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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE PROPOSED AMENDMENTS
TO THE CONSTITUTION
OF UKRAINE
REGARDING THE JUDICIARY
AS APPROVED BY THE CONSTITUTIONAL COMMISSION
ON 4 SEPTEMBER 2015**

**Adopted by the Venice Commission
at its 104th Plenary Session
(Venice, 23-24 October 2015)**

On the basis of comments by

**Ms Regina KIENER (Member, Switzerland)
Mr Peter PACZOLAY (Honorary President)
Mr George PAPUASHVILI (Member, Georgia)
Mr Jean-Claude SCHOLSEM (Substitute member, Belgium)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Evgeni TANCHEV (Member, Bulgaria)
Mr Kaarlo TUORI (Member, Finland)**

I. Introduction

1. Following a request on 21 July 2015 by the Speaker of the Verkhovna Rada of Ukraine and Chair of the Constitutional Commission, Mr Volodymyr Groysman, a Preliminary Opinion on the proposed constitutional amendments relating to the judiciary of Ukraine (CDL-PI(2015)016) was issued on 24 July 2015. It concerned the draft amendments relating to the judiciary prepared by the relevant working group of the Constitutional Commission (CDL-REF(2015)024).

2. By letter of 10 September, Mr Groysman requested the opinion of the Venice Commission on the revised version of these draft amendments, approved by the Constitutional Commission (CDL-REF(2015)040).

3. Ms R. Kiener, Messrs. P. Paczolay, G. Papuashvili, J-C Scholsem, Ms H. Suchocka, Messrs E. Tanchev and K. Tuori continued to act as rapporteurs. A meeting was held in Kyiv on 27 August 2015 between a delegation of the Venice Commission and representatives of the Ukrainian authorities. This opinion also reflects issues discussed during this visit.

4. The present opinion was prepared on the basis of the comments of the rapporteurs; it was examined by the Sub-commission on the Judiciary on 22 October 2015 and was subsequently adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).

II. Scope of the opinion

5. This opinion follows up to the Preliminary Opinion of 24 July 2015. After receipt of such Preliminary Opinion, the working group on the judiciary of the Constitutional Commission of Ukraine made several changes to the draft constitutional amendments. The present opinion analyses these amendments in the light of the recommendations set out in the Preliminary Opinion, and also contains further recommendations.

6. This opinion is based on the English version of the proposed amendments that was submitted to the Commission by the Ukrainian authorities on 11 September 2015. Certain comments may be due to inaccuracies in the translation.

III. Analysis

Article 124 - Justice

7. With respect to the intention of the drafters to restrict recourse to litigation to cases in which there is a genuine “dispute”, the Preliminary Opinion recommended clarifications¹ to ensure the recognition of the right of access to court. This recommendation has been fully followed, and the relevant paragraph of Article 124 now reads: “the jurisdiction of the courts shall cover disputes regarding rights and obligations of a person and any criminal charge against him or her”. This provision thus covers access to justice in the fields of civil, criminal and administrative law. The following sentence - “courts shall also consider other matters in cases prescribed by the law” enables to cover the exceptions.

Article 125 - The Judiciary System; Article 106 – The President’s powers

8. In the Preliminary Opinion, it was recommended² to make clear that the power to decide on the establishment and the dissolution of the courts should belong to the Verkhovna Rada and

¹ CDL-PI(2015)016, § 15.

² CDL-PI(2015)016, § 18.

not to the Executive. The revised draft amendments address this issue in the following way: the competence of the President “to establish courts by the procedure determined by law” is deleted from Article 106 of the Constitution. In addition, a new sentence is added in paragraph 2 of Article 125 to read: “Courts shall be established and dissolved on the ground and under the procedure in accordance with the law, *which draft shall be introduced to the Verkhovna Rada or Ukraine by the President of Ukraine on proposal of the High Council of Justice*” (emphasis added).

9. The role of the President thus seems to be limited, which is welcome. The Ukrainian authorities have clarified that the system and structure of the judiciary will come under the competence of the Verkhovna Rada under the ordinary procedure (paragraph 1 of Article 125). Decisions on the establishment or dissolution of specific courts, instead, will have to be submitted to the Verkhovna Rada by the President upon the proposal of the High Council of Justice. This arrangement seems acceptable in principle. However, in order to make this process easier to carry out in practice, it would be preferable that the President submit the proposals to the Verkhovna Rada “in consultation with”, instead of “upon the proposal of” the High Judicial Council.

