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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON PROPOSALS AMENDING THE DRAFT LAW ON THE AMENDMENTS TO THE CONSTITUTION TO STRENGTHEN THE INDEPENDENCE OF JUDGES OF UKRAINE

Adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013)

on the basis of comments by

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I. Introduction

1. By letter of 5 November 2013, the Head of the Administration of the President of Ukraine, Mr Lyovochkin, requested the Venice Commission to prepare an opinion on Proposals, submitted by 156 members of the *Verkhovna Rada*, amending the draft Law "On Amendments to the Constitution, strengthening the Independence of the Judges" (CDL-REF(2013)050, hereinafter "the Proposals").

2. Mr Hamilton, Ms Suchocka, Mr Tanchev and Mr Tuori acted as rapporteurs for this opinion.

3. The present opinion was adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013).

II. General remarks

4. The Venice Commission has provided a series of opinions on Ukraine's judiciary[1]. The most relevant for the examination of the Proposals is the "Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine"[2]. That Opinion was given, *inter alia,* on the Draft Law on the Amendments to the Constitution of Ukraine, strengthening the Independence of Judges (CDL-REF(2013)020).

5. This Opinion relates to an amended version of the Draft Law on the Amendments to the Constitution (hereinafter "the Draft Law"). The Proposals do not directly amend the Constitution but they amend the Draft Law. Therefore, the Constitution, the Draft Law and the Proposals have to be read together. Document CDL-REF(2013)058 shows in the column on the left side the earlier version, subject to the Opinion CDL-AD(2013)014, and in the right column the Draft Law to which the Proposals refer. Footnotes have been added in Document CDL-REF(2013)058 in order to show to which part of the Draft Law each of the Proposals refers.

6. This opinion is based on an English translation of the Proposals and the Draft Law. The translation may not accurately reflect the original version on all points and, consequently, certain comments might be due to problems in the translation.

III. Proposals introduced by 156 members of the *Verkhovna Rada*

7. The following chapter examines the 28 Proposals, item by item. In order to facilitate the comprehension of the Proposals, each heading below indicates the substance of the change together with the Article of the Constitution to which it refers and the Section of the Draft Law which is being amended.

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[1] See Opinion on the draft Law on the judiciary and the draft Law on the status of judges of Ukraine, CDL-AD(2007)003; Joint Opinion on the draft Law on the judicial system and the status of judges of Ukraine, CDL-AD(2010)003; Joint Opinion on the Law on the judicial system and the status of judges of Ukraine, CDL-AD(2010)026; Joint Opinion on the draft Law amending the Law on the judiciary and the status of judges and other legislative acts of Ukraine, CDL-AD(2011)033; Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law, CDL-AD(2012)019; Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, CDL-AD(2013)014; Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, CDL-AD(2013)025.

[2] CDL-AD(2013)014.

A. Proposal no. 1: Right to a fair trial within reasonable time (Section I.1.2 of the Draft Law)

8. This provision introduces a right to a fair trial within reasonable time by a competent and impartial court and thus complements Article 55 of the Constitution on the protection of human rights in court and Article 126.1 of the Constitution on judicial independence.

9. In principle, the introduction of such a provision is welcome. However, when introducing it consideration should be given to the ways of its implementation. In its report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings, the Venice Commission insisted that in case of an excessive length of proceedings the parties should have both a compensatory and an acceleratory remedy[3], i.e. the possibility of an urgent appeal to a judicial instance which results in speeding up the adoption of the delayed decision.

10. Therefore, in parallel to introducing the right of a fair trial within reasonable time, the respective superior court or directly the Supreme Court should be entrusted with a specific compensatory and acceleratory remedy against the excessive length of procedure.

11. In addition, a full constitutional complaint to the Constitutional Court - against all cases of violation of human rights through individual acts – should be introduced. In Ukraine, individual complaints to the Constitutional Court can only be directed against unconstitutional legislation[4] but not against individual unconstitutional acts. The violation of human rights through individual acts, including cases of excessive length of procedure, cannot be attacked before the Constitutional Court. The introduction of a full constitutional complaint was proposed by the Speaker of Parliament in 2011[5] but this proposal has not yet been implemented. A full constitutional complaint to the Constitutional Court would also cover cases of excessive length of procedure before the Supreme Court.

