

ГРОМАДСЬКА ОРГАНІЗАЦІЯ
« АССОЦІАЦІЯ СУДДІВ ХАРКІВСЬКОЇ ОБЛАСТІ »
PUBLIC ORGANIZATION
«ASSOCIATION OF JUDGES OF THE KHARKOV»

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To the president of the Association of European

Administrative Judges Mrs Edith Zeller

Diar Mrs Zeller,

On 4 September 2015, the Ukrainian Constitutional Commission formed by Presidential Decree No. 119/2015 of 3 March, 2015 in order to prepare alterations to the Constitution of Ukraine went into session and endorsed the Proposals on Amending the Constitution of Ukraine, some provisions thereof being listed hereafter.

I. Article 126 of the draft alterations to the public justice section of the Constitution of Ukraine has the following wording: "Judge shall not be held liable for the decision rendered by him or her, except the cases of committing a crime or a disciplinary offence."

Obligatory authorization required for detention of a judge or of keeping him/her in custody and coming from an authority of court supervision within which the majority of those who sit are judges would serve to increase the independence of judges. Nevertheless, the proposal remains void, for the aforesaid authorization is not required if and when the judge is detained in any actual or alleged act of breaching the law or immediately after it.

Actually, this means that the party dissatisfied with any court judgment acquires a possibility to allege miscarriage of justice (see Article 375 of the Penal Code of Ukraine). Such petition registered (within 24 hours, in compliance with Article 214 of the Penal Code of Ukraine), any judge can be detained.

Thus, the proposed new law actually enables individual citizens and politicians, including representatives of public authority, to put pressure on judges in the above-described manner.

II. Article 126 of the aforesaid draft alterations to the Public Justice section of the Constitution of Ukraine also proposes that any disciplinary infraction or dereliction of duties either incompatible with the status of judge or inconsistent with his/her functions and responsibilities also be regarded as sufficient grounds for dismissal.

The Venice Commission repeatedly stressed that the grounds for dismissal of judges must be presented clearly and unambiguously; as for disciplinary infractions, these must be serious enough to result in dismissal. Yet the above-mentioned norm ignores these recommendations and obviously provides for a wide range of arbitrary grounds for dismissal.

III. Independence of judges implies, in particular, elimination of any political influence on them. The power and authority all representatives of the three branches of public authority are invested with are intended to ensure fair and well-balanced discharging of their duties in the absence of excessive outside pressure or illegal influence. The law investing representatives of all public authority branches with such power and authority must be compatible with the principle of the rule of law and serve the interests of individual citizens and society.

According to approaches adopted by the European Court of Human Rights, "it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference" (see Decision in the case of *Malone v. The United Kingdom* (1984)). Thus, defining the notion of law quality, the ECtHR proceeds from the premise that (1) the law must be intelligible to individual citizens, i. e., contain clear and understandable definitions enabling one to frame and regulate one's behaviour independently or consulting with a lawyer; (2) the law must be predictable, i. e., enable one to foresee the consequences of its application, administration or enforcement; (3) the law must correspond to other requirements related to the rule of law, limiting the discretionary power conferred on the government agencies and clearly defining the ways of its use.

Article 128 of the aforesaid draft alterations to the Public Justice section of the Constitution of Ukraine states that judges are appointed by the Ukrainian President at the request of the High Council of Justice, in compliance with the legally established procedure. Nevertheless, it prescribes no time limits for the official appointment ceremony, i. e., does not indicate the period within which the President must authorize the above-mentioned appointments of the judges. No aforesaid time limits can be found in the effective Law on Judiciary and the Status of Judges of Ukraine. Thus, the above-mentioned Article 128 of the aforesaid draft alterations to the Constitution of Ukraine provides for no definite time framework for official appointment of a judge by the Ukrainian President. Consequently, this norm cannot be regarded as a good quality law.

The aforesaid proposal would preserve the already existing in Ukraine politicization of judge appointment process and slow down this latter, thereby impeding appointment of judges in accordance with definite procedures and regulations, within legally determined period.

