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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE DRAFT LAW ON THE JUDICIARY AND THE DRAFT LAW ON THE STATUS OF JUDGES OF UKRAINE

on the basis of comments by:

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1. Introduction

1. By letter dated 10 October 2006, the Chairman of the Ukrainian Commission for Strengthening Democracy and the Rule of Law, Mr. Serhiy Holovaty requested an opinion on the draft laws Law on the Status of Judges and the Law on the Judiciary (CDL(2006)096 and 097, revised versions CDL(207)040 and 039). Both texts were submitted by the President of the Ukraine to the Verkhovna Rada (Parliament) of Ukraine on 27 December 2006.

2. The present joint opinion of the Venice Commission and the Division for the Judiciary and Programmes of the Directorate General of Legal Affairs of the Council of Europe was prepared on the basis of comments by Mr Hamilton (CDL(2007)034) and Ms Suchocka (CDL(2007)035) for the Venice Commission and Mr. Oberto (PCRED/DG1/EXP(2006)49) and Mr. Zalar (PC-TC(2006)22) for the Division for the Judiciary and Programmes.

3. Within the framework of the Joint Programme between the European Commission and the Council of Europe on Selection and Appointment Procedure, Training, Disciplinary Liability, Case Management and Alternative Dispute Resolution, all four rapporteurs participated in a conference on the draft laws on 12-13 February 2007 in Kiev where they presented their comments and held an exchange with the Ukrainian stakeholders. The conference 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. The results of this exchange are reflected in the present opinion.

4. The present opinion was adopted by the Commission at its … Plenary session (Venice, …).

2. General remarks

5. The Commission welcomes the draft laws as **a clear improvement as compared to the present situation and previous drafts** (see also previous opinions related to the judiciary in Ukraine (see also opinions on previous constitutional and legislative drafts CDL-AD(2005)015, CDL-AD (2003)019, CDL(2001)078 and 055). Nonetheless, the draft laws will require a number of further improvements in order to guarantee an independent and efficient judiciary.

6. 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 "On the judiciary and on the status of judges" instead of two separate laws, since the same issues dealt with are often spread between the two laws. Disciplinary procedures for example are partly regulated in the law "on the Judiciary" (hereinafter "Judiciary") and partly in "on the Status of Judges" (hereinafter "Status"). In order to correctly interpret the provisions, both laws have to be read together. A single Law would make the regulations more coherent and understandable.

7. The Commission was informed that the Parliamentary Committee on the Judiciary submitted a draft resolution proposing to adopt presidential the two draft laws on the judicial reform as such in the first reading and to **merge them into a single draft** for the final reading. Such a step would be **most welcome**.

8. Secondly, the **laws are extremely detailed**. This method of drafting seems to be 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. Some articles are written in such a way that they give the impression that they contain not only substantive provisions but also some kind of comment to other provisions.

3. Fundamental provisions – immunity, incompatibilities

9. 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. 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. The **general rules are in line with European standards**.

10. Nonetheless, the provision of Article 3, para. 5, Status, according to which "All state authorities, institutions and organizations, local self-government authorities, citizens and their unions shall be bound to respect the independence of judges and not infringe on it" remains too vague, as it is not linked to specific sanctions or a procedure to implement this rule. Also Article 5 Status providing that "Display of contempt of judge (court) from persons participating in case consideration or present at the trial proceedings, as well as committing actions out of court that speak for an evident contempt of judge in relation to his/her judicial activities shall entail liability pursuant to the law" does not live up to the wider concept of "contempt of court." **Judges need a means to protect themselves against any kind of external pressure or influence through clear and stringent criminal sanctions against all those who would attempt to the independence of the judiciary**.

11. There seems **not to be a need for the requirement that a criminal case against a judge can be initiated only by the General Prosecutor or his/her deputy** (Art. 4.4 Status). But despite this provision, in the light of the provisions on disciplinary procedure, it is not clear who initiates the procedure.

12. 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. It is **not appropriate that the parliament should have any role in lifting a judges' immunity**. This should be a matter for a court of law to decide based on clearly defined criteria. Such a change would however require a constitutional amendment.

