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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UKRAINE

OPINION

ON

AMENDMENTS TO THE LEGAL FRAMEWORK GOVERNING THE SUPREME COURT AND JUDICIAL GOVERNANCE BODIES

Adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019)

on the basis of comments by

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I. Introduction

1. By letter of 4 October 2019, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, Sir Roger Gale, requested an opinion of the Venice Commission on the amendments to the legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies. The request focuses on then draft Law no. 1008 "on amendments to certain Laws of Ukraine regarding activities of the bodies of judicial governance", which was adopted by the Rada on 16 October 2019 as Law No. 193-IX (CDL-REF(2019)039). This Law amends several key points of the Law "On the Judiciary and the Status of Judges" of 2016 (hereinafter "LJSJ") and of the Law "On the High Council of Justice" of 2017 (hereinafter "LHCJ").

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

3. On 11-12 November 2019, a delegation of the Commission composed of Mr Eşanu, Mr Reissner, Ms Suchocka and Mr Tuori, accompanied by Mr Markert and Mr Dürr from the Secretariat, visited Kyiv and had meetings with representatives of the Constitutional Court, the Parliamentary Committee on Legal Policies, Members of Parliament from the majority and opposition, the Supreme Court of Ukraine, the Minister of Justice, the Commission for Judicial Reform under the President of Ukraine, the (former) High Qualification Commission of Judges, the Bar Association, international organisations and the diplomatic community, as well as with civil society. The Commission is grateful to the Council of Europe Office in Kyiv for the excellent organisation of this visit. On 2 December 2019, the Government of Ukraine sent comments on the draft opinion.

4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Kyiv. Following its discussion in the Sub-Commission on the Judiciary on 5 December 2019 and an exchange of views with Mr Ivan Lishchyna, Deputy Minister of Justice of Ukraine, Agent of Ukraine before the European Court of Human Rights, it was adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019).

II. Law No. 193-IX

A. Scope

5. The new Law No. 193-IX introduces major changes in three main areas which will be discussed below:

a) new rules on the structure and role of High Council of Judges (hereinafter "HCJ") and on the composition and status of High Qualification Commission of Judges (hereinafter "HQCJ"),
b) rules on reducing the number of judges of the Supreme Court and
c) rules on disciplinary measures.

6. The first version of draft Law No 1008, which was adopted as Law No. 193-IX, also included provisions extending the scope of the Law on "Purification of Government" (lustration) to persons who, in the period from 21 November 2013 to 19 May 2019, held positions of Head of the High Qualification Commission of Judges or Head of Judicial Administration of Ukraine and their deputies". This provision was removed during the adoption procedure of Law No. 193-IX.

7. Lustration must be limited to dealing with the legacy of totalitarian regimes and cannot be used to remove unwelcome officials of a previous government after a democratic change of

government. In view of the strict standards for lustration,[1] the Venice Commission warmly welcomes that these provisions were removed from the draft law.[2]

8. Before entering into the substance of the amendments, this opinion will refer to the legislative procedure in the adoption of Law No. 193-IX.

B. Legislative process

9. Reforms of fundamental state institutions, such as the judiciary, should be undertaken only following proper analysis of the current situation and the possible impact of new legislation that show the necessity of the proposed changes. They should be adopted following consultation of the main stakeholders on the basis of the principles of transparency and inclusiveness and their input should be essential in preparing balanced and efficient legislation in these fields.[3] While Parliament can of course not be bound by comments from these stakeholders, it should seriously consider the merits of the arguments presented. For a major reform to be successful, it is not sufficient to "do it right" in substance. The procedure of adoption is as important as the substance. A proper consultation of all stakeholders is essential to make a reform credible and to ensure that it is acceptable even to those who oppose it, so that it can survive changes of government over time.

10. The delegation of the Venice Commission learned that key stakeholders in the Judiciary, such as the Supreme Court, the High Judicial Council, the High Qualification Commission or the Bar, complained that they were not consulted in the preparation of draft Law no. 1008 and the comments that they made at their own initiative once the draft Law became available, were not discussed in detail during the parliamentary proceedings. Before adopting wide-ranging legislation on the Judiciary, a thorough analysis[4] of the possible effects of the legislation is required. Earlier reforms of the judiciary in Ukraine had not been finalised and the effects of these reforms could not yet be seen in practice.

11. The delegation of the Venice Commission did not learn about exceptional circumstances that would justify a fast track legislative process. The authorities, but also NGOs, argued that the composition of the new Supreme Court had been flawed as in 44 cases the negative opinion of the Public Integrity Council had been overruled by the High Qualification Commission. However, according to the procedure in place, the HQCJ was not bound to follow the recommendations of the PIC and was empowered to overrule these recommendations with a qualified majority.

