COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 6 March 2007

Opinion No. 401 / 2006

CDL(2007)034*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON THE JUDICIARY

AND

THE DRAFT LAW ON THE STATUS OF JUDGES OF UKRAINE

by
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1. The Venice Commission has been asked for an opinion on two draft laws of Ukraine in relation to the reform of the judiciary. The first is a draft law "On the Status of Judges" (Status) and the second is a draft law "On the Judiciary of Ukraine" (Judiciary). Both texts were submitted by the President of Ukraine to the Verkhovna Rada of Ukraine on 27 December 2006. In addition to reading the text of the draft laws the writer has had the benefit of attendance at a seminar in Kiev to discuss these two laws at which Mrs. Suchocka and judges Z*alar* and O*berto* were also present. The seminar was attended by a number of members of the Ukrainian Parliament, the Presidential Administration, the Ministry of Justice, judges from Ukraine and legal practitioners and members of non-governmental organizations.

2. It is difficult to see the necessity for having two separate laws. There is a good deal of interlinking between the two draft laws and the fact that there are two laws leads to a considerable amount of repetition. It would be simpler and clearer to have one law dealing with the whole subject. Secondly, the laws are extremely detailed. Clearly this method of drafting is part of the Ukrainian legal culture. It does, however, have the significant drawback that where something is not mentioned at all one has to be doubtful whether general provisions cover the matter sufficiently. For example, nowhere in the provisions dealing with disciplinary liability of judges is it set out clearly that the judge has a right to legal representation and to put forward a case against his accusers. In these circumstances one has to wonder whether it is intended that a judge should have this very fundamental right in the event of disciplinary proceedings being brought. In many places there is a level of detail to be found in the law which one would not in other legal cultures expect to be regulated at the level of statute law but which would be dealt with in subordinate legislation. Despite the attempt to provide for every eventuality the level of detail at times makes it quite difficult to locate the provisions relating to a particular matter.

FUNDAMENTAL PROVISIONS

3. Both the Law on the Status of Judges and the Law on the Judiciary commence with sections dealing with basic provisions and fundamentals of organization of the judiciary. Not surprisingly there is a great deal of repetition between these two sections. Much of what is contained in these two sections of the two draft laws is unexceptionable and indeed admirable. There are statements both of the independence of the judge on an individual basis and of the independence of the judiciary as a whole. One provision which is questionable is that which provides that judges are inviolable and immune from arrest except with the approval of the Verkhovna Rada. In the writer's opinion it is not appropriate that the parliament should have a role in lifting the judges' immunity. This should be a matter for a court of law to decide based on clearly defined criteria.

THE SYSTEM OF COURTS IN UKRAINE

4. Article 16 (Judiciary) recognizes that the courts in Ukraine are established on the basis of three principles, those of territorial division, specialization and division of courts between courts of first instance and courts of appeal. The lowest layer is that of local courts. These are divided in turn between divisional courts and circuit courts. These circuit courts are of three types, economic, administrative and criminal courts. (Articles 16-23 Judiciary)

5. The second level of courts are courts of appeal. These hear appeals from the local courts. There are three types of court, those hearing civil and criminal cases, those hearing economic cases, and those dealing with administrative

cases. (Article 24 Judiciary) The third level of courts are high specialised courts. According to Article 29 (Judiciary), these are cassation courts, but in exceptional cases they can hear full appeals or can also act as courts of first instance. They are specialized into four divisions, the high civil court, the high economic court, the high administrative court and the high criminal court. (Article 29 Judiciary) The final court of general jurisdiction is the Supreme Court. According to Article 36 (Judiciary) its functions include reviewing cases, giving explanations of the law to ensure its uniform application, and dealing with international law, as well as various other more specialized matters.

6. In addition there is a Constitutional Court. The present drafts do not deal with the Constitutional Court except insofar as the members of that court are represented on the Council of Judges of Ukraine (Article 80 Judiciary) and in relation to the appointment and dismissal of the members of the Constitutional Court by the Congress of Judges of Ukraine (Article 76 Judiciary).

