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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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OPINION ON THE DRAFT LAW OF UKRAINE "ON THE JUDICIAL SYSTEM"

Opinion on the Draft Law of Ukraine "On the Judicial System".

The draft law of Ukraine on the Judicial System prepared by the Ministry of Justice of Ukraine, premises as its objects and reasons, the establishment of a legal framework for the organisational set-up and working of courts in Ukraine. It aims to create the appropriate conditions for the administration of justice, and to ensure the protection of the fundamental rights and freedoms of individuals. Last year, the Directorate General of Legal Affairs of the Council of Europe provided the Ukranian authorities with comments on two draft laws on the judicial system of Ukraine. The Ministry of Justice of Ukraine has prepared and proposed a different draft law on the judicial system. This draft is much shorter than the previous two. While dealing with the organisational structure of the system, the draft law fails to regulate such matters as concern disciplinary measures which may be taken against 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 of the Qualification Commission of Judges, and similar issues. One augurs, that such vital matters which are essential for the proper administration of justice, are adequately regulated by other legislation which falls outside the ambit of this opinion. Without any doubt, a mature and in depth opinion would require a detailed study of each provision of the draft law and a study of how it relates to the other relevant legal instruments in the context of the reality of Ukranian society. Such an in depth study is essential as the text of the draft law does not provide the reader with a comprehensive picture of the judicial system of Ukraine.

I think one should note, from the outset, that experts have been asked to comment on a draft text in a translated version that leaves much to be desired. The English version has various inconsistencies and as Ms. Hanna Suchocka rightly pointed out in her opinion on the law, *"the English – language version submitted for evaluation clearly creates the impression of an unchecked version prepared by several individuals"*. One should realise that experts might not have a real knowledge of the historical development of the judicial system in the Ukraine, the present social political environment in which the proposed reforms are being introduced, and to what extent has the previous totalitarian mentality, through choice or necessity, found its way in the new reformed judicial system. I propose that the English version is thoroughly revised in order to clarify matters.

It is not excluded that some of my comments might seem inappropriate when translated to Ukrainian reality. My opinion should be considered against this background and taken in the spirit of good will and co-operation towards the finalisation of a draft that would not only conform to accepted European democratic standards, but would also respond to the particular needs of Ukraine at this important period of transition from a totalitarian state to a fully fledged democracy.

Traits of the old mentality, unfortunately, and perhaps inevitably, still persist and could be traced in the text being examined. It is not easy to change the mentality of decades, when it is the fruit of ideological roots. People were used to expect and accept State guidance and interference in all activities, not least in the judicial system. It has to be noted, however, that the proposed draft is correctly orientated towards democratic principles. One has only to ensure that those principles are correctly reflected and applied in practice. A

draft law on the judicial system is not an academic exercise. It is concerned with the application of justice, and that means that every single aspect of the court structure has to ensure above everything else, the impartiality and independence of Courts as the only accepted means of ensuring justice in a country.

It seems that the drafters of the Bill sought to simplify the previous more detailed drafts, but in doing so, they produced a document that confuses Constitutional provisions with provisions pertaining to the regulation of proceedings in Court and others that are proper to the organisation of the Courts. These latter provisions should, *stricto iure*, be the ones to be included in a code of organisation. There is reference in the draft to a law regulating Court procedures. If this is correct, there is no reason why a number of provisions, which are by and large positive in the present draft, should not be included in that law. This would undoubtedly contribute to a more linear and homogeneous draft on the judicial system. It would also enhance its clarity thus avoiding unnecessary ambiguity and uncertainty that would have to be resolved by dubious interpretation.

In this respect reference is made to, Article 4 (Right for legal protection); Article 10 (Equality before law and courts of law); Article 11 (Presumption of innocence and provision of proof of guilt); Article 12 (The right to legal aid); Article 15 (Openness and publicity of proceedings); Article 56 (Office responsibilities and duties of judges). Such provisions are general principles which ideally should be entrenched in the Constitution. Other provisions, such as Article 13, Article 16 (Filing of appeals), Article 17 (Mandatory character of the court ruling), Article 19 (direct and oral nature of presentation), Article 20 (Language of legal proceedings and clerical work) Article 22 (Access to justice and procedural economy) are more commonly found in ordinary legislation regulating court procedure.

