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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PRELIMINARY OPINION

ON THE PROPOSED CONSTITUTIONAL AMENDMENTS

REGARDING THE JUDICIARY

OF UKRAINE

On the basis of comments by

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Mr Peter PACZOLAY (Honorary President)
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I. Introduction

1. By decree 119/2015 of 3 March 2015, the President of Ukraine, Mr Petro Poroshenko, established the Constitutional Commission of Ukraine with the task of preparing amendments to the current Constitution. Ms Hanna Suchocka, member of the Venice Commission, was appointed by the President as an international observer on the Constitutional Commission. Three working groups were established, one of which deals with the judiciary.

2. At the Plenary Session of 20-21 June 2015, the Venice Commission authorised the rapporteurs to send a preliminary opinion on the draft constitutional amendments, including on the judiciairy, to the Ukrainian authorities prior to its adoption by the Commission at its next plenary session.

3. On 15 and 16 July 2015, a delegation of the Venice Commission composed of Ms Kiener, Ms Suchocka and Mr Papuashvili, accompanied by the Deputy Secretary of the Commission, Ms Granata-Menghini, as well as by the Secretary General's Special Advisor on Urkaine, Mr Giakoumopoulos, met in Kyiv with Mr Oleksiy Filatov, Deputy Head of the Presidential Administration and Secretary of the Constitutional Commission, as well as Mr Serhiy Holovatiy and Mr Kostyantyn Krasovsky, members of the Constitutional Commission, in order to discuss the yet not finalised draft amendments on the judiciary. Amendments were subsequently made to the text. The Venice Commission wishes to thank the Ukrainian representatives for the open and constructive dialogue.

4. By a letter of 21 July 2015, the Speaker of the Verkhovna Rada and Chair of the Constitutional Commission of Ukraine, Mr Volodymyr Groysman, transmitted the text of the amendments to the Constitution of Urkaine relating to the judiciary, proposed by the relevant Working Group of the Constitutional Commission (CDL-REF(2015)024), and requested the Venice Commission to prepare an urgent opinion on these amendments.

5. The present opinion was prepared on the basis of the contrbutions of the rapporteurs; it was sent to the Ukrainian authorities as a preliminary opinion and made public on 24 July 2015.

II. Preliminary remarks

6. The Venice Commission has been emphasising for many years that the most serious criticism concerning the Judiciary and the Public Prosecutor's Office of Ukraine stems from the Constitution.[1] In all of its opinions on the judiciary and the prosecution, the Commission always pointed out the need to amend the Constitution, arguing that without amending the Constitution the reform of the judiciary would only be partial and would not suffice to meet the European standards in full. It has been also pointed out by the Venice Commission that the effective

[1] 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; 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, Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013); CDL-AD(2014)037 Opinion on the Draft law amending the Constitution of Ukraine, submitted by the President of Ukraine on 2 July 2014, endorsed by the Venice Commission at its Plenary Session (Rome, 10-11 October 2014); CDL-AD(2013)025 Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013); CDL-AD(2012)019 Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012); CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015).

reform of the judiciary in Ukraine is not only a question of adopting relevant constitutional provisions but it depends also on the political will and commitment to create a truly independent judiciary.

7. The current Ukrainian authorities have expressed the political will to bring the judiciary into conformity with the applicable European standards and the working group on the Judiciary, being part of the Constitutional Commission, has accordingly prepared draft of amendments to the Constitution. The aim of the new provisions is to reform the judicial system and the status of the judges in Ukraine in order to improve access to justice, to strengthen the independence of the judiciary, to fight corruption within the judiciary and to bring the justice system into line with the needs of the society and European standards. The new draft contains many positive provisions. In the preparation of this draft, many remarks of the rapporteurs have been taken into account, but not all of them, for reasons which will be analysed below.

III. Scope of the present opinion

8. This opinion examines proposed amendments to several articles of the Constitution of Ukraine relating to the judiciary and the prosecution service. In the light of the urgency, it deals only with the main issues and does not assess the amendments exhaustively. Full reference is made to the numerous opinions previously adopted by the Venice Commission on these matters.

9. The opinion is based on the English version of the proposed amendments, which was submitted to the Commission by the Ukrainian authorities on 21 July 2015. Certain comments may be due to inaccuracies in the translation.

IV. Analysis

Article 55

10. Within the framework of the judicial protection of human and citizens' rights and freedoms, it is proposed to add a provision on the possibility for individuals to lodge a constitutional complaint before the Constitutional Court of Ukraine. The extent and modalities of this guarantee will be examined below.

Article 59

11. It is proposed to specify that the right guaranteed by Article 59 refers to "professional" legal assistance, that is, through representation by a practising lawyer. This is a positive clarification.

Article 85

12. It is proposed to remove the competence of the Verkhovna Rada to declare no confidence in the Prosecutor General, thus forcing him or her to resign. This is a very welcome proposal, which has been strongly recommended by the Venice Commission in its past opinions[2] on the ground that the Verkhovna Rada should not have the right to express a motion of no confidence (which is a purely political instrument) in the Prosecutor General who is not a member of the Government. The removal of this competence is therefore strongly supported by the Venice Commission; the option to maintain this competence should not be retained. The reform of the Prosecution service will be examined in detail below (§§ 39-43).

[2] CDL-AD(2014)037, Opinion on the Draft law amending the Constitution of Ukraine, submitted by the President of Ukraine on 2 July 2014, § 46.

13. It is further proposed to remove the competence of the Verkhovna Rada to elect the judges for an unlimited term. This too is a very welcome proposal, which has been strongly recommended by the Venice Commission in its past opinions.[3] The Commission strongly supports it. The new method of appointment of the judges will be examined in detail below (§§ 26-29).

Article 106

14. It is proposed to remove the competence of the President to dismiss one third of the judges of the Constitutional Court. On this point, see below (§ 46), under the analysis of the Constitutional Court.

Article 124

15. The amendment to this provision aims to restrict the recourse to litigation to cases in which there is a genuine "dispute" with some exceptions provided for by law (for example, declaration of presumed death or citizenship matters). While reducing unnecessary workload for the Ukrainian courts may be a legitimate aim, it is essential that the right of access to a court should not be curtailed. The wording "all contentious legal relations and, in cases prescribed law, other legal relations" is rather obscure. The option to provide that "the jurisdiction of the courts shall cover disputes regarding rights and obligations of a person and any criminal charge against him or her" provides a better guarantee to respect Article 6 ECHR. The provision that "courts shall also consider other matters in cases prescribed by the law" enables to cover the exceptions. The wording should be adapted to ensure that issues relating to legal persons are included in the jurisdiction of the courts. An alternative possible formula could be "In a legal dispute, every person has the right to have their case determined by a judicial authority/court of law". The need for a specific constitutional provision on the jurisdiction of the courts, however, is questionable.

16. It is proposed to add that "Mandatory pre-trial dispute resolution procedures may be provided for in the law". This possibility does not require a constitutional basis, but does not raise any issues, insofar as subsequent access to a court is ensured. In practice, such procedures have to be speedy in order to avoid that the total length of the procedure, including court proceedings, is unreasonably long (Article 6 ECHR).

17. It is proposed to add that "Ukraine may recognize the jurisdiction of the International Criminal Court as provided by the Rome Statute of the International Criminal Court". This provision should be strongly supported. It responds to a specific recommendation of the Venice Commission.[4]

Article 125 - The Judiciary System

18. Paragraph 2 of Article 125 provides that "courts shall be established and dissolved on the ground and under the procedure in accordance with the law". The Venice Commission has previously pointed out that courts must be established "by law"[5], which means that the decisions should be made by the Verkhovna Rada, not by the Executive. Paragraph 2 should be redrafted to convey this precise meaning. In addition, it would appear necessary, to remove the competence of the President to "establish courts by the procedure determined by the law" in

[3] CDL-AD(2015)007, §§ 48, 92; CDL-AD(2013)014, § 11-14.

[4] CDL-AD(2013)034, § 23.

[5] CDL-AD(2013)034, § 14; CDL-AD(2010)026, § 16.

Article 106 § 23 and to add the power of parliament "to establish and dissolve courts" in Article 85 of the Constitution.[6]

19. Pursuant to paragraph 3 of Article 25, the Supreme Court shall be the highest court in the judiciary system in Ukraine. Despite this provision, the system of specialized courts with their respective superior courts is maintained (according to the explanations provided to the Venice Commission delegation, this is foreseen for a transitional period, until the number of appeals on points of law will decrease). The Venice Commission has previously pointed out the need to unify the system of ordinary courts and to transform the high specialised courts into sections within the Supreme Court, with the (possible) exception of the high administrative court. This could help to ensure the harmonisation of case-law and the uniform application of the law and avoid conflicts between courts[7] and would diminish the bureaucracy. It would also reduce the length of the proceedings, which must be reasonable under Article 6 ECHR.

20. Against this background, if the abolition of the specialised courts is not acceptable to the Ukrainian authorities, the second option proposed for paragraph 4 (to read "Higher specialised courts may function in accordance with the law") should be supported. This would allow a later merger of the Supreme Court and the High Specialised Courts by way of ordinary legislation.

21. The constitutional entrenchment of administrative courts (Paragraph 5 of Article 125), which already exist in Ukraine, is also welcome. From a human rights perspective, administrative justice is an important element in the process of control over the performance of public administration.

Article 126 – independence and inviolability of the judges

22. Article 126 §§ 3 and 4 relates to the judges' immunity and inviolability. The Venice Commission has examined this matter in its recent Opinion "on draft constitutional amendments on the immunity of members of parliament and judges"[8] and fully refers to it in this context.

23. Article 126 § 5 provides that "judges shall hold office for an unlimited term". This proposal and the proposed removal of current Article 128 deserve strong support, as they put an end to the practice of the probationary periods for junior judges, which the Venice Commission had repeatedly criticised,[9] and introduce permanent tenure until the prescribed mandatory age of retirement (fixed at the age of 65: see Article 126 § 7.1) for all judges (with the exception of the judges of the Constitutional Court).

24. It is proposed to distinguish between the grounds for dismissal and the grounds of termination of a judge's tenure. This is a useful and welcome distinction. The proposed grounds for dismissal and termination are generally in line with the applicable standards, but it should be made clear that only serious disciplinary offences may entail dismissal. The removal of "breach of oath" as a ground for dismissal had been recommended by the Venice Commission[10] and is very positive. Judges may be dismissed if they refuse a transfer after a reorganisation of their court. This provision implicitly enshrines the principle of the prohibition of transfer of judges, outside the cases of reorganisation of a court, which is positive. The choice of automatic termination of tenure following any criminal conviction, irrespective of its gravity, is a very severe one, arguably raising issues under the ECHR.

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[6] See mutatis mutandis CDL-AD(2013)014, §§ 11-14.

[7] CDL-AD(2013)14, § 45.

[8] CDL-AD(2015)013.

[9] CDL-AD(2015)007, § 37; CDL-AD(2013)014, §§ 16-18

[10] CDL-AD(2015)007, par. 52; CDL-AD(2013)014, par. 24, CDL-AD(2013)014, par. 52.

25. The last paragraph of Article 126 provides for the duty of the State to ensure the personal security of judges and their family. While there may certainly be cases in which there is a legitimate need to provide such security, this generalised requirement at the constitutional level (in particular for the judges' families) is not required by European standards. The same remarks apply to Article 149 last paragraph.

Article 128 – Appointment and dismissal of judges

26. The draft amendments under consideration will bring about a substantive and long overdue change in the system of appointment of the Ukrainian judges. Judges will no longer be elected by the Verkhovna Rada; they will be appointed by the President *upon the submission of the High Council of Justice*.

27. The Venice Commission examined this proposal in the context of a previous process of reform.[11] It welcomed "the ceremonial position" of the President and found that as "the appointment of judges by the head of state acting on a proposition of the HCJ [is] designed to limit political influence and partisan pressure on the judiciary (…) [it was to] be welcomed". The Venice Commission cannot but reiterate its strong support for the proposal that judges be appointed by the President (a merely formal, ceremonial act) upon the (binding) submissions of the High Council of Justice.

28. There remains the issue of the proposed (similarly ceremonial) role of the President in the dismissal of the judges. In the Commission's view, this role is not justified. Subsequent to their appointment, judges will have permanent tenure and it will only be possible to dismiss them or to terminate their employment on the grounds set out in the Constitution. All the decisional power in relation to the judges' career will belong to the High Council of Justice, which is a very positive and welcome feature to guarantee the independence of the judges from both the legislative and the executive powers. After appointment, any link between the judge and the political organs should be severed; there should be no space for interventions by either the legislative or the executive, not even if they are merely symbolic. In order to inspire the confidence which is necessary in a democratic society, courts must not only be independent, but also *appear to be* independent.[12] Indeed, the High Council of Justice is empowered to "decide on the termination of powers" of the judges. In addition, the need for a Presidential act after the decision of the HCJ to dismiss a judge would complicate and delay the process of dismissal and raise potential risks of deadlocks if the President fails to act. The question would arise of whether or not the judge whose dismissal has been decided by the HCJ but has not been pronounced by the President would be entitled to continue to perform his or her functions. For these reasons, the Venice Commission recommends to remove the power of the President to dismiss the judges from Article 128 of the Constitution.

29. It is proposed to enshrine at the constitutional level the principle of competitive selection of judges, which already exists on the level of ordinary law. The Venice Commission welcomes this proposal.[13]

Article 130 – The budget of the judiciary

30. It is proposed to add that the budget for the judiciary should be allocated separately "taking into account proposals of the relevant authorities in the judiciary system defined by the law". This is a very welcome proposal, in line with the relevant recommendations of the

[11] CDL-AD(2013)014, §§ 11-14

[12] See, mutatis mutandis, ECtHR, Piersack judgment of 1 October 1982, Series A no. 53, pp. 14-15, para. 30.

[13] CDL-AD(2013)034, § 37; CDL-AD(2013)014, §§ 26-27, 54).

Venice Commission[14] and of the Consultative Council of European Judges.[15] The "relevant authorities in the judiciary system" should include the High Council of the Judiciary (for the ordinary judges) and the President of the Supreme Court (for that Court).

Article 131 – The High Council of Justice

31. The first paragraph of Article 131 lists the competences of the High Council of Justice (HCJ). These competences are consistent with the proposed reform of the judiciary and are to be welcomed, subject to certain adjustments.

32. It should be made clear that the submission made by the HCJ on the appointment of a judge is binding on the President. The HCJ should be given the power to "decide on the dismissal from office of a judge" in the same manner as it decides "on the termination of powers of a judge" (Article 131 §1.4).

33. The HJC will be competent in respect of both judges and prosecutors. This choice follows the inclusion of the prosecution office into the judiciary. A Council of Public Prosecutors exists in Ukraine and will be maintained (with a welcome constitutional basis in § 8 of Article 131), but will only be responsible for organising professional training and other administrative tasks.

34. The HJC will not be competent to *decide* on the disciplinary liability of judges and prosecutors, but only to *review* such decisions which will be taken by the High Qualification and Disciplinary Commissions. This raises the issue of the judicial review of disciplinary decisions.[16]

35. The Venice Commission finds that the parallel existence on the one hand of the HCJ and on the other hand of the High Qualification and Disciplinary Commissions and the Council of Public Prosecutors as distinct bodies instead of specialised branches of the HCJ creates a very complex system, which establishes a dualism in the judiciary administrative governance and bears the risks of overlaps and conflicts. However, this is a matter for a policy choice by the Ukrainian authorities.

36. As of the composition of the HCJ, it is proposed that it should have 19 members: 9 judges (either active or retired) elected by the Congress of Judges; 9 other members: 3 appointed by the President of Ukraine; 2 elected by the Congress of Advocates; 2 elected by the all-Ukrainian Conference of Public Prosecutors and 2 elected by the Congress of Representatives of Law Schools and Law Academic Institutions; 1 judge *ex-officio* member, the Chairman of the Supreme Court (who however is not the *ex-officio* Chair of the HCJ, who will be elected by the members).

37. Thus, no less than ten out of 19 members of the HCJ will be judges, which is very positive. There will be only two Prosecutors. The President has the right to appoint three members. With the removal from the HCJ of the Minister of Justice and of the members elected by the Verkhovna Rada, this power is a very strong one. In a semi-presidential system like Ukraine, the President is not a neutral institution, and should thus not be the only institution which has a say in the composition of the HCJ (hence on the nomination and career of the judges). Previous Presidents of Ukraine did interfere with the judiciary and therefore particular caution has to be exercised with respect to the role of the President. The President's power to appoint members of the HCJ should therefore be counterbalanced by the participation of the Verkhovna Rada in the process of forming the HCJ. This would also add an element of accountability of the HCJ to

[14] CDL-AD(2010)004 § 55.

[15] Consultative Council of European Judges (CCJE), Opinion no. 2, § 5.

[16] CDL-AD(2013)025, §140 ; CDL-AD(2007)028, § 25.

the public.[17] It is of the utmost importance, however, that giving such a role to the Verkhovna Rada does not re-open the door to political influence on judges, which the whole reform under consideration is striving to eliminate. For this reason, the members of the HCJ chosen by the parliament should be elected by qualified majority, which would favour candidates with cross-party support (or by other mechanisms enabling the opposition to participate in the choice). In any case, these members should be chosen among legal professionals and should not be "active" politicians.[18] This requirement of political neutrality should apply to the members appointed by the President too.

38. The Venice Commission would therefore favour that the Verkhovna Rada be given the power to elect e.g. three legal professionals (not active politicians) as members of the HCJ by qualified majority (or as an alternative that two members be chosen by the parliamentary majority and one by the opposition[19]). Adding members of the HCJ will obviously require a revision of the whole composition of the HCJ in order to maintain the necessary balance between judges and other members. One of the possible alternatives could be that the President of Ukraine appoints three members from among six candidates (not active politicians) proposed by the Verkhovna Rada, four by the majority and two by the opposition, the President having to choose two from the first and one from the second group. Whatever system is chosen, in the Venice Commission's view it is essential that an institutional balance be found in the composition of the HCJ.

Article 131-1 – The Public Prosecutor's Office

39. Chapter VII of the current Constitution is repealed and a new system of prosecution is proposed as part of the judiciary. Article 131-1 lists the powers of the Public Prosecutor's office, which are in the first place the public prosecution in court and in the second place the pre-trial investigation, other matters related to criminal proceedings and the supervision of undercover operations of law-enforcement agencies.

40. The third competence is that of "representing the interests of the State in the court in exceptional cases and under the procedure prescribed by law". The Public Prosecutor will lose its non-prosecutorial responsibilities and will only retain the power to represent state interests "in exceptional circumstances". Such residual and exceptional powers exist in other countries and the Venice Commission has found that it is legitimate insofar as it is carried out in such a way as to respect the principle of the separation of state powers, including the respect for the independence of the courts, the principle of subsidiarity, the principle of speciality, the principle of impartiality of prosecutors[20] and the principle of equality of arms. The proposed reformulation of this non-prosecutorial power of the Public Prosecutor is to be strongly supported. Coupled with the removal of the much criticised supervisory powers of the Public Prosecutor under Article 121 § 5, it adequately responds to the recommendations previously expressed by the Venice Commission and the Parliamentary Assembly of the Council of Europe within the framework of Ukraine's Council of Europe accession commitment that "the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards". There should also be a clear separation of the prosecutorial functions in the framework of criminal proceedings from the Public Prosecutor's responsibilities to represent the State interests in exceptional cases.

[17] CDL-AD(2007)028, § 31.

[18] CDL-AD(2007)028, § 32.

[19] See for example Article 95 of the Constitution of Kyrgyzstan.

[20] CDL-AD(2012)019, § 8.

41. As concerns the independence of the Prosecutor General, the Venice Commission has previously expressed the following view:

> *"47. The Venice Commission considers that the appointment and dismissal of the Prosecutor General by both the President and the Verkhovna Rada should be maintained, as an expression of the principle of co-operation among state organs making it possible to avoid unilateral political nominations (CDL-AD(2010)040, par. 35). The no confidence vote by parliament in the Prosecutor General should be removed. In addition, for the institution to be in line with Council of Europe standards, the Prosecutor General should be appointed for a single term, either considerably longer than five years or until retirement. The grounds for dismissal (serious violations of the law) should be laid down in the constitution, or at the very least the constitution should refer to a law setting out these grounds."*[21]

42. Under the proposed amendments the Prosecutor General will be appointed and dismissed by the President of Ukraine with the consent of the Verkhovna Rada (although without a qualified majority, which instead would be necessary). The power of the Verkhovna Rada to express non confidence and force the resignation of the Prosecutor General has been removed (see Article 85 above). The Prosecutor General's term of office is six years and is not renewable consecutively. The non-re-election serves the purpose to prevent an accumulation of power;[22] it may be considered that an interval of six years between two mandates may have the same effect. The Prosecutor General may be early dismissed from office "exclusively and on the grounds prescribed by law".

43. The proposed reform of the Public Prosecution Office is therefore generally in line with the applicable European standards and with the Venice Commission's previous recommendations. The Venice Commission therefore welcomes this proposed reform and strongly encourages the Ukrainian parliament to adopt it.

Article 147 – 149-1 - The independence of the Constitutional Court

44. The proposed amendments design a system ensuring in principle the independence of the Constitutional Court: its 18 members are appointed by the President, the Verkhovna Rada and the Congress of Judges, in order to express a good institutional balance; the judges are selected on the basis of a competition among candidates whose high qualifications are listed in the Constitution; judges of the Constitutional Court may not belong to political parties or trade unions; judges are appointed for a non-renewable term of 9 years; the oath is taken before the Plenary of the Court (and not before another institution of the State, thus avoiding the risk of deadlocks),[23] judges enjoy inviolability and functional immunity.

45. The budget of the Constitutional Court is not part of the general budget of the judiciary and is allocated taking into account proposals of its Chairman, which is to be welcomed.[24]

46. The grounds for termination and dismissal of the judges of the constitutional Court are the same as for the judges and are generally in line with the applicable standards, although it should be made clear that only serious disciplinary offences may entail dismissal. Provision for termination or dismissal of the judges by a two-thirds vote of the Court is to be welcomed and supported; the option of empowering the nominating authority to decide on dismissal on grounds of incompatibility and disciplinary issues should not be retained.

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[21] CDL-AD(2014)037, § 47.

[22] CDL-AD(2014)037, § 44; CDL-AD(2013)034, § 20; CDL-AD(2013)025, § 117

[23] CDL-AD(2006)016, par. 21

[24] CDL-AD(2008)029, par. 35; CDL-AD(2008)029, § 35.

Articles 147 and 150 – Competences of the Constitutional Court

47. The Constitutional Court is firstly competent to decide on the compliance with the constitution of laws and other acts of the Verkhovna Rada, acts of the President of Ukraine, acts of the Cabinet of Ministers and acts of the Verkhovna Rada of the Republic of Crimea. It is unclear whether these "acts" are only normative or also individual ones. The additional competence to decide upon the application of the President on the constitutionality of an act of the Head of a hromada, or a council of a hromada, of a rayon or oblast's council derives from the proposed reform of the Constitution relating to the decentralisation, and was recommended by the Venice Commission. [25] Under the amendments, the Constitutional Court retains the competence "to provide the official interpretation of the Constitution" (Article 147 and Article 150 § 1.1.2.), which is contrary to previous recommendations of the Venice Commission.[26] It is unclear at this stage what the Constitutional Court's "other powers provided by the Constitution of Ukraine" (paragraph 3 of Article 150) will be, whether they are normative or relating to individual acts and whether or not the relevant decisions will be binding (they are excluded from Article 151-2, but Article 147 § 2 proclaims the binding nature of (all) the Constitutional Court's decisions and opinions). These matters should be clarified.

48. It should be possible for the law to define the internal organisation of the Constitutional Court, in particular in order to set up the appropriate sub-structure to deal with individual constitutional complaints.

49. The minimum age requirement for Constitutional Court judges has been increased from 40 to 45. The reasons for this decision are not immediately evident. As for the 20-year (consecutive?) residence requirement, it would exclude scholars and judges who have carried out academic or professional work abroad. It seems excessive.

Article 151 - Constitutionality of international treaties and referendum questions

50. It is proposed to add the possibility for no less than 45 MPs to request an opinion of the Constitutional Court on the constitutionality of international treaties. This is to be welcomed.

51. It is further proposed to add the competence of the Constitutional Court to provide opinions on the constitutionality of questions to be put to the all-Ukrainian referendum (provided under Article 72 of the Constitution). This proposal deserves support insofar as it avoids that a popular consultation may lead to an unconstitutional solution.

Article 151-1 – Constitutional Complaint

52. The constitutional complaint proposed under Article 151-1 goes further than the current possibility to request an official interpretation of the Constitution, insofar as it enables the Constitutional Court to annul the unconstitutional laws upon application by individuals. This is to be welcomed, even if it does not go as far as establishing a full constitutional complaint against individual acts as recommended by the Venice Commission.[27] It would seem necessary to clarify that this complaint may be lodged "after exhaustion of the domestic remedies".

[25] CDL-PI(2015)008, § 12.

[26] CDL-AD(2008)029, § 18.

[27] CDL-AD(2013)034, par. 11

Article 151-2 – Binding force of the decisions of constitutionality

53. The principle that the decisions of the Constitutional Court are "binding for enforcement on the whole territory of Ukraine, shall be final and cannot be challenged" is an important one, which is also already listed among the principles on whose basis the Constitutional Court functions (Article 147 § 2). The binding nature of opinions is mentioned in Article 147 § 2, but opinions are excluded from Article 151-2. This should be clarified.

Article 152 – Entry into force of decisions of the Constitutional Court

54. It is proposed to empower the Constitutional Court to delay the effects of its decisions of unconstitutionality. This is positive, insofar as it avoids legal gaps and enables the Verkhovna Rada to adopt the legislation implementing the decisions. The law on the Constitutional Court should provide for a temporal limitation of this delayed entry into force.

V. Conclusions

55. The proposed amendments are a generally positive text which deserves to be supported. The amendments are well drafted. Their adoption would be an important step forward towards the establishment of a truly independent judicial system in Ukraine. The Venice Commission welcomes in particular:

- The removal of the power of the Verkhovna Rada to appoint the judges;

- The abolition of probationary periods for junior judges;

- The abolition of the "breach of oath" as a ground for dismissal of the judges;

- The reform of the Public Prosecutor's Office, the guarantees for its independence (notably the removal of the power of the Verkhovna Rada to express no confidence in the Prosecutor General) and the removal of its non-prosecutorial supervisory powers.

56. The text, however, still presents some shortcomings, especially with respect to the powers of the main State organs in this field. If not corrected, these shortcomings might create a new danger of politicisation of the judiciary and perpetuate the problems of the current system. In this respect, the Venice Commission formulates the following main recommendations:

- While the ceremonial role of the President to appoint judges seems well justified, this is not the case for his power to dismiss judges, which should be removed from the text;

- In addition, not only the President, but also the Verkhovna Rada should have a role in the election/ appointment of a limited number of members of the High Judicial Council.

55. The Venice Commission remains at the disposal of the Ukrainian authorities for any further assistance they may require.