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(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON THE AMENDMENTS TO THE CONSTITUTION, STRENGTHENING THE INDEPENDENCE OF JUDGES

AND

ON THE CHANGES TO THE CONSTITUTION PROPOSED BY THE CONSTITUTIONAL ASSEMBLY

OF UKRAINE

Adopted by the Venice Commission
at its 95th Plenary Session
(Venice, 14-15 June 2013)

on the basis of comments by

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Table of Contents

I. Introduction 3
II. General remarks 3
III. Earlier opinions of the Venice Commission on the Judiciary in Ukraine 4
IV. Draft Law “on the amendments to the Constitution of Ukraine on the enhancement of the guarantee of the independence of judges” 4
A. Appointment of judges - Article 85(27) and to Article 106(23) 4
B. Court structure - Article 125 4
C. Probationary periods – Article 126 and 128 5
D. Immunity and dismissal - Article 126 5
E. Appointment criteria - Article 127 7
F. Appointing organ - Article 128 7
G. Allocation of cases - Article 129 7
H. High Council of the Judiciary - Article 131 8
I. Final and transitional provisions 10
V. Changes to the Constitution of Ukraine proposed by the Constitutional Assembly 10
VI. Conclusions 12

I. Introduction

1. On 29 March 2013, the Venice Commission received a request for an opinion by Mr L. Kravchuk, Chairman of the Constitutional Assembly, on the draft Law "*on the amendments to the Constitution of Ukraine on the enhancement of the guarantee of the independence of judges*" and on the "*Changes to the Constitution of Ukraine proposed by the Constitutional Assembly*".

2. A delegation of the Venice Commission, composed of Mr Hamilton, Ms Suchocka, Mr Tanchev and Mr Tuori, accompanied by Mr Markert and Ms Mychelova from the Secretariat, visited Kyiv at the beginning of December 2012, to meet with different stakeholders on the constitutional reform in Ukraine. During these meetings, different views on the substance and timetable of the constitutional reform were expressed. The Venice Commission's delegation took part in a plenary meeting of the Constitutional Assembly to discuss the first draft project on constitutional amendments to the Chapter on the Judiciary, prepared by the Presidential Administration. The delegation also held a series of informative and productive meetings with Mr Kravchuk, experts from the presidential administration, parliamentarians and leaders of the opposition parties and representatives of the diplomatic community. However, the opposition was reluctant from the outset to join the work on the constitutional amendments and the sessions of the Constitutional Assembly.

3. The Venice Commission invited Mr Hamilton, Ms Suchocka, Mr Tanchev and Mr Tuori to act as rapporteurs for this opinion.

4. The present opinion was adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013).

II. General remarks

5. This Opinion deals with two separate texts: the draft Law "*on the amendments to the Constitution of Ukraine on the enhancement of the guarantee of the independence of judges*" (hereinafter, the "Amendments") and the proposed Changes made by the Constitutional Assembly, which have not yet taken the form of a legislative text.

6. The Amendments are a product of the discussions in the Constitutional Assembly, but are based on a draft prepared by a working group of the Presidential Administration. This could raise doubts with respect to the inclusiveness of the Constitutional Assembly, which could have been avoided if the Constitutional Assembly's work had been based on drafts produced by its own working parties.

7. The changes to the Constitution, proposed by the Constitutional Assembly, will be submitted to the *Verkhovna Rada* (hereinafter, the "Parliament") as part of a more comprehensive constitutional reform.

8. This opinion is based on an English translation of the Amendments and the Proposals (see CDL-REF(2013)020). The translation may not accurately reflect the original version on all points and, consequently, certain comments may be due to problems in the translation. In particular, while the translation of the Proposal refers to the "Supreme Council of Justice" in point 2, amending Article 85 of the Constitution, it refers to the "High Council of Justice" in point 4, amending Article 126 of the Constitution. This seems to be the same body. In line with earlier opinions and the English text of the Constitution, this Opinion will refer to the High Council of Justice (hereinafter, the "HCJ").

