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Support to the implementation of the judicial reform in Ukraine

Assessment

of the draft law of Ukraine 1008 "On Amendments to Some Laws of Ukraine on the Functioning of Judicial Governance" as to its compliance with the standards and recommendations of the Council of Europe

September 2019

List of abbreviations

CCJE	Consultative Council of European Judges
CoE	Council of Europe
Draft Law	Draft Law No.1008 "On Amendments to Some Laws of Ukraine on the Functioning of Judicial Governance"
ECHR	European Convention on Human Rights
HCJ	High Council of Justice
HQCJU	High Qualification Commission of Judges of Ukraine
Law JSJ	the 2016 law "On the Judiciary and the Status of Judges"
Law HCJ	the 2017 law "On the High Council of Justice"

Introduction

1. On 29 August 2019, Draft Law No.1008 ""On Amendments to Some Laws of Ukraine on the Functioning of Judicial Governance" (hereafter the Draft Law) was submitted to the Verkhovna Rada of Ukraine. On 12 September 2019, the Draft Law was adopted by the Verkhovna Rada in the first reading. This Draft law intends to amend several key points of the Law "On the Judiciary and the Status of Judges" of 2016 (hereafter Law JSJ) and of the Law "On the High Council of Justice" of 2017 (Law HCJ). It also introduces a slight amendment into the 2014 Law "On Government Cleansing" regarding the ban of the present serving members of the HQCJU to take public positions.

2. The changes introduced by this Draft Law are:

   - new rules on the status, composition and appointment of the HQCJU;
   - selection of HQCJU members by a newly created Selection Board;
   - recuperation of powers of the HCJ in the selection and appointment procedures of judges, but restricted by two new commissions;
   - new provisions seeking to increase the publicity/transparency of the sessions of the HCJ;
   - rules on re-structuring of the Supreme Court, and reduction of the maximum number of judges from 200 to 100 judges;
   - creation of the Integrity and Ethics Commission within the HCJ with the involvement of international experts;
   - certain amendments to the disciplinary proceedings against judges.

3. This assessment seeks to analyse whether the proposed changes on the rules of the judiciary comply with the CoE standards and other relevant international standards. In reviewing the compliance of the Draft Law with European and international standards, the comments have taken into account the main relevant documents regarding the judiciary and the role and status of judges.

4. These standards are to be found in:

   - the ECHR and the related case law of the European Court of Human Rights;
   - the CoE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (hereafter CM/Rec(2010)12);
   - the Opinions of the Consultative Council of European Judges (CCJE), in particular Opinion No. 3(2002) On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality; Opinion No. 17 (2014) On the Evaluation of Judges' work, quality of justice and respect for judicial Independence, Strasbourg, 24 October 2014; and Opinion No. 18 (2015) On the position of the judiciary and its relation with the other powers of state in a modern democracy, London, 16 October 2015;
   - the Report on European Standards as regards the Independence of the Judicial System: Part I The Independence of Judges by the European Commission for Democracy through Law ('the Venice Commission')[1]; and

[1] CDL-AD(2010)004, 16 March 2010.

the OECD Fourth Round of Monitoring Ukraine Progress Update 2019[2] have also been consulted.

5. It has to be noted that due to time constrains, this assessment cannot be considered final, it is a preliminary analysis of the main amendments foreseen in the Draft Law, highlighting the potential problems of the intended reform. The changes, as suggested by the Draft Law, have two main objectives:
   - strengthening the role of the HCJ and
   - subjecting the judges of the Supreme Court to another selection process.

   The focus of the assessment will be on these two major changes. Specific comments will also be included regarding the extension of the "lustration" measures.

6. Relevant desk research has been undertaken, but a deep analytical study should follow in order to be able to establish in an accurate manner the potential impact of the present amendments, as well as to be able to make more detailed recommendations on a future action. This assessment has been prepared by Prof. Dr. Lorena Bachmaier Winter[3] upon the English translation of the Draft Law provided by the CoE, as part of the activities of the CoE project "Support to the implementation of the judicial reform in Ukraine".

Justification of the reform and legislative process

7. Two aspects of this Draft Law must be noted: first the lack of data underpinning the proposed changes to the rules on the judiciary; and second, the way the legislative process has taken place.

