USAID FROM THE AMERICAN PEOPLE | FAIR JUSTICE PROJECT

OPINION ON THE CONSTITUTION OF UKRAINE WITH A FOCUS ON RULE OF LAW PRINCIPLES

Contract No. AID-121-C-11-00002

Author: Lorena Bachmaier Winter, FAIR Constitutional Law Expert, Madrid University Law professor, Spain

Month Day, 2012

CONTENTS

1. Apart from the European Convention and its Protocols and the case law of the European Court of Human Rights, account was taken in preparing this opinion of the main International Treaties of Human Rights and the experience of other European constitutional systems. The opinion has been prepared by Lorena Bachmaier Winter[1] and is based on the English translation of the Ukrainian text of the Constitution, 1996 version. The opinion is based on the review of the current Constitution with a focus on rule of law principles.

2. The comments on individual provisions of the Constitution follow the order of its chapters and focus in particular on those provisions that should be revised or could be better formulated in order to improve the rule of law and the independence of the judiciary. However, some clarifications considered necessary or appropriate in order to avoid misinterpretations, contradictions and complexities in the application of the Constitution are also pointed out. For clarification purposes in this comment each constitutional provision is followed with a title indicating the content of the Article, although the Ukrainian Constitution does not include such titles.

I. INTRODUCTION

3. The Council of Europe and in particular the Venice Commission have insisted on the need of undertake urgently a comprehensive constitutional reform in Ukraine[2], especially after the amendments passed in 2004 were declared unconstitutional[3]. The Venice Commission has strongly encouraged the Ukrainian authorities to ensure that such a constitutional reform results in an effective strengthening of the stability, independence and efficiency of state institutions, through a clear division of competencies and effective checks and balances[4]. The European institutions have stated that among those reforms it is important to introduce a more effective parliamentary control to the presidential powers and to reform the local-self government. Among those reforms it is crucial to address a comprehensive reform of the judiciary. However such a reform is largely hindered by several constitutional provisions. In this opinion we will focus precisely on the provisions regarding the judiciary and the public prosecution office but will also comment the rules on fundamental rights connected with the judicial functions.

II. TITLE II – HUMAN AND CITIZEN RIGHTS, FREEDOMS AND DUTIES

4. Articles 21 to 68 list the fundamental rights and liberties of the citizens. Without entering into details regarding the wording of each of those Articles, there are some issues that should be mentioned.

---

[1] Professor of Law, Universidad Complutense, Madrid.
[2] See for example Venice Commission opinion on the procedure of amending the Constitution of Ukraine (CDL-AD (2004) 030); Opinion on the amendments to the Constitution of Ukraine adopted on 8 December 2004 (CDL-AD (2005) 015; Opinion on the constitutional situation in Ukraine (CDL-AD (2010) 044).
[3] By Constitutional Court decision of 30 September 2010 (Case No. 1-45/2010), declaring Law No. 2222 unconstitutional "due to a violation of the constitutional procedure of its consideration and adoption".
[4] See Venice Commission opinion on the constitutional situation in Ukraine (CDL-AD (2010) 044), point 74.

5. The right to a fair trial is not expressly recognized in the Ukrainian Constitution. It is true that most of the procedural safeguards and fundamental rights of the defendant in criminal proceedings are regulated: right to freedom (arts. 29 and 33), right to the inviolability of the domicile (art. 30), right to privacy (arts. 31 and 32), right to judicial protection (art. 55), right to access to court (art. 55.2), right to know his rights and duties (art. 57), right to legal assistance (art. 59), *ne bis in idem* right (art. 61), the right of presumption of innocence (art. 62) and the right against self-incrimination (art. 63).

6. Despite this long list of rights regarding the access to courts and the procedural safeguards, to my mind the Constitution should also recognize expressly the right to a fair trial without undue delays (art. 6 ECHR and art. 14.3 c) ICCPR). The concept of the right to fair trial is broad, it is a catch-all recognition of procedural rights, that needs further definition and concretisation, but the mere formal recognition of this right provides already a higher level of protection for the parties to the proceedings. Article 129 lists the "main principles of proceedings", but the list does not contain all the rights envisaged in the right to a fair trial.

7. Furthermore, the Constitution should also recognize the right to appeal the conviction sentences, in accordance with art. 14.5 of the United Nations International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR)[5]. Article 129.8) UC recognizes the right to file appeal and cassation "save in cases established by the law". This does not amount to a constitutional right to have the conviction sentence reviewed by a higher court, and thus this right to appeal should either be formulated independently or art. 129.8) UC should be redrafted.

8. It would also be appropriate to recognize expressly the right to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court, in conformity with art. 14.3 (f) ICCPR.

9. Within the right to a fair trial and the right to defence it would be appropriate to expressly recognize the right to be informed immediately of the criminal charges pressed against him/her (art. 14.3 ICCPR, for example also Article 11 Constitution of Italy). We are aware that art. 57 UC states the right accorded to everyone to "know his rights and duties", but this Article seems to refer mainly to be informed about the rights and duties established by laws and other regulations, not precisely on the right to be informed on the reasons for being held suspect or criminally liable. Therefore it should be considered to mention under the fundamental rights of a defendant or within the right to a fair trial, also the right to be immediately informed of the charges pressed.

10. Article 59 recognizes the fundamental right to legal assistance and free legal assistance in the cases provided in the law. The wording of this rule —at least in the English version we are using— might lead to confusions, as it uses the terms "legal assistance", "defender" and "advocate". Furthermore Article 29 UC when dealing with the rights of the detainee recognizes the right to "receive legal assistance from a defender". The legal assistance in most countries is provided by legal counsel, advocates or lawyers. The precise requisites to become a lawyer and to provide legal assistance vary from country to

[5] Article 14.5 ICCPR: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

country, but in general the regulation of the legal profession is organized and controlled by the bar associations. It is commonly understood that the legal assistance will be provided by an advocate or lawyer admitted to the bar. This is a guarantee for the citizens that the person who will defend their interests in court is adequately trained and fulfils the legal requirements to act as a lawyer. Rules on advocacy may also allow other persons who have enough qualifications to act as lawyers, even if they are not registered as such in the bar association. This is the case, for example, in Germany or Spain for law professors, who may eventually present cases in court, without being formally registered in the relevant bar association. Thus, it is possible that the legal assistance is provided by lawyers who are not formally advocates.

