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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT LAW OF UKRAINE ON THE JUDICIARY

C o m m e n t s
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Introduction

The Venice Commission in its co – operation with several countries on matters principally related to constitutional reform, has been requested to provide an opinion on the draft law of Ukraine on the Judicial System; *"the constant enlargement of the Commission and the scale of the discussions which take place in the context of its activities show that the Commission has become an ideal forum for the exchange of information, experience, ideas and projects in the constitutional field"* (Annual Report of activities for 1996, Venice Commission). With respect to Ukraine the Commission took a highly active role in the process of drafting a Constitution. Ukraine has been faced with the difficult task of creating a genuine legal culture after deformations of the old command system.

The draft law of Ukraine on the Judicial System (hereinafter referred to as "the Law") premises as its objects and reasons, the setting-up of the procedure for the organization and activities of judicial power in Ukraine with the declared aim of ensuring protection of the rights of human and citizens' rights, and the rights and the lawful interests of legal entities and the State by an open, fair and impartial Court. In fact, it mainly deals with the organizational structure of the system and fails to regulate such matters as concern the selection of persons to be recommended for office of judge, issues concerning disciplinary measures which may be taken as judges, the establishment, functions and powers of the High Council of Justice and the norms it follows in the regulation of its own procedures, the composition and powers of the Judges' Qualification Commission similar issues.

It is understood that a number of these vital issues necessary for the proper administration of justice, are or are intended to be regulated by other legal instruments that would fall outside the ambit of this opinion. It remains therefore a moot point whether the law under review – whatever its merits or demerits on the organizational aspect of the system – actually fulfills its avowed aims above stated. For such a comprehensive opinion to be given one would have to examine this draft Law in the light of other legal instruments.

One has also to state that my opinion must of necessity be understood to be given within the parameters of an examination of the text of the Law in the light of the established principles of due process accepted in a modern democratic society, but without any real first hand knowledge of the political, social and economic context within which the Law has to be put into effect. One has to also take into account the historical fact that the Ukraine belongs to that group of post – totalitarian countries that has been in existence as a sovereign country for less than ten years. It is a new democracy in which the basic democratic institutions are still taking shape and in which the concept of separation of powers is still somewhat blurred. One cannot, when discussing judicial systems in such an ambit, ignore the fact that in such conditions there could still be traces of traditional interference by both the legislative and the executive power in the activities of the judicial power. Accusations of corruption and subservience to the political authority, that is still in many respects authoritarian if not totalitarian, are not unknown.

The lack of a strong tradition of independence and impartiality within the judiciary makes it even more imperative that the basic structures of the judicial system be strengthened to ensure a strong judicial power that would provide an effective and full guarantee for the protection of human rights and freedoms. A system which would ensure access to all citizens to impartial and independent tribunals for the determination of their civil rights and obligations as well as a fair trial with proper constitutional safeguards in criminal matters, and this within a reasonable time.

General Considerations

These basic reflections suggest the following general considerations among others:

(1) This opinion can only be considered to be a first reaction to the text of the law aimed at establishing whether it satisfies the minimum requirements that a judicial system should have in a democratic society. A matured and in depth opinion would require a detailed examination of each and every provision of the Law as well as a study on how it relates to other relevant legal instruments in the context of the reality of Ukranian society.

(2) The Law obviously envisages a hierarchically arranged judicial system to ensure the access to justice for all. A system that had to conform to Article 124 of the Constitution which provides that:*"judicial proceedings are performed by the Constitutional Court of Ukraine and courts of general jurisdiction"*. Article 125 provides expressly *inter alia* that *"the creation of extraordinary and special courts shall not be permitted"*. The Law in theory purports to follow the Constitution laying down a system of courts of general jurisdiction consisting of local courts from which there are appeal courts, and specialised courts from which lays an appeal to supreme specialised courts. The Supreme Court of Ukraine provides a last recourse of appeal in exceptional cases from all courts, apart from other functions stipulated in Article 51 of the Law. In practice however it would appear that the law itself provides for other courts that would not strictly speaking qualify as courts of general jurisdiction. Care should be taken not to confuse the term *"principle of specialization"* that implies a court of general jurisdiction to which all citizens are subject and which is qualified by a clearly defined competence linked to a specialization, and the term *"special courts"* as defined in Article 125 of the Constitution which means *ad hoc* tribunals set – up to determine specific cases to be tried in a special manner outside the general jurisdiction

