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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE LAW OF UKRAINE

ON AMENDING CERTAIN LEGISLATIVE ACTS OF UKRAINE IN RELATION TO PREVENTION OF ABUSE OF THE RIGHT TO APPEAL

by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I refer to previous correspondence including my email dated 4 August 2010 concerning the amendments of the Law of Ukraine in relation to prevention of abuse of the right to appeal.

1. I have now had an opportunity to put in context the amendments to the Code of Administrative Adjudication and to the Law on the High Council of Justice.

2. It is still not altogether clear to me what the intended justification for these laws is and the explanatory memorandum says no more than that the existing situation is unclear and it is desirable to clarify it "to prevent misuse of the right of appeal" whatever is meant by that. No examples of alleged misuse are given. However, it does not really offer any justification for removing the power of appeal and cassation from the administrative courts to the Supreme Court in relation to matters covered by the law. I note the suggestion made by Ukrainian lawyers that such a step is unconstitutional under the law of Ukraine. As I am not a Ukrainian lawyer I do not express any view. However, I repeat what I said in my earlier email that the matters covered by this decision concern matters of the highest importance which are also likely to be politically contentious. While Article 129 of the Constitution of Ukraine provides for a challenge to court decision through appeal and cassation "except in cases established by law" it would seem inappropriate that an ordinary law could exclude cases of the most far-reaching importance from the possibility of appeal or cassation without any justification being offered for the necessity to do so.

3. Under the existing law, the Supreme Court would appear to have competence to review decisions of the administrative courts in certain cases. Article 20.4 of the Code of Administrative Adjudication provides that "the Supreme Court reviews the cases of the administrative courts in exceptional cases". While this provision is not being repealed, under the amendment it will clearly be excluded since under the proposed new Article 171 ¹ it is provided that the decisions covered by this Article can be challenged in the Higher Administrative Court, by a separate distinct chamber of that court, consisting of a panel of at least five judges, and that provision expressly provides that the decision of the Higher Administrative Court in such matters are "final and not reviewable". This would appear clearly to exclude the possibility of applying Article 20.4 of the law in those cases.

4. Under the proposed amendments, the existing Article 171 no longer applies to acts of the Verkhovna Rada (Parliament) or the President, or the High Council of Justice. Although Article 20.4 has not been repealed or amended and although Article 18 now provides that appeals concerning election or referendum results, or acts of parliament, as well as acts of the President, and the High Council of Justice, are to be heard by the High Administrative Court as a first instance court (which would normally imply that some other court hears the same matter as an appellate court), nevertheless the clear wording of the proposed new Article 171 ¹ declaring the decision to be final and not reviewable would seem to exclude any such possibility.

5. There are some other important changes made by the draft law for which again the explanatory memorandum fails to give any real justification. The quorum for the High Council of Justice is now to be a majority of its members not two-thirds as previously. A section meeting of the High Council of Justice requires a quorum of two-thirds rather than three-quarters. Given the importance of the matters dealt with by the High Council of Justice, which include recommendations concerning the termination of office and disciplining of judges, the reduction in the quorum necessary for a meeting would appear to mean a lesser protection for the interests of the judges affected by such decisions. No justification has been offered for these changes. The law on the High Council of Justice is being amended to give a general power to the High Council of Justice to adopt "other deeds". Given that the powers of the High Council of Justice are specified in the Constitution, it is not surprising that some local lawyers have questioned the constitutionality of this provision. Regardless of any question of constitutionality, it seems undesirable that the powers of such an important body as the High Council of

Justice should not be clearly specified and that it should be given a power by ordinary law to adopt "other deeds" which are nowhere defined or limited in the draft law.

6. Article 32 of the Law on the High Council of Justice now includes a definition of what is meant by a breach of a judge's oath. It is not clear why this is being done since breach of oath is already defined in the Law on the Judiciary.

7. The proposed new Article 32 now also requires only a majority of votes on the High Council of Justice, and not two-thirds as heretofore, for a recommendation concerning the dismissal of a judge. This represents a substantial dilution in the rights and interests of judges.

8. Other powers permit the High Council of Justice to demand certain documents and files, including files of cases which are still before a court. The Code for Administrative Infringement is being amended to provide for penalties for failing to provide the High Council of Justice with such information. In principle this would appear to be legitimate, although questions have been raised as to whether sending for papers in a case still before a judge might not be regarded as an interference with judicial independence. Where there is a serious allegation against a judge, however, it can hardly be necessary to allow the judge to proceed to a determination of a particular case before sending for papers if there are reasonable grounds for suspecting there has been an impropriety in relation to the case.

9. I do not have full information as to the practical background to these proposals. I am aware, for example, that a related proposal in relation to the Law on the Judiciary would reduce the membership of the Supreme Court by transferring existing members to other courts. I do not have information in a practical sense as to what changes these proposed amendments to the law will affect in relation to the identity of the actual judges who would now hear cases concerning the dismissal of judges or election petitions or other important matters. I do not, for example, know how this separate distinct chamber of the High Administrative Court which is to deal with these very important matters is to be staffed. Does this mean that this chamber will be staffed with newly appointed judges? If so a question mark arises as to whether it would be possible to staff this court with judges who might be seen as more amenable to decide cases in a particular way than would happen under the existing arrangement. I merely raise this as a question and I emphasize that I have no information whatsoever as to whether this may be the case. However, when evaluating a law of this sort this is the sort of possibility that one always has to consider, if only to exclude it following examination.

10. Finally, Article 117 states that it is "prohibited to secure a lawsuit" by means of the termination of acts or regulations of the parliament, of the President or the High Council of Justice. It is not at all clear to me what is meant by this terminology. It appears to suggest that if there is other litigation in being then that litigation may not be influenced or affected by a decision to declare an act or regulation of the parliament, the President or the High Council of Justice unlawful. However, if this is its effect I fail to see how it can be justified. If a law is unlawful it must surely follow that that fact has to be taken into account in any litigation concerning the matter. It may be that I have misunderstood this provision and in this respect the English used in the translation is somewhat obscure.

11. I would expect that many of the questions concerning the practical effect of this draft legislation may become clearer following the seminar in Kiev in early October.

12. Since writing the above I have seen Hanna Suchocka's opinion with which I agree.