



Strasbourg, 14 November 2013

**CDL-REF(2013)050**

**Opinion no. 747 / 2013**

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**PROPOSALS**

**FOR CHANGES TO THE DRAFT LAW**

**"On Amendments to the Constitution, Strengthening the  
Independence of Judges"**

**OF UKRAINE**

*Unofficial translation from Ukrainian*

Submitted by 156  
People's Deputies of Ukraine

## PROPOSALS

to the Draft law of Ukraine

"On Amendments to the Constitution, Strengthening the Independence of Judges"  
(registration number 2522a)

1. Paragraph 2, Point 1, Section I of the Draft Law shall be amended as follows:

"Everyone shall be guaranteed the right to a just and public consideration of his/her case within the reasonable time by competent, independent and impartial court".

2. In Paragraph 2, Point 2, Section I of the Draft Law the words "submitted by the President of Ukraine" shall be replaced by "according to the Law;"

3. Sub-point "a", Point 3, Section I of the Draft Law shall be amended as follows:

"a) Point 23 of the Part 1 shall be deleted"

4. Point 4, Section I shall be amended as follows:

"4. Part 2, Article 122 shall be amended as follows:"

"The term of powers of the Prosecutor General of Ukraine is 6 years without the right to be reappointed for another term"

5. Paragraph 2, Sub-point "a", Point 5, Section I of the Draft Law shall be amended as follows:

"Article 125. The system of general jurisdiction courts shall be formed on the principles of territoriality, specialization and instance", their network shall be determined pursuant to the Resolution of the Verkhovna Rada of Ukraine. General jurisdiction courts shall be established, reorganized and abolished pursuant to the Resolution of the Verkhovna Rada of Ukraine".

6. Sub-point "б", Point 5, Section I of the Draft Law shall be amended as follows:

"б) Part 2 shall be amended as follows:

"The highest judicial institution in the system of general jurisdiction courts is the Supreme Court of Ukraine, whose powers include:

- 1) review of cases on the grounds of the unequal (different) application by high specialized courts, which considered the cases as cassation courts, of the rules of substantive and procedure law as prescribed by the procedural legislation";

- 2) review of cases on the grounds of the inconsistency between a judicial decision of high specialized courts, which considered the cases as cassation courts, and the decision (opinion) of the Constitutional Court of Ukraine or legal proposition or explanatory statement, set out in the Resolution of the Plenum of the Supreme Court of Ukraine;

3) review of the case provided the international judicial institution, whose jurisdiction is recognized by Ukraine, establishes the violation by Ukraine of its international obligations when adjudicating the case in court;

4) after general examination of the legal practice, rendering to the general jurisdiction courts legal propositions and binding explanatory statements as Resolutions of the Plenum of the Supreme Court of Ukraine;

5) preparation of conclusion whether the acts, the President is indicted with, contain or less, the traits of treason or other crime; submission at the request of the Verkhovna Rada of the written motion on the inability of the President of Ukraine to exercise his/her authority for health reasons;

6) consideration as a court of the first instance of separate categories of cases when it is prescribed by the procedural law;

7) address to the Constitutional Court of Ukraine regarding the constitutionality of laws, other legal enactments as well as the official interpretation of the Constitution and laws of Ukraine;

8) exercise of other authority, determined by law."

7. Paragraph 2, Sub-point "B", Point 5, Section I of the Draft Law shall be amended as follows:

"Ukraine may recognize the jurisdiction of the International Criminal Court under terms stipulated in Rome Statute of the International Criminal Court of 17 July 1998, and may, accordingly, give consent to the binding authority of this International treaty in accordance with the procedure prescribed by the Constitution and laws of Ukraine".

8. Paragraph 2, Sub-point "a", Point 6, Section I of the Draft Law shall be amended as follows:

"A judge shall not be detained or arrested without the consent of the High Council of Justice until a verdict of guilty comes into effect for crimes committed when administering justice except for acceptance of a proposal, promise or obtaining of improper advantage by a public individual or advantage as a result of power (influence) abuse as well as in case of detention upon committing or immediately after having committed a grave or especially grave offence against the life and health of a person"

The decision of the High Council of Justice with the consent to detain or take into custody a judge must be well-founded and reasonable, contain specific facts and evidence, which confirm that the person mentioned in the motion committed a socially dangerous act, defined by law. The decision permitting a detention or taking into custody must clearly substantiate the need of the detention or custody. The grounds and the procedure for giving or refusing consent by the High Council of Justice shall be established by law".

