Strasbourg, 10 April 2015

CDL-AD(2015)008
Or. Engl.

Opinion no. 792 / 2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PRELIMINARY OPINION

ON THE DRAFT LAW

ON AMENDING THE LAW ON THE JUDICIAL SYSTEM AND THE STATUS OF JUDGES

OF UKRAINE

Taken note by the Venice Commission at it's 102th Plenary Session (Venice, 20-21 March 2015)

on the basis of comments by:

Ms Hanna SUCHOCKA (Member, Poland)
Mr James HAMILTON (Former Member, Ireland)
Mr Jørgen Steen SORENSEN (Member, Denmark)

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I. Introduction

1. In a letter dated 13 November 2014, the Minister of Justice of Ukraine requested the opinion of the Venice Commission on the Draft law on Amending the Law on the Judicial System and the Status of Judges of Ukraine (hereinafter, "the draft law") (CDL-REF(2015)003).

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 opinion.

3. On 3-4 February 2015, a delegation of the Venice Commission composed of Mr Gianni Buquicchio, Mr Thomas Markert and Ms Hanna Suchocka visited Kyiv and held consultation meetings with the President of Ukraine, Mr Petro Poroshenko, Prime Minister Arseniy Yatsenyuk, Minister of Justice Pavlo Petrenko and the Speaker of the *Verkhovna Rada* Volodymyr Groysman, on constitutional reform, reform of the judiciary, electoral reform and decentralisation. The Venice Commission is grateful to the Ukrainian authorities and to other stakeholders for their excellent co-operation during the visit.

4. This Opinion is based on the English translation of the draft law, 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.

5. This Preliminary Opinion, which was prepared on the basis of the comments submitted by the experts mentioned above, was taken note by the Venice Commission at its 102th Plenary Session, in Venice, 20-21 March 2015.

II. Background and Preliminary Observations and Remarks

6. The request of 13 November 2014 made by the Minister of Justice was accompanied by an "Explanatory Note" on the Draft Law on Amending the Law on the Judicial System and the Status of Judges of Ukraine, providing some explanations on the background to and the purpose of the said amendments.

7. It appears from the Explanatory Note that the amendments aim to remedy a number of deficiencies in the judicial system, which the Venice Commission and the Directorate General of Human Rights and Legal Affairs have pointed out in their 2010 Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine[1]. The 2010 Joint Opinion contains an important number of recommendations for the improvement of the Ukrainian judicial system including, apart from the recommendations concerning amendments to the Law on the Judicial System and the Status of Judges, constitutional amendments in several respects in order to strengthen the independence of the judiciary at the highest level.

8. The 2010 recommendations cover a range of problems in the Law, concerning in particular the lack of competence of the Supreme Court to resolve conflict of jurisdiction of different orders, the protection of defence rights in disciplinary proceedings against judges, unclear and wide grounds for the removal of judges from office, the collection of information by the High Qualification Commission on candidates for judgeship etc. In addition, the Opinion reiterates the earlier recommendations of the Commission and proposes constitutional amendments in respect of the composition of the High Council of Justice, the exclusion of the role of political organs, such as the *Verkhovna Rada*, in relation to the appointment and to the removal of judges and to the lifting of judges' immunities in particular.

[1] 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).

9. According to the Explanatory Note, the draft amendments also aim to fulfil the requirements of the ECtHR judgment in the case of *Oleksandr Volkov v. Ukraine*[2]. In this case, the Court found that the disciplinary proceedings against the applicant who was a Supreme Court judge at the relevant period, disclosed a number of serious issues pointing to structural deficiencies in the proceedings both before the High Council of Justice and at the parliamentary stage. In particular, the fact that the judges elected by their peers constituted a tiny minority of the members of the High Council of Justice who hear the applicant's case and that the members of the High Council of Justice who carried out the preliminary inquiries and submitted the request for the application of disciplinary measures, subsequently took part in the decision, were the main reasons that led to the Court finding that the proceedings before the High Council of Justice were not compatible with the principles of independence and impartiality required by Article 6 of the European Court of Human Rights (hereinafter, "ECHR"). The Court reached the same conclusions concerning the parliamentary stage of the disciplinary proceedings against the applicant which "served to contribute to the politicisation of the procedure and aggravate inconsistency of the procedure with the separation of powers"[3], amounting thus to a violation of Article 6 ECHR.

