existing probationary period for judges, as well as the Parliament's powers to appoint judges for life, have been abandoned. Instead, the Constitution proclaims that a judge is appointed to office by the President following the submission of the High Council of Justice (Article 128) and that a judge shall "hold an office for an unlimited term" (Article 126). These changes are welcome, as they help ensure the independence and impartiality of the judiciary, and of individual judges.
18. The current Law reflects and further specifies the constitutional changes, and thus forms a further step towards the overall reform of the Ukrainian judiciary. It contains, among others, significant changes relating to the manner in which judges are selected and appointed, and reflects the three-tier system of appeals introduced by the Constitution, whereby cases are taken straight to the Supreme Court following the second instance. In so doing, the Constitution abolished the previously existing high specialized courts in the areas of civil/criminal, administrative and commercial law and expanded the structure of the Supreme Court to include special internalized cassation courts dealing with the subject areas hitherto covered by the high specialized courts.

2.2 General Principles

19. As stated earlier, the Law reiterates and expands on some of the main principles set out in the 2016 Constitution governing the judicial system, the status of judges and the exercise of judicial powers. These principles include Article 124 on the administration of justice, Article 125 on the judicial system, Article 126 on the independence and

¹³ Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)*, CDL-AD(2010)004, adopted by the Venice Commission at its 82th Plenary Session (Venice, 12-13 March 2010), <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx)> (hereinafter, "2010 Venice Commission's Report on the Independence of Judges").

¹⁴ See e.g. Venice Commission, *Opinion on the draft Law on the Constitutional Court of Ukraine*, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), CDL-AD(2016)034-e, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)034-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)034-e)>; *Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015*, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)027-e, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)027-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)027-e)>; *Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015*, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)026-e, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)026-e)>; and OSCE/ODIHR, *Opinion on the Procedure for Qualification Assessment of Judges of Ukraine*, 12 November 2015, <<http://www.legislationline.org/documents/id/19877>>.

inviolability of judges, Article 127 on incompatibilities with the position of judges, Article 128 on the appointment of judges, Article 129 on the main principles of justice, and Article 131 on the High Council of Justice, among others. The above-mentioned principles are generally set out in Section I of the Law, including the independence of courts (Article 6) and key fair trial principles (Article 7).

20. It is noted that Article 6 par 5 specifies that judicial self-government shall operate to, among others, protect the professional interests of judges. Although the professional interests of judges are indeed a matter of legitimate concern, it would be more in line with international standards to say that judicial self-government exists to safeguard both the independence of judges and the independence of the judiciary as a whole,¹⁵ as also reflected in Article 126 par 4 (2) of the Law. **It is recommended to revise Article 6 par 5 accordingly.**
21. Article 7 guarantees to everyone the protection of his/her rights within a reasonable time by an “independent, impartial and fair court”, equal protection and access to court. It thereby reflects some of the key fair trial principles set out in the Constitution, and in Article 6 of the ECHR. At the same time, while the presumption of innocence (Article 6 par 2 of the ECHR) is mentioned specifically in Article 62 of the Constitution, this principle is not mentioned in Article 7, or Section I of the Law in general. **It is recommended to consider supplementing Article 7 accordingly, or to add a new provision to Section I, possibly in the event of future reform processes.**

3. The Conduct of Judicial Proceedings

3.1 The Pre-trial Stage and the Role of Chief Judges

22. The powers and the duties of chief judges (the heads of the courts of first instance and appellate courts) are primarily of an administrative nature (see e.g. Article 24 pars 1 and 2). However, according to Article 29 par 1(9) of the Law, Chief Judges of the Courts of Appeals, in addition to their administrative responsibilities, may also exercise the powers of investigating judges.
23. Investigating judges in Ukraine do not perform the function of the traditional French *juge d’instruction* (responsible for supervising and directing pre-trial criminal investigations in serious or complex cases), but rather seem to resemble the German *Ermittlungsrichter* or the French *juge des libertés*, whose primary task is to review measures that interfere with defendants’ and other participants’ human rights in the course of the pre-trial proceedings; these types of judges also have limited investigative powers. According to the Code of Criminal Procedure of Ukraine, the investigating judge is charged “with carrying out, in accordance with the procedure established by the present Code, court supervision over the observance of rights, freedoms and interests of persons involved in criminal proceedings” (Article 3 par 18). Article 12 par 2 of the Code states further that persons taken into custody shall be brought before an investigating judge to decide on the lawfulness and reasonableness of their detention and also on continued custody.
24. It is in principle positive that the Law thus authorizes judges with sufficient experience (assuming chief judges are elected as a rule among more senior judges) to, in relevant

¹⁵ See *op. cit.* footnote 13, par 6 (2010 Venice Commission’s Report on the Independence of Judges), which states: “the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people”.

cases, control the lawfulness and reasonableness of (continued) deprivation of personal liberty and to review the lawfulness of measures that interfere with their rights to privacy, home or correspondence as well as other rights and freedoms. However, chief judges' powers to order and extend detention measures may jeopardize the internal independence and impartiality of judges, since at a later stage, trial judges may be reticent to overrule their hierarchical superior, the Chief Judge, and release an accused pending trial (given that investigating judges perform their functions in the course of the pre-trial phase, it is assumed that after the commencement of trial, it is for the trial judge to render all decisions, including the decision to prolong or terminate defendants' detention). If a detention measure ordered by the Chief Judge is to be reviewed, the judge's decision not to release an accused may raise doubts as to the internal independence and impartiality irrespective of the judge's personal conduct and attitude. Although the case concerned military proceedings and the scenario was different, the holding in the ECtHR's *Findlay* case is instructive in this regard.¹⁶ In this case, the Court found that there were objectively justified doubts as to the independence and impartiality of a court-martial system, where a "convening officer" was responsible for arranging the court martial and for appointing members of the court and the officers charged with prosecution and defence, where these officers were all subordinate in rank and fell within the convening officer's chain of command.

25. Applying this principle to Article 12 par 2, where a tribunal's members may include a person who is in a subordinate position (in terms of his or her duties or the organization of his or her service) vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that judge's independence. **It is therefore recommended that chief judges do not act as investigating judges during the pre-trial stage but rather that an entirely separate judge should be in charge of such functions; the wording of the Criminal Procedure Code should also be adapted accordingly.**

3.2 Automated Case Assignment

26. A number of provisions, including Article 8 par 2 and Article 15 describe a new system of case assignment, which is to be based on an automated system rather than on decisions by court presidents. According to Article 15 par 5, this system will apparently take into account the specialization of judges, in addition to their caseload, leave, absence and other listed circumstances.
27. Such a system may have a positive effect in terms of avoiding assignment of cases for reasons other than merit, and also seeks to prevent judges deciding on a case in first instance from participating in review proceedings. Additionally, the system should also have a built-in component whereby cases may be assigned to another judge in cases where the system chooses a judge who would be in a conflict of interest with respect to the case at hand. **In order to prevent corruption and increase the (appearance of) impartiality, it is recommended that this should not be left to the automated system or the judge him or herself, nor to the president of the court where the judge serves, but to a separate panel of judges who can rule on cases of conflict of interest.**

¹⁶ ECtHR, *Findlay v. the United Kingdom* (Application no. 22107/93, judgment of 25 February 1997), pars 70-80, <<http://hudoc.echr.coe.int/eng?i=001-58016>>.