The Court Structure.

Ukraine's judicial system has two major systems: the Constitutional Court, which is responsible for issues concerning the Constitution and courts of general jurisdiction. The Constitutional Court is regulated by provisions entrenched in the Constitution. The draft law does not contain any provisions which refer to this court. On the other hand Courts of general jurisdiction deal with civil, commercial, administrative and criminal matters. The apex of this structure is the Supreme Court. The draft laws provides for an elaborate and complicated hierarchical structure. From a reading of the draft law it also transpires that all authority lies in Kyiv. The Courts of general jurisdiction are divided into various courts, amongst which are the so called military garrison courts (Article 28). It seems that such courts have the jurisdiction to deal with civil, administrative and criminal matters. It is not however clear if ordinary citizens are subject to the jurisdiction of these courts in the territory where they are established. This also calls for an explanation. In terms of Article 30 these courts *"shall be established on the territory within which one or several military garrisons are stationed"*. The scope for their establishment is not clear. It is unacceptable that ordinary citizens in peace time are subjected to any form of military discipline or control. In this respect it is strongly advised that the Italian Constitution provision be followed. This *states "military tribunals in wartime have jurisdiction as authorised by law"* (this would not exclude the military courts from exercising jurisdiction over most matters in wartime), *"in*

peace time their jurisdiction is limited to military offences committed by members of the armed forces" (Article 103").

Within the court structure are the High Specialized Courts (Article 42). These too are competent to deal with matters of a civil, commercial, administrative and criminal nature. The draft law stipulates that these courts may be of first instance or appellate instance. They also have the jurisdiction to hear cases with new evidence, apparently creating the possibility of a re-trial. Article 43 provides for a *"prosecutor's appeal instance for hearing of civil, commercial, administrative and criminal cases"*. One fails to understand the involvement of the prosecutor in civil, commercial and administrative cases and the instances where he can exercise such a right. If this means that the Prosecutor General has a right of appeal in these cases where the public administration is a party to proceedings, the reference to his right of appeal should be deleted since he should not be considered differently from any other party lodging an appeal (cfr. Article 16).

The law also establishes a Plenum of the high specialised courts that is composed of the head of the specialised court, deputy head and judges of the high specialised courts. The draft law fails to stipulate the number of judges to form part of the Plenum. I see no justification for the Minister of Justice and the Prosecutor General of Ukraine to participate in the work of the Plenum, and this can only serve to diminish judicial autonomy. Furthermore, the function of this institution as stated in Article 44 requires clarification. From a reading of the law, it appears that the Plenum only issues recommendations and explanations to specialised courts with respect to possible conflict in matters of jurisdiction of such courts. As Ms. Hanna Suchocka rightly noted in her opinion on the draft law, *"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 of law"*. According to the draft law submitted by the People's Deputy Mr Zadoroshnij (Article 47), the Plenum shall *"examine the cases of courts of the correspondent special jurisdiction in newly established circumstances and in cases, which are stipulated by the procedural law, examine cases in cassation order"*. Thus, it appears that the functions of the Plenum under the draft law proposed by the Ministry of Justice have been diminished.

The Supreme Court of Ukraine (Article 46) is at the very top of the courts of general jurisdiction (Article 28). It appears to have a dual function. In the first instance it reviews civil, commercial, administrative and criminal cases on the request of the parties to proceedings. This added procedure seems to prolong judicial procedures unnecessarily, with negative effects on the right to have a case decided within a reasonable time. The Supreme Court also acts on its own initiative in giving advisory recommendations to courts concerning the interpretation of legislation, files requests to the Constitutional Court requesting a declaration as to the constitutionality of provisions of law. With respect to this latter aspect, the draft law should indicate whether or not other courts have such an authority. I see no reason why such a right should be limited only to the Supreme Court. It would make sense to grant a judge of a court of first instance the right to file a similar request. Such a possibility would avoid unnecessary prolongation of proceedings and diminish expenses. On reading the law it appears that if during a case, a question is raised about the constitutional merits of the proceeding or on constitutional rights, it should be referred to the Plenum of the Supreme Court. It has the responsibility to decide whether a constitutional question does