12. The preparation and adoption of draft Law no. 1008 has to be seen as part of a wider legislative programme of the newly elected President of Ukraine, who submitted more than 100 draft laws in a single day. It is inevitable that in such a vast legislative programme some draft laws contain oversights or inconsistences. The Venice Commission welcomes that the authorities seem ready to consider further amendments and clarifications to the existing provisions as part of new draft laws that are being prepared.

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[1] Notably Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe and the ECtHR judgments Matyjek v. Poland, 38184/03, § 62; Turkek v. Slovakia, no. 57986/00, § 115. See also CDL-AD(2015)012, par. 19 for a an overview of cases. See also the very recent case Polyakh and others v Ukraine of 17 October 2019 (Applications nos. 58812/15 and others).

[2] See CDL-AD(2015)012, Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015..

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

[4] The Assessment of the 2014-2018 judicial reform in Ukraine by Bachmaier Winter, Kovatcheva, Engstad and Reissner could serve as a starting point for such impact analysis (https://www.coe.int/en/web/human-rights-rule-of-law/-/assessment-of-the-2014-2018-judicial-reform-in-ukraine).

C. Stability of the legal framework of the judicial system

13. The judicial system of Ukraine has been subject to numerous reforms in recent years, for which the many Venice Commission opinions[5] and Council of Europe reports provide evidence. The principle of stability and consistency of law, as a core element of the rule of law, requires stability in the judicial system.[6] In its recent opinion on Romania, the Venice Commission stated that: *"The Venice Commission recalls that, according to the Rule of Law Checklist, clarity, predictability, consistency and coherency of the legislative framework, as well as the stability of the legislation, are major concerns for any legal order based on the principles of the rule of law."*[7] There is a clear connection between the stability of the judicial system and its independence. Trust in the judiciary can grow only in the framework of a stable system. While judicial reforms in Ukraine have been considered necessary in order to increase public confidence in the judicial system, persistent institutional instability where reforms follow changes in political power may also be harmful for the public trust in the judiciary as an independent and impartial institution.[8]

14. The principle of stability and consistency of laws is essential for the foreseeability of laws for individuals, including judges and others serving in the affected institutions. Frequent changes in the rules concerning judicial institutions and appointments can lead to various interpretations, including even alleging *mala fide* intentions for these changes.

15. Ukraine has undergone profound judicial reforms in recent years,[9] and the implementation of some of them is still unfinished. The reform of the process of the selection of judges and the new composition of the Supreme Court of Ukraine, which began its work in January 2018, has been a marked improvement over the system that existed before. In this situation, convincing justifications have to be presented for yet another reform. The explanatory note and the explanations provided to the delegation of the Venice Commission do not live up to this requirement.

16. A stable and foreseeable judicial system is also considered by investors as very important for the economy and to attract foreign investment.[10]

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

[6] CDL-AD(2016)007, Rule of Law Checklist, II.B.4.i.

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

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

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

[10] According to the Joint Statement on Rule of Law, Selection of Judges and Composition of the Supreme Court the American Chamber of Commerce in Ukraine, the European Business Association and the Union of Ukrainian Entrepreneurs of 15October 2019: *"A crucial pre-condition to inspiring investor confidence to*

III. Reform of the HCJ and the HQCJ

A. Relationship between HJC and HQCJ / complexity of the bodies of judicial governance

17. All bodies entrusted with the relevant competences of judicial governance must be established and function in conformity with the applicable international standards for judicial councils. In numerous opinions, the Venice Commission insisted that the system of judicial governance should be coherent and recommended simplifying the structure of the organs of judicial administration in Ukraine,[11] notably as concerns the parallel existence of the HCJ, which is a constitutional body, and the HQCJ, which has its basis in the law only.[12] The HQCJ is a historical relict from a time when, due to constitutional restrictions, the HCJ was deemed difficult to reform.

18. A substantial part of the Law No. 193-IX is devoted to the regulation of the activities of the HQCJ (amended Articles 92-98 of the Law on Judiciary and Status of Judges), which notably introduce a new procedure for the formation of the HQCJ. Law No. 193-IX brings the HQCJ closer to the HCJ by subordinating the former to the latter. Article 94.1 LJSJ states that the HQCJ will consist of 12 members appointed for four years by the HCJ based on the outcome of competitive selection. This somewhat clarifies the position of the HQCJ in relation to the HCJ and is to be welcomed.

19. The HQCJ is defined in Article 92(1) of the Law on the Judiciary and Status of Judges (LJSJ) as "a public collegial body of judicial governance that operates on a permanent basis in the justice system of Ukraine". It would be preferable if this Article would already clearly define the position of the HQCJ in relation to the HJC, notably that it is subordinated to the HCJ.

20. Immediately with the entry into force of Law No. 193-IX on 7 November 2019, all members of the HQCJ were dismissed. This interrupted all on-going assessment activities, especially the urgent assessment of judges of the first and second instances. This interruption will prolong the problems of access to courts in these instances whose work is directly relevant for citizens.