10. The main improvements to the judicial system proposed by the draft law as mentioned in the Explanatory Note are as follows:

a. Simplification of the judicial system and strengthening its institutional capacity:

- Merger of commercial and civil courts and the reorganisation of local commercial courts into district courts for civil and criminal cases which will enable the burden of local courts of general jurisdiction to be reduced;
-The role of the Supreme Court in the formation of a coherent judicial practice will be enhanced.

b. Introduction of new mechanisms for the selection of judges based on objective criteria and fair procedures;

c. Exclusion of the power of the President and of Parliament to decide on the transfer of judges;

d. Introduction of a competitive basis for the appointment of all judges;

e. A clear definition of the system of disciplinary liability of judges as well as a clear list of disciplinary grounds will be provided;

f. The body in charge of the preliminary examination of disciplinary complaints against judges will be separately established from the decision-making body on disciplinary charges;

g. Measures will be taken in order to ensure the transparency and openness of court proceedings, such as the permission to use video and audio recording in the courtroom.

h. Implementation of an electronic exchange system of documents between the courts in order to speed up court proceedings.

11. In addition, it appears from the information submitted by the authorities before the Committee of Ministers of the Council of Europe within the framework of the execution of the ECtHR judgment in the case of *Oleksandr Volkov v. Ukraine* that the draft amendments are a part of a wider programme on the reform of the judiciary. The Programme of the Cabinet of

[2] ECHR *Oleksandr Volkov v. Ukraine*, no. 21722/11, judgment of 9 January 2013.
[3] para. 118.

Ministers approved by Resolution of Parliament on 27 February 2014, in order to ensure fair justice, to restore the guaranties of independence of the judiciary and to carry out a special screening process of current judges envisages to adopt, amongst others, amendments to the Law on the Judicial System and Status of Judges, to the Law on the High Council of Justice and a new Law on the Funding of the Judiciary. In parallel, a National Council of Reform of the Judiciary was established by presidential decree which consists of leading experts in the area of judicial reform and aims to implement of the State policy on judicial reform[4].

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 Statute of Judges. The Joint Opinion on the Law on the Judicial System and the Status of Judges adopted in October 2010 welcomed some positive aspects of the Law, such as the automatic case-flow and case assignment system[5].

13. The Joint Opinion adopted in October 2011 on the draft law amending the Law on the Judiciary and the Status of Judges also welcomed some improvements in the draft law such as the restoration of a number of important competences of the Supreme Court and the organisation of disciplinary proceedings[6].

14. 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 to 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 appointment and removal of judges, in the establishment of courts, 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 and appointments after the probationary periods, the introduction of principles deriving from 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.

15. 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"[7]. This draft was seen as good starting point for a reform of the judiciary, but finally was not adopted.

16. Generally, the current draft law appears to be well put together and in line with European standards. It deals with the following subjects: 1) Principles of Judicial Power 2) Courts of general jurisdiction 3) Professional judges, peoples assessors and jurors 4) Appointment of judges 5) Order of taking position of a judge of court of general jurisdiction 6) Assuring the proper qualification level of judges 7) Disciplinary responsibility of judges 8) Dismissal from office of a judge 9) Judicial autonomy 10) Status of a retired judge 11) Organisational support for courts 12) Functioning of courts in special conditions.

17. There are many previous recommendations by the Venice Commission that have been taken into account in the process of the preparation of this draft law, e.g., the reference to the respect of the national fundamental law and international law has been introduced in

[4] See the web-site of the Department for the Execution of Judgments of the ECtHR: *http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=volkov&StateCode=&SectionCode=*

[5] CDL-AD(2010)026, para. 128.

[6] 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.

[7] 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).