8. With regard to the first aspect, it has to be recalled that both laws, the Law on the JSJ and the Law on the HCJ were recently amended (in 2016 and 2017 respectively) within the 2015-2020 Strategy of Reform of the Judiciary, Judicial Procedure and Related Institutions. These laws, although subject to further improvement, were assessed positively by international organisations and in general were welcomed for adopting measures to strengthen the professionalism and the independence of judges. The main critical aspects of those reforms, were formulated, *inter alia,* as: the complex system of judicial self-governing bodies; the need to restructure the chambers of the Supreme Court and the functions of the Grand Chamber; the possibility of fine-tuning the composition of the disciplinary chambers; the question on the role of the HCJ, which no longer had responsibility for the selection of judges; and, also, the possible improvement of the criteria for recruiting judges, and the role of the Public Integrity Council.

9. Despite the noted room for improvement, the legal framework was assessed as a major step forward towards strengthening the judicial independence, increasing the mechanisms to ensure accountability of judges compliant with fair trial rights and making the judiciary more efficient.

10. The present laws are not perfect, but, as said, they were assessed *vis-a-vis* compliance with European standards and no major flaws were detected. Being in general aligned with the CoE standards, the reforms introduced in 2016 and 2017 are

[2] Istanbul Anti-Corruption Plan, accessible at: https://www.oecd.org/corruption/acn/OECD-ACN-Ukraine-Progress-Update-2019-EN.pdf

[3] Full Professor of Law, Complutense University, Madrid.

still in an on-going process of implementation, and the new Supreme Court only started working in December 2017. Therefore, it is early to state what has been the impact of these reforms in practice. According to recommendation 15 of the OECD Fourth Round of Monitoring Ukraine Progress Update of 2019 regarding the integrity in the judiciary, it should be ensured "that changes introduced by the judicial reform are effectively implemented and that their practical application is analysed with the view to identify deficiencies and address them." So far, it is doubtful that such an assessment and follow-up of the recently adopted reforms has been done. Without an assessment of the actual implementation of the reforms recently carried out and its impact on the judiciary, it might be early to move towards new amendments.

11. With regard to the reform process, transparency and the inclusion of all stakeholders is important in any major legal reform. The process for amending relevant aspects of the judiciary does not seem to show an adequate involvement of all the stakeholders and the short time since the draft law was published until it was sent for consideration by the Verkhovna Rada and adopted in first reading, has not allowed the stakeholders to open a full debate on the rationale and main aspects of the proposed changes.

Reform of Article 3 b) of the 2014 Law "On Government Cleansing"

12. The Draft Law extends the scope and time of the cleansing measures of 2014, so that "for a member of the HQCJU, *as well for persons who in the period from 21 November 2013 till 19 May 2019, cumulatively for at least one year, held a position (positions) of a Head of the High Qualification Commission of Judges of Ukraine, a Head of the State Judicial Administration of Ukraine, and their deputies*" shall be banned from holding public positions in Ukraine. Even if this provision – if finally adopted – would only affect a few persons, it merits to be addressed here in detail, because it raises a number of important issues as regards compliance with the ECHR.

13. This provision appears to be contrary to the CoE standards regarding lustration and cleansing, as set out in Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe "On Measures to dismantle the Heritage of former Communist Totalitarian Systems" of 27 June 1996; the judgments of the European Court of Human Rights of *Bobek v. Poland,* 68761/01, of 17 July 2007, and *Matyjek v. Poland,* 38184/03 of 24 April 2007 and in the Opinion of the Venice Commission "On the Law of Government Cleansing"[4]. Cleansing and lustration processes aim at excluding persons with serious integrity deficits in order to re-establish civic trust and re-legitimize public institutions (UN High Commissioner for Human Rights in "Rule-of-law tools for post-conflict states vetting an operational framework", 2006). Lustration is an exceptional tool which, after a change of system (e.g. from a totalitarian regime to a democratic state) may be applied. Only if there are no other alternatives for dismantling an authoritarian regime, would vetting and lustration proceedings be justified.

14. Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe recommends that criminal acts are prosecuted and punished under the standard criminal code (para. 7), and that any lustration must comply with a democratic state governed by the rule of law (para. 13). It is clearly stated in this Resolution that

[4] Opinion no. 788/2014, CDL-AD (2014)044, of 16 December 2014 "On the Law on Government Cleansing" of Ukraine.

lustration (and vetting law, accordingly) can be compatible with a democratic state under the rule of law, if several criteria are met, and the focus of lustration should be on threats to fundamental rights and democratization process. The resolution notes that "revenge may never be a goal of such laws, nor should political or social misuse of the resulting lustration process be allowed (para. 12)."