IV. Section 5 of Article 126 of the Constitution of Ukraine will read, "Judge shall hold an office for unlimited term."

Subsection 2 of subsection 19, Section XV of the Transitory Provisions reads: "Powers of judges appointed for the first time before taking effect of the Law of Ukraine "On Amending the Constitution of Ukraine (on justice)" shall end with the expiration of the term for which they were appointed."

Subsection 2, Section II of the "Final and Transitory Provisions" of the Draft Amendments reads: "As from the day of this Law taking effect, appointment, termination of powers and dismissal of judges shall be conducted in accordance with the Constitution of Ukraine as amended by this Law."

Article 128 of the Constitution of Ukraine will read, "Judges shall be appointed on competition basis, except the cases provided for in the law."

As no other provisions of the Draft relate to the judges first appointed or elected to the office before the Law of Ukraine "On Amending the Constitution of Ukraine (on justice)" taking effect, and as the proposed wording of Article 128 provides for permanent appointments of judges on a competitive basis (with the exception of cases provided for by law), the aforesaid judges could formally be dismissed or might find themselves in the state of legal uncertainty, while in the absence of any grounds for dismissal the continuation of their permanent non-competitive appointments would be totally dependent on the goodwill of legislative authority; this is not up to the generally received European standards of judicial procedure and, as regards the judges who were first appointed or elected to the office before the Law of Ukraine "On Amending the Constitution of Ukraine (on justice)" taking effect, would limit their right of permanent non-competitive appointment even in the absence of any grounds for dismissal and given successful proficiency testing and trial period results.

The above-listed clauses of the draft alterations to the Constitution of Ukraine leave no doubt that their implementation would affect, first and foremost, human rights of every Ukrainian citizen in actual or possible need of legal protection. The mechanism of legal protection, the latter being part and parcel of all individual human rights and freedoms, would cease to be efficient.

The above-described situation would result from the fact that the judges first appointed or elected to the office before the Law of Ukraine "On Amending the Constitution of Ukraine (on justice)" taking effect, would forfeit their power and authority upon the expiration of their term of appointment. Quite soon about two thousand judges would be divested of their powers. Consequently, the human right to legal protection, i. e., open trial or fair and public hearing within a reasonable time by an independent, impartial and unbiased bench or tribunal would remain affected.

Simultaneously, the proposed alterations do not meet the requirement of the law predictability, the latter being indispensable to any good quality law. Thus, firstly, Article 126 of the aforesaid draft alterations to the Constitution of Ukraine presents a final and presumably comprehensive list of causes for dismissal of a judge, yet expiration of the term of appointment is never mentioned therein. In other words, even if the power and authority of the judges first appointed or elected to the office before the Law of Ukraine "On Amending the Constitution of

Ukraine (on justice)” taking effect would be forfeited upon the expiration of the term of appointment, this latter not becoming permanent, no causes for dismissal could be identified in accordance with the proposed wording of Article 126 of the Constitution of Ukraine.

Secondly, the provision related to termination of office of the above-mentioned judges contains no references to either the procedure thereof or the subsequent career progress of the judge.

In accordance with clauses 1.3. and 3.3. of the European Charter on the Statute for Judges of 8 – 10 July 1998 that define the criteria relevant to the nature of the duties to be discharged in the permanent capacity of judge upon the expiration of trial period, the decision to refuse the permanent appointment or extension of the judge’s term in office can only be taken by an independent authority.

Thus, “automatic” revocation of the power and authority of judges would not be compliant with the accepted European standards of judicial procedure, although the Venice Commission unambiguously pointed in its Opinion No. 588/2010 of October 18, 2010 (clauses 44, 58) at the necessity of permanent appointment of judges becoming a basic rule, provided that the 5-year trial period proved successful. Exceptions to this rule can be made only in cases similar to those that would entail dismissal of a judge whose term in the office would otherwise be unlimited.

In clause 49 of its Resolution No. 747/2013 of December 10, 2013 the Venice Commission made no objections to the final provisions related to the expected constitutional changes and “automatic” unlimited extension of the judge’s term in office, provided that his/her trial period proved successful.

Therefore, by proposing alterations to the Constitution of Ukraine drafted with no regard to the above-mentioned European standards, the Ukrainian authorities obviously attempt to limit the independence of newly or recently appointed judges and make their official position sufficiently difficult.