(3) It would appear that the draft Law makes a general effort to provide a judicial system that would be an effective separate power from the other organs of State by providing the necessary organizational structures for it to operate independently with its own administrative set – up and financing. The proposed system, even though it is in my opinion a top heavy one, would be a workable one in a democratic environment in times of political normality. Even so I believe that the judiciary is unnecessarily burdened by administrative duties that could very easily be carried out by competent executives working within the framework of an autonomous body constitutionally set–up, under the overall supervision of the State Court Administration (**Article 79** of the Law). Great care should also be taken to ensure that the conditions under which judges perform their duties, should be uniform, accessible and available to all. In this respect, the initial appointment of judges for a term of five years is only acceptable if these judges are to serve in a court of first instance and with reservations made later on in this opinion.

The independence and impartiality of the judiciary, especially in a country where these concepts are relatively novel, should be constantly nurtured and protected. The difficulty in finding the right candidates to fill judicial posts and having the correct democratic orientation, make it impellent on the State to provide adequate and constant training in this difficult and delicate field.

Further Comments

Article 4 of the proposed law provides that judges *"are independent of any influence whatsoever"*. The primary judicial function is to determine disputes, whether between private persons or between a private person and a public authority. In a State governed by the rule of law the judicial authority is the guarantee of fundamental human rights. Judges must apply the law and are bound to follow the decisions of the legislature as expressed in the statutes. It must be possible for a judge to decide a case without fear of reprisals, whether from the executive or wealthy corporations. This does not mean that judges are to be isolated from society and immune from public opinion and the discussion of current issues in the media. The independence of the judiciary from interference by the executive is one, if not the most important principles of constitutional law. The Constitution of Ukraine confirms that: *"In the administration of justice, judges are independent and subject only to the law"* **(Article 129)**. Similarly, **Article 126** of the Constitution stipulates that *"The independence and immunity of judges are guaranteed by the Constitution and the Law of Ukraine"*.

The measures which have been adopted and are being proposed aim at creating a judicial system where judges are guaranteed independence in the execution of their duties with a number of reservations. With this respect particular reference is made to:

(i) **Appointment of judges**: **Article 128** provides that professional judges are first appointed by the President of Ukraine for a term of five years. After this period judges are appointed by the Verkhovna Rada of Ukraine. The law distinguishes between professional judges and people's assessors and jurors. The Qualification Commission of Judges, may recommend a citizen of Ukraine who satisfies certain conditions for office of judge. It would appear that prior to appointment it is not mandatory to seek the recommendation of this Commission. The Constitutional Court is composed of eighteen judges (**Article 148** of the Constitution), and half its members are appointed by the President of Ukraine and the Verkhovna Roda. In fact, the President appoints one – third of the judges as members of the Constitutional Court. There appears to be no specific provision which deals with the situation where no judges are appointed by the President of Ukraine and the Verkhovna Rada of Ukraine. Therefore, the functioning of the Constitutional Court may be obstructed in practice by the non-appointment of judges. Remedial clauses should be included to ensure the automatic composition of a Constitutional Court in case of inactivity by the Executive or the Legislature.

With regard to the appointment of judges, reference is made to Recommendation (94) 12 of the 13th October 1994 on the Independence, Efficiency and Role of Judges by the Committee of Ministers of the Council of Europe. This states that *"the authority taking the decision on the selection and career of judges should be independent of the government and the administration"*. That recommendation also says *"that all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit having regard to qualifications, integrity, ability and efficiency"*. The provisions of the law should, in my opinion be amended to fully respect this recommendation.

