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(VENICE COMMISSION)

UKRAINE

DRAFT OPINION

ON

DRAFT AMENDMENTS TO THE LAW 'ON THE JUDICIARY AND THE
STATUS OF JUDGES' AND CERTAIN LAWS ON THE ACTIVITIES OF
THE SUPREME COURT AND JUDICIAL AUTHORITIES
(DRAFT LAW NO. 3711)

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Table of Contents

I.	Introduction	3
II.	Background	3
A.	General remarks.....	3
B.	Aftermath of Law No. 193-IX and both Constitutional Court decisions	4
C.	Wider context - context of structural reforms.....	5
D.	Thrust of reforms – separate laws vs. a single law	6
III.	Draft Law No. 3711 - Proposal of the President of Ukraine.....	7
A.	Scope.....	7
B.	Legislative process.....	7
C.	Key principles of judicial governance - stability, consistency and coherence of the legal framework.....	8
D.	Relaunching of the HJC under draft law 3711 and forming a Competition Committee.....	9
1.	Competition Committee	9
2.	Conditions to become a member of the HJC	10
3.	End of the mandate of the members of the HJC	11
E.	Additional competences attributed to the HJC	11
F.	Supreme Court (and selection of its judges)	12
1.	Size of the Supreme Court	12
2.	Integration of the Judges of the Supreme Court of Ukraine into the Supreme Court 12	
G.	Judges' discipline	13
IV.	Wider reform of the judiciary.....	14
V.	Conclusion	15

I. Introduction

1. By letter of 7 August 2020, to the Secretary General of the Council of Europe, Marija Pejčinović Burić, the Speaker of the Verkhovna Rada, the Ukrainian Parliament, Mr Dmytro Razumkov, requested an opinion of the Venice Commission on “draft amendments to the Law ‘On the Judiciary and the Status of Judges’ and certain laws on the activities of the Supreme Court and Judicial Authorities” (draft law No. 3711, CDL-REF(2020)061). According to the request, the draft law aims bringing the legislation of Ukraine *“in line with the decisions of the Constitutional Court of Ukraine of 18 February 2020 No. 2-p/2020 and of 11 March 2020 No. 4-p/2020, as well as to improve procedures of the formation and functioning of the bodies of the judicial governance.”*

2. Mr Eşanu, Mr Kuijer, Mr Reissner and Ms Suchocka acted as rapporteurs for this opinion.

3. Due to the COVID-19 crisis, the rapporteurs could not travel to Kyiv. Instead, assisted by Ms Grundmann and Mr Dürr from the Secretariat, they held a series of video meetings between 9 and 14 September 2020 with representatives of the Parliamentary Committee on Legal Policies, Members of Parliament from the majority and opposition, the High Council of Justice, the Supreme Court, the Ministry of Justice, the Office of the President of Ukraine, the Bar Association, international organisations and the diplomatic community, as well as with civil society. The Venice Commission is grateful to the Council of Europe Office in Kyiv for the excellent organisation of these virtual meetings.

4. This opinion was prepared in reliance on the English translation of the draft law, provided by the authorities of Ukraine, as well as on unofficial translations of the consolidated versions of the Law on the Organisation of Courts and the Status of Judges (CDL-REF(2020)068, hereinafter, “LOCSJ”) and of the Law on the High Council of Justice (CDL-REF(2020)067, hereinafter, “LHCJ”). The translations may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation. There may be a problem with a gender neutral translation of the texts.

5. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings held. It was submitted to the written procedure replacing sub-Commissions and was adopted by the Venice Commission at its ... Plenary Session (Venice, ...) held in a hybrid form.*

II. Background

A. General remarks

6. The Venice Commission has been involved in the process of reforming the judiciary in Ukraine for a long time and prepared many opinions on this issue since 1997. The judicial system of Ukraine has been subject to numerous changes in recent years. Following presidential elections, the new political power would often start new changes to the judicial system. In the absence of a holistic approach, various pieces of legislations were adopted that did not have the character of a comprehensive reform.

7. These problems are – at least in part – the result of a poor legislative process: a plethora of bills dealing with specific aspects, often in a rushed manner, a fragmented approach / lack of a holistic approach, no proper impact assessments before further changes are proposed and a lack of clarity. As a logical consequence, some laws are subsequently found unconstitutional by the Constitutional Court and the whole process has to be started again.

8. Another problem is the poor implementation of the laws once they are adopted, possibly due to a continued problem of corruption and a lack of integrity in some parts of the judiciary. However,

institutional reforms cannot be the answer to solve problems that have arisen on account of the personal conduct of some of the members of these institutions.

B. Aftermath of Law No. 193-IX and both Constitutional Court decisions

9. The Commission is aware of the extraordinary urgency of the situation. During the virtual meetings, one interlocutor described the situation as a 'profound crisis' while various other interlocutors said that the country is 'at a crossroads' and that the judicial reform is the most crucial reform of all in Ukraine. What is at stake for the country is more than the billions of Euros of financial support.