21. Law No. 193-IX introduces two new commissions – the Selection Board for the appointment of the members of the HQCJ and the Integrity and the Ethics Commission. A central task of the Selection Board for the appointment of the members of the HQCJ is to re-compose the HQCJ. The main task of the Integrity and Ethics Commission is to supervise the behaviour of the members of both HCJ and the HQCJ.

22. Both the Selection Board for the appointment of the members of the HQCJ and the Integrity and Ethics Commission are conceived to have a mixed international (three members) / national (three members) composition. Following the successful model of the anti-corruption law,[13] such

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put significant capital into Ukraine is the stability and predictability of the rule of law. It is vital to create an environment where investors and businesses feel secure in the irrevocability of established rules and the even-handed protection of property rights adjudicated by an independent judicial system free from interference by executive authority."

[11] CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine, par. 33-35; CDL-AD(2013)014, 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, par. 40.

[12] GRECO too recommended "reviewing the need to reduce the number of bodies involved in the appointment of judges" GrecoEval4Rep(2016)9 (https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207)

[13] CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction

a composition fosters the trust of the public and may help in overcoming any problems of corporatism.

B. Composition of the HQCJ / Selection Board

23. In practice, the role of the HCJ in composing the HQCJ seems rather narrow, because new Article 95-1 LJSJ provides that the appointment of the HQCJ members will be carried out by the new Selection Board, which is in charge of the competition. This new body consists of three persons elected by the Council of Judges of Ukraine from among its members and three persons from among the international experts proposed by the international organisations with which Ukraine cooperates in the field of preventing and combating corruption.

24. As such, the composition of the Selection Board would seem to build on earlier opinions by the Venice Commission, especially as concerns the participation of international experts. In its opinion on the anti-corruption court in Ukraine[14] the Commission had stated that "temporarily, international organisations and donors active in providing support for anticorruption programmes in Ukraine should be given a crucial role in the body which is competent for selecting specialised anti-corruption judges …". It is important to note that such bodies should be established for a transitional period until the envisaged results are achieved. A permanent system might raise issues of constitutional sovereignty.

25. A major problem with these changes is, however, that they come too early, in the middle of a very important period of first testing all the judges of first and second instance. Apart from the fact that the individual tenures of the members of the HCJ were terminated *ex lege* without any transitional provision, the fact that the HQCJ was dissolved on 7 November 2019 results in the complete stop of the procedure of appointments for first and second instance courts, which is regrettable. More than 2000 vacancies need to be filled urgently in these courts, some of which do not work at all due to the absence of judges. Law No. 193-IX intervenes at a damaging moment, at a critical point of the reform process. The members of the HQCJ should at least have been enabled to continue their work until they were replaced.

C. Integrity and Ethics Board

26. The Law also envisages the introduction of an Integrity and Ethics Board, functioning at the HCJ to ensure transparency and accountability of the members of the HCJ and the HQCJ. The Integrity and Ethics Board is a kind of supervisory body over both bodies, which assesses their members' compliance with *"integrity principles and ethical standards of a judge as an integral component of the professional ethics …".*

27. Contrary to the Selection Board, the Integrity and Ethics Board seems to have a more permanent nature. The creation of this additional specialised body further complicates the system of judicial government bodies.

28. In addition to its main task, the supervision of the members of the HCJ and the HQCJ, a late amendment to draft Law no. 1008, added a new competence, "monitoring of information about judges of the Supreme Court in order to identify violation, gross systematic neglect of a judge [of] his/her duties incompatib[le] with the status of a judge or his/her non-compliance with the position, violation of the duty to confirm the lawfulness of the source of property." (Article 28-1(7)(6).

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of mandatory specialisation of judges on the consideration of corruption and corruption-related offences).

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

D. Other issues

29. Undoubtedly, the members of High Qualification Commission of Judges of Ukraine must respect the anticorruption legislation and violations of these rules may lead to dismissal. Article 126 of the Constitution, as amended in 2016, explicitly provides that a violation of the obligation to justify the legality of the origin of property is a ground for the dismissal of a judge. However, making *a "violation of legal requirement related to corruption prevention"* (Article 96(4) LJSJ) a ground for dismissal is problematic as it is not clear what such a *"legal requirement related to corruption prevention"* would be. In addition, the principle of proportionality is not respected if even a small violation of those rules may serve as a ground for dismissal. The type of violations that could lead to dismissal should be specified in the law.

30. Article 95-1(8) LJSJ provides that members of the HQCJ may be appointed if the minutes of the Selection Board are signed by all its members. This means that the minutes must be signed even by members who voted against the decision. This provision can be dangerous as members who disagree with the decision of the Selection Board could block the process of appointment simply by refusing to sign the minutes. To avoid such problems, only the chair and the secretary should sign the minutes.