III. Earlier opinions of the Venice Commission on the Judiciary in Ukraine

9. The Venice Commission has provided several opinions on Ukraine's judiciary[1]. It has also expressed its views on the judicial system in two general reports: 1) on Judicial Appointments[2] and 2) on the Independence of the Judicial System Part I: the Independence of Judges[3].

10. In its earlier opinions, the Venice Commission raised the following questions that have an important impact on the independence of the judiciary in Ukraine: (1) the appointment of judges, (2) the role of Parliament in the appointment process, (3) the role and the composition of the HCJ and (4) the scope of judges' immunity.

IV. Draft Law "on the amendments to the Constitution of Ukraine on the enhancement of the guarantee of the independence of judges"

A. Appointment of judges - Article 85(27) and to Article 106(23)

11. The Amendment deletes from Article 85 the provision empowering Parliament to elect the judges for permanent terms. Instead, the power of Parliament will be to determine the network[4], establishment, reorganisation and abolition of the courts of general jurisdiction upon the motion of the President of Ukraine.

12. This amendment is a logical consequence of the change in Article 106(23), which provides that (the President) *"upon and in accordance with the motion of the High Council of Justice appoints the judges to their positions and dismisses them from their positions".* The Venice Commission welcomes the ceremonial position the President now holds in this respect.[5]

13. These changes to Article 85 and Article 106 are in line with the principle of the separation of powers and affirm the balance and co-operation between the legislative and executive branches, with the aim of ensuring the independence of the judiciary. The powers of Parliament and the President in establishing the court structure and the appointment of judges by the head of state acting on a proposition of the HCJ are designed to limit political influence and partisan pressure on the judiciary.

14. The Venice Commission has, on many occasions, criticised the danger of political influence on appointments to the judiciary of Ukraine. Consequently, these provisions are to be welcomed.

B. Court structure - Article 125

15. Article 125 will be amended to provide that the network of courts and general jurisdiction is to be determined by law, and that the courts are to be established, reorganised and abolished through the law. The intention behind this provision is to prevent such changes being made by means of a decree. Parliament will be empowered (see Article 85) with the right to determine the structure of the court system (called "network" in the Amendments), to establish, to

[1] See Opinion on the draft Law on the judiciary and the draft Law on the status of judges of Ukraine, CDL-AD(2007)003; Opinion on the draft Constitution of Ukraine (prepared by a working group headed by Mr V.M. Shapoval), CDL-AD(2008)015); Joint Opinion on the draft Law on the judicial system and the status of judges of Ukraine, CDL-AD(2010)003; Joint Opinion on the Law on the judicial system and the status of judges of Ukraine, CDL-AD(2010)026; Joint Opinion on the draft Law amending the Law on the judiciary and the status of judges and other legislative acts of Ukraine, CDL-AD(2011)033.
[2] See Report on Judicial Appointments, CDL-AD(2007)028.
[3] See Report on the independence of the judicial system Part I: the independence of judges, CDL-AD(2010)004.
[4] In Ukraine, the term "network" refers to the court structure.
[5] See Joint Opinion on the Law on the judicial system and the status of judges of Ukraine, CDL-AD(2010)026, paragraph 51.

reorganise and to abolish the courts upon the motion of the President of Ukraine. This solution seems to be reasonable and involves the co-operation between various organs. The Venice Commission welcomes that in the future the network will be defined by law.

C. Probationary periods – Article 126 and 128

16. In Article 126, the Amendment deletes the words "*judges appointed to the position for the first time*" from the text of the Constitution. The amended Article 128 provides for appointment without a time limit. Therefore, In the light of the new proposal, the category of judges nominated for a limited period of time no longer exists.