10. A serious problem facing the Ukrainian judiciary at the moment are the enormous amount of vacancies for judicial posts, related to the non-functioning of the High Qualification Commission of Judges (hereinafter "HQCJ"). In addition, there is the unresolved issue of the co-existence of two Supreme Courts (see below).

11. As concerns judicial vacancies, it seems that a large number of candidates had already been evaluated by the former HQCJ but their files could not be terminated because the HQCJ was dissolved with immediate effect on 7 November 2019.

12. Draft law No. 3711, which has been submitted to Parliament by the President of Ukraine on 22 June 2020, which is the subject of this opinion, has to be seen in the light of:

1. Law No. 193-IX, adopted by the *Verkhovna Rada* on 16 October 2019 (CDL-REF(2019)039), which made numerous changes to the system of judicial governance and reduced the Supreme Court by half;
2. decision No. 2-p/2020 of the Constitutional Court of 18 February 2020, which annulled large parts of Law No. 193-IX, and
3. decision No. 4-p/2020 of the Constitutional Court of 11 March 2020, which relates to the *de facto* co-existence of two Supreme Courts since the earlier 2016 reform.

13. Upon request by the Monitoring Committee of PACE, the Venice Commission adopted in December 2019 the Opinion CDL-AD(2019)027 (hereinafter, "the 2019 Opinion") on Law No. 193-IX. The main recommendations that opinion were the following:

1. The main focus of reform should be the first and second instance courts. With the entry into force of Law No. 193-IX on 7 November 2019, the High Qualification Council of Judges (HQCJ) had been dissolved with immediate effect. The Commission found this regrettable, because the HQCJ had been in the process of filling some 2000 (!) vacancies at the first and second instance courts. The Commission recommended that new judges who had passed the re-evaluation procedure should be appointed speedily to fill the high number of vacancies. The work that the HQCJ had done so far should be the basis for these urgent nominations.
2. Law No. 193-IX reduced the number of judges of the Supreme Court from a maximum of 200 judges to 100 judges and provided for a vetting of the Supreme Court Judges, even though they all had already been vetted. Judges who would not be selected to remain at the Supreme Court would be transferred to courts of appeal or could be dismissed. According to the Commission's Opinion, the reduction in size of the Supreme Court to 100 effectively amounted to a second vetting and should be removed. The goal of reducing the number of judges could be pursued at a later stage, once the Supreme Court had cleared its current backlog of cases and access filters had become effective for new cases. A future reduction of the number of judges could probably be achieved by means of natural reduction (retirements) or voluntary transfers.
3. The disciplinary procedure should be simplified by reducing the excessive number of remedies available: against disciplinary decisions of the HCJ, an appeal should lie directly with the Supreme Court and no longer with the unreformed Kyiv City Administrative Court

and the administrative court of appeal; on the other hand, some of the deadlines in disciplinary proceedings shortened by Law No. 193-IX should be re-established.

14. Since its dissolution on 7 November 2019, the HQCJ has not been recomposed yet and the judicial vacancies have not been filled. Since the entry into force of Law No. 193-IX, the President of Ukraine has appointed more than 100 judges but they had still been selected by the 'old' HQCJ.

15. Law No. 193-IX intended to establish two mixed national/international bodies, the "Selection Board" to compose the new HQCJ and the "Integrity and Ethics Board" to vet the HCJ and the Supreme Court. These two bodies have not been established.

16. On 18 February 2020, the Constitutional Court adopted decision No. 2-p/2020, which annulled large parts of Law No. 193-IX. The key elements of this decision are the following:

1. decreasing the number of HQCJ members from 16 to 12 process was found unconstitutional;
2. the vetting and the reduction in size of the Supreme Court were annulled because they were not linked to a substantive revision of the Court's functions and the changes had been adopted without proper consultations. The reduction of the salaries of the Supreme Court judges (only) was deemed to infringe judicial independence;
3. in the absence of a constitutional basis, the provisions on the Integrity and Ethics Board were found to violate judicial independence because as a body subordinate to the HCJ it would have taken decisions jointly with the HCJ; the HCJ is a constitutional body and no body attached to it can exercise control over its members;
4. as regards judicial discipline, a number of amendments did not provide for "a reasonable, commensurate (proportionate) and predictable procedure for disciplinary proceedings against a judge, for a just and transparent bringing a judge to disciplinary responsibility" and were of the rule of law and judicial independence. This concerned notably the submission of anonymous complaints against judges, shortened timeframes for consideration of complaints, and the possibility to hear disciplinary cases in the absence of the judge in question.

17. On 11 March 2020, the Constitutional Court adopted decision No. 4-p/2020, that dealt with the earlier reform of 2016, which had established the new "Supreme Court", which was recomposed following a vetting procedure of its judges. Some eight or nine judges of the old "Supreme Court of Ukraine" (the Venice Commission received contradictory information) had either refused to undergo the vetting or failed the vetting. Since then, the judges of the "Supreme Court of Ukraine" had remained in office receiving their salaries but they did not adjudicate cases. In its decision of 11 March 2020, the Constitutional Court decided that only one Court existed that had been renamed from "Supreme Court of Ukraine" to "Supreme Court". As there had been no provisions on the dismissal of judges who were not integrated into the new Court, these judges continued to be judges of the "Supreme Court".