10. A transitional provision (Article 19.7) is added to read: “Until administrative-territorial system of Ukraine is changed in accordance with article 133 of the Constitution of Ukraine as amended by the Law of Ukraine “On Amending the Constitution of Ukraine (regarding decentralization of power)” but in any case not later than January 1, 2017, the establishment, reorganization, and dissolution of courts shall be conducted by the President of Ukraine on the basis and under the procedure prescribed by the law”. The President therefore retains this power for maximum one year from the adoption of the constitutional amendments on decentralisation, which in the current context in Ukraine appears to be acceptable.

11. The Preliminary Opinion pointed out³ that the Venice Commission had previously recommended the abolition of the specialised courts; however, if this was not acceptable to the Ukrainian authorities, it supported the second option proposed for Article 125 paragraph 4 (to read “Higher specialised courts may function in accordance with the law”). This option has indeed been retained, which is to be welcomed. The English translation of Article 125 paragraph 4 reads: “*The* higher specialised courts may function in accordance with the law” [emphasis added]. In Ukrainian the meaning of this provision is not that all the existing specialised courts may continue to function, but that certain of these courts may remain if the law so provides. The Venice Commission reiterates its strong recommendation to abolish the high specialised courts, with the administrative courts remaining an autonomous system.

Article 126 – Independence of the judges

12. Article 126 paragraph 5.3 provides as one of the grounds for dismissal of a judge “the commission [...] of a disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of a judge or apparent non-conformity with being in office”. The formula “apparent non-conformity with being in office” has been explained by the Ukrainian authorities to mean “non-compliance with the requirements set out in the law on the status of judges and in the Code of Ethics”. The violation by a judge of the obligation to produce an asset declaration justifying the origin of the judge’s property is one of the requirements under the law on the status of judges. In the current Ukrainian context, it might be advisable to mention it explicitly in the Constitution.

³ CDL-PI(2015)016, § 20.

13. The Preliminary Opinion raised the issue of the choice made by the drafters to provide for the automatic termination of a judge's tenure following "a guilty verdict against him or her", that is to say following any criminal conviction, irrespective of its gravity. Article 126 paragraph 6.5 now qualifies this ground for dismissal by specifying that the guilty verdict must relate to *committing a crime*. Assuming that this excludes at least minor criminal offences, this is a welcome improvement.

Article 128 – Appointment of judges

14. The Preliminary Opinion welcomed⁴ the long awaited change in the system of appointment of the Ukrainian judges: judges will no longer be elected by the Verkhovna Rada, but will be appointed by the President upon the submission of the High Council of Justice, on the basis of a competition. This change deserves full support. It marks the end of the power of the Verkhovna Rada to influence the judiciary, which represented a threat to the independence of the judges and of the judiciary as such. The President still has a ceremonial role: he/she appoints the candidates submitted by the High Council of Justice, whose proposals will be binding on the President. The law will have to regulate possible delays or deadlocks in the appointment by the President.

15. The Preliminary Opinion strongly recommended⁵ that the President has no part in the dismissal of the judges, arguing that "[a]fter appointment, any link between the judge and the political organs should be severed; there should be no space for interventions by either the legislative or the executive, not even if they are merely symbolic. In order to inspire the confidence which is necessary in a democratic society, courts must not only be independent, but also appear to be independent."⁶ The revised amendments follow this recommendation: the power to dismiss the judges has been removed from the President (Article 128) and conferred to the High Council of Justice (Article 131 paragraph 1.4). The Venice Commission welcomes this amendment.

16. The Venice Commission stresses however that all decisions on the judges' career (promotions, transfers, dismissals) must belong to the High Council of Justice and not to a political institution, if a truly independent judiciary is to be achieved. In order to avoid any misinterpretation, the Venice Commission therefore strongly recommends specifying in Article 131 paragraph 1.4 that the High Council of Justice has the power "to decide on dismissal of a judge from office and on transfers and promotions of judges". In the current Ukrainian context, it seems, however, acceptable – as a transitional measure, for a limited period of time – that the President play a role in the transfer and promotion of judges with a view to safeguarding national security.

Article 131 – The High Council of Justice

17. As concerns the composition of the High Council of Justice, the Preliminary Opinion welcomed that more than half of its members will be judges. Noting that the President was the only political institution that had the power to appoint HCJ members, the Preliminary Opinion argued however that it was necessary to "counterbalance the President's power by the participation of the Verkhovna Rada in the process of forming the HCJ. This would also add an element of accountability of the HCJ to the public".⁷

⁴ CDL-PI(2015)016, § 26.

