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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

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

by

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1. The opinion of the Venice Commission has been sought on a draft law of Ukraine "on the Judicial System and the Status of Judges" prepared and approved by the Verkovana Rada's Judiciary Committee in June 2008.

2. The draft is essentially a consolidated text of two drafts which were previously considered by the Venice Commission in its Opinion Number 401/2006 (CDL-AD (2007) 003) adopted by the Commission on 16-17 March 2007 comprising a draft law on the judiciary and a draft law on the status of judges of Ukraine. The preparation of a merged text is to be welcomed. In its previous opinion the Venice Commission referred to the fact that there was a good deal of overlap and repetition between the two draft laws and that in order to understand the system properly – notably in relation to the provisions concerning the disciplining of judges – one had frequently to refer back and forward between the two texts. The Commission recommended that it would be simpler and clearer to have one law. The new text is a considerable improvement in this regard and it makes the law much easier to read and understand. Secondly, the translation which we have been provided with is much clearer than the earlier drafts, as a result of which a small number of the concerns which were referred to at that time are in fact clarified by the new translation.

3. In its 2007 opinion the Commission concluded that the draft laws were welcome as a clear improvement compared to the existing situation in the Ukraine and compared to earlier drafts intended to reform the judiciary. The Commission commented that the fundamental provisions were in line with European standards. Despite this a number of concerns were raised in the opinion. The new draft addresses a small number of the Commission's concerns but on the whole the content of the document does not differ greatly from the earlier texts, and many of the Venice Commission's more serious reservations have not been addressed. Having said that, it does seem that most of the changes which have been made are positive and should be regarded as improvements in the text.

Fundamentals of Organization of Judicial Power and Delivery of Justice

4. Section 1, comprising Articles 1 to 16 deal with fundamental questions. In its previous opinion the Commission described these provisions as being for the most part unexceptionable and indeed admirable. It referred to statements both of the independence of the judge on an individual basis and of the independence of the judiciary as a whole. These provisions are largely the same as those previously contained in Articles 1 to 14 of the Law on the Judiciary. A new provision in Article 8 changes the case assignment procedure from one where cases were assigned by court presidents to an automated case assignment system. However, provision is made for judicial specialization in which event cases can be assigned to specialized judges. Where assignment is made in violation of the new procedures the court panel concerned is to be incompetent. This change should lead to a further strengthening of the independence of judges on an individual level.

5. Article 9 which deals with equality before the law and the court has been expanded to prohibit discrimination on linguistic grounds as well as the other grounds which were formerly in the text. This is to be welcomed in a state where linguistic tensions exist. The list of prohibited discriminatory grounds does not mention sexual orientation.

Institutional Framework for the System of Courts of General Jurisdiction

6. Articles 17 to 20 deal with the system of courts of general jurisdiction. For the most part the text remains unchanged from the previous versions. The proposed system of courts remains unchanged. The courts are established on the basis of three principles, those of territorial division, specialization and "instanceness" by which appears to be meant the division of courts between courts of first instance and courts of appeal. The lowest layer is that of local courts. These comprise precinct or district courts and circuit courts. The second level of courts are courts of appeal. These hear appeals from the local courts. At each level there are specialized local and appellate courts dealing with civil, economic, administrative and criminal cases. The third level of courts are high specialized courts. These are described in Article 30 as cassation courts. However, it is also provided that in exceptional cases prescribed by the procedural law, high specialized courts may also act as courts of first instance or as full appellate courts. These courts are specialized into four divisions as with the local and appellate courts. The final court of general jurisdiction is the Supreme Court. According to Article 39 its functions are to administer justice and to ensure uniform application of legislation by all courts of general jurisdiction, which it is to do by reviewing general jurisdiction cases under exceptional circumstances, providing courts with clarifications to ensure uniform application of the laws, addressing questions arising from international treaties entered into by Ukraine, as well as other more specialized functions.

7. In addition there is a Constitutional Court. The present text does not deal with the Constitutional Court except in so far as it is represented on the Council of Judges of Ukraine and in relation to the appointment of dismissal of its judges.

8. As commented on in the previous opinion the system of courts thus proposed is quite an elaborate and complex one. An elaborate court system tends to have considerable potential for procedural delays. However, it remains the position that the system could be simplified only if the Constitution were to be amended.