C. Wider context - context of structural reforms

18. During the virtual meetings, the delegation of the Venice Commission learned about allegations of corruption against some members of Judiciary, including the High Council of Judges (hereinafter "HCJ"). Furthermore, the delegation received contradicting information as to the nature and quality of the members of the HCJ having been properly scrutinised in line with applicable rules and about whether all members of the HCJ were appointed in line with the rule that a consecutive appointment for two terms is not permitted. The question of trust in this highest body of the judiciary was a recurrent topic in all of the virtual meetings.

19. The authorities informed the Venice Commission that the current draft law No. 3711 has to be seen in the wider context of the structural reforms of the judiciary agreed with the European Union and the International Monetary Fund but that draft law No. 3711 itself only aims to solve

urgent issues related to the immediate aftermath of Law No. 193-IX and two subsequent Constitutional Court decisions. Further legislation is being prepared to address wider, structural changes. In order to examine draft law No. 3711, this wider context has to be kept in mind.

20. On 23 July 2020, the Ukrainian Government and the European Union concluded a memorandum of understanding, which *inter alia* refers to opinions of the Venice Commission in its annex on structural reform criteria that relate also to the “independence, integrity and effective functioning of the judiciary”.¹ A separate memorandum with the International Monetary Fund provides for similar commitments.

21. These criteria provide for the creation of (a) a new “High Qualification Commission of Judges of Ukraine” through a transparent selection procedure conducted by a Selection Commission with international participation and (b) an “Ethics Commission” with international participation to carry out a one-time assessment of the integrity and ethics of members of the High Council of Justice. The Ethics Commission would recommend to the electing (appointing) authorities the dismissal of HCJ members having failed the vetting. It would also establish a pool of pre-selected candidates from which the electing (appointing) authorities for members of the HCJ would draw their nominations.

22. Draft Law No. 3711 addresses only part (a) of these commitments. The Ukrainian authorities announced another broader draft to implement these commitments that would be submitted to the Venice Commission for opinion. According to the authorities, draft law No. 3711 is considered to be a fast track legislation for the most urgent issues only, whereas further reforms are to be dealt with in a separate law.

D. Thrust of reforms – separate laws vs. a single law

23. In view of the parallelism of urgent and more structural changes set out above, the Venice Commission will analyse draft law No. 3711 as a “fast track” piece of legislation and will therefore recommend removing more structural changes at this point, leaving them to a separate draft law that should have a more holistic outlook. Some interlocutors of the Commission argued that all changes should be included in a single law. However, some of the necessary changes, notably as concerns ensuring the integrity of the members of the HCJ, are more complex and need thorough and inclusive discussion with all stakeholders. There is a real risk that the adoption of a single law at this stage would delay the urgent appointment of judges at the first and second instance courts.

24. In its 2019 Opinion, the Commission insisted that the “*main focus of reform should be the first and second instance courts. New judges who passed the re-evaluation procedure should be appointed speedily to fill the high number of vacancies. The work the HQCJ has done so far should be the basis for these urgent nominations.*”² Therefore, the purpose of draft law No. 3711, as a fast-track law, should be strictly limited to

¹ “... 3. The authorities will strengthen the independence, integrity and effective functioning of the judiciary, the authorities will adopt amendments to the law on judicial reform taking into account the opinions from the Venice Commission, including through legislative amendments, to ensure:

a) the creation of a new High Qualification Commission of Judges of Ukraine through a transparent selection procedure conducted by a Selection Commission with international participation; and
b) the creation of an Ethics Commission with international participation, which would have the mandate to 1) carry out a one-time assessment of the integrity and ethics of members of the High Council of Justice and recommend their dismissal to the electing (appointing) authorities in those cases where the members of the High Council have been found non-complying with the standards, and 2) establish a pool of pre-selected candidates from which the electing (appointing) authorities for members of the High Council of Justice will draw their nominations...”

² Venice Commission, CDL-AD(2019)027, Ukraine - Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, para. 83.

1. Re-establishing the HJCJ enabling it to fill the some 2000 judicial vacancies.
2. Integrating the judges of the "Supreme Court of Ukraine" into the "Supreme Court". This additional change has been made necessary by the decision 4-p/2020 of the Constitutional Court of 11 March 2020.

Further changes should be reserved to future holistic legislation.

III. Draft Law No. 3711 - Proposal of the President of Ukraine

A. Scope

25. Draft Law No. 3711 amends the laws of Ukraine "On the Judiciary and the Status of Judges", "On the High Council of Justice", as well as Section II "Final and Transitional Provisions" of the Law of Ukraine "On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and certain laws of Ukraine regarding activities of the bodies of judicial governance" of 16 October 2019 № 193-IX.

26. Draft Law No. 3711 introduces major changes in five main areas:

- a) new rules on the structure and role of HCJ and on the composition and status of HJCJ,
- b) the establishment of a Competition Commission for the composition of the HJCJ,
- c) the removal of the previously introduced reduction to 100 judges of the Supreme Court,
- d) rules on integrating the remaining eight or nine judges of the Supreme Court of Ukraine into the Supreme Court,
- e) disciplinary proceedings.