11. From the wording of Article 59 UC it is unclear who shall provide the legal assistance, a defender or an advocate. We know there has been a constitutional decision of the Ukrainian Constitutional Court dealing with the interpretation of this Article and the concept of "defender", allowing persons who are not advocates to provide legal assistance. Problems have arisen also with regard to the rules included in the draft Criminal Procedure Code, as it states that the legal assistance shall be provided by lawyers. We understand the particularities that appear in each country with regard to the exercise of the legal profession, but in order to guarantee effectively the right to legal assistance, the Constitution should avoid using contributing to confusion. The use of the term "defender" is confusing, as —in English— it is not equivalent to lawyer. On the other hand, paragraph 2 of Article 59 uses the term "advocate", but only in connection to the legal assistance in criminal proceedings. Thus it is questionable if the criminal proceedings can only be provided by lawyers registered as advocates and not by other defenders. This interpretation is not consistent with Article 29 which states that the legal assistance to the detainee shall be provided by a "defender". Who may act as a defender? Why does the Constitution mention the advocate in Article 57 paragraph 2?

12. These issues might be country-specific and be related to the fact that Ukraine until now did not have a proper organized advocacy nor a national bar association. Despite this situation, which is not to be addressed here, for the sake of clarity the constitutional text should avoid using different concepts or introducing misunderstandings with regard to the right to legal assistance.

13. Furthermore and in compliance with International Treaties and with the ECHR, the death penalty should be prohibited in the Constitution.

ARTICLE 61 – DOUBLE JEOPARDY

14. This Article expresses the prohibition of double jeopardy or *ne bis in idem* principle. This principle is recognized in Article 14 (7) of the I.C.C.P.R.: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country". It was not included in the text of the European Convention of Human rights of 1950, but was later added through Article 4 of the Protocol 7 of the Convention which entered into force on November 1, 1988. Both provisions prohibit successive prosecutions for the same offence

once a decision on those facts is final in the sense that has acquired the force of *res judicata*. Only under exceptional circumstances can the case be reopened in favour of the convicted person if there are newly discovered facts or a fundamental breach of the procedural rights of the defendant. Following the case law of the European Court of Human Rights, the principle of *ne bis in idem* does not bar to prosecute two different separate offences arising out of the same facts[6]. However in the case *Nilsson v. Sweden*[7] case it is further stated that it is not against the Convention that a single act constitutes more than one offence, but the courts have to examine closely if both offences have the same essential elements or not, as Article 4 of Protocol 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which a person has already been finally acquitted or convicted. However, it excludes the possibility of sanctioning a person for the same facts before different jurisdictions.

15. All European countries recognise the principle of *ne bis in idem* —although with different wording—, and has even been recognised as a general principle of European Community law which is not limited to criminal cases even if it has a different scope in non criminal proceedings. In view of these international rules, recognised in most Constitutions in Europe, it should be considered if Article 61 of the Ukrainian Constitution complies with those standards. The objective of Article 61 appears undoubtedly to recognise the principle of *ne bis in idem*, although the wording could be improved in order to avoid misunderstandings. The English version of this provision says: "No person may be brought to legal liability of the same type for the same offence twice". This text does not clearly state the prohibition of sanctioning the same facts under different laws and/or before different jurisdictions. By stating "liability *of the same type*" it might open the possibility to sanction twice the same conduct, which is against the broad concept of *res judicata* established in the case law of the ECtHR[8].

16. To avoid such a limited interpretation and application of the prohibition of double jeopardy it should be considered to redraft Article 61 Paragraph 1 UC.

ARTICLE 62 – PRESUMPTION OF INNOCENCE

17. This Article recognises essential procedural guarantees such as the presumption of innocence, the principle of *in dubio pro reo* and the exclusionary rule of evidence. Last paragraph states the right to compensation in cases of unjust sentences. With regard to this provision, which is in principle in compliance with the European standards on human rights, the wording might be improved. For example, the English version of Article 62 Paragraph 3, states that "An accusation shall not be based on illegally obtained evidence or on assumptions". This statement is correct but could be further clarified. It is important

[6] See for example, *Gotken v. France* (2002), Application 33402/96), where the Court found no violation of Article 4 of the Protocol 7 in a case where there was a penalty imposed for a drugs offence and one for a customs matter in respect of the same incident.
[7] *Nilsson v. Sweden* (2005), Application 73661/01.
[8] In the same sense also the case law of the German Constitutional Court when interpreting Article 103.3 of the *German Grundgesetz*.

that the accusation is not based on illegally obtained evidence, but what is most important is to prohibit that a conviction might be grounded on such type of evidentiary materials. The guarantee against possible abuses in collecting evidence requires banning the use of that evidence to convict a person. Article 62 Paragraph 3 only refers to "the accusation". It could be said that if illegally obtained evidence is prohibited to base an accusation implicitly is also prohibited for its further use. However, it would be appropriate to clarify this. On the other hand practical reasons justify also this clarification, as in most cases the issue of the illegality of the evidence does not appear at the beginning of the proceedings or cannot be discussed or proofed at the moment when the prosecution presents the indictment or accusation.

18. Last paragraph of Article 62 also raises concerns with regard to the right of compensation. This paragraph states: "In the event of revocation of a court verdict as unjust, the State shall compensate the material and moral damages caused by a groundless conviction". The literal wording of this rule provides compensation only if the conviction was "groundless". Thus, an unjust decision which is revoked for being unjust does not automatically grant the right for compensation of damages. As it is drafted in this Paragraph, the right to compensation elevated to a constitutional right might end up being never recognised, as usually all sentences and decisions, even the most unjust, cannot be considered as "groundless". The right to compensation will depend on the interpretation the courts make of the expression of "groundless". To avoid a too restricted interpretation, contrary to the aim of this Article, it should be considered to eliminate the term "groundless".

ARTICLE 106- POWERS OF THE PRESIDENT OF UKRAINE

19. It is not the aim of these comments to discuss the constitutional system of Ukraine. It could be discussed if the broad presidential powers provided under Article 106 of the Constitution are the best option for the consolidation of a young democracy and for the system of check and balances that is essential for the rule of law. A deep knowledge of the political, sociological, historical and economic context would be indispensable to make an assessment of the implications and consequences of Article 106 UC. In any event it would be clear for any expert in constitutional law that the President of Ukraine enjoys huge powers.