7. The system of courts proposed is quite an elaborate and complex one. Although the system is simpler than that proposed in earlier drafts of this law (which provided in addition for separate courts of cassation) there are in fact four levels of court and each level is itself subdivided between economic courts, civil courts, administrative courts and criminal courts. Obviously the more elaborate the courts system is the greater potential for procedural delays to occur. Article 18 (Judiciary) sets out the procedure for the establishment of courts. They are established and dissolved by the President of Ukraine upon submission of the Minister for Justice of Ukraine and after hearing the views of the President of the Supreme Court, the President of the relevant High Specialized Court, and the Head of the State Judicial Administration of Ukraine. The number of judges of courts is to be determined and can be changed by the President of Ukraine upon the submission of the Council of Judges of Ukraine.

THE APPOINTMENT OF JUDGES

8. Procedures for the appointment of judges are central to the question of judicial independence in any system. In relation to this matter in Ukraine an important role is played by the High Qualifications Commission. It is not established by the Law on the Status of Judges but its procedures are dealt with by that Law as well as by the Law on the Judiciary. The judges at various levels are represented on the High Qualifications Commission. In addition there are separate qualifications commission for lower courts. The High Qualifications Commission is in charge of conducting exams to qualify persons for the office of judge (Articles 28-31 Status).

9. According to Article 32 (Status) the procedure for appointing to the post of a judge (by which is meant merely the first appointment of a judge on a temporary basis for a period of five years) is that the High Qualifications Commission of Judges of Ukraine announces a competition. Candidates apply for recommendation for appointment. The High Qualifications Commission conducts a competition and makes a decision which it sends to the High Council of Justice. The High Council of Justices considers the recommendation and makes a submission to the President of Ukraine who makes a decision. According to Article 34 (23) (Status) if the President rejects the submission he has to issue a justified order.

10. In some respects the procedures for the initial appointment of judges are not fully transparent. Article 27 (Status) refers to the documents to be submitted to the

High Qualifications Commission. Paragraph 10 refers to "other documents" – what are these other documents? Article 29 (Status) deals with the "qualification exam". Where there is a complaint by a candidate the High Qualifications Commission can cancel the results of the exam with regard to the complainant and order a new or an additional exam in respect of that candidate (Article 29(7) Status). This seems a very unusual provision. Article 28(4) (Status) permits the High Qualifications Commission to collect information about he candidates and instruct others to do so and allows organizations and citizens to submit information about the candidate. Finally, before recommending a candidate for appointment the High Qualifications Commission can take account not only of the exam and medical certificate but also of an interview and "other information" which defines the candidate's "level of professional knowledge, personal and moral qualities". Taken together these provisions raise the suspicion that extraordinary interventions can take place in the process. Similar questions arise about other stages of a judge's advancement –for example, Article 38(13) (Status) states which refers to "other documents certifying [the] candidate's preparedness to work on the stated post of judge" where permanent appointment is concerned, and Article 37(2) (Status) which permits the High Qualifications Commission to consider "other materials" before recommending a candidate to permanent appointment.

11. The initial appointment as a judge is for a five-year probationary period. 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.

12. In the case of elections to permanent posts of judges, Articles 36 – 45 Status apply The High Qualifications Commission announce a competition and make a decision on a recommendation with a proposal to the Verkhovna Rada. A committee of the Verkhovna Rada then examines the matter. The committee can consider submissions by citizens, civic organisations and other bodies concerning the activity of the candidate. Representatives of various bodies including the Supreme Court, the High Specialized Courts, the High Council of Justice, the High Qualifications Commission, the Disciplinary Commission, the Council of Judges of Ukraine as well as the candidate are invited to the meeting of the committee of the Verkhovna Rada. The committee in turn makes a recommendation on the proposal which it sends to a plenary sitting of the Verkovna Rada. Under Article 42 (Status) every deputy in the Verkhovna Rada is entitled to question the candidate directly. If objections are raised the matter has to be remitted to the committee for further consideration (Article 42(4) Status). Under Article 43 (Status) the Verkhovna Rada elects candidates following an open vote. Candidates who are rejected twice can no longer be a candidate. It seems to the writer that this provides for a highly politicised method of appointment. The idea of hearings at which so many people can be present and every deputy can question candidates for judicial office seems particularly likely to politicise the process. The opportunities for grandstanding by deputies in the parliament are obvious. Furthermore, the procedures for giving publicity to objections, no matter how ill-founded, seem almost designed to inflict damage even on candidates for judicial office who survive this procedure.

