OPINION of the Plenum of the Supreme Court as to the Draft Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Functioning of Judicial Authorities" (Reg. No. 1008 of August 29, 2019)

Introduction

1. On August 29, 2019, Volodymyr Zelensky, President of Ukraine, submitted to the Parliament a draft Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Functioning of Judicial Authorities" (Reg. No. 1008, hereinafter – draft law No. 1008). That draft law was determined as urgent.
2. On August 30, 2019, Members of the Verkhovna Rada voted in favor of shortened procedure for consideration of the draft No. 1008.
3. On September 10, 2019, the Committee on Legal Policy of the Verkhovna Rada of Ukraine recommended the draft law 1008 be adopted as a basis and as a whole.
4. On September 11, 2019, Dr. Annika Weidemann, Acting Head of the EU Delegation to Ukraine and Mr. Roman Vashchuk, Ambassador of Canada to Ukraine, addressed the Committee on Legal Policy with regard to the draft law No. 1008, calling, in particular, for starting a thorough advisory process on the draft law with involvement of relevant legal experts, civil society, and the international community. According to the authors of the address, "quickly adopted defective laws can seriously undermine reform efforts, cast a shadow on the purity of the intentions of the new government, and lead to unpredictable consequences."
5. On September 12, 2019, the Verkhovna Rada of Ukraine adopted Draft Law No. 1008 as a basis (238 votes in favor). The faction of the political party "SERVANT OF THE PEOPLE" supported that draft law by 236 votes.
6. On 16 September 2019, after the addresses of Ms. Valentyna Danishevska, President of the Supreme Court, Mr. Bohdan Lviv, Deputy President of the Supreme Court, President of Cassation Commercial Court, Mr. Mykhailo Smokovych, President of the Cassation Administrative Court, Mr. Stanislav Kravchenko, President of the Cassation Criminal Court, Mr. Borys Hulko, President of Civil Commercial Court, Mr. Vsevolod Knyazev, Secretary of the Grand Chamber of the Supreme Court, Ms. Tetiana Antsupova, Ms. Olena Sytnik, Ms. Oleksandra Yanovska, justices of the Grand Chamber, Ms. Nataliia Kovalenko, Ms. Iryna Zheltobriukh, justices of the Cassation Administrative Court, Ms. Anna Vronska, justice of the Commercial Cassation Court, Mr. Arkadii Bushchenko, justice of the Cassation Criminal Court, Ms. Alla Lesko, justice of the Cassation Civil Court, the Plenum of the Supreme Court adopted this Opinion on the draft law No. 1008.

Analysis

Having considered the provisions of the draft law No. 1008, which was adopted by the Verkhovna Rada of Ukraine in the first reading on September 12, 2019, the Plenum of the Supreme Court considers it necessary to point out the following.
The Plenum of the Supreme Court emphasized the support for the proposal to exclude paragraph 22 of Section XII "Final and Transitional Provisions" of the Law of Ukraine "On the Judiciary and the Status of Judges", since the implementation of this proposal would lead to a fair resolution of the issue of judicial remuneration for all judges who administer justice, and not only those who have passed the procedure of qualification evaluation. The current legislative approach to the regulation of relevant issues has put in unjustifiably unequal position judges who have passed qualification evaluation and those who have not passed it yet.

At the same time, the justices of the Supreme Court made the following reservations about other provisions of the draft law No. 1008:
First and foremost, it is important to evaluate the draft law No. 1008 in terms of compliance with international standards for the status of judges, their independence, and, in general, the independence of the judicial power. As it is well known, the status of a judge is not a personal privilege, but an integral part of the proper exercise of their powers and the guarantee of the independence of the judiciary as a whole.
The Venice Commission Opinion of October 26, 2015 emphasized: "The evaluation of the professionalism, ethics, and integrity of all judges can only be an exceptional measure, which requires the utmost prudence… The Venice Commission considers that extraordinary measures must be limited in time and exercised quickly and effectively".
Let us note that such an exceptional measure was in fact applied when forming the current composition of the Supreme Court, which was carried out in full openness and transparency and was praised by universally recognized national and international institutions.
For example, on April 8, 2019, the Council of Europe approved the Opinion "On the Compliance of the Selection and Appointment of Judges of the Supreme Court in Ukraine with the Council of Europe Standards". While giving an overall assessment of the legislation on the selection and appointment of judges of the Supreme Court, the international experts noted that the development of a legislative framework for the implementation of that competitive procedure included not only the application of the Ukraine's constitutional rules and the Law of Ukraine "On the Judiciary and the Status of Judges", but also a large number of rules, procedures, and methodologies that were based on international and European recommendations.
The Council of Europe's experts noted in the Opinion that when giving a general assessment of the process of judicial selection and appointment to the Supreme Court, it should be borne in mind that this process covers a very complicated procedure that

