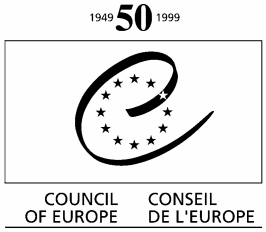

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION
ON THE DRAFT LAW OF UKRAINE
ON THE JUDICIAL SYSTEM

including individual comments by:

Mr Joseph Said Pullicino (member, Malta)
Mr Hjörtur Torfason (member, Iceland) and
Ms Hanna Suchocka (member, Poland)

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SUMMARY OPINION ON THE DRAFT LAW OF UKRAINE ON THE JUDICIAL SYSTEM

INTRODUCTION

The Parliamentary Assembly of the Council of Europe asked, on 1 February 1999, the European Commission for Democracy through Law to give an opinion on the draft Ukrainian laws on the judicial system and the public prosecutor's office. The draft law on the public prosecutor's office is still at an early stage of its consideration within the Ukrainian Verkhovna Rada and no text has yet been made available to the Commission. By contrast, the Commission received in October 1999 an English translation of the draft Law of Ukraine on the Judicial System (document CDL(99)64).

The Commission's rapporteurs (Ms Suchocka and Messrs Said Pullicino and Torfason) provided written comments on this draft (see Appendices I to III of the present document). At its 41st plenary session in Venice on 10 to 11 December 1999 the Commission endorsed the comments made by the rapporteurs and asked the Secretariat to prepare in co-operation with the rapporteurs a summary opinion, on the basis of the main comments made by the rapporteurs and of the discussions at the meeting in particular with respect to the military courts. The individual opinions should be appended to the summary opinion and the whole document then be forwarded to the Parliamentary Assembly.

The present document contains the summary opinion and the individual comments by the rapporteurs.

PRELIMINARY REMARKS

The Commission notes that the adoption of a new law on the organisation of the judiciary is of the highest importance for the establishment and consolidation of the rule of law in Ukraine. The importance of this law is reflected in the Joint Programme of co-operation between Ukraine and the Council of Europe and the European Commission which provides for Council of Europe assistance for the drafting of this and other related laws. The Commission notes that hitherto the Ukrainian authorities have not had recourse to Council of Europe assistance for the draft.

The present opinion was drafted at the request of the Parliamentary Assembly and the Commission's rapporteurs have not had the benefit of direct contacts with the authors of the text. Under these conditions many aspects of the draft have remained difficult to understand for foreign lawyers. For a more detailed opinion direct contacts with the authors of the draft would appear indispensable. The present opinion therefore has a summary character and the individual comments by the rapporteurs are to be considered as provisional. The rapporteurs would be available to develop them further on the basis of discussions with their Ukrainian colleagues.

A particular difficulty for the rapporteurs was that the text does not give a comprehensive picture of the judicial system of Ukraine but can only be understood in the context of the procedural codes and some other laws such as the law on the status of judges. While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one

comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary. By contrast, the draft refers for many such questions to other laws. It seems overburdened with administrative detail not requiring regulation by statute while not being precise enough in dealing with questions of substance. For example, the provisions on specialised courts in Articles 32 and 33 provide little guidance as to the jurisdiction of these courts. In this respect it would seem inter alia desirable to state clearly that the general courts have residual jurisdiction, i.e. that they are competent to deal with all justiciable matters which are not specifically referred by law to the specialised courts within the overall system

The present summary opinion is limited to draw attention to major concerns the draft raises in particular with respect to the independence of the judiciary. More detailed and technical comments appear in the appended individual opinions.

GENERAL COMMENTS

The principle of judicial independence

The Constitution of Ukraine, in particular its Articles 126 and 129, guarantees the independence of judges. It is to be welcomed that this principle is clearly restated in Article 4 of the draft. The detailed provisions of the draft however often do not seem conducive to its implementation in practice. In a country lacking a tradition of judicial independence it would by contrast appear particularly important to devise particularly strict rules guaranteeing judicial independence in practice.

The appointment of judges

According to Act. 128 of the Ukrainian Constitution judges are first appointed for a five-year term by the President of Ukraine and then elected for a permanent term by the Verkhovna Rada by the procedure established by law. It follows presumably that it was not possible for the drafters of the law to entrust this function directly to the High Council of Justice set up in accordance with Art. 131 of the Constitution.

In the light of Art. 131, one would expect that the High Council of Justice should have a dominant or central role in the selection of judges for appointment. However, the draft law does not seem to explain this role very clearly, and it also appears to assign a central function to the Supreme Court of Ukraine and the Chief judge of that Court and of the supreme specialised courts (cf. Art. 70(1) and (2) and Art. 59 (1), subpara. 6 of the present text). The draft law also does not seem to explain how the proposals for appointment are presented to the Verkhovna Rada, i.e. whether the proposals are forwarded to the Assembly by the President of the Republic or directly by the judicial bodies, and whether there will be a proposal of one candidate for each judicial seat to be filled or a proposal involving the Assembly in a selection between more than one candidate. Perhaps the Law on the Status of Judges is designed to provide the answers, but we understand that this Law still is due to be revised. Accordingly, the point must be raised whether these matters are being provided for with sufficient clarity and with sufficient emphasis on judicial independence.

Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are according to the draft elected by the Verkhovna Rada for a five-year term. This solution has no basis in the Constitution and is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable.

Territorial organisation

It would seem that the territorial organisation of the court system under the draft would be based on the administrative structure of Ukraine, both as regards the local general courts of first instance and the establishment of a court of appeal in each oblast. While the overriding criteria determining the territorial structure of the court system should be the needs of the court system itself and the facility of access by people to the courts, such a system is acceptable in principle. In a new democracy such as Ukraine it would however seem preferable to avoid such a link between administrative division and court organisation to make it more difficult for the administration to exert undue influence on the courts.

According to the Concluding and Transitional Provisions of the draft law, it would seem that the first step in establishing a court structure under the new Constitution will be to legitimise the existing local and appeal courts and permit them to carry on their functions more or less as presently constituted. At the same time, it is difficult to determine from the said provisions and the text of the draft law itself what further reform is intended.

Establishment of a strictly hierarchical system of courts

Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches.

The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. 50.1) the possibility to address to the lower courts “recommendations/explanations” on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors.

Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium.

The military courts

Another major concern is the system of military courts established by the draft. According to the text there will be courts martial of garrisons (Art. 20), military courts of appeal (Art. 25) and a military division of the Supreme Court (art. 52). Even the judges within the military division of the Supreme Court will have military ranks (see Art. 59.1.12)! Therefore this division of the Supreme Court will also have the character of a military court.

It is true that military courts exist in other countries and are not objectionable as such. The proposed system nevertheless goes beyond what is acceptable. In a democratic country the military has to be integrated into society and not kept apart. Democracies therefore generally

provide for the possibility of appeals from military courts to civilian courts and a final appeal to a panel composed of military officers appears wholly unsatisfactory.

The extent of jurisdiction of the military courts is not defined in the draft but according to information given to the rapporteurs such courts are competent in cases involving soldiers having no relation with their military duties such as the divorce of a military serviceman. Such a definition of competence *ratione personae* and not *ratione materiae* would seem incompatible with Article 125 of the Ukrainian Constitution according to which the courts of general jurisdiction are based on the territorial principle and the principle of specialisation and extraordinary and special courts shall not be permitted. Furthermore the Commission draws the attention of the Ukrainian authorities to the case law of the European Court of Human Rights, in particular the judgment of 9 June 1998 in the case of Incal v. Turkey. According to this case law even the legitimate fear that a military judge may be influenced in a case by undue considerations is sufficient to constitute a violation of the right to an independent and impartial judge. A system of granting jurisdiction to military courts for cases involving civilians and where there seems no need to have recourse to military judges is bound to produce violations of the Convention.

With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law of Ukraine "On Universal Conscription and Military Service". The Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights.