(ii) **Term of Office**: Contrary to what takes place in the majority of judicial systems, the first appointment of a judge is for a period of five years **(Article 128)**. This in itself could inhibit forthright independent – mindedness. It is clear that, if a judge enjoys security of tenure once he has been appointed – meaning not that he will remain at the same post in a single court throughout his working life, but that he is guaranteed a career as a judicial officer u p to the age of retirement – his independence will in principle be greater than if he has to worry abut re – election after a few years. On the other hand, judges who sit in the Constitutional Court are appointed for a nine year term and may not be re-appointed to office (**Article 148** of the

Constitution) on the lapse of this period. Other judges are appointed indefinitely (**Article 6** of the draft law).

(iii) **Security of Tenure**: The ideal situation is where a procedure is established whereby a judge is removed from office either for mental or physical incapacity or misbehaviour in pursuance of the report of a judicial tribunal of inquiry, and no other ground. **Article 126** of the Constitution lays down the instances where a judge is dismissed from office, following a declaration to that effect *"by the body that elected or appointed him/her"*. The Constitution of Ukraine also contemplates the possibility of a *"voluntary dismissal from office"* **(Article 126)**. It is not clear what this tantamounts to and the introduction of a clear definition is appropriate. On the other hand, with respect to the possibility that a judge could be dismissed from office in the event of *"the breach of the oath"*, it would have been appropriate if the Constitution or the draft Law defined the oath taken by a judge on appointment.

(iv) **Salaries of Judges**: It would appear that financial security is afforded to the judiciary by the Law of Ukraine "On the Status of Judges" and "On State Service" (**Article 87** of the draft law). Ideally though allowances, leave and pension may be determined by Parliament, their variation to the disadvantage of the Judge during his term of office should be prohibited. This would ensure that any particular Judge is not adversely affected by any changes made by law since his appointment.

(v) **Insulation from politics**: **Article 127** of the Ukraine Constitution prohibits a judge from politically partisan activities and/or being a member of a political party. Although judges should be free to criticize the wording and content of legislation and the conduct of members of the Executive, they should be careful not to take sides in matters of political controversy.

(vi) **Immunity of judges**: In terms of **Article 126** of the Ukraine Constitution, a judge may be detained or arrested with the consent of the Verkhovna Rada of Ukraine. Therefore, members of the judiciary are not guaranteed immunity from detention or criminal prosecution. Immunity should not serve to place judges above the law. However, ideally the decision whether a judge should be arrested or remanded in custody should be left in the absolute discretion of the High Council of Justice and not to another organ of the State.

(vii) **Use of judges for extrajudicial powers**: some hold the view that the independence of the judiciary is undermined if judges are entrusted with functions alien to the judiciary. In various countries, judges conceive this function to be an aspect of their duty towards the State. Although in general there are various objections to the advisory judicial opinion, they have only a tenuous connection with judicial involvement in executive policy. It is interesting to note that the Constitution of Ukraine contemplates the situation where following a request of the President of Ukraine or the Cabinet of Ministers of Ukraine, the Constitutional Court provides an opinion on the conformity with the Constitution of Ukraine of international treaties (**Article 151**). Similarly the Verkhovna Rada (Parliament) of Ukraine, may request an opinion on the observance of the constitutional procedure for the impeachment of the President of Ukraine. On the other hand, the draft law contemplates that one of the functions of the Supreme Court of Ukraine is to *"adopt resolutions in which it sets forth its conclusions on the possibility of the President of Ukraine exercising his powers due to his state of health or evidence of indications of high treason or another crime in acts of which he is accused"* (**Article 55** of the draft law). This is a novel provision that positively underscores the independence of the judiciary as a separate power giving it a constitutional relevance.

(viii) **Establishment and Elimination of Courts**: In terms of **Article 106** of the Constitution of Ukraine, the President of Ukraine establishes courts. The draft law on the Judicial System provides in **Article 19** that courts of general jurisdiction are liquidated by the President of the Ukraine following representations by the Chief Judge of the Supreme Court of

Ukraine or the Chief Judge of the appropriate Supreme Specialised Court. In this respect clarification is required in order to establish in what instances and for what reasons a court may *"liquidated"*. Furthermore, it must be clarified whether the representations made by the above-mentioned officials are of a restrictive nature on the President or whether they are merely a recommendation having no binding effect. Without doubt, a provision which grants to the President such power is apt to undermine the independence of the judiciary. A President having executive powers should never be accorded the absolute right to liquidate or eliminate a court established in terms of the Constitution. This would render extremely difficult if not impossible the judicial review of all administrative decisions for which the President is ultimately responsible. It would appear that the Constitutional Court does not qualify as a court of general jurisdiction and thus does not fall under the procedure for the establishment and liquidation of courts as stipulated in Article 19 of the draft law.