exist. If in the affirmative, then the matter is referred to the Constitutional Court. In terms of Article 46, *"The Supreme Court of Ukraine shall exercise its powers as a collegiate board within the Plenum of the Supreme Court of Ukraine"*. As in the case of the Plenum of High Specialised Courts, I totally disagree with that part of Article 48 which stipulates that the Minister of Justice and Prosecutor participate in the Plenum of the Supreme Court *"on the issue of recommendations and explanations concerning legislation"*. The participation of these two officials is out of place and is of no benefit, and is definitely repugnant if, as it seems, they have the right to participate in deciding issues relating to the constitutionality of legislation.

This function of the Plenum *"to issue recommendations and explanations concerning legislation"*, seems to be a residue of the old mentality. It is clearly reminiscent of a system of autocratic control of the judicial function by a State organ *supra cortes*, in that its pronouncements would amount to a theological interpretation of the law that seems to have a binding effect on all courts even against the personal convictions of the presiding judge. This would up to a certain extent be justifiable as a means of establishing judicial precedent. However, when one notes that the Minister of Justice and the Prosecutor General shall participate (note the imperative) in the activities of the Plenum, it is obvious that judicial independence is being seriously impaired. The fine line that should define the separation of powers is being extremely strained. In this regard, the comments of Judge Giaccomo Oberto (ADACS DAJ EXP (2000) 25) are very pertinent and should be heeded (*pages 19 et seq.*).

It appears that judges have a judicial and administrative role. In fact, the draft law provides for the appointment of a head and deputy head within the courts of a general jurisdiction. The appointment is for a five year period. The law does not state whether the appointment is subject to renewal on the lapse of the five year period. Ideally, it should not be possible for the same person to serve as head for more than one successive term. The President of Ukraine has the authority to dismiss the head, following the proposal of the Minister of Justice and on the recommendation of the Qualifying Commission of Judges. This too is objectionable, in that it is one of the instances where the draft law is affording an extensive power to the President (who is not accountable to Parliament) in the administration of the judicial system. Furthermore, the law fails to define the grounds of dismissal. His duties include, to oversee the distribution of cases between judges, timely hearing of cases, judicial ethics and also judges' compliance with work discipline. Therefore, the head should be free from all government interference and/or influence.

The establishment of a secretariat within the courts of general jurisdiction appears to have the scope of supporting the activities of the courts. The secretariat features prominently in Chapter 2 of the draft law. It is an administrative body, at the service of the head of the Court. In terms of Article 52 of the draft law the head of the secretariat of the Supreme Court of Ukraine, shall be appointed and dismissed by the head of the Supreme Court.

Part 2 of the draft law, which regulates the system of courts of general jurisdiction, contains various repetitions which should be avoided. Preferably separate provisions for each and every court of general jurisdiction should be introduced. Introducing a provision which is applicable to all the courts would enhance the understanding of this part of the law. Thus,

for example Articles 32, 35, 34, 38, and 41 merely repeat the duties of the head of the separate courts. The same can be said with respect to Articles 30, 33, 39, which refer to the establishment of the different courts. These provisions of law can be easily merged in one single Article.

Independence of the Judiciary.

The foundation of any democratic society is the Rule of Law whereby individuals are governed, and their disputes settled, by reference to the laws enacted in accordance with legislative processes. However, the mere existence of the process itself is insufficient. Society relies upon the judiciary to protect it against the arbitrary use of power by Government and administrators, and to resolve disputes between individuals in an impartial manner. It is almost universally acknowledged that one of the most fundamental aspects of adherence to the Rule of Law is the existence and maintenance of an independent judiciary. It is the duty of governments to respect and observe the independence of the judiciary, creating an environment whereby a judge is free to decide a case without fear of reprisals, whether from the executive or wealthy corporations. The Constitution of Ukraine rightly affirms: *"In the administration of justice, judges are independent and subject only to the law"* (Article 129). Similarly, Article 126 confirms that *"the independence and immunity of judges are guaranteed by the Constitution and the Law of Ukraine"*.

Article 6 of the draft law declares this principle, *"In administering the judges, people's assessors and jurors are free from any exertion of authority and they only submit to the Constitution and laws of Ukraine"*.