The system of economic (arbitration) courts

The draft provides for a system of separate economic (arbitration) courts. Such systems exist in various countries and the need for judges to specialise in various areas of commercial law to efficiently deal with commercial disputes justifies dealing with commercial cases separately. It is however more common in Western Europe to use special panels of the ordinary courts for such matters, often providing for the involvement of merchants as lay judges. By contrast, the Ukrainian solution appears problematic since it is a simple continuation of the Soviet model which was based on different legal regulations for individuals and socially owned entities. The conceptual justification for this model does not exist in a market economy in which inter-enterprise relations are governed by private law. Under these circumstances the maintenance of the old system appears excessively conservative and the transfer of these cases to economic divisions of the ordinary courts as e.g. in Poland would have given a much clearer signal of the willingness to reform.

The administrative role of the courts

The system of court administration provided for in the draft seems complex and unusual. The draft law (Arts. 79 et seq.) sets up a State Court Administration of Ukraine to perform the tasks traditionally carried out by government departments of justice. Most of these tasks are carried out by the Head of the State Court Administration (Art. 80.1). The draft law does not deal with the relationship in these and other respects between the judiciary and the Ministry of Justice, which is not mentioned in the text. It seems that the Ministry is not intended to have a role in the organisation of the courts, and the extent of its political accountability in relation to the functioning of the court system is not clear. In any case it seems necessary to define the mutual relation between the Minister of Justice and the State Court Administration.

On the other hand the Supreme Court (Art. 50) and particularly the Chief Judge of the Supreme Court (Art. 59) are entrusted with important administrative functions concerning the courts in general which may be regarded as an excessive administrative burden for the judges concerned. The relations between State Court Administration and Supreme Court do not appear particularly clear. The Head of the State Court Administration is "answerable to the Head of the Supreme Court of Ukraine and accountable to the Council of Judges of Ukraine". The relations between other courts and the State Court Administration are not defined.

The general impression is one of an excessively complex and top-heavy administrative system which lacks transparency.

Another important deficiency is the absence of provisions regarding the establishment of self-governing authorities and the relationship between such bodies and individual presiding justices. The precise specification of such mutual rights and responsibilities is crucial for the proper operation of courts. Striking a balance between the jurisdiction of presiding justices and judicial governing authorities is fundamental in order to distinguish between purely judicial and administrative functions. The absence of clear provisions on this issue in the submitted draft may lead in the future to disputes regarding the interpretation of the scope of power exercised by the head of the court and the self-government. It may also mean that, as a matter of fact, it intends to imitate the solutions adopted in the previous system, which do not comply with current European standards.

CONCLUSION

The Commission welcomes that the authors of the draft have undertaken to establish a judicial system based on the principle of the independence of the judiciary from the executive as stated in the Constitution of Ukraine. However it is of the opinion that this goal has not yet been achieved by the draft submitted to its consideration and that a thorough review of the text seems necessary.

A P P E N D I X I

Comments by Mr Joseph Said Pullicino (member, Malta)

Introduction

The Venice Commission in its co – operation with several countries on matters principally related to constitutional reform, has been requested to provide an opinion on the draft law of Ukraine on the Judicial System; *"the constant enlargement of the Commission and the scale of the discussions which take place in the context of its activities show that the Commission has become an ideal forum for the exchange of information, experience, ideas and projects in the constitutional field"* (Annual Report of activities for 1996, Venice Commission). With respect to Ukraine the Commission took a highly active role in the process of drafting a Constitution. Ukraine has been faced with the difficult task of creating a genuine legal culture after deformations of the old command system.

The draft law of Ukraine on the Judicial System (hereinafter referred to as "the Law") premises as its objects and reasons, the setting-up of the procedure for the organization and activities of judicial power in Ukraine with the declared aim of ensuring protection of the rights of human and citizens' rights, and the rights and the lawful interests of legal entities and the State by an open, fair and impartial Court. In fact, it mainly deals with the organisational structure of the system and fails to regulate such matters as concern the selection of persons to be recommended for office of judge, issues concerning disciplinary measures which may be taken as judges, the establishment, functions and powers of the High Council of Justice and the norms it follows in the regulation of its own procedures, the composition and powers of the Judges' Qualification Commission similar issues.

It is understood that a number of these vital issues necessary for the proper administration of justice, are or are intended to be regulated by other legal instruments that would fall outside the ambit of this opinion. It remains therefore a moot point whether the law under review – whatever its merits or demerits on the organisational aspect of the system – actually fulfils its avowed aims above stated. For such a comprehensive opinion to be given one would have to examine this draft Law in the light of other legal instruments.

One has also to state that my opinion must of necessity be understood to be given within the parameters of an examination of the text of the Law in the light of the established principles of due process accepted in a modern democratic society, but without any real first hand knowledge of the political, social and economic context within which the Law has to be put into effect. One has to also take into account the historical fact that the Ukraine belongs to that group of post – totalitarian countries that has been in existence as a sovereign country for less than ten years. It is a new democracy in which the basic democratic institutions are still taking shape and in which the concept of separation of powers is still somewhat blurred. One cannot, when discussing judicial systems in such an ambit, ignore the fact that in such conditions there could still be traces of traditional interference by both the legislative and the executive power in the activities of the judicial power. Accusations of corruption and subservience to the political authority, that is still in many respects authoritarian if not totalitarian, are not unknown.

The lack of a strong tradition of independence and impartiality within the judiciary makes it even more imperative that the basic structures of the judicial system be strengthened to ensure a strong judicial power that would provide an effective and full guarantee for the protection of human rights and freedoms. A system which would ensure access to all citizens to impartial and

independent tribunals for the determination of their civil rights and obligations as well as a fair trial with proper constitutional safeguards in criminal matters, and this within a reasonable time.

General Considerations

These basic reflections suggest the following general considerations among others:

(1) This opinion can only be considered to be a first reaction to the text of the law aimed at establishing whether it satisfies the minimum requirements that a judicial system should have in a democratic society. A matured and in depth opinion would require a detailed examination of each and every provision of the Law as well as a study on how it relates to other relevant legal instruments in the context of the reality of Ukranian society.

(2) The Law obviously envisages a hierarchically arranged judicial system to ensure the access to justice for all. A system that had to conform to Article 124 of the Constitution which provides that:*"judicial proceedings are performed by the Constitutional Court of Ukraine and courts of general jurisdiction"*. Article 125 provides expressly *inter alia* that *"the creation of extraordinary and special courts shall not be permitted"*. The Law in theory purports to follow the Constitution laying down a system of courts of general jurisdiction consisting of local courts from which there are appeal courts, and specialised courts from which lays an appeal to supreme specialised courts. The Supreme Court of Ukraine provides a last recourse of appeal in exceptional cases from all courts, apart from other functions stipulated in Article 51 of the Law. In practice however it would appear that the law itself provides for other courts that would not strictly speaking qualify as courts of general jurisdiction. Care should be taken not to confuse the term *"principle of specialization"* that implies a court of general jurisdiction to which all citizens are subject and which is qualified by a clearly defined competence linked to a specialization, and the term *"special courts"* as defined in Article 125 of the Constitution which means *ad hoc* tribunals set – up to determine specific cases to be tried in a special manner outside the general jurisdiction

(3) It would appear that the draft Law makes a general effort to provide a judicial system that would be an effective separate power from the other organs of State by providing the necessary organizational structures for it to operate independently with its own administrative set – up and financing. The proposed system, even though it is in my opinion a top heavy one, would be a workable one in a democratic environment in times of political normality. Even so I believe that the judiciary is unnecessarily burdened by administrative duties that could very easily be carried out by competent executives working within the framework of an autonomous body constitutionally set–up, under the overall supervision of the State Court Administration (**Article 79** of the Law). Great care should also be taken to ensure that the conditions under which judges perform their duties, should be uniform, accessible and available to all. In this respect, the initial appointment of judges for a term of five years is only acceptable if these judges are to serve in a court of first instance and with reservations made later on in this opinion.

The independence and impartiality of the judiciary, especially in a country where these concepts are relatively novel, should be constantly nurtured and protected. The difficulty in finding the right candidates to fill judicial posts and having the

correct democratic orientation, make it impellent on the State to provide adequate and constant training in this difficult and delicate field.

