Strasbourg, 30 June 2010

CDL(2010)063 *
Engl. only

Opinion No. 588 / 2010

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PRELIMINARY COMMENTS

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

by

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Law of Ukraine on the Judiciary and the Status of Judges

1. The opinion of the Venice Commission is sought on a further draft law of the Ukraine on the Judiciary and the Status of Judges dated 31 May 2010.

2. The draft law is a revised version of the draft Law on the Judicial System and the Status of Judges of Ukraine (CDL(2009)111) which was the subject of an opinion of the Venice Commission adopted at its session on 12-13 March 2010. In this opinion I propose to concentrate on the differences in the text between this draft and the earlier draft which has already been the subject of an opinion.

General Comments

3. The general remarks made by the Commission in its earlier opinion are of course still relevant to the new draft. The Commission was critical of the degree of detail of the earlier draft law which it described as "quite voluminous" and as containing elements which were perhaps not necessary, or which could be delegated to subordinate legislation, as a result of which some of the rules were difficult to find and to know. The new text for the most part continues this detailed approach to lawmaking. There are in addition a number of examples of duplication where the same rule is to be found in more than one part of the text.

Fundamentals of Organization of Judicial Power

4. Section I (Articles 1-16) deal with the fundamentals of organization of judicial power. These provisions are largely unchanged from the earlier text and were previously described by the Commission as being for the most part unexceptionable and indeed admirable. There have been some changes in relation to the provisions for the automatic assignment of cases on a random basis which has been moved from Article 8 to Article 15. However, Articles 18 and 26.5 and 31.4 provide for the specialization of judges in particular classes of case. The provision in the earlier draft making the chief judge of each court personally responsible for ensuring the observation of the procedure of case assignment has been dropped and replaced by a provision requiring the regulation on automated case management to be approved by the Council of Judges of Ukraine upon agreeing it with the State Judicial Administration.

5. Some changes have been made to the provisions relating to the language of legal proceedings. There appear to be some lack of clarity in the provisions. The basic provision is that legal proceedings in Ukraine are to be conducted in the state language. However, courts are to ensure the equality of citizen's rights in terms of language. In the earlier draft a provision was made for the use of other languages in the cases and in the manner prescribed by the law. There is now a more specific provision relating to courts located in areas densely populated by citizens of another nationality in which case their native languages may be used along with the state language. This provision would, however, not appear to have any application to Ukrainian citizens whose mother tongue is other than Ukrainian. There is a right of persons to speak in their native language or a language they know but it is confined to persons who have no command of the language of the court proceedings. Such persons are entitled to a translator's services. It would be preferable to refer also to persons who have an insufficient command of the state language as in the earlier draft.

Courts of General Jurisdiction

6. Section II (Article 17 to 45) deal with courts of general jurisdiction, and set out the institutional framework, with detailed provisions for the four levels of courts, local courts, courts of appeal (their powers should be defined in the present Law – see however Article 27(4)), High Specialized Courts and the Supreme Court. The earlier opinions of the Venice Commission question the need for so many levels of court but it is accepted that this cannot be changed without a constitutional amendment. The existence of so many levels leads to over complexity and delay (see also paragraph 11 below on this point).

7. There are a number of changes in these provisions from the earlier draft while the creation and abolition of Courts of General Jurisdiction remains a function of the President of Ukraine, this function is now exercised upon the proposal of the Minister of Justice rather than the head of the State Judicial Administration and that proposal has in turn to be based upon a proposal from the Chief Judge of the relevant High Specialized Court. The number of judges in a court is no longer to be determined by the President of Ukraine on the basis of a motion by the Head of the State Judicial Administration, but is now to be determined by the Minister for Justice upon the proposal of the State Judicial Administration which in turn must be based on a proposal from the head of the respective High Specialized Court (Article 19(4)).