Article 2 of the draft Law [Purpose and task of justice][8], improvement in the definition of the procedure concerning the automated distribution of cases is introduced (Article 9 of the Draft)[9], the Supreme Court became the ultimate guarantor of the uniformity of the jurisprudence of all courts (Art. 38(6) of the draft Law – the Supreme Court of Ukraine)[10], a judge may be a member of national and international associations to strengthen the authority of the judiciary power in society and development of the legal profession (Draft Art. 53(2) – Rights and obligations of a judge-)[11]; the Minister of Justice's nominee is removed from the composition of the Qualification Commission of judges (Draft Art. 83 – The procedure for forming the Qualification Commission of Judges-)[12]; the President of Ukraine and the Speaker of the *Verkhovna Rada* are excluded from among persons that should be present during the meetings of Congress of Judges (Draft Art.130(3) Judicial self-government)[13]; etc.

18. Firstly, the Venice Commission considers 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. The guarantees listed in Part I of the draft Law (Principles of Judicial Power)[14], as well as the detailed draft provisions on the status of judges (Art. 46 – 56) appear to be in line with international standards. However, similar principles can be found in the current Law too, which have not prevented judges in the recent past from being influenced by political considerations in their judicial functions.

19. Secondly, the draft amendments submitted to the Venice Commission for examination concern only the current Law on Judicial System and not the Constitution. This is the reason why some recommendations of the Venice Commission that require a constitutional amendment could not be introduced. The draft law is rooted in the existing Constitution, which prevents fundamental changes in the judicial system and the drafters had to reiterate a number of negative solutions of the existing system, subjected to the criticism of the Venice Commission in its previous opinions. An important example is the composition of the High Council of Justice. Although the Explanatory Note states that "*the majority of the High Council of Justice will constitute judges appointed through the Congress of Judges of Ukraine*", this does not appear to be possible since the composition of the High Council is regulated at the Constitutional level and without a constitutional amendment such a provision in the draft law will be contrary to the Constitution.

20. Consequently, in the following analysis of the draft law, the Commission will also point, where appropriate, to the necessary constitutional amendments in order for the judicial reform to better address the issues dealt with in the draft law in line with the European standards.

[8] See the recommendation in para. 13 of the Joint Opinion CDL-AD(2011)033.
[9] See the recommendation in para. 18 of the Joint Opinion CDL-AD(2011)033.
[10] See the recommendation in para. 29 of the Joint Opinion CDL-AD(2011)033.
[11] See the recommendation in para. 40 of the Joint Opinion CDL-AD(2011)033.
[12] See the recommendation in para. 54 of the Joint Opinion CDL-AD(2011)033.
[13] See the recommendation in para. 70 of the Joint Opinion CDL-AD(2011)033.
[14] *Such as the right to a fair trial (art. 7), automated distribution of court cases, conditions for the possibility of transfer of cases (art. 9), equality before the law and courts (Art. 10), right to legal assistance (Art. 11), transparency and openness of court proceedings (Art. 12), right to appeal to court (Art. 15).*

III. Standards

21. Independence, impartiality, integrity and professionalism are the core values of the judiciary. The Venice Commission 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);

- 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;

- 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.

IV. Analysis

22. 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"*.

23. 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 Draft law)

1. The principle of audio and/or video recording of judicial proceedings *(Draft Art. 12)*

24. Draft Article 12, which provides for the basic rule concerning the use of video and audio recording during court hearings states that "*participants of the trial and other persons present during open court hearings may use portable audio hardware, may in the courtroom photography, filming, recording and broadcast the trial.*"

25. As the Venice Commission considered in its 2013 Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia[15], "[t]*here is no doubt that there are considerable advantages to having audio recordings of court hearings, notably for the purpose of settling any disputes about what transpired in court and also from the point of view of the transparency of proceedings. It can also help ensuring public scrutiny of the functioning of the justice system.* (…) *Video recording of court hearings may serve the same purpose, but at the same time the presence of cameras is more likely to create difficulties: the behaviour of the actors in the courtroom may change as a result of broadcasting; defendants and their lawyers may be more interested in appealing to the court of public opinion than to the court before which their case is listed; victims of crime and witnesses, not to mention the parties, may feel intimidated by the presence of cameras; the respect for private and family life of the public is much more difficult to ensure with a video recording than with an audio recording. In addition, the conduct of criminal proceedings may reveal to be more difficult: for example, live recording of criminal proceedings will allow witnesses to be informed of other witnesses´ statements, which will often give rise to conflict with prosecutorial as well as with defendant's interests."*