The law proposes a number of measures aimed at creating an environment where judges are guaranteed independence in the execution of their duties. Reference is made to particular issues:

(i) **Qualification for appointment as judge**: The draft law stipulates that a person qualifies for appointment for the office of judge on condition that he:

(a) Is a citizen of Ukraine;
(b) Is at least twenty five years of age;
(c) Has a university law degree;
(d) Has a minimum of three years service in the 'sphere of law';
(e) Has been residing in Ukraine for at least ten years and speaks the state language.

My personal view is that the conditions referring to age and period of practice should be reviewed in order to ensure that persons selected for judicial office have adequate legal expertise, ability to handle cases, firmness and fearlessness. These are all essential attributes of a person suitable for appointment as a judge. The main quality requisite in a judge is the possession of, or the capacity to develop, professional legal skills of the kind required for judicial work. These include knowledge of evidence, procedure and practice, knowledge of the law, analytical ability, a capacity to dispose of a case smoothly and efficiently and a capacity to give a well-reasoned decision

with reasonable promptness. A factor of increasing importance is the demand, backed by governments, that the courts dispose of work efficiently by adopting case management techniques and new procedures. This demand, motivated by a desire to reduce the costs of the court system, calls for pro-active judges. It is only the confident highly skilled professional conversant with court processes that can aspire to becoming a pro-active judge. There is no place for a judge who allows the parties and their lawyers to dictate the course of the action.

With respect to appointment as a judge of an Appellate Court, a High specialised court or the Supreme Court, different requirements are applicable (vide Article 55).

(ii) **Appointment of judges**: The issue concerning the appointment of judges is regulated by Article 57 of the draft law. When assessing the independence of the judiciary, the manner of appointment is one of the considerations that has to be taken into account. The duration of the term of office, the existence of guarantees against outside pressures and the question whether the court presents an appearance of independence, are other relevant considerations. The appointment of a judge to a local court, the Appellate court, the High specialised court, and the Supreme Court of Ukraine may be:

(a) **For a period of five years**. Judges are appointed by the President of the Ukraine, on the recommendation of a Qualifying Commission on the proposal of the High Board of Justice. It is strongly recommended that such judges should only be assigned to courts of first instance, and courts at appeal level should be presided by judges appointed "for life".

(b) **For life**, on selection by the Supreme Court of Ukraine following the recommendation of the Qualifying Commission on the proposal of Minister of Justice of Ukraine.

(c) **Appointment to the Supreme Court of Ukraine for life**, is made by the Verkhovna Rada of Ukraine based on the proposal of the Head of the Supreme Court, and following the recommendation of the Qualifying Commission.

The draft law aims at introducing a system where the authority taking the decision on the selection and career of judges is independent of the government and the administration. This is positive. Notwithstanding, government intervention is still evident. Thus, for example in the case of a local court, the Appellate court and the high specialised court, the Minister of Justice is empowered to reject a proposal for appointment to the post of judge for life. Similarly, it appears that following a presidential appointment, a judge can only start to perform his duties on the issue of an executive order by the Minister of Justice "*indicating the time period from which the judge shall start executing his professional duties*".

Appointment of judges for a period of five years could possibly inhibit forthright independent-mindedness. In a system where a judge is guaranteed a career as a

judicial officer up to the age of retirement, his independence will in principle be better safeguarded than if he has to worry about re-election to office after a few years.

There appears to be a system of checks and balances in the procedure for the appointment of judges, that requires further investigation. It is not clear to what extent the authority having the final say in appointments, is free to accept or discard advice given to it.

Other matters warranting clarification are:

(1) Presumably, the High Board of Justice referred to in Article 57 of the draft law is in actual fact the High Council of Justice. An institution regulated by the Constitution of Ukraine.

(2) It is not clear whether judges appointed for life, are appointed by the President of Ukraine. In this respect the law simply states that selection for the office of judge shall be made by the Supreme Court of Ukraine (in the case of judges appointed to a local court, the Appellate Court, or the High specialised court) and the Verkhovna Rada of Ukraine (in the case of the Supreme Court of Ukraine). It is only in the case of judges appointed for a five year term that the draft law specifically states that judges are appointed by the President of Ukraine. On the other hand, Article 128 of the Constitution of Ukraine, provides that *"The first appointment of a professional judge to office for a five-year term is made by the President of Ukraine. All other judges, except the judges of the Constitutional Court of Ukraine,* ***are elected by the Verkhovna Rada*** *of Ukraine for permanent terms by the procedure established by law"*.

