



Venice, 31 March 2000

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Restricted
CDL (2000) 14 rev
Or. Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**CONSTITUTIONAL REFERENDUM
IN UKRAINE**

**OPINION
ADOPTED BY THE COMMISSION
AT ITS 42nd PLENARY SESSION**

Venice, 31 March 2000

On the basis of the comments by:

**Mr S. BARTOLE (Member, Italy)
Mr G. BATLINER (Member, Liechtenstein)
Mr G. MALINVERNI (Member, Switzerland)
Mr H. STEINBERGER (Member, Germany)
Mr C. SVOBODA (Member, Czech Republic)**

I. Introduction

1. On 15 January 2000 the President of Ukraine adopted a decree on announcement of an All-Ukraine referendum on the People's Initiative. This decree provides for the holding of a referendum on 16 April 2000. Six questions will be put to the people at this referendum, aiming at amendments to the Ukrainian Constitution. The text of the decree appears in document CDL (2000) 4 rev.
2. By letters dated 28 January 2000 and 31 January 2000 the President of the Parliamentary Assembly, Lord Russell-Johnston, asked the Venice Commission to give an opinion on the constitutionality of the referendum and on the proposed constitutional changes. On 31 January 2000, the Secretary General of the Council of Europe, Mr Walter Schwimmer, also asked the Commission to give an opinion on the legal aspects of the referendum.
3. The present opinion was adopted by the European Commission for Democracy through Law at its 42nd Plenary Meeting, 31 March 2000, on the basis of contributions by Messrs Bartole, Batliner, Malinverni, Steinberger and Svoboda.
4. On 27 March 2000 the Constitutional Court of Ukraine adopted its decision on the constitutionality of the referendum. This decision was made public on 29 March 2000. On the same day the President adopted a decree implementing the decision of the Court. For time reasons, the Commission could only take this decision into account in the conclusions of its opinion.

II. Legal background of the referendum

5. The main rules on referendums are contained in Chapter III of the Ukrainian Constitution on elections and referendums:

Article 69

The expression of the will of the people is exercised through elections, referendum and other forms of direct democracy.

Article 72

An All-Ukrainian referendum is designated by the Verkhovna Rada of Ukraine or by the President of Ukraine, in accordance with their authority established by this Constitution.

An All-Ukrainian referendum is called on popular initiative on the request of no less than three million citizens of Ukraine who have the right to vote, on the condition that the signatures in favour of designating the referendum have been collected in no less than two-thirds of the oblasts, with no less than 100 000 signatures in each oblast.

Article 73

Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum.

Article 74

A referendum shall not be permitted in regard to draft laws on issues of taxes, the budget and amnesty.

6. Of particular importance are also Articles 92.20 and 106.6:

Article 92

The following are determined exclusively by the laws of Ukraine:

.....

- 20) the organisation and procedure for conducting elections and referendums;

.....

Article 106

The President of Ukraine:

.....

- 6) designates an All-Ukrainian referendum regarding amendments to the Constitution of Ukraine in accordance with Article 156 of this Constitution, proclaims an All-Ukrainian referendum on popular initiative;

.....

7. The most pertinent provisions of Chapter XIII of the Constitution on Introducing Amendments to the Constitution are the following:

Article 154

A draft law on introducing amendments to the Constitution of Ukraine may be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine, or by no fewer National Deputies of Ukraine than one-third of the constitutional composition of the Verkhovna Rada of Ukraine.

Article 155

A draft law on introducing amendments to the Constitution of Ukraine, with the exception of Chapter I – “General Principles,” Chapter III – “Elections. Referendum,” and Chapter XIII – “Introducing Amendments to the Constitution of Ukraine,” previously adopted by the majority of the constitutional composition of the Verkhovna Rada of Ukraine, is deemed to be adopted, if at the next regular session of the Verkhovna Rada of Ukraine, no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine have voted in favour thereof.

Article 156

A draft law on introducing amendments to Chapter I – “General Principles,” Chapter III – “Elections. Referendum,” and Chapter XIII – “Introducing Amendments to the Constitution of Ukraine,” is submitted to the Verkhovna Rada of Ukraine by the President, or by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, and on the condition that it is adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, and is approved by an All-Ukrainian referendum designated by the President of Ukraine.

The repeat submission of a draft law on introducing amendments to Chapters I, III and XIII of this Constitution on one and the same issue is possible only to the Verkhovna Rada of Ukraine of the next convocation.