Further Comments

Article 4 of the proposed law provides that judges *"are independent of any influence whatsoever"*. The primary judicial function is to determine disputes, whether between private persons or between a private person and a public authority. In a State governed by the rule of law the judicial authority is the guarantee of fundamental human rights. Judges must apply the law and are bound to follow the decisions of the legislature as expressed in the statutes. It must be possible for a judge to decide a case without fear of reprisals, whether from the executive or wealthy corporations. This does not mean that judges are to be isolated from society and immune from public opinion and the discussion of current issues in the media. The independence of the judiciary from interference by the executive is one, if not the most important principles of constitutional law. The Constitution of Ukraine confirms that: *"In the administration of justice, judges are independent and subject only to the law"* **(Article 129)**. Similarly, **Article 126** of the Constitution stipulates that *"The independence and immunity of judges are guaranteed by the Constitution and the Law of Ukraine"*.

The measures which have been adopted and are being proposed aim at creating a judicial system where judges are guaranteed independence in the execution of their duties with a number of reservations. With this respect particular reference is made to:

(i) **Appointment of judges**: **Article 128** provides that professional judges are first appointed by the President of Ukraine for a term of five years. After this period judges are appointed by the Verkhovna Rada of Ukraine. The law distinguishes between professional judges and people's assessors and jurors. The Qualification Commission of Judges, may recommend a citizen of Ukraine who satisfies certain conditions for office of judge. It would appear that prior to appointment it is not mandatory to seek the recommendation of this Commission. The Constitutional Court is composed of eighteen judges (**Article 148** of the Constitution), and half its members are appointed by the President of Ukraine and the Verkhovna Roda. In fact, the President appoints one – third of the judges as members of the Constitutional Court. There appears to be no specific provision which deals with the situation where no judges are appointed by the President of Ukraine and the Verkhovna Rada of Ukraine. Therefore, the functioning of the Constitutional Court may be obstructed in practice by the non-appointment of judges. Remedial clauses should be included to ensure the automatic composition of a Constitutional Court in case of inactivity by the Executive or the Legislature.

With regard to the appointment of judges, reference is made to Recommendation (94) 12 of the 13th October 1994 on the Independence, Efficiency and Role of Judges by the Committee of Ministers of the Council of Europe. This states that *"the authority taking the decision on the selection and career of judges should be independent of the government and the administration"*. That recommendation also says *"that all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit having regard to qualifications, integrity, ability and efficiency"*. The provisions of the law should, in my opinion be amended to fully respect this recommendation.

(ii) **Term of Office**: Contrary to what takes place in the majority of judicial systems, the first appointment of a judge is for a period of five years **(Article 128)**. This in itself could inhibit forthright independent – mindedness. It is clear that, if a judge enjoys security of tenure once he has been appointed – meaning not that he will remain at the same post in a single court throughout his working life, but that he is guaranteed a career as a judicial officer u p to the age

of retirement – his independence will in principle be greater than if he has to worry abut re – election after a few years. On the other hand, judges who sit in the Constitutional Court are appointed for a nine year term and may not be re-appointed to office (**Article 148** of the Constitution) on the lapse of this period. Other judges are appointed indefinitely (**Article 6** of the draft law).

(iii) **Security of Tenure**: The ideal situation is where a procedure is established whereby a judge is removed from office either for mental or physical incapacity or misbehaviour in pursuance of the report of a judicial tribunal of inquiry, and no other ground. **Article 126** of the Constitution lays down the instances where a judge is dismissed from office, following a declaration to that effect *"by the body that elected or appointed him/her"*. The Constitution of Ukraine also contemplates the possibility of a *"voluntary dismissal from office"* **(Article 126)**. It is not clear what this tantamounts to and the introduction of a clear definition is appropriate. On the other hand, with respect to the possibility that a judge could be dismissed from office in the event of *"the breach of the oath"*, it would have been appropriate if the Constitution or the draft Law defined the oath taken by a judge on appointment.

(iv) **Salaries of Judges**: It would appear that financial security is afforded to the judiciary by the Law of Ukraine "On the Status of Judges" and "On State Service" (**Article 87** of the draft law). Ideally though allowances, leave and pension may be determined by Parliament, their variation to the disadvantage of the Judge during his term of office should be prohibited. This would ensure that any particular Judge is not adversely affected by any changes made by law since his appointment.

(v) **Insulation from politics**: **Article 127** of the Ukraine Constitution prohibits a judge from politically partisan activities and/or being a member of a political party. Although judges should be free to criticize the wording and content of legislation and the conduct of members of the Executive, they should be careful not to take sides in matters of political controversy.

(vi) **Immunity of judges**: In terms of **Article 126** of the Ukraine Constitution, a judge may be detained or arrested with the consent of the Verkhovna Rada of Ukraine. Therefore, members of the judiciary are not guaranteed immunity from detention or criminal prosecution. Immunity should not serve to place judges above the law. However, ideally the decision whether a judge should be arrested or remanded in custody should be left in the absolute discretion of the High Council of Justice and not to another organ of the State.

(vii) **Use of judges for extrajudicial powers**: some hold the view that the independence of the judiciary is undermined if judges are entrusted with functions alien to the judiciary. In various countries, judges conceive this function to be an aspect of their duty towards the State. Although in general there are various objections to the advisory judicial opinion, they have only a tenuous connection with judicial involvement in executive policy. It is interesting to note that the Constitution of Ukraine contemplates the situation where following a request of the President of Ukraine or the Cabinet of Ministers of Ukraine, the Constitutional Court provides an opinion on the conformity with the Constitution of Ukraine of international treaties (**Article 151**). Similarly the Verkhovna Rada (Parliament) of Ukraine, may request an opinion on the observance of the constitutional procedure for the impeachment of the President of Ukraine. On the other hand, the draft law contemplates that one of the functions of the Supreme Court of Ukraine is to *"adopt resolutions in which it sets forth its conclusions on the possibility of the President of Ukraine exercising his powers due to his state of health or evidence of indications of high treason or another crime in acts of which he is accused"* (**Article 55** of the draft law). This is a novel provision that positively underscores the independence of the judiciary as a separate power giving it a constitutional relevance.

(viii) **Establishment and Elimination of Courts**: In terms of **Article 106** of the Constitution of Ukraine, the President of Ukraine establishes courts. The draft law on the Judicial System provides in **Article 19** that courts of general jurisdiction are liquidated by the President of the Ukraine following representations by the Chief Judge of the Supreme Court of Ukraine or the Chief Judge of the appropriate Supreme Specialised Court. In this respect clarification is required in order to establish in what instances and for what reasons a court may *"liquidated"*. Furthermore, it must be clarified whether the representations made by the above-mentioned officials are of a restrictive nature on the President or whether they are merely a recommendation having no binding effect. Without doubt, a provision which grants to the President such power is apt to undermine the independence of the judiciary. A President having executive powers should never be accorded the absolute right to liquidate or eliminate a court established in terms of the Constitution. This would render extremely difficult if not impossible the judicial review of all administrative decisions for which the President is ultimately responsible. It would appear that the Constitutional Court does not qualify as a court of general jurisdiction and thus does not fall under the procedure for the establishment and liquidation of courts as stipulated in Article 19 of the draft law.

(ix) **Contempt of Court**: The draft law also provides that the independence of judges is guaranteed by the liability set by law for contempt of court (**Article 4(8)(5))**. In my view this has nothing to do with judicial independence. Disobedience to a court order is a civil contempt, punishable in the discretion of the court. It is a means whereby the courts may prevent or punish conduct that tends to obstruct, prejudice or abuse the administration of justice, whether in a particular case or generally. This branch of the law operates in the interests of all who take part in court proceedings, as judges, counsel, parties or witnesses. It also imposes restraints upon many persons, particularly on the press. In this respect care must be taken to ensure the observance of the principles of natural justice and due process as well as the fundamental right of freedom of expression.

