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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS
ON THE
DRAFT CONSTITUTION OF UKRAINE**

**Prepared by a Working Group
headed by Mr V.M. Shapoval**

by

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1. The following comments focus mainly on Chapter VII “Courts and Justice” and Chapter VIII “The Constitutional Court” of the Shapoval draft.

2. Analysing provisions included in to two Chapters: VII and VIII, one has an impression that the proposed amendments are mostly of technical not substantial nature. The majority of new proposals can be seen rather as better wording of the provisions existing now in the text of the Constitution. The proposed amendments don't change the fundamental principles laid down in the old constitution as a basis of the system of courts and judiciary in Ukraine. In my comments I would like to concentrate on the proposals which are worth being accepted. At the same time however I would like to express my critical opinion on some proposed solutions.

3. In Article 128 there is a new proposal, which opens the way for recognition of the jurisdiction of the International Criminal Court on the condition prescribed by the Rome Statute of the International Criminal Court. I see this proposal as a move in a positive direction.

4. Article 129 is a revised version (better wording) of the existing article 125. The system of courts remains the same as it is now.

5. Article 130 regulates (in the same way as existing article 130) the financial guarantees for functioning of courts and the activity of judges in the separate part of the state budget. The only new provision in this article is a clear statement that expenditures to support courts may not be decreased comparing to the previous fiscal year. This proposal can be accepted.

6. Article 131 lays down (as it does in article 129 of valid constitution) the main principles of judicial proceedings, which are listed in the points 1 to 8). There are 2 additional new principles of judicial proceedings compared to the existing constitution (i.e. p. 1 rule of law and p. 6 reasonable periods of proceedings). Article 131 must be read in the light of the Chapter I on “general principles” as well as in Chapter II “Human and Citizen’s Rights, Freedom and Duties” of the Constitution. The principle of rule of law is a very general principle including basic principles describing the Ukrainian state. It is not only a specific principle of judicial procedure. Article 4 states that “the principle of the Rule of Law is recognised and effective in Ukraine”. For that reason I have some doubts concerning the repetition in article 131 this general rule. If it were to be repeated, it must be done with a clear distinction between the two principles in judicial process: rule of law (p.1) and legality (p. 2). To add the proposal (p. 6) “reasonable period of proceeding” is rational and is welcome, despite its declarative nature. At the same time the drafters propose to eliminate the existing p. 6 “ensuring the right of an accused to the defence”. I have no objection to this because the right to defence is guaranteed in article 33 and 62 of the Constitution. From the point of view of the principles of good legislation, lack of repetition is a better solution.

7. Article 132 declares the principle of independence of judges. There are no substantial changes in the character of immunity as compared with the existing constitution. There is however a new proposal concerning the guarantees of personal security of judges. The draft regulates that: “the State ensures the personal security of judges and their families.” And “The professional interests of judges shall be protected in the manner prescribed by law”. I have strong doubts about this proposal. The state protection can be given to a judge but only in a very concrete situation and hence I am of the opinion that guarantees of the personal security of judges and their families should be regulated by law not by constitution. For that reason I would propose to delete the two new sentences, quoted above from the Constitution.

At the same time, I would like to reinforce my doubts concerning the competencies of Verkhovna Rada to approve that judges be detained or arrested. (It is the same solution now). That decision should be taken by the court or by HJC not by parliament.

8. Article 133 supports the existing solution i.e. the two categories of judges: appointed for permanent terms and appointed for the first time for limited period of time. This solution, (which is a kind of probationary period) always evokes criticism because one argues that it is going against the general principle of the ban of removal of judges. 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. Even if existing in several countries, the institution of probationary judges is not in full conformity with universal and European standards. The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: *"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually"*. Taking this into account the institution of judges appointed for the limited period of time as is proposed in Shapoval's draft should be replaced by judges elected for permanent terms.

In article 133 there are also new proposals aimed to have professional judges who are more experienced and better prepared. Drafters propose to raise the age for the appointing to the office of a professional judge, from 25 to 35 as well as raise the period of professional experience from 3 to 5 years. In my opinion these proposals can be accepted but if it were to be the case, there is no reason for prolonging the institution of judges appointed for a limited period of time in the new Ukrainian constitution. I also see the proposal to delete the condition on residence in Ukraine for no less than ten years as reasonable.