26. It follows that a broad principle allowing audio and video recordings in courtrooms should not be unlimited and the law should provide for some exceptions to the principle in order to prevent chaos in courtrooms. The Draft article recognises the possibility of restricting this right in its paragraph 4, but it does not set out any criteria for such restrictions other than to state that it may be done in cases stipulated by the procedure law. It might be desirable at least, to state in general terms what type of considerations and legitimate which might justify such restrictions, for example, the protection of the interests of justice, ensuring the fairness of the trial, the protection of order in the courtroom, privacy interests, *etc.*

27. In this regard, Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings[16] underlines in its preamble "*the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention*"[17]. Consequently, in balancing the conflicting interests in this area, the restrictions to the right to audio and video recording during court hearings should be subjected to a proportionality assessment in the concrete circumstances of a case, between the measure restricting the right and the legitimate aim pursued by this restriction.

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[15] *CDL-AD(2013)007, adopted at 94t^{h} Plenary Session (8-9 March 2013), para. 10 and seq.*
[16] *Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies*
[17] *See also, ECtHR P4 Radio Hele Norge ASA (Admissibility decision), no. 76682/01, 6 May 2003.*

2. Language of trial (Draft Art. 13)

28. Article 13 and a number of other articles such as Article 56 on people' assessors and jurors" deal with the question of language of court proceedings. The overall tenor of these articles is to provide for all court proceedings in Ukraine to take place in the Ukrainian language. It is welcome that the para. 3 of Article 13 recognises the right of participants in a trial to use their native language or the language they speak. Thus, the extent of rights of Russian speakers is to have translation into Russian and to be allowed to use their language while giving evidence.

29. Also, according to Draft Article 58 (4)6 a person who does not speak Ukrainian is excluded from being a juror. This, of course, is a natural consequence of having all cases heard in Ukrainian. 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.

30. In the opinion of the Venice Commission, these questions raise much broader issues that cannot simply be dealt with in the context of a law on the judiciary. These are important issues which should be carefully examined and addressed. This might include considering practical and more constructive solutions likely to enable access by all to jury service.

3. Other issues

31. Draft Article 5 (1) stipulates that "Justice in Ukraine is carried out exceptionally by courts." This is evidently a translation problem. The word "exceptionally" should be replaced by "exclusively".

B. Courts of General Jurisdiction (Section II of the draft law)

32. This Section of the draft law sets out the structure of the court system in general terms. Draft Art. 17 provides for four levels of courts, local, appellate, High Specialised Courts, and the Supreme Court. According to Draft art. 18, the courts specialise in administrative cases, civil cases, criminal cases and cases on administrative offences. It appears that Draft Art. 18 narrows the court specialisation of the current Art. 18 and abolishes the specialisation in commercial cases.

33. It is explained in the Explanatory Note that the draft law merges courts of civil and commercial jurisdiction in order to simplify the judiciary and to strengthen its institutional capacity. Although those are clearly legitimate purposes in reforming the judiciary, the Venice Commission reiterates, in the absence of any other explanation by the authorities, its previous consideration in para. 21 of Opinion CDL-AD(2011)033 that administrative cases are mentioned both as a specialisation in themselves and separately as administrative offences cases. This is rather confusing and it would have been easier to divide the courts of general jurisdiction into four orders, civil, commercial, criminal and administrative. In any case, the Commission considers that the reform of the court structure system could be dealt with within the framework of the implementation of future constitutional amendments.

34. Draft Art. 19, which provides for the procedure for the establishment of courts of general jurisdiction states that "*Courts of general jurisdiction are established, including through reorganisation, by the President of Ukraine upon the submission of the State Judicial Administration of Ukraine on the basis of proposals from the Council of Judges of Ukraine".* The draft article has the exact same wording as the draft article submitted to the Venice Commission in 2011[18], subjected to the Opinion CDL-AD(2011)33. Thus the Venice commission reiterates that the text represents some improvement compared to an earlier draft which had provided for the President to act on recommendation of the Minister of

[18] CDL-REF (2011)043 Draft Law on Amendments to the Law on the Judiciary and the Status of Judges and to Other Legal Acts of Ukraine.