15. There is a rich European and national jurisprudence in the area of lustration[5]. In the light of these documents, the proposed amendment to Art. 3 of the Law "On Cleansing Government", to the effect that the persons that were members of the HQCJU after the general vetting until May 2019, is contrary to the CoE standards in that with the formulation of the target group and the time periods, the amendment inevitably targets clearly identifiable individuals. If any of them have acted unlawfully, their behaviour should entail civil, criminal or disciplinary liability, and the ordinary procedures for such misconduct should be initiated. As the text stands now, it risks depriving the persons concerned of their fair trial rights and of the presumption of innocence.

Reform of Article 4 of the Law "On the Judiciary and Statute of Judges"

16. The Draft Law provides for the deletion of paragraph 4 of the Law JSJ. This paragraph states: 2. This Law may be altered only by laws amending the Law of Ukraine "On the Judiciary and Status of Judges". This intended amendment is not explained. It provides an opportunity to introduce changes in the legislation on the judiciary without the account of the provisions of the basic law, which is the law "On the Judiciary and Status of Judges". Such an approach may lead to the unnecessary complication and fragmentation of the legislation on the judiciary, which may result in a lack of uniformity of its application. This, albeit not representing a clear infringement of human rights principles, does not contribute to the legal certainty.

17. ***It should be considered that the proposed amendment is eliminated and that art. 4 Law JSJ stands as now.***

Reform of the High Council of Justice

18. Major amendments are proposed to the tasks and functioning of the HCJ. The main features of the reform envisaged in the Draft Law may be summarised as follows:
    - Formal subordination of the new HQCJU to the HCJ, but the appointment of the HQCJU's members will be carried out by a new commission, which is the Selection Board; members of the Selection Board are appointed by the HCJ and are not members of the HCJ.
    - Establishment of the Integrity and Ethics Commission within the HCJ;
    - New procedure for dismissing members of the HCJ, in which the Integrity and Ethics Commission has the initiative;
    - The salary of the members of the HCJ is reduced and will not be the same for all its members.

19. The Draft Law, while maintaining the functions attributed to the HCJ as provided for by the Constitution of Ukraine, limits the HCJ's powers by of introducing the two new commissions, with the involvement of international experts.

[5] See, for example, the Venice Commission opinion on Albania (CDL – AD(2009)044

Dismissal of members of the High Council of Justice

20. One of the amendments that may have a major impact upon the HCJ concerns the proposed rules on the dismissal of HCJ members. The Draft Law provides for a change in the decision-making procedure for the dismissal of a HCJ member. While at present a member of the HCJ can only be dismissed by the body that appointed the member, based on the grounds established in Art. 24 Law HCJ (in connection with Art. 28 Law HCJ) and upon the motion of at least 14 of its members (Art. 20 Law HCJ), the proposed changes to Art. 24 Law HCJ read:

21. "A decision to dismiss a member of the High Council of Justice on the grounds referred to in par. 1, subpar. 3-6 of this Article is adopted, upon a respective proposal of the Integrity and Ethics Board, by the High Council of Justice within a period of five days upon submission of such a proposal", upon the majority vote of the members of the HCJ that are present at the voting session.

22. Consequently, a member of the HCJ, who – according to the Integrity and Ethics Commission – does not comply with his/her duties, can be dismissed in 5 days by the majority of members HCJ who are present. It seems that the current system for the dismissal of a member of the HCJ who does not comply with his/her duties, is not effective, and in practice almost impossible. To overcome that, the proposed system allows dismissing a non-performing member of the HCJ, upon a simple majority of the members present at the voting, following the initiative of the Integrity and Ethics Board, and without any involvement of the body that appointed him/her. Thus it suffices that the three members of the HCJ that make up part of the Integrity and Ethics Commission and one of the international members, agree to propose to dismiss a member of the HCJ, and that this initiative is validated in a session by the majority of the members present, to proceed to the dismissal of one of them.