9. The procedure for the establishment of courts is set out in Article 19. There has been a change in the text from the earlier version in that courts of general jurisdiction are created and abolished by the President of Ukraine, but no longer on the basis of a motion from the Minister for Justice of Ukraine, but instead on the basis of a motion by the head of the State Judicial Administration. Similarly, the number of judges is to be determined on the same basis.

10. A new provision deals with cases of further specialization than that of the broad quadripartite system already referred to. The earlier text simply stated that specialization of courts in specific categories of cases could be implemented but did not say how. It is now provided that the assembly of judges may introduce specialization in the manner described in the law.

11. There have been a number of other changes as well. The term of office of presidents or deputy presidents of courts has been reduced from a proposed five year term to a three year term. The procedure for appointing to such administrative positions has also been clarified. Formerly, in Article 17 of the Law on the Judiciary it was provided that appointments would be made by the Council of Judges of Ukraine. Appointments are now to be made by the President on the basis of a motion by the High Council of Justice, which in turn acts on the basis of recommendations which may be made by the Assembly of Judges of the respective court, by the Council of Judges of the Ukraine, or by the Chief Judge of a relevant court of higher instance. It is also clarified that removal from administrative

positions may be carried out only on the basis of a decision by the Disciplinary Commission of Judges stating that the judge in question has unduly exercised his or her administrative powers. This latter provision is to be welcomed.

12. There has been a change in the provision in relation to the election of Chief Justice. Formerly, it was provided that he or she would be elected from a number of judges of the Supreme Court by the pleanary meeting of the Supreme Court of the Ukraine. It is now provided by Article 20(4) that the Chief Justice is to be elected by the Plenary Session on the basis of a motion by the President of the Ukraine. This seems to be a rather unusual provision and does not appear to be an appropriate role for the President of a state. One would normally expect it to be the other way around, that is, that the President would appoint a judge on the basis of a proposal from a court or some other body. The law is silent as to what happens if the Supreme Court fails to elect the person proposed by the President. It would be preferable to stick with the original proposal.

13. Articles 21 to 24 deal with local courts. A local court consists of not less than three local court judges. The text provides that the chief judge of the court is to be "elected" from amongst its members, whereas the earlier text referred to being "appointed". It is not clear whether this represents a change in the procedure or is simply a translation question. As with the case of other courts the president of the court is no longer given the function of determining specialization which as already stated is now conferred on the assembly of judges. A further change in the text, which also applies at all level of courts, is that courts can present to the Supreme Court of the Ukraine proposals regarding the need for introducing amendments to the laws of Ukraine. I have some concerns about this provision as it is important that the role of the judiciary should not become confused with that of the legislature. If there is to be such a provision, it should be confined to drawing attention to technical difficulties which may need to be addressed but judges should not become legislators or risk becoming involved in the political process.

Courts of Appeal

14. Article 25 to 29 deal with courts of appeals. In order to be a judge in a court of appeal the applicant must have worked for a judge for at least five years (Article 27). The other provisions mirror those already discussed in relation to local courts.

High Specialized Courts

15. Articles 30 to 38 deal with high specialized courts. As already mentioned there are four high specialized courts, the high civil court, the high economic court, the high administrative court and the high criminal court. They can sit in chambers to deal with specialized areas of work. Panel members are to be elected by the assembly of justices for the purpose of the specialized judicial chambers. Under a new provision, there is to be a presidium of the court to address organizational issues, comprised of the Chief Justice of the court, his or her first deputy, deputies, heads of chambers, as well as justices of the court elected to the presidium (Article 30(6)). The Chief Justice of a High Specialized Court is conferred with a number of functions additional to those contained in the earlier drafts. He can present recommendations to the High Council of Justice regarding the appointment of judges of local or appellate courts to administrative positions and removal from such positions. He can also submit proposals for the funding of expenditure related to the maintenance of the court and organizational support for its operation. This role for the Chief Justice of a court in relation to budgets should help to strengthen judicial control over budgetary matters.

16. Article 36 provides for the new institution of the presidium already referred to. The purpose of the presidium is to address issues related to organization of the court, the judicial chambers and the court staff, to approve, upon a motion by the Chief Justice of the court, the personal composition of each of the judicial chambers, to hear accounts from head of judicial chambers about the operation of the chambers, to make recommendations in relation to case law and court statistics, to address organizational issues relating to court operation and to study proposals on how to improve it, to address issues related to the management of judicial resources and staff, to hear accounts from the Chief Judges of local specialized courts, to study proposals regarding the number of judges, and to provide methodological assistance through local and appellate courts to ensure that they correctly apply legislation. Meetings are to be held at least once every two months. It would appear from the text of Article 36 that these functions are essentially advisory in nature.

