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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

DRAFT JOINT OPINION

OF THE VENICE COMMISSION AND THE DIRECTORATE OF HUMAN RIGHTS (DHR) OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON THE LAW ON THE JUDICIAL SYSTEM AND THE STATUS OF JUDGES AND AMENDMENTS TO THE LAW ON THE HIGH COUNCIL OF JUSTICE

OF UKRAINE

on the basis of comments by:

Ms Hanna SUCHOCKA (Member, Poland)
Mr James HAMILTON (Former Member, Ireland)
Mr Jørgen Steen SORENSEN (Member, Denmark)
Mr Gerhard REISSNER (DHR Expert, Austria)

**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.*

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I. Introduction

1. In a letter dated 20 February 2015, the Head of the Presidential Administration of Ukraine requested the opinion of the Venice Commission on the Law on Ensuring the Right to a Fair Trial of Ukraine adopted by the *Verkhovna Rada* on 12 February 2015. This law includes amendments to the Code on Administrative Offences, to different procedural codes, to the Law on the High Council of Justice and also to the Law on the Judicial System and the Status of Judges.

2. The Venice Commission invited Ms Hanna Suchocka (Poland), Mr James Hamilton (Ireland) and Mr Jørgen Steen Sorensen (Denmark) to act as rapporteurs for this Joint opinion. Mr Gerhard Reissner (Austria) analysed the law and the amendments to the Law on the High Council of Justice on behalf of the Directorate of Human Rights ("the Directorate").

3. On 24 February 2015 a delegation of the Venice Commission and the Directorate, including Mr Hamilton and Mr Reissner, held a meeting at the Council of Europe Office in Paris with the representatives of the Ukrainian authorities (Mr. Oleksiy Filatov, Deputy Head of the Presidential Administration of Ukraine and Ms. Oksana Syroid, Vice-Speaker of the *Verkhovna Rada*). It was agreed during this meeting that the Joint Opinion would be limited to the examination of the Law on the Judicial System and the Status of Judges (hereinafter "the Law") and the amendments to the Law on High Council of Justice (CDL-REF(2015)004). The Venice Commission and the Directorate are grateful to the Ukrainian authorities for their excellent co-operation.

4. Previously, on 13 November 2014, the Minister of Justice of Ukraine had requested the opinion of the Venice Commission on a Draft Law, prepared by the Ministry of Justice, on Amending the Law on the Judicial System and the Status of Judges. The Venice Commission already prepared a Preliminary Opinion on this Draft[1]. However, it appears that the Draft presented by the Ministry of Justice was not finally adopted by the *Verkhovna Rada.* The recommendations of the Venice Commission in the Preliminary Opinion remain valid in so far as the issues raised therein are not addressed within the Law currently submitted to the examination of the Venice Commission and the Directorate in the present Joint Opinion.

5. The present Joint Opinion is based on the English translation of the Law and the amendments to the Law on the High Council of Justice, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

6. *This Draft Joint opinion which was prepared on the basis of the comments submitted by the experts mentioned above was adopted by the Venice Commission at its (…) Plenary Session, in Venice, (…) 2015.*

II. Background information and Preliminary observations and Remarks

7. The request of 20 February 2015 made by the Head of the Presidential Administration of Ukraine was accompanied by an "Explanatory Note" on the Law on the Judicial System and the Status of Judges and the amendments to the Law on High Council of Justice, providing some explanations on the background and the purpose of the Law and the amendments.

[1] CDL-AD(2015)004 Preliminary Opinion on the Draft Law on Amending the Law on Amending the Law on the Judicial System and the Status of Judges.

8. It appears from the Explanatory Note that the Law was originally developed by the Judicial Reform Council (an expert advisory body to the President of Ukraine composed of international experts, non-governmental organisations, government officials, judges and other legal community representatives) which was established to drive forward reforms in justice sector as part of the implementation of the Sustainable Development Programme[2].

9. According to the Explanatory Note, the Law appears to be the first step towards a comprehensive judicial reform in Ukraine in order to reconcile the Ukrainian legislation on the judiciary with international standards, to the extent possible under the current constitutional provisions. It is explained that the Law is aimed in particular at improving the competence and professionalism of judges, providing efficient anti-corruption mechanisms, ensuring the independence of judges and eliminating political influence on the judiciary, securing access to justice, transparency and openness of trial and strengthening the role of the Supreme Court to increase consistency of the jurisprudence.

10. During the Paris meeting on 24 February, the representatives of the authorities explained to the Delegation that the next step in the reform process on the judiciary would be the introduction of constitutional amendments in order to achieve medium-term and long-term goals in the reform process of the justice sector. According to the Explanatory Note, the future constitutional amendments will include :

- establishment of a single body entrusted with protection of the independence of judges and training of the judicial corps, respecting the principle of separation of powers;
- Raising formal requirements for judicial candidates;
- Optimising the number of levels of court of general jurisdiction in Ukraine;
- Reviewing constitutional powers of the President of Ukraine and the Parliament in the justice sector.

11. The representatives of the authorities informed the Venice Commission and the Directorate that a constitutional reform commission will soon be established by the President of Ukraine in order to prepare draft constitutional amendments. This Commission was in fact established by decree of the President of Ukraine of 3 March 2015.

12. The Venice Commission has provided a series of opinions on Ukraine's judiciary. Some of those opinions concern draft constitutional amendments whereas others concern draft amendments to the ordinary legislation, in particular to the Law on the Judicial System and the Status of Judges. The Joint Opinion on the Law on the Judicial System and the Status of Judges adopted in October 2010[3] and the Joint Opinion adopted in October 2011 on the draft law amending the Law on the Judiciary and the Status of Judges[4] welcomed some positive aspects, such as the automatic case-flow and case assignment system or the restoration of a number of important competences of the Supreme Court and the organisation of disciplinary proceedings.