23. This system entails the risk of circumventing the powers of a constitutional body such as the HCJ. Following the proposed amendment, an intention perhaps aimed at having the members of the HCJ perform better may result in undue threats of dismissal to those opposing the existing majorities. Furthermore, if a member is finally dismissed, the procedure of appointment by a relevant body should be initiated again, and while this procedure takes place, the composition of the HCJ would not respect the constitutional provisions.

Amendments on the HQCJU

24. The HQCJU is being suspended, and a new composition is envisaged. The composition of the HQCJU is regulated in Art. 94 of the Law JSJ, providing for a mixed composition with all relevant stakeholders involved in the appointment of its members. Such a mixed composition of its 16 members, 8 being judges appointed by the Congress of Judges, leaves the HCJ with few powers to decide on the selection process of judges. In fact the whole procedure of selection of judges is in the hands of the HQCJU, even the rules of procedure of the HQCJ are adopted by this body. At present the HCJ is dedicated mostly to handling disciplinary proceedings.

25. While this system is not usual in other countries, no major dysfunctions were visible in Ukraine. It was indeed recommended that in the future these two self-governing bodies might be merged, but the current composition and selection of members to the HQCJU meets the CoE standards.

26. The proposed amendments change the present system of appointing the members of the HQCJU. A new Art. 94 of the Law JSJ establishes that the members shall be appointed by the HCJ by a decision following a competition carried out by the newly created Selection Board.

27. The Selection Board for appointing members of the HQCJU shall be made up of 6 members: 3 members selected by the Council of Judges of Ukraine and 3 among international experts specialised in the prevention of corruption according to the provisions of the Law on the High Anti-Corruption Court (Draft Law art. 95.1 Law JSJ), and appointed by International Organisations. The Selection Board shall decide by simple majority, but the three votes of the international experts are needed. The Selection Board shall have the technical support of the HCJ. They shall not make any ranking of the candidates selected, and the criteria are: best experience, best knowledge and best qualities. They will call the candidates for an interview and can also undertake background checks of the candidates.

28. While the Selection Board shall have the lead in choosing the members of the HQCJU, the Secretariat of the HCJ will conduct the vetting of those candidates the Selection Board requires to be vetted. Once the Board carries out the selection of the candidates (with no ranking and no scores), it sends the minutes to the HCJ for decision. The HCJ shall appoint the members of the HQCJU following the selection made by the Selection Board. It is not clear if the Selection Board shall only present a limited number of candidates to the HCJ, or establish a list of those candidates that comply with the best formal, professional as well as ethical qualifications, out of which the HCJ could make a selection.

29. Once appointed, the members of the HQCJU can be dismissed by a majority vote of the HCJ upon the proposal of the Integrity and Ethics Commission. Therefore, similar to the members of the HCJ, the members of the HQCJU can be dismissed if three members of the HCJ and one international expert file a motion to dismiss, and the HCJ, by a simple majority of the members present, agrees to it.

30. The intended reforms appear to allow for a more agile decision-making process on the dismissal of members of the HQCJU and of the HCJ. While this is positive in order to prevent a blocking of the functioning of these bodies – as has happened in the past – it also implies shifting important powers of the HCJ to a commission made out of six members. At the end, the proper functioning of the proposed system will to a large extent rely on the integrity, capacities and responsibility of the three members of the HCJ that are part of the Integrity and Ethics Commission, who will only need the support of one of the international experts to form the necessary majority to decide on such key issues as a proposal for dismissal of members of the HCJ and the HQCJ.

31. It is not stated that the three members of the HCJ forming part of the Integrity and Ethics Commission cannot vote on the decisions of the HCJ. This may not only create conflicts of interest, but it could give them excessive powers in the whole decision-making process of the selection and dismissal of the members of the HQCJU and the HCJ. The same applies to the disciplinary proceedings, when the Integrity and Ethics Commission launches a disciplinary procedure. The fact that members of this Commission also form part of the decision-making process by the HCJ would appear to create the possibility of situations which would not meet the requirements of ECHR Art. 6.1 as regards decisions by an independent and impartial tribunal (in this case the HCJ exercising judicial powers when deciding on a possible dismissal)[6].

