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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON AMENDMENTS TO THE LAW ON THE JUDICIARY AND THE STATUS OF JUDGES AND TO OTHER LEGAL ACTS

OF UKRAINE

by

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General remarks:

1. Venice Commission in 2010 has given two opinions on the draft Law and Law on the Judiciary and the Status of Judges. Some remarks of the Venice Commission have been taken into account in previous drafts but not all of them for different reason. Some conclusions have not been accepted by drafters but some of the remarks however could not be introduced because of the provisions of the Constitution. In all its opinions Venice Commission always pointed out the need to amend the constitution to change the provisions which blocked the introduction of the solutions being "in better" compatibility with the European standards, for example: the structure of the system of courts, system of appointment of judges, especially the role of the Verkhovna Rada in the process of appointment., the composition of the High Judicial Council.
The drafters of the new law tried to take into considerations and to include into the law the majority of critical comments and suggestions done by the Venice Commission in its previous opinions. But also for them it was impossible to jump over the provisions of the Constitution. In this situation, without amendments to the Constitution, we can repeat many of the same concerns and doubts expressed in our previous opinions.

In my opinion I do not enter into all technical details. I try to touch only these provisions which are crucial for independence of judges and autonomy of courts in the light of the separation of power, the questions they were many times pointed out in different opinions of the Venice Commission.

2. The drafters tried to modify to some extend the legislative technique in which the law was written. One has however doubts does this effort has been successful. In my opinion the new draft is written more or less in the same legislative technique about which the Venice Commission was very critical. Venice Commission in its opinion (CDL(2010)006 prov.)said: "the Ukrainian legislator prefers a positive approach of making laws, in the sense of a legal "positivism". This means that the legislator tries to mention or to enumerate all the possible facts which can form the elements of a legal rule. Therefore the legal texts are quite voluminous and contain elements which are perhaps not necessary, or which could be delegated to subordinate legislation (e.g. a regulation)."

And also in the opinion (CDL(2010)097): "Many of the remarks made by the Commission in its earlier opinion are still relevant to the new Law. The Commission was critical of the degree of detail of the earlier draft Law which it described as "quite voluminous" and as containing elements which were perhaps not necessary, or which could be delegated to subordinate legislation, as a result of which some of the rules were difficult to find and to know. The new text for the most part continues this detailed approach to lawmaking."
One can repeat the same words now. In my opinion in this draft there are too many provisions which are not of the statutory character. There are many provision of regulatory character which could be included into lower level act.

3. Section I: Fundamentals of organization of judicial power.
This section deals with general principles guaranteeing the independence of judiciary and impartiality of the courts, which are in line with the European standards ensuring right of person to fair trial. There are however some new wordings which can involve some questions. For example Art. 2 in new version does not refers explicity to the rights guaranteed in the Constitution and in international treaties recognized as binding by the Verkhovna Rada, but says in general way on "human rights and basic freedoms" as the values determining the content and direction of the state activities". This formula is more general but should be interpreted as contains all types of human rights guaranteeing by internal law as well by international treaties.
Art. 6.2 in my opinion is written in more precise way which try to answer the criticism given in the VC opinion (CDL(2010)097 p.11) .

Art. 16 on the Automated Case Management System of the Court should be welcomed. It seems to be modern solution guaranteeing better the right to trial.

4. System of Courts of General Jurisdiction
New draft, as current law, provides for the four levels system of courts: 1.local courts; 2. courts of appeals; 3. high specialized courts; 4. the Supreme Court of Ukraine.
The four level system of courts was criticized in all opinions of the VC. But this cannot be changed without constitutional amendment so this system remains also in the new draft and thus all the comments of the Venice Commission given in this subject are valid.

5. Creation and abolition of Courts of General Jurisdiction (Art.19) remains as a competence of the President of Ukraine. Now president takes his decision upon recommendation of the State Judicial Administration (instead of Ministry of Justice) based on the proposal of the Council of Judges.
Still however President can decide on the creation and abolition of the courts what involved concerns in both opinions of the Venice Commissions in 2010. It was proposed that courts should be established by laws adopted by parliament.

The number of judges in general jurisdiction courts is now proposed to be determined by the State Judicial Administration, instead of the Ministry of Justice, on the basis of proposal from the Council of Judges.
In the new draft the role of Ministry of Justice is strongly diminished or better say, completely canceled in the domain of courts and judges. He has no competence in the process of creation and abolishing of courts and in proposing the number of judges, what seems logic in the situation where such a specific body like State Judicial Administration exists.
The number of Judges in the Supreme Court is determined by this Law which is one of the possible solutions existing in the European countries.