It should also be stressed that the majority of the judges appointed for the first time (since January 2012) were appointed on the competitive basis that, as provided for by the Law on Judiciary and the Status of Judges of Ukraine and amended by the Law of Ukraine on Ensuring the Right to Fair Trial, was practically identical to the competitive basis effective at the time of selection and recruitment of the aforesaid judges (trial period excepted). All selection and recruitment stages were monitored by international and European observers and journalists. The selection and recruitment procedure itself was commended by the Venice Commission and USAID experts on democracy and government.

V. Subsection 6, Section II of the Proposals on Amending the Constitution of Ukraine reads: “The Verkhovna Rada of Ukraine within thirty days after this Law taking effect shall transfer submissions of the High Qualification Commission of judges of Ukraine along with relevant documents concerning election of judges for unlimited term which have not been considered by the Verkhovna Rada of Ukraine to the High Council of Justice (Vyscha Rada Pravosuddya) for taking decision on appointment of judges for unlimited term.”

Demonstrably, this norm does not tally with the effective wording of the Law of Ukraine on Ensuring the Right to Fair Trial. Besides, this norm does not provide for any procedure or conditions related to consideration of the above-mentioned submissions by High Council of Justice; it also remains unclear whether availability or absence of recommendation by the High Qualification Commission of judges of Ukraine is relevant to the issue. In other words, the aforesaid norm does not meet the standards of good quality law.

If this provision of the Transitory Provisions of the Draft Amendments to the Constitution of Ukraine becomes effective, the absence of the Verkhovna Rada decision on appointment of judges for unlimited term will affect the human right to open trial or fair and public hearing, for if a considerable number of experienced judges are not invested with judicial power and authority for sufficiently long periods, the courts have no possibility to examine all their current cases within a reasonable time.

VI. Subsection 4 of subsection 19, Section XV of the Transitory Provisions of the Draft Amendments to the Constitution of Ukraine reads: "Conformity with being in the office of a judge, who was appointed or elected to the office before the Law of Ukraine "On Amending the Constitution of Ukraine (on justice)" taking effect should be assessed due to the procedure prescribed by the law. Apparent non-conformity of the judge with being in the office based on criteria of professionalism, ethics, or honesty revealed in view of such assessment shall constitute a ground to dismiss a judge."

But firstly, proficiency testing of all Ukrainian judges has already been scheduled in compliance with the Law of Ukraine "On Ensuring the Right to Fair Trial" and the judges may have passed the aforesaid testing by the moment the above-mentioned draft amendments are endorsed and take effect. This would lead to unjustified proficiency re-testing of the judges.

Secondly, the Venice Commission already emphasized the importance of the irremovability of the previously appointed judges, as otherwise a competent judge already being in the office and innocent of any disciplinary offence could be dismissed or refused permanent appointment just because other candidates possess better qualifications; this would run contrary to the very idea of judiciary independence (see resolution No. 528/2009 of 15 June 2009, clause 57).

Thirdly, the criteria indicated in the above-mentioned draft amendments (professionalism, ethics, or honesty) are purely estimative and admit various interpretations, thus rendering impossible any clear and predictable application of the aforesaid norm provided by the Constitution of Ukraine.

Also, this norm is inconsistent with Draft Article 126 of the Constitution of Ukraine, for such cause of dismissal of a judge as "breach of oath by the judge... [or] commission by a judge of a disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of judge or apparent nonconformity with being in the office" is not indicated in Article 126 norm. Therefore, the norms set forth in subsection 5, Section XV of the Proposals on Amending the Constitution of Ukraine do not meet the standards of good quality law.

VII. Beyond that, we consider it necessary to indicate that an alternative version of draft amendments to the Constitution of Ukraine was submitted for consideration by the Venice Commission. This version stipulates that within six months after the above-mentioned draft Law of Ukraine "On Amending the Constitution of Ukraine (on justice)" taking effect a professional judge appointed (elected) to his/her office previous to the aforesaid law taking effect, has the right of applying for re-appointment in accordance with the procedure set out in subsection 5 of

this Section. A year after the law takes effect the judicial power and authority of the judge who failed to submit such application are revoked, if the judge had not been dismissed or his/her judicial power and authority revoked for other reasons. If the judge applying for re-appointment failed to meet the selection requirements, his/her judicial power and authority would be automatically revoked starting as of the day after the decision on the judge's ineligibility has been published.