17. Article 37 deals with the plenary session of a High Specialized Court. As already mentioned, it is the body which will now decide on creating specialized judicial chambers, a function formerly proposed to be conferred on presidents of courts. The plenary session provides relevant lower courts with advisory clarifications to ensure uniform application of legal norms, and approves the composition of the Scientific Consultative Council under the High Specialized Court, as well as hearing accounts about the state of justice within the respective court jurisdiction and making decisions when to petition the Constitutional Court for interpretation of laws. It is also the body which decides on petitioning the Supreme Court of Ukraine regarding the need to introduce amendments to the laws. This latter function has already been commented on in relation to lower level courts.

18. Article 38 provides for a Scientific Consultative Council. It would appear that its main function is to carry out research in support of the court.

The Supreme Court of Ukraine

19. Articles 39 to 46 deal with the Supreme Court of the Ukraine. The principal change from the earlier draft is that the number of judges of the Supreme Court is now to be substantially less than had been intended. It is to be composed of sixteen justices elected for life, of whom four judges are to represent each specialized jurisdiction, civil, economic, administrative and criminal. In the earlier text there were to be 11 judges from each specialized jurisdiction making a court of 44 judges in all. In order to be eligible to be a judge of the Supreme Court ten years experience as a judge is required. The Chief Justice of the Supreme Court is now to be elected for a three year term and to be removed from office by the plenary session of the Supreme Court in a secret ballot. It is not clear how this ties in with the provision in Article 20 under which removal from administrative positions is to be submitted only on the basis of a decision by the Disciplinary Committee of Judges and the relationship between Articles 20 and 43 in relation to removal from office should be clarified. The plenary session of the Supreme Court is to meet not less than once a month. A welcome improvement in the text is that the Minister for Justice no longer attends the plenary session of the Supreme Court and the provision whereby representatives of state government bodies, scientific institutions, public organizations and mass media could be invited to a session of the plenary meeting of the Supreme Court (Article 41.4 of the earlier Law on the Judiciary) has been deleted.

The Status of Judges

20. Article 47 to 58 deal with the status of judges. These provisions deal with judicial independence. The text has been somewhat strengthened by comparison with the earlier text. A new provision in Article 48 states that "pressuring judges, interfering with their professional activities, or influencing judges in any other way for the purpose of preventing judges from performing their professional duties or inducing judges to hand down an unjust decision or perpetrate other acts incompatible with the status of a judge shall be prohibited and punishable in accordance with the law". This is a much clearer text than in the earlier draft. It is also provided that a judge cannot be obliged to provide any explanations regarding the merits of cases except when required by the law. Again this is a strengthening of judicial independence. Paragraph 3 of Article 48 entitles a judge to report the existence of a threat to his or her independence to the Council of Judges of Ukraine which is required to urgently verify and examine the report and take necessary action to eliminate the threat.

21. Article 49 deals with judicial immunity. In its earlier opinion the Venice Commission commented that the immunity of judges was too wide. It covers the judges' housing, offices, premises, transport and means of communication, correspondence, property and documents and thereby seems to be even wider than parliamentary immunity. In its 2007 opinion the Venice Commission quoted an earlier opinion (CDL-AD (2005) 023) to the effect that there should be "only a limited functional immunity for judges from arrest, detention and other criminal proceedings that interfere with the workings of the court". Again, the Venice Commission took the view that there was no need for a requirement that a criminal case against a judge should be initiated only by the General Prosecutor and it also criticized the provision that judges were to be inviolable and could not be detained or arrested prior to indictment without the consent of the Verkhovna Rada. The Commission considered that it was not appropriate that the parliament should have any role in lifting a judge's immunity. However, these provisions remain in the new text.

22. In a new provision, the judge is given immunity from civil suit in relation to damages caused by his or her decision, action or inaction related to administration of justice. It is provided that liability for court induced damages should be born by the state. While this certainly represents a valuable protection, it may go too far in giving the judge immunity for such matters as failure to give judgment at all or improper conduct such as giving a judgment as a result of an inducement or bribe. Having said that, it is difficult to see how one could introduce limited exceptions to such a law without opening up the whole issue of judicial liability and providing litigants with scope to mount collateral litigation.