B. Proposals no. 2 and 5: Establishment of the court network (Article 85.27 of the Constitution - Section I.2.2 of the Draft Law / Article 125 of the Constitution – Section I.2.a.5 of the Draft Law)

12. Proposal no. 2 concerns the competence of the *Verkhovna Rada* to establish the court network. The Draft Law attributed this competence to the *Rada* upon initiative by the President whereas Proposal 2 removes the requirement of an initiative by the President.

13. The most competent body for designing and changing the court network is the High Judicial Council ("HJC"). The adoption of the network can of course be a competence of Parliament because such decisions have important budgetary implications. However, the initiative for such decisions should come from the HJC rather than the President.

14. Proposal no. 5 provides that courts shall be established, reorganised and removed through a Resolution of the *Verkhovna Rada*. While it is positive that the court network is established by the *Rada*, this should not be done through a resolution but through the ordinary legislative procedure.

[3] CDL-AD(2006)036rev, paragraph 238.
[4] Normative constitutional complaint, see Study on Individual Access to Constitutional Justice, CDL-AD(2010)039rev, paragraph 77.
[5] Annual Report of Activities of the Venice Commission 2011, p. 51.

C. Proposals no. 3, 14 and 21: Appointment and transfer of judges – removal of competence of the President / appointment of judges to administrative positions / dismissal of judges already appointed for permanent office (Articles 85.27 and 106.23 - Section I.3.a of the Draft Law / Article 128 of the Constitution – Sections I.8.2 and II.3.3 of the Draft Law)

15. Article 106.23 of the Constitution currently in force provides for the establishment of courts by the President. The Draft Law would transfer that competence to the *Rada* (see above under Proposal no. 2) and would replace this provision with the competence to appoint judges upon and in accordance with the motion of the High Judicial Council. Proposal no. 3 would delete that competence of the President in Article 106.23. According to Proposal no. 14, Article 128 of the Constitution would provide that judges are appointed to permanent positions directly by the High Council of Justice rather than by the President. A judge could be transferred to another court only upon his (or her) consent including the case when the court is "disbanded or reorganized". The appointment to administrative positions (presumably that of court presidents) is done by the bodies of judicial self-government. Proposal 21 provides that judges already appointed for permanent office can no longer be dismissed by the President but only by the HJC.

16. *A priori*, the Venice Commission has no objection against appointment of judges by the Head of State when the latter is bound by a proposal of the judicial council and acts in a 'ceremonial' way, only formalising the decision taken by the judicial council in substance.[6] In such a setting, a situation where the President refuses to ratify a decision of the judicial council would be critical because it would *de facto* give the President a veto against decisions of the judicial council. In order to ensure that the President indeed only has a ceremonial role[7], the Constitution could provide that proposals by the judicial council would enter into force directly, without the intervention of the President if the President does not enact them within a given period of time. Of course, direct appointment of judges by the judicial council avoids such complex safeguards.

17. Linking the transfer of a judge to his or her consent even if the court is "disbanded or reorganized" (Proposal no. 14) goes too far. In such cases, a transfer of the judge against his or her will should be possible. On the other hand, the immediate dismissal of the judge because he or she refuses such an involuntary transfer would go too far as well. In this respect, Proposal no. 9 – providing for dismissal - and Proposal no. 14 – excluding a transfer against the judge's will – contradict each other.

18. The appointment of court presidents by the organs of judicial self-administration (Proposal no. 14) would go too far as well if this term were to refer only to the Congress of Judges. Even after the reduction of the functions of court presidents, there is indeed a danger that these positions can be abused in order to exert pressure on judges to decide cases in a certain way. However, such appointments should be rather made by the High Judicial Council, which has a higher democratic legitimacy than the organs of judicial self-administration. If the term "organs of judicial self-administration" were to include the High Judicial Council then this should be spelled out explicitly.

[6] CDL-AD(2013)014, paragraph 13, see also Report on Judicial Appointments (CDL-AD(2007)028), paragraph 14.

[7] Similar to that of a "notary", see Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine (CDL-AD(2010)026), para 51)

D. Proposal no. 4: Term of office of the Prosecutor General (Article 122 of the Constitution - Section I.4 of the Draft Law)

19. This Proposal sets the term of office of the Prosecutor General at 6 years, without the right to reappointment for another term.

20. In its Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, the Venice Commission had recommended that "Article 122 of the Constitution should be amended to provide for a longer mandate than the current five years and should exclude re-election."[8] Proposal no. 4 is welcome because the prohibition of re-election prevents an accumulation of power in the person of the Prosecutor General.