has been applied in Ukraine for the first time ever. The very legislative framework for the selection and appointment of judges provides for detailed and predefined rules. All documents and rules pertaining to the process of selection of judges to the highest judicial institution were publicly available and known before the selection began. One of the most important aspects of competition to the Supreme Court is that it was conducted in the atmosphere of extremely high publicity.

On the other hand, the process of selecting and appointing judges can be assessed as lengthy and complex, as it involves several successive stages, involving a large number of bodies with different functions and powers: some of them perform both technical and decision-making functions (High Qualification Commission of Judges of Ukraine (HQCJ), High Council of Justice (HCJ) – also empowered with some decision-making functions, other – with exclusively advisory functions (Public Integrity Council (PIC), and the rest – with ceremonial powers (President of Ukraine).

Therefore, in that Opinion, the international experts who closely monitored the process of forming and staffing of the Supreme Court in Ukraine noted it positively that the process of selection and appointment of judges in Ukraine was complex and multilevel, involving various institutions responsible for certain segments of this procedure. Such approach provides respective guarantees to protect the independence of the judiciary and does not threat the rule of law.

Successful completion of the Supreme Court set-up requires thorough attention to ensuring the independence of judges.

It should be noted that in accordance with paragraph 9 of Opinion No. 10 (2007) of the Consultative Council of European Judges, the independence of judges in a globalized and interdependent society must be considered by every citizen as a guarantee of truth, liberty, respect for human rights and impartial justice free from external influence. Judicial independence is not an exclusive right or privilege granted to judges in their personal interests. It is granted for the benefit of the rule of law and of those who seek and hope for justice. Independence as a condition of judicial impartiality is thus a guarantee of equality of citizens before the courts.

It should be noted that ascertaining interference with the independence of judges is not excluded even if actual dismissal occurs as a result of acts adopted by the parliament – which is the legislative authority. Reducing the number of Supreme Court justices from 200 to 100, despite the fact that the actual number of judges employed by this court is higher (193 judges), actually seeks to dismiss almost half of the justices who currently administer justice. Moreover, such a large-scale dismissal has the signs of inadmissible deprivation of judges of their right to profession and, accordingly, of a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In her comment dated 3 September 2019, “Independence of Judges and Justice at Risk”, the Council of Europe Commissioner for Human Rights noted that "instead of upholding and strengthening judicial independence, impartiality and efficiency, some governments and politicians intervene in the judiciary and even resort to threats against judges." The

Commissioner stressed that judges should be involved and consulted with on drafting legislation affecting them and the functioning of the judicial system. Judges must have guarantees of keeping their office and protection against unwarranted early removal from office or forcible transfer.
The proposed legislative initiative drew the attention of representatives of international establishments and diplomatic institutions operating in Ukraine (in particular, the EU Delegation to Ukraine, the Embassy of Canada) and led to a negative assessment of respective legislative initiatives.
Thus, the Plenum of the Supreme Court notes that the analyzed draft law No. 1008 poses potential threats to the independence of all judges, and its adoption will result in a real encroachment on their independence and will have a negative impact on the rule of law as an integral part of the state of law.