23. Article 50, which refers to liability for contempt of court, appears to confine such liability to actions which take place during the hearing and if this is a correct interpretation of the Article this is welcome.

The Professional Judge

24. Articles 53 to 58 deal with the fundamental requirements in relation to the status of a judge, irremovability, matters which are incompatible with the judicial position, the rights and responsibilities of a judge and judicial ethics. In its earlier opinion the Venice Commission was critical of Article 9 3 of the Law on the Status of a Judge. This prohibited judges from being a member of a political party or trade union and the Commission referred to the European Charter on the Statute for Judges which recognizes the right of judges to join professional organizations and to their right of expression. It commented that judges should be free to join judges associations or

unions, although it accepted that restrictions might be placed on the right to strike. The section criticized in the earlier law remains unamended as Article 55 of the new text.

25. In relation to training, Article 56 (3) obliges a judge to take appropriate training rather than simply giving the judge a right to training. This appears appropriate.

26. There is some overlap between two provisions both of which require the judge to comply with the rules of judicial ethics (Article 56 (4) and Article 58). In a new provision, Article 56 (4)(7) the judge is required to submit to the State judicial administration annually a property status declaration containing information on his income, securities, and other property. This would appear to be a valuable protection against corruption within the judiciary.

People's Assessors and Jurors

27. Articles 59 to 68 deal with people's assessors and jurors and the text appears unchanged from the earlier drafts.

Appointment of Professional Judges

28. This is covered in Articles 69 to 82. The text relating to appointment for the first time remains substantially the same as in the earlier draft. A new provision states that that persons found by a court to have a limited legal capacity, suffering from chronic mental or other diseases which would prevent them from performing their duties, or who are the subject of inquiry, pre-trial investigation or criminal proceedings or have an outstanding or unquashed conviction are not eligible for appointment. The non-discrimination clause adds linguistic discrimination to the category of discriminations which are prohibited.

29. In its previous opinion the Venice Commission described a procedure for appointment as follows:

> "the procedure for appointing to the post of a judge (by which is meant merely the first appointment of a judge on a temporary basis for a period of five years) is that the High Qualifications Commission of Judges of Ukraine announces a competition. Candidates apply for recommendation for appointment. The High Qualifications Commission conducts a competition and makes a decision which it sends to the High Council of Justice. The High Council of Justice considers the recommendation and makes a submission to the President of Ukraine who makes a decision. According to Article 34.23 Status if the President rejects the submission he has to issue a justified order. The discretionary powers of the President should be curbed by limiting him or her to verify whether the necessary procedure for selection and appointment has been followed by the High Qualification Commission and High Council of Justice. The decision of the President of the Republic would therefore have the effect of a "notary".

30. The provisions of Article 34.3 are repeated in Article 81 of the new draft. The earlier comments of the Commission are therefore still relevant.

31. In its previous opinion (paragraph 25) the Venice Commission criticized the procedures for appointment as lacking transparency:

> In some respects the procedures for the initial appointment of judges are not sufficiently transparent. Article 27 Status refers to the documents to be

> submitted to the High Qualifications Commission. Paragraph 10 refers to "other documents" – what are these other documents? Article 29 Status deals with the "qualification exam". Where there is a complaint by a candidate the High Qualifications Commission can cancel the results of the exam with regard to the complainant and order a new or an additional exam in respect of that candidate (Article 29.7 Status). This seems a very unusual provision. 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.

32. All of these provisions which were criticized are still in place. In fact, Article 77 which deals with the decision of the High Qualification Commissions on the recommendation of a candidate is even less transparent than the earlier draft. It is no longer provided that the candidate with the best exam result is to be preferred and that in the case of an inequality a candidate who is an existing judge is to be preferred. Instead, a new provision simply empowers the High Qualifications Commission to make its decision "based on the results of the testing and consideration of other information on the candidates". The Commission is therefore free to disregard the result of the testing depending on whatever other information it chooses to take into account. It is also expressly provided that the Commission may decide to recommend several candidates for the same judicial position. If they do this, on what basis is the President to make a decision? Article 77(4) provides for an express right of an appeal against a decision of the High Qualification Commission to the High Council of Justice and this provision for an appeal is to be welcomed.