⁵ CDL-PI(2015)016, § 28, § 34..

⁶ CDL-PI(2015)016, § 28.

⁷ CDL-PI(2015)016, § 37.

18. The revised amendments follow this recommendation and propose the following composition for the High Council of Justice: twenty-one members, ten of which elected by the Congress of judges, two appointed by the President, two by the Verkhovna Rada, two by the Congress of Advocates, two by the All-Ukrainian Conference of Public Prosecutors and two by the Congress of Representatives of Law Schools and Law Academic Institutions. The Venice Commission welcomes this amendment. It notes nevertheless that, while the High Council of Justice is responsible for the career and dismissal of both judges and prosecutors, only two representatives of the Prosecutor's office (of a total of 21 members) will sit on the Council. The law might provide that cases involving prosecutors be decided by a smaller composition of the High Council of Justice, where the proportion of members coming from the prosecution service would be higher.

19. The Preliminary Opinion stressed that “[i]t is of the utmost importance, however, that giving such a role to the Verkhovna Rada does not re-open the door to political influence on judges, which the whole reform under consideration is striving to eliminate. For this reason, the members of the HCJ chosen by the parliament should be elected by qualified majority, which would favour candidates with cross-party support (or by other mechanisms enabling the opposition to participate in the choice)”.⁸ Although it is conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine, the Venice Commission reiterates its recommendation to enshrine in Article 131 that two members of the HJC be elected by the Verkhovna Rada “by a qualified majority”. Simultaneously, anti-deadlock mechanisms suitable for the Ukrainian situation should be provided for.

20. The Preliminary Opinion further recommended that “[i]n any case, these members should be chosen among legal professionals and should not be “active” politicians”.⁹ The requirement of political neutrality should apply to the members appointed by the President too.”¹⁰ The revised amendments do not explicitly follow this recommendation, although they add a provision to the extent that members of the HCJ cannot be members of political parties and trade unions, take part in any political activity and hold representative mandates (Article 131 paragraph 5). The latter provision is welcome.

21. According to Article 131 paragraph 9/4, members of the High Council of Justice may not “occupy other paid office and perform other remunerated work except scholarly, teaching or creative activities”; as compensation, the law will have to provide for an adequate level of remuneration for these officials.¹¹

Article 131-1 – The Prosecutor General

22. The Preliminary Opinion welcomed the proposed reform of the Public Prosecutor's Office, which it found to be “generally in line with the applicable European standards and with the Venice Commission's previous recommendations” and strongly encouraged the Ukrainian parliament to adopt it.¹² The only recommendation which has not been followed relates to the method of appointment and dismissal of the Prosecutor General, which are in the hands of the President of Ukraine with the consent of the Verkhovna Rada, but “without a qualified majority, which instead would be necessary” according to the recommendation made in the Preliminary

⁸ CDL-PI(2015)016, § 32.

⁹ CDL-AD(2007)028, § 32.

¹⁰ CDL-PI(2015)016, § 37.

¹¹ Consultative Council of European Judges, Opinion no. 10 on the Council for the Judiciary at the service of the society, § 36.

¹² CDL-PI(2015)016, § 43.

Opinion.¹³ The Venice Commission is nonetheless conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine.

Article 131-2 – The Bar

23. The revised amendments provide that the independence of the Bar is guaranteed, which is welcome. They also provide that “Only an advocate shall represent a person before the court, and defend a person against prosecution”¹⁴. This is a very far-reaching provision, which prevents any possibility to be represented before any judge, for any kind of dispute, by anyone but an “advocate”, which is presumed to mean a “practising lawyer member of the Bar”. This seems excessively broad. The Venice Commission recommends that exceptions for certain kinds of disputes, such as labour disputes or disputes of minor importance, should be possible.

Article 148 – Composition of the Constitutional Court

24. The proposed amendments provide for a balanced composition of the Constitutional Court, with its 18 members being appointed by the President, the Verkhovna Rada and the Congress of Judges, after a selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution. As was expressed in the Preliminary Opinion, this proposed composition deserves to be supported.

25. Article 148 does not provide that the 6 members appointed by the Verkhovna Rada are elected with a qualified majority. This possibility should be taken into consideration by the Ukrainian Constitutional Commission¹⁵, as in Ukraine the President is not a politically neutral institution, and there could therefore arise a situation in which twelve judges are chosen by the same political majority, with no say of the opposition. The Venice Commission is nonetheless conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine.