20. However, there are two points of the long Article 106 UC that merit some comment. First point 22) allows the President of Ukraine to "appoint and remove from the office one-third of the members of the Constitutional Court. The appointment of Constitutional Court judges is frequently a controversial issue, even in solid democracies. The Constitutional Court is the guardian of the Constitution and its highest interpreter. The Constitutional Court is not an ordinary court and it is not unusual that its members are appointed differently from the judges of the ordinary jurisdiction. The solutions adopted vary from one country to another and it cannot be affirmed which system is better. There is however certain consensus that the Constitution shall define the composition of the Constitutional Court and the rules to appoint its judges. Those rules usually seek to establish a proper balance between the different state institutions, although it is the

Parliament which is in most systems given the power to appoint or confirm the majority of the members of the Constitutional Court often requiring two-thirds of the votes of Parliament to promote consensual appointments. In this sense, it should be considered if it is sound to provide that one third of the members of the Constitutional Court are appointed by the President[9].

21. Furthermore, the President is granted the power to "establish courts" referring to the legal procedure that shall be established by the law. This provision might not be in conformity with the fundamental principle that the courts shall be established by the law, and not by the President, according to the procedure set out in the law. As stated *infra* when dealing with Article 125 UC, this provision is not adequate to safeguard the fundamental right that the judges are pre-established by the law.

ARTICLE 121 – FUNCTIONS OF PUBLIC PROSECUTION

22. The institution of the Public Prosecution is one of the most relevant to the functioning of a judicial system and particularly to implement the rule of law and to guarantee the protection of Human Rights[10]. The prosecution service plays a key role in the criminal justice system, but its functions may extend far beyond the filing of an indictment in the criminal procedure. If we have a look at the European criminal justice systems, we would see that each of them presents particular features regarding the Public Prosecution Office. There are countries within Europe where the prosecution service is independent (for example, Italy), whereas in other states it is subject to the general instructions given by the executive (UK). The public prosecutor may be accorded with more or less powers: in some countries they only deal with issues related to the criminal prosecution, whereas in others they have many other tasks defined as actions on behalf of the public interest, as for example, the power to file collective civil suits on behalf of the consumers (Spain)[11]. It is pointless to strive to establish a certain model of prosecution service without analysing in which context it shall operate. Any assessment or proposal that might be made with regard to the prosecution office needs to take into account the context in which the public prosecutor works, among other issues how the police and the judiciary are structured, how the defence rights are granted to the defendant and how is the criminal procedure regulated. The relationship between the public prosecution service

[9] See also infra the comments on Article 124 UC.

[10] For a comparative overview see also the national reports of six European countries published in J.M. JEHLE and M. WADE (eds.) *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*, , Berlin-Heidelberg 2006; and P. TAK (ed.) *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen 2005.

[11] On the public prosecution in Spain see, among others, C. CONDE-PUMPIDO FERREIRO, "El Ministerio Fiscal en la Constitución" *Rev. Legislación y Jurisprudencia*, 1981, pp.594 ff.; I. FLORES PRADA, *El Ministerio Fiscal en España*, Valencia 1999; C. CONDE-PUMPIDO FERREIRO, "I modelo post-constitucional del Ministerio Fiscal" in *Poder Judicial*, n.27 (1997), pp. 10 ff.; A. DEL MORAL GARCÍA, "El Ministerio Fiscal y reforma de la Justicia" in *Jueces para la Democracia*, núm. 43, March 2002, pp. 21 ff.; O. FUENTES SORIANO, *La investigación por el fiscal en el proceso penal abreviado y en los juicios rápidos,* Valencia 2005.

and the executive is also a relevant factor that will determine the functioning of the system of checks and balances which is in the essence of every democratic system.

23. The Recommendation of the Committee of Ministers of the Council of Europe, Rec(2000)19, on the role of the public prosecution in the criminal justice system, lists the functions that are attributed to the public prosecutor in all criminal justice systems, which are: "1) to decide whether to initiate or continue prosecutions; 2) to conduct prosecutions before the courts; 3) they may appeal to conduct appeals concerning all or some court decisions" (point 2 CoE Rec(2000)19).

24. Article 121 UC lists the functions of the public prosecutor. First, the public prosecutor is responsible to support the prosecution on behalf of the state in court. Furthermore, the public prosecutor is mainly accorded a supervisory role during the criminal pre-trial stage, in the execution of sentences and application of other measures and in the observance and respect of human rights and other laws by executive bodies, local self-government bodies and their officials.

25. The position of the public prosecutor within the trial stage does not raise much controversy, but what shall be the powers of the prosecutor during the pre-trial stage is an issue that is still hotly debated[12]. In any event, a constitutional provision that grants the public prosecutor only supervisory powers is in compliance with the European standards, and precisely with the CoE Recommendation of 2000. Thus, it is debatable which should be the structure and powers of the public prosecution in Ukraine to overcome the present problems with regard to the implementation of the rule of law and the protection of human rights, as long as it meets the European standards.

26. In any event, we consider that the Constitution should mention which shall be the principles that shall inform the activity of the public prosecution. In this sense it would be positive that the constitutional text already declared that the public prosecution is abide by the principle of impartiality (or objectivity or neutrality), that it shall always act in the interest of society and in their acts it shall only be subject to the law.

ARTICLE 122 –APPOINTMENT AND TERM OF THE GENERAL PUBLIC PROSECUTOR

27. Article 60 of the Ukrainian Constitution expresses that no one shall be obliged to "execute directions or orders that are manifestly criminal", and the issuing or execution of such orders shall entail liability. A similar provision is not to be found in European constitutional texts, as it goes without saying that the issuing and executing of manifestly criminal orders entails criminal liability. But on the other hand, it might not be enough to enable prosecutors to oppose to illegal orders from the superiors, as pursuant to Article 60 only orders which are "manifestly criminal" can be disregarded. Pursuant to art. 122 UC the General Public Prosecutor shall be appointed and removed by the President of Ukraine, subject to the consent of the Verkhovna Rada. In order to avoid political influence on the prosecution service, the term of office of the General Public Prosecutor should not be coincident with that of the President and the causes for removal should be

[12] See, among others, K. AMBOS, (transl. Manso Porto), "Control de la policía por el fiscal versus dominio policial de la instrucción", *Tribunales de Justicia*, March 2002.

established by the law. At the present the appointment of the General Public Prosecutor shall last five years which is exactly the same as for the government.