13. In general, the immunity of judges is too wide. Article 4.1 Status states that immunity of a judge shall cover his/her housing, office premises, transport and means of communication, correspondence, his/ her property and documents. Thus, the scope of immunity seems to be even wider than parliamentary immunity. The Venice Commission was always critical towards the scope of immunity of judges stating 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). Such a functional immunity should exclude criminal liability for unintentional errors committed during adjudication.

14. Article 9, paragraph 3, Status does not comply with international legal standards as regards membership in professional unions. The European Charter on the Statute for Judges recognises the right of judges to join professional organisations and a right of expression (paragraph 1.7.) in order to avoid excessive rigidity which might set up barriers between society and the judges themselves (paragraph 4.3.). Principle IV - associations of Recommendation R(94)12 provides that judges should be free to form associations, which, either alone or with another body, have the task of safeguarding their independence and protect their interests. **Judges should be therefore free to join judges associations or unions**. "… Judges may exercise the right to join trade unions (freedom of associations), although restrictions may be placed on the right to strike" (see CCJE, Opinion No. 3, paragraph 34).

15. In many European countries the irremovability of judges is explicitly guaranteed in the country's constitution or in an ordinary law. An amendment to the Constitution of Ukraine in this respect would provide an additional guarantee.

4. The system of courts

16. Article 16 Judiciary recognises that the courts in Ukraine are established on the basis of three principles, those of territorial division, specialisation 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). The second level of courts are courts of appeal. These hear appeals from the local courts. There are three types of courts, 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 specialised 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 specialised matters.

17. 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).

18. The **system of courts thus proposed is quite an elaborate and complex one**. Although the system is simpler than that proposed in earlier drafts (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. In order to reduce the number of levels of courts, Article 125 of the Constitution would need to be amended.

19. The **procedure of establishment of courts** as described in Article 18 Judiciary seems to be rather complicated. 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 Specialised Court, and the Head of the State Judicial Administration of Ukraine. On the other hand, there is no role for the Council of Judges. While this procedure could be seen as promoting co-operation and providing for a balance between judiciary and executive, it seems that the decisive role for establishing and

dissolving courts belongs to the President on the recommendation of the Minister of Justice. A system involving so many bodies could even lead to tensions between them. A simpler and clearer system of **cooperation between the President and/or the Ministry of Justice and involving the High Council of Justice would seem more appropriate**.

20. There are also doubts as to the competence of the High Specialised Courts (Article 34 p. 2.1 Judiciary) and the Supreme Court (Article 36 p. 2.2 Judiciary) to provide "explanations" in order to ensure the uniform application of legal norms in the judicial practice. The notion is not very clear. **Higher courts contribute to the unification of judicial practice by way of appeal in individual cases not through abstract norms**.

21. In order to avoid any manipulation or even the appearance of it, the draft Law on the Judiciary should also make clear that every person is entitled to a lawful judge selected by objective rules defined and published in advance, by automatic allocation of cases.

5. The appointment of judges

22. 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).

23. The **composition of the High Qualifications Commission seems problematic**. 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 an independent body for the qualification of judges? Taking into account that the process of election of judges by Parliament is already rather politicised (see below), the preparation of candidatures, should be entirely in the hands of an independent body. The procedure of the High Qualification Commission is not transparent. There is **no need for a separate High Qualifications Commission and its competencies should be attributed to a High Council of Justice composed with a majority of judges**. If this cannot be achieved via a required constitutional amendment, the independence of the High Qualifications Commission needs to be further strengthened.

6. Initial appointment

24. 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 Justice 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. **The discretionary powers of the President should be curbed by limiting him or her to verify whether the necessary procedure for selection and appointment has been followed** by the High Qualification Commission and High Council of Justice. The decision of the president of the Republic of Ukraine would therefore have the **effect of a "notary".**

25. In some respects the **procedures for the initial appointment of judges are not sufficiently 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 organisations 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". What kind of information? What kind of procedure regulates the collecting of this kind of information? What is the state of knowledge of the candidate about this information? This provision is not in line with European standards and goes against the transparency of the whole process of selection of judges. Taken together these provisions raise the fear that **extraordinary interventions could take place in the process**. Similar questions arise about other stages of a judge's advancement – for example, Article 38(13) Status 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.