3.3 Court Proceedings and Relevant Fair Trial Rights

28. According to Article 9 par 2 of the Law, courts shall create an atmosphere that permits each participant the equal exercise of procedural rights. This is a noble declaration, but its meaning is not completely clear. Does it refer to the judges' unbiased attitude and behavior and/or the judge's duty to ensure that threats, intimidation by the other party or the public do not prevent anyone from lawfully exercising their procedural rights? It is assumed here that the proclamation refers to the latter interpretation, since impartiality is already mentioned in Article 7 par 1. If this is the case, **it is recommended to reformulate the text and explicitly refer to the duty of the judge to take adequate measures to ensure a proper atmosphere in the courtroom and to prevent and sanction behavior that may create a hostile environment.** If the court fails to do so, this may lead to a violation of Article 6 ECHR (right to a fair trial).¹⁷
29. With respect to fair trial rights in general, the Law sets forth the right to legal assistance and the right to counsel of an individual's choice, adding that the tasks of criminal defense and representation are performed as a general rule by members of the Bar (Article 10). As the ECtHR has held in the case of *Artico v. Italy*, a State "cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes"¹⁸, but courts do need to take appropriate and required measures to prevent shortcomings of the right to an effective legal representation. In light of this jurisprudence of the ECtHR, **it is recommended to state clearly that if the right to effective legal representation is found by a court to be jeopardized by the respective legal counsel, the court should take effective action to ensure that counsel performs their tasks effectively** (see Article 6 par 3 c of the ECHR).
30. Article 11 par 8 mentions that court proceedings should take place in court. This provision is presumably intended to ensure that court proceedings should not take place at random locations, so as to ensure that the public is able to attend them. However, there may be exceptions, for example excursions by the court to the scene of a crime, which is a common practice in some states. **It is recommended to consider such (exceptional) situations as well, and while making allowance for them as an exception, to ensure that the Law requires that the public is informed of such excursions in advance and to allow, as a rule, media access to them** – except in strictly limited circumstances where a court may order the exclusion of the public and the press.¹⁹
31. While courts shall use the official state language according to Article 12, the Law guarantees citizens' rights to use their native language or the language that they speak in judicial proceedings. To safeguard the equality of all persons before court and the law, as specified in Article 9, **it may be advisable to extend this right to all persons, regardless of whether they are citizens or not.**²⁰ **It is thus recommended that the Law make it clear, as specified by Article 14 par 3 (f) ICCPR and Article 6 par 3 (e) ECHR, that criminal defendants' fair trial rights comprises the right to have the free**

¹⁷ For example, in the case of *T. v. the United Kingdom* (Application no. 24724/94, judgment of 16 December 1999, <<http://hudoc.echr.coe.int/eng?i=001-58593>>), the ECtHR stressed that, although it is an important argumentation that "public trials serve the general interest, in the open administration of justice" (par 85), during the proceedings, the national court did not take the adequate measures to ensure the applicant's Article 6 rights as "it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny" (par 88).

¹⁸ ECtHR, *Artico v. Italy* (Application no. 6694/74, judgment of 13 May 1980), par 36, <<http://hudoc.echr.coe.int/eng?i=001-57424>>; see also *Daud v. Portugal* (Application no. 22600/93, judgment of 21 April 1998), <<http://hudoc.echr.coe.int/eng?i=001-58154>>.

¹⁹ See e.g., ODIHR, *Legal Digest of International Fair Trial Rights* (2014), pages 77-86, <<http://www.osce.org/odihr/94214>>.

²⁰ See Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, *Joint Opinion on the Law on the Judiciary and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine*, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL-AD(2015)007, par 21, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)007](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)007)>.

assistance of an interpreter if they do not understand or speak the language used in court.

32. Both Article 129 par 9 of the Constitution and the Law (Article 6 par 3, Article 48 par 4 (6) and Article 50) envisage liability for contempt of court. Contempt of court is a relatively broad notion ranging from conduct impeding or frustrating the administration of justice to behaviour that does not comply with court decisions to offensive speech or speech that brings the court into disrepute. It is assumed here that the separate legislation that the Law refers to in terms of contempt of court, as well as the sanctions attached to it, is Article 330 of the Criminal Procedure Code. However, to avoid legal uncertainty and discretionary interpretation of such provisions, it is recommended to explicitly refer to the exact provision or legislation. In principle, all the forms of contempt of court mentioned therein may entail liability, but those that do not curtail the procedural rights of the parties or the defendant and do not constitute unjustified interference with everyone's freedom of expression should not be penalized.²¹ **It is recommended to ensure that all legislation covering this issue complies with these general principles.**

4. Restructuring the Supreme Court of Ukraine

33. The organizational structure of the judiciary is regulated in Section II of the Law, and focuses on organizational foundations/principles (Chapter 1), as well as on local courts, courts of appeal, high specialized courts, and the Supreme Court (Chapters 2-5).
34. The Law reflects the new structure introduced by the 2016 Constitution to the existing system, which involved changing from a four-tier system (involving first and second instance courts, high (specialized) appeals courts, and the Supreme Court) to a three-tier system (first and second instance courts, and the Supreme Court with specialized integrated courts of cassation).
35. In this context, it is noted that many OSCE participating States have systems in which a single supreme court is the ultimate arbiter on matters pertaining to the various branches of the law (criminal, civil, or administrative), including the United Kingdom (with some exceptions),²² Denmark,²³ and the United States.²⁴ It is understandable that the Ukrainian legislator has sought to impose a degree of unity in jurisprudence by merging the cassation courts and creating a Grand Chamber to resolve potential disparities in jurisprudence between the 'Courts' within the new Supreme Court. At the same time, it is noted that detailed procedural legislation on how this new system is to function has not yet been adopted.
36. A successful transition towards the unification of jurisprudence in Ukraine will depend to a large extent on the procedural laws which are yet to be adopted, in particular legislation on the procedures within the Supreme Court. It is vital for these procedures to adopt an approach that seeks to avoid a 'fourth-instance'-type internal system, whereby all matters can be appealed to the Grand Chamber, since this would likely overburden the capacity of the new Grand Chamber and could lead to delays. At the same time, the Grand Chamber should have adequate competencies to resolve genuine

²¹ See e.g., ECtHR, *Barfod v. Denmark* (Application no. 11508/85, judgment of 22 February 1989), <<http://hudoc.echr.coe.int/eng/?i=001-57430>>; and *Prager and Oberschlick v. Austria* (Application no. 15974/90, judgment of 26 April 1995), <<http://hudoc.echr.coe.int/eng/?i=001-57926>>.