13. Judicial promotions are also dealt with in this law. Articles 46-49 (Status) deal with the process of attestation. This basically involves certification that judges are fit to advance from one level to the next and this procedure is under the control of the High Qualifications Commission. According to Article 49 (4) (Status) the qualification test is to be carried out in order to check the knowledge

of the professional judge, identify the level of the qualification preparedness of the judge, his or her ability to develop a professional level and administer justice, including in the courts of higher level. There is an interview which concerns "the actual administration of justice by the judge and performance of his or her official duties". It is clear that this process could have a serious effect on sitting judges who hope to advance to a more senior level. It is therefore very important that the criteria for making such an assessment are very clearly stated and are such as not to infringe the principle of individual judicial independence. In relation to decisions made by one of the qualifications commissions for the lower courts there is an appeal to the High Qualifications Commission.

DISCIPLINARY LIABILITY AND DISMISSAL OF JUDGES

14. Article 52 (Status) deals with disciplinary liability. Grounds for disciplinary liability include the following:
- "Evidentially unqualified solution of [a] case"
- "Creation of obstacles for persons access to justice"
- "Committing an immoral deed …"
- "Systematical ignoring of position of high-level courts regarding application of legal norms …".

15. It appears to the writer that a reference to an "evidentially unqualified solution of a case" creates a potential for disciplining a judge whose decision the disciplinary body does not agree with. The protection of the principle of individual responsibility of the judge requires that any such provision be approached with a great deal of caution. A similar comment could be made in relation to questions about ignoring decisions of courts at a higher level, or creation of obstacles for access to justice or intentional delay. These would appear capable of a somewhat subjective interpretation and it would be important that if such matters are to be grounds for disciplining a judge they should be very precisely and clearly delineated. In relation to the question of committing an immoral deed it appears that this goes beyond a requirement that the behaviour be unlawful and it would be important to specify precisely what is meant by an immoral deed warranting disciplinary liability.

16. The bodies that carry out disciplinary proceedings are the Disciplinary Commission of Judges of Ukraine who deal with judges of the local courts and courts of appeal, and the High Council of Justice. The procedure provides that a judicial inspector is appointed who can examine material on the cases and ask questions. He can obtain information from the State Judicial Administration and from court staff (Article 54 Status). There is no mention of the right of representation of the judge and this is an omission which should be rectified.

17. Under Article 57 (Status) disciplinary remedies include admonishing, reduction in rank, and exemption from rank and a decision can be published. It is also possible to propose the dismissal of the judge. There is an appeal from the disciplinary committee to the High Council of Justice. A reference to the court concerns only the procedural issues (Article 58 Status). There is no provision for an appeal to court from the High Council of Justice where it makes the decision.

18. Articles 59 to 68 (Status) deal with suspensions and dismissals from the post of judge. No distinction is made between a dismissal in the proper sense of the word, i.e., the removal of someone against his will for misconduct or the like, and the situation which arises when a person reaches the retirement age or where he

has to cease being a judge because of ill-health. In the writer's opinion a distinction should be made between dismissal on grounds which may be regarded as discreditable and the retirement of a judge for other reasons. Article 71 (Status) deals with the procedure before the Verkhovna Rada who are given powers to question the judge. There is no mention of the power of the judge to question any witnesses and this seems to be a serious omission. A committee of the Verkhovna Rada consider the matter and make a proposal to plenary. Under Article 73 (3) (Status) the judges explanations "shall be listened to" and he can be questioned by any deputy. However, this seems much less than the full right of representation that one would expect. There is no mention of the judge having the right to question or confront her or his accuser.

JUDICIAL SELF-GOVERNMENT

19. The draft law on the judiciary contains detailed provisions on the question of "judicial self-government" which is defined in Article 67 (Judiciary).