(3) The draft law contains only one general provision which refers to the Qualifying Commission (Article 70). The law does not provide any indication as to who are the members that compose this Commission, the mode of their election, term of office and similar matters. It appears that prior to the appointment of a judge, it is mandatory to seek the recommendation of the Qualifying Commission. Preferably, such a commission should consist of judges, practising and academic lawyers and possibly also knowledgeable lay persons.

(4) Article 8 of the draft law stipulates that *"judges shall be guaranteed their term of office until the age of sixty five"*. It is therefore apparent that on reaching the age of sixty-five a judge does not enjoy security of tenure. One understands that this provision is to be interpreted in accordance with Article 126 of the Constitution which establishes that a judge is dismissed from office in the event of the *"attainment of the age of sixty-five"* (The terms "dismissed" in this context, and "liquidated" with reference to courts, might be the result of inadequate translation).

(iii) **Insulation from politics**: Article 54 of the draft law provides that *"judges shall not belong to any political party or trade unions, shall not take part in any political activities, nor have a mandate of representation, take any paid positions, perform any other paid job, except for research, teaching and creative activities"*.

Article 127 of the Constitution of Ukraine already prohibits a judge from participating in politically partisan activities and/or being a member of a political party. I am in agreement with the draft, because I believe that judges should be expected to shed all their political affiliations on appointment. I strongly believe that the judicial system should be as far as humanly possible cut off from party political influences. Judges should not be organised according to their political convictions and/or loyalties since this would render them intellectually and otherwise vulnerable to outside influences, especially in sensitive cases with a political content.

I do not concur with the view expressed by Judge Oberto (page 14 of his paper), that this proviso could be seen as an unacceptable form of censure. On the contrary I feel it is a necessary limitation on the activities of a judge in the supreme interest of due administration of justice, that has to be seen to be done by an independent and impartial Tribunal. Though it is true that in Eastern European countries this ban is strictly related to a form of reaction against the Communist past, in which judges were obliged to be members of the party, it also true that countries with a common law tradition pride themselves for having a completely apolitical judiciary. This undoubtedly not only enhances the independence of judges, but also favours the creation of the salutary notion of the judiciary as a bulwark against abuse of power and arbitrariness whatever its origin or political orientation.

(iv) **Immunity of Judges**: In terms of Article 126 of the Constitution of Ukraine, *"a judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court"*. On the other hand, Article 7 of the draft law proposed by the Ministry of Justice stipulates, *"The judge cannot be detained nor arrested without an agreement of the Verkhovna Rada of Ukraine until an indictment has been brought in against him by a court of law"*. First and foremost, I see no justification to have such matters regulated both by the Constitution and ordinary legislation. The legislator should attempt to avoid repetition, which could lead to uncertainty and conflict due to unsatisfactory drafting. In fact, this provision of law would seem to be in conflict with the Constitution. The latter refers to arrest or detention after a guilty verdict, whereas the draft law refers to arrest upon an indictment. Probably, this incompatibility is attributable to the translation into the English version. It is evident that the wording of the draft law calls for clarification.

It is a fact that in many western countries, judges are held accountable for their actions according to the principles of criminal and civil law. However, the system adopted by the Constitution could be justified in countries where the respect for judges and their independence is still not deeply rooted.

I would have thought that the establishment of a self-governing body for the judiciary would have instilled the notion that such matters should be dealt with by such an authority. However, since the Constitution expressly states that the Verkhovna Rada has the authority to deprive a judge from immunity, the draft law cannot serve to amend the prevailing position.