17. One of the main issues that needed to be addressed was the question of the judges' probationary period. The current Constitution of Ukraine provides two consecutive categories of judges, which works as follows: (1) judges are nominated for the first time for a limited period of time (i.e. 5 years) and these judges should then (2) be nominated for an unlimited period of time. The probationary period was criticised from the outset as going against the general principle of the irremovability of judges and the involvement of Parliament, as a political body, in the nomination of judges was also criticised. This is all the more serious when the procedure for the nomination for an unlimited period of time is not very clear. The criticism made indicates that this *probationary period* could restrict a judge's impartiality and independence, since s/he may issue rulings or verdicts in view of ensuring his/her future permanent nomination. The Venice Commission was very critical of the probationary period. In its Opinion on the draft Law on the Judiciary and the draft Law on the Status of Judges of Ukraine, the Venice Commission stated that:

> *"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)".*[6]

18. The abolition of probationary periods is welcomed and in line with the Venice Commission's recommendations. The Amendment provides for only one category of judges appointed for an unlimited period of time.[7]

D. Immunity and dismissal - Article 126

19. The existing provision whereby a judge cannot be arrested or detained without the consent of Parliament will be substituted by a provision that the consent of the HCJ is required. This represents a considerable improvement on the existing provision. However, no criteria on the basis of which consent is to be granted or refused are provided. The Venice Commission has frequently expressed the view that judges should only have

[6] See Opinion on the Draft Law on the Judiciary and the draft Law on the Status of Judges of Ukraine, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), CDL-AD(2007)003, paragraph 26. It was also stated that a change of Article 126 of the Constitution would be required to overcome this problem.

[7] Of course, trainee judges could be asked to assist appointed judges in drafting, but the judgment must be given under the authority of the judge alone.

functional immunity[8], i.e. immunity for acts done in the course of their judicial function, or such immunity as may be necessary to protect the independence of the judiciary against the threat from wrongful arrest:

> *"…judges should enjoy only functional immunity, that is to say immunity from prosecution only for lawful acts performed in carrying out their functions. In this regard, it seems obvious that passive corruption, traffic of influence, bribery, and similar offences cannot be considered as acts committed in the lawful exercise of judicial functions."* [9]

20. Unless there are manifest indications of a false accusation levelled against a judge by the prosecutor, the acts of a judge should not be removed from the scrutiny of an independent court (see below). Where there are reasonable grounds for believing that a judge is guilty of having committed a criminal offence s/he should not be entitled to immunity and the HCJ should lift immunity, notably also in cases of corruption. It is reasonable that the HCJ should have the function of deciding whether to lift a judge's immunity, but the criteria when to do this should be spelt out.

21. The wording of Article 126 concerning the dismissal of Constitutional Court judges, especially the grounds for dismissal, is not very clear and raises some doubts, notably on whether the conditions for the dismissal of judges are also applicable to judges of the Constitutional Court or only to the judges of ordinary courts. The dismissal of Constitutional Court judges should be regulated in the Chapter on that Court only.

22. In addition, this provision should draw a distinction between cases of proper dismissals and other situations, such as reaching retirement age, which is not a ground for dismissal, but the end of a term of office. The Venice Commission recommends that the word "dismissed" be taken out from the heading of the amendment.

23. A number of changes have been made to the criteria for the dismissal of a judge. Firstly, the retirement age is to be increased from 65 to 70. Secondly, legal incapacity is to be added to the list of grounds for dismissal. Currently, a judge may also be dismissed where his/her court is eliminated or reorganised and s/he does not consent to being transferred. However, according to the subsequent provisions amending Articles 128 and 131 the High Commission of Ukraine for Qualification of Judges will be responsible for making the transfer recommendation and this seems to be a sufficient safeguard against possible abuse.

24. The Venice Commission has consistently pointed out that the breach of oath is too vague as a standard for the dismissal of judges[10]. The European Court of Human Rights' judgment in the recent case of *Oleksandr Volkov v. Ukraine*[11] has also expressed concern over the breach of oath as a ground for the dismissal of judges and the possibility of an overly broad and inaccurate interpretation. The 'breach of oath' has to be replaced by clearly defined offences on the legislative level.

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[8] In the opinion of the Venice Commission "*judges should enjoy functional – but only functional – immunity*." (see Report on the Independence of the judicial system Part I: the independence of judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004, paragraph 82.10).

[9] See *Amicus curiae* brief on the Immunity of judges for the Constitutional Court of Moldova, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), CDL-AD(2013)008, paragraph 19.

[10] Opinion on the draft Law of Ukraine Amending the Constitution presented by the President of Ukraine, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), CDL-AD(2009)024, paragraph 90; Joint Opinion on the Law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal, by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), CDL-AD(2010)029, paragraph 43.

