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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. It is worth recalling the words written many decades ago by a British constitutionalist: "Constitutional states do not nowadays greatly differ in the ultimate rights secured to citizens though the judicial „department". They all ensure the impartiality of the judge by placing him above fluctuations of party feeling and giving him security of tenure without making it impossible to remove him for crime or corruption."[1] That formulation encapsulates the very essence of the problem, i.e. the placement of the judicial authority within the state's political system.

2. One of the main challenges for all the post-communist countries was precisely the problem of the placement of the judicial authority within the democratic state's political system. The main problem was how to build a really independent judiciary. Indeed, before the 90's governments in the region were formed in accordance with the doctrine of unity of power instead of separation of powers. The government's subordination to and dependency on both legislative and executive branches was accepted and adhered to. The long tradition in these countries of unity of power, where the courts were also subordinated to the directives coming from the leading party, and as other organs were persist to implement state policy and receive instructions, had to be change. Thus, a genuine separation of the three branches of government and a firm institutional arrangements for judicial independence would be able to prove effective in shielding courts and judges from somewhat immature political process. The crucial question since the beginning of this transformation was how to secure the independence of judges. How to diminish the role of executive power towards judges. How to create a system of guarantees for the independence of judges, in both senses: - the individual, personal independence of judges, and – the autonomy, independence of judiciary vis a vis other state organs, especially executive power. What kind of independent body should be established to better guarantee the independence of judges.

3. Both laws under discussion, "On the Judiciary" and "On the status of Judges" in Ukraine are just examples of searching for a system which would best guarantee the independence of judiciary based on the principle of separation of powers. The Laws are prepared with the general aim to fulfill the European standards on the Judiciary, in line, among others, with: Recommendation No.R (94)12 of the Committee of Ministers to member States on the independence, efficiency and role of judges, and European Charter on the Statute for Judges and Explanatory Memorandum 1998.

4. General remarks.

   a). Both Laws seems to be over regulated in details. They are very voluminous and contain regulations which are not necessary in the Law. Sometimes there are "too many words" to describe the situation, and as a result there are some repetitions and for that reason many provisions of the Law are not very clear. Some articles are written in such a way that, they give the impression, they contain not only provisions but also kind of comment to the provisions themselves. This technique of making law, which was called legal positivism, can give rise to the negative side effect that the rules are difficult to find and to know even for practicing judges.[2]

[1] [1]C.F.Strong, Modern Political Constitutions, London 1949, s. 270

[2] Com. The opinion of prof. S. Gass (University of Applied Science Northwestern Switzerland)

b) The better solution would be to make one single law “On the judiciary and on the status of judges” instead of two separate laws, since the provisions (regulations) very often are divided between two laws. Part is regulated by the law “on the Judiciary” and other part by the law “on the status of Judges”.(for example disciplinary procedures). Trying to make correct interpretation of the provisions one needs to read both laws together. For that reason, a new draft of only one Law, could help make the regulations more coherent and understandable. Taking this suggestions into account it would be possible to shorten both Laws and make them clearer.

I. Law “On the status of Judges”

5. Chapter 1. General provisions.
This chapter contains the general rules on the independence of judges and its guarantees. Art. 3.1 defines the independence of judges by describing two pillars of the principle of independence of judges: - the judge shall be independent from any illegal influence, pressure or interference whatever source they are coming from,- the judge is subordinated only to the Constitution and law, being governed by the principle of the rule of law. There is also a very clear statement that interference with the judge’s activity of administering justice shall be prohibited and shall entail liability defined by the law. One can agree that the general rules are in line with European standards. The regulation of Art. 3.1 is very clear, prohibition of interference in the administration of justice is a substantial element of judicial independence. Because of this I see no reason for repetitions again in Art. 3.4.5) and 3.5 the same regulations but with different wordings. This is only one of the examples of the repetitions in the law which make the whole law very unclear.

