HIGH ADMINISTRATIVE COURT OF UKRAINE

To: **President of Ukraine**
Mr. Petro Poroshenko

Dear Mr. President,

On June 2, 2016 the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On Judiciary and Status of Judges' (hereinafter referred to as the Law).

This Law provides for new legal and organizing principles for judiciary functioning.

Meanwhile the Law does not partly correspond to articles 1 and 8 of the Constitution of Ukraine according to which Ukraine is a law-based state where Rule of Law principle is recognized and effective. The principle of legal certainty is an element of this Rule of Law principle, and the Constitutional Court of Ukraine has mentioned this repeatedly in its decisions.

1. Article 17 of the Law provides for a new system of judiciary which includes local courts, courts of appeal, Supreme Court as the highest court in the judicial system of Ukraine. In order to adjudicate individual categories of cases the High Court on Intellectual Property and the High Anticorruption Court shall operate.

The Supreme Court of Ukraine should be dissolved according to this Law and the Supreme Court should be created. The role of this Supreme Court in the judicial system is much strengthened and the Administrative Court of Cassation is included into its structure in particular.

Simultaneously the fifth paragraph of Article 125 of the Law of Ukraine 'On amendments to the Constitution of Ukraine (with regard to justice)' adopted by the Verkhovna Rada of Ukraine on June 2, 2016 provides for that administrative courts should operate in order to protect rights, freedoms and interests of a person in the public law relationship.

However the Law has ignored both the mentioned article 125 of the adopted amendments and the Opinion adopted by the European Commission for Democracy through Law (the Venice Commission) on October 23, 2015 by which **administrative courts existence as an autonomous court system** was recognized.

Administrative courts should be headed only by the sole and subordinated to none High Administrative Court of Ukraine that will ensure possibility for the effective protection of rights, freedoms and interests of a person in the public law relationship and will create truly efficient mechanism for administrative courts independence from any political influence, being the cassation instance within no other jurisdiction system and being fully autonomous and independent as regards its organisation, law and procedure.

The European Commission for Democracy through Law (Venice Commission) has repeatedly indicated in its recommendations what status the High Administrative Court of Ukraine should have and such a status implying the need to strengthen the procedural role of the High Administrative Court of Ukraine, to secure its status of the single highest court of cassation within the autonomous administrative court system similar to many European countries.

On November 9, 1995 Ukraine obtained the status of the Council of Europe Member State, and this first of all is an obligation of a State to adhere to the norms and rules determined in the Council of Europe documents.

Cooperation between Ukraine and the Venice Commission is an efficient tool for using research and expertise experience of the Council of Europe in order to bring the Ukrainian legislation in accordance with the standards of European law. Though the recommendations of the Venice Commission are not obligatory, nevertheless Ukraine can not disregard the consultative opinions of the Venice Commission taking into account the role that this important institution plays on the international scene and its generally recognized reputation.

The Venice Commission in its guidelines brings out in detail the meaning of generally recognized democratic values, principles of public authorities operating, law enforcing, legal norms and forms of control over their implementation which content and form should approach the European standards at most.

The Venice Commission in the mentioned Opinion envisaging by the Constitution of Ukraine (the fifth paragraph of Article 125) of the administrative courts which had been already established in Ukraine. In terms of human rights the administrative justice is important element in the process of control over public administration effectiveness.

When adjudicating the administrative courts protect human rights against public administration violations and abuses. That is their value in the law-governed state. Functioning of administrative courts as independent specialized branch of judicial power is grounded by the reasons of economic development and social needs; they reflect both interests of society and its individual members to strengthen the judicial control over public authorities' activity, legality of administrative decisions on rights and freedoms of citizens as well as interests of legal entities.

Under such circumstances the absence of the High Administrative Court of Ukraine at the head of the administrative courts will entail the loss of positive achievements of the judicial reform in Ukraine which resulted in establishing the administrative judiciary and the full-fledged system of administrative courts. That is why the proposed way of reorganization of the court system will nullify all positive results and achievements of the case-law in administrative cases formed during the past years.

Administrative justice is recognized and enforced in many countries worldwide as the most effective mechanism to protect a person's rights, freedoms and lawful interests against violations committed by public authorities. Thus the International Association of Supreme Administrative Jurisdictions comprises the relevant highest jurisdictions representing more than 100 countries and international organizations (in the capacity of members, observers and invited jurisdictions) and this confirms that the administrative justice tradition is a distinctive one not only for Europe. Practically it has been introduced in each part of the world (the High Administrative Court of Ukraine had held the observer status within the Association since 2007 and became its member in 2008).

