



Strasbourg, 22 October 2015

Opinion no. 803/2015

CDL(2015)039rev\*

Engl. only

Eliminator: 0

Eliminator: 9

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
(VENICE COMMISSION)

**DRAFT FINAL OPINION**  
**ON THE PROPOSED CONSTITUTIONAL AMENDMENTS**  
**REGARDING THE JUDICIARY**  
**OF UKRAINE**

On the basis of comments by

**Ms Regina KIENER (Member, Switzerland)**  
**Mr Peter PACZOLAY (Honorary President)**  
**Mr George PAPUASHVILI (Member, Georgia)**  
**Mr Jean-Claude SCHOLSEM (Substitute member, Belgium)**  
**Ms Hanna SUCHOCKA (Member, Poland)**  
**Mr Evgeni TANCHEV (Member, Bulgaria)**  
**Mr Kaarlo TUORI (Member, Finland)**

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

*This document will not be distributed at the meeting. Please bring this copy.*  
[www.venice.coe.int](http://www.venice.coe.int)

Article 125 - The Judiciary System; Article 106 - The President's powers

8. In the Preliminary Opinion, it was recommended<sup>2</sup> to make clear that the power to decide on the establishment and the dissolution of the courts should belong to the Verkhovna Rada and not to the Executive. The revised draft amendments address this issue in the following way: the competence of the President "to establish courts by the procedure determined by law" is deleted from Article 106 of the Constitution. In addition, a new sentence is added in paragraph 2 of Article 125 to read: "Courts shall be established and dissolved on the ground and under the procedure in accordance with the law, which draft shall be introduced to the Verkhovna Rada of Ukraine by the President of Ukraine on proposal of the High Council of Justice" (emphasis added).

9. The role of the President thus seems to be limited, which is welcome. The Ukrainian authorities have clarified that the system and structure of the judiciary will come under the competence of the Verkhovna Rada under the ordinary procedure (paragraph 1 of Article 125). Decisions on the establishment or dissolution of specific courts, instead, will have to be submitted to the Verkhovna Rada by the President upon the proposal of the High Council of Justice. This arrangement seems acceptable in principle, however, in order to make this process easier to carry out in practice, it would be preferable that the President submit the proposals to the Verkhovna Rada "in consultation with", instead of "upon the proposal of the High Judicial Council."

10. A transitional provision (Article 19.7) is added to read: "Until administrative-territorial system of Ukraine is changed in accordance with article 133 of the Constitution of Ukraine as amended by the Law of Ukraine "On Amending the Constitution of Ukraine (regarding decentralization of power)" but in any case not later than January 1, 2017, the establishment, reorganization, and dissolution of courts shall be conducted by the President of Ukraine on the basis and under the procedure prescribed by the law". The President therefore retains this power for maximum one year from the adoption of the constitutional amendments on decentralisation, which in the current context in Ukraine appears to be acceptable.

11. The Preliminary Opinion pointed out<sup>3</sup> that the Venice Commission had previously recommended the abolition of the specialised courts; however, if this was not acceptable to the Ukrainian authorities, it supported the second option proposed for Article 125 paragraph 4 (to read "Higher specialised courts may function in accordance with the law"). This option has indeed been retained, which is to be welcomed. The English translation of Article 125 paragraph 4 reads: "The higher specialised courts may function in accordance with the law" [emphasis added]. In Ukrainian the meaning of this provision is not that all the existing specialised courts may continue to function, but that certain of these courts may remain if the law so provides. The Venice Commission reiterates its strong recommendation to abolish the high specialised courts, with the high specialised court in administrative matters being transformed into a Supreme Administrative Court.

Article 126 - Independence of the judges

12. Article 126 paragraph 5.3 provides as one of the grounds for dismissal of a judge "the commission [...] of a disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of a judge or apparent non-conformity with being in office". The formula "apparent non-conformity with being in office" has been explained by the Ukrainian authorities to mean "non-compliance with the requirements set out in the law on the status of judges and in the Code of Ethics". The violation by a judge of the obligation to produce an asset declaration justifying the origin of the judge's property is one of the requirements under the law

Eliminator: The revised Article 125, however, does not make clear that a law adopted by the Verkhovna Rada is required for the establishment or dissolution of courts in concrete cases. Moreover, in the Venice Commission's opinion, structural changes in the judiciary such as the abolition of the high specialised courts should be possible by a law adopted by the Verkhovna Rada in the normal legislative procedure. In addition, the new procedure envisaged appears rather burdensome, which might make the establishment of new courts or the dissolution of existing courts very difficult to carry out in practice. ¶

Eliminator: However, in 1

Eliminator: official

Eliminator: it

Eliminator: is important to make sure that

Eliminator: 1

Eliminator: is unclear

Eliminator: The Venice Commission understands it to include

Eliminator: 1

Eliminator: 1

<sup>2</sup> CDL-PI(2015)016, § 18.