28. Most public prosecution services are hierarchically structured. The Ukrainian Constitution does not state this principle, but this is the way the prosecution office is structured. In that context it would be advisable to emphasize that any instructions given by the executive to the General Public Prosecutor regarding the criminal policy should be published and instructions regarding not to prosecute single cases should be totally prohibited. The Ukrainian state should ensure that the Council of Europe Recommendations Rec (2000) 19 are followed. In particular, in this context we shall recall the recommendation included under point 13 c), which expressly states that "where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way"; and number 13 d) with regard to instructions to prosecute a particular case "such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law …".

29. An excessively subservient prosecution office to the executive power leaves space for abuses and destroys the principles of democracy. In this context it is essential that the Ukrainian legal system provides for an effective procedure for a prosecutor to resist illegal instructions from his/her superior.

III. TITLE VIII - JUSTICE

30. At the beginning of Title VIII we do not find the statement that the judges are only subject to the law[13]. Article 129 when dealing with the principles of proceedings, says that judges "are independent and shall abide only by law". It would be preferable that this general principle would be included at the beginning of art. 126 UC.

ARTICLE 124 – COURTS' JURISDICTION

31. Paragraph 1 of Article 124 states that the jurisdiction shall be exclusively exercised by the courts. Similar provisions exist in other European Constitutions in order to prevent administrative bodies to usurp judicial powers from the judiciary and thus contravene the system of checks and balances and the separation of powers. This paragraph does not pose any particular problems.

32. More problematic appears to be the second paragraph, where it is said that the jurisdiction of the courts shall extend to "all legal relations that arise in the State". It appears that this provision intends to define the scope of the jurisdiction by stating the general rule that all matters are subject to judicial control. It is doubtful if such a rule pretends to state that there are no areas which are excluded from the jurisdiction, not even state secrets, but this shall be an issue for the Constitutional Court to give the adequate interpretation. However, this rule, as it is drafted, may appear to limit the jurisdiction of

[13] As, for example in Article 97 of the German *Grundgesetz*, Article 101 of the Italian Constitution or Article 117 of the Spanish Constitution.

the courts to conflicts that have arisen "in the State". In that case it would contain an unjustified restriction to the territorial limits of the jurisdiction of the Ukrainian courts. It could be considered to redraft this Article with a clearer wording.

33. Moreover, paragraph 3 of art. 124 mentions the Constitutional Court (apart from Article 106. 22) and 126, which states the limited term of the judges of the Constitutional Court). If we are not mistaken, this is the only time where the Ukrainian Constitution mentions this Court. Regarding the importance of this institution and its constitutional character it would be appropriate to regulate in a more detailed way what are the functions and competence of the Constitutional Court, in order to avoid clashes and conflicts with the Supreme Court and other ordinary courts. In order to grant the stability of the Constitutional Court, its composition and the system for appointing its members should also be regulated in the Constitution. This is the model followed by the German, Italian or Spanish Constitution, and might be advisable to be considered for the Ukrainian Constitution.

34. Furthermore it should be considered to establish the right to file individual complaints to the Constitutional Court. This system, following the German *Verfassungsbeschwerde* has proved to be very efficient and useful in protecting the human rights of citizens and elaborating a case-law in constitutional rights that has guided the practice of the lower courts towards the better understanding and implementation of human rights.

35. Paragraph 4 of Article 124 UC provides the right of the citizens to participate in the administration of justice through the institution of the jury or as people's assessors. Jurors and people's assessors are mentioned again in art. 127 first paragraph. It shall be the Ukrainian legislator who has the power to determine which shall be the role of the jury within the administration of justice, if it shall be established in all kind of proceedings, or only in criminal cases; what shall be the composition of the jury and the rules for the appointment of juror, etc. The Ukrainian Constitution also obliges to establish the jury and the people's assessors. From the point of view of the European standards, any system —with or without jury— is admissible. The ECHR does not impose a certain adjudicating model to be adopted, so each country is from this perspective, free to decide if they need a jury trial or not. As an European expert it is not my duty to decide which is the system that shall be adopted in Ukraine. However, experience in post-soviet transitional democracies has shown that the jury trial has helped to combat authoritarian traditions and corruption. Jury trial has played a significant role in framing the modern criminal justice systems, especially in helping to protect the independence of the judicial power and giving relevance to the event of the trial. Thus it undoubtedly contributed to enhance the procedural safeguards of the accused by establishing an adversarial trial as a model. At the same time, it has reinforced the principles of orality, immediacy and equality of arms in the development of the trial. The presence of the jury has strongly influenced the form of the trial, the presentation of the facts, the exclusionary rules of evidence and respect for the rights of defence.

36. In those systems where democracy is still not very strong and needs to be supported, the use of jury trial may be considered as a very useful institution to avoid or diminish risks for the judiciary and its independence. In those countries.

37. Last paragraph of Article 124 establishes that the decisions rendered by the courts "shall be mandatory for execution throughout the entire territory of Ukraine". This provision is perfectly appropriate, and the mandatory nature of the court decisions is reiterated under Articles 129.9) UC. However, taking into account the problems detected with the lack of enforcement of numerous judicial decisions, it should be considered if this problem could also be addressed at the constitutional level. It should be considered if the judges should be accorded with the power to make that their decisions are effectively enforced. The Spanish Constitution defines the judicial power as the power to pass judgments and "having them enforced"[14]. Such a provision might aid in solving the problematic situation that exists at the present where the majority of judgments, especially in the civil courts, are not enforced, and the judge has no power to get them enforced. The problem does not stem from the Constitution, where it is clearly stated that the enforcement of judicial decisions is mandatory. But a constitutional amendment strengthening the powers of the judges to supervise the execution of their decisions might perhaps be helpful in providing a solution.

38. Article 124 states that the court decisions shall be adopted in the name of Ukraine. Apart from this formality it would be also appropriate to state that he judicial decisions shall be grounded, in order to strengthen the principle of justice, the possibility of reviewing the correctness of the judicial decisions, but especially to reinforce the accountability of the judges when applying the law.

ARTICLE 125 – PRINCIPLE OF SPECIALISATION

39. Paragraph 1 on Article 125 of the Ukrainian Constitution states that "the system of courts of general jurisdiction shall be formed in accordance with the territorial principle and the principle of specialisation". It continues stating that the Supreme Court shall be "the highest judicial body in the system of courts of general jurisdiction" and the "respective high courts shall be the highest judicial bodies of specialised courts". Last paragraph of this same Article forbids the "establishment of extraordinary and special courts".

