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COMMENTS

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

by

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1. Two years passed since the Venice Commission gave its opinion "On the draft law on the Judiciary and on the status of Judges of Ukraine" (CDL-AD(2007)003), and the new draft has been sent for an opinion. In my comments I touch only some points which from my point of view are crucial for the establishing really new rules important for the independent and efficient judiciary in Ukraine. I have not entered into details being convinced that first of all the clear rule concerning appointment of judges and depolitisation of the whole process of election of judges must be introduced and then after we can discuss the further details.

2. The Venice Commission in its opinion adopted in March 2007 stated that:
"welcomes the draft as a clear improvement as compared to the current situation and previous drafts. The fundamental provisions are in line with European standards. The Commission further welcomes the announced intention by the Ukrainian Parliament to merge the two very detailed draft laws into a single (hopefully more simple) text" . Nevertheless this positive opinion the Commission addressed a number of issues that should be taken into consideration in the process of preparation of the new Law. Taking into account that only two years have passed since Venice Commission gave its last opinion, the best way to deal with the new draft is to check how far the Venice commission's suggestions were introduced to the new draft.

3. One may have doubts how far the new draft met the proposals done by Venice Commission. In my opinion only some points, not many and not really substantial, in the new draft met the conclusions proposed by the Venice Commission. One of them was proposal to create one piece of legislation instead of two separate laws: "On Judiciary" and "On the Status of Judges". It has been done. Two texts are merged into one single law. It help to avoid some repetition. One can have, however, an impression that it is the only visible change. Unfortunately the new piece of law still seems to be overregulated in details. There are still too many words to describe the concrete situation. Too many regulations of statutory character, which must not be put into the law. The proposed law is not more simple what was the suggestion of the Venice Commission. One can fully repeat what has been said in p. 8 of the Venice Commission opinion "*The laws are extremely detailed…In many places there is a level of detail to be found in the law which one would not in other legal cultures expect to be regulated at the level of statute law but which would be dealt with in subordinated legislation*" . It does not make the law more clear, on the contrary, may create negative side effect that the rules are difficult to find.

4. The problem which seems to be crucial for the scope of regulations concerning the judiciary lies in the provisions of the current Ukrainian Constitution. Some of constitutional provisions at this moment seems to create a kind of obstacle (barrier)for new regulation in the area of judiciary. In case that the new regulations in the law would be different than those in the Constitution, even being in line with the European standards, they should be declared as unconstitutional by Constitutional Court. Thus the field of maneuver is very limited. So it would be better first to change the Constitution and then on the basis of amended Constitution proposed a new Law on the Judiciary. The Venice Commission in many points of the conclusion of its opinion has pointed out the need of constitutional amendments to the Constitution. This mode of procedure is more logical (certainly more difficult politically), but only in this situation it would be possible to create a modern and efficient judiciary in full comparison with European standards. The new Law on judiciary built on the current Constitution could be only a "half-measure" towards the effort to create a new really independent and efficient system of judiciary. This law is a visible example of this situation. For that reason in my opinion I have to repeat many of the critical points from the previous Opinion of Venice Commission.

5. Immunity
One can agree that the general rules on the guarantee of the independence of judges are in line with the European standards (art.48). Judicial immunity however still seems to be too wide. It is immunity not only for judges but also for families, housing, means of transportation. As I

pointed out in my previous comments (CDL(2007)035) it must be clear line between the immunity which gives security to judge administers in concrete cases and is necessary for guaranteeing the work of the court, and the privilege. The immunity proposed by this law seems to be rather a kind of privilege for judge. To be in line with general standards there should be only a limited functional immunity for judges.
In any case, however, it is not accepted that Verkhovna Rada makes decision on the lifting a judge's immunity. This decision should be taken by court or by High Council of Justice not by parliament.
Generally, the Verkhovna Rada has still too many competencies concerning the personal status of judges.

6. Because of the regulations of the current Constitution the role of drafters of the new law is very limited what concerns the new proposals in the area of appointment of judges.
The process of appointment of judges is still very complicated. It is very detailed (too detailed) regulated in Section IV of the law. There are different bodies involved in this process. The important role is played by High Qualifications Commissions. It was the suggestion of the Venice Commission that there was no need for a separate HQC, its competencies should be attributed to the High Council of Justice. In case this solution would be impossible in lack of the constitutional amendments, the independence of HQC should be strengthened. Because the Constitution has not been amended, the HQC remains. One have, however, positive impression that the body is less politicized. It is composed of 15 members. Majority of them (8) are judges. There are also 2 persons appointed by Verkhovna Rada, 2 by the President, 1 by the Minister of Justice. But the law clearly states that People's deputies and members of the Cabinet of Ministers may not be members of a qualifications commission of judges what was the case before.
However some of the controversial provisions of the HQC concerning the procedure for assuming the office of a professional judge, remain. For example, art. 73.1p. 9 saying that in order to take part in the competition, the applicant shall be required to submit .."other documents which might be indicative of the applicant's fitness for judicial work". It is a very general and very imprecise provision. One can repeat the same question as before, what are these other documents? What kind of documents except of those listen in the p. 1)-7). (p.8 does not exist). Such a detailed regulation and at the same time such an imprecise rule.
An then again art. 74 p. 4 "right to collect information about the candidate or entrust its collection to other state bodies, as well as right of organizations and citizens to present to HQC information they may have about the candidate. It is the same provision (may be wording differently) so strongly critised by the Venice Commission in its previous opinion p.25. (*Article 28.4 Status permits the High Qualifications Commission to collect information about he candidates and instruct others to do so and allows organisations and citizens to submit information about the candidate. Finally, before recommending a candidate for appointment the High Qualifications Commission can take account not only of the exam and medical certificate but also of an interview and "other information" which defines the candidate's "level of professional knowledge, personal and moral qualities". What kind of information? What kind of procedure regulates the collecting of this kind of information? What is the state of knowledge of the candidate about this information? This provision is not in line with European standards and goes against the transparency of the whole process of selection of judges. Taken together these provisions raise the fear that extraordinary interventions could take place in the process. Similar questions arise about other stages of a judge's advancement – for example, Article 38.13 Status refers to "other documents certifying [the] candidate's preparedness to work on the stated post of judge" where permanent appointment is concerned, and Article 37.2 Status which permits the High Qualifications Commission to consider "other materials" before recommending a candidate to permanent appointment.*