(v) **Judicial Discipline**: Article 60 of the draft law refers to the possibility of suspension of judges. The matter should be regulated by adequate provisions of law which embody various elements to protect judicial independence. Thus, for example disciplinary action should not be brought against a judge because of disagreement with the merits of his decision. The administration of the procedure should be left within the judicial branch, authority for which could be grounded on the administrative power of a judicial council to make all necessary orders for the effective administration of justice. Such council could be empowered to conduct an investigation of its own initiative, and specifically state the actions it may take. In the interest of public accountability, council orders implementing action could be made public. The fact that a judge should enjoy security of tenure does not, in my opinion, imply that he must be free from all internal sanctions. The power in the judiciary to deal with certain kinds of misconduct furthers both the smooth functioning of the judicial branch and the broad goal of judicial independence.

(vi) **Dismissal of Judges**: Article 8 of the draft law provides that *"The judge shall only be dismissed on the grounds envisaged by the Constitution of Ukraine and this Law"*. Similarly, Article 60 of the draft law provides that *"grounds and procedure for dismissal from position of judges, suspension of their powers shall be determined by the Constitution of Ukraine, this Law and other laws of Ukraine"*. There are therefore two provisions of law that are basically repeating the same principle. The term *"and other laws of Ukraine"* is too vague and could imply expanding the grounds of dismissal by enacting ordinary legislation. The draft law under review does not include any provisions which refer to the dismissal or suspension of judges from office. Issues concerning dismissal should preferably be regulated by the Constitution. Article 126 of the Constitution of Ukraine enlists the grounds for dismissal from office. Ideally, the draft law should contain an express provision stating that *"during the term of office, judges may be dismissed from the post only on the grounds stipulated by Article 126 of the Constitution of Ukraine"*. Nevertheless, Article 126 is an exhaustive list and being a constitutional principle it cannot be amended by the mere enactment of ordinary legislation.

(vii) **Distribution of Cases**: Article 6 of the draft law states that *"the procedure for case distribution among the judges shall be determined by procedural law. Any party to the case or any participant to judicial proceedings or any other person shall not influence the distribution of cases among the judges. The case can only be retrieved from a judge and passed to another one on the grounds envisaged by law"*. This is another positive fundamental principle which requires adequate regulation to ensure that the Executive does not exercise any influence in the distribution of cases among judges, also considering the importance that the draft places on the secretariat in the courts of general jurisdiction. Thus, it is of paramount importance that all possible intervention by the Executive is avoided. The distribution of cases is an internal issue to be determined by the judicial system itself. Furthermore, the transfer of a case from one judge to another should only be possible in exceptional circumstances.

(viii) **Establishment and "liquidation" of courts**: Of concern is Article 29 of the draft law which lays down the procedure for establishing and "liquidating" courts of general jurisdiction. The draft law provides: *"In compliance with this Law*

and the proposal of the Minister of Justice approved by the Head of the Supreme Court the President of Ukraine shall establish and liquidate courts of general jurisdiction". To abolish a court simply for the purpose of terminating the appointment of a judge or judges of that court would be to violate the constitutional provisions designed to protect judicial independence. Clarification is required in order to establish in what instances and for what reasons a court may be *"liquidated"*. Furthermore, a provision which grants to the President such power is apt to undermine the independence of the judiciary. Such a procedure should only take place as part of a planned re-organisation of the court structure, in circumstances where the re-organisation is being undertaken in the public interest in order to provide a better or more efficient court system.

Obviously, a judge's entitlement to hold judicial office until he reaches retirement age or is dismissed in conformity with the relevant constitutional provisions does not preclude the legislature from re-structuring the court system when it considers it in the public interest to do so. The freedom of the legislature lawfully to put in place an improved or more effective court system should not be impaired, though one hopes that such initiatives will be approached with great circumspection. Provisions should be introduced stipulating that (1) a judge of the old court would be appointed to a new court created to replace the old court or to a court of the same status; and (2) that if such appointment were not available, the old court would not be abolished until its judges cease to hold office. Where the new court is exercising a jurisdiction which is similar to the jurisdiction exercised by the old court then one would think that the dictates of judicial independence would require the appointment to the new court. Re-structuring should not become a vehicle for effectively dismissing a judge. Similarly, it should not be used as a vehicle for sidelining a judge simply because the executive considers that it can select a better judge or because the executive believes the judge falls short of the highest standards. Such a trend would surely be inconsistent with the protection of judicial independence and with the purposes sought to be achieved by the terms of judicial appointment.