E. Proposal no. 6: Supreme Court (Article 125 of the Constitution – Section I.b.5 of the Draft Law)

21. Proposal no. 6 entrusts the Supreme Court with unifying the practice of the specialised high courts. In its 2010 opinion on the judicial system of Ukraine, the Venice Commission had criticised the removal of this important function[9] and therefore its reintroduction is welcome.

22. Item 6 provides that the Supreme Court can also act as a Court of first instance in cases to be foreseen in procedural legislation. Given that Ukraine has four levels of jurisdiction (local courts, regional courts, high specialised courts and the Supreme Court), the Supreme Court should not have first instance competence but rather act as an appeal instance only. This also would allow for a double degree of jurisdiction.

F. Proposal no. 7: International Criminal Court (Section I.5.B.2)

23. Proposal no. 7 introduces the recognition of the jurisdiction of the International Criminal Court (hereinafter "ICC") on the constitutional level and is welcome. This recognition is important in view of Article 25 of the Constitution, which prohibits the "surrender" of nationals to another state. Ukraine has signed but not ratified the Rome Statute of the ICC. In 2001, the Constitutional Court of Ukraine found the Rome Statute of the ICC to be in conflict with the Constitution.[10] The recognition of the jurisdiction of the ICC in the Constitution should overcome this problem and enable the ratification of the ICC Statute[11]. As a consequence, Ukraine would be obliged to surrender its citizens to the ICC, if so requested.

G. Proposal no. 8: Judicial Immunity (Section I.6.a.2 of the Draft Law)

24. This proposal provides that when administering justice, judges can only be arrested or detained with the consent of the High Council of Justice, with the exception of detention *in flagranto delictu* or cases of corruption related to the administration of justice.

25. Currently, Article 126.3 of the Constitution gives a much wider, general immunity to judges which covers all cases of detention or arrest and which can be lifted by the *Verkhovna Rada*. Proposal no. 8 would reduce this general immunity to a functional immunity and is therefore

[8] CDL-AD(2013)025, paragraph 117.
[9] Joint opinion on the law on the judicial system and the status of judges of Ukraine (CDL-AD(2010)026, paragraph 125); see also Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine (CDL-AD(2011)033), para. 6.
[10] Case N 1-35/2001, N 3-v/2001 of 11 July 2001.
[11] See also Second Report on Constitutional Issues raised by the Ratification of the Rome Statute of the International Criminal Court (CDL-AD(2008)031), paragraphs 14-15.

welcome. The lifting of judicial immunity should certainly not be a competence of Parliament. The High Council of Justice is much more apt to take such a decision.[12]

26. In its *amicus curiae* brief on the Immunity of Judges prepared upon request by the Constitutional Court of Moldova, the Venice Commission examined the question whether the exclusion of judicial immunity for passive corruption and traffic of influence by judges contradicts international standards and came to the conclusion that this was not the case[13]. Consequently, as such, the removal of immunity for corruption in the administration of justice in Ukraine does not contradict these standards either. However, a problem often discussed in Ukraine was that of 'selective justice', whereby – potentially well founded - charges would be brought only against some persons, possibly including those who would be seen as being close to opposition or in conflict with the prosecution service. Such allegations should be taken seriously but they are not an issue of constitutional legislation and have to be addressed in its implementation.

H. Proposal no. 9: Dismissal of Judges (Article 126.5 of the Constitution – Section I.6.B.11)

27. The Proposal no. 9 provides three additional grounds for the dismissal of a judge:

- The absence of consent to a transfer to another court in case of reorganisation or abolishment of a court according to Article 85.I.27 of the Constitution by the *Verkhovna Rada*.
- A decision on impeachment of a judge
- The failure of re-qualification of a judge

28. The issue of impeachment will be dealt with under Proposal no. 11 below. On the failure of re-qualification of all judges of Ukraine, see Proposal no. 17 below.

29. The absence of consent to a transfer to another court in case of closure or reorganisation of a court is too wide a formulation for a ground for dismissal of a judge, even if the closure or reorganisation has been decided by the *Verkhovna Rada* in the form of a law. Much will depend on the proposals for transfer made to the judge and on their timing. It may well be the case that right at the moment of closure or reorganisation no adequate position for transfer is available but soon thereafter such a position becomes available. Before being faced with a dismissal, the judge should receive more than one proposal for transfer and the prospect of upcoming retirements of judges in other courts should be taken into account when making such proposals. Rather than simply dismissing the judge, he or she should be transferred against his or her will. If the judge then does not turn up for work at the new post, ordinary disciplinary measures could be taken, which eventually could lead to a dismissal of the judge but not because of the refusal of the transfer but because of the refusal to work.