Art. 4 on the inviolability and immunity of judges I have strong reservations. The immunity is too wide. It is not only functional immunity. Art. 4.1 states that immunity of a judge shall spread upon his/her housing, office premises, transport and means of communication, correspondence, his/ her property and documents. The scope of immunity seems to be much wider than parliamentary immunity. The Venice Commission was very critical towards the scope of immunity of judges saying that: “it is very doubtful whether there is a need for such a wide immunity for judges like that for deputies…there should be only a limited functional immunity for judges from arrest, detention and other criminal proceedings that interfere with the workings of the court.” (CDL-AD(2005)023). A very clear line must be drawn between the immunity which is necessary for guaranteeing the work of the court and privilege. The scope of the immunity proposed in Art. 4 to all judges despite what cases they administer is going too far. It seems to be rather a kind of privilege, which is not in line with European democratic standards. The immunity proposed in Art. 4 should be limited. One may also have doubts as regards the competencies of Verkhovna Rada to approve that a judge could be arrested or taken into custody.(Art.4. 2) That decision should be taken by court or by High Council of Justice (HCJ) but not by parliament.
I also see no reason for a criminal case concerning a judge to be initiated only by the General Prosecutor or his/her deputy. (Art. 4.4). But despite this regulation, in fact, (in the light of the provisions on disciplinary procedure) it is not clear who initiates the procedure. In my opinion Art. 4 must be rewritten.

I have also strong doubts as regards Art. 6 the state protection of the judge, his family and property. The state protection can be given to a judge but only in specific circumstances. This provision seems to be too wide In my opinion this Article should be rewritten, as well as Art. 3.10.

6. Art. 10 and 12 rights and responsibilities of judges. The possibility of approving the code of judicial ethics is welcome step in right direction. art. 12 states that the judge shall be obliged to comply with the rules of judicial ethics. It has been stated in several venice commission opinion that such code should be approved by the supreme judicial council and regulated at the level of law. (cdl-ad (2002)15) . Since a number of terms in laws on judicial conduct are broadly formulated, Codes of Ethics may give judges detailed instructions on how to interpret them. for example the notion of political activity prohibited in the overwhelming majority needs further specification. Similarly, codes of ethics may advise judges which types of teaching activities, (besides scholarly and artistic activity) that judges are generally permitted to perform are incompatible with the judicial office.

There could be a clearer description of all types of the judge's liability. Some duties of judges mentioned for example in Art. 10. 4 in such a situation could be part of code of ethics.

A very positive development I see in Art. 10.6) which is one of the important guaranties of the transparency of judges, to provide a yearly income statement to the State judiciary administration of Ukraine for publication on an official web-site of a judicial branch of power. Anti corruption rule is one of the crucial guaranties of the authority of judges and judiciary.

7. Requirements and selection of candidates for the post of judges.

Art.23- 31. The procedure seems to be regulated very detailed, such is the "style" of the Law. All documents are listed which shall be submitted by candidate for judge to High Qualifications Commission of Judges (HQCJ). Such detailed regulations are not needed. The technical information (Art. 27.1 1)-6) could be also regulated by bylaws. But in the wording of Art.27 there is one danger. Despite such detailed regulations there is a point 10) of a very general nature which states that "to take part in the examinations a person shall submit.. if available – other documents certifying candidate's readiness to work on the post of judge". This bids the question, what kind of other documents are no listed there in all the detailed regulations. Even worse, non acceptable wording is repeated in Art. 31.2. "The issue of recommending the candidate to the appointment to the post of judge shall be decided by HQCJ based on results of interview, qualification exam, medical certificate of the person's state of health and ***other information about the candidate*** which define candidate's level of professional knowledge, personal and moral qualities." This provision is a consequence of Art. 28.4 giving HQCJ the right to collect information about candidate, and instruct other state authorities to collect such information. Even organisations and citizens shall have right to submit information about the candidate. What kind of information? What kind of procedure regulates the rule for collecting of this kind of information? What is the knowledge of the candidate of this information? This provision is not in line with European standards. It goes against the transparency of the whole process of selection of judges. These provisions show clearly that regulations should not be too detailed but more precise.
Articles 23 and 24 there also seems to be confusion as to what concerns qualifications for post of judges. Art. 23 states that for post of judge a citizen may be recommended who has a command of the state language, Art. 24 declares the general principle of equality in the process of selection of judges regardless, among others, *linguistic* characteristics of the candidates. This needs to be corrected.