[11] Application no. 21722/11, Judgment (merits) of 9 January 2013, paragraphs 163, 181 and 185.

25. From a systematic point of view, consideration should be given to moving the procedure and the grounds for dismissal of the Constitutional Court judges to the Chapter on the Constitutional Court. In addition to safeguarding the functioning and stability of the constitutional judiciary, the Venice Commission has recommended in the past that a judge (of the Constitutional Court) remain in office after his/her term has expired until the judge's successor takes office.[12]

E. Appointment criteria - Article 127

26. Article 127 proposes to require newly appointed judges to be 30 years old as against the current 25 and to have five years rather than three years' experience. These provisions seem to be reasonable. It will also be provided in the Constitution that the selection of candidates to be judges is to be done on a competitive basis. This appears to be a desirable provision. It is however not clear what kind of experience is needed.

27. The selection of the candidates for the positions of judges is done through contest and this is to be welcomed as corresponding to the best practices in the international and European legal standards on the judiciary.

F. Appointing organ - Article 128

28. Another issue concerns the organ authorised to appoint judges. The Venice Commission had pointed out that the *"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."* [13]

29. This suggestion has also been taken into account and thus the Amendments propose new regulations in Article 106 and Article 128 saying that *"appointment to the position of judge is done for unlimited term by the President of Ukraine upon and in accordance with a motion of the High Council of Justice."* The right to appointment is shared by the President (for five years) and Parliament (for an unlimited period of time) in the current Constitution. In the light of the new proposal - instead of Parliament - the decision will be made by the President who will appoint the judge on the basis of a binding proposal of the HCJ for a permanent period of time. With this provision, the President's role has become a ceremonial one, which is to be welcomed.

30. In addition, a judge can only be transferred with his/her consent, unless there is a reorganisation (etc.) of the courts (see Article 85 above) made by Parliament (i.e. not a mere internal reorganisation in a court). This exception should be set out in this provision.

G. Allocation of cases - Article 129

31. Article 129 will add to the main principles of judicial proceedings the principle of automatic allocation of cases. The Venice Commission's view on this, as set out in its Report on the independence of the judicial system Part I: the independence of judges, is as follows:

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[12] See Opinion on Possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, CDL-AD(2006)016, adopted by the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006), paragraph 13.

[13] See Opinion on the Draft Law on the Judiciary and the draft Law on the Status of Judges of Ukraine, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), CDL-AD(2007)003, paragraph 29.

"80. In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria. This can be done for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges will sit on that case. The criteria for taking such decisions by the court president or presidium should, however, be defined in advance. Ideally, this allocation should be subject to review.

81. To sum up, ***the Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated.*** *"* [14]

32. The automated allocation of cases under Article 129 is therefore in line with Venice Commission recommendations. This is a very welcome change.

H. High Council of the Judiciary - Article 131

33. There are a number of changes to Article 131 that deal with the HCJ. The first of these provides that appointments to administrative positions are to be made by the HCJ on the motion of the respective councils of the judges, "*except for the Supreme Court of Ukraine*". This means that appointments of judges to the Supreme Court are not covered by this provision.

34. In the Report on the independence of the judicial system Part I: the independence of judges, the Venice Commission said *"owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries.*"[15]

35. As concerns the establishment of a council of justice, the Venice Commission, while respecting the variety of legal systems, recommends that where it is established, the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe calls for at least half of the members to be judges.[16] With the exception of *ex officio* members, these judges should be elected or appointed by their peers.

[14] See Report on the independence of the judicial system Part I: the independence of judges, CDL-AD(2010)004, paragraphs 80-81.
[15] Ibid., paragraph 32.
[16] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), paragraph 27.

36. Taking this into account, it was pointed out in many of the Venice Commission's opinions that the Constitution of Ukraine should be changed as regards the composition of the HCJ. The method of composition of the HCJ was severely criticised by the European Court of Human Rights in the recent case of *Oleksandr Volkov v. Ukraine*[17].