33. In its earlier opinion the Venice Commission criticized the initial appointment of five years as being too long (paragraph 26). Again, this problem has not been addressed in the new text and the five year period remains unchanged.

Election to a Permanent Post as Judge

34. Permanent election of a judge is dealt with in Articles 83 – 92. The system of permanent appointment was described in the previous opinion (paragraph 27) as follows:

> The High Qualifications Commission announce a competition and make a decision on a recommendation with a proposal to the Verkhovna Rada. A committee of the Verkhovna Rada then examines the matter. The committee can consider submissions by citizens, civic organisations and other bodies

concerning the activity of the candidate. Representatives of various bodies including the Supreme Court, the High Specialised Courts, the High Council of Justice, the High Qualifications Commission, the Disciplinary Commission, the Council of Judges of Ukraine as well as the candidate are invited to the meeting of the committee of the Verkhovna Rada. The committee in turn makes a recommendation on the proposal which it sends to a plenary sitting of the Verkovna Rada. Under Article 42 Status every deputy in the Verkhovna Rada is entitled to question the candidate directly. If objections are raised the matter has to be remitted to the committee for further consideration (Article 42.4 Status). Under Article 43 Status the Verkhovna Rada elects candidates following an open vote. Candidates who are rejected twice can no longer be a candidate.

35. The Venice Commission criticized this provision as a highly politicized method of appointment. It commented that the idea of hearings of the parliament at which so many people could be present and every deputy could question candidates for judicial office were particularly likely to politicize the process. It was pointed out that there would be opportunities for grandstanding by deputies in the parliament and that the procedures for giving publicity to objections, no matter how ill-founded, seemed almost designed to inflict damage even on candidates for judicial office who had survived the appointment procedure. It commented that "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".

36. None of the criticisms made by the Venice Commission its previous opinion have been addressed in the new text.

Judicial Promotions

37. Articles 93 to 98 deal with the system of judicial promotions which is based on qualification attestation. This basically involves certification that judges are fit to advance from one level to the next and the procedures are under the control of the High Qualifications Commission. In its earlier opinion the Commission stated that it was very important that the criteria for making assessments were very clearly stated and were such as not to infringe the principle of individual judicial independence.

38. While the criteria are not set out in the new text, a new provision provides that the methods for evaluating a judge with a view to conferring each of the qualification ranks are to be approved by the High Qualifications Commission of Judges and by the Council of Judges of Ukraine (Article 96 (7)). In addition, the decision of the High Qualifications Commission on attestation may be appealed to the High Council of Justice (Article 98 (6)). These new provisions represent an improvement in the text but of course whether the procedure will work fairly will depend on what exactly is in the document setting out these methods which has yet to be adopted.

Qualifications Commissions

39. Articles 99 to 109 deal with the question of qualifications commissions.

40. Attestation is carried out by the qualifications commissions. There are territorial qualifications commissions and a High Qualifications Commission. There has been a change in the composition of the qualifications commissions. The territorial qualifications commissions now consist of seven members having higher legal education and a record of service in the legal profession of at least five years. They are to consist of four judges appointed from each of the four jurisdictions, civil,

criminal, administrative and economic. One person is to be appointed by the Minister of Justice, one person from among lawyers by the Congress of Lawyers and one person by the Council of Higher Law Schools and Scientific Institutions. There is no longer a provision for appointment by local authorities. The composition of the High Qualifications Commission remains much the same as in the earlier draft except that instead of the Commissioner for Human Rights appointing a person it is now the Council of Higher Law Schools and Scientific Institutions. The High Qualifications Commission is composed of 15 members, including eight judges appointed by the Congress of Judges of Ukraine. There are still appointees from the parliament and the President.

41. In its earlier opinion the Venice Commission questioned the need for a separate High Qualifications Commission at all and thought that its competencies should be attributed to a High Council of Justice which had a majority of judges.