²² See <https://www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf> [copy and paste weblink in the browser].

²³ See <http://www.supremecourt.dk/about/role/Pages/default.aspx>.

²⁴ See <https://www.supremecourt.gov/about/briefoverview.aspx>.

jurisprudential disparities between the cassation courts within the Supreme Court. **To avoid a fourth instance jurisdiction and at the same time ensure that jurisprudential unity can be achieved and then maintained, the Law and any procedural laws adopted to implement it could introduce certain additional mechanisms, for example a system of leave to appeal (i.e., permission from the Grand Chamber to appeal),²⁵ and should specify that appeals to the Grand Chamber should be limited to cases involving matters of principle or particular public importance, or where a gross injustice is caused to the petitioner.**

5. Qualification Evaluation of Judges

37. At the outset, it must be highlighted that the overall purpose and process of evaluating judges should not be confounded with disciplinary procedures. Ideally, an evaluation procedure should constitute a means of self-assessment and improvement for the judiciary, but should not replace or duplicate disciplinary proceedings.²⁶
38. While Section IV of the Law deals with the procedures for assuming public office, Section V focuses on “Qualifications Level of a Judge”. According to Article 83 of the Law, the High Qualifications Commission of Judges conducts a “qualification evaluation” of judges and judge candidates to establish whether they are capable of administering justice in a relevant court based on the criteria of competence (professional, personal, social, etc.), professional ethics and integrity. This type of evaluation takes place following the application of a judge or candidate, including for participation in a competition to fill a vacancy, or following a decision taken by the High Qualifications Commission in cases stipulated by law (e.g., following disciplinary procedures, in certain cases when a judge is transferred to another court, or if a judge participates in a competition for a vacancy in a higher court).
39. The High Qualifications Commission is a state body of judicial self-government, whose tasks under Article 93 of the Law involve, next to qualifications evaluations, organizing competitions for judicial vacancies, including the selection of judges and submitting recommendations on judicial appointments and transfers to the High Council of Justice. According to Article 94 of the Law, the High Qualifications Commission consists of 16 members, half of whom are judges or former judges appointed by the Congress of Judges. The other members are appointed by the Congress of Representatives of Law Schools and Research Institutions (two), the Congress of Lawyers (Bar) (two), the Commissioner of the Verkhovna Rada for Human Rights (two individuals, who are not judges) and the Head of the State Judicial Administration (two individuals, who are not judges).
40. The evaluation process, which is generally applicable to all judges, and judge candidates, is set out in detail under Section V of the Law, and is made up of an examination, review of a judicial dossier, and an interview (Article 85 par 1). The examination involves an anonymous written test, and the completion of a case study to assess the judge/judge candidate’s level of knowledge and ability to administer justice (Article 85 par 2).
41. The Law sets out the contents of dossiers for already appointed judges in Article 85 par 4, while the contents of dossiers of judge candidates are set out in par 5 of the same

²⁵ For the system in the UK, see <https://www.supremecourt.uk/docs/a-guide-to-bringing-a-case-to-the-supreme-court.pdf> [copy and paste weblink in the browser].

²⁶ *Op. cit.* footnote 14, par 51 (2015 ODIHR Opinion on the Procedure for Qualification Assessment of Judges of Ukraine).

article. The information contained in the dossiers of judge candidates largely relates to the information that they submitted when applying for a particular post, as well as information on their compliance with the criterion of professional ethics, and the results of background checks (including on income, property, expenditures and respective declarations), among others. The dossier of an already appointed judge is made up of various elements set out under Article 85 par 4, namely information on the judge's previous career and job recruitment, decisions taken by supervisory or judicial self-government bodies with respect to him/her, results of previous training exercises and evaluations, information on his/her administrative posts or appointment to bodies of judicial self-government, and the efficiency of his/her judicial administration. In addition to the above, the dossier shall further include information and results of disciplinary proceedings that he/she was involved in, and other information to determine compliance with rules of professional ethics (largely relating to asset declaration and similar anti-corruption mechanisms). Finally, the judicial dossier shall include the opinion on the candidate of the Public Council of Integrity (for more on this body, see section 5.3 *infra*).

42. The evaluation process outlined in Section V is quite detailed, and appears to take great pains to ensure that the evaluation of judges will be undertaken in a balanced, objective and fair manner, by an independent body, namely the High Qualifications Commission. It is particularly positive that the evaluation process involves anonymous tests, and that the contents of the judicial dossier seek to assess various different aspects of the judge's previous and current work and career. When assessing the effectiveness of a judge's work, the type of information to be collected according to Article 85 par 4 (9) appears to focus not only on quantitative, but also on qualitative criteria. Moreover, it is welcome that the judge (and judge candidate) being evaluated has full access to all compiled material, and will have the opportunity to provide explanations and contest or refute information (Article 85 pars 8 and 9).

5.1 Transition from the Current to the New System and the Evaluation of Judges already in Office

43. In the Law, there are Final and Transitional Provisions that outline the process of moving from the current system to the new one. In particular, Article 7 of the Final and Transitional Provisions states that “[s]tarting from the day of commencement of the operations of the Supreme Court in the composition determined by this Law, the Supreme Court of Ukraine, High Specialized Court of Ukraine for Civil and Criminal Cases, High Commercial Court of Ukraine, and High Administrative Court of Ukraine shall cease their operations and shall be dissolved within the procedure stipulated by law.” It adds that “[u]ntil termination of the operations the status, structure, powers and procedure of the operations, status, rights and guarantees of judges of these courts shall be determined by the Law of Ukraine ‘On the Judiciary and Status of Judges’”.
44. Article 20 of the Final and Transitional Provisions of the Law states that the High Qualifications Commission of Judges shall evaluate whether judges appointed for five years or for life before the Law on Amending the Constitution of Ukraine (Regarding Justice) came into force fit their current positions.
45. If following the evaluation, the High Qualifications Commission comes to the conclusion that any such judge is ‘unfit’ to hold his/her current position based on the criteria of competence, professional ethics or integrity, then this shall constitute a ground for dismissing the judge from office following a decision of the High Council of Justice based on a proposal issued by the relevant panel of the High Qualifications

Commission. In case such evaluation was initiated under the previous law, then the High Qualifications Commission shall apply the rules that were effective on the day when such evaluation was initiated (Article 21 of the Transitional Provisions of the Law). Judges whose capacity to hold their positions was confirmed under these proceedings do not need to undergo a renewed evaluation procedure.