6. Appointment for Administrative positions (Art. 21). There are some changes in this part of the law. Some proposals however, are going back to the previous drafts, for example the proposal of three years term for position of chief judge than a five year term in current law.
The right to appoint and remove chief judge from office belongs to the Council of Judges of Ukraine based on the decision of the meeting of judges of the respect courts. As it was criticized in the previous opinion of the VC, one can repeat again, there are not listed in the law the conditions for removal of chief judge. It was then (CDL(2010097) seen as a retrograde step. When chief judge is appointed for concrete period of time, there should be very clear conditions written in this law when he could be removed from office.

The function of presidents of the different courts remains generally, as in current law, very limited. The changes in the new draft seems to be rather technical.

7. High Specialized Courts (Art. 32-33.) remain as courts of cassation for administrative, civil, commercial and criminal cases. One of the function of this courts is to ensure uniform application of the law principles and norms while adjudicating cases of the respective jurisdiction (art. 33.5). This competence involves some concerns with regards to the role of Supreme Court. As a rule it should be a role of Supreme Court to guaranty uniformity of jurisdiction of courts.

8. The Supreme Court of Ukraine (Art.39)
The drastic reduction of the jurisdiction of the Supreme Court in the current law was strongly criticized by the VC. The part on the Supreme Court is significantly changed in the new draft, and the competences of Supreme Court are wider than now.
Supreme Court can act as extra appeal court. Still however the relation between Supreme Court and High Specialized Courts, involve concerns. Especially the relations between art. 33.5 and 39.10. The difference between the role of HSC to “ensure uniform application” and

the competence of Supreme Court "to ensure equal application" is not clear. The opinion of the VC is still valid in this area. (p. 22 CDL(2010)006). "As high specialised courts are intended as cassation instances, in other words, they would play a role which normally belongs to the Supreme Court, one may might ask whether it would not be conceivable to merge the two levels (the high specialised courts and the Supreme Court) into one and thereby hopefully streamline the system by reducing bureaucracy and heavy administration. Under this model the role foreseen for the high specialised courts could be played by specialised sections (or chambers) of the Supreme Court, whereas a differently composed "Grand Chamber" (cf. the ECtHR) of that court could be charged, for example, with the kind of judicial review that is foreseen in exceptional circumstances. As an alternative (or as an additional element) one might consider whether the need for a special review in exceptional cases could be satisfied by a possibility for the specialised cassation chamber/section to relinquish jurisdiction in appropriate cases in favour of the plenary court."

The formulation in art. 39.11 seems to be not very clear: "within its powers of reference resolve the matters arising from international treaties to which Ukraine is a part," The question arises in which procedure? The wording "resolve the matters".. is too general and can evoke the controversies with the Constitutional Court.

9. The general principles on the judicial independence (Art. 47), are in line with European standards. But there are still detailed provisions which involved criticism of the VC and still involves concerns, for example art. 48 the role of Verkhovna Rada in the process of taking decision on judicial immunity. As a positive solution one can see the catalogue of the obligations for judges in art. 54,5-6.

10. Judicial Appointment (art. 66-78)

The draft includes very detailed procedure on the judicial appointment, the different stages of the procedure to make the process more transparent. Some provisions however seem to be more technical not for the statutory regulation.

Despite such a detailed regulation the main substantive problem, so criticized by Venice Commission in its previous opinions, remains. There are still two categories of judges: judges appointed for period of time (by President) and judges elected for life-time by Verkhovna Rada and this procedure is determined by the Law and Procedural Rules of the Verkhovna Rada (art. 78). The new draft does not provide the new solutions in this area. Taking into account critical comments of the VC on the role of Verkhovna Rada in the process of election of judge, (see opinion of the Venice Commission on the appointment of judges (CDL-AD(2007)028, p.12). The new draft tries to keep the role of parliament limited so much as possible not to be accused to go against the provisions of the Constitution.

I can repeat some doubts as regard the procedure "special integrity check for the candidates"..(art.67.1-3) It seems as a kind of invigilation against the candidate. The procedure was strongly criticized by the VC in its opinion (CDL(2010)097 p. 55 and 56: "Submitting a candidate's performance as a judge to scrutiny by the general public, *i.e.* including by those who have been the object of unfavourable rulings, constitutes a threat to the candidate's independence as a judge and a real risk of politization.

