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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON DRAFT LAW OF UKRAINE

ON THE "JUDICIAL SYSTEM" (CDL (2001) 46)

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The draft law 'On the Judicial System' under analysis is of an executive nature in relation to the Ukrainian Constitution. The Ukrainian Constitution in Chapter 8 entitled 'Justice' contains what for an act of constitutional rank are rather detailed regulations pertaining to basic judicial principals as well as to the independence of courts and judges. It also resolves a number of questions relating to the manner of appointing and recalling judges and also establishes a High Council of Justice. A number of constitutional solutions, especially those concerning guarantees of independence may raise certain doubts. However, as an executive act with relation to the Constitution, the Law on the Judicial System must fit within that framework. Hence, a number of critical remarks that the proposed solutions contained in the law elicit have become groundless in light of the Constitutions provisions. Nevertheless, certain doubts persist, the most important of which concern the none-too-consistent division between individual authorities within the framework of the accepted separation of powers. One of those questions is undoubtedly the entity assenting to depriving a judge of immunity. In situations where a judges' self-governing body exists, that prerogative should belong to such a body. In Ukraine's judicial system, that prerogative has been accorded to the Supreme Council of Ukraine. That is a constitutional principle, and a law cannot change it. Nevertheless, granting such authorisation to the Supreme Council in states, where the very idea of an autonomous judiciary is still fresh and thinking in terms of the overriding nature of political authority over judicial authority remains entrenched, may politicise the process of resolving cases of stripping judges of their immunity. Rather than becoming an element guaranteeing the independence of judges, it may become an element of political bargaining, of various political options in parliament exerting their influence on the judge. Not because of the law but because of a concrete decision affecting a concrete judge. I wish to re-emphasise that I am fully aware of the fact that that remark applies to constitutional solutions, but it should nonetheless be formulated as a solution de lege ferenda.

The broad scope of matters regulated by Chapter 8 of the Constitution requires the law, an executive document in relation to the Constitution, to more concretely and exhaustively regulate individual issues. From that point of view, the study of the draft under discussion gives rise to basic misgivings. The draft creates the impression of being incomplete, since a number of essential issues have not been regulated, whilst elsewhere unnecessary repetition occurs. Also, widely regulated are matters of a 'rules and regulations' rather than a legislative character. The remarks made about the previous draft law on Ukraine's judicial system, when it was being evaluated by the Venice Commission (CDL-INF [2000] 5), may be repeated. Especially the following remark: '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…' The present draft in my view is defectively constructed.

The draft law consists of six none-too-equivalent parts. Part 1, General Provisions, constitutes an elaboration of the constitutional principles contained mainly in Articles 124 and 129. At the same time, in many places the regulations contained in that part are too general and refers the reader to successive laws without specifying which laws are concerned. For instance, Article 2 even on such a concrete issue as the organisational set-up and working of courts of general jurisdiction refers the reader to other Ukrainian laws. On the other hand, Articles 6 and 7 guaranteeing the independence of judges deserve a positive rating. Again, however, the regulation is too general. Article 6 in Point 2 refers to other Ukrainian laws without specifying which ones it has in mind. Similarly, Point 4 of Article 6 is extremely declarative in nature. The way it is formulated is more typical of a constitution than of an executive law pertaining to the constitution. That manner of regulation seems to confirm doubts as to the completeness of the law under analysis. Perhaps that is a question of the translation, however in this version certain

provisions are incomprehensible. For instanced in Article 23 the scope of regulation contained in Points 1 and 2 is unclear.

Of key significance to this draft are Parts 2, 'The Judicial System', and 3, 'Judges, Assessors and Jurors'. Incidentally, the title of Part 2 is the same as the title of the entire law, which is also a defect of construction, albeit of a largely editorial. Part 2, however, contains a number of solutions that deserve critical evaluation. In that part pertaining to the judicial system the problem of imprecise delimitation of divisions between the judicial authorities and other authorities is even more obvious. There are a number of solutions left over from the previous system. These include the solutions contained in Article 44 and correspondingly 48 pertaining to the plenum of the high specialist court and the plenum of the Supreme Court of Ukraine. Point 2 of Article 44 states that the plenum, on order to meet the integrity of judicial practice, gives recommendations and explanations to the courts concerning issues of applying legislation regulating legal relations within the framework of appropriate special jurisdiction. The wording of that provision suggests that this is a supra-trial measure deployed beyond normal court procedures and having the character of administrative guidelines (?) applied to court rulings. Imprecision spawns doubts, and such a measure should not be applied in a democratic law-abiding state. Moreover, Point 4 of that article accords both the justice minister and the prosecutor general the right to participate in the work of the Plenum. That article does not envisage any exclusions or reservations. That means that the justice minister, as an organ constituting part of the executive authority, participates in the deliberations of the Plenum, takes part in the voting and may participate in issuing recommendations and explanations to the courts mentioned above. I believe that provision should be changed. Additional clarification is needed as regards the character of those recommendations and the legal consequences of their not being taken into account by a court. After all, they pertain to court rulings, to the sphere of court,s adjudication not the realm of court administration. Similar doubts and misgivings are raised by Point 4 of Article 48. It gives similar prerogatives to the Plenum of the Supreme Court, also including the participation of the justice minister and prosecutor general on the issue of recommendations and explanations concerning legislation. To whom are they directed and what is their purpose? Is there any essential difference between the recommendations contained in Articles 44 and 48, or are they simply phrased differently? In the area the draft law is unacceptable and must be changed. Serious doubts arise that those provisions fundamentally violate the principle of separation of power and the judicial autonomy deriving therefrom – and that is one of the basic principles of Ukraine's Constitution.