26. 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. The Venice Commission considers that **setting probationary periods can undermine the independence of judges**, since they might feel under pressure to decide cases in a particular way. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office" (CDL-AD(2005)038, § 30). A change of Article 125 of the Constitution would be required to overcome this problem.

7. Election to a permanent post

27. 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 Specialised 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.

28. It seems 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 are 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.

29. Also in respect to other countries, the Venice Commission always found that "the parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge" (CDL-AD(2002)026, § 22). **Appointments of judges** of ordinary (non-constitutional) courts are **not** an **appropriate** subject **for a vote by Parliament** because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, **it would be necessary to change Article 128 of the Constitution**.

30. However, even within the current constitutional framework it would be **necessary to provide for a fair procedure for the appointment of judges by Parliament**. Objective criteria in the choice should be binding for Parliament, which should be obliged to give reasons for granting or denying reappointment (see e.g. Article 44, Para. 3, Status, according to which "Proposal of candidates for election for a post of judge without term limitation, which were rejected twice by the *Verkhovna Rada* of Ukraine, shall not be permitted"). There is a danger that an applicant who in his/her previous activity has issued a judgement "angering" some political actors, risks that re-appointment will be denied. In order to limit this danger, **if the High Qualification Commission insists on a candidate rejected by Parliament a second rejection should requite a qualified majority**.

31. The criterion of the "number of quashed, changed court decisions, grounds for quashing changing court decisions" in Article 38 para. 2, item 8 is a quite dangerous one. As a consequence, during the probation period judges will feel themselves obliged to follow blindly principles and case-law set forth by "superior" judges, and will not attempt to decide cases according to their convictions and conscience, as (quite on the contrary) each judge should do.

8. Judicial promotions

32. 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.

33. In order to make the system of promotions more objective, **appointments of judges to another office, in particular a higher position, should be done on a competitive basis**, possibly by filling all vacant posts at a given time during regular and anonymous competitions.

9. Disciplinary liability and dismissal of judges

34. 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 …"
> "Systematic ignoring of position of high-level courts regarding application of legal norms …".

35. It appears 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.

36. 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.

37. 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.

38. 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. However, 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**.

39. By referring to "evasion of the required training at the National School of Judges of Ukraine", the draft Law introduces a mandatory system of training for judges. However, 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; (…) there may be mandatory in-service training only in exceptional cases; examples might (if the judicial or other body responsible so decided) include when a judge takes up a new post or a different type of work or functions or in the event of fundamental changes in legislation". Taking this into account, **the avoidance of a required training, should not be seen as ground for disciplinary liability.**

40. The formulation of Article 52, item 1 Status on „intentional violation of norms of procedural law during execution of justice or evidently unqualified solution of case" is inappropriate. **An incorrect interpretation of the law by the judge should be solved by way of appeal and not by way of a disciplinary procedure**. The judge's disciplinary responsibility in such a sensitive area as the adjudication process should be formulated in more precise way.

41. Article 52, item 5 refers to the very imprecise term "morality" and should be absorbed by item 6 on systematic or grave violation of rules of judge's ethics.

42. Art. 54 Status provides 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**.

43. However, **High Council of Justice has no judicial majority** (this would require a constitutional amendment). The explanatory memorandum of the European Charter on the statute for judges (DAJ/DOC (98) 23) points out that disciplinary sanctions shall be imposed by *"…a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation."* Furthermore, there is **no provision on an appeal to a court against disciplinary measures.** The Memorandum also underlines the right of appeal of this decision to a higher judicial authority. This view is supported by the United Nations' Basic Principles on the Independence of the Judiciary. In its Principle 17, they emphasise the judge's right to a fair hearing and under Principle 20 they mention that decisions in disciplinary proceedings should be subject to an independent review. This position is also supported by Article 6 of the European Convention on Human Rights on the right to a fair trial, which establishes a direct link between this right and the independence of the judge.

44. The draft law on Status is not very clear about the body which is to start a disciplinary action. In order to provide for an accusatorial (as opposed to inquisitorial) system, there should be a clear-cut distinction between the body which has to enquire into possible violations (the inspection service), the body which has the right to initiate the procedure (Minister of Justice, Chief Prosecutor?), the body which presents the accusation (it could be a substitute of the Chief Prosecutor) and the body which decides on the merits of the case.