40. There are several issues that could be clarified with regard to this Article which deals with the principles of judicial organization.

41. This Article starts mentioning the "territorial principle", which as far as we understand refers to the territorial organization of the courts, usually divided in judicial districts. Usually the courts as well as the public administration units are divided in territorial units or districts for the better distribution of the judicial tasks and the adequate coverage of the state territory. However it is not clear what is meant by the "territorial principle". Furthermore the territorial division of the courts is usually complemented with rules that establish the jurisdiction by subject-matter. It might be due to the translation, but it is unclear what shall be understood as "territorial principle" to be considered as a constitutional principle.

[14] Spanish Constitution, Article 117.3: "The exercise of judicial authority in any kind of action, **both in passing judgment and having judgments executed**, lies exclusively within the competence of the Courts and Tribunals established by the law, in accordance with the rules of jurisdiction and procedure which may be established therein."

42. As a second point Article 125 mentions the "principle of specialisation". As expressed with regard to the "territorial principle" it is unclear what is meant by this "principle" and why the specialisation has been elevated to the constitutional level. Specialisation is not usually included as a guiding principle of organization of the judiciary in European constitutions. Certain degree of specialisation of the courts is deemed useful to achieve a more efficient administration of justice, but this does not mean that it should be considered a constitutional principle essential for the institution of the judicial power. Moreover, to consider it a "constitutional principle" might entail difficulties regarding the meaning, scope and application of this principle. The needs for specialisation, as they may vary from time to time, and might be extended or reduced, should be evaluated by the legislator taking into account the judicial statistics and the human and economic resources of the judiciary.

43. We find a reference to specialisation in Article 102 of the Italian Constitution, after stating the prohibition of special courts or judges it allows the possibility of creating specialised sections within ordinary courts. The aim is to clarify that the ban of special courts does not prohibit establishing specialised section within the courts, to deal more efficiently with the cases. Thus it is not considered as a "constitutional principle", but rather a clarification of the scope of the prohibition of special or exceptional courts.

44. In sum, as it is not an essential feature for the establishment of an independent judiciary, it is not indispensable to include it in the Constitution and including it may cause problems of interpretation. For example, does it mean that the Ukrainian courts shall be divided into judicial branches? How many branches would be necessary to consider that the principle of specialisation has been respected? A first instance court with jurisdiction to hear all kind of civil cases would be considered in conformity with the specialisation requirement, or the court should be more "specialised"? A court having jurisdiction to hear on civil and criminal cases, would be "unconstitutional"?

45. The third paragraph appears to provide for the establishment of "High Courts", organically situated under the Supreme Court and being the highest bodies of specialised courts. For some reason we are not able to discuss, the drafters of the Constitution wanted the judicial organization to have specialised courts, and specialised High Courts apparently having the last say with regard to the issues competence of these specialised courts. The precise design of the judicial organization is an issue to be decided by the authorities of each state, and the European standards do not impose any model of courts organization nor a certain degree of specialisation. Thus, the comments with regard to this Article do not aim to point out infringements of international or European standards, but try to explain what is the reason for including a "specialisation principle" in a constitutional text and what the consequences that such a provision might cause are.

46. In addition, last paragraph of Article 125 forbids the creation of "special courts". A similar prohibition is found for example in the Italian Constitution (art. 102), the German *Grundgesetz* (art. 101) or the Spanish Constitution (art. 117). Out from the context it is clear that Article 125 differentiates between "special courts" and "specialised courts".

47. Special courts are usually considered courts that are created by different means as the ordinary courts, but also courts that are attributed special jurisdiction on certain matters,

and also courts that function according to special procedural rules. Even a court which is too much specialised can be classified as a "special court", because an excessive limitation of the subject-matter jurisdiction of a court can end up in creating a *de facto* special court. In this sense, there might appear a conflict between the application of the principle of specialisation and the ban of special courts.

48. The concept of "special court" is manifold: it may include military courts, courts in cases of state exception or courts created for special purposes or special cases. The ban of special courts finds its justification in avoiding the perils to the right to an independent and impartial judge by creating *ad hoc* tribunal.

49. In this context we are missing in the Constitution the express requirement that courts shall be created only by law. Through the creation or abolition of courts it is possible to manipulate the judicial power and exercise undue pressure to its members. Therefore, as a guarantee of the judicial independence, the creation and elimination of courts should not be decided by decrees or other executive acts. Many European constitutions also recognize the right to the "natural judge" or the guarantee of the "judge pre-established by the law" (Article 101 German Constitution, Article 24 Spanish Constitution, Article 25 Italian Constitution), granting not only that the courts shall be created by the law, but also requiring that clear and objective rules of competence and jurisdiction determine which is the competent court to decide each case. In order to avoid *ad hoc* courts that could be created for specific cases and to diminish the risks that the rules of jurisdiction might be used to redistribute the case assignments for other reasons than efficiency, those rules establishing the competence and jurisdiction have to be in place before the commencement of the proceedings[15]. Moreover, every defendant should be able to identify which is the competent court to hear his/her case according the objective applicable rules, prior to the indictment.

50. It might be discussed to which extent shall the Ukrainian Constitution enter into the details of the judicial organisation[16], but in any event it would be desirable that the Ukrainian Constitution included the right to the "judge pre-determined or pre-established by the law". Contrary to this, Article 106.23) UC states that the establishment of the courts lies within the President's powers, albeit "in compliance with a procedure established by the law".

51. Last point that appears confusing is paragraph 4 of Article 125, which states that "courts of appeal and local courts shall operate in accordance with the law". We might be missing some point in the understanding of this paragraph, but as it stands, it is unclear what is the aim of such a statement. If the whole system is based on the rule of law, as stated in Article 8 of the Ukrainian Constitution, it is clear that the courts will function according to the law. On the other side, it needs to be made clear why only appeal and

[15] In the same sense Venice Commission opinion on the law on the judicial system and the status of judges of Ukraine of 18 October 2010, (CDL-AD (2010) 026), point 13: "It should be made clear that specialisation of judges cannot be used to circumvent the system of random case assignment".

[16] For example, the German *Grundgesetz* regulates in a very detailed way the organization and structure of the courts, establishing a clear distribution of competences and functions between the national courts and the federal courts, whereas the Spanish Constitution only mentions the Supreme Court and the Constitutional Court, referring the regulation of the judicial organization to an organic law.

local courts are mentioned here. Does it mean that the other courts are not subject to the law? The principles applicable to the appeal and local courts are different from the principles applicable to the rest of the courts. From the English version of this paragraph it is unclear what is the meaning of this provision, and at the same time it might be misunderstood in the sense that the other courts are not bound to the law.