46. Overall, international standards on the independence of the judiciary provide judges with a guaranteed tenure until a mandatory retirement age or the expiry of their term of office.²⁷ This so-called principle of irremovability helps ensure the independence of individual judges, and of the judiciary *per se*. Exceptions to this rule need to be limited to specific cases that are clearly set out in law.
47. Decisions to dismiss judges should thus not be taken lightly, or in a summary manner. Rather, judges may only be dismissed in exceptional cases involving, e.g. incapacity,²⁸ behavior that renders them unfit to discharge their duties,²⁹ serious grounds of misconduct or incompetence,³⁰ or serious breaches of disciplinary or criminal provisions established by law.³¹ To ensure the independence of the judiciary, such decisions further need to be taken by the judiciary itself, via relevant self-government bodies, and in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.³²
48. According to the 2016 Constitution, judges may be dismissed for the following reasons, under Article 126 par 6: 1) health reasons, 2) incompatibility requirements, 3) the commission of a disciplinary offence, flagrant or permanent disregard of duties incompatible with the status of judge, or non-conformity with being in office, 4) resignation or voluntary dismissal, 5) refusal to be transferred to another court in case of courts' dissolution or reorganization, or 6) the violation of the obligation to justify the legality of the origin of property. These provisions are reflected, and further elaborated in Section VII of the Law on Dismissal of a Judge from Office and Termination of his/her Powers.
49. The ground for dismissal set out in Article 20 of the Final and Transitional Provisions of the Law constitutes a separate ground for dismissing a judge, which is based on Article 16 par 1 (4) of the Transitional Provisions of the Constitution. The wording used in Article 20, whereby a judge may be considered 'unfit' to hold his/her current position based on the criteria of "competence, professional ethics or integrity" largely matches the formulations used in Article 16 par 1 (4) of the Transitional Provisions of the Constitution. The intention of these provisions is to vet judges appointed prior to the entry into force of the constitutional amendments and ensuing new law and is thus focused on this category of judges – the wording suggests that it is *de facto* time-bound, in the sense that once all judges falling into this category have been evaluated (once), then Article 20 will cease to apply (including as a ground for dismissal).
50. In their 2015 Joint Opinion on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, the Venice Commission and the Directorate of Human Rights of the Council of Europe's Directorate General of Human Rights and Rule of Law found that extraordinary measures may be necessary and justified to remedy corruption and incompetence among judges, if there had been considerable political influence on judges' appointments in

²⁷ See *op. cit.* footnote 6, pars 11-12 (UN Basic Principles on the Independence of the Judiciary). See also *op. cit.* footnote 8, par 60, CCJE Opinion No. 1; pars 49-52 (CoE Recommendation CM/Rec(2010)12); and the OSCE 1991 Moscow Document, par 19.2 (v) and (vii).

²⁸ *Ibid.* par 18 (UN Basic Principles on the Independence of the Judiciary).

²⁹ *Ibid.*

³⁰ *Op. cit.* footnote 6, par 20 (UNHRC General Comment No. 32).

³¹ *Op. cit.* footnote 7, par 50 (CoE Recommendation CM/Rec(2010)12).

³² *Op. cit.* footnote 6, par 20 (UNHRC General Comment No. 32).

previous periods.³³ The qualifications assessment described in Article 16 par 1 (4) of the Transitional Provisions of the Constitution was considered to be such an extraordinary measure, which should be regarded as wholly exceptional and should be made subject to extremely stringent safeguards to protect judges fit to occupy their positions.³⁴

51. On a general note, it is doubtful whether an evaluation procedure *per se* may, or should lead to the dismissal of a judge. As stated in OSCE/ODIHR's Opinion on the Procedure for Qualification Assessment of Judges of Ukraine (2015), it may be clearer, and more in line with international standards to retain such assessment procedure as a pure evaluation tool aiming to improve the work of the judiciary, and to leave the question of sanctions and dismissal to existing disciplinary bodies and procedures, following concrete cases of wrongdoing.³⁵
52. Moreover, it is noted that the respective judges shall be assessed for their competence, professional ethics and integrity. These are all quite general terms, and may be difficult to assess in practice. **Regarding ethical rules in particular, given their nature and the fact they are often drafted in general and vague terms, they should not be directly applied as a ground for sanctions, all the more if this may ultimately result in dismissal.**³⁶
53. At the same time, the process envisaged by Article 20 of the Final and Transitional Provisions of the Law, and Article 16 par 1 (4) of the Transitional Provisions of the Constitution is limited in scope and time-bound. Given the current weaknesses within the judiciary, and the extreme lack of trust that it enjoys within the population, requiring these judges to undergo an evaluation process that may result in their dismissal may, exceptionally, as indicated by the Venice Commission, be understandable and perhaps even justifiable, depending on how this evaluation process is conducted and providing that stringent safeguards are in place.
54. The relevant board of the High Qualifications Commission will, if it considers a judge to be 'unfit' to hold his/her current position, issue a proposal to dismiss the judge to the High Council of Justice, which may adopt a decision to dismiss (Article 20 of the Final and Transitional Provisions of the Law).
55. Pursuant to par 12 of the Transitional Provisions of the Law on the High Council of Justice, the Council shall debate such matters in plenary following the procedure set out in Article 56 of the Law on the High Council of Justice on "removal of judges from office on particular grounds". Any decision of the Council may be appealed to the Supreme Court (Article 35 of the Law on the High Council of Justice). Appeals against the Council's decision to dismiss a judge based on par 12 of the Transitional Provisions of the Law on the High Council of Justice shall follow the procedure set out in Article 57 of the same law,³⁷ which differs depending on the grounds for dismissal.

³³ *Op. cit.* footnote 20, pars 72-73 (2015 Joint Opinion of the Venice Commission and the DHR of the DG of Human Rights and Rule of Law on the Law on the Judiciary System and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine).

³⁴ *Ibid.*, par 74.

³⁵ *Op. cit.* footnote 14, par 53 (2015 ODIHR Opinion on the Procedure for Qualification Assessment of Judges of Ukraine).

³⁶ *Op. cit.* footnote 8, pars 44 and 46-48 (CCJE Opinion No. 3). See also OSCE/ODIHR-Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, pars 25-28, <<http://www.legislationline.org/documents/id/19099>> (hereinafter, "2014 Joint ODIHR-Venice Commission on Disciplinary Responsibility of Judges in the Kyrgyz Republic").

³⁷ Article 57 of the Law on the High Council of Justice of Ukraine states: "Appealing a decision of the High Council of Justice on a removal of the judge from the office

1. A decision of the High Council of Justice that a judge be removed from the office on the grounds referred to in paragraphs 1, 2, 4 of Article 126(6) of the Constitution of Ukraine can only be appealed and revoked for the reasons established by the law.