37. Article 131 therefore proposes an entirely new composition of the HCJ. At present, out of 20 members only three are elected by the judges and in addition the chairman of the Supreme Court is a member. The new proposal is for the judges to elect 12 members providing representation from the different levels and specialisations of courts. The Bar and legal academics are to appoint two members each. The remaining four members are, *ex officio*, the heads of the Constitutional Court and the Supreme Court, the Chairman of the Council of Judges, and the Prosecutor General. This seems to be an improvement on the current composition. However, in order to guarantee the independence of the HCJ, the bodies electing or appointing its members must themselves be composed in an appropriate manner. As concerns the judges' component, it must be ensured that judges of all levels carry equal weight in the election. Judges of the highest courts should not have a stronger position in the election. As for the Bar, the Law on the Bar will need to be amended to provide for a democratic election of the Bar's representatives in the HCJ.[18] The same applies to the Congress of the Representatives of Legal Academia.

38. The Prosecutor General remains a member of the HCJ. The Explanatory Note to the Amendments sets out that:

> *"The All-Ukraine Conference of the Members of the Office of the Prosecutor General in accordance with the proposed changes to article 131 of the Constitution of Ukraine loses the status of the subject authorized to appoint its representatives to the Supreme Council of Justice. Only the Prosecutor General of Ukraine shall be a permanent member of the Supreme Council of Justice. The reason for his keeping the status of a member of the Supreme Council of Justice is that the Supreme Council of Justice continues to exercise its decision-making authority with regard to the breaches of the incompatibility requirements by the prosecutors, as well as the power to consider the appeals against the decisions on disciplinary sanctions against prosecutors. In view of these aspects it seems necessary to provide for at least minimal representation of the members of the Prosecutor General's Office."*

39. The presence of the Prosecutor General in the HCJ may be problematic[19] when decisions on the career of judges and in particular their discipline, are made. Then again, the HCJ is also competent to deal with the careers and discipline of prosecutors. Consideration should be given to provide the Prosecutor General with only a vote in respect of matters concerning prosecutors. Alternatively, two separate chambers could be set up in the HCJ, one dealing with judges and the other with prosecutors on matters concerning the career and discipline of the respective professions.

40. Finally, in part three of Article 126, the Amendments refer to the judges' qualification commission. The Venice Commission maintains its position that there is no need for two separate bodies. However, if both the High Qualifications Commission and the HCJ were

[17] Application no. 21722/11, Judgment (merits) of 9 January 2013, paragraphs 109-117.
[18] See also CDL-AD(2011)039, Joint Opinion on the draft Law on the Bar and practice of law of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), paragraph 103.
[19] Ibid., paragraph 113.

maintained, both have to be independent and the procedure of both organs would have to be transparent.[20]

I. Final and transitional provisions

41. These provisions were designed to provide a smooth enforcement of the amended Articles within the context of the Constitution in force and the constitutional legislation. They are also supposed to resolve all the collisions resulting from the temporary entry into force of the new provisions on all pending cases waiting to be resolved or procedures to be completed, terms of office and disciplinary procedures created with the Amendments.

42. However, the Venice Commission would recommend that the Ukrainian authorities reconsider terminating the mandate of the current [judicial] members of the HCJ and allow them to complete their mandate. In this respect, transitional measures, which bring the current HCJ closer to its future composition, could be considered.

V. Changes to the Constitution of Ukraine proposed by the Constitutional Assembly

43. In addition, the Venice Commission has been asked for its opinion on a number of proposals from the Constitutional Assembly. These are set out in a letter from the Chairman of the Assembly to the Venice Commission. However, it seems that not all of the proposals of the Constitutional Assembly's working groups were included in this letter. By supplementing the text of the Chapter on the Judiciary, a number of these proposals would make the amendments more valuable and it is regrettable that they were not included in the text of the Amendments.

44. There is a proposal to include principles deriving from the European Convention on Human Rights in the Constitution, such as the right of an individual to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law as well as the right to appeal. This would be a useful explicit addition to Article 55 of the Constitution.