(x) **Managerial Duties**: In its attempt to ensure and safeguard the independence of the judiciary, the draft law contains a number of provisions whereby judges are afforded managerial duties. Thus, for example in terms of **Article 22** of the draft law the Chief Judge of the local court has the duty of engaging for employment and dismissing members of the court staff, giving them ranks as State civil servants, applying incentives and imposing disciplinary sanctions according to law. He also has the duty to organize the work of enhancement of the skills of members of the court staff and carries out organisational management of the activities of the court. In addition to these duties he is to exercise the powers of a judge. The same duties are attributed to the Chief Judge of the Court of Appeal (**Article 27** of the draft law). This is a positive approach in that the staffing and information support necessary for the judiciary to dispense justice is held outside the realm of the other organs of State thereby strengthening and affirming the autonomy of the judiciary. However, this has to be interpreted in the context of what was stated above under the heading "General Considerations".

High Council of Justice

Article 131 of the Ukraine Constitution provides for the setting up of a High Council of Justice enjoying an executive and consultative function. As stated in the Draft Consolidated Opinion of the Venice Commission on the Constitutional Aspects of the Judicial Reform in Bulgaria (1999), *"there is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State"*. Article 131 reads:

"The High Council of Justice operates in Ukraine, whose competence comprises:

1) *forwarding submissions on the appointment of judges to office or their dismissal from office;*

2) *adopting decisions in regard to the violation by judges and procurators of the requirements concerning incompatibility;*

3) *exercising disciplinary procedure in regard to judges of the Supreme Court of Ukraine and judges of high specialised courts, and the consideration of complaints regarding decisions on bringing to disciplinary liability judges of courts of appeal and local courts, and also procurators".*

The High Council of Justice consists of twenty members. The Verkhovna Rada of Ukraine, the President of Ukraine, the Congress of Judges of Ukraine, the Congress of Advocates of Ukraine, and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions, each appoint three members to the High Council of Justice, and the All-Ukranian Conference of Employees of the Procuracy – two members of the High Council of Justice.

The Chairman of the Supreme Court of Ukraine, the Minister of Justice of Ukraine and the Procurator General of Ukraine are ex officio members of the High Council of Justice".

The scope of setting – up such institutions is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters referring to the appointment of judges and the exercise of disciplinary functions. It is uncontested that independence of judges should be maintained against interference of: the executive, since it would be seriously compromised if decisions concerning the careers of judges were in the hands of the executive; the legislature, since judges are to apply the law, not other expressions of the will of parliament; their superiors in the judiciary itself, since no judge in carrying out his duties should be bound to obey the orders of a judge on a higher level; other powers of the State such as pressure groups. Ultimately, judges are to be independent from themselves as like all other human beings, they are subject to prejudice, hatred, passion and particular likes and dislikes. The establishment of an effective Justice Council or Judicial Service Commission ensures that the conduct of judicial affairs is freed from the grip of the executive by placing its function outside the latter's control. It is also a means to provide the judiciary with a management system that prevents judges from becoming an exclusive and inward looking caste and encourages a certain amount of co – ordination with those who represent the will of the people, while at the same time guaranteeing its independence and freedom from manipulation.

Entrusting the nomination of judges to this institution would have been preferable in an attempt to reduce the risk of nominations which may be motivated by political considerations and thereby also providing a wider base of different opinions for the choice of judges. However, as noted it is the Verkhovna Rada which appoints permanent judges (except members of the Constitutional Court). In terms of **Article 70** of the draft law, the Supreme Court of Ukraine and the Qualification Commission participate in that they provide representations and conclusions respectively, although it is not clear what effect such participation has on the final decision. The presence of the Minister of Justice and other officials chosen by the Executive and the Verkhovna Rada is not advisable in an institution which ideally should be a politically neutral body. In an established democracy, where the independence of the judiciary is well established, no such difficulty would be encountered. On the other hand, one might argue that the fact that the Council has mainly an advisory role does not impinge on the concept of independence. The monitoring of activities of the judiciary by other organs of the State is on the

other hand justified. Thus, the presence of a number of members who do not for part of the judicial system would not have an adverse effect. Furthermore, the functions of this institution do not extend to he organization of the judicial system in the country, which is vested in the State Court Administration of Ukraine.

Unfortunately no part of the law on the judicial system deals directly with this institution, which normally serves as an effective instrument to serve as a watchdog of basic democratic principles. However, it appears that that there is *ad hoc* legislation dealing with the High Council of Justice (vide **Article 70(5)**). Ideally such an institution should have the scope of securing the independence of the judiciary by ensuring that matters which relate to organisational requirements are not influenced by the Executive. It should also provide the judiciary with a management system that would ensure a measure of accountability. Under the draft law the State Court Administration of Ukraine is the authority established to provide and ensure organisational support for the activities of local, appeal and specialised courts (**Article 79**). It appears that this institution is autonomous from the Executive, notwithstanding that in terms of **Article 79** the members of staff are civil servants. Furthermore, it seems that the authorities of the Executive may not exercise their competence in the process of drafting, execution and accounting of the budget of the judiciary which is a constituent part of the annual state budget. In fact:

(i) The head of this institution is the Head of the State Court of Administration of Ukraine who is appointed to office and dismissed by the Supreme Soviet of Ukraine on the representations of the Chief Judge of the Supreme Court of Ukraine and with the agreement of the Council of Judges of Ukraine.

(ii) The Chief Judge may not be a member of the Executive authorities.

(iii) This institution appears to be above the realm of party politics. The members are not elected on party lines. In fact deputies are appointed to office and dismissed from it by the Presidium of the Supreme Court of Ukraine on representations made by the Chief Judge of the Supreme Court of Ukraine and with the agreement of the Council of Judges of Ukraine.

Academy of Judges of Ukraine

Also positive is the setting up of an Academy of Judges of Ukraine which aims at ensuring that persons having a higher legal education are trained for the office of judge, and after appointment aims at enhancing the kills of judges and members of the court staff. Another function of the Academy is to analyze foreign judicial systems, with the scope of amelioration the administration of justice in Ukraine. It has to be emphasized that, as a rule, judges must possess certain essential qualifications and meet certain criteria (general experience, strength of character, etc.). In this regard I emphasize once more the need to instil in the members of the judiciary, a culture of independence and impartiality and training in this respect is imperative.

Disciplinary proceedings

Although one would have expected the draft law to contain a number of provisions dealing with the exercise of disciplinary procedure as contemplated in **Article 131** of the Constitution, this is absent. Thus, the position is not clear as to what machinery, if any, exists in the implementation of Article 131(4) of the Constitution. A positive note is that it would appear that transfer of judges is not considered as being a disciplinary measure which may be adopted. In fact **Article**

71 of the draft law deals with the procedure of transfer of a judge and provides: *"A judge may be transferred with his or her consent …."*. On the other hand this provision is undermined by Article 6 of the draft law. In fact the law contemplates the *"liquidation of a court"*. In the event that the presiding judge does not agree to be transferred to another court he *"shall be dismissed from office by the authority which selected or appointed them on grounds of retirement or at their own request"*. A measure which will certainly give rise to debate since it could very well be used as a tool to weaken and threaten the independence of the judiciary. Provision must be made to ensure that members of the judiciary facing disciplinary charges would be accorded adequate means of defence, a fair hearing in which the principles of natural justice are observed. There appears to be no provision in this respect in the Law, though it is not excluded that this is provided in some other legal instrument.

Appointment to Certain Office

Another aspect which warrants comment concerns the method of appointment of certain offices within the judiciary. The Constitution in **Article 28** contains an exhaustive list of the functions and duties of the Supreme Soviet of Ukraine. This includes the appointment of judges. However, the draft law stipulates for example that the Chief Judge of the Local Court (**Article 23** of the draft law) and the Chief Judge of the Court of Appeal (**Article 29** of the draft law) are appointed by the Supreme Soviet of Ukraine following representations of the Chief Judge of the Supreme Court of Ukraine and on recommendation of the Council of Judges of Ukraine. This contradicts the Constitution which does not confer such powers to the Verkhovna Rada. There appears to be no justification for such a provision, and the chairmen of these courts may be elected by the judges sitting in such courts. In fact the Constitution itself provides for example that the Chairman of the Constitutional Court of Ukraine is elected from amongst the judges presiding over such court (**Article 148** of the Constitution). Similarly, the Chief Judge of the Supreme Court is appointed by secret ballot by the Plenum of the Supreme Court of Ukranian (**Article 64** of the draft law) for a term of five years.