8. There are significant changes in the procedure for appointment and dismissal of the presidents of the four levels of courts (including the Chief Justice). Appointment to these administrative positions is now for a five year term rather than a three year term. The earlier draft provided for appointment by the President of Ukraine on the proposal of the High Council of Justice. Under the new draft the appointment is to be by the High Council of Justice upon the submission of the respective council of judges. This would appear to strengthen judicial independence. The Chief Justice is appointed for a period of five years, but his appointment remains a decision for the Supreme Court as in the earlier draft. However, whereas in the earlier draft removal of a judge from an administrative position was to be made by the President of Ukraine on the basis of a motion by the High Council of Justice, which was to be based on a decision by the Disciplinary Commission of Judges stating that the judge had unduly exercised his or her administrative powers, or, in the case of judges of High Specialized Courts, on the basis of a decision by the High Council of Justice themselves to that effect, the new provision allows for removal from administrative office by the High Council of Justice upon the proposal of the respective Council of Judges. However, the basis for a proposal for removal is not specified in the legislation (see Article 20(1)) and this would appear to be a retrograde step.

9. The function of presidents of the different courts (including the Chief Justice) has also been altered from the earlier draft. They are no longer given the function of providing organizational management of the courts' operation. However, they still have the function of defining the administrative powers of their deputies. It seems to be envisaged that day-to-day administration and management is to be in the hands of the deputy subject to this definition of powers. I must confess I do not altogether understand what is intended here or why this change has been made. In addition, instead of having the function of supervising the efficiencies of the activities of the court staff, the President or Chief Judge of Courts is to exercise control over the effectiveness of courts' staff, and to submit motions to the Head of the Territorial Office of the State Judicial Administration. It seems, therefore, that the control of the president of a court is to be indirectly exercised through the State Judicial Administration. Again, it is not clear to me in practice what the intention behind these apparently different arrangements is.

10. An innovation in the new draft is that the Minister of Justice is to take part in the work of the plenary session of High Specialized Courts (Article 36 (5)) and also the plenary session of the Supreme Court (Article 44 (4)). This appears to me to be a retrograde step from the point of view of the separation of powers.

11. The draft provides for a drastic reduction in the size for the Supreme Court (Article 39), which will lose its jurisdiction in civil and penal matters in favour of a new specialised high court (Article 31). Current judges of the Supreme Court will be transferred to the specialised high courts (transitory provision no. 4). This provision is a dramatic change, which requires in depth consideration. The new (small) Supreme court will hear only:

> *"1) review cases under unequal application by courts (court) of cassation of the same rule of substantive law in similar legal relations in the manner prescribed by the procedural law;*
> *2) review cases when international judicial institution the jurisdiction of which is recognized by Ukraine has established the violation of international obligations by Ukraine when deciding case in court;*
> *3) provide opinion on whether or not the actions of which the President of Ukraine is accused contain elements of state treason or other crime; submit, upon request of the Verkhovna Rada of Ukraine, a written motion stating that the President of Ukraine is incapable of exercising his/her powers for health reasons;*
> *4) apply to the Constitutional Court of Ukraine for constitutionality of laws or other legal acts as well as for the official interpretation of the Constitution and laws of Ukraine."*

The drastic reduction of the jurisdiction of the Supreme Court may be explained by the wish to reduce the number of instances of ordinary cases from four to three. However, the shift from civil and penal jurisdiction of the Court to more politically sensitive cases, combined with the transfer of the present judges to the specialised high courts raises concern. Even if the idea of the reduction of the jurisdiction of instances were accepted (other procedural measures could have the same effect), it should not be possible to 'fill' the new Supreme Court with new judges. Judges of the present Supreme Court should remain in the that Court on the basis of seniority or by drawing lots rather than appointing new judges. More time is needed to study the implications of this reform.

Judges, People's Assessors and Jurors

12. Section III (Articles 46-62) deal with the status of judges, judicial independence, judicial immunity, rights and responsibilities, judicial ethics, as well as the status of requirements for, engagement of and grounds and procedure for relieving the duty to act as a people's assessor. These provisions are almost identical to those in the earlier draft. The provisions in relation to judicial immunity which were criticized in the earlier opinion have been unchanged. The judicial oath is somewhat changed and is now longer and more elaborate. This has a knock-on effect on the power to dismiss a judge since one of the grounds of dismissal is violation of the oath. However, I do not see any difficulties with the contents of the oath which seems appropriate.

13. The more detailed provisions in relation to jurors have now been replaced by a very brief Article 62. The effect of this is to transfer detailed provisions in relation to jurors to the procedural law.