Article 157

The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

8. Law N° 1286-XII on All-Ukraine and Local Referendums of 3 July 1991 was adopted before Ukraine became an independent state. This law was amended in 1992 in order to change the terminology and to modify certain provisions on local referendums in the Republic of Crimea. The law was never brought into conformity with the Constitution of Ukraine adopted on 28 June 1996. Its applicability is therefore governed by the transitional provisions of the Ukrainian Constitution:

Chapter XV Transitional Provisions

1. Laws and other normative acts, adopted prior to this Constitution entering into force, are in force in the part that does not contradict the Constitution of Ukraine.
9. On 11 January 2000 the Parliament of Ukraine adopted a law (Law no. 1356-XIV) introducing a ban on all referendums due to the fact that there "was a difficult socio-economic situation in the country and no sufficient legislative basis for organising a referendum". The President refused to sign this law and returned it to the Parliament on 26 January 2000. In his reply to the Parliament the Head of State said that referendum is a sovereign right of the people of Ukraine that cannot be restricted.

III. The developments in Ukraine leading to the referendum

10. The proposed referendum is a referendum at the people's initiative for which more than three million signatures have been collected. Article 72.2 of the Constitution provides for a referendum on popular initiative on the request of no less than three million citizens and the law on All-Ukraine and Local Referendums provides a procedure for collecting signatures. The regularity of the procedure of collecting signatures in this case has been challenged by opponents of the referendum. It is obviously not up to the Commission to take a position in this respect.
11. The proposed referendum can only be understood in the context of the current political conflicts in Ukraine. The Parliament (the Verkhovna Rada) has been perceived by many as not being able or willing to adopt the legislation necessary to implement reforms in the country. It has recently split into two parts, a majority broadly favourable to the President and the government and a minority headed by the previously elected speaker. Both parts of the parliament have even held separate sessions and the question whether the election of a new speaker by the new majority is valid or not is contested between both sides.

IV. The legal nature of the referendum

12. In general, two main types of referendums can be distinguished: consultative or binding. The binding referendum can relate to the Constitution or to legislation. With respect to the

referendum on popular initiative, the Ukrainian Constitution unfortunately is silent as to its legal nature, although the Commission, in its Opinion on the Draft Constitution of Ukraine (CDL-INF (96) 6) had recommended that the possible subject matters of people's initiatives be clearly defined.

13. The present referendum relates to the Constitution and not to legislation. It is less clear whether it is binding or not. During contacts with the Secretariat of the Commission the Minister of Justice of Ukraine, Ms Stanik, has clearly stated that the result of the referendum would have to be confirmed by a decision of the Verkhovna Rada. By contrast, the President of Ukraine indicated to the rapporteurs of the Parliamentary Assembly that the results of the referendum would be directly binding.
14. The text of the presidential decree is not absolutely clear in this respect. In the introductory paragraph mention is made both of "consulting the opinion of Ukrainian citizens on a range of important questions that could influence the future of the country" and of "introducing the corresponding changes to the Constitution of Ukraine". With respect to the various questions, it is clear that question 5 on the introduction of a bicameral parliament cannot be directly binding since no detail is given as to the composition and powers of such a second chamber. By contrast, other questions contain the precise text of an amendment to the constitution and therefore could theoretically be considered as binding. The wording of the questions ("Are you in favour...", "Do you support...") leaves however the possibility of a consultative character open.
15. Having regard to the fact that it would seem highly unusual to combine directly binding and purely consultative questions in the same referendum without a clear distinction between both types of questions, it would seem more appropriate to assume that the referendum is conceived as having a consultative character. Nevertheless, the fact that even for (admittedly foreign) constitutional scholars it is not very obvious which legal consequences the referendum is supposed to have is worrying and one wonders whether the citizens of Ukraine will know exactly what they are voting on.
16. Since the purely consultative character of the referendum is not uncontested, it is important to examine whether there would be a constitutional basis in Ukraine for a directly binding character of the referendum. As stated above, Article 72.2 does not clarify the legal nature of referendums on popular initiative. Read in isolation, it might therefore be interpreted as providing a basis also for a referendum directly amending the constitution.
17. Nevertheless, other provisions of the Constitution clearly show that Article 72.2 cannot be used as the basis for a constitutional referendum.
18. Chapter XIII on introducing amendments to the Constitution of Ukraine contains detailed provisions on the procedures required for amending the Constitution. These procedures clearly reflect the conviction of the authors of the Constitution that the Ukrainian Constitution should be a rigid constitution which cannot be amended very easily but only on the basis of procedures implying sufficient guarantees. Article 156 mentions the possibility of constitutional referendums, but only with respect to certain chapters of the Constitution and only to confirm a decision already taken by the Verkhovna Rada by a two-thirds majority in favour of a constitutional change.
19. With the exception of question 6, the proposed changes relate to Chapter IV of the Constitution, which is not mentioned in Article 156, and no decision has been taken by the