In its present wording, the alternative version of draft amendments to the Constitution of Ukraine submitted for consideration by the Venice Commission would result in a situation when, the aforesaid norm taking effect, a judge would continue dispensing justice yet cease to be a legally appointed Justice performing his/her duties in accordance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Venice Commission qualified such approach to reforming judiciary systems as inadmissible (see Draft Opinion No. 606/2010 of 20 June 2011 "On the Draft Decisions of the High Judicial Council and of the State Prosecutorial Council on the Implementation of the Laws on the Amendments to the Laws on Judges and on the Public Prosecution of Serbia").

In its Preliminary Opinion No. 803/2015 of 24 July 2015 ("Preliminary Opinion on the Proposed Constitutional Amendments Regarding the Territorial Structure and Local Administration of Ukraine") the Venice Commission indicated that once appointed, the judge should sever all his/her ties with political bodies, since neither legislative nor executive authorities should be given a possibility for even a purely symbolic interference with the judge's duties. To maintain and increase public confidence, indispensable to democratic society, the judges must not only be independent, but appear independent as well.

Any amendments to the Constitution of Ukraine should be aimed at improving the current provisions thereof and strengthening of the existing guarantees of the independence of judges, not at boosting "principles of political expediency" etc. Representatives of the judicial branch of authority have a vested interest in reforming the current judiciary system in order to promote its independence and increase public confidence, yet we think that the positive aspects of the draft alterations to the Public Justice section of the Constitution of Ukraine are rendered void by the above-listed provisions, those being contradictory by their nature and falling short of the corresponding international standards.

Therefore, we request that, given the urgent need to provide protection to the Ukrainian judges, you kindly appeal to whoever it may concern and point to the necessity of:

- examining the proposals on Amending the Constitution of Ukraine in the Public Justice section endorsed on 4 September 2015 at the session of the Ukrainian Constitutional Commission and recognizing the above-listed norms thereof perilous and harmful to the independence of individual Ukrainian judges and of the Ukrainian judicial system as a whole;

- approaching the Venice Commission requesting that the aforesaid proposals regarding Draft Law of Ukraine "On Amending the Constitution of Ukraine (on justice)" be regarded as incompatible with the European judiciary standards and perilous to the independence of individual Ukrainian judges and the Ukrainian judicial system as a whole;

- suggesting that the Venice Commission include into its opinion on legal review of the aforesaid proposals regarding Draft Law of Ukraine "On Amending the Constitution of Ukraine

(on justice)” a provision on the necessity of including into the above-mentioned proposals a norm related to automatic and permanent re-appointment of the judges first appointed or elected to the office before the Law of Ukraine “On Amending the Constitution of Ukraine (on justice)” taking effect;

- suggesting that the Venice Commission include into its above-mentioned opinion a provision qualifying as inexpedient re-testing of the proficiency of the judges previous to their re-appointment if the aforesaid judges were first appointed or elected to the office before the Law of Ukraine “On Amending the Constitution of Ukraine (on justice)” taking effect and their proficiency had already been confirmed by the preliminary testing in compliance with the Law of Ukraine of 12 February 2015 “On Ensuring the Right to Fair Trial”;

- approaching the Council of Europe Committee of Ministers and requesting that an opinion be expressed on the correspondence of the aforesaid Draft Law of Ukraine “On Amending the Constitution of Ukraine (on justice)” to Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) for the Attention of the Committee of Ministers of the Council of Europe on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges.

- an opinion be expressed on the correspondence of the aforesaid Draft Law of Ukraine “On Amending the Constitution of Ukraine (on justice)” to European Charter on the Statute for Judges, the Bangalore Principles of Judicial Conduct, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region as regards the principles of permanence of the Judiciary.

**President Public organization
“Association of judges of the Kharkov area,
Judge Court of Appeal of the Kharkov region**



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