8. Appointment of judges.

Art. 32 regulates the procedure for appointment to the post of judge. There is an obligatory competition for the post of judges announced and conducted by HQCJ. The decision on recommending the candidate to the post of judge made by the HQCJ is then sent to the High Council of Justice. The High Council of Justice makes a proposal on appointment of the candidate for a post of judge and send it to the President. The president makes a decision on the appointment of the candidate to judge.

Art. 34 of the Ukrainian Law, establishes, as in many other countries, the possibility of appointing judges for a limited period of time (5 years) and following this period of election to judge without term limitation. That solution, (a kind of probationary period) always evokes criticism because, one may argue, is going against the general principle of the ban of removal of judges. Especially when the procedure for nomination for an unlimited period of time is not very clear. The critics point out that it may restrict a judge's impartial adjudication, since he may issue rulings or verdicts with a view to his future permanent nomination. Personally I am not so strong opponent to this solution. As I have written before, it can be seen as a quest for a method of appointing the best persons to the office of judge. There must be a very clear procedure for the nomination of judges for unlimited period of time. In any case a 5 year period seems to be too long.

The decision on the appointment for the post of judge for 5 years is made by the President of Ukraine. The procedure seems to be very formalised. There are three bodies involved in the process of nomination. High Qualifications Commission of Judges, the High Council of Justice, President of Ukraine. In my opinion it would be better to empower the High Council of Justice with all the competencies to announce and conduct the competition. High Classification Commission might be, in such a situation, a body inside the High Council of Justice.

9. Election of judges.

Chapter 3 , Art. 36 – 45 regulates the procedure on the election of judges without term limitation. The right, in the light of the Constitution, to elect judges for an unlimited period of time is a right of Verkhovna Rada. I am very critical of this solution.

The Law, however, proposes the regulation in line with the Constitution. Perhaps the discussion on the new laws will lay a base for the amendments to the Constitution in the chapter on Judiciary. I am strongly convinced that the system of election of judges should be changed. The Ukrainian law proposes a very complicated system for the election of judges for unlimited term. The procedure is completely in the hands of parliament and for that reason it could be exploited for political purposes (game) between different political parties.

The procedure for the election of judges proposed by the Law is very politicised. Art. 36.1.6) states that Verkhovna Rada shall decide to elect or refuse his/her election to the post of permanent judge. There are no clear rules, no clear conditions under which Verkhovna Rada can decide to refuse the election. Art. 44 is very ambiguous, because it states that "if candidate was not elected to the post of permanent term judge... *due to newly discovered circumstances reported in speeches of the people's deputies of Ukraine,* the Committee of the Verkhovna Rada , after examined the circumstances(....) shall decide to re-submit the previously rejected candidate to the plenary sitting of the Verkhovna Rada. If the Verkhovna Rada twice refused his election it is not permitted to submit candidate for election." Art. 39. 1 regulates that the Committe of Verkhovna Rada shall check the candidates compliance with the requirement of the Constitution (Art. 127) and the Law but also verify *appeals of*

citizens, civic organisations, enterprises, institutions, and other bodies regarding activity of the candidates." This procedure seems to be a real danger for the independence of judges. In this procedure (Art. 38. 13) there is also a possibility to use "***other documents certifying*** candidate's readiness to work on the post of judge" (see comments above, p. 7).

This system of election of judges can cast a real doubts about the probationary period. After 5 years a judge can be refused by parliament for election to the post of permanent judge without clear grounds. The danger that party politics in taking the decision, prevail over the objective merits cannot be excluded.