9. Paragraph 11, Sub-point "B", Point 6, Section I of the Draft Law shall be replaced with Paragraphs 11-13 as follows:

"9) absence of the consent from a judge to be transferred to a different court in case of the abolition or reorganization of the general jurisdiction court, in which he/she holds a position in compliance with Point 27, Part 1, Article 85 of the Constitution of Ukraine;

10) decision on the impeachment of a judge;

11) failure of a judge to pass re-qualification in accordance with the procedure established by law."

10. In Sub-point "r", Point 6, Section I of the Draft Law the words "his attaining the age of seventy five" shall be replaced with "his attaining the age of sixty five and in relation to the judge of the Supreme Court of Ukraine and judges of the high specialized courts – the age of seventy five".

11. Paragraph 2, Sub-point "д", Point 6, Section I of the Draft Law shall be amended as follows:

"The impeachment procedure of a judge of the local and appellate court shall be initiated by no less than twenty percent of the citizens of Ukraine who have the right to vote in accordance with the electoral legislation and are members of the territorial community, which is covered by the jurisdiction of the relevant court, or by no less than one third of the People's Deputies of Ukraine of the constitutional composition of the Verkhovna Rada of Ukraine in accordance with the procedure prescribed by law. A decision on the impeachment of a judge shall be considered taken if it is voted for by no less than half of the constitutional composition of the Verkhovna Rada of Ukraine in accordance with the procedure prescribed by law. The impeachment procedure of a judge of the Supreme Court of Ukraine or high specialized court shall be initiated by no less than one third of the People's Deputies of Ukraine of the constitutional composition of the Verkhovna Rada of Ukraine and the relevant decision shall be considered taken if it is voted for by no less than two thirds of the constitutional composition of the Verkhovna Rada of Ukraine in accordance with the procedure prescribed by law. A decision on the impeachment of a judge is mandatory for his dismissal from office by the High Council of Justice."

12. Sub-point "а", Point 7, Section I of the Draft Law the words "by the High Qualification Commission" shall be replaced with "by the High Council of Justice".

13. Paragraph 2, Sub-point "б", Point 7, Section I of the Draft Law shall be amended as follows:

"Candidates to a position of a judge shall be selected on a competitive basis in accordance with the procedure prescribed by law. Candidates to a position of a judge shall in no way be discriminated on the basis of race, color, political, religious and other views, sex, ethnic and social background, material status, place of residence, language or other features".

14. Paragraphs 2 and, Point 8, Section I of the Draft Law shall be amended as follows:

"Article 128. The appointment to the position of a judge of the court of general jurisdiction for unlimited term of office, the dismissal of a judge from his position or the transfer of a judge to another court of general jurisdiction shall be done by the High Council of Justice. A judge can only be transferred to another court upon his consent, including the case, when the court of general jurisdiction in which he holds office is disbanded or reorganized. The transfer of a judge to a court of higher instance is done only through contest in accordance with to the procedure established by law.

The appointment of judges to the administrative positions and the dismissal of judges from the administrative positions in the courts of general jurisdiction, except for the Supreme Court of Ukraine, is done by the bodies of judicial self-government under the procedure established by law."

15. Point 10, Section I of the Draft Law shall be amended as follows:

"10. Article 131 shall be amended as follows:

"Article 131. The High Council of Justice in Ukraine is an independent body that ensures the organization and functioning of the courts, the protection of independence of the judges.

The functions of the High Council of Justice shall include:

- 1) selection of candidates to the position of a judge;
- 2) appointment of judges to their positions, their dismissal from the positions, their transfer to other courts;
- 3) delivering decision, in accordance with the procedure established by law, in the matter of violation by judges and prosecutors of the incompatibility requirements;
- 4) disciplinary actions vis-à-vis judges and prosecutors.

The High Council of Justice is composed of fifteen members. The Congress of the Judges of Ukraine appoints to the High Council of Justice ten members from among the judges ensuring proportionate representation of the judges of different instances and specializations. The Congress of the Bar of Ukraine, the Congress of the representatives of the institutions of higher legal education and academic institutions appoint two members of the High Council of Justice each.

A citizen of Ukraine having academic degree in Law, not less than ten years of work experience in the legal profession and having command of the state language may be a member of the High Council of Justice as appointed by the Congress of the Bar of Ukraine and the Congress of the representatives of the institutions of higher legal education and academic institutions. A citizen of Ukraine having academic degree in Law, not less than ten years of professional experience as a judge and having command of the state language may be a member of the High Council of Justice as appointed by the Congress of the Judges of Ukraine.

The Chairman of the Supreme Court of Ukraine shall be *ex officio* member of the High Council of Justice.

A member of the High Council of Justice shall be appointed for the term of 6 years and cannot be reappointed for another term.