Verkhovna Rada in favour of a constitutional change. Article 156 therefore cannot be used as the basis for the present referendum. No other article of the Constitution refers to the possibility of amending the Constitution by a referendum. Having regard to the detailed rules on amending the Constitution and the clear tendency to make constitutional amendments difficult and subject to guarantees, the possibility of amending the Constitution directly by a binding constitutional referendum would have to be provided for expressly in the text of the Constitution.

20. Under the Constitution of Ukraine, it is therefore not possible to give the present referendum a legally binding character. The referendum does not have, and may not have, the character of a binding constitutional referendum.
21. Therefore, only the possibility of a consultative referendum remains in the present case. Nevertheless, even this possibility is not at all certain. A consultative referendum is not legally irrelevant. By giving the people the possibility to express their opinion, pressure is put on the elected bodies to abide by the will of the people. Therefore the possibility to have recourse to a consultative referendum has an important influence on the balance of powers between the State organs.
22. Both in its opinions on the draft Constitution of Ukraine (CDL-INF (96) 6) and on the Constitution of Ukraine (CDL-INF (97) 2) the Commission has interpreted Article 72.2, although without detailed analysis for which there was no reason at the time, as relating to the legislative referendum. This would seem to be the most logical interpretation of this provision. A consultative referendum makes sense if the State organ, be it the President, the government or the Parliament, asks the population to give its opinion on a specific issue. Here the referendum was not initiated by a State organ but by the population itself. It would appear highly unusual and would probably be without precedent elsewhere if the result of an initiative by the people would only be that the people have to be consulted and cannot decide directly.
23. The Commission would therefore tend to stick to its previous interpretation, that Article 72.2 refers to the legislative referendum. Nevertheless, it would be desirable for the Ukrainian Constitutional Court to give an interpretation of this article. The issue whether the individual questions put to referendum may be submitted *ratione materiae* to a consultative referendum will be examined below.
24. It is irrelevant whether the Law on all-Ukraine and local referendums gives a wider scope to the possibility of holding referendums. The Constitution prevails over ordinary laws (see Article 8.2 of the Constitution) and is moreover even the more recent law.
25. To sum up, the Commission is of the opinion that the present referendum does not have, and may not have, the effect of directly introducing amendments to the Ukrainian Constitution and that it appears highly questionable whether the referendum is admissible as a consultative referendum.

V. The regularity of the referendum

26. It is quite obvious, and this is confirmed by Article 92.20 of the Constitution, that in addition to the constitutional rules, rules on the organisation and procedure for the referendum are required. The Law on All-Ukraine and Local Referendums of 1991/1992 contains such rules. Certain articles are however obviously in contradiction with the

Ukrainian Constitution and therefore no longer applicable (cf. Transitional Provision 1 of the Constitution). Until now, no decision of the Constitutional Court has been taken to decide which provisions of this Law are still applicable. It may well be that so many of its provisions are based on an entirely different constitutional order that it appears problematic or even impossible to conduct a referendum on its basis. Legal certainty as a main element of the rule of law, enshrined in particular in Articles 1 and 8.1 of the Ukrainian Constitution, requires that all major issues pertaining to referendums are clearly defined by Law.

27. It is not up to the Venice Commission but only to the Constitutional Court of Ukraine to decide to which extent this Law is still applicable and whether under these circumstances the holding of the referendum appears possible. One of the elements the Constitutional Court might take into account is the fact that the Verkhovna Rada which, according to Article 92.20, has to adopt the law setting out the rules on the organisation and procedure of referendums, is of the opinion that such a legal basis does not exist at the moment. It should however be underlined that the Verkhovna Rada is then under an obligation to adopt such a law as soon as possible.
28. With respect to the text of the presidential decree, it is striking that the President has added a preamble to the text of the question which strongly suggests that a positive reply should be given to those questions. This would be inadmissible in other countries.

