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(VENICE COMMISSION)

PRELIMINARY COMMENTS

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

by

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1. The Law is a new version of the Law on Judiciary and the status of Judges. The previous versions involved a lot of critical comments of the Venice Commission. In the new Law the drafters tried to take into considerations some remarks and suggestions done by the Venice Commission. Not always, however in very successful way. One of the main obstacles was the idea did not amend the Constitution. The field of manoeuvre was very limited in the situation when there was no a political decision, political will to make amendments to the Constitution, as it was suggested by the Venice Commission. Keeping the new Law in conformity with the existing Constitution, means that many provisions, proposed by the Venice Commission to be amended, must remain as they are.

2. Art. 17 provides 4 different levels of the courts. The Venice Commission suggested that the complex court structure should be simplified (by way of constitutional amendment). There is no possibility to introduce by law 3 levels of the courts organisation. So as general rule the structure of the courts remains the same. The drafters however try to seek the way for simplification of the system, for example, one may have an impression that Art. 32 p. 20 opens way for three level jurisdiction, but the details should be regulated by the procedural law, not by the law on the judiciary.

3. In the new Law the role of the Ministry of Justice seems to be growing. There are different models in European systems concerning the role of the Ministry of Justice towards the courts, however always with a very clear rule guaranteeing the independence of the judiciary. One has doubts if it is a role of the Ministry of Justice to take part in the work of the Plenary Session of a High Specialised Court (art. 36. p. 5.), p 6.) as well in the plenary session's meetings of the Supreme Court (art.44.4.). Taking into account the competencies of the plenary sessions, in my opinion, it is not a role of the Ministry of Justice to participate in such a work of the court.

4. I find as a good solution the elimination of p. 4) in art. 31 that the "high specialized courts provide relevant courts of lower level with advisory clarifications concerning application of law to cases within the respective court jurisdiction to ensure uniform application of law by the courts."

5. The relationship between the Supreme Court and the Constitutional Court are very unclear. In the previous draft, the plenary session of a high specialised courts "decide on petitioning the Constitutional Court for official interpretation of the Constitution and laws of Ukraine".(art.37.2.p. 4); In the light of new draft the plenary session can not apply directly to the Constitutional Court, as it was before, by only to Supreme Court. In the new Law the plenary "decides on applying to the Supreme Court of Ukraine regarding submission of petition for the official interpretation of the Constitution and laws of Ukraine) (art. 36.1.p. 4); In the light of art. 38. 1. par.4) the Supreme Court shall apply to the Constitutional Court for constitutionality of laws or other legal acts as well as for the official interpretation of the Constitution and laws of Ukraine". This regulation is very unclear. The role of Supreme Court is only that of a kind of post box in this cases? Or something more? This provision does not simplify the regulation.

6. There arise general questions concerning the role of Supreme Court and the position of judges of the Supreme Court.

7. In the new Law an article on state protection of a judge and member of his family is deleted, which I find as a good solution. Still, however, remains rule that it is the competence of Verkhovna Rada to give a consent for detaining or arresting of judge. I repeat again, it should not be a competence of the parliament but one of the judicial bodies.

8. System of the appointment of judges. There is still system of the appointment of judges for the first period and then election for a lifetime by Verkhovna Rada. It is a constitutional rule

so it could not be changed without amendments to the Constitution. The regulation is very detailed, in my opinion too detailed. The role of the Verkhovna Rada remains, but in a kind of a speedy procedure. (art. 78). The role of the parliamentary commission is eliminated. The decision on electing a candidate for a life time judicial position is taken by majority of the constitutional composition of the Verkhovna Rada. This kind of qualified majority can help to avoid the politisation of the decision taken by parliament. It was a clear conclusion of the Venice Commission (p. 9, 10) that art. 128 of the Constitution should be amended, if not the independence of the High Qualification Commission should be strengthened. I think that drafters tried to fulfil this recommendation.

9. Disciplinary cases. Art. 84 is controversial. The disciplinary proceedings are conducted by the HQC in relation to judges of local and appellate court. In the light of the composition of the HQC where are not only judges but also persons appointed representing high law schools, one person appointed by minister of Justice, it seems not to be the appropriate solution. Appeal to High Council of Justice or Administrative court remain. But it is still unclear solution (art.88). I support my previous opinion that should be either a kind of disciplinary court composed only of judges and appeal in all cases to the court or may be even to the Supreme Court.

10. The system of judicial self-government still is much too complex. The recommendations of the Venice Commission have not been taken into account.

11. The Law is still overregulated which make it very unclear. It was one of the conclusions of the VC that the law should be simplified. It is, however, not a case. I can only repeat that the new law still seems to be overregulated in details. There are too many regulations of statutory character, which must not be put into the law and should be dealt with in subordinated legislation.