ARTICLE 126 – INDEPENDENCE AND IMMUNITY OF JUDGES

52. Article 126 declares that the independence of judges shall be guaranteed by the Constitution and by the laws and that any influence on judges shall be prohibited. It is highly positive that the Constitution mentions the principle of judicial independence and the need to safeguard it, even if the mere formal recognition might not suffice. At this point, we consider that Article 126 UC should have included also the right to an impartial judge. Independence is a pre-requisite for impartiality, which is one of the core elements of the principle of justice. The judicial proceedings try to guarantee that both parties to the case have the same opportunities to defend their own positions, so that both are treated according to the equality principle. This is the reason why the judge shall decide upon what has been presented to the court and according the evidence produced by the parties, not being allowed to make a decision based on elements of his private knowledge or evidence not produced in court, as this would infringe the principle of equality of arms. In order to guarantee that the court applies the law without taking into account other out-of-court elements that could unduly benefit the position of one of the parties towards the opponent one, the judge has to remain impartial. Independence does not guarantee that the judge will act in an impartial way in every case. Only the contrary statement is true: it cannot be trusted that a non-independent judge will decide impartially, in other words, only applying the law in a single case.

53. In order to guarantee the independence the judges shall not be removed from office except for limited causes established by the law. In Ukraine, it is the Constitution itself where the causes for dismissal of judges from office have been defined. Such a provision is positive, as long as the causes for dismissal are precise and objective. In this regard the "breach of oath" regulated under art.126.5) UC, might instead of providing a safeguard for the independence of judges, cause rather the contrary effect: jeopardise the independence, because it is a very broad concept that can be interpreted in very different ways.

54. The content of the "judicial oath" is regulated in art. 55.1 Law on the Judiciary:

> "1. A person first appointed to a judicial position shall assume office after taking the following oath of office:
>
> "In assuming my duties as a judge, I, (name and last name), do solemnly swear to administer justice in an objective, fair, and unbiased manner abiding only by law, guided by the principle of rule of law, to discharge my judicial duties honestly and conscientiously, to comply with moral-ethical principles of judicial conduct and not to commit any actions disgracing the title of a judge and diminishing the authority of the judiciary."

55. A similar oath can be found in many states, for example, in the Spanish Law (art. 38 Judiciary Act). It is a solemn and public statement of the commitment to fulfil the judicial function in an impartial and honest way, subject only to the rule of law, and behaving in a manner that preserves the dignity of the judiciary.

56. Obviously the content of the oath is very broad, expressing the essential ethic and professional or basic principles that shall lead the judge in the accomplishment of his/her duties. As stated in the Opinion 3-2002 of the CCEJ "precise reasons must be given for any disciplinary action", even if it is not possible to define all such potential reasons[17]. It should be avoided to identify general self-regulatory standards with grounds for disciplinary liability. The precise acts or conduct that might be considered as an infringement of the judicial duties and thus lead to disciplinary responsibility have to be further defined by statutory provisions. Formulations such as "Breach of oath by a judge is: …violation of a morally-ethical principles of judicial conduct" (Article 32.2 of the Law on the High Council of Justice) comprise an ethical behaviour which is per se not a disciplinarily punishable conduct. This definition of a breach of oath which could lead to a judge's release from office – the heaviest disciplinary measure – is a catch-all formulation thus contradicting the principle of sufficient determination which governs legislation. A wide variety of behaviour, of facts could be brought or subsumed under this particular rule thus making it easy to bring forth disciplinary action against a judge and the subsequent dismissal. And this does not contribute to strengthen the judicial independence.

57. Article 126.6) UC includes as a ground to remove a judge from office the "entry into legal force of a verdict of guilty against him". It has to be mentioned that the conviction judgement is considered a cause for removal in most judiciary acts of European countries. However, a distinction shall be made between minor infringements, for example traffic offences, and serious offences. Otherwise, there is a risk that the independence of the judges is curtailed by the threatening of filing a criminal complaint against him/her and achieving a conviction even in less serious misdemeanours.

58. Finally, with regard to the procedure to dismiss a judge from office, Article 126 UC provides that "a judge shall be dismissed from office by the body having elected or appointed him". If we analyze this provision in connection with Article 128 of the Constitution, we realize that the dismissal of non permanent judges is decided at the end by the President and the decision of dismissal regarding the permanent judges will be taken by the Verkhovna Rada. This increases the risks of political interferences in the judicial independence as well as the risks to politicise the proceedings for dismissal. Therefore we consider that Article 126 should be amended in order to limit the role of the Verkhovna Rada in the proceedings to dismiss a judge from office.

59. On the other hand, for practical reasons it should be reconsidered if the Constitution is the adequate place to regulate the age of retirement of judges. At the present moment the age of 65 years might be appropriate, but in the future it might be necessary to increase the age or to lower it, depending on many factors. Most European Constitutions do not enter in such a detail, as reforming the Constitution should be only an exceptional measure.

[17] Point 64, Opinion N. 3-2002 CCJE.

60. With regard to the immunity of judges art. 126 UC states: "A judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court". It is unusual to find such a broad immunity of judges in European Constitutions. The Venice Commission has also criticized this constitutional provision on immunity of judges[18]. We are not able to assess the appropriateness of this wide judicial immunity recognition, as only having a deep knowledge of the circumstances of the practical work of the judges, we could dare to render an opinion on this particular issue. As a hypothesis, it might be necessary for Ukraine to provide for it, if in the past judges have been disturbed and put under pressure through arbitrary preventive detentions to hinder them to decide on a certain cases. Under such circumstances the immunity recognized in art. 126 UC could be deemed necessary.