Justice based on a proposal from the Chief Judge of the court in question. Despite the improvements in the new draft law, it is still recommended that the President's role be a formal one making the order once the appropriate proposal and recommendation has been made[19].

35. 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 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;"*[20]. 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 to procedural law (currently limited to rules of substantive law). The new Draft provision subject to this 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 that "[the Supreme Court shall] *review the court decisions and decides other issues in the manner stipulated by law*;". The Explanatory Note provides that the Supreme Court will be able to review cases not only for unequal application of substantive law, but also for procedural regulations. This is welcome, but should be clearly spelled out in the draft provision.

36. The role of the Supreme Court in summarising judicial practice in order to ensure uniform application of the principles and the rule of law by all courts of law in deciding court cases (Draft art. 38(6)) follows the recommendation made in the Joint Opinion CDL-AD(2011)033, para. 29 and is welcome.

C. Appointment of Judges

1. Probationary periods

37. 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 (i.e. 5 years) and judges nominated for an unlimited period of time. This separation results from Article 128 of the Constitution and the draft law contains the same regulation as the current Law.

38. The nomination of judges for a limited period of time (probationary period) was criticised by the Venice Commission from the outset as going against the general principle of the irremovability of judges. The criticism made indicates that this *probationary period* could restrict a judge's impartiality and independence, since she/he may issue rulings or verdicts with a view to ensuring his/her future permanent nomination. In its 2007 Opinion on the Draft law on the Judiciary and the Draft law on the Status of Judges of Ukraine, the Venice Commission stated that: *"Probationary periods by definition raise difficulties for judicial independence but if they are to apply they should not be longer than is needed to assess a judge's suitability. Five years seems too long a period. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office"*[21].

[19] See para. 22, CDL-AD (2011)033.
[20] CDL-REF (2011)043.
[21] CDL-AD (2007)003, para. 26.

39. For that reason, the Venice Commission, when commenting on draft constitutional amendments in 2013, expressed its positive opinion on the proposal about the elimination of limited time appointments from the Constitution. In the draft constitutional amendments then presented, the words "*judges appointed to the position for the first time*" were proposed to be deleted from art. 126. As a consequence "*The amended Article 128 provides for appointment without a time limit. Therefore, in the light of the new proposal, the category of judges nominated for a limited period of time no longer exists. The abolition of probationary periods is welcomed and in line with the Venice Commission's recommendations. The Amendment provides for only one category of judges appointed for an unlimited period of time*"[22].

40. The Constitution however was not amended and as a result two categories of judges remain in the Ukrainian system.

41. In these circumstances, as the Venice Commission considered in its above-mentioned 2005 Opinion, the procedure for the nomination of judges for an unlimited period of time becomes even more important. Special guarantees must be provided for the procedure of "passage" from a temporary judge to a position of lifetime judge, which should be based on objective criteria in order to prevent that political considerations prevailing over the objective merits of a candidate and not to restrict a temporary judge's impartiality and independence, since she/he may issue rulings or verdicts in view of ensuring his/her future permanent nomination.

2. Appointment procedure

i. Temporary appointments

42. The procedure for temporary appointment is provided in a detailed manner in Draft articles 62-71.

43. Draft Article 62(5)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 (Draft art. 62(5)2) 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.

44. Draft Article 64 refers twice to the "qualifying examination", both in sections 3, 4 and 7. It is clear that there are in fact two separate qualifying examinations at different stages of the procedure for appointment of a judge, respectively regulated by Draft Articles 66 and 69. The terminology should reflect this in order to avoid confusion.

45. Article 65 prohibits any request from an applicant for the position of judge of 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 addition the submission, receipt or consideration of any such documents.

46. At the end of the procedure, which includes qualification examinations, special inspection of candidates, special preparation for a position of judge and conducting of competition to fill the vacant position of a judge, the Council of Justice, on the basis of a recommendation of the Qualification Commission (which is a body composed of judges and formed by the Council of Judges of Ukraine) recommends to the President of Republic the appointment of candidates as judges. The High Council should make this recommendation within 15 days from the receipt of the recommendation of the Qualification Commission.

47. It seems that at this stage of the procedure the President's role is a formality, but this should be confirmed by a clear wording that at this point the President "shall appoint" rather than "appoints" the successful candidate.