<sup>3</sup> CDL-PI(2015)016, § 20.

on the status of judges. In the current Ukrainian context, it might be advisable to mention it explicitly in the Constitution.

13. The Preliminary Opinion raised the issue of the choice made by the drafters to provide for the automatic termination of a judge's tenure following "a guilty verdict against him or her", that is to say following any criminal conviction, irrespective of its gravity. Article 126 paragraph 6.5 now qualifies this ground for dismissal by specifying that the guilty verdict must relate to committing a crime. Assuming that this excludes at least minor criminal offences, this is a welcome improvement.

#### Article 128 – Appointment of judges

14. The Preliminary Opinion welcomed<sup>4</sup> the long awaited change in the system of appointment of the Ukrainian judges: judges will no longer be elected by the Verkhovna Rada, but will be appointed by the President upon the submission of the High Council of Justice, on the basis of a competition. This change deserves full support. It marks the end of the power of the Verkhovna Rada to influence the judiciary, which represented a threat to the independence of the judges and of the judiciary as such. The President still has a ceremonial role: he/she appoints the candidates submitted by the High Council of Justice, whose proposals will be binding on the President. The law will have to regulate possible delays or deadlocks in the appointment by the President.

15. The Preliminary Opinion strongly recommended<sup>5</sup> that the President has no part in the dismissal of the judges, arguing that "[a]fter appointment, any link between the judge and the political organs should be severed; there should be no space for interventions by either the legislative or the executive, not even if they are merely symbolic. In order to inspire the confidence which is necessary in a democratic society, courts must not only be independent, but also appear to be independent."<sup>6</sup> The revised amendments follow this recommendation: the power to dismiss the judges has been removed from the President (Article 128) and conferred to the High Council of Justice (Article 131 paragraph 1.4). The Venice Commission welcomes this amendment.

16. The Venice Commission stresses however that all decisions on the judges' career (promotions, transfers, dismissals) must belong to the High Council of Justice and not to a political institution, if a truly independent judiciary is to be achieved. In order to avoid any misinterpretation, the Venice Commission therefore strongly recommends specifying in Article 131 paragraph 1.4 that the High Council of Justice has the power "to decide on dismissal of a judge from office and on transfers and promotions of judges". In the current Ukrainian context, it seems, however, acceptable – as a transitional measure, for a limited period of time – that the President play a role in the transfer and promotion of judges with a view to safeguarding national security.

#### Article 131 – The High Council of Justice

17. As concerns the composition of the High Council of Justice, the Preliminary Opinion welcomed that more than half of its members will be judges. Noting that the President was the only political institution that had the power to appoint HCJ members, the Preliminary Opinion argued however that it was necessary to "counterbalance the President's power by the

Eliminator: specify this interpretation

Eliminator: amendments are silent on

Eliminator: the law will have to regulate this issue

<sup>4</sup> CDL-PI(2015)016, § 26.

<sup>5</sup> CDL-PI(2015)016, § 28, § 34.

<sup>6</sup> CDL-PI(2015)016, § 28.

participation of the Verkhovna Rada in the process of forming the HCJ. This would also add an element of accountability of the HCJ to the public".<sup>7</sup>

18. The revised amendments follow this recommendation and propose the following composition for the High Council of Justice: twenty-one members, ten of which elected by the Congress of judges, two appointed by the President, two by the Verkhovna Rada, two by the Congress of Advocates, two by the All-Ukrainian Conference of Public Prosecutors and two by the Congress of Representatives of Law Schools and Law Academic Institutions. The Venice Commission welcomes this amendment. It notes nevertheless that, while the High Council of Justice is responsible for the career and dismissal of both judges and prosecutors, only two representatives of the Prosecutor's office (of a total of 21 members) will sit on the Council. The law might provide that cases involving prosecutors be decided by a smaller composition of the High Council of Justice, where the proportion of members coming from the prosecution service would be higher.

Eliminator

Eliminator: This amendment should be considered

Eliminator: T

19. The Preliminary Opinion stressed that "[i]t is of the utmost importance, however, that giving such a role to the Verkhovna Rada does not re-open the door to political influence on judges, which the whole reform under consideration is striving to eliminate. For this reason, the members of the HCJ chosen by the parliament should be elected by qualified majority, which would favour candidates with cross-party support (or by other mechanisms enabling the opposition to participate in the choice)".<sup>8</sup> Although it is conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine, the Venice Commission reiterates its recommendation to enshrine in Article 131 that two members of the HJC be elected by the Verkhovna Rada "by a qualified majority". Simultaneously, anti-deadlock mechanisms suitable for the Ukrainian situation should be provided for.