In my opinion the whole procedure should be changed. The best solution would be to change the system and give the right to appoint judges for limited period as well as for an unlimited one the President. after conducting a competition and on the proposal of the High Council of Judiciary. (But these proposal involve a change of the Constitution, also as regards the composition and role of High Council of Justice)

Apart from my substantial reserves as regards this chapter, I have also doubts concerning the form at redaction of this chapter. The law on status of Judges is too detailed in its regulation in this part. Some of the provisions of Art. 38 should not be regulated by Law (statute) but by executive act to this Law. The same reserve as before to Art. 38 p. 13) . This point should be deleted. Art. 39-41 should be regulated by the rules of parliament not by the Law on Status of Judges, because the whole procedure of election of judges is done on the ground of parliamentary rules, (the role of parliamentary commission, the rights of MP, but the rights of judges are not sufficiently guaranteed).

10. Disciplinary liability.

Laws on judiciary in various countries generally put the obligation on judges to refrain from conduct likely to compromise the dignity of the judicial office. The grounds for disciplinary action vary from country to country. It is however possible to list the most common ground for such disciplinary accountability. Laws on judicial conduct generally establish an obligation for judge's:

-to refrain from conduct likely to compromise the dignity of the judicial office,
-to avoid undue delays in the performance of duties,
-to refrain from conduct within or outside office damaging the judiciary's reputation,
- to refrain from conduct discrediting the judicial office or the court,
-to avoid offences and omissions in the discharge of their official duties or grave disregard of deadlines for delivering judgment.

Generally the Law on the Judiciary in different countries, in addition requires that judges not to disclose certain information on the parties, not to express themselves on matters under adjudication, not to accept gifts in relation with their work. Some laws list frequent delays, unjustified absence from work, interference in the activity of another judge, frequent negligence, disclosure of rules on secrecy, unjustified refusal to perform office work. In countries where judges are not permitted to be members of political parties or to be involved in political activities the violation of the ban constitutes a disciplinary offense.

The Ukrainian Law lists the grounds for the disciplinary liability of judges in Art. 52.
1)intentional violation of procedural law rules during administration of justice or evidently unqualified solution of case;

2)creation of obstacles for person's access to justice, not prescribed by law;
3)intentional delay of consideration of an application, complaint or case;
4)evident display of partiality or disrespect to any of the participants of proceedings;
5)commission of an immoral deed in or out of the court;
6) systematic or grave violation of rules of judge's ethics;
7)use of his/her position for obtaining personal benefits, not provided by the status of judges;
8)evasion of the required training at the National School of Judges of Ukraine;
9)disclosure of confidential information about a specific person out of court;
10) disclosure of secret which became known to the judge during consideration of case in closed court sitting;
11)systematic ignoring of position of higher level courts regarding application of legal norms in consideration of cases;
12)receiving gifts from the participants of proceedings or persons connected with them;
13)failure to submit or untimely submission for publication of the proprietary situation declaration, submission of false information in the declaration or concealment of revenues, property or other information which are subject to declaration.

The list is very long and the grounds are very differentiated. The majority of them are common with the conditions existing in other countries (mentioned above). Some of the grounds, however, listed in the Ukrainian law can give rise to doubts and in my opinion should never be put onto the list of grounds for disciplinary liability. One of them is p. 8) "evasion of the required training at the National School of Judges of Ukraine". The Ukrainian Law proposes the mandatory system of training for judges. It should be remembered that according to Opinion No 3 of the Consultative Council of European Judges (CCEJ) of the Council of Europe," the in-service training should normally be based on the voluntary participation of judges.(…) they may be mandatory only in exceptional cases". Taking this into account, an avoidance of a required training, should never be seen as ground for disciplinary liability.

Some of the conditions listed in Art. 52 seems to be very ambiguous. In concrete situation they could be interpreted in such a way as to weaken the independence of judges instead of guaranteeing it. In my opinion such a danger could be seen in the formulation of p. 11 "systematic ignoring of position of high level courts regarding application of legal norm in consideration of cases". A judge may not be restricted solely by existing case-law. The essence of his/her function is to independently interpret legal regulations. For that reason, the grounds for disciplinary responsibility, described in such a general manner, as above in p. 11 should be deleted.