I. Proposal no. 10: Retirement age of judges (Article 126 of the Constitution – Section I.6.r)

30. Proposal no. 10 sets the age of 75 as the retirement age for judges of the Supreme Court and the high specialised courts whereas 65 is fixed as the retirement age for all other judges. Such a stark distinction seems excessive because it would create two classes of judges, the 'upper' judges who can work until the age of 75 years and the 'lower' judges who have to retire at 65 (and as a consequence have to live with a retirement pension, which is much lower than the income of active judges). The consequence of such a split system would probably be that 'lower' judges will make every effort – and possibly compromises in their judgments - to be appointed as a judge of a high specialised court before they have to retire at 65. Such a distinction within the profession of judges is not only discriminatory, it

[12] CDL-AD(2013)014, paragraph 20.
[13] CDL-AD(2013)008, paragraph 54.

might also lead to judges being willing to compromise in their adjudication in order to obtain promotion before they have to retire at 65.

J. Proposal no. 11: Impeachment of judges (Article 126 of the Constitution – Section I.6.д)

31. This proposal would introduce an impeachment procedure against a judge of lower instance courts, which would be initiated by at least 20 per cent of the citizens of Ukraine of the respective court district or by one third of the members of the *Verkhovna Rada*. Following such an initiative, the *Verkhovna Rada* voted on the impeachment and the judge would be dismissed if more than half of all members of the *Rada* voted for it. Initiatives for the impeachment of judges of the high specialised courts and the Supreme Court could be introduced by one third of all members of the *Rada* and would be carried if two thirds of all members voted for it.

32. The introduction of such a procedure is clear contradiction of the principle of the independence of the judiciary and would make the position of the judges dependent on a political organ, the *Verkhovna Rada*. The initiation of an impeachment by the citizens could even lead to judges trying to please "the voters" rather than to apply the Constitution and the laws, for example through harsh sentences in highly mediatised criminal cases.

M. Proposals no. 12 and 25: Role of the High Qualification Commission - recommendation of candidates for the office of judge / transfer of judges (Article 127.3 of the Constitution – Section I.7.a / Section II.8 of the Draft Law)

33. Proposal no. 12 would remove the competence of the High Qualification Commission ("HQC") to make proposals for the office of judge and attribute this power to the High Judicial Council. While the draft Law provided for a competence of the High Qualification Commission to submit a motion for the transfer of judges, Proposal no. 25 would attribute the final decision in this matter to the HQC.

34. It seems not logical to attribute the transfer of judges to a body called "qualification commission" while the competence to make proposals for the office of judge is withdrawn from that body. If it were retained as a separate body, the HQC should be in charge of the qualifications rather than transfers of judges.

35. Ideally, in order to ensure a coherent approach to judicial careers, the HQC should become part of the HJC, possibly as a chamber in charge of the selection of candidates for judicial positions. Admittedly there is no European standard that judicial appointments and careers should be dealt with by a single body, however.

M. Proposal no. 13: Competitive selection of judges (Article 127 of the Constitution – Section I.7.б.2)

36. Proposal no. 13 provides that judges shall be selected on a competitive basis and that candidates shall not be discriminated on the basis of "race, colour, political, religious and other views, sex, ethnic and social background, material status, place of residence, language or other features".

37. The principle of competitive selection of judges already exists on the level of ordinary law. Raising this principle – or for example the automatic distribution of cases – to the constitutional level is nonetheless welcome.[14] Given that in Ukraine the independence of the judiciary remains an issue of concern, raising such principles to the level of the Constitution addresses

[14] CDL-AD(2013)014, paragraph 27.

the danger of ordinary legislation contradicting such principles and provides an occasion for the Constitutional Court to remove such legislation from the legal order.

38. The list of grounds for which discrimination is prohibited does not include sexual orientation, which should be added. On the other hand, the (absence) of the knowledge of language can be a valid reason to discriminate. A command of the state language is a legitimate requirement for appointment as a judge. The term "or other features" may also be too wide: Sufficient legal qualifications, for example, are of course necessary for appointment.