45. The relationship between grounds for disciplinary proceedings and grounds for dismissal should be clarified. The situations contemplated in Articles 63-65 Status should rather be listed among disciplinary cases. In order to comply with the principle of proportionality, outright dismissal should be possible only in most serious cases or cases of repetition. For example, a violation of incompatibility rules is usually a case for disciplinary responsibility, there is no need to immediately expel a judge from the judiciary for violating a minor incompatibility rule. The same is true for a minor violation of oath and for entry into legal force of a judgment of conviction regarding a judge - it is not necessary to dismiss a judge because s/he has been convicted for causing a car accident. On the other hand, it should be possible to dismiss a judge who has intentionally and systematically committed grave violations of one or more of the rules in Article. Oddly, this appears to be the consequence of the fact that rules on dismissal do not make any reference to the Article 52 Status.

10. Judicial self-government

46. The draft law on the judiciary contains detailed provisions on the question of "judicial self-government" which is defined in Article 67 Judiciary. 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 provides 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 the activity of bodies of the judicial self-government shall facilitate the creation of proper organisational and other conditions essential for the 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 court 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.

47. 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."*

48. 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."*

49. 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.

50. **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."* (Article 1.8)

51. 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.

11. The institutions of judicial self-government

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

53. 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).

54. 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 Specialised 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.

55. 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.

56. 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.

57. 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 Specialised 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.

58. 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)

59. 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 organise 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).

60. According to the discussions in Kiev, the proposed system of judicial self-government is a result of distrust in the executive power, especially the 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" within the judiciary. However, **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.**

61. Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The **best protection for judicial independence, both "internal" and "external", can be assured by a High Judicial Council**, as it is recognised by the main international documents on the subject of judicial independence.

12. The highest judicial self-government authorities

62. 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 meets 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 organisations, 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 **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.

63. 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 Specialised 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.

64. 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.

65. 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).

66. The power of the State Judicial Administration (Article 90 Judiciary) is rather wide but the scope of competences can be accepted. One could suppose that the main reason to create such a special body was to replace an executive body by a judicial one but this is not the case. The new body is an executive one and could develop into a new Ministry of Justice. The result of establishing this body seems to be the replacement of the Ministry of Justice by another executive body. A clear distinction must be made between the role of Ministry of Justice, the State Judicial Administration and the role of presidents of the courts. Their role should not be completely limited. **The State Judicial Administration - and judicial training - should come under the control of an independent judicial body.**

67. 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.

68. 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.

69. **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 Commission 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.

70. The Venice Commission 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 Ukrainian "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.

71. 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 specialised 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**.

72. 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.

13. Judicial budget and remuneration of judges

73. Even though Article 84, para 6, provides for the regulation of the budget by the Budget Code of Ukraine, already the present draft law on the Judiciary should set out who prepares and submits the draft budget for the judiciary to the government or to the parliament. The State Judicial Administration, the Supreme Court, the Constitutional Court and Specialised Courts are responsible only for the allocation of funds within the already adopted state budget. The budget is, of course, ultimately subject to the decision by parliament. However, the judiciary should not be left without representation at a crucial stage, when the budget is discussed in the Cabinet (government) and in the Parliament. Placing the authority for the preparation and submission of a budget proposal in the hand of an independent body – the Council of Judges of Ukraine or the High Judicial Council could limit the executive ability to curtail judicial independence. "The independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources" (Final conclusions of the First Study Commission of the International Association of Judges, Vienna, 2003). **An autonomous body with substantial judicial representation should play a significant role in presenting and defending the judicial budget before Parliament**. Parliament will still allocate funding, but solutions such as mandatory funding levels, or multi-year funding, or block appropriations can reduce the scope of political interference.

74. The Council of Europe Recommendation No. R(94)12 provides that judges' remuneration should be guaranteed by law and be commensurate with the dignity of their profession and burden of responsibilities (principles I (2)a (II) and II (1)b). Also the European Charter contains a recognition of the role of adequate remuneration in shielding off pressures aimed at influencing their decisions and, more generally, their behaviour, and of the importance of guaranteed sick pay and adequate retirement pensions (paragraph 6). **The draft Law should provide for a strict prohibition of any reduction of a judge's salary** during his/her term of office, except in case of a monetary disciplinary sanction imposed on a judge.