13. However, the Venice Commission also emphasized in these Opinions that the most serious criticism stems from the Constitution. Therefore, the Commission recommended that the Constitution be amended, implying that a reform of the judiciary would be incomplete with regard to European standards without remedying deficiencies which find their origins in the constitutional provisions. The Venice Commission underlined that constitutional amendments should mainly concern the exclusion of the role of political organs in the

[2] See http://www.president.gov.ua/en/news/32046.html. The top priorities of the Sustainable Development Programme are reform of the national security and defence system, renewal of authorities and anti-corruption reform, judicial and law enforcement reform, decentralization and public administration reform, deregulation and development of entrepreneurship, healthcare reform and tax reform.
[3] CDL-AD(2010)026, para. 128.
[4] CDL-AD(2011)033, Joint Opinion on the Draft Law Amending the Law on the Judiciary and the Status of Judges and Other Legislative Acts of Ukraine (Venice, 14-15 October 2011), para. 77.

appointment and removal of judges and the reduction of their role in the establishment of courts and in the composition of the High Council of Justice, a substantial part of which should be judges, elected by their peers, the elimination of the role of the *Verkhovna Rada* in lifting judges' immunities, the introduction of principles deriving from the European Convention on Human Rights (hereinafter "the ECHR") in the Constitution, such as the right to a fair and public trial within a reasonable time by an independent and impartial tribunal.

14. In the same vein, the Venice Commission expressed its positive opinion on "the Draft Law on Amendments to the Constitution, Strengthening the Independence of the judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine"[5]. This draft was seen as a good starting point for a reform of the judiciary, but finally was not adopted.

15. In view of the above, the Venice Commission and the Directorate welcome the determination of the Ukrainian authorities to introduce constitutional amendments in order to ensure that the Ukrainian judicial system fully complies with European standards concerning the independence of the judiciary. Indeed, the Law subject of the present Joint Opinion is rooted in the existing Constitution which prevents fundamental changes in the judicial system and the drafters had to maintain a number of negative solutions of the existing system, which was criticised by the Venice Commission in its previous opinions.

16. In addition, the Venice Commission and the Directorate consider that effectively reforming the judiciary in Ukraine is not only a question of adopting legislative texts, but also depends on the political will and the practical implementation of the provisions to create a truly independent judiciary. This means that the links between the judiciary and political organs that have existed for many years need to be terminated and the patterns of behaviour in their relations and within the judiciary should change. A good law is certainly a good preliminary step in this respect but the political will and effective implementation of the amendments are necessary elements in order to prevent the reform from remaining a mere declaration.

III. Standards

17. Independence, impartiality, integrity and professionalism are the core values of the judiciary. The Venice Commission and the Directorate will examine the draft amendment law in the light of international standards on the independence of the judiciary, as in particular reflected in:

- Article 6 of the ECHR and the case-law of the European Court of Human Rights (hereinafter "ECtHR");

- Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007) (CDL-AD (2007)028);

- Report on the Independence of the Judicial System Part I: the Independence of Judges adopted by the Venice Commission at its 82th Plenary Session (Venice, 12-13 March 2010);

- Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe to Member States on Judges: independence, efficiency and responsibilities (which replaces the Recommendation Rec (94)12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges);

[5] CDL-AD(2013)014, Opinion on the Draft Law on the Amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine (Venice, 14-15 June 2013).

- The European Charter on the Statute for Judges (adopted at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998);

- Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges;

- Opinion no. 3 (2002) of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality;

- Opinion no. 10 (2007) of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society;

- Opinion no. 17 (2014) of the CCJE on the evaluation of Judge's work, the quality of Justice and respect for judicial independence;

- The Bangalore Principles of Judicial Conduct, 2001, as revised at the Roundtable Meeting of Chief Justices held in the Peace Palace, The Hague, November 25-26, 2002;

- Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), Strasbourg, 17 November 2010);

- United Nations Basic Principles on the Independence of the Judiciary endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

- The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (23-25 June 2010).

IV. Analysis

18. As concerns the form of this draft law, the Venice Commission reiterates its previous criticism that "*the Ukrainian legislator prefers a positive approach of making laws, in the sense of a legal 'positivism'".* This means that the legislator tries to mention or to enumerate all possible facts which can form the elements of a legal rule. This criticism was repeated in Opinion CDL-AD(2011)033 worded slightly differently : "*The Commission was critical of the degree of detail of the earlier draft Law which it described as "quite voluminous" and as containing elements which were perhaps not necessary, or which could be delegated to subordinate legislation, as a result of which some of the rules were difficult to find and to know. The new text for the most part continues this detailed approach of law making. There are in addition a number of examples of duplication where the same rule is to be found in more than one part of the text"*.

19. The new draft law submitted for opinion is written more or less in the same legislative technique. The internal structure of the draft law follows the structure of the current Law. It appears to be quite (even too) voluminous, especially in regulation of details which could be delegated to subordinate legislation. This technique results in repetition of the same rules in different provisions.

A. Principles of judicial power (Section I of the Law) - Language of trial

20. Article 12 (Language of the judicial procedure and management of records in courts) and a number of other articles, such as Article 61(7) (Requirements to the people's

assessors, jurors) deal with the question of language in court proceedings. The overall tenor of these articles is to provide for all court proceedings in Ukraine to take place in the Ukrainian language. Also, according to Article 61(7) persons who do not speak the national language are excluded from being a juror.