The draft law provides that *"the number of courts of general jurisdiction except for the Supreme Court of Ukraine shall be established by the President of Ukraine following the proposal from the Minister of Justice approved by the Head of the Supreme Court of Ukraine"*. There is nothing objectionable in that the Executive establishes the number of the various courts of general jurisdiction as enlisted in Article 28 of the draft law.

(ix) **Salaries of Judges**: Affording financial security to the judiciary is another essential requisite. This matter is not regulated by the draft law. Allowances, leave and pension are matters which should be determined by Parliament. Furthermore, a judge's salary should not be decreased throughout his term of office.

(x) **Court funding**: Article 74 establishes a system which ensures that the funding of courts at all times, even where the State Budget is not adopted for any particular fiscal year. In such an eventuality, the courts are funded on a monthly basis. This is an added safeguard for judicial independence. Another safeguard is

found in Article 6 of the draft law, which provides that the amount of expenditure from the state budget cannot be reduced during the year.

(xi) **Legal Training for Judges:** Article 76 of the draft law provides for a National Academy for Judges of Ukraine. The Academy is to *"provide an adequate level of professional training for judges to shape up a highly skilled body of judges"*. Although such an Academy is appropriate in providing training to potential candidates for the office of judge and should serve to improve the qualification of judges and court employees, the draft contains only one provision. It seems that Article 76 aims at merely establishing such an institution. An institution separate and independent from the Ministry of Justice would be more advisable in ensuring the application of the principle of judicial self-governance, also considering that I was highly probable that prospective appointments for judges would be made from graduates from this academy.

(xii) **Other comments**: The draft law contains a number of provisions which are commendable in that they aim at guaranteeing judicial independence and impartiality. In this respect reference is made to:

(1) **Article 6**:

(a) Intervention into administering justice, any exertion of influence upon judges, people's assessors and jurors shall be punishable by law.
(b) Any party to the case or any participant to judicial proceedings or any other person shall not influence the distribution of cases among the judges.
(c) Demonstrations, meeting and pickets in the court's premises and within the perimeter shall be prohibited.
(d) The provision that judges should not be obliged to comment, is acceptable only if the provision is intended to mean that judges should not comment on cases determined or still pending in front of them. However, judges should be constitutionally obliged to provide a reasoned judgement.

(2) **Article 58** - defines the oath to be taken by a judge. This is appropriate since Article 126 provides for the dismissal of a judge from office in the event of *"the breach of oath"*.

(3) **Article 68** – advocates the principle that judicial self-governance shall be the guarantee of independence and immunity of judges and their irremovability from office.

(4) **Article 59** – provides the procedure for the transfer of judges from one court to another court of the same level. A judge must agree with such a transfer.

Participation of citizens in judicial procedures.

The draft law provides for the appointment of jurors and assessors who participate in judicial procedures. They are citizens of Ukraine. Whether or not there is a distinction between assessors and jurors is not clear. In terms of Article 61, assessors perform their duties in district, city/districts courts whereas jurors are involved in the Supreme Court of the Autonomous Republic of the Crimea, oblast, Kyiv and Sevastopol city courts. It is not clear what type of cases fall under their jurisdiction. The draft law does not provide any indication of how a judgement is delivered, which issues are decided by the judge and which issues are decided by the jury/assessors and whether a judge may be out voted on a point of law. However, Article 18 clearly states that all court rulings which are to be delivered on a collective basis *"shall be approved by a majority vote of judges, people's assessors and jurors in the court"*.

The draft law clearly attempts 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 the work, which are envisaged by the law"* (Article 66). Possibly one might envisage a situation where the Executive exercises 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 appointment period. Measures, aimed at discouraging such "incentives" are appropriate. Furthermore, their remuneration should be established by law and not left to the discretion of the Cabinet of Ministers (Article 66).

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 of the Constitution 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. 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. 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 form part of the judicial system would not have an adverse effect. Furthermore, the functions of this institution do not extend to the organisation of the judicial system in the country, which is vested in the State Judicial Administration of Ukraine (Article 72-73).
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. 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.

Chief Justice J. Said Pullicino
in collaboration with Dr. Anthony Ellul
(Liaison Officer),
Malta,
July, 2001.