27. Before entering into the substance of the proposed amendments, this opinion will refer to the legislative procedure currently under way for the adoption of draft Law No. 3711.

B. Legislative process

28. Following the request of the Speaker of the *Verkhovna Rada*, the current opinion is assessing draft law 3711 initiated by the President of Ukraine which had had its first reading in Parliament. During the video-meetings, the delegation learned of two more initiatives of parliamentarians, draft law no. 3711-1 authored by a member of the opposition party Golos (Voice) and draft law no. 3711-2 authored by a member of the party Servant of the People.

29. In its virtual meeting with the Ministry of Justice, the delegation was informed of their work on a provisional draft law that had just been submitted to the HCJ for consultation. The Venice Commission is aware of criticism expressed on several aspects of the two alternative versions sponsored by parliamentarians as well as of the critical statement of the HCJ concerning the draft of the Ministry of Justice. The Venice Commission cannot examine these other texts but it will refer to proposals contained therein when appropriate.

30. The Venice Commission was informed by the Presidential Administration that there had been extensive consultations on draft law No. 3711 with the stakeholders in the judiciary. The Venice Commission reiterates the importance of proper analysis of the situation and the need for a transparent and inclusive dialogue with all stakeholders³ when changing the legal framework of fundamental state institutions, such as the judiciary, even when some changes need to be made urgently.

31. While Parliament can of course not be bound by comments from these stakeholders, it should seriously consider the merits of the arguments presented. The Venice Commission acknowledges that contrary to the previous process leading to Law No. 193-IX, major

³ See Venice Commission, CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, paras. 9-21.

stakeholders were involved in the preparation of draft law No. 3711. It encourages the Parliament to nourish this dialogue and recommends integrating the different proposals made into their reflections and the legislative process.

C. Key principles of judicial governance - stability, consistency and coherence of the legal framework

32. European standards as concerns judicial independence are reflected *inter alia* in the Venice Commission Report on the Independence of the Judicial System - Part I: “*An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy*”.⁴ In its Opinion No. 10, the Consultative Council of European Judges of the Council of Europe (CCJE) states that “[t]he composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively.”⁵ In the same Opinion, the CCJE insisted that “[m]embers of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality.”⁶

33. In view of the fact that the judicial system of Ukraine has been subject to numerous reforms in recent years, for which the many Venice Commission opinions⁷ and Council of Europe reports provide evidence, the Commission feels the need to reiterate key principles. The principle of stability and consistency of law, as a core element of the rule of law, requires stability in the judicial system.⁸ In one of its recent opinions, the Venice Commission stated that: “*The Venice Commission recalls that, according to the Rule of Law Checklist, clarity, predictability, consistency and coherency of the legislative framework, as well as the stability of the legislation, are major concerns for any legal order based on the principles of the rule of law.*”⁹ There is a clear connection between the stability of the judicial system and its independence. Trust in the judiciary can grow only in the framework of a stable system. While judicial reforms in Ukraine have been considered necessary in order to increase public confidence in the judicial system, persistent institutional instability where reforms follow changes in political power may also be harmful for the public trust in the judiciary as an independent and impartial institution.¹⁰

⁴ Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 48.

⁵ Para. 15.

⁶ Para. 36.

⁷ Venice Commission, CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015; CDL-AD(2015)043, Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027); CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences)..

⁸ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.B.4.i.

⁹ Venice Commission, CDL-AD(2019)014, Romania – Opinion Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, par. 14.

¹⁰ CCJE-BU(2017)11, Bureau of the Consultative Council of European Judges (CCJE), Report on judicial independence and impartiality in the Council of Europe member States in 2017, par. 7. “Public trust in judges may be undermined not only in cases of real, existing and convincingly established infringements, but also where there are sufficient reasons to cast doubt on judicial independence and impartiality”.

34. Ukraine has undergone profound judicial reforms in recent years,¹¹ and the implementation of some of them remains still unfinished. The reform of the process of the selection of judges and the new composition of the Supreme Court, which began its work in January 2018, has been a marked improvement over the system that existed before. It is therefore necessary to provide stability and legislate with a comprehensive and coherent approach when making further changes to the framework governing the judiciary.

35. The Venice Commission observes that due to the numerous unfinished and incoherent attempts to reform the judiciary, the Ukrainian Judiciary rests in a stage of transition. The introduction of an Integrity and Ethics Board, functioning at the HCJ with the aim to ensure transparency and accountability of the members of the HCJ and the HQCJ has failed, as it was declared unconstitutional by the Constitutional Court in March 2020. In its December 2019 opinion, the Commission had already pronounced itself critically on the concrete way this body had been set up.

D. Relaunching of the HQCJ under draft law 3711 and forming a Competition Committee

1. Competition Committee

36. With the entry into force of Law No. 193-IX on 7 November 2019, all members of the HQCJ were immediately dismissed. Already in its 2019 Opinion, the Venice Commission deplored that this measure interrupted all on-going assessment activities, especially the urgent assessment of judges of the first and second instances. This interruption has prolonged the problems of access to court in these instances whose work is directly relevant for citizens.