21. Article 12(3) recognises "the citizens' right to use their native language, or the language they speak, in the course of proceedings". This provision is welcome, but the guarantee it provides should not be limited to citizens and should be extended to all participants in court proceedings irrespective of their citizenship. The speakers of Russian and other languages thus have the right to have translation into their languages and to be allowed to use their language while giving evidence.

22. For the Venice Commission and the Directorate, it seems reasonable that all judges should have knowledge of the state language, but one has to wonder about a provision which would exclude a substantial part of the population from jury service. The question of language raises sensitive and difficult questions, not only in Ukraine but in many other countries, which are difficult to deal with in the context of a law on the judiciary as a side issue. The question of language should thus be carefully examined and addressed in a separate specific law by taking into account more practical and constructive solutions likely to enable effective access by all to Justice.

B. Courts of General Jurisdiction (Section II of the Law)

1. Specialisation of courts of general jurisdiction

23. According to Article 18 of the Law, courts of general jurisdiction "shall specialise in civil, criminal, commercial, administrative cases and cases of administrative offences". It appears that the commercial courts which would have been abolished in the Draft Law on the Judicial System and the Status of Judges previously submitted to the Venice Commission by the Ministry of Justice, are retained as a specialised form of courts. This is a matter for a policy choice by the authorities as to what system best suits the circumstances of the country.

24. However, the Venice Commission and the Directorate reiterate the previous consideration in para. 21 of the Opinion CDL-AD (2011)033 that it would have been easier to divide the courts of general jurisdiction into four orders, civil, commercial, criminal and administrative. In any case, the reform of the court structure system could be dealt with within the framework of the implementation of future constitutional amendments.

2. The Supreme Court

25. Article 13(5) of the Law provides that conclusions regarding application of the law provisions specified in resolutions of the Supreme Court of Ukraine shall be taken into account by other courts of general jurisdiction, which should have the right to depart from those conclusions only by providing for substantiated decisions. This seems to be a good solution in a system which while lacking a doctrine of binding precedents nevertheless seeks to provide for a consistent approach to legal interpretation. The provision appears to follow the recommendation made in the Joint Opinion CDL-AD(2011)033, para. 29 and is welcome.

26. Previous opinions of the Venice Commission were critical about the reduction in the competences of the Supreme Court. A previous draft submitted to the Venice Commission for opinion in 2011 provided that the Supreme Court shall " *review cases regarding unequal application by courts (court) of the same rule of substantive or procedural law in similar legal relations regarding the decisions that have entered into force when any other means for appeal were exhausted;"*[6]. In its Opinion CDL-AD(2011)033, the Venice Commission welcomed this draft provision which extended the power of review of the Supreme Court also

[6] CDL-REF (2011)043.

to procedural law, which was limited to the rules of substantive law in the Law on the Judicial System as in force at the material time.

27. The new Law subject to the present Joint Opinion, does not explicitly mention the separation between procedural and substantive law as to the review competence of the Supreme Court and stipulates in a more concise manner in its Article 38 that "*the Supreme Court is the highest judicial body of general jurisdiction of Ukraine, which ensures unity of judicial practice following the procedures and in the manner specified by the procedural law*." It seems that the term "general jurisdiction" covers the power to review cases not only for unequal application of substantive law, but also for procedural regulations. This is welcome, but it is preferable that it be clearly spelled out in the provision.

28. Moreover, certain issues such as the existence of two levels of cassation courts could be addressed following constitutional amendments.

29. Lastly, under Article 77 of the Law, a retired judge of the Constitutional Court could be appointed to the Supreme Court without an interview or an examination of the judge's dossier. This seems to contradict the provisions in the amended Law which points towards the introduction of competitive procedures in judicial appointments as a general rule.

3. The Power of the President of Ukraine in establishment and abolition of courts of general jurisdiction

30. Article 19 of the Law on the procedures for establishment and dissolution of courts of general jurisdiction provides that "*courts of general jurisdiction shall be created, including by way of reorganisation, and dissolved by the President of Ukraine on the basis of a proposal of the State Judicial Administration of Ukraine*".

31. The powers given to the President of Ukraine in Article 19 of the Law appear to be broader than those accorded to the President in the Constitution according to which the President "*establishes courts by the procedure determined by law*" (Art. 106(23) of the Constitution).

32. Thus, a question arises as to the compatibility of Article 19 of the Law with Article 106(23) of the Constitution. During the Paris meeting, following a question raised by the Delegation, the authorities explained that in a decision, the Constitutional Court of Ukraine considered that the power to establish courts also includes, by necessity, the power to liquidate courts, and that from this point of view, Article 19 would be compatible with Article 106 of the Constitution.

33. The Venice Commission and the Directorate reiterate that the President's role should be a formal or ceremonial one making the order once appropriate proposal and recommendation has been made[7]. During the Paris meeting, the representatives of the authorities emphasised that the power of establishment and liquidation of courts as provided by Article 19 is a formal one and the proposal of the State Judicial Administration concerning the establishment or the liquidation of courts is binding on the President. This is welcome. However, the term "on the basis of a proposal" should then be replaced by "on the basis of a decision" in Article 19 in order to better reflect in the provision the interpretation given by the Ukrainian authorities.

34. In addition, if the President's function of establishing and liquidating courts is to remain in the Constitution, the future constitutional reform should ensure that the ceremonial character of that function is clearly reflected. However, for the Venice Commission and the

[7] See para. 22, CDL-AD(2011)033.

Directorate, establishment and liquidation of courts should be a matter of legislation and constitutional amendments should be made in this direction.