Apparent Contradictions

The draft law on the Judicial System also contains a number of provisions which contradict other provisions entrenched in the Constitution of Ukraine and which require revision. Thus for example:

- Article 3 of the draft law provides that *"the judicial system in Ukraine is established by the Constitution of Ukraine, the present Law and other laws of Ukraine"*. On the other hand, the Constitution grants the President of Ukraine a legislative function. In fact, **Article 106** of the Constitution stipulates that *"The President of Ukraine, on the basis and for the execution of the Constitution and the laws of Ukraine, issues decrees and directives that are mandatory for execution on the territory of Ukraine"*.

- The principle of specialisation on which courts are intended to be built according to the Constitution (**Article 125**), do not correspond to the draft Law which only creates economic and administrative specialised courts (**Article 33**).

- **Article 127** of the Constitution provides that persons who satisfy the conditions specified therein may be recommended by the Qualification Commission of Judges. However, **Article 68** of the draft law would appear to

impose a mandatory recommendation by the Commission prior to appointment. Furthermore, there is no provision which stipulates the manner in which the members of this Commission are appointed.

- **Article 126** of the Constitution stipulates that a judge is dismissed from office on attaining the age of sixty – five. However, **Article 68** contemplates the possibility that a judge continues to work and perform his duties as a judge not withstanding that he has the right to retire.

- **Article** 131 of the Constitution lays down that the High Council of Justice is to forward submissions on the dismissal from office of judges. Yet **Article 70(4)** of the draft Law provides that dismissal depends on a decision of Supreme Council of Justice where the judge has infringed requirements of incompatibility (listed in **Article 127** of the Constitution). In other instances dismissal is based on the conclusion reached by the Judges' Qualification Commission which appears to be an autonomous and different institution from the High Council of Justice, even though the Constitution only makes reference to this organ in the appointment of judges.

- **Article** 5 of the Constitution provides that *"judges are immune"*. However, in terms of Article 126 a judge may be arrested and detained with the consent of the Verkhovna Rada of Ukraine.

Points of Clarification

I end this contribution by referring to certain provisions of the Law which amongst others require clarification:

(i) **Article 8(5)** provides: *"Execution of court judgements is entrusted to the State executive service and the service enforcing punishments"*. Does this mean that the courts have no means of control once a judgment is delivered ? Any criticism is not intended to be attributed to the fact that court judgements are enforced by persons employed by the State. However, the manner in which judgments are enforced should be regulated by law and subject to the review of the courts.

(ii) **Article 19**: *"courts of general jurisdiction are established and liquidated by the President of the Ukraine on the representations of the Chief Judge of the Supreme Court of Ukraine or the Chief Judge of the appropriate Supreme Specialised Court"*. The Law does not specify whether the President of the Ukraine still enjoys the power to liquidate a court nothwithstanding that the Chief Judge is contrary to such a liquidation. The word "representations" occurs frequent in the draft Law. It is not clear what the connotations of this term are precisely and whether it means "consultation" or "recommendation" or "with the approval of". This could be a linguistic hurdle, and if so it might not be the only one.

(iii) **Article 31**: *"…….. All matters connected with judging a case in a jury court are decided collectively"*. There is no specification of how a judgement is delivered, which issues are decided by the judge and which issues are decided by the jury and whether this means that a judge may be out voted by the jury on a point of law.

(iv) **Article 70(4)** of the draft Law provides that: *"Judges selected for the office of professional judge for an indefinite term are dismissed from the office of judge on the conclusion of the appropriate Judges' Qualification Commission on the grounds*

provided by the leglislation of Ukraine, and if the judge has infringed requirements of incompatibility, also on the grounds of a decision of the Supreme Council of Justice on the representations of the Chief Judge of the Supreme Court of Ukraine or the Chief Judge of the appropriate Supreme Specialised Court by the Supreme Soviet of Ukraine". It would seem that the draft law is proposing that the dismissal of a judge by the Supreme Soviet of Ukraine depends on a preliminary decision to dismiss taken by the Qualification Commission. No such requirement appears to be present under the Constitution of Ukraine and therefore clarification is also required in this respect.

(v) **Article 74** deals with jurors. It is not clear whether they are the only members presiding over the court or whether they are assisted by a qualified judge. Furthermore, their selection depends on *"representations of the Chief Judges of Courts of Appeal"*. Clarification is necessary in order to establish whether such representations have a binding effect or whether the commission which selects the jurors may discard such "representations". Although Article 74(2) provides that the Commission consists of *"authorized representatives of the court, the executive authority and the appropriate council"*, there is no indication of the number of persons who constitute this commission, their qualifications, and mode of selection.

The Constitution of Ukraine and the draft Law contemplate courts which are presided by judges, people's assessors and jurors. The scope of the latter two is that *"the people directly participate in the administration of justice"* (**Article 124** of the Constitution). This is reiterated in **Article 12** of the draft Law. According to **Article 73** of the draft Law, people's assessors are drawn up on a random basis and hold office for a term of five years. It is not clear what type of cases fall under their jurisdiction. On the other hand jury courts consist of judges of the appropriate court of appeal and six jurors, and they consider criminal cases (**Article 31** of the draft Law). Both enjoy independence and immunity afforded to professional judges during their term of office (**Article 78** of the draft Law).

(vi) **Article78** appears to protect the employment of people's assessors and jurors. Thus, for example during their term of office they retain all the *"guarantees and privileges at their main place of employment which are provided by legislation for employees of the enterprise, institution or organization where they work"*. Here too there is the risk that the Executive might exercise undue pressure on these officials, especially where the assessor or juror occupies a post with the executive authority for example by pledging a promotion or an increase in pay on the lapse of the period of appointment. It would be appropriate to adopt measures in an attempt to discourage such "incentives". The situation seems to favour executive interference and in any case would appear to be seriously prejudicial to the concept of the independence of the judiciary.

(vii) The Law is not clear on whether the proposed judicial system envisages a system where lawyers operate in private practice without the hindrance of the State and whether they are free to offer their services to citizens who choose to ask for them. While the law provides for free legal assitance to those in need, it does not seem to recognize the Bar as having an essential role in the administration of justice and its rights and duties in the course of proceedings are not laid down.

(viii) I note that nowhere in the Law is there any mention of the procedure to be adopted within the judicial system in cases of violations of fundamental human rights. The law should specify which court is competent to investigate such complaints and provide the necessary remedy to the aggrieved party. The right of individual petition in

such cases should be clearly laid down and the remedy available before a competent court specifically defined.

A P P E N D I X II
Comments by Mr Hjörtur Torfason (Member, Iceland)

Introduction

This opinion is forwarded to the Secretariat of the European Commission for Democracy through Law (the Venice Commission) in accordance with the decision of its 40th Plenary Meeting on October 15, 1999 to request the comments of three Commission members as rapporteurs on a proposed law on the organisation of the judiciary in Ukraine.

This proposed law (herein referred to for convenience as the Law, and the several parts thereof as Sections, Chapters and Articles) was presented to the Commission at the above meeting in an English translation of a text prepared by the Legal Reform Committee of the *Verkhovna Rada* (parliament of Ukraine) following a first parliamentary reading of the law bill (where more than one draft version was submitted), as a draft wording to be proposed for the second reading. The opinion accordingly refers to this translated text (subsequently marked as CDL (99) 64), and I am not familiar with the further processing of the draft in the Verkhovna Rada.

In the English translation, the draft Law is entitled "Law of Ukraine on the Judicial System", but it also has been referred to as the Law on "the Judiciary". In considering the draft, I have had reference to an English translation of 27 July 1996 of the Constitution of Ukraine, adopted on 26 June 1996 by the Verkhovna Rada (CDL (96) 59), and to the Opinion of the Venice Commission of 11 March 1997 on the Constitution of Ukraine (CDL-INF (97) 2). For comparative purposes, I have also had reference to information on the Supreme Court of Ukraine in the Themis 3 document entitled "the competences of Supreme Courts" (DAJ/Doc (97) 24), and on the legal materials relating to the Constitutional Court of Ukraine on pp. 104-123 of the Bulletin on Constitutional Case Law, Special Edition (Basic Texts 4). On the other hand, I have not had access to any official background material on the purpose and scope of the Law or the current organization and functions of the Ukrainian court system. It follows that some of the assumptions and statements set forth below may require certain correction or adjustment.