IV. Reduction of the number of judges of the Supreme Court and selection of its judges

A. Scope of amendments

31. By amending Article 37(1) LJSJ, Law No. 193-IX reduces the maximum number of judges in the Supreme Court from 200 to 100. The explanatory memorandum to the draft Law does not refer to this provision and no convincing reasons as to why this number should be reduced to 100 within a short period of time and without impact assessment were given to the members of the Venice Commission's delegation.

32. Following the implementation of the 2016 constitutional reform, the Supreme Court is close to its maximum number of 200 judges with currently 193 sitting judges, following two competitions completed by the former High Qualification Council in 2017 and most recently in May 2019. Therefore, the amendment means that nearly 100 judges will lose their positions as judges of the Supreme Court.

33. Section 5 of the Final Provisions of Law No. 193-IX provides that it will be for the newly composed HQCJ to select the judges of the Supreme Court within its cassation courts (chambers) who will remain at the Supreme Court *"based on the criteria of professional competence, ethics and integrity."* However, Law No. 193-IX does not provide any criteria or procedure for this selection as the "procedure for the selection of judges to the cassation courts within the Supreme Court shall be approved by the High Qualifications Commission of Judges of Ukraine, in agreement with the High Council of Justice."

34. Section 7 of the Final Provisions of Law No. 193-IX provides that "Judges of the Supreme Court who 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, which results from the competitive selection." This means that judges who have a rating that is lower than that of the 100 judges with the best rating will either be transferred to the courts of appeal, which would effectively mean a demotion, or – supposedly those with the lowest rating – may even be dismissed as Section 7 of the Final Provisions only provides that the lower rating judges "may" be transferred to the courts of appeal.

35. This reduction of the number of Supreme Court judges raises a number of issues, including the question of criteria and procedure of evaluation of the sitting judges, the transfer of lower rating judges to courts of appeal against their will and the dismissal of judges.

B. Irremovability of judges

36. The irremovability of judges and their security of tenure are the essential core of judicial independence. Judges should be appointed permanently until retirement age. In particular, any link between judicial office and the electoral term of the President and Parliament has to be avoided. It is obviously dangerous for judicial independence to give the impression to the judges and to the general public that following elections it is up to the discretion of the newly elected political organs of the state whether the sitting judges remain in their position or not.

37. As regards transfers, the basic principle is that judges shall not be transferred without their consent. This general principle is reflected in the Committee of Ministers Recommendation (2010)12, par. 52: "A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system."[15]

38. The Venice Commission has consistently held that the transfer against the will of the judge may be permissible only in exceptional cases.[16] The irremovability of judges is also guaranteed in Article 126 of the Constitution of Ukraine, which only allows transfer in case of a reorganisation or dissolution of a court. Exceptions to this principle can only be a "reform of the organisation of the judicial system".[17] Judges may be transferred against their will after a reorganisation of their court.[18] The question is therefore whether the changes introduced with Law No. 193-IX – and possibly additional draft laws being prepared – can be interpreted as a "reform of the organisation", which is a concept that has to be interpreted narrowly. Clearly, neither a reorganisation within a court nor a simple reduction of the number of judges are covered by this exception, which has to be interpreted narrowly.

39. In this case, the Ukrainian authorities argue that the reduction of judges in the Supreme Court and their subsequent transfer would be part of a general reform to transform the Supreme Court into a court of cassation. However, the explanatory note to the draft Law makes no claim of a general reform which would require a reduction of judges. Instead, the Explanatory Note[19] presents the draft Law as a remedy to shortcomings in the judicial administration bodies and does not mention the Supreme Court at all.

C. "Reform" of the Supreme Court / Court of Cassation

40. The number of judges at Supreme Courts varies largely from country to country and there is no ideal number. For each country, the appropriate number depends on the procedural laws, the legal culture, the quality of the work in the lower instances and the overall trust of the people in the justice system. Low trust in the judicial system can lead to a higher number of appeals.

41. The current Supreme Court has started working only in December 2017, following a new competition process. Judges appointed to the Supreme Court came through a process that was

[15] See also CCJE Opinion no: 1 (2001), par. 60 (a).
[16] See CDL-AD(2010)004, Report on the independence of the judicial system part 1: The independence of judges, par. 43.
[17] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, par. 52.
[18] CDL-PI(2015)016, Preliminary Opinion on the proposed constitutional amendments regarding the judiciary of Ukraine, par. 24.
[19] CDL-REF(2019)039.

found to comply with European standards for the selection of judges, which was a positive outcome from the previous reforms.

42. As pointed out, the explanatory memorandum for Law no. 193-IX remains silent on the justification for the drastic reduction of the number of judges. These amendments do not provide for changes in the role of the Supreme Court within the judicial organisation, which could qualify as a reform of the Supreme Court. No justification is provided for the number of 100 Supreme Court judges, which seems to have been chosen arbitrarily.

43. The reduction of the number of judges will trigger an even higher backlog of cases and jeopardise the functioning of the Supreme Court. Due to its current heavy caseload (some 70.000 cases), the Supreme Court will not be able to provide properly reasoned judgments within a reasonable time, contrary to Article 6 ECHR.