37. The Commission therefore welcomes the thrust of draft law No. 3711 to re-establish the HQCJ in order to relaunch the selection procedure of first and second instances judges.

38. Draft law 3711 establishes a Competition Committee (somewhat similar to the Selection Board under Law No. 193-IX) for the appointment of the members of the HQCJ. Unlike Law No. 193-IX, draft law No. 3711 does not establish an Integrity and the Ethics Commission to examine the integrity of the members of the HCJ. This matter is indeed more complex and should be dealt with in a separate more holistic manner.

39. The proposed draft law No. 3711 aims at restructuring the position of the HQCJ in relation to the HCJ by subordinating the HQCJ to the HCJ. However, the relationship between these bodies should be addressed only in the framework of a wider reform. Until then, the HCJ should not obtain wider powers in respect of the HQCJ.

¹¹ In its opinion CDL-AD(2017)020 the Venice Commission acknowledged that *“Ukraine has launched a comprehensive reform of the judiciary which includes significant constitutional and legal amendments – i.a with respect to judges’ appointment - , the reform of the High Council of Judges (HCJ) and the High Qualifications Commission of Judges (HQC) (...) This reform is clearly aimed at reconstructing the Ukrainian justice system in accordance with the standards of The Council of Europe and securing the rule of law in Ukraine”*

40. Draft law no. 3711 establishes a Competition Committee (referred to as Selection Board in the framework of Opinion CDL-AD(2019)027) for the re-composition of the HJC. The Competition Committee has a mixed international (three members) / national (three members) composition.

41. The Venice Commission welcomes that the composition of this Competition Committee builds on its earlier opinions, especially as concerns the participation of international experts, notably the opinion on the anti-corruption court in Ukraine¹² where the Commission had stated that “temporarily, international organisations and donors active in providing support for anticorruption programmes in Ukraine should be given a crucial role in the body which is competent for selecting specialised anti-corruption judges ...”. Such a composition fosters the trust of the public and may help in overcoming any problems of corporatism.

42. The Venice Commission reiterates that they should be established only for a transitional period until the envisaged results are achieved. A permanent system might raise issues of constitutional sovereignty.¹³

43. However, in draft Law No. 3711 the scope of international bodies that can nominate international members is much wider than it was for the Selection Board under Law No. 193-IX. This raises some concern. Regarding the international experts, the nominating entities should be as narrow as with the Anti-Corruption Court. The Venice Commission recommends granting nominating powers only to those entities who traditionally co-operate with the Ukraine in the field of the judiciary and already concluded agreements on such co-operation.

44. The amended Article 95-1 (1) (2) LOCSRJ provides that entities which participate in the formation of the Competition Committee (national and international actors) shall nominate persons within twenty days from the date on which the announcement of the competition commencement is published. This means that the respective entities must follow the announcements and act *proprio motu*. Instead there should be a formal request addressed to those international entities which can easily be identified as long-standing partners of Ukraine in the reform of the judiciary, if the recommendation in the previous paragraph were followed.

45. If these entities fail to make nominations, the persons will be nominated by the Commissioner for Human Rights of the Rada within fifteen days. This choice was criticised during the virtual meetings but it seems difficult to identify another neutral actor who could make such nominations.

46. Article 95-1 (9) provides that the Competition Committee shall approve its Rules of Procedure at its very first meeting but this should be possible also at one of the next meetings but as soon as possible.

47. Concerning the procedure, it has to be ensured that the Competition Committee can take into account all relevant information, including registers and sources with limited access.

2. Conditions to become a member of the HJC

48. Under the Law on Courts and the status of Judges in the version before Law No. 193-IX, the HJC was composed of eight judges and eight persons nominated by other entities all appointed by the HCJ. This was in line with CCJE Opinion 17 para 37 on evaluation. Draft law No. 3711 no

¹² Venice Commission, CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences).

¹³ Venice Commission, CDL-AD(2019)027, Ukraine - Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, para. 24.

longer provides for such a condition and it is possible that all members are non-judges. However, the applicable standards should be maintained. The Selection Committee should be able to identify qualified eight judges whose integrity is beyond doubt.

49. The wording of Article 95 (6) (5) LOCSJ is somewhat unclear. The HQCJ candidates must submit "a declaration of the person authorized to perform functions of the state or local self-government for the year preceding the year in which the announcement of the competition commencement was published". If this meant that only persons who are supported by a public official can apply as HQCJ member, then this provision would violate the separation of powers as it would unduly link the candidacies to the HQCJ, a judicial organ, to the discretion of political organs. Such a limitation for candidacies should be removed.

3. End of the mandate of the members of the HQCJ

50. The amended Article 92 (2) LOCSJ provides that the HQCJ has a quorum with 11 of its 16 members. The same paragraph provides a specific rule if the number of members falls below that quorum. In such case, the mandate of the members is extended for a maximum of three months. This rule seems problematic. It should be triggered not only for the last 11 members but for all members. Also the possibility that the mandate of more than one member expires at the same time should be considered. In order to ensure the stability of the HQCJ, the mandate of all members should continue until appointment of a new member replacing them, not only for three months.