Considering the above-mentioned the recognition of a human being as the highest social value according to the Constitution of Ukraine corresponds to the principal task of the judiciary which is ensuring the effective administering of justice in Ukraine and that depends directly on the quality and effectiveness of the structure and functioning of the judicial system.

The proposed formation of the judiciary will entail compelling of the administrative justice to the principles of the general jurisdiction and will quash its based on European principles and standards exercising when judges are more than mere arbitrators and a person is not left alone against the bureaucracy of the public authorities.

The autonomous administrative courts system should enable the consideration of the cases deriving from the public law relations starting from the first instance with further possibility of the appeal review of the judgment and the review by the cassation instance, the latter to be assigned to the High Administrative Court of Ukraine acting as the cassation court with its judgments being final. This is the only way to ensure the autonomy of the administrative courts system and the recommendations of the European countries community to be followed.

Such an approach is fully justified as it would ensure the prompt and qualitative consideration of the public law disputes and formation of the unified case-law and enable the development of the rule of law state and civil society in Ukraine.

Implementation of the Law provisions with regard to elimination of the High Administrative Court of Ukraine bears risks to infringe on citizens' constitutional right to a judicial protection and well-timed consideration of public law disputes.

In fact, as on June 1, 2016 the total amount of 15 090 claims, appeals and cassation appeals was communicated to the High Administrative Court of Ukraine as to the court of the first instance, the court of appeal and the court of cassation. Averagely each of 79 judges of the High Administrative Court of Ukraine receives approximately 70 cases per month for which the Code of Administrative Justice of Ukraine sets one to two months term for consideration (depending on the instance).

Judges of the High Administrative Court of Ukraine have considered ***22 014*** cases within five months of this year. On average one judge used to consider approximately 90 cases every month.

Besides as on the date mentioned above ***19 657*** cases more are pending in the Court.

Reduction of the quantitative composition of judicial corps envisaged by the Law will lead to the double workload increase on a judge and during the transition period even to the triple one. This will call in question the enhancement of justice efficiency defined as one of the judicial reform targets.

Therefore framework arrangements for the system of administrative courts offered by the Law both damage its integrity and contain considerable threats to constitutional warranties for citizens' right to judicial protection against wrongful actions of public authorities

The Law innovation essence is merely gathering all the judicial jurisdictions under one "roof" of the Supreme Court with the common bookkeeping.

Depriving administrative justice of its autonomy sets up grounds for ensuring administrative courts' controllability by state authorities and officials, possibility to have an impact on making "favourable" judgements and eventually deprives citizens of their right to efficient judicial protection in disputes with state authorities.

Such approach to judicial system reformation leads to comeback to the Soviet times when the "Rule of Telephone Law" but not the "Rule of Law" was the fundamental principle and that provided the complete controllability of the judicial system which served not as a tool for protection of infringed rights but as a tool for compulsion and punishment.

In the present context while the main vector of reformation is aimed at approaching judicial system and justice to the European standards the amendments proposed sooner or later will lead to uncontrolled processes which will pose real threats of abolishing justice per se on the territory of the nowadays state which is Ukraine.

2. The first paragraph of Article 31 of the Law provides for that the high specialized courts shall act within the judicial system as courts of the first instance on consideration of certain categories of cases. In our opinion, a problem of appellate and cassation recourse against such courts' judgments will arise whereas it is not envisaged by the Law.

The second paragraph of Article 31 of the Law provides the exceptional list of high specialized courts, in particular the High Court on Intellectual Property and the High Anti-Corruption Court. This brings up the question why only these courts and why the possibility to establish other courts is not taken into account.

Having regard to considerable amount of legal actions, huge workload, complicacy of disputable matters, significance of issues and necessity for prompt consideration of all the categories of cases not only in patent and anti-corruption disputes, such specialization may include courts on consideration of juvenile, labour, corporate cases, cases on protection of citizens' political rights, cases on protection of citizens' medical rights and health care, cases on protection of environment, protection of fresh air etc.

Afterwards it may be concluded that the list of high specialized courts given in the Law is absurd and unjustified as regards financial expenses for ensuring activity of a high specialized court (high load upon state budget) and at the same time as regards workload per a judge (small amount of relevant cases for these high specialized courts).