20. Paragraph 1 states that judicial self-government "shall exist for settling issues of internal operation of courts in Ukraine, which means autonomous collective resolution of such matters by professional judges". Paragraph 2 says that the judicial self-government is one of the most important guarantees for ensuring the autonomy of courts and independence of judges. It goes on to say that activity of bodies of the judicial self-government shall facilitate the creation of proper organisational and other conditions essential for normal operation of courts and judges, establish the independence of the courts, ensure protection of judges from interference in judicial activity, and also raise the quality of work with court personnel. It is provided in paragraph 3 that internal matters of courts operations are to include issues of organisational support of courts and judges' activities as well as social protection of judges and their families and other matters. Other specific objectives of judicial self-government are referred to in paragraph 4 of this Article and include participation by judges in the determination of their needs relating to personnel, financial, material, technical and other kinds of support for courts as well as dealing with matters pertaining to the appointment of judges and their discipline.

21. Thus the idea of judicial self-government is seen as central to the protection of one of the core principles governing the judiciary, that of judicial independence. Here it is worth recalling that the independence of the judiciary has two facets: firstly, that the judiciary as a whole are to be independent of other branches of government, that is to say, the executive and the legislature, and secondly, that the individual judge be free of any external influence. As is set out in paragraph 1 of value 1 of the Bangalore Principles of Judicial Conduct (2000):

> "A judge shall exercise the judicial function independently on the basis of the judges assessment of the facts and in accordance with a conscientious understanding of the law, free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."

The judge should be free from influence not only from the other branches of government but in relation to society in general (Bangalore Principles Value 1.2). A further principle which is important is that apart from the independence of the judiciary itself the individual judge must be independent in making his or her

decision. This includes independence from judicial colleagues. Again, the Bangalore Principles state the relevant principle clearly in Value 1 paragraph 4:

> "In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently."

22. The text of Article 67 (Judiciary) makes it clear that judicial independence is not the only value sought to be promoted by the idea of judicial self-government. It is intended also to create proper and efficient organisational and other conditions essential for the operation of courts and judges and to raise the quality of judicial work. Furthermore, it appears to be intended to ensure a sort of democratic control by the judges as a whole over the operation of the judiciary. At the Kiev seminar a number of speakers indicated that part of the thinking behind the proposal was to curb the power, of the court presidents who some felt had too much power over the ordinary judges.

23. The attempt to provide for democratic control is quite far-reaching and does not appear to be required by any of the international instruments relating to the judiciary. While there is no obstacle to setting up a system under which all of the judges will participate in making decisions which govern the judiciary as a whole, neither does there appear to be a requirement in any of the international instruments to provide for such a system. Indeed, in most legal systems many of the matters which are crucial to the functioning of the judiciary, such as the allocation of work between courts and decisions as to where judges sit and the hours they work, etc, would be decided by senior judges such as the Chief Justice or Presidents of courts and not necessarily by bodies democratically elected by the whole body of judges. It may be noted that the European Charter on the Statute for Judges envisages a process of consultation for judges, but not necessarily of decision making:

> "Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare."[1]

It is, however, reasonable to evaluate any proposal to establish such a system according to the tests of whether it does effectively protect judicial independence and also whether it contributes to or permits an effective operation of the court system as a whole. Clearly it is essential that any system, whether it be democratic or hierarchical, must fulfil both these functions if the judiciary is to function properly.

THE INSTITUTIONS OF JUDICIAL SELF-GOVERNMENT

24. Article 68 Judiciary provides that the organisational forms of judicial self-government are to be four in kind, meetings of judges, conferences of judges, the

[1] Article 1.8, European Charter on the Statute for Judges

Congress of Judges of Ukraine, and councils of judges. In addition some of these bodies may also create executive bodies.