32. The system envisaged in the Draft Law, if correctly applied, can provide for a more efficient functioning of the HCJ and also speed up and control the correct functioning of the HQCJU. The same could be said about the present system: if correctly applied and implemented, it should be able to comply with the highest standards of judicial independence, integrity and professionalism. However, the proposed system, if not correctly applied, while allowing for a more speedy decision-taking process –because less persons are involved in such process– also entails the risk that only a few persons (4 votes make a majority in the Integrity and Ethics Commission), could have a strong influence and control over the whole self-governing structure.

33. The appointment of international experts by international organisations may seem to be positive in order to ensure higher standards as regards impartiality and integrity, even if they too are immune neither to undue interferences nor to corruption. The involvement of international experts is to be viewed as a positive temporary measure. In practice, their involvement needs to be streamlined, because if they do not master the language or the political and legal context of the country, their influence could easily be neutralised.

34. ***The proposed amendments return some of the powers of recruitment, promotion and dismissal of judges to the HCJ. The HQCJU entrusted with carrying out the selection processes will be operating under the rules of procedure approved by the HCJ. This is, in principle, positive.***

35. ***Although the HCJ shall appoint the members of the HQCJU, it is the newly created Selection Board, whose members are not appointed by the HCJ, which shall play in fact the leading role in selecting the members of the HQCJU.***

36. ***From the point of view of CoE standards, the distribution of powers between the HCJ and the two newly created commissions is per se not against international standards, as long as it is implemented properly.***

Restructuring of the Supreme Court and re-appointment of all its judges

37. According to the Draft Law, Art. 37 of the Law JSJ is to be changed to reduce the number of Supreme Court judges from a maximum of 200, to "not more than one hundred judges." This proposed reduction is not justified by reasons of a reduced workload or a reform on the cassation functions of the Supreme Court. Indeed, the justification for this reduction of number of judges is unclear and is not explained by a change in the role of the Supreme Court within the judicial organisation, as the Supreme Court was restructured and renewed recently.

38. The Law JSJ of 2016 implemented the structure of the judiciary introduced by the 2016 Constitutional amendments. This involved changing from a four-tier system to a three-tier system (first and second instance courts, and the Supreme Court with specialised integrated courts of cassation). The three-tier system should promote efficiency and improve the coherence and consistency of the jurisprudence, by making also the case-law of the Supreme Court binding. This re-organisation of the judiciary was welcomed, as it should contribute to improve the efficiency, coherence and uniformity of the legal system.

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[6] See e.g. *Oleksandr Volkov v Ukraine*, Appl. No. 21722/11, of 9 January 2013; *Svetlana Naumenko v. Ukraine*, Appl. No. 41984/98, of 9 November 2004.

39. The transfer from a four-tier to a three-tier court system involved necessarily the setting up of the new Supreme Court and led to the selection and appointment of its judges. The selection process of judges to the new Supreme Court was a test of the new procedures, and actively debated, because all judges of the Supreme Court of Ukraine were dismissed, and a new competition process was carried out. Only those who passed the new competition were re-appointed. This procedure was based on the transitional provisions of the amendments to the Constitution stating that in cases of reorganization or dissolution of particular courts, established before the Law of Ukraine "On amending the Constitution of Ukraine (as to justice)" came into force, these courts continue functioning in accordance with the Ukrainian law until the new courts are established. It is also worth noting that prior to the constitutional changes in 2016, judges were elected by the Verhovna Rada, while those appointed to the 2017 Supreme Court came through a process that was found to comply with European standards for the selection of judges.

40. The new appointment procedure was significantly more transparent and competitive than the previous. Although presenting certain critical aspects – and a room for improvement – in general, the process was positively assessed by external observers for its transparency and objectivity. Though the whole structure and design of the Supreme Court is still complex, it appeared to work appropriately within the new procedural legislation on appeals in cassation.

41. Within this context, the Draft Law not only reduces drastically the maximum number of judges of the Supreme Court, it also introduces a re-organization of the Supreme Court chambers (Final provision 4). Furthermore, in order to select those judges that are to retain their positions at the Supreme Court, the sitting Supreme Court judges shall undergo a new selection process before the new HQCJU.

42. Final provision 5 states: "Within two months from the date of formation of the new composition of the High Qualifications Commission of Judges of Ukraine, it shall select judges to cassation courts within the Supreme Court from among the judges of the respective cassation courts of the Supreme Court based on the criteria of professional competence, ethics and integrity."