The formulation of Art. 52 p.1 can be confusing „intentional violation of norms of procedural law during execution of justice or evidently unqualified solution of case". How far this can be taken is a problem of interpretation. In the case that it is a problem of interpretation of law, the violation of norm in the process of adjudication should be solved by way of appeal not by way of disciplinary procedure. Without doubt, such a vague formulation of the principle of a judge's disciplinary responsibility in such a sensitive area as the adjudication process should be formulated in more precise way.
P.5) is also very imprecise as regards the definition of morality. This point should be absorbed by p. 6) systematic or grave violation of rules of judge's ethics;

11. Disciplinary procedure.

The lack of clearly formulated rules of conduct involves the risk of arbitrary prosecution of judges for disciplinary offenses. This is, to some extent counterbalanced by procedural safeguards. In most countries judges under investigation have the right to present their arguments at oral hearings, they may be assisted by counsel and appeal against

decisions of the disciplinary body. In a number of countries the rules of criminal procedure with all the safeguards protecting defendants apply to disciplinary proceedings.

Ukrainian Law "On the Status of Judges" regulates this disciplinary proceedings in Art. 53-58. (The further regulations one can find in the Law on Judiciary). The procedure is regulated, as is the rule of this Law, in very detailed manner. Art. 54 states that disciplinary proceedings shall be carried out by: 1) the Disciplinary Commission of Judges (for judges from local and appellate courts), 2) the High Council of Justice (for judges of specialised courts and Supreme Court Judges). The detailed regulations aim to make the disciplinary procedure very transparent, which can be welcome as a solution going in right direction. As has been pointed out many times the lack of transparency of disciplinary procedure may harm the reputation of judges and contribute to the public's distrust in the judiciary. Despite all the positive "formal" solutions, there is an unavoidable query of substantive character, as regards the body which decides on the disciplinary responsibility. I am of the opinion that on the disciplinary responsibility the court should decide, not the special bodies, even in the case when all the members are judges. The situation regulated by Ukrainian law is much worse. The decisive bodies are not composed of judges.(see p. 17)

In a situation when the decision on the disciplinary responsibility is taken by the court, the transparency of the disciplinary procedure is guaranteed in better way (by the provisions of the code of procedure in criminal cases) than by establishing special procedures in the Law on the Statute of Judges.

Art. 58 gives the right to appeal (but only to the judge of the local or appellate courts) to High Council of Justice, which is not body consisting only of judges. The decision to go to court may be appealed only on ground of procedural violation of the disciplinary proceedings. I am of the opinion that this procedure is not in line with European standards. In any case the judges should have the right to go to court, to make an appeal to the court.

I have no very strong reservations about the catalogue of sanctions. This catalogue, however, should be analysed in the light of the Recommendation No.R (94)12of the Committee of Ministers of the Council of Europe. *"Where judges fail to carry out their duties...all necessary measures which do not prejudice judicial independence should be taken, for instance: a. Withdrawal of cases from the judge; b. moving the judge to other judicial tasks within the court; c. economic sanction such as a reduction in salary for a temporary period, d. suspension.*

Appointed judge may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules."

II. Law "On the Judiciary"

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12. Law "On the Judiciary" regulates legal functioning of the courts system in Ukraine. As a fundamental base for the organisation of judiciary there is a principle of separation of power. Art. 1 states that in the "system of separation of power, the judicial power is exercised by independent and impartial courts". Art. 5 declares that Justice is administered exclusively by courts. Art. 8 guarantees the autonomy of courts. The pillars of the autonomy of courts are the same as those of the independence of judges regulated by the law "on the status of Judges" , i.e. "courts shall not depend on any illegitimate influence, pressure, or intrusion emerging from whatever source. Courts administer justice on the basis of the Constitution and laws of Ukraine." The principle of separation of power in the domain of the judiciary is realised by the institutional independence of the judicial

branch and the personal independence of judges. This regulation is fully in line with European democratic standards.

The above regulation clearly shows that one law regulating both the judiciary and status of judges would be better solution. It will help avoid so many repetitions.