44. The one reason for the reduction of the number of judges indicated to the delegation of the Venice Commission was the unification of case-law, which would be easier to achieve with 100 than with 200 judges. Cassation courts within the Supreme Court would give contradictory judgments and even the Grand Chamber, which is entrusted to settle contradiction would have provided contradictory judgments.

45. In discussion with the delegation of the Venice Commission, the Supreme Court did admit that in a few cases contradictory judgments had been adopted, but they insisted that the Grand Chamber was actively working on solving these issues. The Commission also learned that, as a priority, the Supreme Court decided model cases, which would solve legal issues for many pending cases (14 such model cases have been adopted).

46. A reduction of the number of judges is no guarantee that there are no contradictions. There are much smaller supreme courts, which adjudicate in chambers, where the problem arises. The essential point is the establishment of a mechanism within the court to react, possibly correct, and to reduce such contradictions. This is a question of the procedural provisions, the awareness of the judges and the ease of access to case law (indexing, efficient database searches).

47. The delegation of the Venice Commission learned that another draft Law is being prepared to introduce procedural filters limiting access to the Supreme Court with the purpose of changing it to a “real” court of cassation, which would examine points of law only. Indeed, the Supreme Court provides so-called “comprehensive review”. The Supreme Court has a backlog of some 70.000 cases (including from the former high specialised courts) and receives some 360 new cases every day.

48. Most of the delegation’s interlocutors agreed that the source of problem of the backlog of cases is not the Supreme Court itself, but the courts of first and second instance, which have not yet been reformed. Some 1500 judges quit the courts because of the evaluation or before they were evaluated. As the citizens did not trust the judges, many cases were appealed to the Supreme Court, because of the inadequacy of the lower instances. Therefore, the approach must be to first reform the lower instances and to fill these vacancies before turning the Supreme Court into a court of cassation. Otherwise, the access to the court under Article 6 ECHR would be severely hampered.

49. In principle, the goal to reduce access to the Supreme Court and to limit it to decide legal issues rather than performing comprehensive review is a valid purpose for reform. However, the sequencing of such a reform is not respected by Law No. 193-IX. First the filters should be adopted and the Supreme Court should deal with its backlog in its current composition, because the filters will have an effect only for future cases (a retroactive application removing pending cases from the docket would raise serious issues of access to the courts under Article 6 ECHR). Once the backlog is settled and the incoming case-load is reduced by the filters, it may be possible

to reduce the number of judges gradually. This will depend on the remaining case-load resulting from the effectiveness of the filters, while the need to give sufficient time to the judges for serious consideration of cases raising important issues of principle will have to be taken into account. This reduction of the number of judges could probably be achieved by means of natural reduction (retirements) or voluntary transfers.

50. Therefore, the changes envisaged in Law No. 193-IX cannot be seen as a general reform that could justify the transfer or even dismissals of judges against their will.

D. Procedure of selection of Supreme Court judges

51. Both the Venice Commission and the Consultative Council of European Judges (CCJE) have maintained that in order not to endanger judicial independence, evaluations and disciplinary measures and processes should be clearly differentiated.[20] Indeed, CCJE Opinion no. 17 concludes: *"Some consequences, such as the dismissal from office because of a negative evaluation, should be avoided for all judges who have obtained tenure of office, except in exceptional circumstances."*[21]

52. It is important to note that all judges of the Supreme Court already have recently undergone an extensive process of performance evaluation of judges and assessment of their integrity before their appointment. The judges of the present Supreme Court have no longer been appointed by the *Verkhovna Rada*, but in a procedure considered by the Venice Commission to meet European standards.

53. As to procedural rules and guarantees, no such rules can be found in the draft Law. According to Article 5 of the Final Provisions, the procedure for the selection of judges to the cassation courts within the Supreme Court is to be approved by the newly formed HQCJ in agreement with the HCJ. In the absence of provisions in the Law, the newly formed HQCJ and the HCJ have complete discretion on this procedure.

54. This raises important issues of the rule of law (absence of legal certainty) and the separation of powers, given that the body adopting both criteria and the procedure also applies them in individual cases. This would even allow for *ad hoc* procedural rules to be adopted for a specific set of evaluations of judges. This may lead to arbitrariness in the evaluations.

55. The procedure for evaluating the judges in this case as in all cases has to be compatible with the applicable standards. Moreover, since the evaluation procedure leads to the transfer of judges to a lower level court and even the dismissal of judges, the evaluation must comply with the procedural guarantees flowing from the case law of the European Court of Human, Rights and set out *inter alia* in the cases *Baka v. Hungary* and *Oleksandr Volkov v. Ukraine*.[22] The procedure should be based on objective criteria, and "should enable the judges to express their view on their own activities and on the assessment of these activities, as well as to challenge assessments before an independent authority or a court."[23] Rather than leaving full discretion to the HQCJ and the HCJ the existing rules should be applicable to the judges affected.

