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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

CHANGES TO THE CONSTITUTION

OF UKRAINE

PROPOSED BY THE CONSTITUTIONAL ASSEMBLY

AND

**DRAFT LAW ON THE AMENDMENTS TO THE CONSTITUTION OF
UKRAINE, STRENGTHENING THE INDEPENDENCE OF JUDGES**

**(INCLUDING AN EXPLANATORY NOTE
AND A COMPARATIVE TABLE)**

CHANGES TO THE CONSTITUTION OF UKRAINE PROPOSED BY THE CONSTITUTIONAL ASSEMBLY*

(...)

Among other proposals on the improvement of constitutional foundations of the justice system the members of the Constitutional Assembly expressed proposals to include into the Main Law of Ukraine the following additional provisions:

- those based on the principles of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the provisions regarding the right of an individual for a fair and public review of his/her case within a reasonable time by an independent and unbiased court constituted through the law and the provision, establishing the right of a person found by the court of law guilty of committing a crime to seek at a higher court a review of the fact his/her found guilty or of his/her verdict. There also were the proposals to add to the basic principles of the justice system the principles of the rule of law and openness of the system to the general public, as well as the principles of independent allocation of the cases and their hearing within reasonable time;
- determination in the Constitution of Ukraine of the powers of the Supreme Court of Ukraine, in particular those that provide the uniform application within the forms established by law of the norms of material and procedural law by all the courts. Besides, it was proposed to vest into the Supreme Court of Ukraine the right to initiate new legislation;
- introduction of the institution of the elected justices of the peace. Requirements to a justice of the peace, his election and dismissal, his powers and their exercise were proposed to determine through a law;
- inclusion into the Main law of Ukraine of a provision on the establishment, elimination or reorganization of the courts exclusively through a law, the draft of which is presented by the President of Ukraine upon the motion of the High Council of Justice, agreed with the Prime Minister of Ukraine;
- provision that an agreement for a detention or arrest of a judge can be given by the High Council of Justice, of a Judge of the Constitutional Court – by the Verkhovna Rada of Ukraine;
- incorporation of the provision into the Main Law of Ukraine, establishing that the courts cannot make the rulings that are the exercise of the powers of the other bodies or officials, except for the cases established by law. The reasoning for the provision that might establish the procedures for out-of-court dispute settlement, including those through the bodies of voluntary arbitration, was also reviewed;
- the replacement of such a reason for the dismissal of a judge as the “breach of the oath of the judge” with the “commitment of an offence, incompatible with further discharge of the duties of a judge”. The proposal was also discussed to make a provision, establishing as a reason for the dismissal of a judge the lack of his/her consent to be transferred to another court specialized in the same body of law and being of the same level (and in the case of the lack of vacancies in such court – the lack of consent to the

* This is an extract from the letter dated 29 March 2013, written by Mr L. Kravchuk (Chairman of the Constitutional Assembly of Ukraine) to Mr G. Buquicchio (President of the Venice Commission), requesting an opinion from the Venice Commission on these proposed Changes and the draft Law on the amendments to the Constitution of Ukraine, strengthening the independence of judges.

transfer to any other court or to the judiciary reserve) in case of the elimination or reorganization of the court, where the judge works. It was also proposed to envisage a possibility of the termination of a judge's office, specifically, if a judge is indicted with a crime and for the time of his being in the reserve of the employees of the judiciary;

- to provide for a judge's promotion to a higher level court through a contest and according to a procedure set by law (except when the reasons for the judge's transfer are the elimination or reorganization of a court);

- transformation of powers and composition of the High Council of Justice. There were the proposals to vest into the High Council of Justice the functions of selection of candidates for the positions of judges; submission of motions on the transfer of the judges; disciplinary actions regarding the judges; taking of the decisions to terminate the judges' discharging of their offices; appointment of the judges to the administrative positions and their dismissal from such positions in the courts except for the Supreme Court of Ukraine upon the motion by the meeting of the judges of respective court. With regard to the composition of the High Council of Justice it was proposed that the qualifications of the members of this body (citizenship, university level legal education, previous employment as legal professional for not less than 15 years and their term of office (5 years)) be incorporated into the Constitution of Ukraine. Another proposal was to include in the Main Law of Ukraine a provision stating that the members of the High Council of Justice work there full time and that work is incompatible with any political activity, elected office, any other paid employment or work except the research, teaching and artistic.

- One of the proposals discussed at the meeting of the Constitutional Assembly regarded the number of the High Council of Justice. Specifically, it was proposed that the number of members of the High Council of Justice be set at 15 and that the Congress of the Judges of Ukraine appoint 9 members from among the active judges and those retired, the National Academy of Legal Sciences of Ukraine, the congress of the representatives of legal academia appoint 2 members of the High Council of Justice each, and the congress of the members of the Bar of Ukraine – 2 members of the High Council of Justice from amongst the defense lawyers.

