



Strasbourg, 2 July 2010

Opinion No. 588 / 2010

CDL(2010)066
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

EXPLANATORY NOTE

**TO THE
DRAFT LAW OF UKRAINE
ON THE JUDICIARY
AND THE STATUS OF JUDGES**

EXPLANATORY NOTE

To the Draft Law of Ukraine "On the Judiciary and Status of Judges"

1. Justification of the Need to Pass the Law

Fair trial and due protection of human rights and freedoms is one of the main characteristics of a democratic and rule-of-law state.

The Constitution of Ukraine guarantees the protection of human and citizen's rights and freedoms by the court (Article 55).

The Constitution also lays the main foundations of justice (Chapter VIII).

At the same time, the current legislation on the judiciary and the status of judges does not match the current status of social relationships, and requires fundamental change.

Today justice is characterized with violation of terms for consideration of cases, the low quality of court decisions, and a high level of corruption among judges.

Inter alias, this is caused by gaps in procedure law, the system of judicial selection and discipline, and the poor conditions for judicial professional activities.

The need of a complex and systematic reform of the judiciary has been asserted in the findings of international organizations, including the Venice Commission. It is worth paying special attention to decisions of the ECHR regarding the violation by Ukraine of international commitments in the field of adjudication, the number of which grows steadily every year.

The above confirms the need to urgently conduct judicial reform in order to provide for the exercise of the constitutional right of citizens to protection in court taking into account international democratic standards.

2. Goals and Objectives of the Law

The Draft Law aims to establish the legal basis for the judiciary and status of judges in Ukraine.

The goals of passing the Law are:

- judiciary reform in accordance with international standards;
- increase of the role and status of judges in the society;
- provision of judicial independence of influence, including influence within the judiciary;
- simplification of access to court for each citizen.

3. General Characteristics and Main Provisions of the Draft

In order to improve the system of general jurisdiction courts, the draft provides for the establishment of a High Civil and Criminal Court of Ukraine, which would function together with the High Administrative Court and the High Economic Court as the cassation instance.

At the same time, the Supreme Court will retain authority to review cases based on:

- Different application by court (courts) of cassation instance of the same

substantive law norms, which lead to contradictory court judgments in similar cases;

Establishment by an international judicial body, the jurisdiction of which has been recognized by Ukraine, of violation by Ukraine of international commitments in the course of the resolution of a case in court.

This way, a comprehensive approach to considering cases in the cassation instance by high specialized courts is established, and is eliminated the possibility of double cassation, as required by the Decision of the Constitutional Court of Ukraine of March 11, 2010, № 8-пп/2010.

The Draft reduces the number of judges of the Supreme Court of Ukraine to twenty – five judges per each specialized jurisdiction (civil, criminal, commercial and administrative).

The current justices of the Supreme Court shall receive the possibility to transfer to the High Civil and Criminal Court of Ukraine via a simplified procedure, as well as to transfer to other courts. At the same time, the social guarantees established for justices of the Supreme Court shall be preserved.

Justices of the Supreme Court who desire to continue working at the Supreme Court shall remain there, and vacancies shall not be filled-in until the number of judges decreases to twenty.

The Draft provides for the liquidation of military courts. The judges of military courts shall receive the possibility to transfer to general jurisdiction courts, and receive social benefits in case of retirement from judicial or military positions.

The Draft introduces a transparent procedure for first appointment of a judge, including:

- application of candidates directly to the High Qualifications Commission of Judges of Ukraine (HQC) with a clear list of required documents;

- conduction of anonymous testing to verify general theoretical knowledge;

- special training (training in theory – in a specialized legal higher educational establishment of fourth level of accreditation and practical – at the National Judicial School of Ukraine);

- taking of qualifications exam (by means of anonymous testing and case study);

- establishment by the HQC of a rating of candidates based on their qualifications test scores and inclusion of candidates onto the Reserve List for filling-in vacant judicial positions;

- posting the information about the results of the qualifications test and the position of the candidate in the rating on the official Web-portal of the HQC;

- the announcement by the HQC of a competition among the candidates on the Reserve List in case a judicial vacancy is open;

- conduction by the HQC, based on the rating of the candidate and the number of vacancies, of selection of the candidates that participated in the competition, and submission of recommendation to the High Council of Justice (HCJ) about the appointment of the candidate as a judge;

- consideration by the HCJ of the recommendation of the HQC about the

appointment of the candidate as a judge and submission of an application to the President of Ukraine about the appointment of the candidate as a judge;

decision by the President of Ukraine about the appointment of the candidate as a judge.

The procedure for training of candidates for judicial positions shall be paid for exclusively by the state, as far as according to international standards this training has to be free and paid for by the state. This position has been expressed, inter alia, in Clause IIIa of the Recommendation of the Committee of Ministers of the Council of Europe № (94) 12 "Judicial Independence, Efficiency and Role" (1994, art. 2.3 of the European Charter on the Law for Judges 1998).