[22] CDL-AD (2013)014.

48. 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

49. The procedure is regulated in detail in Draft Articles 73-78. 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 those related to disciplinary sanctions or legal liability, and, if its decision is positive, recommends the appointment of the candidate to the *Verkhovna Rada*.

50. 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 order to diminish the danger of politisation of the procedure, Draft art. 78.4 provides for a requirement of a qualified majority in parliament for the election of judges: "*The decision to elect a candidate to a lifetime judicial position is taken by the* ***constitutional majority*** *of the Verkhovna Rada of Ukraine*". However, 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."* [23]

51. 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 such a constitutional amendment cannot be introduced, the involvement of the parliament should be mainly ceremonial one and the decisive say in the election of judges should be entrusted to an independent body composed of a majority of judges or of a substantial element of judges elected by their peers (High Qualification Commission or a differently composed High Council of Justice). In this case, Draft Article 78(4) could provide that Parliament will appoint a candidate 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.

iii. Monitoring lifestyle of a judge

52. Draft Article 56 provides concisely that "*in order to establish relevance of a judge's level of life to his/her and his/her family property and the income received by them, monitoring of a lifestyle of a judge is conducted in accordance with the law*". The provision has a clear and legitimate aim, i.e. fights against corruption among judges and as such, is welcomed. However, taking into account that the draft law is so detailed in its regulation, that it also regulates many technical issues in detail, it is not acceptable that such an important issue for the independence of judges as the monitoring of his/her lifestyle, is regulated in such a general and concise way. The body competent to conduct the monitoring is not indicated in the Draft Article and no guarantees are provided in order to protect substantive (right to privacy) and procedural (the position of the judge in this procedure) rights of the judge[24], nor are the working methods in the conduct of monitoring indicated.

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

[24] *See, for the guarantees that should be provided to the judge and drafting requirements in this area, CDL-AD(2014)031 Joint Opinion on the Draft Law on Amendments to the Organic Law on General Courts of Georgia (10-11 October 2014), para. 53-59.*

53. The Draft Article as such has the potential of being extremely intrusive and a possible source of intimidation and harassment and would very much benefit from redrafting, taking into account the relevant substantial and procedural guarantees for the judge concerned.

D. Disciplinary liability of judges

1. Disciplinary grounds

54. Although Draft art. 92 provides for a long and detailed list of grounds for disciplinary liability, it is still not precise and clear enough. A ground of general nature like the "violation of the right to access to justice or the right to reasoned judgment" are mixed with regulations that may be considered as subsets of this general ground, such as: the "delay in making a judgment", "violation of a reasonable term to hear a case", (Art. 92(1)1) This sort of regulation gives an impression of repetition.

55. The Venice Commission has consistently pointed out that the breach of oath is too vague to be a standard for the dismissal of judges[25]. 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. The 'breach of oath' is not mentioned among the grounds for disciplinary liability in Draft art. 92 which is positive. This ground, however, is mentioned in Draft art. 99(1)5 among the disciplinary sanctions which may be applied to a judge, namely "conclusion (by disciplinary body) on violation of oath by the judge preventing further occupation by that person of the post of a professional judge". The Explanatory Note also provides that "*it is possible to dismiss the judge for oath breaking only as a consequence of the disciplinary procedure*". The relationship between Draft Articles 92 and 99(1)5 is not clear as to the breach of oath as a ground for disciplinary liability. The relationship between grounds for disciplinary proceedings and grounds for dismissal should also be clarified.

56. Article 92(9) and (10) refer to activities carried out by members of the judge's family. Family is not defined. Furthermore, while it is important that judges are not able to avoid provisions designed to eliminate corruption through the use of family members, it is also important that judges not be penalised for misbehaviour by members of their family over which they have no control. The provision needs to be expanded to provide for a defense right to the judge concerned in such a case.

57. There are further ambiguities in Draft art. 92 that need to be clarified. The meaning of "declaration" referred to in para. 7 of the draft provision is not clear. In case these are the declarations that the judge concerned should make or submit, this should be clearly stipulated in the provision. Also, the ground for disciplinary liability in Draft art. 92(13), "dissociation of a judge having judicial authorities from exercising these authorities" is uncertain.