The provisions concerning the plenum are incongruous with those pertaining to 'judicial self-governance' contained in Part 4. Point 2 of Article 68 states that 'bodies of judicial self-governance exercise their authority thought judges' assemblies, conferences, congresses and board sittings'. The question arises: what is the relationship of judges' assemblies and board sittings to the plenum? What is the composition of those bodies? Do assemblies exist and board sittings take place in every court or only in courts of specified levels? The law fails to answer those questions, referring the reader to detailed regulations in a separate law 'On the bodies of Judicial Self-Governance'.' That is a serious flaw of the draft under analysis. Those regulations should be contained in the law itself. Especially within the context of so detailed and controversial provisions applying to the plenum. There exist justifiable fears that in such a situation both the prerogatives and role of judicial self/governance may be purely decorative.

The draft law, despite its title, does not give clear answers about the existing court system. It continues to be complicated and hierarchically quite elaborate. The position of secretariats requires clarification. All articles pertaining to courts (eg Articles 30, 33, 36 and 39) state that

courts consist of: 1) The head of the court, deputy head of the court and a judge; 2) the secretariat. The secretariat is mentioned as an essential component of the court. The secretariat is referred to repeatedly in the law, but it is difficult to find any precise explanation as to whether or not the secretariat constitutes a separate structure of administrative court management. Article 75 appears to indicate that is not the case. It is rather, a kind of auxiliary structure in the hands of the court president. I do not believe the secretariat should so prominently figure in individual articles of the law. The legislative regulation should rather restrict itself to a modified version of Article 75. I believe Part 2 should be reconstructed. It contains far too much repetition, especially as regards the prerogatives of court presidents. Those are identical formulations pertaining to the presidents of different courts (Articles 32, 35, 38 and 41). They could be consolidated in a single article, thereby enhancing the law's legibility.

There is a lack in the law of essential provisions, for instance regarding the responsibility of judges, the recall of judges and principles regulating disciplinary proceedings. I am convinced that the status of judge, his particular prerogatives and duties, as well as disciplinary proceedings should constitute an essential part of this law. Misgivings are therefore evoked by Article 60 which refers the reader on such important issues to other laws. Under the circumstances, this law is more reminiscent of framework legislation or even rump legislation, containing as it does more elements of a 'rules & regulations' character than of a systemic nature, and that is the character a law 'On the Judicial system' should have.

I also have reservations about the extremely wide scope of prerogatives the President of the State enjoys with regards to law courts. It is worth considering whether it should be the President's prerogative to appoint court presidents and vice-presidents as well as to establish and liquidate courts of general jurisdiction (Article 29). All those provisions confirm the impression of greater trust placed in the prerogatives of political authorities with relationship to the judiciary than in judicial self-governance bodies.

Before ending, I wish to add one more remark of a more technical nature. The English-language version submitted for evaluation clearly creates the impression of and unchecked version prepared by several individuals I hope, therefore, that many of the misunderstanding are the fault of the translation. For instance, Article 5 speaks of economic cases and Article 37 uses the term 'commercial cases'. I believe the same type of cases is being referred to in both articles. Judging by its scope of competence, the term 'High Board of Justice' used in Article 57 appears to be the same as the 'High Council of Justice' mentioned in Article 60. Those are, of course, minute examples.

To conclude, I believe this draft does not deserve approval in its present form. It is too general and imprecise and overlooks a number of essential matters pertaining the status of judges. I believe that if the authorities of Ukraine envisage issuing at least three separate laws, the they should be jointly evaluated and jointly passed by parliament. Owing to the weight of these questions, however, it would be more proper to regulate those matters in a single law. That would provide greater guarantees of cohesive and complete solutions.