E. Additional competences attributed to the HCJ

51. Draft Law No. 3711 attributes a series of new competences to the HCJ, removing them from the HQCJ but also from the State Judicial Administration. This concerns notably the following points relating to the relationship between the HCJ and the HQCJ:

1. Form and content for the application for participation in the selection of candidates Article 71 part 2 (draft point 5);
2. Regulation on the procedure for taking the selection examination and the method of evaluating its results Article 73 part 6 (draft point 6);
3. Agreement on training program for judges Article 77 part 2 (draft Law point 7);
4. Regulation on the procedure for passing the qualification examination and the method of evaluating candidates Article 78 part 5 (Draft Law point 8);
5. Regulation on conducting a competition to fill a vacant judicial office (Article 79 part 2) Draft Law point 9);
6. Procedure and methodology of qualification assessment, indicators of compliance with the criteria of qualification assessment and the means of establishing them Art 83 part 5 (Draft Law point 9);
7. Procedure for conducting the examination and the method of establishing its results regarding the qualification assessment of judges Article 85 part 2 (Draft Law point 9);
8. Formation and maintenance of the personal file of a judge (candidate for judicial office) Article 85 part 6 (Draft Law point 10).

52. Competences shifted from the State Judicial Administration are:

1. Number of judges in courts (Article 19 part 6) (Draft Law point 1) corresponding with Article 2 point 20-2 Law on High Council (Draft Law Final Provisions);
2. Number of judges in specialised chambers (Article 31 part 4) draft law point 2

53. In view of the urgent character of draft law No. 3711 and the prospects of a wider reform, draft law No. 3711 should remain restricted to re-establishing the HQCJ only. No new competences should be attributed to the HCJ.

F. Supreme Court (and selection of its judges)

1. Size of the Supreme Court

54. According to Article 19 (7) LOCSJ currently in force, “[t]he maximum number of judges of the Supreme Court shall be established by this Law.” Law No. 193-IX reduced the maximum number of Judges in Article 37 LOCSJ from 200 to 100. This change, which would have been accompanied by a renewed vetting of the Supreme Court judges and their possible dismissal, was strongly criticized by the 2019 Opinion on the Venice Commission and found unconstitutional by the Constitutional Court in its decision No. 4-r/2020 of 11 March 2020.

55. Draft Law No. 3711 would entirely remove the provision that the maximum number of judges is determined by law (Article 19 (7) LOCSJ) and the provision setting the maximum number of Supreme Court judges to 100 (previously 200), article 37 (1) LOCSJ. This means that there is no more upper limit to the number of judges and the actual number of judges will be determined by the High Council of Justice upon recommendation of State Judicial Administration of Ukraine.

56. According to Article 19 (6) LOCSJ, for any court, including the Supreme Court, the HCJ determines the actual number of judges taking into consideration the judicial workload and this can be done only “within the limits of expenditure specified in the State Budget of Ukraine for maintaining courts and paying judge salaries”. This limits the discretion of the High Council of Justice because it is natural that budgetary constraints must be respected.

57. The HCJ has to respect another condition, that the number of judges shall be determined only “upon recommendations of the State Judicial Administration of Ukraine”. This goes too far as the ability of High Council of Justice is subordinated to the discretion of the State Judicial Administration of Ukraine. The words “upon recommendation” should be replaced with “after consultation” to ensure that the High Council of Justice retains a decisive role. Such a change may require changes also to other articles for coherence (for example article 31).

58. The Venice Commission seizes this opportunity to reiterate that in line with European standards such a reduction of the number of judges of the Supreme Court in any case could not terminate the tenure of sitting judges of the Supreme Court, except if a ground of premature termination exists, which is in line with the Constitution. For any reorganisation of the Supreme Court the basic principles concerning the irremovability of judges have to be respected.

2. Integration of the Judges of the Supreme Court of Ukraine into the Supreme Court

59. Clause 7 of Section XII “Final and transitional provisions” of draft Law No. 3711 transfers the remaining eight judges of the ‘old’ Supreme Court of Ukraine to the Supreme Court.

60. In order to implement the decision 4-p/2020 of Constitutional Court of 11 March 2020, there is indeed an urgent need to resolve the issue of two parallel Supreme Courts in the country. The Constitutional Court held that in the 2016 reform, the old “Supreme Court of Ukraine” was only renamed “Supreme Court” and no new court was created. This is a coherent argument avoiding the existence of two parallel courts. There must indeed be continuity between the ‘old’ and the ‘new’ Court, not least to ensure that the Supreme Court can refer to the case-law of the former Supreme Court of Ukraine. The registration of the Supreme Court as a new legal entity, in addition to the Supreme Court of Ukraine was clearly not a useful step. The decision of the Constitutional Court corrects that error. In general, what matters is the situation as set out in the law, not the formal registration of a legal entity, which nevertheless should be corrected.