N. Proposal no. 15: High Judicial Council (Article 131 of the Constitution – Section I.10 of the Draft Law)

39. Proposal no. 15 gives the High Judicial Council wide powers, including:

- The selection of candidates for the position of a judge
- The appointment of judges
- The dismissal of judges
- The transfer of judges to other courts
- The decision on the violation of incompatibility requirements by judges and prosecutors
- Disciplinary actions against judges and prosecutors

40. According to the Proposal, the HJC would have 15 members. The President of the Supreme Court would be *ex officio* member. 10 judges would be appointed by the Congress of Judges among judges from all levels and specialisations in a proportionate manner. The Bar and Academia would appoint two members each. To become member of the HJC 10 years of experience would be required (at least the English translation seems to confuse the criterion of a law degree for judges, where this is obvious, and other members of the Council). Members would be appointed for 6 years and could not be reappointed.

41. The HJC would thus have 11 judges among its 15 members. This proportion seems even too high and could lead to inefficient disciplinary procedures. While calling for an appeal to a court against disciplinary decisions of judicial councils is required, the Venice Commission insists that the non-judicial component of a judicial council is crucial for the efficient exercise of the disciplinary powers of the council.

42. Proposal no 15 would remove the Prosecutor General from the HJC. In its Joint Opinion on the Draft Law on the Public Prosecutor's Office[15], the Commission had welcomed the separation of the functions of the judicial and prosecutorial councils but criticised that this separation was not done coherently. The Proposal too removes all participation of prosecutors from the HJC but retains powers of the HJC in respect of prosecutors (incompatibility requirements and discipline). However, the HJC should have no such powers if there is a separate prosecutorial council.

43. The Venice Commission is of the opinion that in the implementation of the constitutional amendments, the judgment *Oleksandr Volkov v. Ukraine* of the European Court of Human Rights[16] has to be taken into account. In respect of the HJC, this means *inter alia* that the members of the HJC should exercise their functions as a full-time profession.

[15] CDL-AD(2013)025, paragraph 154, see also CDL-AD(2013)014, paragraph 39.
[16] Application no. 21722/11, Judgment (merits) of 9 January 2013, paragraphs 163, 181 and 185.

O. Proposal no. 16: Entry into force (Section II.1 of the Draft Law)

44. The Draft Law provided for an entry into force of the constitutional amendments 90 days after their publication and made the entry into force of the constitutional amendments conditional on the adoption of a law defining the grounds and procedure for the consent of the HJC to the detention or arrest of a judge. Proposal no. 16 would reduce the 90 day deadline to 30 days and would remove the condition of the adoption of a law on the consent of the HJC to detention or arrest of a judge.

45. This proposal is welcome because it does not seem logical why the entry into force of the constitutional amendments should depend on a law in one specific field. More importantly, the removal of the requirement of a motion of the High Qualification Commission for a decision of the HJC on the consent to detention or arrest of a judge (Proposal no. 8 above) does not seem a sufficient reason to warrant a specific law, the adoption of which would condition the whole constitutional reform.

P. Proposal no. 17: Probationary periods - transitional provision (Section II.2.2 of the Draft Law)

46. Proposal no. 17 refers to probationary judges and provides that within one year after the entry into force of the constitutional amendments, all judges have to undergo a qualification test.

47. The Venice Commission has consistently opposed probationary periods for judges because they endanger the judges' independence.[17] The Commission recognises that the personal qualities of a newly recruited candidate need to be tested. The Commission has therefore suggested that during their probationary period, judges prepare judgments, conduct hearings but do not adjudicate themselves but act under the authority of permanently appointed judges.[18]

48. A qualification test for all sitting judges is a very delicate matter. The Venice Commission was very critical of the dismissals of all judges in Serbia who had to re-apply for their positions.[19] A qualification test for all sitting judges could create similar problems, endanger judicial independence and should be avoided. Problems with the qualification of judges should be settled through efficient disciplinary proceedings in individual cases.

Q. Proposal no. 18: Permanent tenure for judges at the end of their probationary period (Section II.2.3 of the Draft Law)

49. The Draft Law foresaw that judges who are at the end of their probationary period at the entry into force of the constitutional amendments would be appointed as permanent judges. Proposal no. 18 further adds that these judges would be appointed by the HJC and would not have to pass a competitive examination. This specification does not call for specific comment.