61. However, the fact that the arrest or detention of a judge requires the prior consent of Parliament may also raise concerns as to the independence of the judges. In practice the judge might feel dependent from political majorities in Parliament, when it comes to guarantee his/her protection against arrests or detentions. It would not be unreasonable to think that a judge should prefer to have Parliament on his side just for the case he/she should need them to apply the immunity rule. In other words, this kind of immunity protection is two-folded, as it exercises a certain degree of "soft power" upon the person of the judge: when confronted with a case where a member of parliament belonging to a political majority is charged, the judge might not feel free to decide subject only to the law, as this could cause an uncomfortable tension between him/her and the parliamentary majority with adverse consequences in the case he/she should be detained. In such a scenario —which we describe as a mere hypothesis—, the provision on immunity does not create the best conditions to make the judge feel free from political pressures and, thus, it does not contribute to create the best safeguards for judicial independence. As was stated by the Venice Commission[19]: "Immunity should not be lifted by Parliament but by the High Council of Justice. Article 126 should be changed in this sense and provide only for functional immunity for acts preformed in the office excluding corruption. Pending such an amendment, at least the law should guarantee that the lifting of immunity only takes place on the basis of a judicial recommendation".

ARTICLE 127 – STATUS OF JUDGES: INCOMPATIBILITIES, REQUIREMENTS

62. Paragraph 2 of this Article establishes a strict system of incompatibilities for judges: judges are not allowed to do any other paid activity, except research, teaching or creative activities. The system of incompatibilities aims to avoid conflicts of interest that would

[18] See the Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, made by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights ad Legal Affairs of the Council of Europe adopted in March 2010, on the basis of comments by S. Gass, J. Hamilton, M. Pellonpää and H. Suchocka, point 27, and is again recalled in the Venice Commission opinion on the law on the judicial system and the status of judges of Ukraine of 18 October 2010, (CDL-AD (2010) 026), point 38.

[19] See point 27 of the Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, made 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 in March 2010, on the basis of comments by S. Gass, J. Hamilton, M. Pellonpää and H. Suchocka.

diminish the guarantee of independence and impartiality of the judges. But it also seeks to promote the efficiency of the administration of justice by having judges exclusively dedicated to their judicial tasks. Such a rigid system of incompatibilities is not alien to other European countries, as for example, Portugal or Spain. But it is not usually regulated in the Constitution.

63. The prohibition to be member of a political party or a trade or labour union is also to be found in the Spanish Constitution. Other legal orders do not prohibit it expressly, but include it in those conducts and behaviours that should be avoided because they could affect the image of impartiality of the judges and the judiciary. This is a typical European feature, as the judges do not have democratic legitimacy and are not linked to political parties. However, the judges should be allowed to establish professional associations not linked or integrated in political parties that would allow them to defend their interests in an independent way.

64. The fourth paragraph of Article 127 allows "persons having a professional training" in specialised issues to become judges of the specialised courts. It is unclear for us if such persons are judges or not. If they are judges, the provision is not really necessary to be included in the Constitution, as it is not an essential principle, but rather a rational system of selecting judges for specialised courts. To my mind it would suffice to have this provision in the judiciary act. However, if those "persons with professional training" are not members of the judiciary, it should be reviewed if this provision is consistent with the rule established in paragraph 1 of this same Article ("justice shall be administered **only** by professional judges and, in cases determined by the law, people's assessors and jurors".

ARTICLE 128– APPOINTMENT OF JUDGES

65. This provision deals with the appointment of judges, making a distinction between the first appointment and the permanent appointment. The first appointment "for a five-year term shall be made by the President of Ukraine" and for the permanent appointment of judges the competence lies with the Verkhovna Rada. In both cases there are risks of political interference in the designation of the members of the judiciary, but such a system is not alien to many other European countries where there is a political appointment of judgments. However, taking into account the specific situation of Ukraine, it seems advisable to take legal measures to reduce such political influence.

66. On the other hand, the five-year term for a judge to be on probation is excessively long and directly affects the independence of these provisionally appointed judges. Such a probation period should be eliminated or at least reduced. For the system to function adequately it is important to scrutinize thoroughly the system of election of judges, guarantee the objectivity of such a procedure and introduce enough controls and training to ensure that the selection of candidates is correct, rather than making an appointment that can be reversed by the President of the State within the next five years. The lack of independence of these judges does not need to further explained.

ARTICLE 129 – PRINCIPLES OF JUDICIAL PROCEEDINGS

67. There have been already some issues regarding this Article that have been pointed out above, when commenting on the need to introduce a provision on the right to a fair trial (see above under points 6 and 7).

68. Regarding Article 129 UC it could be first discussed if from a systematic point of view this is the right place to deal with procedural rights and constitutional principles of proceedings. It might be more appropriate to include these rights under the title dealing with fundamental rights and liberties. In any event, as this is a minor issue, it is not worth to dedicate more efforts to decide on the placement of this provision.

69. As to the content, point 1) of Article 129 UC recognises the principle of "legality". It should be clarified that this principle shall be understood in conformity with Article 8 of the Constitution which states the rule of law principle. Legality shall not be understood as subject only to statutory law, but first of all, judicial proceedings shall be in conformity with the Constitution and with the International Conventions on Human Rights. It would be advisable to reinforce this idea by stating explicitly in this Article the principle of protecting and respecting the human rights.

70. Point 3) of Article 129 UC expresses that "ensuring that the guilt is proved" shall be one of the principles of judicial proceedings. It might be a question of the English version, but the meaning of this paragraph appears to need clarification. If it relates to the principle of presumption of innocence, this principle is already set out under Article 62 UC; if it wants to underline the evidentiary rule *in dubio pro reo*, that the guilt shall be proved beyond any reasonable doubt, the wording does not seem to be appropriate; and finally if the meaning seeks to ensure that the judges will be actively involved in promoting the efficiency of justice by checking the collection of evidence, such a principle is unacceptable. We are not able to assess adequately what is the intention of the constitutional drafter by elevating to the category of principle of judicial proceedings "ensuring that the guilt is proved". As this expression, at least in the English text, might be misleading, it might be considered to be amended.

71. With regard to paragraph 7) of this Article, it should be noted that the technical recording of judicial acts can be a positive way to increase the transparency and fairness of judicial proceedings. However, if included in a constitutional text, it can lead to render unconstitutional all those hearings or other judicial proceedings that have not been technically recorded. If the modernization of the Ukrainian courts is already at a stage that in every single court a recording device is in place, the problems might only arise exceptionally (for example, the need to suspend hearings when the recorder is not working). But if there are not enough resources to install such devices in all courts and provide with adequate technical resources to make them function smoothly, the application of this requirement might lead to more backlogs.

72. Furthermore the mandatory nature of court decisions (art. 129.9) is already expressed under Article 124 UC: reiterations in a constitutional text should be avoided, as it does not contribute to clarity.