43. This provision raises a number of issues vis-à-vis the CoE's standards.

44. First, the selection process as such is not set out in the law. The Final Provision states that the "procedure for the selection of judges to the cassation courts within the Supreme Court is approved by the High Qualifications Commission of Judges of Ukraine, in agreement with the High Council of Justice." The consequence of this provision would appear to be a situation which is contrary to the fundamental principle of judges' irremovability. The Recommendation of the Committee of Ministers of the CoE CM/Rec(2010)12 sets out that: "A judge should not receive a new appointment or be moved to another judicial office without consenting to it" (Rec.52). Exceptions to this principle are disciplinary sanctions or a "reform of the organisation of the judicial system".

45. The proposed reduction in the number of judges of the Supreme Court would entail a transfer (downgrading) to another position without their consent. In other words, judges who are going to be transferred to another, lower level, court and who do not consent to that move will effectively have been subject to a disciplinary sanction, without the procedure and safeguards that should go with that. This would appear to run counter the CoE recommendation. It could be argued that, as long as the transfer is justified with reference to a re-organisation or the judicial system, such a transfer should be seen as complying with the CoE Recommendation. However, it seems

debatable whether the changes proposed could be said to meet the standard of a reform of the "organisation of the judicial system", which would be the criteria for such non-consensual transfers.

46. The text of the Draft Law might also entail other risks to judicial independence, as it is not clear that the judges of the Supreme Court who would not be selected to retain their positions would be transferred to lower courts. Final Provision No. 7 says that "Judges of the Supreme Court who were failed to pass the selection procedure envisaged in paragraph 5 of this section ***may*** be transferred to the relevant appellate courts, taking into account the rating resulting from the competitive selection."

47. The use of the expression ***may*** instead of ***shall***, raises concerns as to the possibility that those judges who, upon consideration of the newly appointed HQCJU were not fit to keep their position in the Supreme Court, could be dismissed. This is probably not the intention of the Draft Law, but the wording of Final Provision 7 leaves such a possibility open. A dismissal following an unsuccessful selection procedure, without the necessary procedural safeguards, would not be in line with the requirements of judicial independence.

48. Other reforms, such as reducing the salary of the judges of the Supreme Court (from 75 minimum salary to 55) provided under Art. 135 Law JSJ, also have the potential to to interfere with judicial independence. If such measure is due to general budgetary constraints – which cannot be assessed here –, it does not necessarily constitute a breach of the principles of judicial independence. Nevertheless it is to be analysed in more detail, contrasting with the increase in salaries foreseen for the public prosecutors.

49. Final Provision 4 is not clear. It states that "the number of positions in each of the cassation courts within the Supreme Court shall be determined taking into account the requirements of this Law for the chambers that are necessarily created in the cassation courts, the procedure for the formation of the Grand Chamber of the Supreme Court and taking into account other requirements defined by law". More clarity on how the reduced number of judges shall be distributed among the chambers would have been welcome.

50. The scope of appeal by cassation is still kept very broad, with rules on limiting access to cassation as regards minor cases not having been introduced. Limiting access to cassation may be needed in order not to risk jeopardising its ability to function. This question seems particularly pertinent in line of the proposal to limit the number of judges by half.

Amendments of the disciplinary proceedings

51. With the Law "On the Right to a Fair Trial" of 12 February 2015, Ukraine undertook a comprehensive reform on the disciplinary liability of judges and corresponding proceedings. This law introduced amendments to Section VI (Disciplinary liability of judges) of the Law "On the Judiciary and Status of Judges" (articles 106-111). The reform represented a significant improvement towards ensuring accountability, legal certainty, foreseeability, fairness and impartiality of the proceedings on disciplinary liability and imposing disciplinary sanctions, while still having room for improvement. According to Law on HCJ of 2016 disciplinary proceedings against judges are within the powers of the HCJ, and will be carried out by disciplinary chambers whose majority should be made up of judges (although this is not ensured for all cases in the Law HJC). In general, the existing procedure on judicial discipline could be

considered – in the law – to be aligned with CoE standards, and, if correctly implemented, it should provide a more adequate balance between judicial independence and accountability.