45. According to another proposal, the Constitution should set out the powers of the Supreme Court and in particular those that provide for its function to ensure the uniform application of the law. In the light of the previous reduction of the jurisdiction of the Supreme Court, which only partly has been attenuated, such a provision would seem highly desirable. The constitutional reform and the problems related to the relationship between the high specialised courts and the Supreme Court should also be the occasion to consider whether Ukraine needs four levels of jurisdiction or whether three levels might be enough. Obviously this would require a further amendment of Article 125 of the Constitution.

46. According to one proposal, the Supreme Court should have the right to initiate legislation. However, this would drag the Court into the political sphere because it would have to defend its proposals in the political arena.

47. There is a proposal to introduce elected justices of the peace. It is not clear what is intended. There is no problem with introducing lay judges, but this should not be done through popular elections. Judges would have to campaign for their election or – even worse – political parties would do that for them. This would endanger the impartiality of the judges who might later feel obliged to be "grateful" to the political party, which supported their election. Such a system should not be introduced in Ukraine, in a context where the independence of the judiciary is essential in combatting corruption.

[20] See Opinion on the draft Law on the judiciary and the draft Law on the status of judges of Ukraine, CDL-AD(2007)003, paragraph 23.

48. Another suggestion was that draft laws providing for the establishment, elimination and of reorganisation of courts should be presented by the President only upon the motion of the HCJ and agreed with the Prime Minister. While the HCJ should certainly be consulted about any such proposal, it would not be wise to give them what would effectively be a veto. Judges can be unduly cautious when it comes to reform of the law or such matters as reorganisation of courts.

49. There is a suggestion that the decision on detention or arrest in the case of judges of the Constitutional Court should be by Parliament. This would certainly not be desirable, as it would represent a continued politicisation of judicial immunity and endanger judicial independence. In all cases, judges' immunity should be reduced to functional immunity only[21]. For ordinary judges, immunity should be lifted by the HCJ. For judges of the Constitutional Court, immunity should be lifted by the plenary of the Court, with the exception of the judge concerned. In both cases, unless there are manifest indications of a false accusation levelled against a judge, immunity should be lifted by the HCJ and the Constitutional Court respectively[22]. The decision on the criminal case should be left to an independent court, notably as concerns cases of corruption[23].

50. There is a proposal to the effect that *"courts cannot make the rulings that are the exercise of the powers of the other bodies or officials, except for the cases established by law".* It is not clear what exactly is intended here or why this proposal is made. It might mean that courts should stay out of decisions in the competence of the executive or legislative. However, such a proposal would have no effect. Courts decide disputes according to the law. In adjudication they do not take over the "competence" of other state bodies, but are obliged by law to settle disputes between parties, including between state powers.

51. There is also a reference to out-of-court dispute settlements and bodies of arbitration. It is not clear why provisions relating to these matters would need to be made at the constitutional level.

52. There are some proposals relating to the dismissal of judges. The criticism that the "breach of oath" is potentially very wide and that it would be better to be more specific is clearly justified (see under item B, above). The wording proposed is *"commitment of an offence, incompatible with further discharge of the duties of a judge"* – if this welcome wording is to be used, then each of the offences in question would have to be clearly defined in law.

53. There is a suggestion that dismissal for refusal to consent to transfer should apply only where the transfer is to another court specialised in the same body of law at the same level. There is some merit in the suggestion, although it is conceivable that there could be legitimate reasons why such a transfer could not be made, e.g. because over time, less commercial judges would be needed. There is also a proposal that a judge charged with a crime should have his/her appointment terminated. It seems that it would be reasonable that s/he be suspended from sitting pending trial, provided there is at least a *prima facie* case against the judge. However, there seems to be a problem in the translation (see CDL-REF(2013)020).

[21] See Report on the independence of the judicial system Part I: the independence of judges, CDL-AD(2010)004, paragraph 61.
[22] See *Amicus curiae* brief on the immunity of judges for the Constitutional Court of Moldova, CDL-AD(2013)008, paragraph 23.
[23] Ibid., see paragraph 21. The Commission takes note of the opinion expressed by the Presidential Administration that in view of the weakness of the judicial system in Ukraine, the reduction of judicial immunity to a functional one, is premature.