The Chairperson of the High Council of Justice shall be elected by a majority vote of the total number of the members of the High Council of Justice for the term of one year. The same person cannot be elected as the Chairperson of the High Council of Justice for two consecutive terms.”.

16. Point 1, Section II of the Draft Law the word “ninety” shall be replaced with “thirty”, the words shall be deleted “but not earlier than a law comes into force, which determines the grounds and procedure for granting or rejecting by the High Council of Justice of the consent to detain or arrest a judge.”.

17. Paragraph 2, Point 2, Section II of the Draft Law shall be amended as follows:

“1) judges of the general jurisdiction courts, appointed to the position of a judge for the first time before the Constitution of Ukraine is amended by this Law, continue to discharge the duties of their office until the end of the term for which they were appointed. Further appointment of these judges for the unlimited term of office is done according to the requirements of Paragraph 3, Article 127 of the Constitution (as amended by this Law) without the application of the requirement of Paragraph 4, Article 127 of this Constitution, regarding the selection for the position of a judge on a competitive basis. The High Council of Justice within one year after its establishment in compliance with this law conducts qualification tests for the judges of all the courts of general jurisdiction in accordance with the procedure prescribed by law.”.

18. Paragraph 3, Point 2, Section II of the Draft Law the words “acquire the status of the judges appointed for the unlimited term of office” shall be replaced with “shall be appointed to the position of a judge with unlimited term of office according to the requirements of Paragraph 3, Article 127 of the Constitution of Ukraine (as amended by this Law) without the requirement to select judges on a competitive basis prescribed by Paragraph 4, Article 127 of this Constitution.”.

19. Paragraph 4, Point 2, Section II of the Draft Law shall be amended as follows:

“3) the documents of the persons, whose candidacies for the appointment for the first time to the position of a judge were submitted by the High Council of Justice for the consideration by the President of Ukraine, shall be forwarded to the High Council of Justice within 15 days after this Law becomes effective for a decision on their appointment to the position of a judge with unlimited term of office to be made in compliance with the requirements of Paragraph 3, Article 127 of the Constitution of Ukraine (as amended by this Law) without the requirement to select judges on a competitive basis, prescribed by Paragraph 4, Article 127 of this Constitution.”.

20. Paragraph 2, Point 3, Section II of the Draft Law shall be deleted.
21. Paragraph 3, Point 3, Section II of the Draft Law the words “by the President of Ukraine” shall be replaced with “by the High Council of Justice”.
22. Point 4, Section II of the Draft Law the words “by the President of Ukraine for a breach of the oath of a judge upon the motion by the High Council of Justice presented in case the High Qualification Commission of the Judges of Ukraine or the High Council of Justice shall establish the facts proving that the judge breached the oath” shall be replaced with “for a breach of the oath of a judge upon the decision of the High Council of Justice in case the High Council of Justice shall establish the facts proving that a judge breached the oath.”.
23. Point 6, Section II of the Draft Law the words “submits a motion” shall be replaced with “takes a decision”.
24. Point 7, Section II of the Draft Law the words “shall be considered without submission of any additional materials” shall be replaced with “within the period of two weeks from the day this law becomes effective shall be forwarded to the High Council of Justice, which within the period of two weeks from the day of their reception takes a decision on the dismissal of judges from their positions without submission of any additional materials”.
25. Point 8, Section II of the Draft Law the words "of the High Qualification Commission of the Judges of Ukraine, which within the period of two weeks from the day of their reception shall submit a motion on the transfer of judges" shall be replaced with "of the High Qualification Commission of the Judges of Ukraine, which within the period of two weeks from the day of their reception shall take a decision on the transfer of judges".
26. Point 9, Section II of the Draft Law shall be amended as follows:
- “9. The Verkhovna Rada of Ukraine shall continue to fulfill the functions established by Paragraph 3, Article 126 of the Constitution of Ukraine (in its version of June 28, 1996) until the High Council of Justice is formed in compliance with the requirements of Paragraph 3, Article 131 of the Constitution (as amended by this Law). The documents for granting consent to detain or arrest a judge of the general jurisdiction court, which have not been considered by the Verkhovna Rada of Ukraine, before the High Council of Justice is formed in compliance with the requirements of Paragraph 3, Article 131 of the Constitution, shall be forwarded to the High Council of Justice within one week from its formation.”.
27. Point 10, Section II of the Draft Law the words “three month” shall be replaced with “one month”.
28. Paragraph 3 shall be deleted from Point 11, Section II of the Draft Law.

/signed/

V.Klychko

/signed/

A. Yatseniuk

/signed/

O.Tiagnybok