25. Firstly, meetings of judges are to be gatherings of judges of the relevant court at which they discuss issues of internal operation of the court and take collective decisions on the issues discussed (Article 69(1) Judiciary). These meetings can take place on all four levels of courts. The general rule provides for meetings to be convened by the relevant president of the particular court either upon his or her initiative or upon the demand of one-third of the total number of judges of the particular court (Article 69(2) Judiciary). According to Article 69(5) (Judiciary) meetings of judges are to discuss issues concerning the internal operation of the court and its secretariat and make decisions on these issues which are to be mandatory for execution. They are also to hear reports of judges holding administrative posts and of the head of the courts secretariat. They are to approve the procedure for establishing panels of judges to consider cases and for determining the presiding judge and the order of substitution of judges in case of their absence. They are to approve the procedure and schedule for judges vacations. (Article 69(5) and Article 70 Judiciary) Meetings of judges of a local court must take place at least once every six months, meetings of the court of appeal at least once every three months and meetings of judges of the Supreme Court and the High Specialized Courts at least once a year. The meetings of the judges of the Supreme Court of Ukraine and of the High Specialized Courts can in addition submit proposals for consideration by the Congress of Judges of Ukraine, elect delegates to that Congress, appoint to and dismiss from their posts the heads of the secretariats of courts and their deputies, and approve regulations on the court secretariat, the general number of its staff and the structure of that secretariat. According to Article 70(4) (Judiciary) meetings of judges of the Supreme Court and the High Specialised Courts "shall consider issues which concern the internal operation of the court or work of individual judges and the courts staff members, and shall take on these issues decisions binding for judges of a given court". It is assumed that the reference to "work of individual judges" means the workload of individual judges rather than anything pertaining to the actual decisions they make, as otherwise this provision would infringe a key principle of the Bangalore principles relating to the independence of the individual judge from his or her judicial colleagues.

26. It can therefore be seen that meetings have quite substantial powers, and in particular the power to appoint and dismiss the heads of the higher courts secretariats is a very substantial one.

27. In addition meetings of judges can submit proposals on the settlement of issues which arise concerning the relationship between the judiciary and other bodies of the state power and also issues relating to legislation.

28. The second level of judicial self-government is the conference. Conferences of judges are dealt with by Article 72 (Judiciary). They are defined as gatherings of representatives of judges at which they discuss the operation of their courts and take collective decisions on the issues discussed. An immediate question arises as to the respective competence of the conference and the meeting and it is not clear from the text which is to prevail if there is a difference between the two as to a question relating to the operating of courts. Again conferences are to hear reports of executive bodies established by them as well as relevant departments of the State Judicial Administration. Conferences can also hear reports of the members which it sends to the relevant territorial qualifications commission. Like meetings they can also submit proposals to other state bodies. The conference

elects delegates to the Congress of Judges of Ukraine. According to Article 72(3) (Judiciary) it can take decisions binding for its executive body and for the judges of the courts it deals with. It seems from the context of the document that conferences exist only at the level of local courts and courts of appeal. So far as the Supreme Court and the High Specialized Courts are concerned a single body, that of the meeting, appears to fulfil the same functions which for the lower courts are filled both by the meetings and conferences.

29. In order to be valid a conference must be attended by at least two thirds of the total number of delegates. It may also be attended by other judges. (Article 74.1 Judiciary) The delegates to the conference are elected by the meetings. The conference is to take place at least once a year. The conference may also be attended by representatives of bodies of the state power, local self-government authorities, educational and scientific institutions, law enforcement bodies, and civic organisations. Only delegates may vote. (Article 74 Judiciary)

30. According to Article 75 (Judiciary) in between the conferences of judges the functions of judicial self-government are to be performed by the relevant council of judges. The council of judges is elected by the conference. The conference also determines the number of members of the council. The council's function is to organize control over the enforcement of decisions taken by the conference and settle issues concerning the convocation of the next conference. It also exercises control over the activity of the State Judicial Administration concerning the work of the relevant court. It hears a report from the head of that department regarding the work of the court. It consider issues of legal and social protection of the judges. It can submit to the Council of Judges of Ukraine proposals for candidates for posts of presidents and deputy presidents of courts within its remit. It can also submit proposals to the bodies of same power. Decisions of councils of judges are binding for judges holding administrative posts in relevant courts (this refers to presidents and deputy presidents of the courts). A decision of the council of judges may be revoked only by a conference of judges and may be suspended by the decision of the Council of Judges of Ukraine. There is a further provision which allows a conference to be convened upon the demand of at least two-thirds of the delegates at the previous conference of judges and if the council of judges does not act on foot of that demand the initiators of the conference convocation can set up an organizational bureau and organise a conference themselves (Article 73(1) Judiciary).