61. Draft law No. 3711 follows the Constitutional Court’s decision when it orders the integration of the judges of the old Supreme Court of Ukraine into the Supreme Court. However, the provision

which dissolves the Supreme Court of Ukraine should be removed as it contradicts the Court's decision, as the Court decided that there was always one Court only (clause 7 of Section XII LJSH, as amended by point 19 of the draft law).

62. The draft law No. 3711 subjects the eight remaining judges of the Supreme Court of Ukraine to a qualification assessment within one year. Should this assessment be negative or should the judge refuse to undergo it, this shall be ground for dismissal.

63. The absence of a provision on the dismissal of judges who refused to undergo the vetting procedure or who failed it was clearly a lacuna of the 2016 reform. The Constitutional Court held that those judges are still part of the single Court.

64. It may be seen as discriminatory that some judges can become member of the new Court without having undergone the vetting procedure, but this is the clear conclusion of the Constitutional Court. Therefore, subjecting them now to the vetting that they refused or failed some time ago is not an option and the provisions on the vetting of the 'old' judges should be removed from draft law No. 3711.

65. Should there be any problems as to the integrity of these judges, these will have to be settled through ordinary disciplinary procedures but cannot be dealt with on the level of the law, within the limits of the decision of the Constitutional Court. A specific assessment of these judges seems excluded but the regular assessment according to section 5 chapter 1 of the Law on Courts and the Status of Judges would be applicable to these judges as to any other judge of the Supreme Court.

G. Judges' discipline

66. Article 96 (4) and (5) provides that when facts are revealed that may result in the dismissal of a member of the HJCJ, the HCJ shall take a decision to verify such facts. From the date of the decision to initiate this verification, the member of the Committee shall be removed from office, and his or her powers shall be suspended until the HCJ adopts its decision.

67. This solution is problematic from the point of view of the efficiency of the body, as its activity can be blocked due to the small number of members. And it is also problematic from the point of view of the rights of the member. The authors of the draft established the presumption of guilt and provided automatic suspension of a member concerned, even before the verification is started, without any possibility to take in consideration the concrete circumstances of the cases. Whereas there can arguably be cases when suspension is possible and even necessary, this must be the exception and not the rule.

68. The Venice Commission re-iterates its recommendation that the administrative court procedure against decisions of the HCJ/HJCJ should not start at the first instance level. The 2019 Opinion recommended attributing this function directly to the Supreme Court. During the video-meeting, the Presidential administration expressed the opinion that first instance decisions by the Supreme Court would be contrary to its (new) character as a cassation court.

69. To overcome this issue, it seems that there is a proposal to consider such cases as pilot cases that would be rare. In reply, the presidential administration refers to a high number of appeals against government appointments, which all are now dealt with by the Kiev City Administrative Court.

70. The Venice Commission insists that in its 2019 Opinion it had referred exclusively to decisions in judicial disciplinary cases and not to appeals against all governmental appointments. At the

very least, the Kiev City Administrative Court, which remains unreformed¹⁴, should not act as first instance.

IV. Wider reform of the judiciary

71. This opinion specifically covers draft law No. 3711 and examines neither the alternative drafts No. 3711-1 and 3711-2 nor a recent preliminary draft of the Ministry of Justice, which is not yet public.

72. In his request for the opinion, the Speaker of the Rada pointed out that the draft should “improve procedures of the formation and functioning of the bodies of the judicial governance.” The Venice Commission cannot avoid referring also to the wider context of structural reforms that should be addressed in a holistic manner, including in view of the recent commitments of Ukraine towards the European Union and the International Monetary Fund, which aim to foster that appointments are made in a trustworthy framework.

73. The Venice Commission has always underlined the importance of the diversity of systems, pointing out that there is no single „non-political” model for appointing judges which could be implemented in all countries but the adopted solution has to guarantee the independence of the judiciary.

74. In the light of proposals made in the alternative drafts and arguments presented during the video meetings, the Commission can provide a few guideposts for addressing these wider issues:

1. The Constitution prescribes by whom the members of the HCJ are elected (Article 131 (2)) and delegates the election procedure to the legislator. (Article 131 (3)). It limits the tenure of office to four years (Article 131 (5)), but it contains nothing about the pre-term termination of the mandate.
2. In order to overcome a specific situation, such as problems of integrity, mixed national / international bodies should have a mandate clearly limited in time.
3. Civil society could be given an advisory role, not binding the constitutional competent bodies, within such a body.
4. The constitutional basis for such mixed bodies is Article 131 of the Constitution, which enables the establishment of other bodies within the justice system. As there is no limitation of the tasks of such bodies they can also deal with disciplinary matters or assessment, as long as they do not infringe the deciding competence of existing constitutional bodies. An involvement of such mixed bodies as advisory bodies, e.g. to prepare decisions for dismissal by the appointing bodies, seems to be consistent with the Constitution.
5. In the light of the decision of the Constitutional Court of February 2020, such a mixed national/international body cannot be part of the HCJ, the very integrity of which it is to examine.
6. There is more leeway for binding decisions of such a mixed body as concerns future members of the HCJ, who can be vetted before they are appointed.
7. Only candidates who successfully pass the evaluation by the mixed body could be appointed by the competent appointing body, which would not rank candidates but simply state whether they can apply or not.
8. The requirement of a vote of 14 of the 21 members of the HCJ (excluding the member concerned) for a proposal to dismiss one of its members (Article 24 of the Law on HCJ) seems too high and may need to be reduced.