Due mostly to reasons of time, the opinion is mainly limited to a brief survey of the Law and to comments on certain aspects thereof of a more general nature. By the same token, these comments should not be taken to represent a negative overall view of the Law, even though they largely relate to matters which are though to give rise to question or clarification.

1. General Comments

The stated purpose of the Law is to set "the procedure for the organisation and activities of judicial power in Ukraine with the aim of ensuring protection of human and citizen rights and the rights and lawful interests of legal entities and the state by an open, fair, independent and impartial court", and is thus to be applauded. As a translation is involved, it is not clear to me whether the words "sets the procedure" mainly are intended to reflect the fact that the Law is dealing with the organisational structure of the judicial power, or whether they also relate to the fact that several important aspects of the organisation of the courts are not settled directly by the provisions of the Law, but are to some extent dependent on other legislation and to further decision in the course of implementation of the Law.

As I understand, the organisation of the court system in Ukraine recently has been primarily governed by the Law of 5 June 1981 on the Judicial System, which stands on old ground, but

was amended to a limited extent in 1992 and 1994. In addition, there is the Law of 4 June 1991 on the Arbitration Court, as amended in 1992, 1993 and 1997, which relates to a long-standing system of state arbitration courts for dealing with legal disputes on civil and commercial matters between legal persons. Both of these enactments are intended to be replaced by the Law (Concluding Provision No.9)

The other laws concerning the judicial power to which the Law relates or refers are primarily (1) a Law of 15 December 1992 on the Status of Judges, (2) a Law of 2 February 1994 on the Bodies of Judicial Self-Management, (3) a Law of 2 February 1994 on Qualification Committees, Qualification Attestation and the Disciplinary Liability of Judges in the Courts of Ukraine and (4) a Law of 17 February 1998 on the High Council of Justice. As I have not had access to these enactments at this point, it is not clear to me to what extent their adoption involved substantial judicial reform. According to Concluding Provision 2 of the Law, the first two enactments are due to be promptly revised, as the Legal Reform Committee is there instructed to prepare within six months for consideration by the Verkhovna Rada a draft Law on the Status of Judges (a new edition) and a draft Law on Judicial Self-Government. I assume that the judicial Congresses, Councils and Conferences referred to in Article 7 (3) of the Law (and perhaps also the Assemblies) are among the subject matters dealt with and defined in the latter enactments.

In addition, there are the respective laws of legal procedure, which presumably affect not only the court procedures to be followed and the rights of access to court and the recourses of appeal to be maintained, but also to a certain extent the organizational requirements applicable to the various courts in handling individual cases (such as their division into panels etc.). Primary among these procedural laws are the Code of Civil Procedure and the Code of Criminal Procedure. These are now intended to be revised, as by Concluding Provision 3 of the Law, the Cabinet of Ministers of Ukraine is invited to submit to the Verkhovna Rada drafts of the two Codes with the aim of "setting the new procedure for court proceedings which arises from the present Law." – The Provision similarly requires the Cabinet to submit drafts of two further laws, i. e. a Code of Economic Procedure and a Code of Administrative Procedure. I understand that the former of these is intended to replace the law governing the procedure in the existing courts of arbitration. The latter code, which refers to procedures before the administrative courts to be established under the Law, will constitute novel legislation.

The Law is intended to meet the requirements of Articles 124 and 125 and other provisions of Chapter VIII of the Ukrainian Constitution, which lay down fundamental rules regarding the role and status of the judiciary and the organisation and activities of the judicial system. I presume that its adoption is being considered at this time in view of the time limit set out in Transitional Provision 12 of the Constitution, which states that the Supreme Court and the High Court of Arbitration of Ukraine shall exercise their authority on the basis of the legislation currently in force, until the formation in Ukraine of a system of courts of general jurisdiction in accordance with Article 125, but for no more than five years. I further expect that the declared intention of renewing the above two laws and introducing the above four codes is also motivated by this time limit (and, in the case of the Criminal Procedure Code, the similar deadline set out in Transitional Provision 13). – In the above Opinion of the Venice Commission on the Constitution, it was noted that the postponement of the full entry into force of its new provisions on the judiciary as envisaged by the said Provisions might lead to discrepancies within the system during the transitional period, and that the limit under Provision 13 seemed extremely long.

2. Relation of the Law to the Constitution

The Constitution of 1996 was adopted and welcomed as the legal foundation upon which the people of Ukraine would be building a democratic state and culture based on the rule of law. In the above Opinion of the Venice Commission, the Constitution was generally felt to merit positive assessment, it being particularly noted that the catalogue of human rights protected was very complete and showing a willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights and to ensure that these rights are implemented in practice. In relation to Chapter VIII on Justice, it was noted with favour that it did contain important principles of the rule of law, reflected in its declaration that justice is to be administered exclusively by the rule of law (Article 124), its provision for the independence and immunity of judges (Article 126, cf. 129), and its statement of the main principles by which judicial proceedings would be governed (Article 129). The proposed Law presumably may be taken to represent an effort to meet these standards, as also indicated by its stated purpose.

As I understand, the Constitution was thought to embody a new concept for the judiciary of Ukraine and new fundamental principles of judicial procedure and access to court. The general provisions of the Law appear to be based on this understanding and to be intended to reflect the above standards. They deal with the position and function of the judicial power in a rather comprehensive manner and refer inter alia to the autonomy of the courts, the independence of judges and judicial self-government, as well as the right to judicial protection under observance of the principles of fair hearing. On the other hand, the provisions of this first Section appear to go in considerable extent beyond the scope of the remaining four sections, since that main body of the law primarily deals only with the organisation of the court system as such and the establishment and powers of the State Court Administration of Ukraine. The fact that the scope of the Law is thus limited may possibly be said to represent a weakness, at least for the time being. However, the wider connotation of the general principles perhaps is designed to set the tone for the framing of the separate laws which it is proposed to draw up promptly after the adoption of the Law. In any case, the fact that the remaining Sections are not more comprehensive and that the said new laws are not at hand for comparison makes it more difficult than otherwise to evaluate the Law.

3. Contents of the Law

The Law now consists of five Sections and 9 Concluding Provisions together with 32 Transitional Provisions, the contents of the Sections being briefly the following:

Section I, General Provisions (Articles 1-16) contains provisions on the position and expression of the judicial power and task of the courts (Arts. 1-2), on the extent of legislation on the judicial system (Art. 3), on the autonomy of courts and independence of judges (Art. 4), the immunity of judges and their irremovability (Arts. 5-6), judicial self-government (Art. 7), the binding nature of court judgements (Art. 8), the right to judicial protection (Art. 9), the right to legal assistance (Art. 10), the right to challenge judgements by appeal (Art. 11), on equality before the law and the courts (Art. 12), on court composition in individual cases (Art. 14), on an open trial and the recording thereof (Art. 15), and the language of court proceedings and use of an interpreter (Art. 16).

Section II, Courts in Ukraine (Articles 17-67) is subdivided into six Chapters, so that Chapter 1 contains general provisions, including a declaration of unity of the system of courts of general jurisdiction (Arts. 17-19). Chapter 2 deals with the organisation of the local courts of first instance (Arts. 20-23). Chapter 3 concerns the general courts of appeal, which have regional

jurisdiction (Arts. 24-31). Chapter 4 deals with specialized courts, i.e. on one hand the economic (arbitration) courts and on the other the new administrative courts, each of which have a local first instance and a regional appeal instance (Arts. 32-41). Chapter 5 concerns the supreme specialised courts (economic and administrative), which are to constitute the supreme judicial authority within the special part of the system (Arts. 42-50). Finally, Chapter 6 deals with the organisation of the Supreme Court of Ukraine (Arts. 51-67).

Section III, Professional Judges, People's Assessors and Juries (Articles 68-78) is subdivided into two chapters, one concerning professional judges (Arts. 68-72) and the other with people's assessors and juries (Arts. 73-78).