13. Art. 16 regulates the system of general jurisdiction courts, which is a 4 level system: local courts, courts of appeal, high specialised courts and the Supreme Court of Ukraine. One can not arise doubts there are too many levels.
The procedure of establishment of courts as described in Art. 18 seems to be rather complicated. Courts are established and dissolved by the President of Ukraine upon a submission of the Minister of Justice. The submission of the Minister of Justice shall be appended with conclusions of the President of the Supreme Court of Ukraine, president of the relevant high specialised courts, the Head of the State Judicial Administration. The establishment of court involves 4 different bodies: the President, Minister of Justice, President of the Supreme Court or relevant high specialised court and Head of State Judicial Administration if they have been provided upon request of the Minister of Justice. There is no role for the Council of Judges. This procedure could be seen as a kind of cooperation, a good example of balance of power between judiciary and executive, but I am not sure this is exactly the case. The final part of the art. 18.1)" if they have been provided upon request of the Minister of Justice," is not very clear. The decisive role for establishing and dissolving belongs to President on the recommendation of the Minister of Justice. One can suppose that without the agreement expressed by the other bodies (belonging to judiciary) it would be impossible for the president to establish and dissolve court. But it is not very clear in the light of this provisions. One has doubts whether a system, where so many bodies are involved, could really guarantee a good balance of power, or would it instead create tensions between different bodies, which would then have negative impact on the whole procedure. This part should be redrafted with the aim of proposing a simpler and clearer system of cooperation between President or Ministry of Justice and the High Council of Justice in the process of establishment of new courts.

14. I have some doubts as to Art. 34 p. 2.1) and Art. 36 p. 2.2) " to provide courts with explanations in order to ensure the uniform application of legal norms in the judicial practice." The notion is not very clear. What does it mean? what kind of explanations are regarded out of judicial process, out of system of appeal? If this is clarification in more abstractive way, the competence should be deleted because it is role of the Constitutional Court.

15. The authors of the new "Law on judiciary" are trying to create a system of organisation of judiciary completely different from the system existing till now in Ukraine as well as existing in majority of other european countries. The new model has to be in opposition to the organisation (and some deformations of the system) which has existed for decades in Ukraine. The new regulation is proposed as an result of distrust to the executive power, especially minister of Justice, but also as distrust towards the presidents of the courts. For that reason the law provides for the establishment of several new bodies with the intention of replacing "old bodies" in its role towards judiciary. They are: the High Qualification Commission of Judges, vary enlarged system of judicial self-government: meetings of judges on different levels of the courts, conferences of judges, the Congress of Judges of Ukraine, council of judges on different levels, Council of Judges of Ukraine and High Council of Justice (art. 131 of the Constitution), Disciplinary Commission of Judges and State Judicial Administration of Ukraine. In effect the new regulations are very complicated and unclear and could make the whole system completely non efficient.

16. Qualifications Commissions of Judges.

Art. 46 states that “qualifications commissions shall be assigned with the task of forming the corps of professional judges, who are able to administer justice in qualified, good faith manner and impartially, by selecting and recommending nominees for the post of professional judges and by determining the level of professional skills of professional judges, as well as with the task of consideration of issues relating to giving opinions as to dismissal of judge from his/her post in cases determine by law.” The commissions shall operate on territorial as central level. I have reservations as regards the composition of the bodies playing such an important role in the process of forming the corps of professional bodies. Why should a member representing city of Kiev council, and oblast council and Verkhovna Rada of the Autonomous Republic of Crimea be among between the members of independent body for qualification of judges? It is against the principle of independence. Taking into account that the process of election of judges by parliament is rather politised, this stage, the preparation of candidatures, should be in hands of the judicial bodies. The whole procedure of Qualification Commission of Judges is not transparent. I am of the opinion that, as I expressed above in comments on the law on the status of Judges, there is no reason for the existence of this body, and therefore its competencies should be given to the High Council of Justice.