VI. Constitutionality of the proposals submitted to referendum and their compatibility with international standards

29. The present opinion examines the various proposals submitted to referendum both from the point of view of the Ukrainian Constitution and of international standards. To the extent that amendments to the present Constitution are proposed, there may be questions of compatibility of the proposals with other non-amended parts of the Constitution but the question of constitutionality becomes moot once the proposals are adopted. Nevertheless, the issue remains whether such proposals are compatible with international standards, in particular whether a sufficient balance of powers would remain if the proposals were adopted.

Question 1

30. The first question contains in reality two questions. Citizens are asked to pronounce themselves at the same time
 - on the question whether the present Verkhovna Rada enjoys their confidence;
 - on a proposal to amend the Constitution introducing the possibility for the President of Ukraine to dissolve the Verkhovna Rada in the case of such a vote of no confidence.
31. To combine two questions in this way is in contradiction with a principle of referendum law known for example in Switzerland or Italy as the unity of subject matter. It may well be that a citizen of Ukraine wishes to have in general the right to express his lack of confidence in parliament without at the same time doing so with respect to the Verkhovna Rada presently in office. The present wording of the question deprives him of this possibility to give different replies to the two questions.

32. The first part of the question is clearly unconstitutional. The Constitution of Ukraine contains no legal basis for a vote of no confidence by the people in the Verkhovna Rada. While earlier drafts of the Constitution of Ukraine (see document CDL (95) 28) contained the possibility of referendums of no confidence in the Verkhovna Rada (and also the President), these provisions were deleted following *inter alia* strong criticism from the Venice Commission (see opinion of Mrs A. Milenkova, CDL (95) 63). The possibility of a vote of no confidence by the people in Parliament is alien to the Western concept of representative democracy and can in no way be presumed in the absence of an express constitutional authorisation.
33. On the contrary, the Ukrainian Constitution is clear in excluding such a possibility. It sets down the period of office of the Verkhovna Rada and Article 90 provides for an early termination of the authority of the Verkhovna Rada only if it fails to meet within 30 days of a regular session. Article 5 of the Law on All-Ukraine and Local Referendums also seems to exclude the possibility of a dismissal by referendum. Finally, the fact that the authors of the proposal propose at the same time a constitutional amendment seems to indicate that they were conscious of the absence of a legal basis. This is a violation of the fundamental principle that any action by a State organ requires prior legal authorisation.
34. The first part of the question is therefore incompatible with the Constitution of Ukraine and, in the absence of the possibility to answer both parts of the question separately, the whole question falls.
35. As regards the second part of the question, the Commission has taken a position against this type of referendums already during the process of adoption of the Constitution of Ukraine. The possibility to hold such referendums would be a permanent source of instability. To provide it with respect to one of the State organs, the Verkhovna Rada elected by the people, would seriously undermine the balance of powers between Parliament and President by giving the President the possibility to appeal to the people in the case of conflict between him and Parliament without giving a similar possibility to Parliament.
36. Question 1 is therefore both unconstitutional and at variance with international democratic standards.

Question 2

37. Since this question aims at amending the Constitution, the question of the constitutionality of the question as such does not arise. By contrast, the compatibility of the proposed constitutional amendment with international standards seems questionable.
38. First of all, the wording of the proposal seems seriously flawed. It is proposed to give to the President of Ukraine the power to terminate the powers of the Verkhovna Rada and to dissolve the Verkhovna Rada. The drafting of the proposal is unclear and confusing. It is proposed to amend at the same time Article 90 and Article 106 of the Constitution and both proposals are mixed up in the proposed wording.
39. Moreover, the conditions for this step are ill-defined. What precisely is the meaning of failing to form a stable and operational majority? This gives too much discretion to the President and the period of one month for forming such a majority appears short.

40. In conclusion, the drafting of this question is so unclear that its admissibility appears questionable and the adoption of the proposal would appear highly undesirable.

Question 3

41. By limiting parliamentary immunity, the proposed constitutional amendment intends to curtail an important safeguard for the independence of Parliament. Parliamentary immunity is an achievement of the 19th century, and the independence it is designed to safeguard still is pertinent, particularly in a new democracy.

Question 4

42. Whether it is advisable to reduce the number of deputies from 450 to 300 is a political question, it being understood that such a change could only be applied to a future Verkhovna Rada.