Disciplinary Liability

42. Articles 110 to 116 deal with disciplinary liability of judges.

43. There have been some changes in the grounds on which a person may be disciplined. The ground "evidently unqualified solution of a case" which was criticized by the Commission in its previous opinion has been removed. The ground of "systematic ignoring of position of high level courts regarding application of legal norms" has also been removed. The ground "creation of obstacles for a person's access to justice not prescribed by law" remains. So does "perpetration of an immoral act" which was criticized by the Commission which thought it would be important to specify precisely what was meant by an immoral act warranting disciplinary liability. There is no requirement that the immoral act be unlawful. An additional disciplinary ground is non-submission or untimely submission of a property status declaration. The new provisions clarify that anyone who is aware of the facts of a judge's violation of requirements regarding his or her official responsibilities may file a complaint.

44. There is a procedural change in that question of whether a disciplinary case should be opened can now be decided by a three member panel of the Disciplinary Commission rather than by the Commission as a whole.

45. The Commission's earlier criticism of the failure to set out what are the judge's rights at the hearing have been met by Article 113 (8) which now provides that the judge subjected to disciplinary action is entitled to have a representative of his or her own, to question witnesses and other participants in the proceeding, to express objections, to file motions and to seek disqualification. In addition, the provision relating to appeal to a court no longer states that the appeal is based on procedures only, but simply states that there is an appeal to a court (Article 116 (4)). It is not, of course, clear whether this in fact confers a full right of appeal.

The Disciplinary Commission

46. Articles 117 to 127 deal with the Disciplinary Commission.

47. There has been some improvement in the composition of the Commission in that it is now to consist of 15 persons of whom 8 are to be judges to be appointed by the Congress of Judges of the Ukraine. Members of the executive and legislature may not be members of the disciplinary commission. The principal change in organization is that three member panels can decide on the admission of

complaints. It is provided that meetings of the disciplinary commission are to be held in public. A meeting of the Commission must now be attended by at least two thirds of its members whereas previously the text provided for a bare majority. On the whole these provisions represent an improvement on the text.

Removal of Permanent Judges

48. Articles 128 to 145 deal with the removal of judges. No distinction is made between a dismissal in the proper sense of the word i.e. the removal of someone against his will for misconduct or the like, and the situation which arises where a person reaches retirement age or indeed where he is dead or missing. Article 142 deals with the procedure before the Verkhovna Rada for the removal of a judge. It provides that his or her explanations must be heard but is silent as to whether he or she can call or question witnesses. There is no mention of the judge having the right to question or confront his or her accuser. However the deputies are entitled to ask questions of the judge. These matters were commented on in the Venice Commission's earlier opinion but have not been addressed.

Judicial Self-Government

49. Articles 146 to 160 deal with judicial self-government and the various institutions which are established under the law. There have been some amendments to these provisions. For example, there are changes in the frequency with which the various bodies of self-government meet and there are also changes in the number of persons required to summon meetings.

50. Under a new provision (Article 154 (1)) judges holding administrative positions or sitting on qualifications or disciplinary commissions may not be members of a Council of Judges. There are also some changes in the powers of the Council of Judges of Ukraine. It is no longer responsible for the distribution of cases nor for the appointment of the chairs or administrative positions in courts nor for dealing with complaints about the chairs of courts. The new provisions have been referred to above.

51. However, the basic structure as proposed in the earlier drafts remains. It is therefore unnecessary for me to examine the matter further in any detail. The proposal for judicial self-government was the subject of detailed criticism in the earlier Venice Commission and all of those criticisms in my opinion remain valid. I would simply repeat the conclusions of the Venice Commission in relation to the very complex and apparently cumbersome system which is proposed:

> "69. There are substantial doubts about the effectiveness of a procedure which establishes judicial self-government bodies on so many levels. The scope for judicial engagement in a form of judicial politics seems enormous. While important functions are conferred on the bodies of judicial self-government the dispersal of these powers through many bodies seems to lead to a potentially confusing situation where different bodies would conterminously exercise the same powers. In this connection the effectiveness of any of the bodies may be called into question. Secondly, the existence of these bodies would seem to have considerable potential to undermine the effective administration of the courts by the presidents and deputy presidents of the different courts and by the permanent staff in the State Judicial Administration of Ukraine. In effect these officials have to report to and are answerable to quite a variety of persons. This may, on the one hand, mean that they are not all that answerable at all. On the other hand, it could lead to paralysis. Important functions such as the allocation

of cases and case-loads appear to be conferred on democratically elected bodies. The Commission wonders how effective such a system would be. It is inevitable that any effective system of allocations may involve making unpopular decisions which will not be to every judge's liking. To confer these on democratically elected bodies may well lead to a system where the soft option becomes the norm.