(ix) **Contempt of Court**: The draft law also provides that the independence of judges is guaranteed by the liability set by law for contempt of court (**Article 4(8)(5))**. In my view this has nothing to do with judicial independence. Disobedience to a court order is a civil contempt, punishable in the discretion of the court. It is a means whereby the courts may prevent or punish conduct that tends to obstruct, prejudice or abuse the administration of justice, whether in a particular case or generally. This branch of the law operates in the interests of all who take part in court proceedings, as judges, counsel, parties or witnesses. It also imposes restraints upon many persons, particularly on the press. In this respect care must be taken to ensure the observance of the principles of natural justice and due process as well as the fundamental right of freedom of expression.

(x) **Managerial Duties**: In its attempt to ensure and safeguard the independence of the judiciary, the draft law contains a number of provisions whereby judges are afforded managerial duties. Thus, for example in terms of **Article 22** of the draft law the Chief Judge of the local court has the duty of engaging for employment and dismissing members of the court staff, giving them ranks as State civil servants, applying incentives and imposing disciplinary sanctions according to law. He also has the duty to organize the work of enhancement of the skills of members of the court staff and carries out organisational management of the activities of the court. In addition to these duties he is to exercise the powers of a judge. The same duties are attributed to the Chief Judge of the Court of Appeal (**Article 27** of the draft law). This is a positive approach in that the staffing and information support necessary for the judiciary to dispense justice is held outside the realm of the other organs of State thereby strengthening and affirming the autonomy of the judiciary. However, this has to be interpreted in the context of what was stated above under the heading "General Considerations".

High Council of Justice

Article 131 of the Ukraine Constitution provides for the setting up of a High Council of Justice enjoying an executive and consultative function. As stated in the Draft Consolidated Opinion of the Venice Commission on the Constitutional Aspects of the Judicial Reform in Bulgaria (1999), *"there is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State"*. Article 131 reads:

"The High Council of Justice operates in Ukraine, whose competence comprises:

1) *forwarding submissions on the appointment of judges to office or their dismissal from office;*

2) *adopting decisions in regard to the violation by judges and procurators of the requirements concerning incompatibility;*

3) *exercising disciplinary procedure in regard to judges of the Supreme Court of Ukraine and judges of high specialised courts, and the consideration of complaints regarding decisions on bringing to disciplinary liability judges of courts of appeal and local courts, and also procurators".*

The High Council of Justice consists of twenty members. The Verkhovna Rada of Ukraine, the President of Ukraine, the Congress of Judges of Ukraine, the Congress of Advocates of Ukraine, and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions, each appoint three members to the High Council of Justice, and the All-Ukranian Conference of Employees of the Procuracy – two members of the High Council of Justice.

The Chairman of the Supreme Court of Ukraine, the Minister of Justice of Ukraine and the Procurator General of Ukraine are ex officio members of the High Council of Justice".

The scope of setting – up such institutions is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters referring to the appointment of judges and the exercise of disciplinary functions. It is uncontested that independence of judges should be maintained against interference of: the executive, since it would be seriously compromised if decisions concerning the careers of judges were in the hands of the executive; the legislature, since judges are to apply the law, not other expressions of the will of parliament; their superiors in the judiciary itself, since no judge in carrying out his duties should be bound to obey the orders of a judge on a higher level; other powers of the State such as pressure groups. Ultimately, judges are to be independent from themselves as like all other human beings, they are subject to prejudice, hatred, passion and particular likes and dislikes. The establishment of an effective Justice Council or Judicial Service Commission ensures that the conduct of judicial affairs is freed from the grip of the executive by placing its function outside the latter's control. It is also a means to provide the judiciary with a management system that prevents judges from becoming an exclusive and inward looking caste and encourages a certain amount of co – ordination with those who represent the will of the people, while at the same time guaranteeing its independence and freedom from manipulation.