35. Also, there are a number of articles in the Law which strengthen or emphasise the role of the President with regard to the judiciary without that being required by the current constitutional provisions. For example, according to Article 51 (2) the certificate of a judge appointed to the position for the first time shall be signed by the President of Ukraine. Further, according to Article 56 (2) judges are to be sworn in in the presence of the President. These provisions are perhaps intended to enhance the status of judges, but they might also be seen as giving support to political involvement with the judiciary, albeit in respect of rather formal matters.

C. Appointment of Judges

1. Probationary periods

36. Although the draft law includes a very detailed procedure on judicial appointments and on different stages of the procedure which is welcome for the sake of transparency, it maintains the separation between judges nominated for the first time for a limited period of time and judges nominated for an unlimited period of time. This separation results from Article 128 of the Constitution.

37. During the Paris meeting, the authorities informed the Delegation that the nomination of judges for limited period of time (probationary period) will be abolished and also eliminated from the Constitution with the future constitutional amendments. As the Venice Commission considered in its 2013 Opinion on draft constitutional amendments[8], the abolition of probationary periods is welcomed and in line with the Venice Commission's recommendations. The future constitutional amendments should therefore provide for only one category of judges appointed for an unlimited period of time.

2. Appointment procedure

i. Temporary appointments

38. The procedure for temporary appointments is provided in a detailed manner in Articles 65-75 of the Law.

39. Article 65(2)1 excludes from appointment as judges persons who are recognised by the court as incapable or partially capable. This does not appear to relate to mental or other illnesses since a separate subsection (Art. 65(2)1) deals with this issue and confines it to cases which prevent them from performing judicial duties. It needs to be clarified what is envisaged by this provision.

40. Many sections of Article 66 concerning the procedure for first appointment to the position of judge, refer to the "eligibility assessment" (see sections 5, 7, 8 and 9). It is clear that there are in fact two separate examinations at different stages of the procedure for appointment of a judge, respectively regulated by Article 69 (Eligibility assessment) and 72 (Qualification assessment). Unlike the Draft previously submitted to the Venice Commission in November 2014, the terminology used in the Law reflects this separation between two different examinations in order to avoid confusion.

41. Article 67(1)11 of the Law prohibits any request to an applicant for the position of judge to provide documents going beyond those specified in the Law. In order to avoid the protection provided to the candidate being circumvented, it might be desirable to prohibit in

[8] CDL-AD(2013)014, para. 18.

addition the submission, receipt or consideration of any documents which are not relevant to assess the judge's professional skills, as political testimonies.

42. At the end of the procedure, which includes qualification examinations, special inspection of candidates, special preparation for a position of judge and conducting of a competition to fill the vacant position of a judge, the High Council of Justice, on the basis of a recommendation of the Qualification Commission[9] (Art. 73(6)), recommends to the President of Republic the appointment of candidates as judges. It seems that the Law does not set any time limit within which the High Council of Justice should make the recommendation to the President and which would start running from the receipt of the recommendation of the Qualification Commission. Introduction of such a time limit is recommendable.

43. It appears from the wording of Article 74(1) of the Law that at this stage of the procedure the President's role is a formality. Article 74(1) provides that the appointment to a position of a judge "shall" be done by the President of Ukraine. In addition, according to the same Article, the President shall make the appointment "*without verification of the requirements for candidates for a position of a judge, established by this Law, and procedure for the selection of candidates for the position of a judge*". Also, according to Article 74(1)2, "*any enquiries regarding a candidate for a position of a judge shall not prevent their appointment to a position of a judge*". These provisions reflect the ceremonial or formal character of the role of the President in the appointments and are welcome.

44. However, according to the second sentence of Article 74(1)2 "*facts stated in those enquiries may serve as grounds for the President of Ukraine to raise an issue with the competent authorities of conducting an inquiry into those facts allowing a procedure envisaged by law*". During the Paris meeting, the representatives of the authorities assured the Commission and the Directorate that the possibility for the President to ask for an enquiry to the competent authorities, does not allow him to suspend the appointment procedure. In this respect, they referred to Article 74(2) which states that the President shall issue a decree on the appointment of a judge within thirty days of receipt of the proposal of the High Council of Justice. This is welcome; however, the consequences of this additional enquiry at the request of the President, concerning a judge the appointment of which is already proposed by the High Council, should be clarified in the Law. In any case the provision should not be interpreted as according to the President a substantial role in the evaluation of professional skills of a candidate which would go beyond a ceremonial role of appointment.

45. Generally, the procedure for examining and ensuring the suitability of candidates is elaborate and appropriate and appears to provide for good guarantees to avoid favouritism, nepotism or corruption.

ii. Lifetime appointments

46. The procedure is regulated in detail in Draft Articles 76-80. The candidate submits a written application to the Qualification Commission to be recommended for a lifetime judicial position. The Qualification Commission reviews the information about the candidate, including information related to disciplinary sanctions or legal liability, and, if its decision is positive, recommends the appointment of the candidate to the *Verkhovna Rada*.