54. There is a proposal that judicial promotions should be by contest. This is a good suggestion.

55. There also is a proposal to change the powers and composition of the HCJ. According to this proposal, the powers of the HCJ might include the function of selecting candidates, instead of the High Qualification Commission. The Venice Commission recommends that, instead of introducing this change, it would be preferable to link the High Qualification Commission to the HCJ (see above).

56. As to the proposal that the Constitution should provide that members of the HCJ should be full-time as this is required by the Volkov judgment: it is not clear why this should be regulated at the constitutional level. In the light of the Volkov judgment, there is a clear need for full-time members. However, such a regulation could be left to legislation.

57. There were also detailed proposals concerning the composition of the HCJ. There is scope for discussion about what should be the numbers and the precise composition. There is a case for the presence of the *ex officio* members who of course could not be full-time members of the HCJ. It seems that the Volkov judgment does not rule out *ex officio* members. They could be members of the HCJ without a right to vote.[24]

VI. Conclusions

58. Overall, the draft Amendments are in line with many recommendations made in previous Venice Commission opinions, which were provided on request of the Ukrainian authorities over the past few years.

59. In several of its opinions on the judicial system of Ukraine, the Venice Commission has stated that the constitutional provisions on the judiciary should be amended in order to bring them into line with European standards. The proposed Amendment meets the Venice Commission's main criticism and is therefore welcomed. This notably concerns:

- founding and establishing courts as well as determining the court structure through law;
- transferring the appointment and dismissal of judges to the President, who is bound by the motion of the HCJ (with the exception of the Constitutional Court on which particular rules prevail);
- abolition of the probationary period for judges appointed for the first time;
- introduction of an open procedure of contest for the selection of candidates;
- automatic division of cases among the judges as a new principle for adjudication;
- new composition of the HCJ, which should provide for a majority of members from the judiciary and comprises even members from the Bar and representatives of legal education.

60. There are, however, a few outstanding matters, notably:

in the Amendments:

Article 126

1) If the High Qualifications Commission and the HCJ are maintained, then they need to be independent and their procedures need to be transparent;

[24] On an earlier proposal to exclude *ex officio* members from the HCJ, see CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine (prepared by a working group headed by Mr V.M. Shapoval) adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008, paragraph 76.

2) with respect to the arrest or detention of a judge – there is a need for criteria on the basis of which consent by the HCJ is to be granted or refused;
3) judges should only have functional immunity;
4) dismissal for breach of oath should be replaced by dismissal for specific offences;

Article 128

1) It should be clarified that a judge can only be transferred against his/her will if there is a reorganisation etc. (see Article 85) of the courts made by Parliament – not a mere internal reorganisation of a court.
2) The Prosecutor general should not have a vote on matters concerning the career or discipline of judges. Alternatively, the HCJ should have two chambers, one for judges, one for prosecutors.

Final and transitional provisions

61. The Venice Commission recommends that the termination of the mandate of the current HCJ be reconsidered so that its members may complete their mandate. Transitional measures could bring the current HCJ closer to its future composition.

In the Changes to the Constitution proposed by the Constitutional Assembly:

62. It is regrettable that the following changes were not included in the Amendments as they would have enriched the text:

- principles deriving from the European Convention on Human Rights in the Constitution, such as the rights of an individual to a fair and public review of his/her case within a reasonable time by an independent and unbiased court constituted through the law as well as the right to appeal;
- the powers of the Supreme Court and in particular those that provide for its function to ensure the uniform application of the law;
- change in the wording with respect to the "breach of oath" to *"commitment of an offence, incompatible with further discharge of the duties of a judge"* – if this welcome wording is to be used, then each of offences in question would have to be clearly defined in law;
- that judicial promotions should be by contest.

63. The constitutional reform might also be the occasion to consider whether Ukraine needs four levels of jurisdiction (Article 125 of the Constitution) or whether three levels might be enough.

64. The Venice Commission would also like to re-emphasise the need for a broad-based drafting process and for deliberation on a major constitutional reform, as well as the approval of such a reform, in compliance with the provisions of the Constitution in force.

65. The Venice Commission is ready to further assist the Ukrainian authorities, should they make a request for such assistance.