2. The following should be noted regarding the amendments proposed in Draft Law No. 1008 as to Article 37 of the Law, thereby reducing the maximum number of the Supreme Court justices from 200 to 100.
Since it started functioning (December 15, 2017), 77,227 cases, which were not considered by the high specialized courts and the Supreme Court of Ukraine were referred to the Supreme Court. Since then, the Supreme Court has been receiving an average of 360 cases per day. In total, from December 15, 2017 to September, 2019, the Supreme Court issued 154 189 decisions, which marked the closure of proceedings. As of September 1, 2019, the backlog constitutes 63,071 complaints and claims.
The fact that there is such a backlog alongside the significant influx of new cases leads to a situation where the Supreme Court cannot always administer justice within a reasonable timeframe, and given the importance of each case for the participants, any delay in the administration of justice is tantamount to denying of administering justice. In turn, reducing the number of the Supreme Court justices, as proposed in the draft law No. 1008, will result in a situation where the clearance rate will be 1 to 2, and the backlog will go up. This, in turn, will result in the increase the length of trial in the geometric progression.
At the same time, the Supreme Court is dealing with extremely important cases concerning the banking system, disputes involving foreign investors, tax disputes, and in the near future, criminal cases of so-called “high-profile corruption” can be brought before the Supreme Court, whose consideration, under the existing circumstances, may be significantly complicated.
Ultimately, this will lead to the public distrust in the government’s ability to provide the proper conditions for the effective protection of their rights in courts, which will lead to a significant increase in the number of appeals to the European Court of Human Rights due to the breach of reasonable terms of trial, albeit today, Ukraine is the second by the number of such applications submitted before the ECtHR.

In addition, the top priority of the Supreme Court is to ensure the uniformity of practice. Legal opinions developed by the Supreme Court should serve as a guidance for the first instance and appellate courts, and following them should be a guarantee that the vast majority of judgments will be in line with the uniform case law. At the same time, the first instance and appellate courts are lacking judges. This leads to excessive workload on the acting judges of such courts, which cannot but affect the quality of their work, including as regards compliance with the Supreme Court's opinions.
Therefore, the reduction in the number of Supreme Court justices cannot be accomplished until the first instance and appellate courts are properly staffed, the consistency of case law is ensured, and as a consequence, the authority of such courts is increased while the parties' expectations to have their cases successfully appealed before the Supreme Court are reduced.
Only successful implementation of such measures can become an objective prerequisite for the gradual reduction of the number of the Supreme Court justices based on the effective implementation of so-called "procedural filters" and their proper public perception. Today, even the application of the "procedural filters" envisaged in the applicable procedural law is perceived by the public and the professional community as a denial of access to justice.

3. The proposal to reduce the remuneration of the Supreme Court justices, which directly contravenes the international standards of guaranteeing the independence of judges, in particular by prohibiting the deterioration of their financial situation, should also be revised. The Montreal Universal Declaration on the Independence of Justice of 1983 and Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges stated that the term of office of judges, their independence, social guarantees, adequate remuneration and work conditions are guaranteed by law and cannot be reduced.
According to the Universal Charter approved by the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999, judicial remuneration should not be reduced throughout the term of office of a judge or depend on the results of his / her work.

4. The provisions of the draft law No. 1008 (the proposed wording of paragraph 1 of part one of Article 44 of the Law of Ukraine "On the High Council of Justice") concerning the commencement of a disciplinary case against a judge on the basis of an anonymous statement also give rise to concerns. We believe that such statutory provisions would bring about the instruments of pressure on judges, which is unacceptable. A personalized complaint is a safeguard of the judge's independence from groundless complaints about his / her activities, and a guarantee that judges will not face any unlawful obstacles to the administration of justice.

The anonymous appeal may be used as a tool for groundless persecuting, harassing, and intimidating of a judge. Therefore, this novelty would also undermine the independence of judges.

5. The draft law No. 1008 (wording of part four of Article 48 of the Law of Ukraine "On the High Council of Justice") proposes to shorten the term of notification to a judge about a session of the Disciplinary Chamber from 7 to 3 days. This should happen alongside the exclusion of a provision (in particular, part one of Article 48 of the Law of Ukraine "On the High Council of Justice"), which allows a member of the High Council of Justice to carry out a preliminary review. That is, the judge will not be asked to provide any explanation and will be informed about the case against him/her be considered, 3 days before the meeting of the Disciplinary Chamber. At the same time, it should be borne in mind, for example, that under Article 128 of the Civil Procedure Code of Ukraine, even a summons must be served in such a way that the summoned persons have enough time to appear before court and to get prepared for a trial, but no later than five days before the hearing.
That is, the judge's absence at a meeting of the Disciplinary Chamber for any reason, even a very serious one (as follows from the suggested wording of part three of Article 47 of the Law of Ukraine "On the High Council of Justice"), would not prevent the consideration of a disciplinary case against such a judge, provided he/she was notified three days before the meeting. On the other hand, if a judge still chooses to participate in a meeting of the Disciplinary Chamber, he/she will have to cancel the hearings, which in turn may affect proper, timely, and effective judicial protection of the rights and freedoms of participants to a trial.
The failure to get properly prepared and participate in the meeting of the Disciplinary Chamber may adversely affect the judge's ability to defend effectively against the charges pressed against him/her and would make the judge vulnerable to unjustified persecution. Therefore, this novelty would also undermine the independence of judges.