2. A decision of the High Council of Justice that a judge be removed from the office on the grounds referred to in paragraphs 3 and 6 of Article 126(6) of the Constitution of Ukraine can only be appealed and revoked for the following reasons only:

1) the composition of the High Council of Justice that adopted the decision did not have the power to do so;

2) the decision is not signed by any of the members of the High Council of Justice who adopted it;

56. Given that the evaluation process assesses judges for their competence, professional ethics and integrity, the Council will in these cases most likely rely on Article 126 par 3 or par 6 of the Constitution as grounds for dismissal (i.e., a substantive disciplinary offence by a judge, a gross or repeated neglect of the judge's duties that is incompatible with the status of the judge or exposes his/her incompetent job performance; or a violation of the judge's obligation to confirm a lawful source of his/her assets). In such cases, Article 57 par 2 of the Law on the High Council of Justice applies.
57. Under Article 57 par 2, an appeal to the Supreme Court is possible only based on certain formal grounds. Thus, a decision of the Council to dismiss a judge may only be appealed where the composition of the High Council of Justice that adopted the decision did not have the power to do so, where the decision is not signed by any of the Council members who adopted it or where the decision did not reference the required legal grounds that were the basis for the decision.
58. It would thus appear that in cases where the evaluation procedure envisaged by Article 20 of the Final and Transitional Provisions of the Law leads to the dismissal of judges by the High Council of Justice, the judges have no possibility to appeal the merits of this decision. While there is in principle no entitlement to appeal in non-criminal proceedings,³⁸ this would, however, constitute an important safeguard for the judges' independence (and the independence of the judiciary overall). As stated by the CCJE, "the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court".³⁹ If the court can indeed fully examine the merits of the case that lead to dismissal, then the judge subject to the decision of dismissal should in principle be considered to have had access to a court under the domestic system.⁴⁰ **It is thus recommended to reconsider the limitations to the right of appointed judges to appeal against their dismissal based on a negative outcome of their evaluation procedures pursuant to Article 20 of the Final and Transitional Provisions of the Law, by allowing the Supreme Court to review all aspects of the decision to dismiss taken by the High Council of Justice.**
59. Finally, to gain a complete picture of whether the evaluation process will function according to these principles in practice, and whether it contains sufficient safeguards to protect judges appointed before the constitutional amendments and the Law entered into force from inadequate evaluation and thus wrongful dismissal, it will need to be assessed once a significant number of judges have completed the above assessment process. **It is recommended to undertake a critical and independent review of the evaluation process once this stage has been reached, in particular with respect to the concrete reasons leading to dismissals of judges appointed for life.**

5.2 Transparency of the Evaluation Process

60. The process of conducting the qualifications evaluation of judges and judicial candidates is set out in Article 85, which specifies that this process is made up of two main stages – a qualifications examination and the review of a judge's judicial dossier

3) the decision does not contain references to the grounds defined by the law for the judge's dismissal and to the reasons on the basis of which the High Council of Justice reached its findings.

3. A decision of the High Council of Justice that the judge be removed from the office on the grounds referred to in paragraph 5 of Article 126(6) of the Constitution of Ukraine can be appealed and revoked on the grounds prescribed by Article 57(2) hereof, or if the judge was not duly informed about the session of the High Council of Justice during which the decision was adopted."

³⁸ See e.g., UN Human rights Committee, *I.P. v. Finland*, Communication No. 450/1991, UN Doc CCPR/C/48/D/450/1991 (1993), par 6.2, <<http://www1.umn.edu/humanrts/undocs/html/450-1991.html>>.

³⁹ *Op. cit.* footnote 8, par 77 (v) (CCJE Opinion No. 3).

⁴⁰ *Op. cit.* footnote 36, par 113 (2014 Joint ODIHR-Venice Commission on Disciplinary Responsibility of Judges in the Kyrgyz Republic).

and interview (to discuss the results of this review). The law drafters have sought to make this process as transparent as possible, by allowing interested persons to be present at any stage of the examination and in the course of evaluation of the results (Article 85 par 2), and by ensuring the publication of judges' judicial dossiers under par 7 of the same provision (with exceptions made for private and/or classified information). In this regard, it is welcome that private information, including the results of tests on candidates' moral and psychological qualities, and general abilities, is not disclosed to the public. At the same time, it is noted that the judicial dossier of judges shall contain a wide array of other evaluation results, as well as previous decisions concerning the respective judge, and information on "the efficiency of the justice administration of the judge" (including quantitative data on the number of cases that he/she dealt with, cancelled or modified decisions, and the time taken for cases, among others) (Article 85 par 4). It is questionable whether the extent of transparency set out in Article 85 is necessary and useful, with a view to ensuring the independence of and trust in the judiciary.

61. In principle, judicial evaluation processes can help maintain public confidence in the judiciary. The public must thus be able to understand the general principles and procedure of the evaluation process, which therefore need to be made available to the public.⁴¹ At the same time, the process and results of individual evaluations should remain confidential and not be made public, as this could well endanger the independence of individual judges. In particular, publishing this information could discredit the judge in the eyes of the public and render him/her vulnerable to outside influence, verbal or other attacks⁴² or acts of disobedience.⁴³ The same principles apply equally, if not to an even greater extent, to situations where members of the public are present during examinations and the evaluation of their results. **Bearing in mind the above discussion, the relevant stakeholders are encouraged to re-evaluate the transparency of the evaluation process as set out in the Law, and to ensure that in particular the results of the written and oral evaluation of judges are treated confidentially.**
62. By contrast, the process whereby judge candidates are selected should be open and transparent. This category of persons needs to be treated differently from that of already appointed judges, as the purpose of the procedure is to assess their aptitude for becoming a judge, and not their past work. Moreover, transparency is more justified here, given that the candidates have accepted to take part in a highly competitive selection process,⁴⁴ the elements of which they are, or should be, aware of before submitting their application.

5.3 The Public Council of Integrity

63. In the process of examining the ethics and professional integrity of a judge or judicial candidate, the High Qualifications Commission is assisted by a Public Council of Integrity (Article 87). This Council shall help the High Qualifications Commission determine the eligibility of a judge or judicial candidate following the criteria of professional ethics and integrity (Article 87 par 1). To do so, the Council shall collect, check and analyze information about a judge/judicial candidate, provide the High

⁴¹ *Op. cit.* footnote 8, par 48 (CCJE Opinion No. 17).

⁴² *Ibid.*

⁴³ *Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine*, April 2017, Council of Europe Support to the implementation of the judicial reform in Ukraine Project, par 3.6, <<https://rm.coe.int/council-of-europe-opinion-on-the-rules-of-procedure-of-the-public-coun/1680722415>> (hereinafter, "2017 CoE Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine").

⁴⁴ *Ibid.* pars 3.6 and 3.7.

Qualifications Commission with this information, and shall then, “with justifiable reasons, provide the High Qualifications Commission of Judges of Ukraine with the conclusion on the non-eligibility of a judge (a judicial candidate) in terms of professional ethics and integrity, which shall be included in the record of a judicial candidate or the record of a judge” (Article 87 par 6).