52. The Draft Law introduces minor changes to the proceedings with the aim of speeding them up and making them more transparent. Most of these amendments consist in establishing shorter timeframes: 1) new Art. 42 Law HCJ states that the whole disciplinary proceedings cannot last longer than 30 days from the point of receipt of the complaint; 2) the timeframe for other procedural acts within the disciplinary proceedings are also reduced: Art. 48 Law HCJ: notification to the judge shall be done within 3 days, while now it is required that it be done within 7 days; Art. 51 Law HCJ: the appeal against the decision on disciplinary proceedings shall be filed within 10 days (now within 30 days); Art. 51.5 Law HCJ: the timeframe for HCJ to decide on the appeal shall be taken within 5 days (while now it is 60 days, plus a possible extension of additional 60 days).

53. Seeking also to speed up the proceedings, an addition to paragraph 13 of Art. 106 Law JSJ provides that not complying with the legal timeframe to provide the information requested to be provided by the judge, shall also entail disciplinary liability. This provision is adequate for speeding up the whole procedure, but taking into account that the timeframes are much reduced and that the files requested may be numerous, a balancing approach should be appropriate: imposing a disciplinary sanction for failing to present numerous files within three days, and doing so in five days, for example, would be disproportionate.

54. Legislators often resorts to the shortening of the timeframes to fight against delays in proceedings. However, most of the delays are not caused by the inadequate regulation of the timeframes, and reducing notifications from 7 to 3 days does not entail a significant change. The grounds for delays most often are to be found in an excessive workloads and/or inadequate and insufficient staffing to deal with such workloads. Thus, the intended shortening of timeframes, apart from being in some cases unrealistic, will likely only have a minor impact.

55. If the reasons for the delays are to be found in the workload, the filtering of ungrounded complaints against judges should be better dealt with. In that vein, the intended deletion of Art. 107.8 Law JSJ does not seem to aid in saving time as regards manifestly ill-founded complaints against judges. If abuses have been detected in the filtering of the complaints, the solution is not to delete such filtering (which can lead to a major backlog of the proceedings), but to establish any liability on the part of the persons carrying out such a process. The same applies to the deletion of Art. 44 of the Law HCJ providing for the possibility to dismiss certain manifestly ungrounded complaints without consideration.

56. The Draft Law eliminates the need to identify the persons filing a disciplinary complaint or reporting a possible disciplinary offence committed by a judge (Art. 107 Law JSJ and 42 and 44 Law HCJ). This is positive and it is provided in most legal systems, but needs to be coupled with an adequate filtering system. Anonymity in reporting may open the door to all kinds of abusive and ill-founded accusations. Thus, if such an open reporting system is not accompanied by a reliable and efficient filtering system, the whole system is doomed to collapse. It may end with the HCJ dealing with more than 10.000 complaints within 30 days.

57. Other measures, such as the possibility of holding disciplinary proceedings *in absentia* (of the complainant and of the judge, Art. 47 Law HCJ), are adequate, if

they are duly and effectively notified. Only if the notification ensures that the absence is a waiver of appearance, should those proceedings continue in absentia. The provision is adequate to prevent that a voluntary non-appearance causes suspensions and delays in the proceedings, but it requires an effective – not merely formal – system of notifications.

58. The measure adopted in Art. 49 Law HCJ eliminating the possibility to postpone the hearing on disciplinary liability even in case of impossibility on the part of the judge to attend is not compliant with fair trial rights. If abuses in presenting excuses by judges have been identified, the suspension should be accorded only once, maximum twice, but a postponement of the hearing should not be ruled out if justified reasons are really present.

59. As to the transparency of the decision-making process on the disciplinary complaints, the Draft Law provides for decisions to be taken in open session – not in a deliberation room – and these sessions shall be open to the public (Art. 50 Law HCJ). Transparency is to be welcomed, but trust in the judiciary can also be undermined by making these discussions open to the general public. Open access and video-link retransmissions may also hamper the frank deliberation process, for fears of retaliation. It is advisable that similar rules should be in place here as for judges' deliberations[7].