[17] CDL-AD(2013)014, paragraph 18.
[18] Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004), paragraph 37.
[19] Interim opinion on the draft decisions of the high judicial council and of the state prosecutorial council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia, CDL-AD(2011)015, paragraph 9.

R. Proposal no. 19: Transfer of pending judicial candidacies from the President to the HJC (Section II.2.4 of the Draft Law)

50. Proposal no. 19 provides that files of candidate judges that had already been transmitted to the President of Ukraine shall be transferred to the HJC. There is no objection against such a transitional provision.

S. Proposal no. 20: Retirement of judges who are 65 years old but have not yet been dismissed (Section II.2.4 of the Draft Law)

51. It seems that the Draft Law allowed some flexibility as concerns the requirement to retire for judges who have reached 65 years. Proposal no. 20 would remove such flexibility.

52. The retirement age for judges should be clearly set out in the legislation. Any doubt or ambiguity has to be avoided and a body taking decisions on retirement should not be able to exert discretion. The absence of clear provisions could be used to exert pressure on the judge.

T. Proposal no. 22: Dismissal for breach of oath (Section II.4 of the Draft Law)

53. Proposal no. 22 transfers the competence for a dismissal of a judge because of breach of oath from the President to the HJC.

54. In its opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution, the Venice Commission strongly criticised the vague term of "breach of oath" as a basis for the dismissal of a judge and welcomed the introduction of the clause "commitment of an offence, incompatible with further discharge of the duties of a judge"[20].

55. In this clause, the term "offence" has to be understood as meaning that each disciplinary ground has to be individually codified in Law in a way similar to a penal provision. The absence of a catalogue of such disciplinary offences would be unconstitutional under such a clause. No dismissal should be possible unless the conduct of a judge is covered by the definition of a disciplinary offence. The obligation to typify disciplinary offences on the level of the law also stems from the judgment *Oleksandr Volkov v. Ukraine* of the European Court of Human Rights[21].

U. Proposals no. 23 to 26: Transitions provisions - Transfer of the competence to lift judicial immunity from the *Verkhovna Rada* to the HJC (Section II.9 of the Draft Law)

56. Proposal no. 23 provides that cases of dismissal of judges pending before the *Verkhovna Rada* should be transferred to the HCJ. According to Proposal 24, the HJC would have to take a decision on pending dismissal cases within two weeks. The High Judicial Council would also have to take decisions on pending cases of transfers within two weeks, according to Proposal no. 25. Proposal no. 26 provides for the transfer of the competence to lift judicial immunity from the *Verkhovna Rada* to the HJC within one week after the establishment of the HJC under the amended Article 131.3 of the Constitution.

57. As pointed out above under Proposal no. 8, judicial immunity should not be lifted by Parliament but by an organ of the judicial system, like the HJC. Therefore, the transfer of pending cases to the HJC once it is (re)established, is positive. However, the deadlines under which the HJC would have to decide all pending cases are clearly too short.

[20] CDL-AD(2013)014, paragraphs 24 and 53.
[21] Application no. 21722/11, Judgment (merits) of 9 January 2013, paragraphs 163, 181 and 185.

IV. Conclusions

58. The Proposals submitted by 156 deputies purport to amend the Draft Law amending the Constitution, submitted by the Presidential Administration of Ukraine. These Proposals contain some welcome elements, notably:

- the introduction of a right to fair trial within reasonable time (however, its implementation needs to be addressed);
- the exclusion of the re-appointment of the Prosecutor General;
- the strengthening of the role of the Supreme Court;
- the recognition of the jurisdiction of the International Criminal Court at the constitutional level;
- the reduction of judicial immunity;
- the constitutional guarantee for the competitive selection of judges;
- the direct appointment and dismissal of judges by the High Judicial Council.

59. However the proposals contain also very critical elements:

- the impeachment of judges by the *Verkhovna Rada* and even the direct initiation of such impeachment by citizens;
- discrimination in the retirement age between 'higher' and 'lower' ranking judges;
- the dismissal of judges because of a “breach of oath”;
- a requalification examination for all judges;
- the dismissal of judges because of a refusal of a transfer against their will;
- the remaining link between prosecution and the High Judicial Council;
- an incoherent distribution of functions between the High Judicial Council and the High Qualification Commission.

60. The Venice Commission hopes that the positive elements of the Proposals can be included in the Draft Law amending the Constitution without significantly delaying its entry into force. The Commission is ready to further assist the Ukrainian authorities, should they make a request for such assistance.