Procedure for Assuming the Office of a Professional Judge of a Court of General Jurisdiction

14. Section IV (Article 63-79) deal with the selection of judicial candidates, the procedures for appointing them to a judicial position, both the first appointment and the lifetime election.

15. The procedure for initial appointment as a judge has been changed somewhat. The eligibility conditions require a candidate to be a citizen of Ukraine, at least 25 years of age, to have higher legal education, and a record of at least three years service in the legal profession, to have resided in Ukraine for at least 10 years, and to speak Ukrainian. It is a barrier to appointment if a person has been found by a court to have limited legal capacity or legal incapacity, is suffering from chronic mental or other diseases which prevents him or her from performing judicial duties, or has an outstanding or unquashed conviction. It is no longer a barrier that a person is under investigation or awaiting a trial and this change is a welcome one.

16. The procedure for first appointment is as follows:- firstly, the high qualifications commission of judges announces a competition based on the estimated number of judicial vacancies which are open. A person who wishes to become a judge submits an application supported by a number of documents. These include the passport, personal data sheet and curriculum vitae, a copy of relevant academic certificates and degrees, an extract from the work record books certifying the record of service, a certificate of health, and consent to the collection, storage and use of information for the purposes of evaluating his or her fitness for judicial work and to be subjected to a background check. I do not see any difficulty with this except that the reference to collecting, storing and using information should I think specify what information is envisaged can appropriately be sought. A welcome provision is that the High Qualifications Commission is not entitled to demand documents other than those specified in the new draft.

17. The High Qualifications Commission then reviews the eligibility of persons, and those who meet the requirement can take an examination on general theoretical knowledge. If they pass it they go to specialized training and a specialized higher law school following which they do a special training of a practical nature at the National School of Judges. Following this, they can be admitted to take a qualification examination by the High Qualifications Commission and taking into account the results of this examination candidates are rated and put on a reserve list to fill vacancies. The High Qualifications Commission then conducts a selection taking into account the place of the candidates in the rating list and forwards to the High Council of Justice a recommendation to appoint the candidate to a judicial position.

18. The High Council of Justice then considers the recommendations of the High Qualifications Commission at a meeting and in case of a positive decision submits a motion to the President of Ukraine for appointment of the candidate and the President of Ukraine takes a decision. I fail to see the point of the requirements for the High Council of Justice and the President of Ukraine to approve the appointment unless the criteria on which a negative decision might given were to be set forth in the draft law. It seems to me that the criteria for appointment should be absolutely clear and as far as the journey to the decision of the High Qualifications Commission the law seems quite clear that it is to be based on results in the examination and an assessment of suitability taking into account the various documents which have to be supplied. However, no criteria on which the High

Council of Justice or the President of Ukraine might second guess the decisions of the High Qualifications Commission are set out and this is unsatisfactory in my opinion.

19. Article 67 of the draft provides that the selection of candidates (this refers to the initial examination in general theoretical knowledge) is to be anonymous. However, following this the High Qualifications Committee is to carry out a background check and has the right to collect information about the candidate, and make enquiries to enterprises, institutions and organizations in order to receive information. Organizations and citizens have the right to present to the High Qualifications Commission information they may have about a candidate (Article 67). I think it is unsatisfactory that these provisions do not specify what sort of information is in mind here. There would seem to be little point in having an anonymous examination if it can then be overridden by some unspecified information which is not reviewed on an anonymous basis in order to deprive a person of the opportunity to participate further in the process.

20. I should add that in some respects this chapter is somewhat confusing in its arrangement as frequently a reference is made to something (for example the examination on general theoretical knowledge which is referred to in Article 65(1)(4) and then details concerning this appear two articles on in Article 67 after the draft has jumped to deal with other matters.

21. Article 68 deals with training of candidates for a judicial position and this appears to be in order.

22. Article 69 then deals with the qualification examination. The written element of this examination is to be anonymous. According to Article 69(10), the results of the examination may be appealed to the High Council of Justice. It is not clear on what basis such an appeal can be taken or by whom (presumably only by the candidate).

