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(VENICE COMMISSION)

COMMENTS

ON THE LAW OF UKRAINE

ON AMENDING CERTAIN LEGISLATIVE ACTS OF UKRAINE IN RELATION TO PREVENTION OF ABUSE OF THE RIGHT TO APPEAL

by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. As it has been pointed out in the explanatory note to the "Law on….prevention of abuse of the right to appeal" (quoted further as "New Law"), the main goal of this law was "to prevent misuse of the right of appeal in cases where acts issued by the High Council of Justice are the matter of contention". It was repeated in p. 5 of the explanatory note that adoption of this Law „will make it impossible to abuse the right to appeal in cases where acts/regulations of HCJ are the matter of dispute". These two sentences provide the only rationale for adopting the New Law which substantially changes the rights of judges. Ultimately, the New Law leads to a significant restriction (limitation) of judges' right to appeal whereas arguments brought forward in its favour seem to be neither convincing nor compatible with the relevant European and international standards. In addition, the situation of judges has got even more hazardous because of the lack of precision in defining the notion (concept) of "abuse of the right to appeal".

2. The Ukrainian system of administration of justice is very complex. The High Council of Justice is not the only body operating within it. There are also other bodies that serve this system: the Congress of Judges, Councils of Judges (the bodies of judicial self-governance), and the High Qualification Commission. Yet, the role of HCJ is of special importance. It has been introduced to the Ukrainian legal system, like in many other post-communist countries, with a general aim to better guarantee independence of judges, in particular, by protecting the process of nomination and dismissal of judges against political interference.

3. From among the aforementioned bodies, HCJ is the only one established by the Constitution itself, notably by Art. 131 included in the Chapter VIII on Justice. Despite this "location" its juridical position is not very clear. The Constitution does not define the status of HCJ. Its description is done only by listing the competencies of HCJ. More detailed regulations are done by the "Law on the High Council of Justice" (VVR, N 25, 1998, Art. 146). This Law states that "The High Council of Justice shall present a collective independent body". However, the meaning of the word "independent" is here different than in the case of courts. Hence, taking the quoted provision into account it is clear that despite being included in the constitutional chapter on justice and having sui generis attribute of independence, HCJ itself is not a part of the judicial power. Although, on the other hand, it is linked (connected) to Judicial Power or attributed to Judicial Power through its competencies.

4. Similar problems have occurred in the context of the National Council of Judiciary in Poland. The 1997 Polish Constitution also speaks about NCJ in its chapter "Courts and Tribunals." Its Art. 186 states that "NCJ shall safeguard the independence of courts and judges". Taking this into account the Polish Constitutional Tribunal described the National Council of Justice as sui generis, independent, central state's organ whose functions are **connected with** (but not belonging to) judicial power.

5. According to Art. 131 of the Ukrainian Constitution, the HCJ is composed 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, whereas the All-Ukrainian Conference of Employees of the Procuracy appoints two members. 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 composition of HCJ is diversified, but there is a lack of balance between members of judiciary and other members. The judges are in a clear minority which contradicts the recommendations of the VC. There exists an evident danger of politically motivated nominations to the HCJ which can lead even to the domination of members of the HCJ guided by political considerations. Needless to say, generally apolitical nature of HCJ is a fundamental premise for the performance of its functions as a guarantor of impartiality and independence of judiciary.

6. Art. 131 sets forth the competencies of HCJ as: *1) forwarding submissions on the appointment of judges to office or on 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 an d local courts, and also procurators.* The competences of HCJ are laid down in more details by the Law on the High Council of Justice (VVR, N 25, 1998, Art. 146). Its Art. 3 states that: *„The High Council of Justice shall: submit proposals to the President of Ukraine as to appointment of judges or their release from duties; examine cases and take decisions as to judges' and public prosecutors' infringement of requirements of non-combination of jobs; execute disciplinary proceedings involving judges of the Supreme Court of Ukraine and judges of highest specialized courts; consider complaints about decisions of calling judges of courts of appeal, local courts, and public prosecutors to disciplinary account"*

7. Thus, HCJ, the majority of which does not represent judges, has important competencies in the area of independence of judges. Firstly, it plays a very influential role in the formation of the corps of judges. It is for HCJ to submit proposals concerning appointments and the release of judges from office. Secondly, HCJ has been vested with crucial competences in such a delicate matter as the disciplinary responsibility of judges.