¹⁴ During the video-conference, the HCJ informed the Venice Commission, that its recent decision rejecting proceedings against member of the Kiev City Administrative referred irregular notification of the persons concerned and that new proceedings, following the applicable procedure, can be instituted again.

9. In the long term, once the measures of integrity are in place and proven and the high number of first and second instance judges are appointed by the HQCJ, the size of the latter could be reduced and eventually its tasks could be transferred to the HCJ, as the Venice Commission has recommended for some time. Indeed, in several opinions the Venice Commission recommended that the system of judicial appointment must be coherent and was critical as to the complicated structure of the different bodies.
10. In addition, concerns over some judges of the Supreme Court persist. No new vetting of the judges already vetted can be envisaged, but a reformed HCJ should be able to efficiently deal with specific individual cases in the framework of disciplinary procedures.

75. In any case, the applicable European standards on the independence of the judiciary have to be respected in the future reform.

V. Conclusion

76. Already in its Opinion CDL(2019)028, the Venice Commission recognises the urgency of the need to appoint the some 2000 judges of the first and second instance courts. The Commission stated that “[t]he main focus of reform should be the first and second instance courts. New judges who passed the re-evaluation procedure should be appointed speedily to fill the high number of vacancies. The work the HQCJ has done so far should be the basis for these urgent nominations.”¹⁵

77. Draft Law No. 3711 is only a part of a step in the right direction. According to its drafters at the Presidential Administration, draft law No. 3711 is of limited scope and intends to settle only urgent matters. Wider reform of the judiciary is envisaged in separate legislation, including to implement recent commitments of Ukraine towards the European Union and the International Monetary Fund.

78. The Venice Commission is faced with a dilemma: on the one hand there is a real need for a “quick fix” for the High Qualification Commission of Judges so that - hopefully - judicial vacancies can be filled as soon as possible, and, on the other hand, it has to be ensured that an HQCJ without doubts of integrity be established for that purpose. The Venice Commission can accept the idea of a “quick fix” because (a) the Competition Committee should ensure the integrity of the HQCJ before it commences its work, and (b) elements in in draft Law No. 3711 that would subject the HQCJ to the HCJ should be removed.

79. In view of this urgency, draft Law No. 3711 should remain strictly limited to the re-establishment of the HQCJ and the integration of the judges of the Supreme Court of Ukraine, which is necessary due to decision No. 4-p/2020 of 11 March 2020 of the Constitutional Court. Draft Law No. 3711 as it was presented covers these topics, but it goes much further than these urgent needs as it also fully subordinates the HQCJ to the HCJ.

80. However, the relationship between these two judicial governance bodies is a complex topic and this issue should be addressed only in the framework of a wider reform. Therefore, these provisions should be removed and the new HQCJ should have full autonomy, like the dissolved HQCJ, especially be able to establish its own rules of procedure. The new HQCJ should build on the work of its predecessor and it should be free from interference from the HCJ.

81. The new HQCJ members need of course to be carefully selected before they commence with their tasks. Draft Law No. 3711 maintains a mixed national / international body, the Competition Committee for the selection of the new members of the HQCJ. This follows the successful model chosen for the Anti-Corruption Court and is welcome.

¹⁵ Para 85; emphasis added.

82. The current draft however widens the scope of bodies which can nominate international experts. Instead the circle of possible nominating entities should remain as narrow as with the Anti-Corruption Court. The Venice Commission recommends granting nomination powers only to those entities who traditionally co-operate with the Ukraine in the field of the judiciary and have already concluded agreements on such co-operation. There should be a formal request addressed to those international entities to make nominations.

83. As already pointed out in the 2019 Opinion, the sequencing of changes is important.¹⁶ This opinion cannot deal with the wider reforms and provides only a few reflections on questions the integrity of the members of judiciary, including the HCJ. The long-term goal of a merger of the HCJ and the HJCJ should be the final point only of such reforms, once (a) the current problems of appointments are settled through draft law No. 3711 (b) issues of integrity in the judiciary, including the HCJ are settled.

84. The second issue that draft law No. 3711 can settle is the integration of the judges of the "Supreme Court of Ukraine" into the "Supreme Court". This change has been made necessary by the decision of the Constitutional Court of 11 March 2020. Even though this may create discrimination as compared to the other judges of the Supreme Court, a vetting of these eight judges seems precluded by the judgment of the Constitutional Court. Any problems concerning competence or ethics will have to be settled through ordinary disciplinary mechanisms, as they are available for all judges.

85. As draft law No. 3711 cannot bring about a holistic reform, this opinion cannot have a character of a "holistic opinion". The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance, notably as concerns the wider reform.

¹⁶ Paras. 48 and 84.