Question 5

43. This question cannot be directly binding. It would require amendments to the Constitution which are however not spelt out. Even as a consultative question it thus appears highly problematic since the elements provided in the question do not enable the voters to make an informed judgment on the advisability of the proposed reform. Nothing is said with respect to the powers of the suggested second chamber and information on its composition is limited to the statement that it would represent interests of the Ukrainian regions.
44. In general, it is obviously up to Ukraine to decide on whether the country wishes to have a monocameral or bicameral system. In a unitary State such as Ukraine there is no obvious need for a second chamber. Nevertheless, a second chamber may contribute to the quality of legislation. It has however to be taken into account that the existence of a second chamber will slow down the legislative process. The present problems given as reasons for the introduction of the reform are therefore likely only to be aggravated under such a system.
45. With respect to any such second chamber it would, of course, have to be ensured that its members are elected freely and do not in any way depend on the heads of the local State administration, who are appointed by the President of Ukraine (Article 106.10 and 118.4 of the Constitution).

Question 6

46. The wording of this question appears again seriously flawed. Taken literally it would seem to undermine the whole constitutional order by giving to the people of Ukraine the possibility to replace the present Constitution of Ukraine by an entirely new Constitution. For such a new Constitution it would no longer be necessary to respect the important safeguards applicable to constitutional amendments under the present Constitution. Reference is made in particular to Article 157 outlawing the abolition or restriction of human rights and freedoms and to the need for a two-thirds majority in the Verkhovna Rada. If this question is interpreted as referring to amendments to the Constitution only, it

remains completely unclear which parts of the present Articles 154 et seq. would remain or be amended.

47. The introduction of the possibility to amend the Constitution by referendum seems inadvisable. In its opinion on the Draft Constitution of Ukraine (CDL (96) 6), the Commission has already stated:

"It is in particular recommended to avoid the possibility of amending the Constitution through a referendum, since this apparently democratic procedure may easily be abused for populist purposes."

48. Developments in other CIS countries such as Belarus or Kazakhstan have confirmed that this possibility is likely to be abused to excessively strengthen presidential powers.

49. The admissibility of the question therefore seems highly questionable due to **its** lack of clarity and the proposal submitted to referendum in any case undesirable.

General assessment of the questions taken together

50. The analysis of the questions one by one has shown that there is a large number of ambiguities and incoherences. Even for constitutional lawyers it is extremely difficult to grasp the content of some of the questions and one wonders whether the Ukrainian voters will be able to make an informed judgment. These flaws are certainly due to the fact that the questions were formulated by citizens' initiatives without any subsequent control by the organs of the State and show that amending a Constitution in this way is undesirable.

51. The first question is clearly unconstitutional and other questions are extremely problematic. The combined flaws undermine the validity of the whole referendum.

52. In addition, the political consequences of the various proposals would always be the same: to weaken the Verkhovna Rada and directly or indirectly to strengthen the President. Taken together the proposals will, if implemented, disrupt the balance of powers between the President and Parliament.

Conclusions

53. With respect to the referendum as originally proposed in the decree of 15 January 2000 the conclusions of the Commission can be summarised as follows:

- the present referendum cannot directly amend the Constitution;
- it seems highly questionable whether a consultative referendum on the people's initiative is admissible;
- it is up to the Constitutional Court of Ukraine to decide whether at the present stage of the implementation of the Ukrainian Constitution there is in general a legal basis for the holding of referendums in Ukraine;
- one of the questions submitted to referendum is clearly unconstitutional, the other questions are extremely problematic and/or unclear;
- taken together, the adoption of the proposals contained in the referendum would disrupt the balance of powers between the President and the Parliament.

These elements taken together cast grave doubts on both the constitutionality and the admissibility of the referendum as a whole.

54. Following the decision of the Constitutional Court, the factual situation taken into consideration by the Commission has changed. In this very important decision the Court has declared questions 1 and 6 unconstitutional and decided that, if the other questions are approved during the referendum, this is not equivalent to a direct amendment of the Constitution but that the State organs are obliged to consider these proposals and to take a decision on them in accordance with Chapter XIII of the Constitution on introducing amendments to the Constitution of Ukraine.

55. The Commission notes that this decision opens the door for a possible solution on the basis of consensus between the various branches of State power. If the questions are approved by the people, their consideration by the Verkhovna Rada and the other bodies of State power will make it possible to ensure that the amendments finally adopted will not contain any provisions incompatible with European standards and that they reflect a solution acceptable to the various State organs. The Commission is at the disposal of the Ukrainian authorities to provide its assistance in this respect.