56. Procedural guarantees for the judges concerned are particularly warranted in this case. According to Article 7 of the Final Provisions, the HQCJ would have discretion in deciding whether

[20] See CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, paras. 28, 102 and 108; Consultative Council of European Judges, Opinion no. 17, par. 29.
[21] Consultative Council of European Judges, Opinion no. 17, par. 41.
[22] Baka v. Hungary, [G.C.] no. 20261/12, paras. 100-106; *Oleksandr Volkov v. Ukraine*, no. 21722/11, paras. 87-91.
[23] See CM Recommendation (2010)12, par. 58; Consultative Council of European Judges, Opinion no. 17, par. 41.

judges, who are not selected for continued service in the Supreme Court, shall be transferred to an appellate court or not. Since the draft Law does not provide for an alternative, it appears natural to conclude that the High Judicial Council may choose to dismiss these judges. However, the criteria the HQCJ is supposed to use when deciding on the transfer are not laid down in the law. This creates a threat to the independence of the judiciary.

57. The only criteria for selection mentioned in Law No. 193-IX "professional competence, ethics and integrity" are not detailed enough for their application in practice. By giving the HQCJ (under the control of the HJC) the competence to specify the criteria (as part of the procedure) within this wide framework and then to apply these criteria, Article 7 of the Final Provisions provides to the HQC very wide discretion, which is not compatible with the principle of judicial independence and the irremovability of judges. If a re-evaluation of some judges of the Supreme Court were indeed undertaken, at least the substantive evaluation criteria should be the same as those that already exist under the law in order to avoid arbitrariness.[24]

58. The delegation of the Venice Commission learned that the authorities complained that in the evaluation procedure, judges were appointed who did not fulfil the criteria of the process. In 44 cases, the recommendations of the Public Integrity Council[25] were overruled by a qualified majority within the HQCJ and in some cases the Public Integrity Council provided "additional information" without giving a negative recommendation, expressing the hope that the HQCJ's investigation into this information would lead to a rejection of the candidates.

59. The interlocutors of the Venice Commission complained about the application of this procedure by the HQCJ in these cases only. Nonetheless, the Final Provisions provide for a completely new selection procedure for all judges of the Supreme Court.

60. The evaluation of judges is normally intended as a means to improve the judge's work and as a means to decide on the promotion of judges. In the case of a promotion, a negative outcome of the evaluation means that the *status quo* applies. In this case, the evaluation is meant to decide between the *status quo* and what is effectively a demotion of the judge to a lower court and which may entail a transfer to a different part of the country or even dismissal. While not formally a disciplinary measure, a negative result of the evaluation procedure entails negative consequences for the judges' irremovability and security of tenure, which is an effect that resembles the effect of disciplinary sanctions. Moreover, unlike disciplinary measures which are based on specific violations, the evaluation criteria are general and leave a wide margin of discretion to the evaluating body. The process, as set out in Law No. 193-IX, instead amounts to a vetting of the judges of the Supreme Court. A large number of the judges of the Supreme Court were appointed only this year. It therefore seems premature to evaluate their record.

61. In addition, this raises a serious constitutional issue as the transfer and dismissal of judges is a competence of the HJC according to the Article 131 of the Constitution. While Section 5 of the Final Provisions of Law No. 193-IX provide for the approval of the procedure for the selection by the HJC, the transfer – and possible dismissal – of lower rated judges is done by the HQCJ alone. The approval of the procedure by the HJC cannot replace its competence to decide on transfer and dismissal in each case. It may be for the Constitutional Court to examine the constitutionality of this provision.

[24] See CDL-AD(2019)020, Republic of Moldova, Interim Joint Opinion of the Venice Commission and DHR and DGI on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Office, par. 50.

[25] The Public Integrity Council, composed of representatives of human rights NGOs, academic lawyers, advocates and journalists, was established to assist the HQCJ in determining the conformity of candidate judges with the criteria of professional ethics and integrity. Its recommendations can be overruled by a qualified majority of the HQCJ.

62. To conclude, the Venice Commission is of the opinion that subjecting all judges of the Supreme Court to a new selection procedure when there are complaints about the appointment of some judges only effectively amounts to a second vetting, which is not justified and clearly not proportionate. If there really had been problems in the application of the procedure of appointments of judges, the recommendations of the Public Integrity Council should provide sufficient indications as to which cases would need to be reviewed on an individual basis.

V. Disciplinary proceedings

A. Judges' discipline

63. According to the LHCJ of 2016, disciplinary proceedings against judges are within the powers of the HCJ, and will be carried out by disciplinary chambers, the majority of which should be made up of judges. In general, the existing procedure on judicial discipline was considered to be aligned with applicable standards, and, if correctly implemented, it should provide a more adequate balance between judicial independence and accountability.