70. The Venice Commission understands the desire to limit presidents' powers but wonders if this is the way to do it. The exclusion of presidents from a role on the bodies of self-government may tend to create a confrontational atmosphere. In this regard perhaps a provision allowing court presidents to attend without voting could be considered. It is interesting to note that the Ukrainian "Concept" Document envisaged court presidents being members of the Council of Judges of Ukraine but limit their numbers to not more than one third. An alternative method of limiting the undue power of presidents would be to appoint them for a limited term of office only.

71. Overall, therefore, there are considerable questions about the efficacy of the proposed system of judicial self-government notwithstanding its aspirations to be highly democratic. There should not be a multitude of representative bodies of the judiciary. There is a case for a single body such as a High Judicial Council, perhaps with sub-committees for specialised functions. A much simpler and perhaps more effective system than that proposed would provide for a majority of elected judges on the High Judicial Council.

72. However, such a solution would require an amendment to the Constitution. As an alternative, there may still be scope to confer substantial powers on a Council of Judges below the level of the High Judicial Council if it proves impractical to amend the Constitution. Secondly, once a president and deputy president of a court are elected they should be allowed to serve out their terms unless they are guilty of misconduct. To subject them to the control of an elected body which can remove them at any time is not a recipe for allowing them to take hard decisions where these are necessary. A similar comment could be made in relation to the control over the administrators working for the State Judicial Administration."

Support for a Professional Judge

52. Paragraphs 161 to 166 deal with judicial remuneration, vacation, calculation of a judge's length of service, provision of housing and social welfare. The provisions seem to be appropriate ones. Article 167 to 169 deal with the retired judge and again the provisions seem appropriate.

Organizational Support for Courts and the State Judicial Administration of Ukraine

53. Articles 170 to 184 deal with organizational support for courts, provisions relating to the budget and funding, the organization of the state judicial administration and court staff and such matters as court libraries and court officers.

54. For the most part the provisions are the same as in the earlier drafts. One significant change is that the head of the State Judicial Administration is no longer responsible for appointing and dismissing the heads of staffs of courts. Instead, pursuant to Article 181 of the draft the managers of the staff of local courts, courts of appeal, the Supreme Court, and High Specialized Courts are to be appointed and dismissed by the chief judge of the local court or of the Court of Appeals, or by the

meeting of justices of the High Specialized Court and Supreme Court. This represents a strengthening of judicial independence and is to be welcomed. There are also some changes in the powers of the State judicial administration. It is no longer responsible for ensuring the independence and immunity of judges which is now a matter for the judges themselves. However, there is considerable overlap in a number of the powers with those powers which are reserved to the bodies of judicial self-government. This problem has already been commented on in relation to the system of judicial self-government and a problem with the draft is that it is not clear how these various competencies and powers are to be exercised particularly if there is a conflict between the bodies of judicial self-government and the state judicial administration.

55. A further change is that the State Judicial Administration is no longer responsible for the training of judges. The new text does not contain an equivalent of Article 91 of the Law on the Judiciary in the earlier draft which dealt with the National School of Judges of Ukraine. From earlier references in the texts it appears there is a body known as the Council of Higher Law Schools and Scientific Institutions of Ukraine who appoint a member to the qualifications commissions of judges. As well as to the Disciplinary Commission. However, the question of judicial education and training does not appear to be dealt with in the new text. Presumably this matter is regulated in a separate instrument.

56. The Venice Commission's previous opinion made recommendations in relation to the judicial budget, in particular that an autonomous body with substantial judicial representation should play a significant role in presenting and defending the judicial budget before parliament. This recommendation has not been adopted in the new draft.

57. The Venice Commission also recommended that there should be an express prohibition on the reduction of a judge's salary during his or her term of office. This recommendation does not appear to have been adopted either.

Conclusion

58. While the provision of a consolidated text is to be welcomed, and there have been some welcome amendments to the text, most of the criticisms of the text made by the Venice Commission in its previous opinion have not been addressed. Particular concerns relate to the lack of transparency in appointing temporary judges, the over-politicization of permanent judicial appointments, over-broad judicial immunity, the criteria for disciplinary liability of judges, and the over-complex system of judicial self-government which is likely to be time-consuming and costly but in practice unwieldy and ineffective.