47. In its previous opinions, the Venice Commission considered many times that Parliament is not the appropriate organ to elect judges. In case a political organ is competent to elect judges, the danger that political considerations prevail over objective merits of a candidate cannot be excluded. In addition, the Law does not seem to take any measure in order to diminish the danger of politicisation of the procedure before the *Verkhovna Rada.* For instance, it appears that the Law does not provide for a requirement of qualified majority in

[9] A body composed of judges and formed by the Council of Judges of Ukraine.

parliament for the lifetime appointment of judges. Even in this case, despite the fact that the recommendation is made by a judicial body, i.e. Qualification Commission, the parliament, as a political body, *"is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge" (…) "Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, it would be necessary to change Article 128 of the Constitution."* [10]

48. Consequently, the role of the *Verkhovna Rada* should be removed by way of a constitutional amendment, in the absence of which it is quasi impossible to prepare a new law which will fully meet all European standards. In case the involvement of the *Verkhovna Rada* cannot be removed from the Constitution, the involvement of the parliament should be mainly a ceremonial one and the decisive say in the election of judges should be entrusted to an independent body with a substantial part or the majority of members being judges elected by their peers (High Qualification Commission or a differently composed High Council of Justice). In this case, the Law could provide that the Parliament will appoint a candidate (with a qualified majority) where the statutory requirements are met so as to avoid any possibility of political interference. However, even this kind of regulation in the Law may require constitutional amendment.

D. Disciplinary liability of judges

1. Disciplinary Grounds

49. Article 92 deals with grounds for disciplinary liability of a judge. It appears from Article 92(1)1 that disciplinary liability may arise not only for intentional acts or serious negligence but for ordinary negligence. During the Paris meeting, the representatives of the authorities agreed on the principle that a judge should not be liable for actions occasioned by an ordinary negligence. Also, disciplinary liability should not be extended to judge's legal interpretation in adjudication process[11].

50. Further, according to Article 92(1)3 the disciplinary liability may also arise in case of "systemic or gross violation of judicial ethics rules that determine the authority of justice". The Venice Commission and the Directorate consider that in this clause it is unclear whether reference is made to an existing Code of Ethics or to general, unwritten rules. In a number of opinions, the Venice Commission has criticised the general penalisation of breaches of codes of ethics as too general and vague and insisted that much more precise provisions are needed where disciplinary liability is to be imposed[12].

51. The Venice Commission has consistently pointed out that the breach of oath is too vague to be a standard for the dismissal of judges[13]. The ECtHR judgment in the recent case of *Oleksandr Volkov v. Ukraine* has also expressed concern over the breach of oath as a ground for the dismissal of judges and the possibility of an overly broad and inaccurate interpretation. In this respect, Article 97(2) of the Law (Disciplinary Penalties against Judges) which provides for detailed grounds for liability for "breach of oath" in order to exclude any wide discretion on the issue, is welcome. However, "breach of oath" is not mentioned among the grounds for disciplinary liability in Article 92 (Grounds for disciplinary responsibility of a judge). Therefore, the relationship between Articles 92 and 97(2) is not clear as to the breach of oath as a ground for disciplinary liability.

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[10] CDL-AD(2013)014, para. 28.

[11] See for example, CDL-AD(2014)032, Joint Opinion on the Draft Law on Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of Georgia (October 2014).

[12] See for example, Opinion on draft Code on Judicial Ethics of the Republic of Tajikistan (CDL-AD (2013)035); CDL-AD(2014)006, para. 35; CDL-AD(2014)007, para. 111.

[13] CDL-AD(2013)014, para. 24.

52. Further, the criticism made by the ECtHR in its judgment in *Oleksandr Volkov v. Ukraine* and that of the Venice Commission concerning the parliamentary stage of the procedure of dismissal from office for breach of oath which "served to contribute to the politicisation of the procedure and aggravate inconsistency of the procedure with the separation of powers"[14] should also be taken into account. This, however, requires an amendment to Article 126 of the Constitution, which provides that "a judge is dismissed from office by the body that elected or appointed him or her in the event of "breach of oath", recognising thus the competence of Parliament, which appoints judges for permanent terms.

2. Disciplinary Proceedings

53. Article 94(1) regulates the disciplinary bodies. There are 1) the High Qualification Commission – for judges of local and appellate courts, and 2) the High Council of Justice – for judges of high specialised courts and the Supreme Court.

54. Article 95(12) provides that the consideration of a disciplinary case against a judge shall be "contention-based" which appears to point to the adversarial character of disciplinary proceedings. The guarantees for judges under disciplinary proceedings are also regulated in Article 95(13) according to which a judge "in respect of whom the issue of disciplinary responsibility is considered and/or his/her representative shall have the right to provide explanations, make motions to call witnesses, ask questions to participants in the proceedings, express objections, make motions and challenges".

55. Despite those positive developments in the Law, some clarifications are still necessary in order to better reflect the adversarial character of disciplinary proceedings. For instance, the person to play the role of advocate for the proposition that there is a breach of discipline is not clearly indicated. Whether this should be the representative of the commission for preliminary examination which should be in the possession of the facts of the disciplinary case, or the complainant who will know only his/her part of the story, should be clarified.

56. Article 99 deals with the right to appeal in disciplinary cases. According to the first paragraph of this provision, a judge of a local or appellate court may appeal the disciplinary decision to the High Council of Justice **or** to court. It is not clear from the text in what circumstances one appeal mechanism rather than the other should be used, although it may be presumed that the applicants should first appeal to the High Council of Justice before appealing to courts.

E. Immunity of judges

57. Draft art. 49 provides for a full immunity from detention or arrest without the consent of the *Verkhovna Rada.* A judge can be removed from office as a result of being brought to criminal liability by the Disciplinary Commission only on the basis of a reasoned request by the Prosecutor General (Art. 49(4)). Where the consent of a court is required for operative and search or investigative measures in respect of a judge, the motion must be brought by the Prosecutor General or his/her deputies and the head of regional prosecutor's office or their deputies. However, there is no limitation on the exercise of powers which do not require the consent of a court. It seems a reasonable protection for judges to expect the involvement of the Prosecutor General in proceedings against a judge.