Entrusting the nomination of judges to this institution would have been preferable in an attempt to reduce the risk of nominations which may be motivated by political considerations and thereby also providing a wider base of different opinions for the choice of judges. However, as noted it is the Verkhovna Rada which appoints permanent judges (except members of the Constitutional Court). In terms of **Article 70** of the draft law, the Supreme Court of Ukraine and the Qualification Commission participate in that they provide representations and conclusions respectively, although it is not clear what effect such participation has on the final decision. The presence of the Minister of Justice and other officials chosen by the Executive and the Verkhovna Rada is not advisable in an institution which ideally should be a politically neutral body. In an established democracy, where the independence of the judiciary is well established, no such difficulty would be encountered. On the other hand, one might argue that the fact that the Council has mainly an advisory role does not impinge on the concept of independence. The monitoring of activities of the judiciary by other organs of the State is on the other hand justified. Thus, the presence of a number of members who do not for part of the judicial system would not have an adverse effect. Furthermore, the functions of this institution do not extend to he organization of the judicial system in the country, which is vested in the State Court Administration of Ukraine.

Unfortunately no part of the law on the judicial system deals directly with this institution, which normally serves as an effective instrument to serve as a watchdog of basic democratic principles. However, it appears that that there is *ad hoc* legislation dealing with the High Council of Justice (vide **Article 70(5)**). Ideally such an institution should have the scope of securing the independence of the judiciary by ensuring that matters which relate to organisational requirements are not influenced by the Executive. It should also provide the judiciary with a management system that would ensure a measure of accountability. Under the draft law the State Court Administration of Ukraine is the authority established to provide and ensure organisational support for the activities of local, appeal and specialised courts (**Article 79**). It appears that this institution is autonomous from the Executive, notwithstanding that in terms of **Article 79** the members of staff are civil servants. Furthermore, it seems that the authorities of the Executive may not exercise their competence in the process of drafting, execution and accounting of the budget of the judiciary which is a constituent part of the annual state budget. In fact:

(i) The head of this institution is the Head of the State Court of Administration of Ukraine who is appointed to office and dismissed by the Supreme Soviet of Ukraine on the representations of the Chief Judge of the Supreme Court of Ukraine and with the agreement of the Council of Judges of Ukraine.

(ii) The Chief Judge may not be a member of the Executive authorities.

(iii) This institution appears to be above the realm of party politics. The members are not elected on party lines. In fact deputies are appointed to office and dismissed from it by the Presidium of the Supreme Court of Ukraine on representations made by the Chief Judge of the Supreme Court of Ukraine and with the agreement of the Council of Judges of Ukraine.

Academy of Judges of Ukraine

Also positive is the setting up of an Academy of Judges of Ukraine which aims at ensuring that persons having a higher legal education are trained for the office of judge, and after appointment aims at enhancing the kills of judges and members of the court staff. Another function of the Academy is to analyze foreign judicial systems, with the scope of amelioration the administration of justice in Ukraine. It has to be emphasized that, as a rule, judges must possess certain essential qualifications and meet certain criteria (general experience, strength of character, etc.). In this regard I emphasize once more the need to instil in the members of the judiciary, a culture of independence and impartiality and training in this respect is imperative.

Disciplinary proceedings

Although one would have expected the draft law to contain a number of provisions dealing with the exercise of disciplinary procedure as contemplated in **Article 131** of the Constitution, this is absent. Thus, the position is not clear as to what machinery, if any, exists in the implementation of Article 131(4) of the Constitution. A positive note is that it would appear that transfer of judges is not considered as being a disciplinary measure which may be adopted. In fact **Article 71** of the draft law deals with the procedure of transfer of a judge and provides: *"A judge may be transferred with his or her consent …."*. On the other hand this provision is undermined by Article 6 of the draft law. In fact the law contemplates the "*liquidation of a court"*. In the event that the presiding judge does not agree to be transferred to another court he "*shall be dismissed from office by the authority which selected or appointed them on grounds of*

retirement or at their own request". A measure which will certainly give rise to debate since it could very well be used as a tool to weaken and threaten the independence of the judiciary. Provision must be made to ensure that members of the judiciary facing disciplinary charges would be accorded adequate means of defence, a fair hearing in which the principles of natural justice are observed. There appears to be no provision in this respect in the Law, though it is not excluded that this is provided in some other legal instrument.