64. According to Article 87 par 2, the Public Council of Integrity shall consist of 20 members, who shall be representatives of human rights civic groups, law scholars, attorneys, and journalists. The members of this Council shall be “recognized specialists in the sphere of their professional activity”, with a high professional reputation; they shall also meet the criterion of political neutrality and integrity. The Law does not, however, specify how the political bias of such members could be assessed, in particular whether this would be determined on the basis of party membership, or of a person’s actions. If an NGO representative, scholar or journalist argues for a certain political position or piece of legislation, would this already mean that he/she is not politically neutral? In order to resolve such questions, **it is recommended to specify the criteria that would make members of civic rights organization, scholars, etc. ineligible for membership in the Council due to political bias.**
65. Members of the Public Council of Integrity shall be appointed by a meeting of representatives of civic associations for a term of two years, which is called and organized by the High Qualifications Commission following the procedures set out in Article 87 pars 10-16. The meeting may only be attended by civic organizations or unions that have been working on combatting corruption, protecting human rights, and/or supporting institutional reforms for at least two years prior to the day of the meeting. Civic organizations or unions which receive assistance from or are financed by donors from “aggressors” may not participate at the meeting (Article 87 par 12). It is unclear why, if an organization operates legally and is not banned, such organization should not be allowed to participate at such meetings merely due to its sources of funding. **It is recommended to reconsider this provision.** Furthermore, consideration may be given to enhance the transparency of the process of selecting members for the Council by doing so via a fully open and public selection process.⁴⁵
66. While the purpose of having a Public Council for Integrity is clearly to enhance the transparency of the qualifications evaluation process, it also raises many questions. Primarily, given the importance of the process of evaluation, it is noted that the criteria for appointing the members are quite general. Specialization in a specific field of work, good reputation, political neutrality and integrity are no doubt necessary and positive attributes. It is questionable however whether these criteria are sufficient, and whether the process could not be enhanced by adding relevant years of experience, and more specific, tailor-cut requirements in terms of work experience and skills. Further wording to ensure the independence and impartiality of the members of the Council may also be added. In this context, it is noted that while Article 87 par 8 clearly aims to avoid bias on the side of the Council members by requiring that they recuse themselves in individual cases if there is danger of bias, **it does not specify what shall happen if such recusal does not take place and should be supplemented in that respect.**
67. Moreover, it is worth discussing whether having two bodies, the High Qualifications Commission and the Public Council for Integrity, to evaluate judges and judicial candidates at the same time, but relatively independently from one another, will really add to the transparency of the process, or whether this may not lead to some confusion, and hamper the procedure.

⁴⁵ For more details on this point, see *op. cit.* footnote 43, par 2.4 (2017 CoE Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine).

68. The main actor in the qualifications evaluation process is still the High Qualifications Commission, created as an independent body in the manner and composition set out in par 39 *supra*. While the Public Council of Integrity is invited to assist the Commission, the limitations imposed on its mandate and capacities raise concerns with respect to the effectiveness and added value of such assistance.
69. The main role of the Council appears to be collecting, checking and analyzing information on judges and judicial candidates (Article 87 par 6). To do so, the Council may create an information portal to collect information about professional ethics and integrity of judges and judicial candidates (par 5 of the same provision), and has free and complete access to open state registers (including court decisions, if they are part of such registers). The Council will thus need to base large parts of its work on publicly accessible information, or information received from members of the public. This raises the question of whether it will in all cases be able to access the extent of the information that it would require in order to assess a particular situation in full, and whether the access to information available in public registers will always allow Council members to verify some of the information received on its information portal. In this context, it is important to note that relevant international bodies have cautioned against taking public views on a judge into account when evaluating him/her. Such views may not always be the result of complete or fully understood information, or may even be based on a misunderstanding of the judges' work overall.⁴⁶
70. In this situation, it is important to introduce mechanisms that would ensure that all information received through public means, including the information portal, can be verified.⁴⁷ It is difficult to see how such verification could be possible based on the current text of the Law, which provides the Council with somewhat limited access to information. These restrictions will also render the work of the Council quite challenging, as it is expected to assist the High Qualifications Commission, which under Article 86 par 1 has full (and thus much more) access to all information concerning a judge or judicial candidate (also documents and materials with limited access), and has a decisive impact on the final evaluation of a judge (see more details in pars 74-75 *infra*).
71. Moreover, it is important that the process before the Public Council of Integrity also treats the results of its assessment confidentially (in this context, see the discussion on the need for confidentiality in the evaluation process as a whole, par 61 *supra*). In particular, public accusations brought against individual judges by the Public Council of Integrity before the evaluation process is completed could jeopardize the process of evaluation, and reduce respect for the judiciary and for the judges (and their judgments) themselves, even if such allegations are later proven to be unsubstantiated. **It is recommended to introduce the requirement of confidentiality of information into the wording of Article 87 of the Law.**
72. Another wider problem concerning the effectiveness of the work of the Council is the fact that its work is conducted entirely on a *pro bono* basis, and that the Law does not provide the Council with any administrative support or investigatory means to carry out its activities. Thus, the Public Council of Integrity would appear to lack the necessary resources to investigate concerns that the public brings to its attention about certain (candidate) judges. This leads to a situation where a body that was created solely for the

⁴⁶ *Op. cit.* footnote 8, par 48 (CCJE Opinion No. 17). See also Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, *Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine*, CDL-AD(2010)026-e, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), par 60, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)026-e)>.

⁴⁷ In this context, see also *op. cit.* footnote 43, par 3.5 (2017 CoE Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine).

purpose of enhancing the transparency of the process of evaluating judges and judge candidates relies entirely on the motivation, time and capacity of its members, which may lead to varying results in different cases, and endanger the overall sustainability of this body.

73. Finally, Article 87 par 6 (3) allows the Council to provide the High Qualifications Commission with the conclusion that a judge or judicial candidate does not meet professional ethics and integrity criteria, and that this shall be included in the dossier of the judge or candidate. It is noted that the Law does not specify what will happen in case the Council comes to the opposite conclusion, namely that a judge or judicial candidate meets professional ethics and integrity criteria – **for the sake of consistency, this scenario should also be reflected in the Law.**
74. Moreover, according to Article 88 par 1 of the Law as amended in December 2016,⁴⁸ a negative conclusion issued by the Council may only be overcome by a qualified majority decision of the High Qualifications Commission (11 votes).⁴⁹ If the Commission does not achieve this qualified majority, then the judge or candidate may not obtain a positive evaluation. This approach raises serious concerns with respect to the role of the Public Council of Integrity in the process, as well as the evaluation process itself.
75. According to international standards, in order to safeguard judicial independence, individual evaluations of judges should be undertaken primarily by judges, to ensure that the process remains free from outside, possibly undue influence.⁵⁰ In Ukraine, the evaluation of judges is undertaken by the High Qualifications Commission, with the support of the Public Council of Integrity. If the Council's powers go beyond that of a mere advisory body, and even allow the Council to substantively influence the results of the evaluation process, by issuing *de facto* vetos on positive evaluations undertaken by the High Qualifications Commission, then this means that the process is no longer entirely within the purview of a judicial self-government body. Given the inherent weaknesses in the role and work of the Council, and the fact that it does not have access to the same information that the Commission does, including possible discussions with the judge or candidate (see also pars 79-80 *infra*), providing the Council with such an influential voice when discussing the eligibility of a judge or candidate for judiciary positions could have negative consequences for the entire process of evaluating judges/judge candidates. **It is recommended to review, and ideally remove these additional powers of the Public Council of Integrity.**
76. Overall, given the concerns voiced above, it may be worthwhile to discuss the need for a body such as the Public Council of Integrity in general, and its impact on the transparency and quality of the process of evaluating judges and judge candidates. In light of this, it would be advisable to reconsider having this body at all, or at least to substantially reform it. In particular, it is concerning that the Council, despite its inherent weaknesses and lack of unfettered access to information, has a decisive influence over the results of the evaluation procedure. To avoid these issues, it may be preferable to, **rather than create a body to assist the High Qualifications Commission in its work, expand the composition of the High Qualifications Commission to also include representatives of civil society, which could be**