58. 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"[26] 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.

59. Lastly, in Draft Article 116, concerning the dismissal of a judge from office for breach of Oath, there is a reference, in its para. 3, to "the constitutional members of the Supreme Council of Justice" [which should be read as High Council of Justice]. Since the Constitution

[25] CDL-AD(2013)014, para. 24.
[26] para. 118.

provides rules for the composition of the whole Council, it is not clear how some of the members could be constitutional and others not.

2. Disciplinary Proceedings

60. Draft Art. 93 regulates the disciplinary bodies. There are: 1) disciplinary commission of Judges – for judges of local and appellate courts, and 2) the High Council of Justice – for judges of high specialised courts and judges of the Supreme Court.

61. The following regulations on disciplinary proceedings are very long and detailed but not necessarily correct in respect of substantive matters. The procedure and especially the guarantees for judges under disciplinary proceedings are not well regulated. Despite detailed provisions, substantive regulations concerning the right of judges in the disciplinary procedure are still lacking.

62. For instance, although Draft art. 97(3) [Consideration of a disciplinary case] states that the consideration of a disciplinary case is to be based on adversarial principles and the Explanatory Note underlines the conformity of this principle in disciplinary proceedings to European standards compared to an accusatorial system, the draft provision is still not clear on the procedural rules for the implementation of the adversarial principle, e.g. the person to play the role of advocate for the proposition that there is a breach of discipline. 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.

63. Under Articles 103 and 108, all nine members of the Commission for Preliminary Examination and all five members of the Disciplinary Commission must be available for the bodies to meet and take decisions. This appears to be a potential source of paralysis for the bodies concerned. It would be preferable to fix a quorum close to the full membership or alternatively to provide for a system of alternate members.

64. Draft art. 100 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. The proposed formulation is still imprecise and incoherent.

E. Immunity of judges

65. Draft art. 47 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 (Draft art. 47(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. 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.

66. 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 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.

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

F. Transferring a judge with lifetime tenure to a higher court (Draft art. 79(3))

68. Transfer to a higher court is possible on the basis of the results of a competition. During the competition, the Qualification Commission monitors of the judges lifestyle, and in addition questions the judges of the court where the applicant judges are sitting about personal qualities of the candidates and their rapport with colleagues. These provisions create considerable unease. If such a procedure is to be followed, it should be on the basis that anything said must be made available to the applicant who should have an opportunity to comment on it.

G. Judicial Autonomy

69. The Section VIII of the draft law (Draft art. 125-134) provides for a comprehensive system of representative judicial bodies to regulate various matters. This Section is coherent and well-constructed. There are three basic institutions: (1) judicial conferences, which exist at the level of each court and which make decisions of relevance to the respective court; (2) the Congress of Judges which represents all judges in Ukraine, is elected from the conferences and exercises important powers set out in Article 129 of the draft law; and (3) Board of Judges which is a smaller permanent body intended to exercise powers in the interim period between Congresses.

V. Conclusion

70. Generally, the draft law appears to be coherent, well put together and in line with European standards. There are many previous recommendations of the Venice Commission that have been taken into account in the process of the preparation of this draft law, as indicated throughout the present Opinion and in particular in its paragraph 17.

71. However, for the Venice Commission, 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. Moreover, certain issues such as the existence of two levels of cassation courts could be addressed following constitutional amendments.

72. The following main recommendations are made:

Legislative level:

- Legitimate aims for restricting the right to video and audio recording during court hearings should be indicated;
- the President's role in the establishment of courts should be a formal one once the appropriate proposal and recommendation has been made;
- the President's role in the appointment of judges to temporary positions should be a formal one and this should be clearly indicated in the draft law;
- provisions concerning the monitoring of the lifestyle of a judge should be construed in a detailed manner and provide for some guarantees in the procedure for the judge concerned.

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 of it are judges elected by their peers;
- the competence of the *Verkhovna Rada* in lifting judges' immunities should be excluded.

73. The Venice Commission remains at the disposal of the Ukrainian authorities for any further assistance they may need in improving the legislation and the Constitution on the provisions concerning the judiciary and the status of judges.