31. It seems to the writer that these arrangements are highly complex and confusing. In respect of some of the functions in question there will now be three bodies, the meeting, the conference and the council, which are conferred with identical functions all of which are binding. As if this was not complicated enough in addition, as will be seen, these functions are also to be conferred on the Congress of Judges of Ukraine and the Council of Judges of Ukraine. While there are provisions for decisions being overridden by a higher body, the Council of Judges of Ukraine, the scope for internal judicial politics and manoeuvring appears enormous. Furthermore, while on the face of it the whole system appears to be extremely democratic, the existence of a number of bodies all exercising similar if not the same functions dilutes the authority of any one of them. In these circumstances one would have to take great care to ensure that what appears to be an extremely democratic system does not in practice create very weak institutions which are capable of being overridden by much stronger institutions within the state.

THE HIGHEST JUDICIAL SELF-GOVERNMENT AUTHORITIES

32. The draft law then goes on to create two further self-government authorities of the judiciary at the highest level which lead to even further overlap in functions. The first of these is the Congress of Judges of Ukraine. According to Article 77 (Judiciary) it takes place once in every three years. It is convened by the Council of Judges of Ukraine. An extraordinary Congress of Judges of Ukraine may be convened upon the demand of at least one-third of the conferences of judges or upon demand of the meeting of judges of the Supreme Court. The congress may be attended by a large number of people, including the President of Ukraine, the People's Deputies of Ukraine, the Commissioner for Human Rights of the Verkhovna Rada, members of the High Council of Justice, representatives of the cabinet of ministers of Ukraine, other bodies of the state power, representatives of scientific and educational establishments and institutions, civic organizations, and other persons who may be invited to participate (Article 77(3) Judiciary). It is not clear whether these persons are entitled to participate fully in the congress (although presumably they are not entitled to vote). However, principles of the separation of powers would suggest that these persons should have only observer status unless on specific request for some specific purpose. As with the convening of conferences, a mechanism is established to convene an extraordinary congress if the Council of Judges of Ukraine fails to convene one upon request. It is difficult to see what is the thinking behind this provision. It seems to the writer strange that the draft law might envisage that a body consisting solely of senior judges would deliberately flout a legal provision requiring it to call a congress. It is difficult to see how such a question would arise unless there were some *bona fide* dispute over the validity of a request for the calling of an extraordinary congress. In such a case the difficulty would probably have to be resolved by a court of law. Of course, a complicating factor in such an eventuality is that many of the judges will have been engaged in this process.

33. Delegates to the Congress of Judges of Ukraine are elected by conferences of judges, in the case of the local courts and courts of appeal, and by meetings of judges in the case of the Supreme Court and the High Specialized Courts as well as the Constitutional Court. The number of delegates are to be elected by each of the courts is to be fixed by the Council.

34. The powers of the Congress of Judges of Ukraine are extensive. It can appoint and dismiss the Justices of the Constitutional Court of the Ukraine in compliance with the Constitution and the law. It appoints members of the High Council of Justice and can decide on the termination of their offices. It can appoint members of the High Qualifications Commission of Judges of Ukraine and of the Disciplinary Commission of Judges of Ukraine. It can take decisions binding for all bodies of the judicial self-government and all professional judges. (Article 76 Judiciary) The power to take decisions binding on all professional judges needs to be qualified so as to ensure that it is compatible with the Bangalore Principles in relation to the independence of the individual judge.

35. In addition the Congress of Judges of Ukraine hears reports from the Council of Judges of Ukraine, as well as from its representatives on the various other bodies on which it is represented or referred to in the previous paragraph. It also hears reports from the head of the State Judicial Administration of Ukraine which is the executive body tasked with providing support for the courts. It can vote no confidence in the head of the State Judicial Administration. (Article 76 Judiciary)

36. A second body established by these provisions is the Council of Judges of Ukraine. It is the highest body of judicial self-government in between the holding of congresses of judges of Ukraine (Article 80 Judiciary). It consists of 33 members elected by the Congress with quotas fixed for each of the separate courts. Proposals for candidates are submitted by conferences or meetings of judges as well as by individual delegates of the Congress. The Council of Judges elects its own chair, deputy chair and secretary as well as a *presidium*. In between congresses it is to organise control over enforcement of Congress's decisions and to decide on the convocation of further congresses. Its powers include the following

- To elaborate and organise the execution of measures to ensure the independence of judgments and improvement of the organizational support of courts' activities.