CONCLUSIONS

Reform of Article 3 b) of the 2014 Law "On Government Cleansing"

60. ***The proposed amendment of Article 3 b) of the 2014 Law "On Government Cleansing" should be reconsidered. Even if the persons targeted by the lustration measures were involved in illegal conducts or violations of human rights, adopting such measures against a limited number of identified persons, is problematic vis-à-vis Article 6 of the ECHR.***

61. ***The provision amending Article 3 of the Law "On Cleansing Government" that allows applying lustration measures to the Heads of the HQCJU and the State Judicial Administration of Ukraine and their deputies holding offices from 21 February 2013 to 19 May 2019, raises a number of important issues as regards the compliance with the ECHR. As the text stands now, it risks depriving the persons concerned of their fair trial rights and of the presumption of innocence.***

Reform of the High Council of Justice

62. ***The Draft Law provides for the amendment of Art. 24 Law HCJ, changing the system for the dismissal of members of the HCJ. The proposed system allows dismissing a non-performing member of the HCJ, upon a simple majority of the members present at the voting, following the initiative of the Integrity and Ethics Board, and without any involvement of the body that appointed him/her.***

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[7] See *mutatis mutandis, Seckerson and Times Newspapers Limited v. the United Kingdom*, Appl. Nos. 335/10 and 32844/10, of 30 December 2018, although this case deals with the deliberations of the jury.

An intention, perhaps aimed at having the members of the HCJ perform better, may result in undue threats of dismissal to those opposing the existing majorities.

63. *The proposed reform of the dismissal of members of the HCJ (Art. 24 Law HCJ) entails risks that the constitutional provisions on the composition of the HCJ are circumvented via decisions adopted by a few number of its members. Furthermore, if a member is finally dismissed, the procedure of appointment by a relevant body should be initiated again, and while this procedure takes place, the composition of the HCJ would not respect the constitutional provisions.*

64. *Adequate practical arrangements should be put in place to make the involvement of international experts of both the Selection Board and the Integrity and Ethics Commission, meaningful and effective.*

65. *The proposed amendments return some of the powers of recruitment, promotion and dismissal of judges to the HCJ, as the HQCJU entrusted with carrying out the selection processes will be operating under the rules of procedure approved by the HCJ. This is, in principle, positive.*

66. *Although the HCJ shall appoint the members of the HQCJU, it is the newly created Selection Board, whose members are not appointed by the HCJ, that shall play in fact the leading role in selecting the members of the HQCJU. The functioning of the Selection Board and the Integrity and Ethics Commission should be followed closely.*

67. *From the point of view of CoE standards, the distribution of powers between the HCJ and the two newly created commissions is per se not problematic, as long as it is implemented properly. The powers attributed to these commissions may represent a hollowing out of the HCJ.*

Restructuring of the Supreme Court and re-appointment of all its judges

68. *The reduction of the number of Supreme Court judges raises issues as regards compliance with the fundamental principle of judges' irremovability.*

69. *At the present moment, it does not seem, based on the number of cases, the backlogs and the procedural rules, that a reduction in the number of judges at the Supreme Court is required, rather the contrary: this measure risks leading to an overload and potential excessive length of proceedings .*

70. *The criteria for the selection for re-appointment (transfer) should be set out in the law in order to ensure full respect for the principle of legal certainty.*

71. *While this expert takes for granted that the Draft Law, by way of reducing the maximum number of judges of Supreme Court, would entail the transfer of the non-reappointed judges, the wording of Final Provision 7 does not exclude the possibility of the non-selected judges being dismissed.*

72. *The proposed reduction in the number of judges of the Supreme Court should be reconsidered, along with the proposed new selection process of all sitting, duly appointed, judges. Both steps would raise important issues vis-à-vis European standards on judicial independence and the irremovability of judges.*

Amendments of the disciplinary proceedings

73. ***The Draft Law seeks to speed up disciplinary proceedings against judges and ensure a more transparent decision-making process to increase control. However, the measures provided are not fully consistent with those aims, and may even lead to increased backlogs.***

74. ***The timeframes introduced by the Draft Law of maximum 30 days and 5 days for deciding on appeal, do not seem to be realistic.***

75. ***It should be considered to keep mechanisms that allow the filtering of abusive disciplinary complaints to prevent undue delays contrary to Article 6 of the ECHR.***

76. ***The changes proposed to be introduced in the disciplinary proceedings, while perhaps not being completely adequate to the aim sought, in general do not pose problems from the point of view of compliance with CoE standards. An exception is the proposed amendment to Art. 49 Law HCJ about the elimination of a possibility to postpone a hearing on a disciplinary case, even when it is impossible for the judge to attend the hearing.***

77. ***The proposed amendment of Art. 49 Law HCJ should be eliminated or redrafted: sufficiently justified absence of the participant to the proceedings should be admitted as a ground for postponement of the hearing.***