58. As far as the basic immunity of judges is concerned, the Venice Commission has consistently opposed the conferring of immunities that go beyond functional immunity. Also, the Venice Commission has raised many times that the consent of the *Verkhovna Rada* for lifting judges' immunity is not an appropriate solution, since this involves a political body in a decision concerning the status of judges and their immunities. Consequently, the competence to lift judges' immunity should not belong to a political body like the *Verkhovna*

[14] para. 118.

Rada, but to a truly independent judicial authority. However, this requires an amendment to Article 126 of the Constitution which unequivocally recognises the competence of the *Verkhovna Rada* in this respect. The Venice Commission and the Directorate note that constitutional amendments concerning also the immunity of judges are currently in preparation[15]. According to Draft new Article 126 of the Constitution, "a judge cannot be detained without the consent of the High Council of Justice". Consequently, in case the constitutional amendment of Article 126 is adopted, the authorities will have to amend Article 49(1) of the Law accordingly.

59. Furthermore, the criteria for the lifting of such immunity should be specified and the decision should be reasoned.

F. Transfer of judges

60. A judge within a five year period (probationary period) or elected for an indefinite period may be transferred to a position of a judge in another court by the President of Ukraine (Art. 75(1) and 82(1) respectively). As a rule this transfer should be made upon a contest for vacant position (Art. 75(2) and 82(1)). However, Articles 75(3) and 82(2) provide for an exception for this general rule and provide that the transfer may be made without contest only in cases of reorganisation, liquidation or termination of the court where that judge holds the position of a judge. According to Article 19(1) of the Law, the President of Ukraine has also the power to liquidate the courts on the basis of a proposal of the State Judicial Administration. Although, during the Paris meeting, the representatives of the authorities emphasised the ceremonial role of the President in respect of liquidation of courts, the combination of Articles 19(1), 75(3) and 82(2) appear to allocate too much power to the President concerning transfer of judges. It is recommended that the Law be amended in a manner as to provide that the role of the President for transfer of judges is a formal one that may be used only on the basis of a proposal by the High Qualification Commission or the High Council of Justice.

G. Qualification assessment of judges

61. The Law provides for two different qualification assessments of judges respectively regulated in Articles 83-87 and the transitional Article 6.

1. Qualification Assessment in Articles 83-86

62. The qualification assessment in Articles 83-86 shall be made 1) upon an application by a judge requesting a verification of his/her ability to administer justice (voluntary basis) 2) upon an application for a lifetime appointment to a position of judge 3) on the basis of a decision by the High Qualification Commission in connection to a disciplinary sanction. It consists of an examination as well as a review of the judge's dossier and an interview. The dossier contains material including information about the number of cases dealt with, the number of appeals against the judge's decision which were upheld, and decisions which were overruled, the observance of time limits, the average length of time taken to deliver judgement, the number of complaints made against a judge and *etc*. (Article 85(2)).

63. In the opinion of the Venice Commission and the Directorate there is no objection to keeping a record of such matters provided that, if any conclusions are to be drawn based on such material, the judge should have an opportunity to explain any anomalies or any matters relating to these records. There is no doubt that unusual patterns of behaviour may well indicate a problem but may also be susceptible of reasonable explanations[16].

[15] In a latter of 28 February 2015, the Chairman of the *Verhovna Rada* requested the opinion of the Venice Commission on the draft law of Ukraine "On introducing changes to the Constitution of Ukraine (On immunity of the members of the Ukrainian Parliament and judges).

[16] See, CDL-AD (2014)007, Joint Opinion on the Draft Law Amending and Supplementing the Judicial Code (Evaluation System for Judges) of Armenia (21-2 March 2014), paras. 34 and seq.

64. As the quality, not merely the quantity, of a judge's decisions must be at the heart of individual evaluation[17], the criteria in Article 85(3)9 a) total number of cases considered, b) number of cancelled court decisions and d) number of modified court decisions need utmost caution and interpretation by an expert. Further, the judge's dossier on the basis of which the qualification assessment of the judge will be conducted, should concern, according to Article 85(3)10 a), number of complaints against any action of the judge. The information which should be taken into account should rather concern the complaints which have been verified and not the number of complaints against the judge concerned. Also, the judge's compliance with ethical and anti-corruption criteria (Article 85(3)11) should only be based on facts which have already been established by the competent authorities.

65. Article 88 deals with the procedure for regulatory assessment of a judge. This form of assessment "is aimed at identification of the judge's individual needs in improvement and incentives for maintaining his/her qualification at the proper level and for professional growth".

66. In the process of assessment, a questionnaire prepared by public associations on the basis of an independent evaluation, may also be attached to the judge's dossier. According to Article 88(7) this questionnaire may include such information as duration of trial, observance of judicial rules, respect by the judge for the rights of the participants to trial, communication culture, level of the judge's impartiality and level of satisfaction of the trial's participants with the judge's conduct.

67. It is clear that there is no objection to such associations forming their own assessment of a judge's work. However, the Venice Commission and the Directorate are concerned about including such assessments in the judge's dossier without even giving an opportunity to the judge to comment on it. It should not be assumed that public associations (i.e. NGOs with an interest and involvement in the judicial system) are necessarily objective. Many of them campaign for particular objectives as they are obviously entitled to do, but the degree of the judge's sympathy towards or compliance with those objectives may colour their reports.

68. Secondly, judges are often aware of matters (such as procedural requirements) which observers in court (e.g. representatives of public associations) may not know about. These matters, however, could well affect the assessment by associations on judge's performance.

69. Thirdly, a number of the matters which are described as matters which should be assessed are in fact matters which are capable of judicial determination, if necessary on appeal. These include observance of the judicial rules, the level of the judge's impartiality, the satisfaction of the participants in the trial with the judge's rulings, and objections to the conduct of the trial. These are all matters which should be brought to the attention of the judge by the parties, and, if necessary, before the appellate courts. In the absence of such interventions they are not matters proper to be recorded by observers of the trial with the intention of placing them on the judge's dossier.

70. In the opinion of the Venice Commission and the Directorate, such a procedure would risk a serious interference with the independence of judges.

2. Qualification assessment in the transitional Article 6

71. The transitional Article 6 of the Law deals with a qualification assessment of judges "in order to define whether they are capable of administering justice in relevant courts". As already observed above (point G.1) such an assessment is made under Articles 83-86 when

[17] See, Opinion no. 17 (2014) of the CCJE on the evaluation of Judge's work, the quality of Justice and respect for judicial independence, para. 35. Also, The Kyiv Recommendations, para. 28.

a judge applies for permanent appointment or for a post senior to that in which he or she is already serving. The qualification assessment under Transitional Article 6 is a different procedure and is carried out with respect to the sitting judges under a time schedule: judges of the Supreme Court and the high specialised courts are to be assessed within six months as of the date of the enactment of this Law and judges of appellate courts, within two years of that date, and finally all other existing judges.

72. During the Paris meeting, the representatives of the authorities gave detailed explanations as to the purpose of this provision. They underlined the major problems both with corruption and incompetence among the judiciary which are a result of political influence on judges' appointments in the previous period. In addition, the representatives of the authorities also emphasised almost complete lack of public confidence in either the honesty or the competence of the judiciary. According to the representatives of the authorities, in these circumstances, the choice was between dismissing all the judges and inviting them to reapply for their positions (which would not be preferable) or assessing them in the manner now proposed by the transitional Article 6.

73. If the situation is as described by the representatives of the authorities, it may be both necessary and justified to take extraordinary measures to remedy those shortcomings. Such extraordinary measures should indeed be aimed at identifying the individual judges who are not fit to occupy a judicial position. In this respect, dismissal of every member of the judiciary appointed during a particular period would not be an appropriate solution to the problems indicated by the authorities. That is particularly so in the case of judges who were appointed in a lawful manner in a country which had a democratic system, although imperfect in many respects and allowing too great a political influence in the appointment of judges.

74. However, such measure as the qualification assessment as provided for in transitional Article 6 should be regarded as wholly exceptional and be made subject to extremely stringent safeguards to protect those judges who are fit to occupy their positions.

75. Also, Article 126 of the Constitution which provides that judges hold office for permanent terms, except the judges of the Constitutional Court of Ukraine and judges appointed to the office for the first time, should be taken into account. Any law which purported to remove every existing judge without any examination of individual liability or culpability would be a clear breach of this constitutional provision.

76. In this respect, it appears that the qualification assessment as provided in transitional Article 6 can also result in the dismissal of a judge. If the results of the initial qualification evaluation have not confirmed the judge's capability to administer justice, he/she shall be dismissed from office and sent for training to the National School of Judges followed by a repeated qualification examination. The failure of the judge concerned in the repeated qualification examination shall be the basis for the conclusion of the High Qualification Commission on sending the recommendation to the High Council of Justice for a proposal to dismiss the judge on the grounds of violation of oath.

77. It is true that the breach of oath is provided for by Article 126 of the Constitution as a reason for dismissal of judges from office. However, the failure of a judge in the repeated qualification examination in transitional Article 6, is not mentioned among the grounds for liability for "breach of oath" provided for in Article 97(2) which may lead to confusion. For the Venice Commission and the Directorate, the transitional Article 6 requires the backing of a constitutional amendment to authorise it.

78. For the Venice Commission and the Directorate, it is not appropriate that this matter, which introduces a substantial change in the Law and which could have important consequences, be dealt with in the transitional provisions as now proposed. The matter needs to be dealt with in a substantive legal provision in much more detail and requires constitutional underpinning. During the Paris meeting, the representatives of the authorities

underlined that the detailed provisions in Articles 83-86 (point G.1 above) may also be used for the purpose of qualification assessment provided by the transitional Article 6. The Venice Commission and the Directorate do not consider however that those provisions which are appropriate when dealing with permanent appointment of judges are necessarily appropriate in respect of the qualification assessment as regulated in the transitional Article 6.

79. Further, the specialisation of judges in this qualification examination should also be taken into account. Judges will very often during their career engage in a degree of specialisation. Some will remain generalists and pursue a career across a broad spectrum, but others will specialise to a greater or lesser extent. In some cases the specialisation may be very marked. In many systems, some of the judges deal only with a narrow range of cases in which they will be expected to have a very profound knowledge. Therefore, if a written examination is to be required of existing judges to enable them to keep their present positions, those examinations would have to be extremely targeted and in some cases even individualised. It may be doubted whether such a procedure would be practicable and in principle the idea of targeted or even individualised examinations presents its own difficulties. It would seem preferable, therefore, that the assessment to be carried out under the transitional Article 6 would focus on the individual judge's work record rather than taking the form of a written examination.

80. According to the transitional Article, the procedure of qualification assessment must be carried out by the High Qualification Commission. There is an obvious logistic problem since a body of nine persons could not possibly carry out all of these examinations, interviews and reviews of dossiers within the timeframe envisaged. It would be reasonable that the High Qualification Commission be authorised to employ persons to carry out examinations in the nature of a screening process. The High Qualification Commission may then be entrusted with the task of making the decision. It is clear that such a procedure would require to be authorised by the legislation.