Section IV, The State Court Administration of Ukraine (Articles 79-84) deals with the powers and organisation of that institution, to be established for providing organisational support for courts other than the Supreme Court, and in Art. 84 also with the Academy of Judges to be established within the State Court Administration.

Section V, Other Matters of the Organisation and Activities of Courts (Articles 84-95) is subdivided into two chapters, of which the first deals with the financial and material technical support for the activities of the courts, including library facilities (Arts. 85-89). The second contains provisions on the symbols of judicial authority, the states of courts as legal entities, court staff, the judges´ clerks, the court ushers, and security and keeping of civil order in court (Arts. 90-95).

The Concluding Provisions of the Law (1-95) deal with various measures relating to the implementation of the Law and imposes short time limits for their execution. Beside the drafting of certain new laws and codes as above mentioned, it is proclaimed that appropriate amendments in other existing legislation should be made and governmental regulatory acts should be brought into line with the Law. The formation of the State Court Administration is also deal with and foreseen to be completed within six months. Provisions 6-8 deal with certain important matters which are considered to be dependent on the passage and/or contents of the procedural laws due to be adopted following the Law. This includes the determination of the number of judges in the (lower) courts, the ratification of the staffing of the courts of first and second instance, the liquidation of the existing Inter-Oblast Court and the formation of jury courts and lists of people's assessors. According to Provision 1, the Law will enter into force three months after its publication.

The Transitional Provisions (1-32) are extensive and of great importance, as they deal with the passage from the existing court system to the system envisaged by the Law. Provisions 1-4 apply to the general local courts, and No. 5-10 apply to the general courts of appeal. No. 11-14 (and 22) concern the existing arbitration courts of first instance to be converted to specialised local courts, No. 15 deals with the Economic Court of Appeal of Ukraine, which is to be created as a middle instance with judges from the existing High Court of Arbitration, and no. 16-22 apply to the High Court itself, which will be converted to a Supreme Economic Court of Ukraine. Provisions 23-30 then deal with the Supreme Court of Ukraine, the Benches of which will be converted to Divisions.

Finally, Provisions 31-32 deal with the system to be used for administrative law cases until the formation of administrative law courts after the entry into force of the appropriate law of procedure for these cases. In this interim, the cases are to be handled by the general local courts and by administrative divisions established within the courts of appeal and the Supreme Court.

The text of the Law is set forth in logical sequence and appears to be carefully drafted. There is a certain amount of repetition that might have been avoided, e.g. in that the selection of Chief Judges and Presidia and their tasks and those of the judges are listed separately for the courts of each instance, but this is mainly a matter of presentation and effective when carefully done, the only question being whether it might contribute to rigidity in actual practice. There seem to be a few inconsistencies within the text and in relation to the text of the Constitution, but it may be that these can be explained.

On a general view, it appears that while the Law sets out to cover the field of its subject matter in a comprehensive manner, it may be said that only a limited part of the text represents new and firm substance. In the first place, several provisions of the Law involve a restatement of provisions of the Constitution, which of course is in good order as far as it goes, and partly also of other legislation. Secondly, a large number of its provisions are dependent on other legislation for their substantive content, so that they stand more as references to that legislation than as independent rules. This applies especially to those parts which relate to the Law on the Status of Judges and on Judicial Self-Government (in Section III (1) and Article 7 et al.), but also to those matters within Section II and other parts which are stated to be dependent on the procedural codes which are due to be renewed. Where the text is thus based on reference to future law, it follows that the treatment of the substance is not yet exhaustive. Thirdly, some provisions do not deal with their subject matter in depth, so that they represent a descriptive statement of policy or principle to be implemented rather than as hard law. This applies e.g. to parts of Section V on the various kinds of support for the courts, such as the Academy of Judges (Art. 84), but the actual grounds for the limitation of the text may well be reasonable.

The fact that the Law has to refer to other legislation for such crucial matters as the status of judges and their selection and qualification (i.e. laws that exist but are due to be revised or reissued) raises the question whether it might be preferable to join these other laws with the present Law in order to make for a more comprehensive whole within a single statute covering the composition, organisation, activities and standing of the judiciary. The question is primarily one of legislative policy, and I believe that the answer is not necessarily in the negative.

This question is not pertinent with respect to the procedural codes, which preferably should be separate in any event, and the problem there is mainly the one of drawing the optimum line between matters of procedure and of the system. However, the fact that the above laws are still under development and the procedural codes have not been renewed does also raise the question (as intimated in 2 above) whether it is desirable or realistic to adopt the present Law with the limitations inherent in the situation, or whether the Law should be remodelled and presented simultaneously with the other legislation or in any case on the basis of a more firm or clear alignment therewith. This latter question is more problematic, and the answer partly depends on the state of the preparatory work being done on the other legislation, with which I am not familiar. However, I believe that the desire to go ahead with the adoption of the Law is to be viewed positively, provided that the underlying concept for the court structure proclaimed is sufficiently sound and in line with the aims of the Ukrainian Constitution.

4. Fundamentals of the Court Structure

Article 124 of the Constitution properly states that justice in Ukraine is to be exclusively administered by the courts, whose jurisdiction shall extend to all legal relations that arise in the State. Judicial proceedings are to be performed by the Constitutional Court of Ukraine (which stands apart from the general judicial system) and by courts of general jurisdiction, these latter being the subject matter of the present Law.

In Article 125 of the Constitution, it is laid down that the system of courts of general jurisdiction is to be formed in accordance with the territorial principle and the principle of specialisation, and also that the creation of extraordinary and special courts shall not be permitted. As to the structure of the system, the Article further states that the Supreme Court of Ukraine shall be the highest judicial body in the system of courts of general jurisdiction, while the respective high (or supreme) courts are to be the highest judicial bodies of specialised courts.

Both Articles are of course framed in alignment with other provisions of the Constitution concerning the judiciary, such as Article 55, which refers to the protection of human rights and freedoms by the courts and the rights of the people to challenge in court the decisions or actions of bodies of State power, and Article 92 (14), which states that the judicial system, judicial proceedings, the status of judges and the principles of judicial expertise shall be determined exclusively by the laws of Ukraine.

Proceeding from the tenets of Article 125, the Law proclaims in Article 17 of Section II that courts of general jurisdiction operate in Ukraine and shall form a single system based on principles of territoriality and specialization. After listing within Article 17 the basic components of the system, as (1) local courts, (2) appeal courts, (3) specialised courts, (4) supreme specialized courts, and (5) the Supreme Court of Ukraine, the Law states in Article 18 that the unity of the system shall be ensured by the establishment of the court system by the Constitution and the present law, a single status of judges, a single procedure for appointing an selecting judges, and a unity of the principles of the organisation and activities of the courts, as well as by principles further listed.

In Chapters 2-6 of Section II, the Law goes on to describe and define the various courts within the system and the relationship between them. In brief terms, the Chapters provide for a three-level order of general courts, presumably with residual jurisdiction, and two parallel orders of specialized courts, i.e. economic (arbitration) courts and administrative courts, each ultimately also of three levels. They further provide for courts martial, which are placed by the Law among and beside the general courts.

The first level of general courts consists of local courts with territorial jurisdiction in rural districts, towns, districts within towns or cities, and the courts martial of garrisons. The courts as such are not specialized, but the judges thereof may specialise in particular categories of cases (Art. 20).

The second level consists of regional courts of appeal with jurisdiction in the Republic of Crimea, in Oblasts and in the cities of Kiev and Sevastopol (Art. 24). There also are military courts of appeal divided by regions and for the Navy. The Article further names a Court of Appeal of Ukraine, the status of which is not clear to me, but I take it to be a future replacement for the existing Inter-Oblast Court, cf. Concluding Provision 8, which I understand has jurisdiction in specially restricted or designated zones. – These appeal courts (sometimes with first-instance jurisdiction) will operate in divisions, presumably partly on the basis of special case categories, although this is not directly stated.

The third level is occupied by the Supreme Court of Ukraine as a national court of ultimate appeal. As I understand, the court will handle cases both by way of appeal and cassation procedure, and it also is charged with supervision of the application of the law by the lower courts and their procedures, beside other duties (Art. 51).