The regulation in art.67 p.4 providing for possibility to the candidate to study such information can be seen as a guaranty of transparency in this controversial procedure. Despite it one can fully share the opinion of VC p.56 that: "this highly questionable feature is not compensated by the fact that the candidate will have the right to have access to the information received by the High Qualifications Commission and to comment on it although this right in itself is a good thing."

11. Disciplinary Liability of Judges.(section VI).

The grounds for disciplinary liability vary from country to country. It is however possible to list the most common ground for disciplinary accountability: -to refrain from conduct likely to

compromise the dignity of the judicial office, -to avoid undue delays in the performance of duties, -to refrain from conduct within or outside office damaging the judiciary's reputation, - to refrain from conduct discrediting the judicial office or the court, -to avoid offences and omissions in the discharge of their official duties or grave disregard of deadlines for delivering judgment.
Art. 92 of the draft deals with the grounds for disciplinary action. They are as follow:
1) violation of person's right to access to justice, rules of jurisdiction, illegal application of measures to secure the claim, ungrounded refuse to take measures to secure the claim, leading to damages to a person;
2) violation of requirements regarding unbiased consideration of case, specifically violation of recusal (self-recusal) rules;
3) disclosure of classified information protected by law, including confidential information of deliberation room, or secrets which the judge learned during an in-camera session;
4) systematic or gross one-time violation of rules of judicial ethics, other actions which defame the status of a judge and undermine the authority of justice;
5) failure to submit or untimely submission of property, income, expenditure and financial liability statement, inclusion of intentionally false information in the statement;
6) use of judicial status in order to receive illegal material gain personally or in favour of third parties;
7) expenditures by the judge or his family members which exceed the income of the judge or his family members.

The grounds are well defined. The drafters took into account the suggestions done by Venice Commission in its previous opinions to avoid ambiguity in describing some of the grounds.
Disciplinary proceedings shall be conducted by disciplinary bodies (not by courts). In relation to judges of trial and appellate court the disciplinary body will be Judicial Disciplinary Commission. To justices of high specialized courts and of the Supreme Court – High Council of Justice as in current law. The drafters decided to set up a separate body as a disciplinary institution instead of High Qualification Commission as it is now. It is one of the possible solution, but it was not very welcomed by the Venice Commission, see p. 70 (footnote18) CDL(2010)097).
12. I have some concern as regards the composition of the Disciplinary Commission of Judges. There are not only judges but also persons appointed by the scientific institutions and one person appointed by the Verkhovna Rada (art. 103) . As a positive solution (who took into consideration the opinion of VC) one can see art. 104 p. 6 regulating who may not be the member of the DCJ. There is also direct provision that members of Parliament may not be a member of DCJ. In the light of this provision Verkhovna Rada may not appoint person trough among its members but on the other part VR is not obliged to appoint a judge but person who fulfills the conditions from art. 82.1.
I would like to repeat what I said many times that the best solution should be to give the disciplinary jurisdiction over judges to the court not to the special body. The same doubts I can repeat as regards the role of HCJ as disciplinary body.
Art. 100 dealing with appellation in disciplinary case is so imprecise as in the current law and for that reason was strongly criticized by the VC. I support my previous opinion that appeal in all cases should be sent to the court not to the special bodies even to HCJ.

13. The draft law provides for 5 sanctions (Art.99):
1) warning;
2) reprimand;
3) strict reprimand;
4) temporary (for a fixed period) suspension from office without right to receive additional payments to judicial wage and mandatory sending to the National School of Judges of Ukraine for advanced training;
5) decision about the violation of judicial oath, which makes it impossible for a judge to continue holding the position of a professional judge.
The last sanction is very strict one but necessary. The procedure for removing the judge from the office is regulated in the special section.

14. The grounds for removal listed in the new draft are the same as in current law. There is only new wording in some articles as is a case of art. 116 on Removal of a Judge for violating of the Oath of Office. Art. 116 regulates the procedure, (steps) for removal of a judge. The drafters tried to make the process of taking decision very transparent (the main role of High Council of Justice) and to limit the role of President and Verkhovna Rada only to the role of "executor" of the decision of HCJ which is in line with suggestions of the VC(reducing the involvement of the Verkhovna Rada in the process of election of judges) to guaranty the independence of judges and to avoid the politisation of the whole process.

15. I have no special concerns to the Section VIII on Judicial Self-Government.