23. Following the qualification examination there is then a competition for a judicial position. Article 70 deals with this in detail but to some extent repeats material which is previously set out in Article 65 (this is an example of the same provisions appearing more than once in this text). It is not clear to me what is the purpose of the competition in addition to the qualification examination. Finally, Article 70(6) refers to the High Qualification Commission making a recommendation to the High Council of Justice which in turn makes a recommendation to the President of Ukraine for appointment. Again, this repeats provisions earlier contained in Article 65.

Permanent Appointment of Judges

24. Articles 73-79 deal with the permanent appointment of judges. Candidates apply in writing to the High Qualifications Commission of Judges and are required to provide the usual information. Again there is a provision requiring the applicant's written consent to the collection, storage and use of information about her although there is also a provision prohibiting the demand of documents not prescribed by the Article. One of the matters which is to be taken into account are case consideration rates of the candidate. The High Qualifications Commission makes a recommendation and forwards the motion to the Verkhovna Rada which takes a decision whether to elect the candidate.

25. Article 75(3) requires the High Qualifications Commission in considering a candidacy to consider the petitions received from citizens, public organizations,

enterprises, institutions, central and local government bodies regarding the candidates judicial performance. This appears to me to be a recipe for the politicization of such appointments and to amount to a serious interference with the independence of judges in their first five years before they receive permanent appointment.

26. The earlier opinion of the Venice Commission also took the view that the involvement of the Verkhovna Rada in the appointment of judges to permanent positions was inappropriate and a threat to the independence of the judiciary. These provisions have, of course, a constitutional origin and remain in the new draft. What is more, there appears to be no limitation on the power of the Verkhovna Rada to accept or refuse a candidate, and they are not required to have any reason for rejecting a candidate, much less a good one.

Ensuring the Appropriate Qualification Level of a Judge

27. Section V consists of two articles and establishes the National School of Judges of the Ukraine under the control of the High Qualifications Commission of Judges. The provisions appear to be appropriate ones and in line with the principle of judicial control of judges' education and training.

Disciplinary Liability of a Judge

28. Section VI (Articles 82-98) deals with disciplinary liability of a judge and also makes provisions concerning the High Qualifications Commission of Judges of Ukraine. In the earlier draft there was a provision for a separate disciplinary commission as well as the High Qualifications Commission, but the functions of these two bodies have now been merged into a single body in the new draft. This represents a welcome simplification of the procedures.

29. Article 82 deals with the grounds for disciplinary action. These are a little more tightly defined than in the earlier drafts. Disciplinary proceedings on the grounds of violation of norms of procedural law is now qualified to refer only to "essential" violation and it is specified that this relates in particular to denying a persons access to justice on grounds not stipulated by law, violation of requirements for case assignment etc. A complaint in a disciplinary matter may be made by any person. It may not be an initiated on the basis of an application containing no evidence or on the basis of an anonymous application or report.

30. When a complaint is made the High Qualifications Commission of Judges appoints one of their members to verify the information contained in it. He or she is entitled to demand information, and, based on the results of the verification, writes an opinion presenting the facts and circumstances which have been found and a proposal either to open or dismiss a disciplinary case. The High Qualifications Commission then decide whether to do so. A copy of that decision is sent to the judge against whom the complaint is made. The judge is invited to the meeting of the High Qualifications Committee at which the disciplinary case is to be considered, and is entitled to give written explanations. The judge or his representative is entitled to give explanations, put questions to participants in the proceeding, express objections, file motions, and seek disqualification. The law does not, however, specify whether the judge is entitled to call witnesses in his support or to examine witnesses, or indeed whether such witnesses are to be called or whether the commission relies solely on the report from its member who conducted the verification. These matters should be clarified. The High

Qualifications Commission can then make a decision imposing a disciplinary sanction. If it thinks that the judge should be removed, it can send a recommendation to the High Council of Justice. The decision of the High Qualifications Commission must be given in writing and must state the reasons for its decision.

31. The judge concerned may appeal the decision to the High Council of Justice or the High Administrative Court of Ukraine (Article 88(1)). It is not clear from the draft in what circumstances one appeal mechanism rather than the other should be used but it appears from Article 96.4 that this is dealt with in the procedural law of the High Administrative Court.