⁴⁸ Article 88 par 1 of the Law as amended on 21 December 2016 states: "1. The High Qualifications Commission of Judges of Ukraine shall adopt reasoned decision on judge (candidate for the judicial position) confirming or non-confirming ability to administer justice in relevant court. In case the Public Council of Integrity in its opinion has established that judge (candidate for the judicial position) does not meet requirements of professional ethics and integrity, the High Qualifications Commission of Judges of Ukraine can adopt decision on his/her confirming ability to administer justice in relevant court only if such decision is supported by no less than 11 members of the Commission".

⁴⁹ See *op. cit.* footnote 43, par 3.1 (2017 CoE Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine).

⁵⁰ *Op. cit.* footnote 8, par 49 (8) (CCJE Opinion No. 17).

appointed in the manner described in Article 87 pars 9-20 of the Law. This would help enhance public trust in the process, and ensure that all persons evaluating judges and judicial candidates follow the same procedures initiated by the same body, and take decisions based on the same level of information.

5.4 Procedural Fairness and Right to Appeal

77. As noted by the CCJE, it is important that procedural safeguards are in place for judges participating in the evaluation procedure.⁵¹ In particular, throughout the process of individual evaluation, judges need to have the chance to express their views on their own activities, and on the assessment made.⁵²
78. According to Article 85 pars 8 and 9 of the Law, judges shall have full access to their dossiers, and have the opportunity to discuss the results of the review of the dossier with the High Qualifications Commission. According to the relevant Procedure and Methodology for Qualification Evaluation of Judges of Ukraine,⁵³ this mechanism allows the judge to supplement, refute or specify the information contained in the dossier.
79. At the same time, the Law does not appear to provide judges with the same opportunity before the Public Council of Integrity. There is also no obligation for judges to participate in proceedings before the Council, or to provide it with information, given that the Council is not a judicial body.⁵⁴ However, judges, and judge candidates should have the chance to explain, clarify or refute matters being discussed before the Council.
80. While the Council delegates one member to attend meetings of the High Qualifications Commission (Article 87 par 6 (4)), it is not fully clear whether this also includes participation in the interview. Moreover, allowing judges to express their views towards one member of the Council is not the same as doing so before the entire Council. **If the evaluation process and its consequences are retained as they are at the moment, then the evaluated judge should have the right to explain/defend him or herself not only before the High Qualifications Commission, but also during sessions of the Public Council of Integrity.**
81. Following the evaluation process, the High Qualifications Commission takes a reasoned decision confirming or not confirming the capability of a judge or judicial candidate to administer justice in a relevant court (Article 88 par 1). An appeal against the decision of the High Qualifications Commission is possible, first to the High Council of Justice (involving a review of the merits of the decision), and later to the administrative court. According to Article 88 pars 2 and 3, this latter challenge is possible only for formal reasons, meaning in cases where the members of the High Qualifications Commission exceeded their powers or did not sign the decision, where a judge or judicial candidate was not duly informed about the qualifications evaluation, or where the decision did not reference the legal grounds for its adoption/failed to show why the Commission arrived at its respective conclusion. In principle, an evaluated judge must have an effective right to challenge an unfavourable evaluation, particularly when it affects the judge's "civil rights" in the sense of Article 6 of the ECHR and the more serious the consequences of an evaluation can be for a judge, the more important are such rights of effective

⁵¹ *Op. cit.* footnote 8, par 44 (CCJE Opinion No. 17).

⁵² *Ibid.*, par 41 (CCJE Opinion No. 17). See also *op. cit.* footnote 7, par 58 (CoE Recommendation CM/Rec(2010)12).

⁵³ See pars 3.16.5, 3.17.1.2 and 3.17.2 of the *Procedure and Methodology for Qualification Evaluation of Judges of Ukraine*, <http://www.legislationline.org/download/action/download/id/7248/file/Ukraine_Procedure_methodology_qualification_evaluation_judges_en.pdf>.

⁵⁴ See *op. cit.* footnote 43, par 3.11 (2017 CoE Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine).

review.⁵⁵ To see whether the appeal modalities are effective in practice, and can lead to an effective reversal of the decision of the High Qualifications Commission, the evaluation process, including appeals, should be assessed once a significant number of judges have completed the evaluation process.

6. Rules Regarding Disciplinary Proceedings against Judges and Sanctions

82. Under the Law, the disciplinary liability of judges is set out in Section VI, focusing on grounds for disciplinary liability (Article 106), rules of submitting disciplinary complaints (Article 107), and disciplinary sanctions (Articles 109-110). As indicated in some provisions of the Law (e.g. Articles 108 and 111), the rules of disciplinary procedure are laid down in the Law on the High Council of Justice, specifically in chapters 4 and 5 of Section II.
83. Article 106 par 1 (1) of the Law provides that in addition to intentional conduct, judges may be punished also for negligence in cases involving denial of access to justice, violation of procedural law, of the principles of publicity and openness of trial, of principles of equality of all participants in trial or of the rules for (self-)recusal. Additional grounds for disciplinary procedure are the failure to reason judgments, and the inability to protect the rights of the defendant or of other participants in the trial. This may open up the possibility to impose disciplinary sanctions for relatively trivial matters. In principle, judges should not be liable for actions occasioned by an ordinary negligence as this may negatively affect their judicial independence.⁵⁶ Therefore, **it is recommended to limit judges' disciplinary liability to intentional acts and to acts of serious negligence.**⁵⁷
84. Under Article 106 par 1 (3), a judge may be found liable for disciplinary offences if his/her conduct “disgraces [the] status of judge or undermines the authority of justice, in particular on the issues of moral, integrity, incorruptibility, congruence of the lifestyle of the judge with his/her status, compliance of other norms of judicial ethics and standards of conduct which ensure public trust in court [...]”. In this context, it is noted that the purpose of judicial ethics is to provide general rules, recommendations or standards of good behaviour that guide the activities of judges and enable judges to assess how to address specific issues which arise in conducting their day-to-day work, or during off-duty activities.⁵⁸
85. Ethical standards aim at achieving, in an optimal manner, the best professional practices.⁵⁹ this is entirely different from the purpose of disciplinary procedures, which aim to police misconduct and respond to inappropriate acts, which call for some form of disciplinary sanction.⁶⁰ According to the CCJE, “principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement

⁵⁵ *Op. cit.* footnote 8, pars 41 and 49 (11) (CCJE Opinion No. 17). See also *op. cit.* footnote 14, par 52 (2015 ODIHR Opinion on the Procedure for Qualification Assessment of Judges of Ukraine).