8. Taking all this into account the New Law „on prevention of abuse …" must evoke serious reservations. Two negative consequences of this law are particularly striking. On the one hand, the Law furnishes the HCJ with new competences which, in part, are inconsistent with the Constitution (see below). On the other hand, the new Law evidently imposes restrictions on the rights of judges.

9. Art. 25 of the New Law raises a rather fundamental question regarding the overall position of the HCJ. According to this provision, HCJ "may request and obtain necessary information from bodies of state administration and local self-government, its officials, managers of enterprises, entities, organizations, irrespective of forms of property and subordination, individuals and their public associations. Such information is given under written request of the High Council of Justice on verification of concrete cases." Questions arise whether this competence is not going too far; whether it is not unnecessarily making out of HCJ a super organ sui generis; whether HCJ's scope of power is not too wide?

10. Crucial for the rights of judges is new par. 3 of Art. 27 which provides „The High Council of Justice deeds may be challenged solely in the High Administrative Court of Ukraine, according to the procedure established by the Code of Administrative Adjudication of Ukraine." The scope of HCJ deeds regulated by Law on HCJ is very large[1]. The New Law adds new very imprecise point 7 containing an open-ended formula "other deeds within the powers of the High Council of Justice". Now, the only possibility for the judge is to go to the High Administrative

1. The High Council of Justice shall adopt the following deeds:1)representation of appointment of judges; 2)representation of judges' release from their duties; 3)decision of infringement of requirements of non-combination of jobs; 4)decision of disciplinary accountability; 5)decision on a complaint about a decision of calling to disciplinary account; 6)decision of release of a member of the High Council of Justice from his duties in cases provided by Article 18 of this Law; 7)other deeds within the powers of the High Council of Justice

2. The High Council of Justice shall adopt the following procedural deeds: 1)decision of a disciplinary proceeding; 2) decision of a proceeding upon legislative requirements as to non-combination of jobs; 3)decision of refusal of a nomination; 4)decision of rejection (self-rejection) of a member of the High Council of Justice; other procedural documents as may be required for the discharge of functions by the High Council of Justice.

Court. And the decision of the Court is final and shall not be reviewed in accordance with the appeal or cassation procedure. Judge has no other possibility to appeal which substantially weakens his /her rights since the way of appeal to the supreme judicial power – the Supreme Court has been blocked.

11. The danger of new amendment is clearly visible in the context of art. 32 regarding dismissal of a judge on special grounds. The new article introduces the definition of the breach of oath. Among others there are such imprecise criteria like: „violation of moral and ethical principles of human conduct". This criteria can create ground for dismissal of judge. And what is a right of judge? He may lodge a complain only to HAC and the decision of this court shall be final. HAC in its jurisprudence is governed by the principle of legality. It is unable to assess the merit of HCJ decisions. As a result, it would not be possible for the HAC to pronounce its opinion about such a vague concept as the violation of a morally-ethical principle of judicial conduct.

12. Amendments to Art. 32, 42 and 46 may also have a negative impact on the rights of judges. Prior to the adoption of the amendments, the Law provided that consideration of a disciplinary case without the participation of the judge concerned was admissible only in case of his/her failure to attend the Council's session without good reasons. New provisions state *inter alia* that „a repeated failure of a judge to attend the session shall constitute grounds for considering the case in his/her absence." The New Law says nothing about the reasons for the absence of the judge concerned. Therefore, the new solution evidently weakens the protection of judges. Moreover, in the light of new amendments a decision about submission of the HCJ's petition regarding dismissal of a judge in accordance with Art. 126, Part five, clause 4,5 and 6 of the Constitution shall be taken by the majority of members of the constitutional membership of the HCJ. Before, a qualified majority was required as regards the conditions in pp.4 and 5 of Art. 126 of the Constitution.

13. The scope of HCJ's power in the area of disciplinary responsibility always evoked my critical remarks. In my previous comments on the judiciary, I was always of the opinion that on the disciplinary responsibility the court should decide, not special bodies, even in the case when all their members are judges. In the discussed case, the situation is even worse. The decision is taken by HCJ where judges constitute only a minority of the membership and some members, at least, may be political nominees. The right of appeal is very limited. As a result, the entire process involves a high level of risk of arbitrariness in the prosecution of judges for disciplinary offenses.

14. One can have well founded concerns that the New Law can lead to the politization of the process of formation of the corps of judges. Thus, it may create a room for decisions against judges based on political considerations. All this can weaken instead of strengthening the guarantees of judges' independence.