Appointment to Certain Office

Another aspect which warrants comment concerns the method of appointment of certain offices within the judiciary. The Constitution in **Article 28** contains an exhaustive list of the functions and duties of the Supreme Soviet of Ukraine. This includes the appointment of judges. However, the draft law stipulates for example that the Chief Judge of the Local Court (**Article 23** of the draft law) and the Chief Judge of the Court of Appeal (**Article 29** of the draft law) are appointed by the Supreme Soviet of Ukraine following representations of the Chief Judge of the Supreme Court of Ukraine and on recommendation of the Council of Judges of Ukraine. This contradicts the Constitution which does not confer such powers to the Verkhovna Rada. There appears to be no justification for such a provision, and the chairmen of these courts may be elected by the judges sitting in such courts. In fact the Constitution itself provides for example that the Chairman of the Constitutional Court of Ukraine is elected from amongst the judges presiding over such court (**Article 148** of the Constitution). Similarly, the Chief Judge of the Supreme Court is appointed by secret ballot by the Plenum of the Supreme Court of Ukranian (**Article 64** of the draft law) for a term of five years.

Apparent Contradictions

The draft law on the Judicial System also contains a number of provisions which contradict other provisions entrenched in the Constitution of Ukraine and which require revision. Thus for example:

- Article 3 of the draft law provides that *"the judicial system in Ukraine is established by the Constitution of Ukraine, the present Law and other laws of Ukraine"*. On the other hand, the Constitution grants the President of Ukraine a legislative function. In fact, **Article 106** of the Constitution stipulates that *"The President of Ukraine, on the basis and for the execution of the Constitution and the laws of Ukraine, issues decrees and directives that are mandatory for execution on the territory of Ukraine"*.

- The principle of specialisation on which courts are intended to be built according to the Constitution (**Article 125**), do not correspond to the draft Law which only creates economic and administrative specialised courts (**Article 33**).

- **Article 127** of the Constitution provides that persons who satisfy the conditions specified therein may be recommended by the Qualification Commission of Judges. However, **Article 68** of the draft law would appear to impose a mandatory recommendation by the Commission prior to appointment. Furthermore, there is no provision which stipulates the manner in which the members of this Commission are appointed.

- **Article 126** of the Constitution stipulates that a judge is dismissed from office on attaining the age of sixty – five. However, **Article 68** contemplates the possibility that a judge continues to work and perform his duties as a judge not withstanding that he has the right to retire.

- **Article** 131 of the Constitution lays down that the High Council of Justice is to forward submissions on the dismissal from office of judges. Yet **Article 70(4)** of the draft Law provides that dismissal depends on a decision of Supreme Council of Justice where the judge has infringed requirements of incompatibility (listed in **Article 127** of the Constitution). In other instances dismissal is based on the conclusion reached by the Judges' Qualification Commission which appears to be an autonomous and different institution from the High Council of Justice, even though the Constitution only makes reference to this organ in the appointment of judges.

- **Article** 5 of the Constitution provides that *"judges are immune"*. However, in terms of Article 126 a judge may be arrested and detained with the consent of the Verkhovna Rada of Ukraine.

Points of Clarification

I end this contribution by referring to certain provisions of the Law which amongst others require clarification:

(i) **Article 8(5)** provides: *"Execution of court judgements is entrusted to the State executive service and the service enforcing punishments"*. Does this mean that the courts have no means of control once a judgment is delivered ? Any criticism is not intended to be attributed to the fact that court judgements are enforced by persons employed by the State. However, the manner in which judgments are enforced should be regulated by law and subject to the review of the courts.