- To approve the procedure for distribution of cases among judges taking into account their specialization, their case-load rate per judge, coefficients of case complexity etc.

- To consider issues of legal protection of judges, social protection of judges and their families and take decisions to this effect.

- To exercise control over the organisation of courts work and activities of the State Judicial Administration of Ukraine, and to hear reports from court presidents and officials of the State Judicial Administration of Ukraine about their activity.

- To review complaints of judges on the presidents of courts and other officials, as well as other information from judges concerning threats to their independence.

- To dismiss a judge from an administrative post (including the post of president or deputy president of any particular court).

- To inform relevant state bodies about grounds for criminal, disciplinary or other liability.

- To adopt a case-load rate per judge in courts at all levels.

- To appoint to and dismiss from the posts of presidents and deputy presidents of all courts except the Supreme Court.

- To hear reports on the work of members of the High Qualifications Commission of Judges of Ukraine and the Disciplinary Commission of Judges of Ukraine.

- To suspend decisions of Councils of Judges that do not comply with the constitutional laws or that run counter to the decisions of the Congress of Judges of Ukraine.

Again these are very powerful functions and given that the Council is a permanent body whereas the Congress meets only every three years one would anticipate that the real

power is likely to rest with the Council (or indeed with the *praesidium* of the Council) rather than with the Congress itself.

CONCLUSION ON THE PROPOSALS FOR JUDICIAL SELF-GOVERNMENT

37. There are substantial doubts about the effectiveness of a procedure which establishes judicial self-government bodies on so many levels. The scope for judicial engagement in a form of judicial politics seems enormous. While important functions are conferred on the bodies of judicial self-government the dispersal of these powers through many bodies seems to lead to a potentially confusing situation where different bodies would conterminously exercise the same powers. In this connection the effectiveness of any of the bodies may be called into question. Secondly, the existence of these bodies would seem to have considerable potential to undermine the effective administration of the courts by the presidents and deputy presidents of the different courts and by the permanent staff in the State Judicial Administration of Ukraine. In effect these officials have to report to and are answerable to quite a variety of persons. This may, on the one hand, mean that they are not all that answerable at all. On the other hand, it could lead to paralysis. Important functions such as the allocation of cases and case-loads appear to be conferred on democratically elected bodies. The writer wonders how effective such a system would be. It is inevitable that any effective system of allocations may involve making unpopular decisions which will not be to every judge's liking. To confer these on democratically elected bodies may well lead to a system where the soft option becomes the norm.

    The writer understands the desire to limit presidents' powers but wonders if this is the way to do it. The exclusion of presidents from a role on the bodies of self-government may tend to create a confrontational atmosphere. In this regard perhaps a provision allowing court presidents to attend without voting could be considered. It is interesting to note that the "Concept" Document envisaged court presidents being members of the Council of Judges of Ukraine but limit their numbers to not more than one third. An alternative method of limiting the undue power of presidents would be to appoint them for a limited term of office only.

38. Overall, therefore, there are considerable questions about the efficacy of the proposed system of judicial self-government notwithstanding its aspirations to be highly democratic. There should not be a multitude of representative bodies of the judiciary. There is a case for a single body such as a High Judicial Council, perhaps with sub-committees for specialized functions. A much simpler and perhaps more effective system than that proposed would provide for a majority of elected judges on the High Judicial Council. However, such a solution would require an amendment to the Constitution. As an alternative, there may still be scope to confer substantial powers on a Council of Judges below the level of the High Judicial Council if it proves impractical to amend the Constitution. Secondly, once a president and deputy president of a court are elected they should be allowed to serve out their terms unless they are guilty of misconduct. To subject them to the control of an elected body which can remove them at any time is not a recipe for allowing them to take hard decisions where these are necessary. A similar comment could be made in relation to the control over the administrators working for the State Judicial Administration.