6. The draft law No. 1008 suggests to exclude the provision enshrined in part 2 of Article 4 of the Law of Ukraine "On the Judicial System and the Status of Judges" stipulating that "the amendments to this Law may be made only by laws on amendments to the Law of Ukraine "On the Judicial System and the Status of Judges". The existence of such a provision is a guarantee of the independence of the judiciary, since draft laws envisaging amendments to the Law of Ukraine "On the Judiciary and the Status of Judges", in accordance with the existing draft, shall undergo analisys, in particular, by the judicial authorities that are responsible for the independence of this branch of power, above all, by the High Council of Justice. Thus, in accordance with Article 3 of the Law of Ukraine "On the High Council of Justice", the High Council of Justice shall render opinions, that are mandatory for consideration, on draft laws related to the formation, reorganization, or liquidation of courts, the judiciary and the status of judges, summarize the proposals

of courts, justice sector bodies and institutions, as regards legislation on their status and operation, the judicial system and the status of judges.
Therefore, the Plenum of the Supreme Court emphasizes that the provision contained in part 2 of Article 4 of the Law of Ukraine "On the Judiciary and the Status of Judges" is not a technical one, but the one that is intrinsic to the system of independence of judges. The repeal of this provision without immediate introduction of any guarantees of timely involvement of the relevant judicial authorities in the discussion around the respective draft laws seems to be very dangerous.

7. The extension of lustration as envisaged in the draft law No. 1008, that is, the extension of the prohibition provided by part 3 of Article 1 of the Law of Ukraine No. 1682-VII "On Purification of Power" of September 16, 2014, to persons who have been for no less than 1 year cumulatively, within the period from November 21, 2013, to May 19, 2019, in office (s) of President of the High Council of Justice of Ukraine, Head of the State Judicial Administration of Ukraine, deputies thereof, does not meet the purpose of the Law No. 1682-VII "On Purification of Power" which is to prevent people who had taken (and / or been involved in taking) measures aimed at the usurpation of power by the former President Yanukovych. In the meantime, the draft law No. 1008 violates the principle of proportionality: the removal from office of people who held certain offices under the presidency of Poroshenko is unjustified (one cannot claim the threat to democracy). The proposed changes are selective in nature: it is proposed to extend the application of lustration to the officials of only some of judicial authorities.

General conclusions

Considering the above, the Plenum of the Supreme Court concluded the following:
1. The draft law No. 1008, as amended on September 12, 2019, in the first reading, poses significant risks to the independence of the judiciary and may undermine the achievement of the justice sector reform of 2014-2018 in terms of strengthening the independence and de-politicization of the judiciary.
2. The provisions of the draft law No. 1008 regarding the reduction of the maximum number of the Supreme Court justices from 200 to 100, the cut of the judicial remuneration of the Supreme Court justices, as well as the re-election of the Supreme Court justices as envisaged in the draft law, are contrary to the Council of Europe standards and international commitments of Ukraine.
3. The review of the existing disciplinary procedures against judges, as provided for in the draft law No. 1008, narrows down the guarantees of judicial independence and violates the principle of legal certainty.
4. The lustration of officials of some judicial administration bodies (Head of the High Qualification Commission of Ukraine, Head of the State Judicial Administration of

Ukraine, their deputies) does not meet the purpose of the Law of Ukraine “On Purification of Power” and violates the principle of proportionality.

5. The provisions of the draft law 1008 have not been previously discussed with representatives of either judiciary, or professional community, or civil society, or international partners of Ukraine, such as the Council of Europe, the European Commission for Democracy through Law (Venice Commission), the European Union, OSCE, USA, and Canada, etc.

6. At the same time, the initiative of streamlining the salaries of the first instance and appellate court judges, regardless of whether they have undergone the qualification assessment, worth being supported.

Based on the above, the Plenum of the Supreme Court is of the opinion that consideration of the draft law No. 1008 should be postponed so that all the comments and proposals could be taken into account, the discussion with the Legal Reform Commission could take place, and the international organizations could submit their opinion regarding the compliance with European standards of judicial independence.