These proposals were not voted for and included into the draft law that is sent for analysis to the European Commission 'For Democracy through the Law' (Venice Commission) as they require further study, including the analysis of these provisions by the Venice Commission.

In general, the position of the Constitutional Assembly is that the modernization of the constitutional foundations of the exercise of justice should be done in the context of changes to the Constitution of Ukraine *in toto*, which will make possible systemic and holistic approach to the constitutional regulation of the legal basis of the organization and functioning of both the judiciary branch, and of the other related authorities (for example, the status of the Office of the Prosecutor General and Constitutional Court of Ukraine). Some other issues, directly related to the justice system, like rights and freedoms of an individual and citizen will require further elaboration.

Therefore the draft Law of Ukraine "On the Amendments to the Constitution of Ukraine, Strengthening the Independence of the Judges", which includes the proposals on the improvement of the important constitutional foundations of the justice system, on which the Venice Commission more than once focused its attention, is concrete effort to remove the key institutional shortcomings of the constitutional regulation of the exercise of justice in Ukraine.

The draft law will certainly be elaborated further on by the Constitutional Assembly with the aim of making it correspondent to the international standards.

Given a large amount of issues that request the amendments to the Constitution of Ukraine and acknowledging pressing need for the resolution of these issues, we present you the draft law mentioned above and request that it be analyzed and a conclusion be given on this draft's correspondence to the European standards.

We also ask you to analyze the proposals of additional changes to the Constitution of Ukraine, developed by the Constitutional Assembly.

(...)

The draft

THE LAW OF UKRAINE
“ON THE AMENDMENTS TO THE CONSTITUTION OF UKRAINE ON THE
ENHANCEMENT OF THE GUARANTEES OF THE INDEPENDENCE OF JUDGES”

The Verkhovna Rada of Ukraine r e s o l v e s:

I. To enter into the Constitution of Ukraine (The Bulletin of the Verkhovna Rada, 1996, № 30, art. 141) the following changes:

1. To lay out paragraph 27 of part one, article 85 in the following version:

“27) the determination of the network, establishment, reorganization and abolishment of the courts of general jurisdiction upon the motion by the President of Ukraine”.

2. Article 106:

a) paragraph 23 of part one shall be laid out in the following version:

“23) upon and in accordance with the motion of the Supreme Council of Justice appoints the judges to their positions and dismisses them from these positions”;

b) to exclude digits “23” from part four.

3. Article 125:

a) part one shall be laid out in the following version:

“Article 125. The system of the courts of general jurisdiction in Ukraine is organized on the principles of territoriality, specialization and instances, their network is determined by law”;

b) after part four the new part of the following content is added to the article:

“The courts of general jurisdiction are established, reorganized and abolished through the law”.

In conjunction with this part five shall be deemed part six.

4. Article 126:

a) part three shall be laid out in the following version:

“Prior to the issuance of the sentence by the court the judge cannot be detained or arrested without consent of the High Council of Justice, given upon the motion of the qualification commission of the judges”;

b) the words “and the judges who are appointed to the position of a judge for the first time” are struck out;

c) to lay out part five in the following version:

“The judge is dismissed from his/her position by the body that appointed him/her in the case:

- 1) when the judge applies for retirement or dismissal from his/her post of his own will;
- 2) the judge reached the age of seventy;
- 3) the judge is incapable of discharging the duties of the office due to poor health;
- 4) the judge breaches the requirements of incompatibility;
- 5) the judge breaches the oath of office;
- 6) the court sentence against him enters into force;
- 7) his/her citizenship is discontinued or when he/she takes permanent residence abroad;
- 8) he/she is recognized missing for unknown reasons or proclaimed dead;
- 9) recognized legally incapacitated;
- 10) consent is not given by the judge for his/her transfer to the another court in case of elimination or reorganization of the court of general jurisdiction, in which he/she holds his/her position”;

d) after part five the new part of the following content is added to the article:

“The judge of the Constitutional Court of Ukraine is dismissed from his/her post by the body that appointed him/her also when the term of his/her office expires”.

In conjunction with aforementioned parts six and seven shall be considered parts seven and eight respectively.

5. Article 127:

a) in part three the words “twenty five years” substitute with the words “thirty years” and the words “three years” with the words “five years”;

b) lay out part four in the following version:

“Selection of candidates to the position of the judge is done through a Contest, procedure of which is established by law”.

6. Lay out part one of article 128 in the following version:

“Article 128. The judges are appointed to their positions without time limit for their term of office. The appointment is done by the President of Ukraine upon and according to the motion of the High Council of Justice. The transfer of a judge to another court is done by the President of Ukraine upon and in accordance with the motion of the qualification commission of the judges. The transfer of the judge can only be done with his/her consent”.

7. Add to part three of article 129 after paragraph 8 the new paragraph of the following content:

“9) automatic division of cases among the judges;”.

In conjunction with this paragraph 9 shall be considered paragraph 10.

8. Article 131:

a) add to part one paragraphs 4 and 5 of the following content:

“4) appointment of the judges to the administrative positions and their dismissal from the administrative positions in the courts of general jurisdiction except for the Supreme Court of Ukraine upon the motion of the respective councils of the judges;

5) exercise of the other powers determined by the Constitution and the laws of Ukraine”;

b) lay out parts two and three in the following version:

“The High Council of Justice is composed of twenty members. The congress of the judges of Ukraine appoints to the High Council of Justice twelve members from amongst the judges, providing at that the representation of the judges from the courts of different instances and specializations. The congress of the members of the Bar of Ukraine, the congress of the representatives of legal academia appoint 2 members of the High Council of Justice each. The requirements to an individual, who can be appointed a member of the High Council of Justice are established by law.

The Head of the Constitutional Court of Ukraine, the Head of the Supreme Court of Ukraine, the Chairman of the Council of the Judges of Ukraine, Prosecutor General of Ukraine shall be *ex officio* members of the High Council of Justice of Ukraine”.

II. Final and transitional provisions

1. This Law enters into force from _____, except for point “a” of paragraph 4 part I, which becomes effective after one month from the day, when the High Council of Justice of Ukraine is formed in accordance with the Constitution of Ukraine (with the amendments, made by this Law).

2. From the day this Law enters into force:

1) the judges of the courts of general jurisdiction, appointed to their positions for the first time and whose five year term of office has not expired by the day this Law enters into force, gain the status of the judges appointed with no time limit of their office;

2) the initially appointed judges of the courts of general jurisdiction, whose five year term of office has expired by the day this Law entered into force, but who had applied according to the procedure set by law for their recommendation for the election to the positions of the judges with unlimited term of office, but the decision on their election was not taken by the day this Law entered into force, gain the status of the judges appointed with no limit of their term of office;

3) persons, for whom before the day this Law entered into force the motions of the High Council of Justice for their initial appointment have been submitted, are considered to be corresponding to the requirements of part three article 127 of the Constitution of Ukraine (with the amendments, made by this Law) and shall be appointed by the President of Ukraine to the positions of the judges with no limits of their terms of office without presenting any additional materials.

3. The judges of the courts of general jurisdiction elected with unlimited duration of their term of office, the judges of the Constitutional Court of Ukraine continue to discharge the duties of their office until their dismissal from their posts or until their office is terminated on the grounds listed in parts five – seven of article 126 of the Constitution of Ukraine (with the changes introduced by this Law).

The judges of the courts of general jurisdiction, the judges of the Constitutional Court of Ukraine who by the day this Law entered into force have reached the age of sixty five, but the decision to dismiss them from their positions of the judges has not been taken by the day this Law entered into force, continue to discharge the duties of their office until dismissed from their positions or until their office is terminated on the grounds listed in parts five – seven of article 126 of the Constitution of Ukraine (with the changes introduced by this Law).

Dismissal of the judges of the courts of general jurisdiction elected for unlimited term and named in paragraphs one and two of this part is done by the President of Ukraine following the procedure set by law.

4. The requirements to the persons who can be recommended to the position of a judge, listed in part three of article 127 of the Constitution of Ukraine (with the amendments, introduced by this Law) do not include the persons, who had passed qualification examination before this Law entered into force. Such persons are appointed to the position of a judge by the President of Ukraine following the procedure established by law for an unlimited term.

5. The motions for the dismissal of the judges of the courts of general jurisdiction, which had not been considered by the Verkhovna Rada of Ukraine by the day this Law entered into force, shall be forwarded to the High Council of Justice within two weeks. The High Council of Justice submits its motion for the dismissal of the judges from their positions within two weeks from the day it received those motions.

6. The motions for the dismissal of the judges of the courts of general jurisdiction from their posts, submitted for the consideration of the President of Ukraine before this Law entered into force, are reviewed by the President of Ukraine; no other additional materials are submitted.

7. Materials concerning the transfer of the judges elected permanently, which had not been reviewed by the Verkhovna Rada of Ukraine by the day this Law came into effect, are forwarded to the High Commission of Ukraine for Qualification of Judges, which in two weeks term from the day of their reception submits a motion for the transfer of the judges to the President of Ukraine.

8. Materials to grant a consent to the detention or arrest of a judge of the court of general jurisdiction, of a judge of the Constitutional Court of Ukraine, which by the day point "a" part 4 chapter I of this Law had not been considered by the Verkhovna Rada of Ukraine are forwarded to the High Council of Justice within one week term.

9. The congress of the judges of Ukraine, the congress of the members of the Bar of Ukraine, the congress of the members of legal academia are convened within the three months term from the day this Law enters into force with the purpose of appointing the members of the High Council of Justice in accordance with article 131 of the Constitution of Ukraine (with amendments made by this Law).

The congress of the members of the Bar of Ukraine appoints two members from among the defense lawyers to the High Council of Justice, and the congress of the members of the legal academia appoints two members of the High Council of Justice from among the representatives of the universities and other academic institutions.

10. The High Council of Justice formed before this Law enters into force shall discharge its functions determined by paragraphs 1 – 4 of part one of article 131 of the Constitution of Ukraine (with the amendments made by this Law) and shall terminate its activity simultaneously with the formation of the High Council of Justice in compliance with the Constitution of Ukraine (with the amendments introduced by this Law).

The High Council of Justice is considered to be established in compliance with the Constitution of Ukraine (with the amendments introduced by this Law) after the oath of office is sworn by not less than one third of the total number of its members determined by the Constitution of Ukraine.

EXPLANATORY NOTE
to the draft Law of Ukraine “On the Amendments to the Constitution of
Ukraine on the Enhancement of the Guarantees of the Independence of Judges”

In order to introduce international standards of the independence of the judges, to take into account the conclusions and recommendations of the European Commission “For Democracy through Law” (Venice Commission), the draft law envisages the following amendments to the Constitution of Ukraine:

1) It is proposed that the setting, reorganization and elimination of the courts, as well as the determination of their network be enacted through the laws and not through the Decrees of the President of Ukraine.

Such changes will make it possible to incorporate the recommendations of the European Commission “For Democracy through Law” (Venice Commission), that pointed out in p. 16, 130 of its Conclusion CDL-AD (2010)026 of October 18, 2010 that the Constitution of Ukraine should provide for the establishment of the courts through the laws, adopted by the Verkhovna Rada of Ukraine as they rank higher in the order of legal norms than the Decrees of the President of Ukraine.

Besides, the introduction of such norms will facilitate the incorporation of the provisions of art. 6 of the Universal Convention on Human Rights, which states that a court corresponds to the requirements of the Convention, if it is “constituted by law”. As is stated in the decision of the European Commission on Human Rights in the case “Zand vs Austria”, the provision “the court constituted by law” means, among other, that “the organization of the judiciary in a democratic society should not depend on the discretion of the executive branch but should be regulated by law adopted in the parliament”.

According to the amendments, proposed by the draft law, the determination of the network of the courts of general jurisdiction, along with their establishment, reorganization and abolishment will be executed by the Verkhovna Rada of Ukraine upon the motion by the President of Ukraine through the adoption of a law (amendments to art. 85, 126 of the Constitution of Ukraine).

2) it is proposed that the Verkhovna Rada be relieved of its right to participate in the election of the judges to their positions and their dismissal.

According to the provisions of the draft law, the Verkhovna Rada of Ukraine is totally relieved of its right to elect the judges of the courts of general jurisdiction to their positions and dismiss them (amendments to p. 27, part one of article 85, part five of article 126, part one of article 128 of the Constitution of Ukraine).

The amendments mentioned above will make it possible to incorporate the position of the European Commission “For Democracy through Law” (Venice Commission), laid out in p. 29 of its Conclusion CDL-AD (2007)003 that “the parliament is undoubtedly more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge. Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate can not be excluded. Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, it would be necessary to change article 128 of the Constitution”.

Similar points about the need to remove the parliament from the procedure of the election of the judges were also laid out in the conclusions of the Venice Commission CDL-AD (2010)003 of

March 16, 2010, CDL-AD (2010)026 of October 18, 2010, CDL-AD (2011)033 of October 18, 2011.

In its Report on the appointment of the judges CDL-AD (2007)028 of June 22, 2007 the Venice Commission also pointed out that “the participation of the parliament in the process of appointment of the judges can politicize the appointment of the judges. In the context of European standards selection and career of the judges “should be based on their merits, take into consideration their qualification, abilities and results of their work”. Election of the judges in the parliament is discretionary in its nature. Even if the candidacies of the judges are proposed by the Council of Justice, it should not be excluded that the elected legislative body may not resist turning the candidacy down. Thus political considerations may prevail over objective criteria. Appointments to the positions of ordinary judges is not an appropriate subject for the vote in parliament because it is impossible to exclude the risk that political reasons prevail over objective merits of a candidate”.

According to the changes proposed in the draft law the appointment of a judge will be done by the President of Ukraine upon and in accordance with a motion of the Superior Council of Justice (amendments to paragraph 23 of part one of article 128 of the Constitution of Ukraine).

3) it is proposed to abolish the five year term of office for the judges appointed for the first time.

Proposal to abolish the five year term in case of initial appointment is based on the recommendations on the Venice Commission, laid out in p. 39 of the Joint Opinion CDL-AD (2010)003 of March 16, 2010, which states that “initial appointment as a judge is for five-year term, apparently intended as a kind of probationary period. “Setting probationary periods can undermine the independence of judges” (CDL-AD (2007)003, paragraph 26). This rule is based on article 126 of the Constitution, which should be amended. If probationary periods are considered indispensable, they should not exceed two years. A period of five years can not be regarded acceptable. Such a period would mean that an important number of judges would at any given period of time be under uncertainty about their future. Their situation is worsened by the fact that in order to be finally elected to a permanent position they have to face what may be – or at least to an outsider may seem to be – a politicized procedure in parliament. The system leaves the probationary judges for too long a period in a situation in which they do not have sufficient guarantees against outside pressures – or in which at least an appearance of potential pressures may be created”.

Paragraph 78 of the Joint Opinion CDL-AD (2011)033 determines the existence of the probationary judges as one of the fundamental problems that there are in Ukraine’s system of appointment and dismissal of the judges.

Taking into consideration all the above mentioned the draft of the changes to the Constitution of Ukraine suggests that the five year term of office for the judges be canceled entirely (amendments to part one of article 128 of the Constitution of Ukraine).

It is envisaged that instead the appointment of the judges will be done by the President of Ukraine for an unlimited term. The Head of State will therefore appoint a person to the position of a judge only upon and in accordance with the motion of the Supreme Council of Justice. That means that the role of the President of Ukraine will in fact be ceremonial and depend upon the contents of the expression of the will of the Supreme Council of Justice (amendments to paragraph 23, part one of article 106, part one of article 128 of the Constitution of Ukraine). Similar provisions are proposed with regard to the right of the President of Ukraine to transfer the judges, whereas a decision of the President of Ukraine will depend on the contents of the motion of the qualification commission of the judges and the judge’s consent to the transfer.

In its time the Venice Commission stated in p. 14 of the Report on the appointment of the judges CDL-AD (2007)028 of June 22, 2007 that if the President were to act only within the boundaries of the motion of an independent council of the judges, the appointment of the judges by the President does not seem to be a procedure that can cause problems.

4) proposals on the composition and formation of the Supreme Council of Justice, its powers.

Provisions of the European standards of independence of judges and opinions of the Venice Commission have been taken into account in the development of respective proposals on the Constitution of Ukraine.

In particular, according to the Recommendation of the Committee of Ministers of the Council of Europe № 94 (12) "On the Independence, Efficiency and Role of Judges" the body that has the authority to make decisions on the election and career of the judges should be independent of the government and administrative agencies. To guarantee the independence of this body such provisions should be adopted as, for example, the oversight of the election of its members by the judiciary branch.

Paragraph 46 of the Recommendations CM/Rec (2010)12 of the Committee of the Council of Europe to the member states on the independence, efficiency and duties of the judges states directly that the authority, which takes decisions on the election and promotion of the judges should be independent of the executive and legislative branches. Not less than half of the members of such authority should be the judges, elected by the judges.

The European Charter on the law "On the Status of Judges" (paragraph 1.3) also determines that an intervention by a body independent of the executive and legislative branches should be envisaged in any decision regarding the selection and appointment of a judge, his or her promotion or dismissal. At least half of the members of that body should be the judges, elected by their colleagues. The most ample representation of the members of the judiciary should be guaranteed in such body.

Paragraph 49 of the Opinion of the Venice Commission CDL (2010)098 of October 7, 2010 on the Law of Ukraine of October 7, 2010 on the Law of Ukraine "On the Amendments to Some Laws of Ukraine Regarding the Inadmissibility of the Abuse of the Right to Appeal" states that "the composition of the Supreme Council of Justice as determined by the Constitution of Ukraine remains problematic. Even after the amendments were made according to which some subjects in the formation of the Supreme Council of Justice were to be appointed under their quota of the judges, the composition of the Supreme Council of Justice does not correspond to the European standards as only 3 of the 20 members of the Supreme Council of Justice are the judges, elected by the judges".

Notices on the non-correspondence of the composition of the Supreme Council of Justice and of the procedure of its formation are also included into the Opinions CDL-AD (2010)003 of March 16, 2010, CDL-AD (2010)026 of October 18, 2010, CDL-AD (2011)033 of October 18, 2011, in which the Venice Commission recommended to make amendments to the Constitution of Ukraine.

Taking into account the aforementioned proposals the draft law provides for the change of the composition of the Supreme Council of Justice in as far as it determines that 11 out of 20 members of this body shall be the judges, elected by the judges, convened at a congress of the judges of Ukraine. Representation of the judges from the courts of different instances and specializations should be guaranteed at the appointment of the Council's members.

Moreover, in order to make this organization broadly representative the draft law proposes that the Head of the Constitutional Court of Ukraine, the Head of the Supreme Court of Ukraine,

the head of the top representative body of self-government of the judiciary of Ukraine – the Council of the Judges of Ukraine, along with the Verkhovna Rada's Commissioner for Human Rights be made ex officio members of the Supreme Council of Justice of Ukraine.

The All-Ukraine Conference of the Members of the Office of the Prosecutor General in accordance with the proposed changes to article 131 of the Constitution of Ukraine loses the status of the subject authorized to appoint its representatives to the Supreme Council of Justice. Only the Prosecutor General of Ukraine shall be a permanent member of the Supreme Council of Justice. The reason for his keeping the status of a member of the Supreme Council of Justice is that the Supreme Council of Justice continues to exercise its decision-making authority with regard to the breaches of the incompatibility requirements by the prosecutors, as well as the power to consider the appeals against the decisions on disciplinary sanctions against prosecutors. In view of these aspects it seems necessary to provide for at least minimal representation of the members of the Prosecutor General's Office.

5) modification of the existing order of removal of the immunity of the judges.

In paragraph 12 of its Opinion CDL-AD (2007)003 the Venice Commission reached a conclusion that provisions establishing “the immunity of the judges, including the immunity against the arrest except when consent is given by the Verkhovna Rada” were dubious. “It is wrong for the parliament to play any role in lifting the judge's immunity. ... At the same time, changing this will require amending the Constitution”.

Comma 5 paragraph 130 of the Opinion CDL-AD (2010)026 states that the changes to the Constitution of Ukraine should be made in as far as the Constitution should provide for the lifting of the immunity of the judges not by the Verkhovna Rada, but by a really independent body of the judiciary.

Comma 79 of the Opinion CDL-AD (2011)033 of October 18, 2011 among the three provisions of the Constitution of Ukraine that needed to be changed pointed to the need for the immunity of the judges to be lifted not by the Verkhovna Rada, but by a really independent body of the judiciary.

Thus in case changes are made to the Constitution of Ukraine in the part, concerning the composition and the order of the formation of the Supreme Council of Justice, the power to give consent to the detention or arrest of a judge could be vested in this very body. Given the need to strengthen the guarantees of the independence of the judges we deem it appropriate that at the present stage of the development of the judiciary system of Ukraine complete and not functional independence of the judges be preserved, which has more than once been pointed out by the Venice Commission;

6) the draft law also proposes to alter the requirements put to the individuals, who can seek the position of a judge, to increase the age limit for the judges and to stipulate that selection of the candidates for the position of a judge be done through a contest (amendments to paragraph 2 of part five, article 126, parts three and four of article 127). Such changes are needed to improve constitutional norms and establish stricter demands to the persons, aspiring to the position of a judge.

Apart from that, provision on the automatic apportioning of the cases among the judges is proposed to be added to the Constitution (amendment to paragraph 9 part three of article 129 of the Constitution of Ukraine).

Closing and transitional provisions of the draft law contain the provisions supposed to resolve organizational and other issues that would appear after the draft law is enacted. Their goal is, first and foremost, to prevent any deterioration of the status of the judges and individuals

who won the right to fill the position of a judge after some provisions of the Constitution of Ukraine are amended.

COMPARATIVE TABLE
to the draft Law of Ukraine
“On the Amendments to the Constitution of Ukraine on the Enhancement of the
Guarantees of the Independence of Judges”

Existing version	Proposed amendments
<p>Article 85. The powers of the Verkhovna Rada include:</p> <p>...</p> <p>27) election of the judges for the unlimited term;</p> <p>...</p>	<p>Article 85. The powers of the Verkhovna Rada include:</p> <p>...</p> <p>27) determination of the network, establishment, reorganization and abolishment of the courts upon the motion of the President of Ukraine;</p> <p>...</p>
<p>Article 106. The President of Ukraine:</p> <p>...</p> <p>23) establishes the courts in accordance with the procedure set by law;</p> <p>...</p> <p>The Acts of the President of Ukraine, emanated within the powers, determined by paragraphs 3, 4, 5, 8, 10, 14, 15, 17, 18, 21, 22, 23, 24 of this article are countersigned by the Prime Minister of Ukraine and the minister in charge of their execution.</p>	<p>Article 106. The President of Ukraine:</p> <p>...</p> <p>23) upon and in accordance with the motion of the High Council of Justice appoints the judges to their positions and dismisses them from their positions;</p> <p>...</p> <p>The Acts of the President of Ukraine, emanated within the powers, determined by paragraphs 3, 4, 5, 8, 10, 14, 15, 17, 18, 21, 22, 24 of this article are countersigned by the Prime Minister of Ukraine and the minister in charge of their execution.</p>
<p>Article 125. The system of the courts of general jurisdiction in Ukraine is established according to the principles of territoriality and specialization.</p> <p>The highest body of the judiciary in the system of courts of general jurisdiction is the Supreme Court of Ukraine.</p> <p>The highest bodies of the specialized courts are respective highest courts.</p> <p>According to the law function the appellate courts and the local courts.</p> <p>Establishment of extraordinary and special courts is not allowed.</p>	<p>Article 125. The system of the courts of general jurisdiction in Ukraine is established according to the principles of territoriality, specialization and instances, their network is determined by law.</p> <p>The highest body of the judiciary in the system of courts of general jurisdiction is the Supreme Court of Ukraine.</p> <p>The highest bodies of the specialized courts are respective highest courts.</p> <p>According to the law function the appellate courts and the local courts.</p> <p>The courts of general jurisdiction are established, reorganized and abolished through the law.</p> <p>Establishment of extraordinary and special courts is not allowed.</p>
<p>Article 126. Independence and immunity of the courts are guaranteed by the Constitution and laws of Ukraine.</p> <p>It is prohibited to influence the judges in any way.</p> <p>The judge cannot without consent of the</p>	<p>Article 126. Independence and immunity of the courts are guaranteed by the Constitution and laws of Ukraine.</p> <p>It is prohibited to influence the judges in any way.</p> <p>The judge cannot without consent of the</p>

<p>Verkhovna Rada be detained or arrested before the verdict of the court establishing his culpability is issued.</p> <p>The judges hold their posts for unlimited time except for the judges of the Constitutional Court of Ukraine and the judges appointed for the first time.</p> <p>The judge is dismissed from his/her post by the body that elected or appointed him/her in case:</p> <ol style="list-style-type: none"> 1) of the expiration of the term of office, for which he/she was elected or appointed; 2) the judge reached the age of sixty five; 3) the judge is incapable of discharging the duties of the office due to poor health; 4) the judge breached the requirements of incompatibility; 5) the judge breached the oath of office; 6) the court sentence against him entered into force; 7) his/her citizenship is discontinued; 8) he/she is recognized missing for unknown reasons or proclaimed dead; 9) when the judge applied for dismissal at his/her own will. <p>The office of the judge is discontinued in case of his/her death.</p> <p>The state provides for personal security of the judges and their families.</p>	<p>High Council of Justice, given upon the motion of the judges' qualification commission, be detained or arrested before the verdict of the court establishing his culpability is issued.</p> <p>The judges hold their posts for unlimited time except for the judges of the Constitutional Court of Ukraine.</p> <p>The judge is dismissed from his/her post by the body that appointed him/her in case:</p> <ol style="list-style-type: none"> 1) when the judge applied for dismissal at his/her own will; 2) the judge reached the age of seventy; 3) the judge is incapable of discharging the duties of the office due to poor health; 4) the judge breached the requirements of incompatibility; 5) the judge breached the oath of office; 6) the court sentence against him entered into force; 7) his/her citizenship is discontinued or when he/she moves abroad for permanent residence; 8) he/she is recognized missing for unknown reasons or proclaimed dead; 9) recognized legally incapacitated; 10) consent is not given by the judge for his/her transfer to the another court in case of elimination or reorganization of the court of general jurisdiction, in which he/she holds his/her position. <p>The judge of the Constitutional Court of Ukraine is dismissed from his/her post by the body that appointed him/her and in case of the expiration of the term of office, for which he/she was appointed.</p> <p>The office of the judge is discontinued in case of his/her death.</p> <p>The state provides for personal security of the judges and their families.</p>
<p>Article 127. Justice is exercised by professional judges and in cases determined by law, lay judges and members of the jury.</p> <p>Professional judges can not be members of any political parties and trade unions, take part in any political activity, have representational mandate, hold any other paid posts, do other paid job except research, teaching and artistic.</p> <p>The judges' qualification commission can be recommend to the position of a judge a citizen of Ukraine not younger than twenty five, possessing a degree in law and experience of work in the justice system of not less than</p>	<p>Article 127. Justice is exercised by professional judges and in cases determined by law, lay judges and members of the jury.</p> <p>Professional judges can not be members of any political parties and trade unions, take part in any political activity, have representational mandate, hold any other paid posts, do other paid job except research, teaching and artistic.</p> <p>The judges' qualification commission can be recommend to the position of a judge a citizen of Ukraine not younger than thirty, possessing a degree in law and experience of work in the justice system of not less than five years,</p>

<p>three years, resident in Ukraine for not less than ten years and having command of state language.</p> <p>The persons that have professional training in the jurisdiction of the specialized courts can be the judges of specialized courts. These judges administer justice only as the members of a panel of judges.</p> <p>Additional requirements to certain categories of the judges with regard to the length of service, age and professional level are established by law.</p> <p>Protection of professional interests of the judges is done in accordance with the law.</p>	<p>resident in Ukraine for not less than ten years and having command of the language.</p> <p>Selection of the candidates for the positions of the judges is done through contest according to the procedure set by law.</p> <p>Additional requirements to certain categories of the judges with regard to the length of service, age and professional level are established by law.</p> <p>Protection of professional interests of the judges is done in accordance with the law.</p>
<p>Article 128. Initial appointment to the position of professional judge for the term of five years is done by the President of Ukraine. All the other judges except for the judges of the Constitutional Court of Ukraine are elected by the Verkhovna Rada of Ukraine for unlimited term through the procedure established by law.</p> <p>The President of the Supreme Court of Ukraine is elected to his position and dismissed from it through a secret ballot of the Plenum of the Supreme Court of Ukraine through a procedure set by law.</p>	<p>Article 128. Appointment to the position of a judge is done for unlimited term by the President of Ukraine upon and in accordance with a motion of the High Council of Justice. The transfer of the judge to another court is done by the President of Ukraine upon and in accordance with a motion of the commission for qualification of the judges. The transfer of the judge to another court is possible only upon his/her consent.</p> <p>The President of the Supreme Court of Ukraine is elected to his position and dismissed from it through a secret ballot of the Plenum of the Supreme Court of Ukraine through a procedure set by law.</p>
<p>Article 129. Administering justice, judges shall be independent and abide only by law.</p> <p>Judicial proceedings shall be conducted by a single judge, by a panel of judges, or by a court of the jury.</p> <p>The main principles of judicial proceedings shall be:</p> <ol style="list-style-type: none"> 1) legality; 2) equality of all participants of a trial under the law and before the court; 3) ensuring that the guilt is proved; 4) adversarial procedure and freedom of the parties in presenting their evidence to the court and in proving the cogency of the evidence before the court; 5) prosecution by the prosecutor in court on behalf of the State; 6) ensuring the right of an accused person to a defence; 7) openness of trial and its complete recording by technical means; 8) ensuring appeal and cassation against a court decision, save as in cases established by law; 	<p>Article 129. Administering justice, judges shall be independent and abide only by law.</p> <p>Judicial proceedings shall be conducted by a single judge, by a panel of judges, or by a court of the jury.</p> <p>The main principles of judicial proceedings shall be:</p> <ol style="list-style-type: none"> 1) legality; 2) equality of all participants of a trial under the law and before the court; 3) ensuring that the guilt is proved; 4) adversarial procedure and freedom of the parties in presenting their evidence to the court and in proving the cogency of the evidence before the court; 5) prosecution by the prosecutor in court on behalf of the State; 6) ensuring the right of an accused person to a defence; 7) openness of trial and its complete recording by technical means; 8) ensuring appeal and cassation against a court decision, save as in cases established by law; 9) automatic division of cases among

<p>9) the mandatory nature of court decisions.</p> <p>The law may also determine other principles of judicial proceedings in courts of specific judicial jurisdiction.</p> <p>Persons guilty of contempt of court or of showing disrespect towards the judge shall be held legally responsible.</p>	<p>the judges;</p> <p>10) the mandatory nature of court decisions.</p> <p>The law may also determine other principles of judicial proceedings in courts of specific judicial jurisdiction.</p> <p>Persons guilty of contempt of court or of showing disrespect towards the judge shall be held legally responsible.</p>
<p>Article 131. The High Council of Justice shall operate in Ukraine with the following issues being under its authority:</p> <ol style="list-style-type: none"> 1) submit a proposals for the appointment of judges to office or for their dismissal from office; 2) adopt decisions on the violation by judges and prosecutors of the incompatibility requirements; 3) execute disciplinary proceedings regarding judges of the Supreme Court of Ukraine and judges of high specialised courts, and the consideration of complaints regarding decisions on bringing judges of courts of appeal and local courts, and prosecutors to disciplinary liability. <p>The High Council of Justice shall comprise twenty members. Each of the 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 Research Institutions shall appoint three members to the High Council of Justice, and the All-Ukrainian Conference of Employees of the Public Prosecution - two members to the High Council of Justice.</p> <p>The Chairman of the Supreme Court of Ukraine, the Minister of Justice of Ukraine and the Prosecutor General of Ukraine shall be <i>ex officio</i> members of the High Council of Justice.</p>	<p>Article 131. The High Council of Justice shall operate in Ukraine with the following issues being under its authority:</p> <ol style="list-style-type: none"> 1) submit a proposals for the appointment of judges to office or for their dismissal from office; 2) adopt decisions on the violation by judges and prosecutors of the incompatibility requirements; 3) execute disciplinary proceedings regarding judges of the Supreme Court of Ukraine and judges of high specialised courts, and the consideration of complaints regarding decisions on bringing judges of courts of appeal and local courts, and prosecutors to disciplinary liability. 4) appointment of the judges to the administrative positions and the dismissal of the judges form the administrative positions in the courts of general jurisdiction except for the Supreme Court of Ukraine upon the motions of the respective councils of the judges; 5) exercise the other powers determined by the Constitution and laws of Ukraine. <p>The High Council of Justice shall comprise twenty members. The congress of the judges of Ukraine shall appoint twelve members to the High Council of Justice who are judges, providing for representation of the judges of the courts of different instances and specializations. The Congress of the Members of the Bar of Ukraine, the Congress of Representatives of Higher Legal Educational Establishments and Research Institutions each appoint two members of the High Council of Justice. Requirements to a person, who can be appointed a member of the High Council of Justice are set by law.</p> <p>The Chairman of the Constitutional Court of Ukraine, the Chairman of the Supreme Court of Ukraine, the Chairman</p>

	<p>of the Council of the Judges of Ukraine and the Prosecutor General of Ukraine shall be <i>ex officio</i> members of the High Council of Justice.</p>
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