(ii) **Article 19**: *"courts of general jurisdiction are established and liquidated by the President of the Ukraine on the representations of the Chief Judge of the Supreme Court of Ukraine or the Chief Judge of the appropriate Supreme Specialised Court"*. The Law does not specify whether the President of the Ukraine still enjoys the power to liquidate a court nothwithstanding that the Chief Judge is contrary to such a liquidation. The word "representations" occurs frequent in the draft Law. It is not clear what the connotations of this term are precisely and whether it means "consultation" or "recommendation" or "with the approval of". This could be a linguistic hurdle, and if so it might not be the only one.

(iii) **Article 31**: *"…….. All matters connected with judging a case in a jury court are decided collectively"*. There is no specification of how a judgement is delivered, which issues are decided by the judge and which issues are decided by the jury and whether this means that a judge may be out voted by the jury on a point of law.

(iv) **Article 70(4)** of the draft Law provides that: *"Judges selected for the office of professional judge for an indefinite term are dismissed from the office of judge on the conclusion of the appropriate Judges' Qualification Commission on the grounds provided by the leglislation of Ukraine, and if the judge has infringed requirements of incompatibility, also on the grounds of a decision of the Supreme Council of Justice on the representations of the Chief Judge of the Supreme Court of Ukraine or the Chief Judge of the appropriate Supreme Specialised Court by the Supreme Soviet of Ukraine"*.

It would seem that the draft law is proposing that the dismissal of a judge by the Supreme Soviet of Ukraine depends on a preliminary decision to dismiss taken by the Qualification Commission. No such requirement appears to be present under the Constitution of Ukraine and therefore clarification is also required in this respect.

(v) **Article 74** deals with jurors. It is not clear whether they are the only members presiding over the court or whether they are assisted by a qualified judge. Furthermore, their selection depends on *"representations of the Chief Judges of Courts of Appeal"*. Clarification is necessary in order to establish whether such representations have a binding effect or whether the commission which selects the jurors may discard such "representations". Although Article 74(2) provides that the Commission consists of *"authorized representatives of the court, the executive authority and the appropriate council"*, there is no indication of the number of persons who constitute this commission, their qualifications, and mode of selection.

The Constitution of Ukraine and the draft Law contemplate courts which are presided by judges, people's assessors and jurors. The scope of the latter two is that *"the people directly participate in the administration of justice"* (**Article 124** of the Constitution). This is reiterated in **Article 12** of the draft Law. According to **Article 73** of the draft Law, people's assessors are drawn up on a random basis and hold office for a term of five years. It is not clear what type of cases fall under their jurisdiction. On the other hand jury courts consist of judges of the appropriate court of appeal and six jurors, and they consider criminal cases (**Article 31** of the draft Law). Both enjoy independence and immunity afforded to professional judges during their term of office (**Article 78** of the draft Law).

(vi) **Article78** appears to protect the employment of people's assessors and jurors. Thus, for example during their term of office they retain all the *"guarantees and privileges at their main place of employment which are provided by legislation for employees of the enterprise, institution or organization where they work"*. Here too there is the risk that the Executive might exercise undue pressure on these officials, especially where the assessor or juror occupies a post with the executive authority for example by pledging a promotion or an increase in pay on the lapse of the period of appointment. It would be appropriate to adopt measures in an attempt to discourage such "incentives". The situation seems to favour executive interference and in any case would appear to be seriously prejudicial to the concept of the independence of the judiciary.

(vii) The Law is not clear on whether the proposed judicial system envisages a system where lawyers operate in private practice without the hindrance of the State and whether they are free to offer their services to citizens who choose to ask for them. While the law provides for free legal assitance to those in need, it does not seem to recognize the Bar as having an essential role in the administration of justice and its rights and duties in the course of proceedings are not laid down.

(viii) I note that nowhere in the Law is there any mention of the procedure to be adopted within the judicial system in cases of violations of fundamental human rights. The law should specify which court is competent to investigate such complaints and provide the necessary remedy to the aggrieved party. The right of individual petition in such cases should be clearly laid down and the remedy available before a competent court specifically defined.