9. In article 133 the drafters propose equal procedure of appointment of judges of both categories. Not only judges for limited period of time but also for a permanent period of time are nominated by the President of Ukraine (not Verkhovna Rada) on the submission by the High Judicial Council. The new procedure is in accordance with Venice Commission opinion. As it was stated in VC document (CDL-JD(2007)001), "At least in respect of new democracies, appointments of ordinary judges 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". The solution is to give the President the right to appoint judges for limited period as well as for an unlimited one, after conducting a selection process and on the proposal of the High Council of Justice. This proposal is welcome. In such a situation, proposed candidates for the post of judge from the HCJ may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it.

10. Article 135 introduces some amendments describing more precisely, the general role of the High Council of Justice as being vested with responsibility to form the professional judiciary. This is exactly the role of HCJ and this precision is welcome. In my opinion however the drafters should go further and describe explicitly the role of HCJ as being guarantor of the independence of courts and judges. It is important in the situation when judges are appointed by the president on the submission by the HCJ. The main task of HCJ is to safeguard the independence of third power and individual judges. The proposed competencies of HCJ don't vary from the competencies in the current Constitution.

11. In article 135 there are new proposals concerning the composition of the HCJ which are aimed at the depolitisation of the Council. Drafters propose reduce the numbers to 15 instead of 20 members. The members of the HCJ are appointed by the Verkhovna Rada, the President, congress of judges of Ukraine, employees of prosecutorial authorities of Ukraine, and defence lawyers of Ukraine (each appoint three members). There are also reservations about the fact that Verkhovna Rada and the President can appoint members from among the retired judges to avoid nominating politicians. The institution of ex office members (Chairperson of the Supreme Court, Minister of Justice, Procurator General) is proposed to be eliminated. This proposal can be accepted

12. One of the key proposals in this draft is the part on the prosecutors office. The separate Chapter currently in existence, in the valid Constitution on the Public Prosecutor's Office is

proposed to be deleted and the regulation on procuracy is to be included into the Chapter VII on Courts and Justice, one may suppose that in the drafters view that the procuracy should be closer connected with the courts, not with executive power, what can be seen as positive solution. The constitutional regulation however is of very general nature (article 136). It could then suggests that the entire concept of the new prosecutor's office is not yet completely elaborated.

13. Despite this objection, article 136 is a proposal of great importance. The drafters propose to deprive the prosecutors of the function of supervision over implementation of rights and freedoms man and citizen, observance of laws on these issues by the organ of executive power, organs of local self-government, their public and official servants, as it is stated now in p. 5) article 121 of the Constitution. This proposal is in accordance with the European guidelines on the role of prosecutor's office. The right of the prosecution to protect human and citizen's rights and freedoms and was always strongly criticised by Venice Commission. In its Opinion (CDL(2004)083), p. 5 states: *"It is recommended that this representation should be limited to cases where the public interest is involved and where is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask State assistance or not"*.

14. Chapter VIII on the Constitutional Court does not introduces any substantive changes as regards to the function of the Constitutional Court. The substantive changes are proposed in the area of the composition and appointment of judges. The drafters propose:

- a) To diminish the number of judges to 12 instead of 18.
- b) That all judges are elected by Verkhovna Rada on the submission of the President of Ukraine with very strong majority by "no less than two-thirds of the total membership of the VR". As a rule appointment of the CC judges by parliament can be accepted. It is the common practice in a majority of European countries. The doubts arisen on the efficiency of such system in the condition of Ukrainian political scene. On the one hand such a strong majority can strengthen the depolitisation of the nomination of judges because a compromise has to be sought with the opposition. On the other hand in a concrete Ukrainian situation it can lead to a constant blockade of the candidates proposed by president in the case that president does not have enough support in parliament to find a compromise.
- c) A renovation of judges every 3 years. I have no objection.
- d) Fifteen years of professional experience. May be this period is too long. It can completely close the path to Constitutional Courts to younger judges.

15. Taking into consideration all the proposed changes, in my opinion there is no need to pass a completely new constitution. The proposed changed can be introduced by way of amendments to existing constitution.