81. Lastly, given that the High Qualification Commission has numerous ordinary functions under the Law, the appointment of a special commission to carry out this task in relation to the existing judges should also be considered. Such a commission should consist of senior judges and former judges of undoubted integrity, if necessary with the assistance of suitably qualified and independent persons from outside Ukraine. Its procedures should be subject to all necessary safeguards for the rights of the individual judge affected, including rights of appeal to a court of law.

H. Amendments to the Law on High Council of Justice

82. The composition of the High Council of Justice is regulated in Article 131 of the Constitution. The High Council consist of twenty members. The *Verhovna Rada*, the President, the Congress of Judges, the Congress of Advocates and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions, each appoint three members to the High Council of Justice, and all Ukrainian Conference of employees of the Prokuratura appoint two members of the High Council of Justice. In addition, the Chairman of the Supreme Court of Ukraine, the Minister of Justice and the Prosecutor General are ex officio members of the High Council.

83. In its previous opinions, the Venice Commission has criticised the composition of the High Council in Article 131 of the Constitution and considered that a substantial part or a majority of the High Council should be judges elected by their peers[18]. This would evidently require a constitutional amendment.

[18] See e.g. CDL-AD(2013)014 Opinionn on the Draft Law on Amendments to the Constitution, Strengthening the independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine (14-15 June 2013), para. 35 and CDL-AD(2010)026 Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine, by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe (Venice, 15-16 October 2010).

84. The amendments to the Law on High Council of Justice may be seen as an attempt to ameliorate the current provisions so far as is possible within the constraints of the constitutional framework and represent as much improvement as is possible within that framework and display a degree of legal ingenuity. According to the amendments introduced in Articles 8-13 of the Law on High Council of Justice:

- of the three members to be appointed by the Verkhovna Rada, two should be judges or retired judges;
- of the three members to be appointed by the President, on the basis of a competition, two should be judges or retired judges;
- three members to be appointed by the Congress of Judges should be judges or retired judges;
- of the three members to be appointed by the Congress of Advocates, one should be a judge or a retired judge;
- of the three members to be appointed by the Congress of the representatives of law schools, one should be a judge or a retired judge;
- of the two members to be appointed by all Ukrainian Conference of Prosecutors, one should be a judge or a retired judge.

85. The judge members should have at least fifteen years of experience as judge.

86. While this system has the merit of ensuring that the majority of the members of the High Council will be judges and as such, is a positive development, those judges will not be elected by their peers as previously recommended by the Venice Commission.

87. In the case of election of the members by the President (Article 9 of the Law on High Council of Justice as amended), a separate competition is to be organised under the rules to be set out by the President. It follows that a future President might provide for different rules for the competition.

88. Further, the High Council of Justice still retains functions in relation to appeals by the prosecutors and for this reason it is preferable for the prosecutors to remain sufficiently represented in the High Council of Justice. In this connection, it would be advisable to lift the obligation imposed on the Ukrainian Conference of Prosecutors to include a judge among the members that it appoints.

89. Also, a structure containing only judges with more than 15 years of experience may not be regarded as properly representative.

90. For the Venice Commission and the Directorate, the system introduced by the amendments, despite the improvements, cannot be regarded as a permanent solution to the current problems. During the Paris meeting, the representatives of authorities also assured that the amendment of the Law on High Council of Justice was a temporary solution, while the constitutional amendments are under way.

V. Conclusion

91. Generally, the Law appears to be coherent, well put together and appear to follow the previous Venice Commission recommendations on many points. The strengthening of the role of the Supreme Court as the guarantor of the unity of the jurisprudence, the emphasis put on the formal character of the role of the President in temporary appointments, introduction of a list of grounds for liability for “breach of oath” in order to exclude wide discretion of disciplinary authorities, introduction of a scale of sanctions for disciplinary liability allowing application of sanctions in a proportionate manner and detailed provisions for qualification examination of judges before lifetime appointments or other promotions are examples of improvements in the Law as amended.

92. However, for the Venice Commission and the Directorate, the real problems concerning the independence of the judiciary in Ukraine lie rather in the constitutional provisions than in the Law on the Judicial System. To achieve an effective justice reform that satisfies European standards in Ukraine, constitutional amendments are necessary.

93. The following main recommendations are made:

Legislative level:

- More general provisions on the use of language in courts other than Ukrainian could be envisaged as part of a more comprehensive policy;

- The new functions of the President with regard the judiciary, concerning the signing of judge's certificates and the requirement that judges are to be sworn in the presence of the President should be reconsidered;

- It should be made clear in Article 92(1)1 that "negligence" as a disciplinary ground, covers serious or gross negligence and not ordinary negligence committed in good faith;

- The power of the President to decide on the transfer of judges without contest in case of reorganisation or liquidation of courts should be excluded;

- The qualification assessment in the transitional Article 6 should be dealt with in a substantive legal provision with much more detail. The legal consequences of a failure to pass the assessment do not seem to be in line with the Constitution. The provision should also be harmonised with the lustration process.

Constitutional level:

- The role of the *Verkhovna Rada* should be excluded in the appointment to permanent posts and in the dismissal of judges;

- The composition of the High Council of Justice should be modified so as to ensure that a substantial part or a majority of it are judges elected by their peers;

- The competence of the *Verkhovna Rada* in lifting judges' immunities should be excluded (constitutional amendments in this respect are currently under way);

- The power of the President to establish and liquidate courts should be removed from the Constitution. This should rather be considered as a legislative matter.

94. The Venice Commission and the Directorate are informed that by a presidential decree, a constitutional reform commission has been recently established and will start working on constitutional amendments. They welcome this important development and reiterate their readiness for any further assistance the Ukrainian authorities may need in improving the legislation and the Constitution on the provisions concerning the judiciary and the status of judges.