Besides, in accordance with the findings of the Venice Commission, the participation of the President of Ukraine in the judicial appointment process shall be limited exclusively to verifying the observance of judicial selection and appointment procedures.

According to the Draft, all the issues related to selection and dismissal of judges appointed for a life term (verifications, consideration of applications of natural persons and legal entities, etc.) have to be resolved accordingly by the HCJ and the HQC.

In turn, the acts of the Verkhovna Rada of Ukraine shall reflect the decisions of the above-mentioned bodies. For this reason, a shortened procedure for the selection and dismissal of judges appointed for life is introduced: these items are included on the agenda of the Verkhovna Rada's session out of turn without a vote, and are considered by the Parliament without the findings of parliamentary committees.

The Draft provides for the mandatory appointment as members of the HCJ only of judges, who have been appointed for life.

The Draft also improves and enhances the procedure for disciplining judges.

Unlike the current legislation, the Draft grants the right to apply with a complaint about judicial misconduct, which may become grounds for disciplining the judge, to anyone aware of such facts. Thus, every citizen receives the possibility to protect himself from illicit actions of a judge.

Besides, it is planned to liquidate the territorial qualifications commissions and transfer their authority to the HQC, which improves the procedure for considering disciplinary issues.

The HQC shall have eleven members. The Commission shall include:

six judges appointed by the Congress of Judges of Ukraine;

two persons appointed from among leading scientists of specialized higher law schools of fourth level of accreditation;

one person appointed by the Minister of Justice of Ukraine;

one person appointed by the Ombudsman of the Verkhovna Rada of Ukraine;

one person appointed by the Head of State Judicial Administration of Ukraine (SJA);

Thus, unlike the current law of Ukraine “On the Judiciary” the President of Ukraine shall not have the right to appoint members of the HQC.

According to the Draft, a member of the HQC shall be appointed to consider a specific case using an automated system, in order to provide for a fair consideration of the case.

In order to increase the efficiency of the work of the HQC, the draft introduces administrative liability for failure to provide or untimely provision of information in answer to the inquiries of the HQC or its members.

The service of disciplinary inspectors is introduced to provide for the work of the HQC and increase the quality of disciplinary investigations.

In order to provide for judicial independence in terms of financing, the Draft establishes the SJA as an independent body of the judiciary, the management of which is appointed and dismissed by the Council of Judges of Ukraine.

The Draft accounts for the Decision of the Constitutional Court of Ukraine of March 11, 2010, № 7-пп/2010, in the case about the financial support of the work of the courts. Every general jurisdiction court is specified as a separate administrator of budget funds, which eliminates the possibility to intrude upon the work of the courts in the course of allocation and use of budget funds.

The draft establishes a democratic and transparent procedure for one of the urgent issues of the judiciary – the appointment of judges for administrative positions in courts.

The chief judge of local court, his\her deputy, chief judge of appellate court, his\her deputy shall be appointed for a five-year term from among the judges of that court and shall be removed from office by the HCJ upon the proposal from the respective council of judges.

As far as the majority of members of the HCJ shall be judges, the implementation of this procedure for appointment of judges to administrative positions and their dismissal practically eliminates the influence of executive and legislative authorities upon this process.

In order to eliminate the influence of the chief judge of a court on other judges, the Draft provides for the implementation in all the courts of an automated case management system, including automated case assignment, which currently functions only in administrative courts.

The chief judges are deprived of the authority to influence logistical and maintenance issues for judges of their court, and of any procedural instruments to influence the consideration of the case (through approving recusals, etc.).

The Draft strengthens criminal liability for failure to comply with the decision of a court, and widens the circle of persons, who may be held liable on such grounds. Administrative responsibility for court contempt is also increased.

The Draft raises the requirements to candidates for judicial positions: only judges appointed for life may become judges of appellate and high specialized courts, and only judges with over fifteen years of work experience may become justices of the Supreme Court.

A criminal case against a judge may be initiated only by the Attorney General of Ukraine.

The Draft introduces a simplified procedure for detention or arrest of a judge appointed for life. According to this procedure, Attorney General of Ukraine submits to the Verkhovna Rada the application for detention or arrest of a judge appointed for life. These items are included on the agenda of the Verkhovna Rada's session out of turn without a vote, and are considered by the Parliament without the findings of parliamentary committees at the nearest plenary session.

The Draft also guarantees the right of the judge to give written explanations on the subject matter of the issue, as well as the right to representation in the course of the consideration of the issue in Parliament.

Alongside with higher requirements to candidates for judicial positions and increased accountability of judges, the Draft provides for considerable growth of judicial social welfare.

The salary of a judge shall be determined exclusively by the law, not by regulations, which is in line with the requirements of the Constitution.

The salary of a trial court judge shall be established in the amount of 15 minimal wages established by the law. The dependence of the amount of the salary of a judge on the amount of the minimal wage shall ensure its annual growth, as the amount of the minimal wage is increased by the Law On State Budget for the respective year.