7.There are still 2 categories of judges, what is in line with art. 128 of the Constitution; first appointment for a probationary period 5 years (art. 81 of the Law and this is a role of the President to make appointment) and for life time. Appointment of judges for lifetime is subject

of a vote in Parliament. In the light of art. 90.2 the decision shall be taken by a **majority of the constitutional composition** of the Verkhovna Rada. It is a kind of qualified majority what has been proposed by Venice Commission. Despite this regulation I still have a doubts on the role of parliament in the election of judges. I think that in this case there is still valid p. 29 of the previous opinion of the Venice Commission: *"the parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge" (CDL-AD(2002)026, § 22). Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, it would be necessary to change Article 128 of the Constitution.*
In this context one may repeat that without amendments to the Constitution it is quasi impossible to prepare a new piece of law who will fully meet all European standards.

8. Disciplinary Liability.
Art. 110 of a new Law more o less repeat the same grounds for disciplinary action against a professional judge. The positive element is that "an incorrect interpretation of the law by judge" is not included to the grounds disciplinary action. The other controversial grounds, however, remain, i.e. p.8) evasion from mandatory training at a specialized higher law school; and the very imprecise p. 5) perpetration of an immoral act. I repeat that this point should be absorbed by p. 6) violation of rules of judicial ethics.

9. Disciplinary procedure.
I support my previous remarks concerning the disciplinary procedure. I am of the opinion that on the disciplinary responsibility of judges should decide court, not the special bodies. In Ukrainian case there is a proposal to create a special body "the Disciplinary Commission of Judges" composed not only from judges. Out of 15 members only 8 are judges(one less than in previous draft). Others are nominated by President (2 of them), 2 by Verkhovna Rada, 1 by Minister of Justice, 1 by Congress of Lawyers, 1 by the Council of Higher Law Schools and Scientific institutions of Ukraine. I am still of the opinion that too many bodies is involved in creation of the Disciplinary Commission of Judges. The provision of art. 116 on appealing a decision in a disciplinary case is very unclear. Point 1-3 regulates the procedure of appealing a decision of the Disciplinary Commission to the High Council of Justice. This regulation is rather detailed, The draft said that "1.*A judge of a local or appellate court may appeal a decision of the Disciplinary Commission of Judges of Ukraine on disciplining him/her to the High Council of Justice not later than one month from the next day after the service of a copy of the decision on him/her. The complaint shall be filed through the Disciplinary Commission of Judges of Ukraine.*

2. Upon receiving the complaint, the Disciplinary Commission of Judges of Ukraine shall send it, along with the case file, not later than within three days to the High Council of Justice.

3. The complaints shall be reviewed by the High Council of Justice pursuant to the Law of Ukraine "On the High Council of Justice."

There is also p. 4 saying that "decision in the disciplinary case against a judge may be appealed to a court". This provision has replaced the one from the previous draft, which said in art. 58 p. 4 that "a decision of a disciplinary case may be disputed in court only in regard to violation of the procedure of execution of disciplinary proceedings". As a principle the right to go to the court is very welcomed and it was suggested by the Venice Commission in its opinion. The new formula proposed by drafters seems wider than the previous one and for that reason can creates a better guarantee for judge. On the other hand this text, its new formulation (wording) is very laconic, very imprecise. It seems to be added to the previous regulation without necessary changes to make the procedure coherent. In this context arise a lot of

questions. When the decision can be appealed? On which stage of the procedure? After the decision has been taken by High Judicial Council, as kind of third instance, or before, instead to send it to High Judicial Council? One may have even impression that p. 1-3 are in kind of contradiction with p. 4.
Despite so detailed regulation of statutory character (like art. 113, 114) there is still lack of very substantive regulations concerning the right of judges in the disciplinary procedure.

10. The system of judicial self-government is too complicated (Art. 147). There are too many institutions: meetings of judges on different levels, conferences of judges, the Congress of judges of Ukraine, council of judges of respective courts and Council of Judges of Ukraine which is a different organ than the High Council of Justice built on the ground of art.l31 of the Constitution. The structure must be simplified to be effective. This pyramid structure can create more obstacle to built a real self-government.

11. As regards the State Judicial Administration I can repeat only my previous remarks. The new body is described as executive one. It should not be so that the main reason for establishing such a body seems to be the replacement of the Ministry of justice by another body. The question of responsibility of this body and its relation (subordination) to judicial power is still not clear. One should point out that the changes in this chapter could be made without new amendments to the Constitution but the drafters have not decided to follow this way.

12. The presented draft in main provisions, crucial for the position of judge and judiciary in the system of power, does not differ substantially from the previous one. In case it will be passed as a law it can create a new obstacle (even bureaucratic nature) for guaranteeing the independent and efficient judiciary. It was also a case as regard the new draft on prosecutor's office in Ukraine (see: Opinion of the Venice Commission CDL(2009)100, p. 30 „a comprehensive reform in line with the country's commitment to the Council of Europe would require, first of all, constitutional amendments(…)and, thereafter, an entirely different new law."