⁵⁶ See *op. cit.* footnote 20, par 49 (2015 Venice Commission-Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law Joint Opinion on the Law on the Judiciary and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine).

⁵⁷ *Op. cit.* footnote 7, par 66 (CoE Recommendation CM/Rec(2010)12).

⁵⁸ *Op. cit.* footnote 36, par 26 (2014 Joint ODIHR-Venice Commission on Disciplinary Responsibility of Judges in the Kyrgyz Republic); and *op. cit.* footnote 8, pars 44, and 46-48 (CCJE Opinion No. 3).

⁵⁹ *Op. cit.* footnote 7, Explanatory Memorandum, par 73 (CoE Recommendation CM/Rec(2010)12). See also the Evaluation and Compliance Reports of the CoE Group of States against Corruption (GRECO) of the Fourth Evaluation Round on Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors, <<http://www.coe.int/fr/web/greco/evaluations/round-4>>, which in particular review the ethical principles and rules of conduct concerning judges applicable in CoE Member States.

⁶⁰ *Ibid.* par 60 (CCJE Opinion No. 3); see also *op. cit.* footnote 7, pars 72-73 (CoE Recommendation CM/Rec(2010)12).

- or a civil or criminal offence”.⁶¹ Breaches of ethical norms should, in the end, usually result in moral rather than in disciplinary liability.⁶²
86. Moreover, due to the potentially serious consequences of a disciplinary procedure, the relevant provisions constituting the basis for such procedures, on the other hand, need to be based on clear and precise provisions outlining exactly which behavior is proscribed, whereas ethical norms are sometimes drafted in a rather vague and unspecific manner.
87. This is of particular relevance in the case of Article 106 par 1 (3), as the behavior described therein shall, according to Article 109 on disciplinary sanctions (in particular its pars 1 and 4), lead to more serious sanctions, including temporary removal, transfer to a lower-level court or dismissal (the application of more lenient sanctions is explicitly excluded). According to Article 109 pars 8 and 9, the conduct described in Article 106 par 1 (3) is even considered to be a ‘substantial disciplinary offence’, leading to the proposal to dismiss a judge. Given such dire consequences, it is especially important that the language of Article 106 par 1 (3) be drafted in a clear and precise manner, so as to avoid different forms of interpretation. **It is thus recommended to revise the language of this provision accordingly, and to delete all references to ethical norms.**
88. Moreover, where disciplinary proceedings lead to the dismissal of a judge according to Article 56 of the Law on the High Council of Justice, **it is recommended to consider expanding the right to appeal under Article 57 par 2, so as to also include a review of the merits**⁶³ (see par 58 *supra* where this matter is discussed in greater detail).
89. Article 109 outlines different types of sanctions, as well as the timeline within which they shall be imposed (par 11). Article 109 par 12 appears to suggest that a decision of the ECtHR that has found the facts which may constitute grounds for imposing a disciplinary sanction on a judge could lead to sanctions against this judge, without a domestic disciplinary procedure. In a situation where facts *may* constitute grounds for imposing a disciplinary sanction, it would however be important to verify these facts once more before a disciplinary board, applying procedures that would allow the respective judge to be heard and prepare his/her defence. Unless this is stated with greater clarity in other legislation, **it is recommended to revise this provision, to clarify that a decision of the ECtHR could, depending on the circumstances, lead to the initiation of disciplinary proceedings, but would not replace the need for such procedures.**

7. Gender Issues

90. The Law does not include references to gender issues with any level of specificity. In reforming the Ukrainian judiciary, it would, however, be extremely useful to analyze gender aspects and to determine which (legislative and/or policy-level) measures should be taken to improve the situation. As the OSCE/ODIHR has previously noted, the representation of women in the judiciary in Ukraine is not entirely balanced, with few women in high positions,⁶⁴ which is not in line with international standards and good practices.⁶⁵ This is compounded by a lack of published information on gender equality.

⁶¹ *Ibid.* par 48 (i) (CCJE Opinion No. 3).

⁶² *Op. cit.* footnote 36, par 27 (2014 Joint ODIHR-Venice Commission on Disciplinary Responsibility of Judges in the Kyrgyz Republic).

⁶³ *Ibid.* pars 112-113 (2014 Joint ODIHR-Venice Commission on Disciplinary Responsibility of Judges in the Kyrgyz Republic).

⁶⁴ *Op. cit.* footnote 14, par 41 (2015 ODIHR Opinion on the Procedure for Qualification Assessment of Judges of Ukraine).

⁶⁵ UN CEDAW Committee, General Recommendation No. 23 (1997) on Political and Public Life, par 5, <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23>>; Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), pars 182 and 190,

A continuation of this policy would further enhance the risk of underrepresentation of women, especially in the higher courts.

91. In case this has not yet been done, there are various ways to address this issue. First, it would be important to get a clear picture of the challenges that Ukraine faces in this area. **It is therefore recommended, as a first step, to collect and publish statistics on the gender composition of the judiciary, both as a whole and broken down by type and level of court.** Second, since the Law deals with a large number of different types of appointments, both of judges and judicial officials, and of judges to various representative and specialized bodies within the judiciary, **it should specify that account should be taken of the relative representation of each gender when such appointments are made.** This may require setting up appropriate mechanisms to ensure that gender requirements are introduced in both the nomination process to identify candidates, as well as in the respective rules and procedures governing their appointment.⁶⁶ Third, positive measures could also be taken to speed up the process of reform. **It is recommended to consider specifying in the Law that the procedure on judicial appointments should give preference, in case of a tie between two judicial candidates applying for a position, to the individual belonging to the under-represented gender in the particular (type of) court in question.**

[END OF TEXT]

<<http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>, particularly Strategic Objective G.1. “Take measures to ensure women's equal access to and full participation in power structures and decision-making”; CoE, Recommendation Rec (2003)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making adopted on 30 April 2002, <<https://wcd.coe.int/ViewDoc.jsp?id=2229>>; and OSCE Ministerial Council Decision No. 7/09 on Women's Participation in Political and Public Life, 2 December 2009, pars 1-2, <<http://www.osce.org/mc/40710>>.

⁶⁶ See e.g., *op. cit.* footnote 36, Sub-Section 5.1 (2014 Joint ODIHR-Venice Commission on Disciplinary Responsibility of Judges in the Kyrgyz Republic).