20. The Preliminary Opinion further recommended that "[i]n any case, these members should be chosen among legal professionals and should not be "active" politicians".<sup>9</sup> The requirement of political neutrality should apply to the members appointed by the President too."<sup>10</sup> The revised amendments do not explicitly follow this recommendation, although they add a provision to the extent that members of the HCJ cannot be members of political parties and trade unions, take part in any political activity and hold representative mandates (Article 131 paragraph 5). The latter provision is welcome.

21. According to Article 131 paragraph 9/4, members of the High Council of Justice may not "occupy other paid office and perform other remunerated work except scholarly, teaching or creative activities"; as compensation, the law will have to provide for an adequate level of remuneration for these officials.<sup>11</sup>

#### Article 131-1 – The Prosecutor General

22. The Preliminary Opinion welcomed the proposed reform of the Public Prosecutor's Office, which it found to be "generally in line with the applicable European standards and with the Venice Commission's previous recommendations" and strongly encouraged the Ukrainian parliament to adopt it.<sup>12</sup> The only recommendation which has not been followed relates to the method of appointment and dismissal of the Prosecutor General, which are in the hands of the

<sup>7</sup> CDL-PI(2015)016, § 37.

<sup>8</sup> CDL-PI(2015)016, § 32.

<sup>9</sup> CDL-AD(2007)028, § 32.

<sup>10</sup> CDL-PI(2015)016, § 37.

<sup>11</sup> Consultative Council of European Judges, Opinion no. 10 on the Council for the Judiciary at the service of the society, § 36.

<sup>12</sup> CDL-PI(2015)016, § 43.

President of Ukraine with the consent of the Verkhovna Rada, but "without a qualified majority, which instead would be necessary" according to the recommendation made in the Preliminary Opinion.<sup>13</sup> The Venice Commission is nonetheless conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine.

#### Article 131-2 – The Bar

23. The revised amendments provide that the independence of the Bar is guaranteed, which is welcome. They also provide that "Only an advocate shall represent a person before the court, and defend a person against prosecution"<sup>14</sup>. This is a very far-reaching provision, which prevents any possibility to be represented before any judge, for any kind of dispute, by anyone but an "advocate", which is presumed to mean a "practising lawyer member of the Bar". This seems excessively broad. The Venice Commission recommends that exceptions for certain kinds of disputes, such as labour disputes or disputes of minor importance, should be possible.

#### Article 148 – Composition of the Constitutional Court

24. The proposed amendments provide for a balanced composition of the Constitutional Court, with its 18 members being appointed by the President, the Verkhovna Rada and the Congress of Judges, after a selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution. As was expressed in the Preliminary Opinion, this proposed composition deserves to be supported.

25. Article 148 does not provide that the 6 members appointed by the Verkhovna Rada are elected with a qualified majority. This possibility should be taken into consideration by the Ukrainian Constitutional Commission<sup>15</sup>, as in Ukraine the President is not a politically neutral institution, and there could therefore arise a situation in which twelve judges are chosen by the same political majority, with no say of the opposition. The Venice Commission is nonetheless conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine.

26. The Preliminary Opinion expressed some doubts<sup>16</sup> as to the increase of the minimum age requirement for Constitutional Court judges from 40 to 45. The revised amendments get back to a minimum age of 40, a solution which the Venice Commission welcomes. The Venice Commission reiterates its doubts as to the desirability of the 20-year residence requirement, which would exclude scholars and judges who have carried out academic or professional work abroad.

#### Article 149 – Independence of Constitutional Court judges

27. To the due exclusion of liability of constitutional court judges "for voting on decisions or opinions of the Court", an exception has been added for cases of "committing a crime or a disciplinary offence". Providing this exception, which also exists for ordinary judges (Article 126), also for Constitutional Court judges does not raise any issue.

#### Article 149-1 Grounds for termination of the powers of Constitutional Court judges

<sup>13</sup> CDL-PI(2015)016, § 42.

<sup>14</sup> The entry into force of this provision is deferred in time pursuant to Article 19.8 of the Transitional Provisions.

<sup>15</sup> CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paragraphs 18-19. CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 24.

<sup>16</sup> CDL-PI(2015)016, § 49.

Eliminator: there may well be situations in which, for example, a trained legal professional who is not a member of the Bar, of a trade union or an employers' representative may adequately represent the interests of a party.

Eliminator: therefore

Eliminator: the possibility for "

Eliminator: provided for by law"

Eliminator:

Eliminator: be added in this provision