ARTICLE 131 – HIGH COUNCIL OF JUSTICE

73. It is out of question that for the establishment of the rule of law and for the implementation of human rights and democracy, the independence of the judiciary is indispensable.[20] The independence of judges is one of the main guarantees for freedom, respect for human rights, and it is granted in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts.

74. Judiciary Councils are foreseen in many constitutional texts to promote and safeguard the independence of judges and the self-government of the judiciary. In order to accomplish their main objective, the Judiciary Council should embody the autonomous government of the judicial power, enabling individual judges to exercise their functions with any undue influence or control of the executive and the legislature, and without improper pressure from other members of the judiciary. The Council for the Judiciary shall protect judges from any external pressure or prejudice of a political, ideological or cultural nature, and promote the unfettered freedom of judges to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law[21].

75. The composition of a Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively. A Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. When a Council for the Judiciary is made solely of judges, the CCJE states that these should be judges elected by their peers. When there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers.[22]

76. A mixed composition presents the advantage of avoiding the perception of self-interest and self protection of the judges, while at the same time allows the viewpoints of other non judicial bodies and legal experts to be heard. This provides the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and shall be free

[20] Consultative Council of European Judges (CCJE): Opinion No. 10 (2007) On the Council for the Judiciary at the Service of Society. Strasbourg, 21-23 November 2007. In: https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3.

[21] See Council of Europe Recommendation No. R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (1994).

[22] CCJE: Opinion No. 10 (2007), paragraph 18. In the same sense Article 1.3 of the European Charter on the statute for judges, made in Strasbourg 8-10 July 1998: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent from the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

from any subordination to political interests and keep the required impartiality to safeguard the values and fundamental principles of justice.

77. To that end a Council for the Judiciary should have a majority or at least a substantial part of judges among its members[23] and the judges should be elected by their peers or be members by virtue of their specific judicial office but not selected by government or parliament.[24] Where a Council for the Judiciary is not structured in such a way there is always a danger that it may not serve to protect the independence and can even undermine that independence.

78. 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 Procurator General of Ukraine are *ex officio* members of the High Council of Justice.

79. This composition of the High Council of Justice of Ukraine does not correspond to European standards. Out of 20 members only three are judges elected by their peers, one judge is a member *ex officio* (the Chairman of the Supreme Court) and thus only 1/5th of the members of the High Council of the Judiciary are judges. 6 members are appointed by Parliament and the President of Ukraine and two members by the Public Prosecutor's Office. Together with the Minister of Justice and the Prosecution Office 50% of the members belong to or are appointed by the executive or legislative.

80. It is true that many other European countries provide for the Minister of Justice to be *ex officio* member of the Judiciary Council (for example, Poland, France or Hungary), and that other countries even include the President of the State as a member of the Judiciary Council (Italy or France), which might not be the best solution for strengthening the independence of the judiciary. However in all the mentioned legal orders, the Judiciary Council is made of a majority of judges.

---

[23] While the exact composition of Judicial Councils varies greatly from country to country and depends on existing risks to judicial independence, there is a quite broad consensus among judges, legal scholars and practitioners that Judiciary Councils should be composed of a majority of judges and that Councils with broad representation may function more fairly and independently. In this sense, see also the study of V. Autheman and S. Elena, *Global best Practices: Judicial Councils. Lessons learned from Europe and Latin America*, (ed. K. Henderson), April 2004, IFES Rule of Law White Paper Series.

[24] International Association of Judges: General Report and Conclusions of the First Study Commission. "The role and function of the High Council of Justice or analogous bodies in the organisation and management of the national judicial system", done in Vienna 2003. See: http://www.iaj-uim.org/site/modules/mastop_publish/?tac=43 . A High Council of Justice should be structured to protect the judiciary from undue influence from government rather than be an instrument of it. Furthermore it should play a major role in the appointment, promotion, discipline or training of judges.

81. In sum, the composition of the High Council of Judges does not have a substantial part of judges. This composition of the High Council of Justice entails risks for the independence as it may allow some influence of the interplay of parliamentary majorities and pressure from the executive. This body does not offer enough safeguards to ensure protection against any subordination to political parties' interests. The composition of the High Council of Justice raises concerns with regard to the role of safeguarding the values and fundamental principles of justice and the independence of the judges.

82. The composition of the High Council of Justice should be changed in such a way that this body is composed of a majority or at least a substantial part of judges among its members and that the judges should be elected by their peers, or be members by virtue of their specific judicial office but not selected by government or parliament.

IV. RECOMMENDATIONS

1. Article 61 UC: To avoid such a limited interpretation and application of the prohibition of double jeopardy it should be considered to amend Paragraph 1 of this Article.
2. Article 129 UC: Include an express recognition of the right to a fair trial without undue delays, the right to appeal the conviction sentence, the right to a free interpreter and the right to be promptly informed of the charges pressed.
3. Article 59 UC: Clarify who should provide legal assistance so that their professional qualifications are really guaranteed.
4. Consider introducing the prohibition of the death penalty.
5. Article 121 UC: Include express recognition of the principle of neutrality, defence of human rights, legality and transparency as essential principles that shall inform the acts of the public prosecution.
6. Articles 122 UC: Consider reviewing the terms of the General Public Prosecutor so that it does not coincide with the term of government.
7. Articles 124 UC: Include rules on composition, structure and functions of the Constitutional Court and introduce the right to file individual complaints with the Constitutional Court.
8. Article 124 UC: Strengthen the judicial powers in the procedure of enforcing the judgments.
9. Article 124 UC: Express recognition that the judicial decisions shall be founded.
10. Article 125.2 UC: Eliminate or at least clarify the scope of the principle of specialisation.
11. Article 125 UC: Introduce the express recognition of the fundamental right to the judge pre-established by the law.
12. Article 125.4 UC: Needs to be clarified; otherwise it should be eliminated.

13. Article 126 UC: Introduce the express recognition of the right to an impartial judge.

14. Article 126 UC: Recast this provision to improve the guarantees of the judicial independence: the "breach of oath" is a too broad cause for dismissal; dismissal shall not be decided by President or Parliament; the rule on immunity of judges might increase the political interference in the judicial independence.

15. Article 128 UC: The five year term for provisional appointment of judges is excessively long.

16. Article 129.7 UC: It should be considered if the technical recording of the judicial acts shall be elevated to a "constitutional principle".

17. Article 131 UC: The composition of the High Council of the Judiciary shall be made of a majority of judges.