After the implementation of this Law in 2011, the salary of a judge of a trial or appellate court together with all the additional payments shall increase on average more than by 2.5 times.

It is suggested to establish the salaries of the judges of other courts in proportion with the salary of a trial court judge according to the following rating: appellate court judge – 1.1; high specialized court judge – 1.2; Supreme Court judge - 1.3.

Besides, the Draft provides for the establishment of the following additional payments to judges for the length of service: work experience up to 5 years – 15 %, over 5 years – 20 %, over 10 years – 30 %, over 15 years – 40 %, over 20 years – 50 %, over 25 years – 60 %, over 30 years – 70 %, over 35 years – 80 % of the salary.

Judges occupying the positions of deputy chief judge, secretary of the court chamber, secretary of the plenum of a high specialized court, secretary of the Plenum of the Supreme Court of Ukraine shall receive an additional monthly payment of 5 % of the salary, and chief judges – 10 % of the salary of a judge of a respective court.

The approach taken in the Draft provides for the growth of judicial salaries in proportion to their career growth.

The Draft also provides for the liquidation of qualifications classes of judges, the assignment of which is often used as a means of influencing judges. At the same time, it establishes a ban on state awards for judges before their retirement in order to increase their impartiality in administration of justice.

The Draft introduces a series of measures aimed at providing for judicial integrity:

annual submission of income and property statements reflecting both the income and the expenditures of the judge no later than on April 1 to the SJA for publication on the official Web-portal of the judiciary;

the obligation of the judge to include expenditures into the income statement in case the one-time expenditure is higher than his/her monthly salary.

Chapter XII "Final Provisions" of the Draft introduces changes to a number of laws of Ukraine, which are caused herewith. Namely, changes are introduced to the Administrative Adjudication Code of Ukraine, the Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine, the Criminal Procedure Code of Ukraine, the Regulation of the Verkhovna Rada of Ukraine approved by the Law of Ukraine of February 10, 2010 № 1861-VI, the Laws of Ukraine "On Committees of the Verkhovna Rada of Ukraine", "On the High Council of Justice", "On Status of People's Deputy of Ukraine", "On Prosecution".

Besides, changes to the procedure codes aimed at increasing accessibility of justice and improving court procedures are being introduced. In order to achieve this goal, the Draft:

considerably reduces the timeframes for consideration of cases in appellate and cassation instances (e.g. the term for consideration of a cassation claim in commercial procedure is reduced by half – from two months to one);

prohibits the courts of appeal from returning cases for new hearings;

implements the possibility to send subpoenas in administrative adjudication via e-mail and fax;

introduces the right of a person to submit appeals in administrative and civil cases without filing a preliminary application about the intent to appeal.

Chapter XIII "Transitional Provisions" of the Draft provides for a series of transitional activities.

4. Status of Legislation in this Field of Legal Regulation

The issues raised in the Draft are currently regulated by the laws of Ukraine "On the Judiciary", "On Status of Judges", and "On Procedure for Selection and Dismissal of a Professional Judge by the Verkhovna Rada of Ukraine", which shall be declared void.

This field is also regulated by the Administrative Adjudication Code of Ukraine, the Criminal Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine, the Administrative Violations Code of Ukraine, the Budget Code of Ukraine, the Criminal Code of Ukraine, the Regulation of the Verkhovna Rada, the Laws "On High Council of Justice", "On Committees of the Verkhovna Rada of Ukraine", and others.

The implementation of this Draft Law after its passing shall not require the introduction of changes to other laws.

5. Financial Justification

The Draft provides for additional expenditures of the State Budget of Ukraine.

According to the official estimate, in order to establish the High Specialized Civil and Criminal Court of Ukraine UAH 26,375.2 thousand will be required this year. A major part of these funds shall be compensated through the placement of the newly established court into the premises currently occupied by the respective chambers of the Supreme Court of Ukraine, and it will be staffed mostly with the justices of these chambers of the Supreme Court.

Support of the activities of the HQC this year requires UAH 2,656.1 thousand.

In case of passing, the implementation of this Law shall also require additional expenditures for:

implementation of automated case management at the courts (399,500.00 thousand UAH);

increase of judicial salaries (UAH 2,658,294.8 thousand);

increase of court staffing because of the establishment of every court as a separate administrator of budget funds (UAH 94,603.1 thousand).

At the same time, the provisions of the Draft in this part take effect from January 1, 2011, thus, these funds will have to be provided for in the draft law “On State Budget of Ukraine” for the following year.

Besides, after the abolishment of the military courts on September 15, 2010, additional funds in the amount of UAH 6,525.3 thousand shall become available to finance the expenditures connected with the taking effect of this Law, including the financing of the functioning of the HQC in the current year.

6. Estimated Socio-Economic and Other Impact of Passing the Law

The passing of this Law shall become one of the main steps on the way to justices reforming Ukraine’s judiciary.

Deputy Head of Presidential
Administration of Ukraine –
Head of the Main Department for
Judicial Reform and the Judiciary

A.Portnov