64. Law No. 193-IX introduces drastically reduced deadlines for disciplinary proceedings (Articles 50 and 51 LHCJ), they allow for proceedings *in absentia* of the judge even when the judge concerned can justify his/her absence (Article 47(3) LHCJ) and disciplinary proceedings can be initiated anonymously (Article 42(1) LHCJ).

65. The new shortened deadlines for disciplinary proceedings do not seem to be realistic. Notably, leaving to the judges only three days to prepare their reply to allegations is clearly too short. These shortened deadlines could easily result in unjustified decisions due to a lack of time on the side of the judges, but also for the HJC to prepare properly.

66. Eliminating the possibility of postponing the hearing on disciplinary liability, even if the absence of a judge is justified, and then to conduct proceedings *in absentia* clearly contradicts the right to a fair trial under Article 6 ECHR. It is regrettable that the legislator excluded paragraph 4 which provided that, if the judge is not able to participate in the session of the disciplinary chamber for valid reasons, s/he can require to postpone the disciplinary review once, as this provision was a sound basis for ensuring on the one hand the respect of the right of the judges and celerity of the procedure on the other hand.

67. Speeding up disciplinary proceedings is certainly a valid purpose of amendments. However, the rights of the judge concerned to properly prepare have to be respected. Instead, the procedure should be accelerated by reducing the excessive number of remedies available: against disciplinary decisions of the HCJ, an appeal should lie directly with the Supreme Court and not with the still unreformed Kyiv City Administrative Court.

B. Discipline of members of the HCJ and the HQCJ

68. Article 24(3) LHCJ provides that the decision to dismiss a member of the HCJ shall be adopted within five days from the submission of the request by the Integrity and Ethics Board. The same paragraph provides that the decision to dismiss a member is considered to be adopted, if it is not rejected at a joint meeting of the High Council of Justice and members of Integrity and Ethics Board: "*A decision to dismiss a member of the High Council of Justice is considered to be adopted if the submission will not be rejected at a joint meeting of the High Council of Justice and the Integrity and Ethics Board by a majority vote of the meeting participants, provided that at least two international experts - members of the Integrity and Ethics Board have voted for it".*

69. The same procedure is applied for the members of the HQCJ. They can be dismissed by a majority vote of the HCJ upon the proposal of the Integrity and Ethics Commission.

70. The Ukrainian Constitution is silent on the issue which body is competent to dismiss a member of the HCJ and on what grounds. Such a competence can in general be established through ordinary law. It is welcome that the HCJ is in charge of dismissing its members but there are several procedural flaws.

71. The term of five days for making decision on dismissal is clearly too short. This system entails the risk of circumventing the powers of a constitutional body such as the HCJ. These changes could affect the balance between the bodies.

72. Even more problematic is the choice to establish a presumption for dismissal of the members of the High Council of Justice. A simple proposal for dismissal by the Integrity and Ethics Board leads to dismissal unless a majority of the HJC votes against. This voting rule gives excessive power to the Integrity and Ethics Board and might be unconstitutional.

73. Furthermore, doubts arise as concerns to a possible double voting of the members of the Integrity and Ethic Commission (as members of that Commission but also as members of HCJ). The situation is not clearly regulated by law. The vote of these members in the HCJ on their own proposal should be excluded. A similar problem was identified by the European Court of Human Rights in the case *Oleksandr Volkov v. Ukraine*.[26]

74. The new procedure for dismissing a member of the HCJ lowers the threshold of dismissal in a way which may prove detrimental to the independence of this constitutional body. Whether these changes are unconstitutional will have to be determined by the Constitutional Court.

VI. Other issues – remuneration

75. The amendment to Article 135 reduces the salary for a judge of the Supreme Court from 75 to 55 subsistence minimums. This is a reduction of 27 per cent. The salaries of other categories of judges are maintained at the same level. The delegation of the Venice Commission learned that depending on the experience of the Supreme Court judges, their salaries start at some 8000 Euros and can easily exceed 10.000 Euros. The average salary in Ukraine is some 250 Euros. The salaries of judges were set deliberately high, in order to shield them from the temptation of corruption.

76. Whether or not the reduction of a judge's salary is compatible with judicial independence depends on several factors. One factor is the actual minimum level of the salary. Paragraph 57 of the explanatory memorandum to CM Recommendation (2010)12 maintains that *"An adequate level of remuneration is a key element in the fight against corruption of judges and aims at shielding them from any such attempts."*[27] Irrespective of the relative size of the reduction of the salary, it should not fall below what in Ukraine may be considered an adequate level for a judge in the highest court of the land.