75. A crucial security device against corruption in the justice system should is the **duty of judges to disclose their financial situation**. This helps to prevent financial conflicts of interest and protects judges against the reproach that they might have financial interests in a case. Financial disclosure means that judges have to disclose their possessions, financial circumstances, shares, presents, fees and other income as well as loans they raised (Council of Europe, GRECO recommendations). Article 10, para 4, item 6 Status is therefore welcomed.

14. Conclusion

76. The Commission welcomes the draft laws as a clear improvement as compared to the current situation and previous drafts. The fundamental provisions are in line with European standards. The Commission further welcomes the announced intention by the Ukrainian Parliament to merge the two very detailed draft laws into a single (hopefully more simple) text. Nevertheless, a number of issues should be addressed:

77. As concerns the judges independence and immunity:

- The discretionary powers of the President should be curbed by limiting him or her to verify whether the necessary procedure has been followed (effect of a "notary").
- Clear and stringent criminal sanctions should protect the judges against external pressure.
- Judges should benefit only from a functional immunity.

- Judges should be free to join judges associations or unions.
- There is no need to provide that a criminal case against a judge can be initiated only by the General Prosecutor or his/her deputy.
- Parliament should not have any role in lifting a judges' immunity (constitutional amendment required).

78. As concerns the establishment of courts and unification of judicial practice:
- A simpler procedure of establishment of courts providing for cooperation between the President and/or the Ministry of Justice and involving the High Council of Justice would seem more appropriate.
- High Specialised Courts and the Supreme Court should not provide abstract explanations but contribute to the unification of judicial practice by way of appeal in individual cases.

79. As concerns judicial appointments:
- The composition of the High Qualifications Commission seems problematic.
- There is no need for a separate High Qualifications Commission. Its competencies should be attributed to a High Council of Justice with a majority of judges (constitutional amendment required).
- The procedures for the initial appointment of judges are not fully transparent.
- Setting a probationary period of 5 year can undermine the independence of judges (constitutional amendment required).
- Appointments of judges non-constitutional courts are not an appropriate subject for a vote by Parliament necessary to change the Constitution of Ukraine (constitutional amendment required). However, if the Constitution cannot be changed, the overriding of the insistence by the High Qualification Commission on a rejected candidate should requite a qualified majority in Parliament.
- Objective criteria in the choice should be binding for Parliament, which should be obliged to give reasons for granting or denying appointments.
- Appointments of judges to other, in particular higher positions should be done on a competitive basis.

80. As concerns disciplinary procedures:
- The failure to participate in obligatory training should not be a ground for disciplinary liability.
- An incorrect interpretation of the law by the judge should be solved by way of appeal and not by way of a disciplinary procedure.
- A clear definition of immoral deed warranting disciplinary liability is required.
- An adversarial system clearly separating accusation and decision should be established.
- The right of to counsel for the judge needs to be provided for.
- The right of the judge for an adversarial procedure and to question witnesses should be provided for.
- It should be possible to appeal to a court against disciplinary measures.

81. As concerns judicial self-administration:
- The system of judicial self-administration is overly complex and should be simplified (e.g. building upon a single body such as a High Judicial Council, perhaps with sub-committees for specialised functions).
- The State Judicial Administration and judicial training should come under the control of an independent judicial body.
- The High Judicial Council should have a majority of judges elected by their peers (constitutional amendment required).

82. As concerns the budget of the judiciary and judges remuneration:

- An autonomous body with substantial judicial representation should play a significant role in presenting and defending the judicial budget before the parliament.
- The draft Law should provide for a strict prohibition of any reduction of a judge's salary.

83. The Venice Commission recommends to pursue the reform of the Judiciary in Ukraine on the basis of the draft laws submitted to Parliament. The fact that the Parliamentary Committee on the Judiciary intends to merge the two drafts into a single law is encouraging in this respect. Clearly, in order to ensure an independent and efficient judiciary, the recommendations set out in this opinion should be implemented in the resulting single Law.

84. The Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter.