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**(VENICE COMMISSION)**

# JOINT OPINION

# ON THE LAW AMENDING CERTAIN LEGISLATIVE ACTS OF UKRAINE IN RELATION TO THE PREVENTION OF ABUSE OF THE RIGHT TO APPEAL

**by**
**the Venice Commission**
**and**
**the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe**

**Adopted by the Venice Commission**
**at its 84th Plenary Session**
**(Venice, 15-16 October 2010)**

**on the basis of comments by**

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## 1. Introduction

1. By letter dated 28 June 2010, the Chair of the Monitoring Committee of the Parliamentary Assembly, Mr Dick Marty, requested an opinion on the Law No 2181-VI Amending certain Legislative Acts in relation to the Prevention of Abuse of the Right to Appeal (CDL(2010)067). This Law, which is the subject of the present joint opinion, was adopted by the *Verkhovna Rada* on 13 May 2010. By he same letter Mr Marty also requested an opinion on the draft Law on Judicial System and the Status of Judges of Ukraine (see separate opinion on that Law CDL-AD(2010)026)

2. The Venice Commission invited Mr Hamilton and Mrs Suchocka to act as rapporteurs (CDL(2010)085 and 086). In the framework of the Joint Programme of the European Union and the Council of Europe entitled "Transparency and Efficiency of the Judicial System of Ukraine" (TEJSU Project)[1], the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe invited Ms Bachmaier and Mr Gass to act as rapporteurs for the present opinion (DGHL(2010)19).

3. The Venice Commission is grateful to USAID in Kiev for their help with translating both the relevant laws.

4. On 1 October 2010, the Constitutional Court of Ukraine has declared that the amendments to the Constitution introduced in 2004 are unconstitutional. This change in the constitutional situation does not affect the content of this joint opinion, as the chapter devoted to the Judiciary in the Constitution of 1996 was not changed in 2004.

5. On 4 and 5 October 2010, the TEJSU Project Office in Kyiv and the Venice Commission organised meetings with the different authorities concerned, as well as with the civil society. The present opinion is based on the comments by the members and experts as well as on the results of those meetings.

6. The present opinion was adopted by the Venice Commission at its 84th plenary session (Venice, 15-16 October 2010).

## 2. General remarks

7. The Law submitted for opinion amends three different Laws: the Code of Ukraine for Administrative Infringements (adding Article 188-32); the Code of Ukraine for Administrative Adjudication (amending Articles 18, 19, 24, 117 and 171) and the Law on the High Council of Justice.

8. It remains unclear what is the justification for these changes. The explanatory memorandum only says that the existing situation is unclear and it is desirable to clarify it in order "to prevent misuse of the right of appeal", without further explanation. No examples of alleged misuse are given. During the meetings with the authorities in Kyiv, several explanations were given for these changes, such as the excessive length of procedures, the dysfunction of courts and corruption, what was suggested was a need to avoid so-called "double cassation", i.e. a cassation hearing in the High Specialised Court followed by an appeal to the Supreme Court in relation to the matters covered by the law. However, this does not

[1] This document has been produced with the financial assistance of the European Union. The views expressed herein reflect the opinion of the Venice Commission but can in no way be taken to reflect the official opinion of the European Union. It may not under any circumstances be used as a basis for any official interpretation that may be used, in the light of the legal instruments mentioned, in proceedings against the governments of the member states, the statutory organs of the European Union, the Council of Europe or any other body set up under the European Convention on Human Rights.

really offer sufficient justification for removing the power of appeal and cassation from the Supreme Court. The matters covered by this Law concern issues such as the proceedings for appealing the decisions of the High Council of Justice (hereinafter HCJ), as well as the President and the *Verkhovna Rada*, mainly in relation to discipline or dismissal of judges, bans on political parties, decisions made by the national bank concerning the establishment and carrying out of administrations or bank liquidations, etc. It is evident that these are matters of the highest importance which are also likely to be politically contentious.

9. Another issue of concern in this Law is its relation with the Constitution of Ukraine. While Article 129.8 of the Constitution provides for a challenge to court decision through appeal and cassation "except in cases established by law", it would seem inappropriate that an ordinary law could exclude cases of the most far-reaching importance from the possibility of appeal or cassation without any justification being offered for the necessity to do so. In some other aspects, the Law follows the Constitution and this also is a source of problems form the point of view of the European standards.

## 3. Amendments to the Code for Administrative Infringement

10. Only one Article has been added by the Law under consideration to the Code for Administrative Infringement (hereinafter CAI): Article 188. This provision states that the failure to comply with legal requirements of the HCJ regarding requests for information shall entail the imposition of pecuniary sanctions. The amount of the fines does not constitute a fixed sum, but will be determined according to the income of the person to be sanctioned. The law determines the percentages of that income in order to impose the fine.

11. This provision is in accordance with Article 25 of the Law "On the High Council of Justice[2], which sets out the power of the HCJ to request information from all kind of public or private agencies, as well as citizens, in order to fulfil their duties. This information shall be provided by the requested body or person, within an ordinary term of 10 days. Article 25.4 of the Law on the HCJ states expressly: "*Failure to provide the High Council of Justice with copies of case files, as well as deliberate provision of false information shall result in responsibility pursuant to the law*".

12. The lawfulness of the imposition of sanctions will be first addressed and then the content of Article 25, which raises concerns with regard to the judicial independence.

13. Article 188 CAI is instrumental to the effectiveness of the obligations included in Article 25 of the Law on the HCJ. In order to fulfil its duties as defined in Article 131 of the Constitution, the HCJ might need access to information from other public entities or even from private companies, associations or citizens. It is logical that the law provides for sanctions if the necessary collaboration is not provided. Usually the failure to collaborate constitutes an infringement of the duties of civil servants and other members of the public administration, in other words, there is the general requirement to cooperate between all the public agencies and bodies. Thus, the provision of sanctions for failure to comply with the requirements of a state body, in this case the HCJ, poses no problems as long as three basic conditions are met: 1) that the requirements are lawful and justified; 2) that the sanctions meet the proportionality test; and 3) that the procedure to impose those fines complies with standards of fairness.

14. Additionally the law can also oblige private persons or entities to cooperate with the HCJ, as this obligation to collaborate is justified by the reasons of public interest, as it is the adequate protection and functioning of the judiciary. However, the request for cooperation should in any event be limited to the cases or duties the HCJ has to fulfil. The need for the

[2] For the preparation of this opinion the experts have used the version of the Law as of 13 May 2010.

information should be balanced against the fundamental rights of the persons that might be restricted or affected when providing the requested information. Measures for privacy and data protection should be established to provide adequate safeguards to the persons required to collaborate with the HCJ.

## 4. Amendments to the Code of Administrative Adjudication

15. The amendments of the Code of Administrative Adjudication of Ukraine (CAA) made by Law 2181 deal mainly with the judicial review of administrative acts, executive acts and regulations of the higher public institutions of Ukraine.

16. There is a **problem of coherence** and lack of clarity in this respect. Indeed, Article 20.4 of the CAA provides that "the Supreme Court reviews the cases of the administrative courts in exceptional cases". The **Supreme Court, therefore, appears to have competence to review decisions of the administrative courts in certain cases**. While this provision is not being repealed, under the amendment, **it will clearly be excluded** since, under the proposed new Article 171¹.5, it is provided that the decisions covered by this Article (such as acts of the High Council of Justice, actions or inactivity of the *Verkhovna Rada* of Ukraine, of the President or the High Council of Justice) can be challenged in the High Administrative Court. In 171¹.6, the Law No. 2181 expressly provides that the decision of the High Administrative Court "*shall be final and shall not be reviewed in accordance with the appeal or cassation procedure".* This would appear clearly to exclude the possibility of applying Article 20.4 of the Law in those cases.

17. Moreover, this is difficult to reconcile with Article 18 of the same Law 2181 under consideration. According to the new wording of Article 18.4 of the CAA as amended by the Law 2181, the High Administrative Court, "*acting as a first instance court*", will have **jurisdiction over cases regarding establishment by the Central Elections Commission of results of elections or of an all-Ukrainian referendum**, as well as cases dealing with challenging acts, actions or inaction of the *Verkhovna Rada* of Ukraine, the President of Ukraine and the High Council of Justice. This seems to imply that, if the High Administrative Court act as a first instance court, there should be a possibility for challenging the same matter before an appellate Court. However, the new Article 171¹ seems to preclude any possibility of appeal, as the decisions are declared to be final and not reviewable.

18. **A clearer and more systematic regulation would be needed to facilitate understanding and the correct application of these legal provisions.** As pointed out above, the new Article 18.4 CAA clarifies Article 97.4 of the Law on the Judiciary and the Status of Judges, in which it is said that "*A decision of the High Qualifications Commission of judges of Ukraine may be appealed in court in the manner prescribed by the procedural law*".

19. Concerning the jurisdiction of the **High Administrative Court** to deal with cases challenging the acts, decisions or inaction of the *Verkhovhna Rada*, the President or the High Council of Justice, Article 171¹.2 establishes that a "separate distinct chamber shall be created within the High Administrative Court" to decide these cases, with a panel of not less than five judges who will decide within a maximum time of one month after the proceedings have started. Regarding the "creation of a separate chamber", **it should be precisely established that such a chamber and its composition (which judges are serving in it), fulfils the requirements of the fundamental "right to a court pre-established by the law".** The composition of this chamber, because of the significance of the cases it has to decide, should be set out in an objective way in the Law. Otherwise, the risks of endangering the independence and impartiality of the judiciary increase as political interferences in the composition of the court might occur.

20. The objective of avoiding delays in the proceedings within a separate chamber of the High Administrative Court when deciding cases referred in Article 171 and 171[1], is clearly present in this law: there can be no provisional suspension of the act or regulation challenged, there is a maximum time of one month to render the decision and no further review by way of appeal of cassation is possible. These provisions may foster a quick resolution of the case and thus also discourage the misuse of judicial review to hinder the application of the acts challenged. However, according to the importance and complexity of some of the cases the special chamber will have to deal with, one month might not be enough time, especially taking into account that the decision of this court will be final, with no further appeal or review. Eliminating the possibility of appealing the decision might benefit speedy adjudication, but also raises concerns with regard to the powers that this chamber can exercise. Again, the procedure of appointment of the members of this chamber has to be transparent and objective and the provisions set out in Article 116.5 of the Law "On the Judiciary and the Status of Judges (2453-VI) might not suffice (decision by the meeting of judges of the relevant court, upon proposal of the chief justice of that court).

21. Finally, there is a further modification of Article 117, which states that it is "prohibited to secure a lawsuit" by means of the termination of acts or regulations of the parliament, of the President or the High Council of Justice. It is not clear what is meant by this terminology. It appears to suggest that **if there is other litigation in being then that litigation may not be influenced or affected by a decision to declare an act or regulation of the parliament, the President or the High Council of Justice unlawful. However, if this is what is meant, it is difficult to see how it can be justified**.

## 5. On the High Council of Justice

### 5.1. General remarks

22. The Law of Ukraine on the High Council of Justice (Law on the HCJ) entered into force on 17 February 1998 and it was amended several times, the most recent one through the Law No. 2181-VI on amending certain legislative acts of Ukraine in relation to prevention of abuse of the right of appeal, adopted on May 13, 2010 (Law No. 2181-VI) and under consideration in this joint opinion.

23. The HCJ is a complex organ with different types of functions. Article 131 of the Constitution establishes that the competences of the High Council of Justice comprise the following:

> "1) *Forwarding submissions on judges to office or on their dismissal from office*
> *2) Adopting decisions in regard to the violation by judges and procurators of the requirement concerning incompatibility*
> *3) Exercising disciplinary procedure in regard to judges of the Supreme Court of Ukraine and judges of high specialised courts and the consideration of complaints regarding decisions on bringing to disciplinary liability judges of courts of appeal and local courts and also procurators*".

24. The HCJ is therefore, according to the Constitution, in charge of the "formation of the corps of judges" (Part IV, chapter I of the HCJ). The Law on the HCJ, as it is after the amendments introduced by the Law No. 2181-VI, establishes that the Council, upon recommendation of the Qualification Commission of Judges (as already stated by the Law on the Judiciary and the Status of Judges), submits proposals to the President of Ukraine in order to appoint judges; it can also submit proposals to release a judge from his or her duties (Part IV, chapter 2). A member of the Parliament, the Commissioner of the *Verkhovna Rada* on human rights, the qualification commission of judges or a member of the HCJ can make a proposal to dismiss a judge. The HCJ can carry out disciplinary procedures against judges

and public prosecutors. According to Part IV chapter 3 of the Law on the HCJ, the HCJ will monitor respect for the rule of "non-combination of their duties with activities prohibited by the Constitution and Laws", as well as the compatibility of their tasks with other activities. Finally, the HCJ carries out disciplinary proceedings involving judges of the Supreme Court and of the High Specialised Courts. Among the sanctions, there are mainly two: reproof and downgrading of qualification class (Part IV, Chapter IV of the Law on the HCJ); it will also consider complaints about a decision calling judges and public prosecutors to disciplinary account. The HCJ acts therefore as an appellate body, as it will review the disciplinary complaints against judges of ordinary courts and, at the same time, it can initiate disciplinary proceedings against the Supreme Court and High Specialised Courts' judges. It seems also that there is a **difference between judges of local and regional courts, who can challenge disciplinary proceedings before the HCJ and then before the High Specialised Administrative Court and the judges from the Supreme Court and the High Specialised Courts, who can challenge decisions on disciplinary proceedings only before the High Specialised Court**.

25. The Law 2181-VI reforms mainly this part of the Law on the HCJ. However, even in the light of the explanatory note to the Law 2181-VI, it is not clear what are the appropriate procedures to challenge in court the acts and regulations issued by the HCJ in disciplinary proceedings. The lack of clarity in the Law can raise obstacles to the bringing of appeals.

26. **Another element of concern is the wide scope of the HCJ's competences, which seems to go beyond the scope granted to this body by the Constitution in the field of the appointment of judges to administrative posts**. In the decision of the Constitutional Court of Ukraine of 21 May 2002 No. 9-rp, in which the Law on the HCJ was analysed, the Court considered that according to article 131 of the Constitution, "*the right to present submissions to the Verkhovna Rada of Ukraine on the election of judges on a permanent basis and the appointment of judges to administrative posts in courts of general jurisdiction does not extend to the High Council of Justice*." The High Council of Justice as a state body can act only on the basis of and within its powers and in a manner prescribed by the Constitution and Laws of Ukraine. The legal status of the High Council of Justice is determined by the Constitution. Article 131 of the Constitution of Ukraine contains an exhaustive list of powers of the High Council of Justice, which **does not include the appointment of judges to administrative posts**.

### 5.2. Composition of the High Council of Justice

27. Article 131.2 of the Constitution of Ukraine provides that the High Council of Justice consists of twenty members. The Parliament (*Verkhovna Rada*) of Ukraine, the President of Ukraine, the Congress of Judges of Ukraine, the Congress of Advocates of Ukraine, and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions each appoint three members to the High Council of Justice. The All-Ukrainian Conference of Employees of the Procuracy appoints two members. The Chairman of the Supreme Court of Ukraine, the Minister of Justice of Ukraine and the Prosecutor General of Ukraine are ex officio members of the High Council of Justice. Article 5 of the Law on the High Council of Justice has the same wording as Article 131.2 of the Constitution.

28. Apparently in a welcome effort to overcome the problem of the low number of judges in the High Council of Justice, the Final Provisions under Section XII;3 (Amendments to the legal Acts of Ukraine) of the Law on the Judiciary and the Status of Judges the amendments 3.11 to the Law of Ukraine "On the High Council of Justice now provide that two of the three members of the High Council for Justice, which are appointed by the Verkhovna Rada (Article 8.1) and the President of Ukraine (Article 9.1) respectively, one of three members appointed by the Congress of Judges (Article 11.1), and one of three members appointed by the Congress of Representatives of Legal Higher Education Institutions and Research

Institutions (Article 12.1) are appointed from the ranks of judges. The All-Ukrainian Conference of Prosecutors shall appoint two members to the HCJ, one of whom shall be appointed from among the judges (Article 13.1).

29. Nonetheless, **the composition of the High Council of Justice of Ukraine still does not correspond to European standards because out of 20 members only three are judges elected by their peers**. The final provisions in effect acknowledge that the judicial element in the High Council of Justice should be higher, but the solution chosen is to require the Parliament, the President, the educational institutions and the prosecutors to elect or appoint judges. In addition, the transitory provisions provide that the new composition of the High Council of Justice will be applied only after the end of the mandate of the present Council (Section XIII.8 of the transitional provisions). In the current composition, one judge is a member *ex officio* (the Chairman of the Supreme Court) and some of the members appointed by the President and Parliament are *de facto* judges or former judges, but there is no legal requirement for this to be the case until the mandates of the present members expire**.** Together with the Minister of Justice and the General Prosecutor, 50% of the members belong to or are appointed by the executive or legislature. Therefore the High Council of Justice cannot be said to consist of a substantial part of judges.[3] It may sometimes be the case in older democracies that the executive power has a decisive influence and in some countries, such systems may work acceptably in practice. The Ukrainian authorities themselves during the meetings in Kyiv referred to Ukraine as a transition democracy which is happy to use the experience of other countries. As it has been stated in former opinions, "*New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse and therefore, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges*"[4].

30. The actual composition of the HCJ may well allow concessions to the interplay of parliamentary majorities and pressure from the executive, but this cannot overcome the structural deficiency of its composition. This body may not be free from any subordination to political party consideration. There are not enough guarantees ensuring that the HCJ safeguards the values and fundamental principles of justice. The composition is set up in the Constitution and a constitutional amendment would be required. The inclusion of the Prosecutor General as *ex officio* member raises particular concerns, as it may have a deterrence effect in judges and be perceived as a potential threat. The Prosecutor General is a party to many cases which the judges have to decide, and his presence on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges whose decisions he disapproves of. Consequently, the composition of the HCJ of Ukraine does not correspond to European standards. As a changed composition would require an amendment of the Constitution and this may be difficult, **the Law should include, in order to counterbalance the flawed composition of the HCJ, a stronger regulation of incompatibilities**. Taking into account the powers granted to the HCJ, it should work as a full time body and the elected members, unlike the ex officio members, should not be able to exercise any other public or private activity while sitting in the HCJ.

### 5.3. Amendments to the Law on the High Council of Justice

31. Law 2181 introduces changes in eight articles of the Law on the High Council of Justice, namely Articles 24, 25, 27, 30, 32, 42.4, 46.6, and 47.4.

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[3] *Ibidem*, para. 50.

[4] Report adopted by the Venice Commission at its 82nd plenary session (Venice, 12-13 March 2010) on *The independence of the judicial system part I: the independence of judges,* para. 31.

### 5.3.1. Article 24 of the Law on the HCJ

32. This article refers to the quorum required for the HCJ to act validly. Concerning the sessions, these are now valid if attended by a majority, while before now a two thirds majority was required. If this provision is intended to facilitate the functioning of the HCJ, the explanatory memorandum fails to give any real justification. The necessary majority concerning the decisions remains unchanged.

33. However, there is a further change in section 5, according to the Law No. 2181, in which the words "three quarters" should be replaced by "two thirds". This is confusing, taking into account that in the Law on the HCJ, either the official translation published in its Website that in the translation prepared by the USAID Ukraine Rule of Law Project, Section V, which relates to conclusions adopted, says in its new text that they will be adopted by a majority (and not by two thirds as the amendment indicates). There is therefore an apparent contradiction in the texts. Section IV of this same article 24 refers nevertheless to a majority of two thirds concerning the sittings of the HCJ.

34. Given the importance of the matters dealt with by the High Council of Justice, which include recommendations concerning the termination of office and disciplining of judges, the reduction in the quorum necessary for the sittings or the decisions would appear to mean a lesser protection for the interests of the judges affected by such decisions. No justification has been offered for these changes in the text of the Law, although during the meetings held in Kiev the risk of blockage of the HCJ was raised as a reason for lowering the quorums. However, this poses a further threat of a politicization of the process concerning the dismissal and disciplinary proceedings of judges.

### 5.3.2. Article 25 of the Law on the HCJ

35. Article 25.2 of the Law on the HCJ ("Competence of the High Council of Justice at examination of cases") says that the HCJ "may demand and obtain from the courts the copies of court cases, consideration of which is not stopped, except the cases, which are considered in closed court sessions…Demanding and obtaining of copies of the court cases doesn't hamper the hearing of this case in the court" (Article 25.3). And it goes on:" A member of the High Council of Justice shall have the right to familiarise himself with materials submitted for the Council's examination, to participate in their elucidation and control, to send applications, cite his motives, and submit relevant documents." This provision gives the HCJ **the authority to request from courts copies of files of cases which are still under consideration by the respective court**. **This raises important concerns regarding judicial independence.**

36. With regard to the previous draft, the main changes are the inclusion in this article of some procedural rules as to the way of making the request, the time within the request has to be answered and the sanctions for not complying with the request. To be precise, the request must be written, the maximum time to comply with it shall be, as a rule, 10 days and the responsibility for non compliance shall be established by law.

37. Thus, the main changes introduced by the Law 2181 in Article 25 Law on the HCJ are aimed to complete the provisions of the procedure of requesting information. As to the possible sanctions for non compliance, see comments on Article 188 of the Code of Ukraine for Administrative Infringement.

38. However, the provision in Article 25 Law on the HCJ providing that the HCJ may "demand that courts provide copies of case files that are still being processed (…) except for cases that are scheduled for a hearing in private" remains unchanged. Such a provision is

dangerous as it might undermine the independence of the judges. Sending for papers in a case which is still at hearing may be seen as sending a message about how the case should be decided. An essential principle of judicial independence is that every judge when adjudicating a case is only subject to the law and shall be free from any interference when applying the law. Article 126.1 of the Ukrainian Constitution holds that the independence and immunity of judges are guaranteed by the Constitution and the laws of Ukraine. And Article 129.1 of the Constitution says:" In the administration of justice, judges are independent and subject only to the law."

39. The control over disciplinary issues, requiring compliance with the personal and professional obligations of judges, does not encompass the possibility of reviewing the content of judicial decisions, nor an evaluation of how the judges apply the law. The correction of mistakes as to the application of the law when rendering a resolution is to be corrected by way of appeal, but not through disciplinary proceedings. Thus, the request for court files might only be directed to establish, for example, if there have been undue delays in the handling of the case. But the HCJ may not re-examine the administration of justice in particular cases, nor establish disciplinary responsibility for errors in the application of the law when sentencing, as this would amount to an unlawful interference with the judge's independence.

### 5.3.3. Article 27 of the Law on the HCJ

40. Article 27 of the Law on the HCJ enumerates the acts which the HCJ shall adopt. The acts listed follow almost literally the powers provided in Article 131 of the Ukrainian Constitution. Law 2181 introduces two changes in this Article 27 Law on the HCJ. First, it includes a new paragraph 7) to Article 27.1, adding an open provision allowing the HCJ to adopt "Other deeds within the High Council of Justice mandate". This provision may be subject to criticism if the list of powers of the HCJ of Article 131 of the Constitution is exhaustive as appears to be the case. I**t is undesirable that the powers of such an important body as the High Council of Justice should not be clearly specified** and that it should be given a power by ordinary law to adopt "other deeds" which are nowhere defined or limited in the draft law. During the meetings in Kiev, the authorities referred as example of "other deeds" to matters relating to the internal organisation of the HCJ. Nevertheless, it seems dangerous to include such a vague term and to open up the possibility to interpret this provision as giving extra competencies to the HCJ. The powers of the HCJ should be exhaustively defined by the Law. If indeed these "other deeds" relate exclusively to the regulation of the internal functioning of the HCJ, the Law should state this to avoid other interpretations.

41. Second, the Law 2181 adds to Article 27 a third part stating that the acts of the HCJ may be challenged solely before the High Administrative Court and through the procedure established in the Code of Administrative Adjudication. On this provision see the comments on the amendments to the Code of Administrative Adjudication made above.

### 5.3.4. Article 30 of the Law on the HCJ

42. This Article establishes who can submit proposals as to the release of judges from office to the HCJ. The amendment introduced by Law 2181 has reduced the entities entitled to do so, from four to two. Previously the petition could be filed by 1) a member of Parliament; 2) a Commissioner of Parliament on human rights; 3) a corresponding qualification commission of judges; and 4) a member of the HCJ. With the reform of Law 2181 only the last two are entitled to file the proposal for dismissal of a judge to the HCJ. It is logical that the qualifications commission of judges can submit proposals for dismissal of judges to the HCJ. More doubtful appears to be a member of the HCJ can also propose the dismissal. Taking

into account that the Minister of Justice and the Procurator General of Ukraine are members *ex officio* of the HCJ (Article 131 of the Constitution), and that the Ukrainian Constitution does not guarantee that the HCJ will be composed of a majority or substantial number of judges elected by their peers, the submitting of proposals for dismissal by members of the executive might impair the independence of the judges and thus infringe Article 126.2 of the Constitution and specifically Article 47.4.5) of the Law on the Judiciary and the Status of Judges (see in this respect the comments on the Draft opinion on this Law, CDL(2010)097). In any event, **the member of the HCJ who submitted the proposal should not be allowed to take part in the decision to remove from office the relevant judge**: this would affect the guarantee of impartiality. Such a provision was included in the previous draft version of Article 30 Law on the HCJ, but has disappeared with the amendment by Law 2181 and this seems a regrettable change.

### 5.3.5. Article 32 of the Law on the HCJ

43. Article 32 refers to the dismissal of judges and this amendment includes **a more precise definition of what is the "breach of oath" by a judge**. According to this new Article, breach of oath by a judge is: commission of acts which damage the title of judge and might call into question its objectivity, impartiality and independence, the integrity/fairness and incorruptibility of the judiciary; illegally acquired wealth by the judge or the implementation of costs that exceed the revenues of the judge and his family; deliberate delay by the judge of terms of consideration of the case over legal limit; violation of a morally-ethical principle of judicial conduct. Article 32.3 of the Law holds that a breach of oath of a judge who holds an administrative position in court is also a failure to perform duties prescribed for the relevant administrative positions related to the proceedings. This complements Article 55.1 of the Law on the Judiciary and the Status of Judges, which contains the judicial oath. This provision raises concern for several reasons.

44. First, **this Article tries to specify the acts which lead to disciplinary responsibility of a judge**. Reasons for disciplinary measures are already dealt with in the Law on the Judiciary and Status of Judges (Articles 83 seq.; Section VI: Disciplinary Liability of a Judge). There, the concept and content of the oath is dealt with (cf Articles 104 and 105 of the Law on the Judiciary and the Status of Judges). Establishing the regime for such an important issue as the responsibility of judges in different legal texts complicates the system and makes it difficult to understand it and access it. **It is therefore recommended to keep this regime only in the Law on the Judiciary and the Status of judges**.

45. Second, it is **essential not to confuse ethical principles with disciplinary matters** and the purpose of this provision should be to specify in detail all conduct that might give grounds for disciplinary proceedings leading to some form of sanction. Precision and forseeability of the grounds for disciplinary liability is desirable for legal certainty and particularly to safeguard the independence of the judges; therefore an effort should be made to avoid vague grounds or broad definitions. However, the **new definition includes very general concepts**, such as "the commitments of actions that dishonor a judicial office or may cause doubts in his/her impartiality, objectivity and independence, integrity, incorruptibility of the judiciary" and "violation of moral and ethical principles of human conduct" among others. This seems particularly dangerous because of the vague terms used and the possibility of using it as a political weapon against judges. Article 32.2 adds nothing significant that was not already included in Article 83 of the Law on the Judiciary and the Status of Judges. Thus, the grounds for disciplinary liability are still too broadly conceived and a more precise regulation is required to guarantee judicial independence.

46. Finally, Article 32, in its last paragraph, requires decisions about the **submission of the HCJ's petition regarding dismissal of a judge to be taken by a simpler rather than a**

**two thirds majority. In the light of the flawed composition of the HCJ, this is a regrettable step which would go against the independence of the judges**.

### 5.3.6. Articles 42.4, 46.6 and 57.4 of the Law on the HCJ

47. These provisions establish the **right to be heard for the judge or public prosecutor** (47.4 Law on the HCJ) who is subject to the disciplinary proceedings, and how to proceed if the judge/public prosecutor cannot or does not attend to the hearing. Before the amendment of Law 2181, there was the possibility to conduct the disciplinary proceeding without a judge's/public prosecutor's participation "only in case of his/her failure to attend the Council's session without good reasons". While this provision fully guarantees the right to be heard, it might cause problems as to progress of the proceedings, as in principle the attendance of the judge or public prosecutor against whom the disciplinary proceedings have been instituted is needed. Thus, if the judge or public prosecutor gave "sound reasons" for non attendance, the hearing could not take place and the proceedings could not advance towards a decision.

48. From a practical point of view it seems reasonable that in order to avoid the procedure being hampered by the judge's or public prosecutor's inability to attend to the hearing, a decision might be taken on the basis of the written explanations given by him or her. However, the wording should more strongly safeguard the right to a fair hearing. This amendment tries to avoid procedural abuses that could lead to the impossibility or undue delay in taking a decision on the disciplinary liability. However, these provisions **should be interpreted to favour the right to a fair hearing of the judge or public prosecutor who is the subject of the disciplinary action**.

## 6. Conclusions

49. The Law on the prevention of the abuse of the right to appeal has introduced important modifications with specific impact on the competences and activities of the High Council of Justice, strengthening its role. However, the composition of the High Council of Justice as stipulated in the Constitution remains problematic, even after amendments obliging various state bodies to appoint judges as members of the High Council of Justice; its composition still does not correspond to European standards because out of 20 members only three are judges elected by their peers. Consequently, the powers of the High Council of Justice should not be extended as was done in the Law but rather reduced and limited to those expressly mentioned in the Constitution (excluding the appointment of judges to administrative posts.). In order to counterbalance the problematic composition of the Council a strict regulation of incompatibilities is needed, excluding persons who could have conflicts of interest. Further issues related to the powers of the Council are:

1. The powers of the HCJ to request from courts copies of files of cases which are still under consideration by the respective court raise important problems regarding judicial independence.
2. In disciplinary proceedings, the member of the HCJ who submitted the proposal should not be allowed to take part in the decision to remove from office the relevant judge.
3. Especially in light of the composition of the Council, the fact that the quorum for the dismissal of judges was lowed is to be regretted.

50. The risk of politicization of disciplinary proceedings is high and can have a chilling effect on judges thus weakening their independence. In particular:

1. A more precise definition of what is the "breach of oath" by a judge is required, specifying the acts which lead to disciplinary responsibility of a judge. Ethical principles must not be confused with disciplinary matters.

2. For systematic reasons disciplinary proceedings should be regulated only in the Law on the Judiciary and the Status of judges.
3. As compared to judges of local and regional courts, who can challenge disciplinary proceedings before the HCJ and then before the High Specialised Administrative Court, higher level judges have reduced possibilities for appeal.
4. The right to be heard for the judge or public prosecutor has to be interpreted in favour of the person who is the subject of the disciplinary action.

51. Finally, the composition of the and new highly influential so-called “fifth chamber” of the High Administrative Court should be precisely determined by the law in order to comply with the requirements of the fundamental right of access to a court pre-established by the law. The Supreme Court should not be excluded from jurisdiction in reviewing appeals concerning cases regarding establishment by the Central Elections Commission of results of elections or of an all-Ukrainian referendum should not be final but open to review.

52. The Commission welcomes the intention of the Ukrainian authorities to take further steps for the improvement of the judicial laws, as expressed during the meetings in Kiev and at the plenary session in Venice, and remains ready to assist in this respect.