26. The Preliminary Opinion expressed some doubts¹⁶ as to the increase of the minimum age requirement for Constitutional Court judges from 40 to 45. The revised amendments get back to a minimum age of 40, a solution which the Venice Commission welcomes. The Venice Commission reiterates its doubts as to the desirability of the 20-year residence requirement, which would exclude scholars and judges who have carried out academic or professional work abroad.

Article 149 – Independence of Constitutional Court judges

27. To the due exclusion of liability of constitutional court judges “for voting on decisions or opinions of the Court”, an exception has been added for cases of “committing a crime or a disciplinary offence”. Providing this exception, which also exists for ordinary judges (Article 126), also for Constitutional Court judges does not raise any issue.

¹³ CDL-PI(2015)016, § 42.

¹⁴ The entry into force of this provision is deferred in time pursuant to Article 19.8 of the Transitional Provisions.

¹⁵ CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paragraphs 18-19. CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 24.

¹⁶ CDL-PI(2015)016, § 49.

Article 149-1 Grounds for termination of the powers of Constitutional Court judges

28. The Preliminary Opinion recommended¹⁷ clarifying that only serious disciplinary offences may entail the dismissal of a Constitutional Court judge. The revised amendments replace the vague formula “commission of actions incompatible with the status of judges of the Constitutional Court of Ukraine” with a more qualified one: “commission of a disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of judge of the Court or apparent non-conformity with being in the office”. This formula is clearly preferable; nevertheless, it is recommended to further qualify the disciplinary offence as “serious”.

29. The Venice Commission welcomes the choice, recommended in the Preliminary Opinion¹⁸, to provide for termination or dismissal of the judges by a two-thirds vote of the Court.

Article 150 – Competence of the Constitutional Court

30. The Preliminary Opinion invited the Ukrainian authorities to clarify¹⁹ whether the competence of the Constitutional Court was limited to “normative” acts or extended to individual ones. It is now specified in Article 150 that only normative acts may be reviewed by the Constitutional Court.

Article 151 - Constitutionality of referendum questions

31. The revised amendments add the possibility for “no less than forty-five People’s Deputies” to seek an opinion of the Constitutional Court on the constitutionality of questions to be put to an all-Ukrainian referendum. This is to be welcomed.

Article 151-1 – Constitutional Complaint

32. The Preliminary Opinion recommended²⁰ to clarify that a constitutional complaint may only be lodged “after exhaustion of the domestic remedies”. This is now done in the revised amendments, and is to be welcomed.

Chapter XV – Transitional Provisions

33. According to Article 19 paragraph 1.2, the “powers of the judges appointed for the first time before taking effect of the Law of Ukraine on amending the Constitution of Ukraine (on justice)” shall end with the expiration of the term for which they were appointed”. The Venice Commission recommends that the experience acquired by these judges during their probationary period be duly taken into account after their passing the judicial competition, for example by exempting them from the obligation to follow an additional training period within the next few years.

34. A transitional provision has been added in the revised amendments, reading: “Conformity with being in the office of a judge, who was appointed or elected to the office before the Law of Ukraine “On Amending the Constitution of Ukraine (on justice)” taking effect, should be assessed due to the procedure prescribed by the law. Apparent non-conformity of the judge with being in the office based on criteria of professionalism, ethics, or honesty revealed in view of such assessment shall constitute a ground to dismiss a judge.”

¹⁷ CDL-PI(2015)016, § 46.

¹⁸ CDL-PI(2015)016, § 46.

¹⁹ CDL-PI(2015)016, § 47.

²⁰ CDL-PI(2015)016, § 52.

35. This provision appears to provide a constitutional basis for a procedure of assessment of all the ordinary judges of Ukraine with respect to their professionalism, ethics and honesty. According to the information provided by the Ukrainian authorities, this procedure is to be carried out by either the High Judicial Council or the High Qualification Commission of Judges of Ukraine. The authorities refer to the Venice Commission's recommendation to provide a constitutional foundation to emergency measures to overcome corruption and incompetence in the justice system proposed by the Law of Ukraine "On ensuring the right to a fair trial".²¹

36. In their joint opinion "on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine"²², the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law had indeed taken note of the Ukrainian authorities' explanation that a choice needed to be made between dismissing all the judges and inviting them to reapply for their position or assessing them in the manner proposed in the law. The Venice Commission and the Directorate expressed the view that "it may be both necessary and justified to take extraordinary measures" to remedy "corruption and incompetence among the judiciary which are a result of political influence on judges' appointments in the previous period" but that "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". They stressed in addition that even "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" and that "the matter needs to be dealt with in a substantive legal provision in much more detail and requires constitutional underpinning". Finally, the Venice Commission and the Directorate called for "harmonisation with the lustration process".