77. A second factor for considering a reduction of a judges' salary is whether or not such a cut is part of a general reform or if it is directed against judges in general or against specific judges. The remuneration of judges at an adequate level is closely linked to judges' safety of tenure and irremovability, which are both important for protecting judicial independence. However, a reduction of judges' salaries is not in itself incompatible with judicial independence. Paragraph 57 of the explanatory memorandum to CM Recommendation (2010)12 states: *"Public policies aiming at the general reduction of civil servants' remuneration are not in contradiction with the requirement to avoid reducing specifically judges' remuneration".* A reduction of the remuneration

[26] No. 21722/11.
[27] See also European Charter on the statute for judges, art. 6.1; CCJE Opinion no. 1, par. 61; CCJE Opinion no. 21, V.g.

for a specific group of judges only, will easily infringe judicial independence.[28] In this case, the reduction is specifically directed at the judges of the Supreme Court only.

78. The salary of judges is not only an element in judicial independence. A reduction of the remuneration of judges may lead to a risk of corruption and it reduces the attractivity of the position as it has an incidence on the willingness of candidates to apply and for sitting judges to stay in the profession.

79. Finally, by removing Sections 22 and 23 of the Final and Transitional Provisions of the LJSS, Law No. 193-IX attributes the same salary to all judges, not only to those who passed the re-appointment procedure under the 2016 amendments. The difference in salaries between re-appointed judges and others is indeed a problem. However, it should be solved by finalising re-evaluation procedure rather than by giving the same salary to the "unreformed" judges, especially those who refused to participate in the procedure and whose tenure should be terminated.

VII. Conclusion

80. The stability of the judicial system and its independence are closely interrelated. Citizens' trust in the judiciary can grow only within a stable constitutional and legislative framework. Following a previous constitutional reform and a thorough vetting process, Law No. 193-IX introduces a number of additional radical changes to the judiciary of Ukraine. It provides new rules on the structure and role of HCJ and on the composition and status of HQCJ (which has already been dissolved dismissed with the entry into force of the Law), reduces the number of judges of the Supreme Court by half and it introduces strict rules on disciplinary measures for judges and the members of the HCJ and the HQCJ.

81. The Commission welcomes that the project to subject the heads of the HQCJ and heads of the State Judicial Administration acting between 2013 and 2019 to the Law on Purification of Government" (lustration) was abandoned.

82. The Venice Commission welcomes that the Law No. 193-IX simplifies the system of judicial administration by bringing closer the HCJ and the HQCJ. In the long term, a merger of the HQCJ into the HCJ could be envisaged.

83. The Venice Commission takes good note that the governmental majority seems to be open to further changes in the judicial system to remove shortcomings in Law No. 193-IX, which was adopted in a very speedy procedure, without sufficiently taking into account the view of all relevant stakeholders. However, the Commission is deeply worried that the Law may lead to major changes in the composition of the Supreme Court following a change of the political majority. The Supreme Court was comprehensively reformed based on legislation adopted by the previous *Verkhovna Rada*. Doing so again, following elections, sends a message both to the judges and to the general public that it depends on the will of the respective majority in parliament whether judges of the highest court may stay in office or not. This is an obvious threat to their independence and to the role of judiciary in the light of Article 6 ECHR.

84. A reform of the Supreme Court can and even should be undertaken once its huge case-load has been reduced. Introducing filters for access to the Supreme Court with the purpose of replacing the comprehensive review that it currently exercises, are indeed valid goals and can be pursued as soon as the first and second instance courts have been reformed. The main problem of the changes brought by Law No. 193-IX is the sequencing of the changes. It is obviously dangerous for judicial independence to give the impression to the judges and to the general public that following elections it is up to the discretion of the newly elected political organs of the state

[28] See also CDL-AD(2010)038, Amicus Curiae brief for the Constitutional court of "The Former Yugoslav Republic of Macedonia" on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, paras. 16-20,

whether the sitting judges remain in their position or not". Therefore, any link between judicial office and the electoral term of the President and Parliament has to be avoided.

85. The Venice Commission therefore makes the following main recommendations:

- The main focus of reform should be the first and second instance courts. New judges who passed the re-evaluation procedure should be appointed speedily to fill the high number of vacancies. The work the HQCJ has done so far should be the basis for these urgent nominations.
- The provision reducing the number of judges of the Supreme Court to 100 effectively amounts to a second vetting and should be removed. A vetting of all Supreme Court judges when there are doubts about the integrity of a few of them is clearly not proportionate. The goal of reducing the number of judges may be pursued at a later stage, once the Supreme Court has cleared its current backlog of cases and access filters have become effective for new cases. The reduction of the number of judges could probably be achieved by means of natural reduction (retirements) or voluntary transfers.
- The disciplinary procedure should be simplified by reducing the excessive number of remedies available: against disciplinary decisions of the HCJ, an appeal should lie directly with the Supreme Court and no longer with the Kyiv City Administrative Court and the administrative court of appeal; on the other hand, some of the deadlines in disciplinary proceedings shortened by Law No. 193-IX should be re-established.

86. The Venice Commission remains at the disposal of the Ukrainian authorities and the Parliamentary Assembly for further assistance in this matter, notably as concerns legislation currently being prepared for limiting access to the Supreme Court.