The economic courts are to be similarly ordered, except that the local courts at first level appear to have large jurisdiction divided by regions parallel to the general appeal courts. The second level is intended to have a single Economic (Arbitration) Court of Appeal, and the Supreme Economic (Arbitration) Court occupies the third level (Art. 32 (2)). The specialized jurisdiction of these courts covers cases of economic disputes, cases of bankruptcy and other cases as determined by procedural law (Art. 33).

The order of administrative courts seems intended to be much the same as of the general courts, with local courts, regional appeal courts and a Supreme Administrative Court of Ukraine (Art. 32 (3)). However, the territories of the local courts may be intended to be larger than those of the general local courts. The material jurisdiction of the administrative courts is described in Art 33 (2) as extending to administrative cases placed within it by procedural law.

5. Implications of the Structure

From a general viewpoint, the above concept of three orders of courts of three instances should be favourably regarded. The comments I have at this point with respect to the structure of the system as set out in the Law mainly relate to the application of the territorial principle, the principle of specialization, the nature of the economic courts, and the development of the administrative courts, as well as the passage from the existing court system to the system envisaged.

A. As I understand, the territorial division of the local general courts and the general courts of appeal is intended to be approximately the same as the division between the existing courts of the same instance, which again has been determined so as to coincide with the administrative division of the country into districts (rural and urban) and regions. This raises the first question whether it might be more appropriate and more supportive of the standing of the judicial power to have an independent division of the country into judicial areas, totally or as limited by the degree of federalization within the country.

As I am now not familiar enough with the administrative and political structures in Ukraine, I will not pursue the question, except to note that optimum territorial division depends on many elements, including the evaluation of the people of the distance to their court and the communication facilities affecting that distance.

However, I also wish to note that from the point of view of security and consistency of performance of the judiciary at the local level, it is generally desirable to organise the courts as relatively large rather than small units, with a collegium of judges with adequate support facilities serving the community or communities within their jurisdiction. On such grounds, there may the reason to aim at a restructuring of the territorial placement of the general local courts of Ukraine. Lacking background, I do not know whether it is intended to pursue such aim following the adoption of the Law.

B. As regards the principle of specialization of the courts, it may be asked whether the degree or manner of specialization is in line with the concept expressed in Article 125 of the Constitution, which for me is an open question at this point.

As I understand the Law, the direct provision for specialization mainly lies in the intention to maintain an order of economic courts developed from the existing order of arbitration courts, and to create a new order of administrative courts. In addition, it is provided that the Supreme Court

will continue to operate in specialized divisions, and that the general courts of appeal will be able to do so. It is also stated that the judges of the lower courts may arrange their work so as to specialize in certain fields of the law. Since I personally favour the view that judges should be generalists as far as possible (being more democratic and giving them a larger overview) rather than specialists (which makes them more effective but perhaps more authoritarian), I have no strong reason for negative comment on this concept of the Law, except to note that in as large a country as Ukraine, it might be desirable to address the matter more firmly at the outset of a court reorganization, rather than to leave it to develop with time.

C. I understand that the intention to have an order of economic courts is largely grounded in the long-standing tradition in the country of having institutional arbitration courts to deal with commercial and related disputes between legal entities. While I am not closely familiar with the procedure of those courts, I have understood that they combine elements of both arbitration and court trial, e.g. that the procedure is less open and formal than in a law court, but on the other hand not merely instigated on a voluntary basis, i.e. by way of advance contract or association undertaking or by agreement ad hoc. According to the Law, they are now to be placed within a system of courts of general jurisdiction in the form of economic courts, and accordingly should have to meet the test of procedure by fair trial and hearing. The question therefore arises whether their procedure is in fact or will be so arranged. If not, their placement within the system would appear problematic.

D. As regards the proposed administrative courts, it is of course always a question whether the task of such courts ought not to be left to the same courts who resolve the disputes between the citizens. However, they clearly possess advantages which it may be fitting to utilize and develop within the Ukrainian system, and this perhaps was anticipated when the Constitution was adopted with the principles above cited. The main question, therefore, is whether the plans for establishing this order of courts are sufficiently mature to be realized soon enough to meet the requirements of the actual situation.

E. As finally regards the passage from the prior court system to the system to be developed under the Law and its Transitional Provisions, it appears on a general view that the passage is to be effected mainly by having the basic structure correspond very closely to the prior structure, so that the existing courts can continue to operate with limited interruption on the terms of the new regime. The Law does not make it clear whether a further reform of the system itself will follow after its adoption, in connection with the new procedural codes or otherwise. The question may be raised, therefore, whether this is likely to be felicitous in all respects, and also whether the transition as described is to be regarded merely as a first step to a further structural reorganization (e.g. in the territorial division of the lower courts), or whether the structure is expected to remain.

6. Fundamentals of the Court Organization

The provisions of Section II on the organization of the various courts are among the most complete in the Law, and deal inter alia in thorough terms with the operational side of the inner structure of the courts and the allotments of tasks and powers between the leading representatives or officers of the higher courts and their judges as a group. It is generally provided that each court will have a Chief Judge with one or more Deputy Chief Judges, and that Presidia will be formed by these and certain other judges elected for the purpose to carry the main load of the court management, with plenary meetings being held at relatively long intervals.

Except for the Chief Judge or Chairman/President of the Supreme Court, whose election by the Plenary Assembly of the Court itself is provided for in Article 128 (2) of the Constitution, it is generally provided that the Chief Judges of the higher courts will be elected by the Verkhovna Rada, on the representation of the Chief Judge of the Supreme Court (or of the Supreme Economic or Administrative Court) and the Council of Judges of Ukraine. It is not quite clear to me what this implies, i.e. whether this procedure is seen as a process of parliamentary approval or as involving initiative on the part of the legislative assembly. I understand that the procedure will not involve the President of the Republic, who is vested with the power of establishing courts under Article 106 (23) of the Constitution.

Otherwise, it might be appropriate to raise the question whether the method of having the Chief Judges elected by their colleagues in plenum might be more extensively applied.

As regards secondly the provisions in Section II on the powers and tasks of the respective Chief Judges, and the relations between the higher courts and the lower, it is particularly notable that the higher courts, especially the Supreme Court of Ukraine and also the supreme specialized courts, are charged with substantial tasks of supervision and methodological assistance and recommendation towards the lower courts, both as to matters of procedure and the application of the law. I understand that this relates to the purpose of promoting consistency in court practice, and the lower courts may well be in a position to benefit by such assistance from time. However, the provisions in this regard seem to be very far-reaching and to make the three-level system extremely hierarchical, with the consequence that the independence of the lower court judges and their equality among judges may be subject to a risk of undue restriction.

Accordingly, it seems to me that this aspect of the Law needs to be further studied and further compared with the natural point of departure in the organization of court relations in a judicial system, which is in my opinion that the higher courts express their views on the performance of the lower courts through their own decisions, both as regards substantial law and procedure, the law through the disposition of the case at hand and the procedure in the same way or by critical or instructive remarks in relation to matters arising in connection with the handling of the case.

7. Judges and Juries

As to Section III of the Law, I have already mentioned that the provisions relating to professional judges, although positive as far as they go, are much dependent on the provisions of other laws relating to the judiciary.

The provisions of Chapter 2 on people's assessors and juries are of great interest and merit a closer view. As of now, however, it appears to me that the distinction between the two groups as presented in the text is rather less than I would expect, as I am used to people's assessors or other lay experts appointed to sit on a court being regarded as the co-judges of the professional judge or judges who lead the proceedings, while juries on the other hand function as an integral complement of the court for the purpose of answering and deciding specific crucial questions, mainly as to fact in in relation to the law as explained by the judges. This may well be the basic concept of these provisions, and I would appreciate further clarification.

8. Other Matters

As regards Sections IV and V of the Law, I would limit my comments at this point to stating that the planned establishment of the State Court Administration is to be welcomed.

The concluding Provisions and Transitional Provisions merit further study. Although they are quite explicit, a further clarification of the plans for implementation of the Law would be desirable.

A P P E N D I X III
Comments by Ms Hanna Suchocka (Member, Poland)