37. The Venice Commission considers that dismissing all the judges, outside very exceptional situations such as constitutional discontinuity, is not in line with European standards and the Rule of Law. In addition, the Venice Commission finds that replacing all the judges (more than 8,000) would not be feasible without jeopardising the continued administration of justice. In case of reorganisation of particular courts, the judges concerned should have the possibility to retire or apply for a new position

38. The Venice Commission finds that it is unclear whether this transitional provision in the Constitution of Ukraine is meant to provide constitutional underpinning not only to the assessment procedure provided in transitional provision no. 6 on the law "on ensuring the right to a fair trial", but also to the screening procedure set out in the law "on the Restoration of the trust in the judiciary" or to the lustration procedure set out in the law "on Government cleansing". The Venice Commission considers the existence of several parallel and overlapping procedures extremely problematic, as an assessment of the professionalism, ethics and honesty of all the judges can only be an extraordinary measure which requires the utmost care: the parallel enforcement of substantially different procedures carried out by different organs is unlikely to ensure respect of the most stringent safeguards for those judges who do meet these criteria. The Venice Commission finds that the extraordinary measure should be limited in time and should be carried out swiftly and effectively.

²¹ Adopted on 16 July 2015.

²² CDL-AD(2015)007, §§ 71 and following.

IV. Conclusions

39. In the view of the Venice Commission, the latest version of the constitutional amendments prepared by the Working Group on the Judiciary of the Constitutional Commission of Ukraine is very positive and well-drafted, and deserves to be fully supported. Nevertheless, the Venice Commission suggests some further changes in the Constitution. In addition, the Venice Commission reiterates its strong recommendation to abolish, when implementing the amendments, the high specialised courts, with the administrative courts remaining an autonomous system.

40. In its Preliminary Opinion, the Venice Commission had already welcomed in particular:

- The removal of the power of the Verkhovna Rada to appoint the judges;
- The abolition of probationary periods for junior judges;
- The abolition of the “breach of oath” as a ground for dismissal of the judges;
- The reform of the Public Prosecutor’s Office, the guarantees for its independence (notably the removal of the power of the Verkhovna Rada to express no confidence in the Prosecutor General) and the removal of its non-prosecutorial supervisory powers;
- The balanced composition of the Constitutional Court, with its 18 members being appointed by the President, the Verkhovna Rada and the Congress of Judges, after a selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution;
- The introduction of a constitutional complaint for individuals to seek the annulment of allegedly unconstitutional laws.

41. The Venice Commission also welcomes that, following its recommendations in the Preliminary Opinion:

- the power of the President to dismiss the judges will be removed;
- the Verkhovna Rada will participate in deciding on the composition of the High Council of Justice;
- the possibility will be given to “no less than forty-five People’s Deputies” to seek an opinion of the Constitutional Court on the constitutionality of questions to be put to an all-Ukrainian referendum.

42. However, the Venice Commission strongly recommends:

- to specify in Article 131 paragraph 1.4 that the High Council of Justice has the power not only “to decide on dismissal of a judge from office” but also to decide “on transfers and promotions of judges”; in the current Ukrainian context, it might be acceptable – as a transitional measure, for a limited period of time – that the President play a role in the transfer and promotion of judges with a view to safeguarding national security.
- To provide that only *serious* disciplinary offences may entail dismissal of the judges of the Constitutional Court.

43. In addition, the Venice Commission considers that, in the current situation in Ukraine, it might be advisable to mention explicitly in the Constitution that the violation by a judge of the obligation to produce an asset declaration justifying the origin of the judge's property may be a ground for dismissal.

44. With respect of the transitional provision which sets out the possibility to carry out an assessment procedure of all the ordinary judges of Ukraine with respect to their professionalism, ethics and honesty, the Venice Commission reiterates that such a procedure can only be an extraordinary measure which requires the utmost care: the parallel enforcement of different procedures carried out by different organs is unlikely to ensure respect of the most stringent safeguards for those judges who do meet these criteria.

45. The Venice Commission welcomes the constructive attitude and the fruitful exchanges which it has had with the Constitutional Commission of Ukraine.

46. The Venice Commission considers that, after so many attempts, over so many years, to reform the provisions of the Constitution of Ukraine on the judiciary, the time has come to proceed with this long overdue reform in order to finally move towards achieving an independent judiciary. The Venice Commission finds that the constitutional amendments under consideration represent an important step towards reaching this goal.