17. Disciplinary Commission of Judges

I have strong reservations as regards the composition of the Disciplinary Commission of Judges. In the light of Art. 58 out of 15 members only 9 are judges, others are nominated by President of Ukraine, Verkhovna Rada, Minister of Justice, Congress of Ukraine. This kind of body does not offer sufficient guarantees for the independence of judges. As I wrote in my comments above, the best solution would be to empower the courts with competencies to decide on the disciplinary responsibility of judges. Solutions proposed in art. 58 seems to be out of line with European standards. (see p. 11)

18. There is no consensus in practice among the different states as to how the judiciary is to be administered. Different models are in use in different countries. In some countries the judiciary is administered by the executive, normally by the Ministry of Justice, in others administered by the ministry and to some extent the judicial council (it seems the model most it is popular in the new democracies in Central and Eastern Europe), in others the judiciary fulfils these functions itself, through special bodies (for example the Judicial Council in Hungary). It is also a rule that all the states have vested some administrative responsibilities in court presidents or councils. The budgetary responsibility remains very much in the hands of the legislative and executive branches. But what is of great importance is that an independent judiciary is possible under each of these systems.

For that reason international standards are not in consensus as regards the recomended form of administration. Some explicitly call for the judiciary to be administered by an independent body representing judges, but what is most common is that all call for it to be organised in such a way as not to compromise the independence of judges, but do not identify a clearly preferable method, or allow for variety of models.

The final decision belongs to individual countries.

19. State Judicial Administration

The Ukrainian Law on the Judiciary proposes the creation of a new body: State Judicial Administration, which, as is described in Art. 89 “shall be a central body of the executive power which carries out organisational provision of the operation of courts of general jurisdiction (except for the Supreme Court of Ukraine and the high specialised courts), as well as other bodies and institutions of the judiciary pursuant to this Law. The State

Judicial Administration of Ukraine shall be under control of the Council of Judges of Ukraine".

Personally I am not against such a special body which could administer the courts in more efficient way and better realized the principle of separation of power.. The power of the SJA (Art. 90) is rather wide but in my opinion the scope of competences can be accepted.

The regulations proposed in Ukrainian law involves however many doubts and reservations.

One could supposed that the main reason to create such a special body was to replace the executive body by judiciary one in administration of courts. But reading these articles this is not the case. The new body is described as an executive one. The head of this body shall be appointed to and dismissed from the post by the Cabinet of Minister of Ukraine upon submission of the Prime Minister of Ukraine based on the recommendation of the Council of Judges of Ukraine. In the light of the new Law I do not see any clear reason for establishment of this body. It can be seen as a tendency to evolve into "new ministry of justice". This causes misgivings. It is not enough to justify its existence.

In Ukrainian new law the administration of courts still is in the hands of executive power. But the wording of Art. 89.1 gives grounds for new tensions between executive and judiciary declaring that the executive body, as State Judicial Administration shall be under control of the Council of Judges. The question arises, what are the instruments of this control? Is the State Judicial Administration (its head) also responsible to the Cabinet of ministers as an executive body? In the light of Law the questions are not clearly answered.

Taking into consideration the qualifications of different forms of administration of the courts, despite the creation of a new body, the Ukrainian system still should be classified as system with decisive role of executive power in administered of the courts.

The problem concerns the place of that body in the state organization system. It should not be so that the main reason for establishing such a body seems to be the replacement of the Ministry of Justice by another executive body. Clear distinction must be made between the role of ministry of justice, the Administration Body and the role of presidents of the courts. Especially the role of the presidents of courts should not be completely limited.

I recommend changing the chapter on State Judicial Administration. The changes should be done reasonably, also taking into account the experiences of other countries. Not only separation but also balance is needed in the process of administration of the courts.
I would like also to recall here what has been written in the context of the case of Hungary, which established a model where the administration of courts is only in the hands of judiciary itself (by the Council of Judiciary). 'According to some critics, the operation of the Council is rather bureaucratic, resulting in the increase of the administrative burden of judges. Some argue that it is actually the Office of the Council, composed of civil servants, which has the real power and not the Council itself. Many of the employees of the Office used to work at the competent department of the Ministry of Justice prior to the reform, and their mentality still reflects the old times, when courts were clearly subordinated to the bureaucracy of the Ministry.'[3]

[3] Monitoring the EU Accession Process, Judicial Independence, , p.43