32. Articles 89-98 deals with the High Qualifications Commission of Judges. Its functions in relation to the appointment and disciplining of judges have already been discussed and are repeated in the article concerning its powers. It is composed of 11 members of whom 6 are judges appointed by the Congress of Judges, two are persons appointed by the Higher Law Schools and Scientific Institutions, one person is appointed by the Minister for Justice, one by the Ombudsman of the Verkhovna Rada and one by the Head of the State Judicial Administration. The term of office is for three years.

33. The High Qualifications Commission is assisted by disciplinary inspectors to enable them to conduct a proper verification of the grounds for disciplinary action. Under Article 97(2) there are to be 33 disciplinary inspectors. This seems to be a rather large number and I wonder why it is necessary to specify in the legislation how many inspectors there should be. Presumably the number of inspectors should depend on the need for them which in turn should depend on the extent to which members of the judiciary in Ukraine are misbehaving.

Removal from Office of a Judge

34. Articles 99 – 111 deal with the removal of office from a judge. The provisions of this section are the same as the earlier draft except for the section dealing with the removal of a judge by the Verkhovna Rada of Ukraine. In place of the very elaborate provisions which are contained in the earlier draft, there is now merely a provision which states that the procedure for considering issues and making a decision on removal of a judge elected for a lifetime position shall be set forth by this law and the procedural rules of the Verkhovna Rada. The Verkhovna Rada has to act in plenary session. The discussion of the motion begins with a report by the Head of the High Council of Justice or another member of that body. The decision to remove a judge is to be taken by a majority of the Verkhovna Rada. If the removal of a judge does not receive the necessary majority of deputies, re-voting is to be conducted. This seems a strange provision as one would have thought that if there is not a majority to remove the judge the motion should fail.

35. It would seem that the thinking behind this provision is to avoid going any further than the provisions already contained in Article 126 of the Constitution of Ukraine. Those provisions include the violation by the judge of requirements concerning incompatibility and the breach of oath by the judge. Nevertheless, one would have thought there should be some procedural provisions which should set forth what is to happen in relation to such matters as rights of audience, rights of representation, rights to call witnesses and challenge the finding of the High Council of Justice, and so forth. It may be added that the requirements for appointments and dismissal by the Verkhovna Rada and the President of Ukraine derive from Article 128 of the

Constitution and Article 126 of the Constitution provides that the body which dismisses is also the body that elects or appoints a judge. As a result it is not possible to take these functions from the Verkhovna Rada without an amendment to the Constitution. Nonetheless, the conferring of this power on the Verkhovna Rada, taken with the failure to provide for procedural safeguards, in my view risks the politicization of the method of dismissal as well as appointment of judges.

Judicial Self-Government

36. Articles 112-127 of the draft law deal with the bodies of judicial self-government. These provisions are substantially the same as in the earlier draft and consequently the criticisms made in the earlier opinion remain applicable as in the earlier draft.

Support for the Professional Judge

37. These sections deal with judicial remuneration, vacation, calculation of the judge's length of service, provision of housing, provision for needs relating to professional activity and social insurance. These provisions are essentially the same as in the earlier draft and therefore the comments made in the earlier opinion remain applicable.

Status of a retired Judge

38. Articles 134-136 deal with this issue. The provisions have not substantially changed since the earlier draft. The earlier comments therefore remain valid.

Organizational Support for the Operation of Courts

39. Articles 137-150 deal with the issues of support for the operation of courts, in particular in relation to funding courts through the State Judicial Administration of Ukraine. This body is now to be subject to the Congress of Judges of Ukraine. The head is to be appointed and removed from office by the Council of Judges (Article 144.2). This represents an improvement for the principle of judicial independence over the previous draft Article 179.2 which provided for appointment and removal by the cabinet upon a motion submitted by the Prime Minister of Ukraine on the basis of a recommendation from the Council of Judges.

Conclusion

40. While there have been a number of improvements in the draft compared with the preceding draft, in particular the strengthening of judicial independence in a number of areas, the main criticisms made in the earlier opinion remain valid for the new text. In particular there are still fundamental problems in the system envisaged for the appointment and removal of judges, notwithstanding that improvements have been made. In particular the role of the Verkhovna Rada is deeply problematical. The system of judicial self-government is too complicated and there are too many institutions. In a number of other respects the text represents an improvement. The transfer of control over the State Judicial Administration to the judiciary is welcome, as is judicial control over training for judges.