The only justification for existence of such courts is political expediency which whatever should not be determinative for the judicial system of the state. Subsequently it may result into “delivering an order to detect 1000 corruptionists per month” as it was in the Soviet times when specialized ‘*dvoyka*s’ and ‘*troyka*s’ functioned to declare fair citizens as public enemies. Thus, the High Anti-Corruption Court has many preconditions to turn into the High Corrupt Court.

3. The second paragraph of Article 61 of the Law contains the list of information which a judge is obliged to indicate in the Declaration of a judge’s family connections. Meanwhile it has not been considered at all what should be done when relatives refuse to provide information about them or treat the related judge with hostility.

Furthermore, nowadays the opinion that “all the judges are bribe recipients” is actively propagated to the society. However the society is not acquainted with the issue on who are “bribe givers”. In order to protect “the attorneys clan” which is the only one that will be entitled to represent a person before courts we suggest adding to the list mentioned in the second paragraph of this Article the information on family connections with attorneys which includes those who are not engaged in legal profession but possess an attorney’s certificate.

4. Article 87 of the Law, in particular, the fifth paragraph, provides that the Public Integrity Council will operate in four panels, either of which includes five members.

In fact, these five people are to determine the destiny of each judge of the judiciary.

The seventeenth paragraph of Article 87 of the Law provides that the meeting of representatives of non-governmental organizations is considered valid on the assumption of participation of at least five non-governmental organizations. However, the minimum number of members of these five non-governmental organizations is not provided. In Ukrainian History non-governmental organizations consisting of three, five or ten persons have occurred.

Considering the circumstances in which the Law was drafted and facts of neglecting of opinion of judges, one can imagine how the Public Integrity Council is going to be formed and which part of the Ukrainian population it will represent.

We can draw an analogy between implementing of the foresaid provisions and formation of extraordinary '*dvoyka*s' and ‘*troyka*s’, which determined the fates of millions of people in accordance to their subjective view or under pressure from senior officials. Representation of country’s forty million population by 25 members of five non-governmental organizations is considered to be legalized ‘engineering of the system of coercion of judges’.

Such provisions have nothing to do with the constitutional values pronounced by authorities such as ‘rule of law’, ‘civil society’, ‘democracy’, ‘European path of Ukraine’ and so on.

5. Article 106 of the Law is expected to establish additional grounds for bringing judges to disciplinary responsibility, namely the failure to file the declaration of family connections of the judge or its late filing; filing of the

declaration containing designedly unveracious (or incomplete) statements; declaring of designedly unveracious statements in the declaration of integrity of judge.

Considering the innovations provided by the Law it seems that the professional activity of the judge and his future career would depend on the subjective will of members of the High Qualification Commission of Judges of Ukraine which is the openly expressed coercion of judges and contradicts the applicable legislation, rule of law principle being very similar to 1937 with all its shameful displays.

The amendments proposed by the Law are to nullify the provisions of Article 126 of the Constitution of Ukraine. According to this Article, the Constitution and the laws of Ukraine guarantee the independence and immunity of judges. Thus, it seems that the authors of the Law are trying to replace the work of law enforcement bodies, which competence includes investigation of crimes, including those that can be committed by judges.

This Article provides grounds for bringing judges to disciplinary responsibility, which are completely value judgment. In fact, it will create conditions for coercion of judges, especially those who will obey only the law and refuse to obey 'the advice of those in power and/or members of Public Integrity Council'. This is totally contrary to the principles of law-governed state.

Considering the above-stated the High Administrative Court of Ukraine believes that this Law is aimed at destroying the administrative justice system, implementation of which is the evidence of the development of democracy and Rule of Law state in accordance with European standards and the guarantee of the right to fair trial. The Law contradicts both the current Constitution of Ukraine and the Law 'On amendments to the Constitution of Ukraine (with regard to justice)' endorsed by Verkhovna Rada of Ukraine. The Law comprises a high share of corruption components and leads to elimination of the institute of judicial independence and causes the inability to exercise effective judicial protection of rights of citizens and legal entities.

Given the above we ask you to exercise the right vested in you by the Constitution of Ukraine and veto the Law 'On Judiciary and Status of Judges' endorsed by Verkhovna Rada of Ukraine.

Sincerely yours

Chief Justice Oleksandr Nechytailo