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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE IMPLEMENTATION OF THE REFERENDUM IN UKRAINE

prepared by

Mr S. Bartole (Member, Italy)
Mr G. Batliner (Member, Liechtenstein)
Mr G. Malinverni (Member, Switzerland)

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I. Introduction

1. By letter dated 13 June 2000 the Chairperson of the Monitoring Committee of the Parliamentary Assembly asked the Venice Commission to prepare an opinion

> "concerning Ukraine, the two draft laws on the constitutional reform presented by President Kuchma and by members of Parliament, following the referendum of April this year, in particular, as regards freedom of decision of Parliament, compatibility with Articles 157 and 158 of the Constitution, compliance with international standards and consequences for democracy and the rule of law in Ukraine".

2. It is recalled that the President of Ukraine signed on 15 January 2000 a decree announcing an all-Ukraine referendum on the people's initiative for 16 April 2000. The aim of the referendum was to amend the Ukrainian Constitution mainly with a view to weakening the position of the Verkhovna Rada (the Ukrainian parliament). The referendum was hotly contested, in particular by members of the Verkhovna Rada, it was examined by the Venice Commission (see below) and the Constitutional Court declared two of the initial six questions submitted to referendum unconstitutional.

3. The Venice Commission adopted on 31 March 2000 at the request of the Parliamentary Assembly and the Secretary General of the Council of Europe an opinion on the referendum (document CDL-INF (2000) 11). Its conclusions were as follows:

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

4. The referendum took place on 16 April 2000 (in accordance with Ukrainian legislation voting started 10 days earlier). According to the official results, 81.1% of Ukrainian voters took part in the referendum and majorities between 80% and 90% approved the four remaining proposals submitted to referendum.

5. In order to implement the results of the referendum, two draft laws were submitted to the Verkhovna Rada, one by the President of Ukraine (CDL (2000) 41) and one by 152 Deputies (CDL (2000) 42). These two drafts are the subject of the present opinion. In accordance with the Ukrainian Constitution both drafts were submitted to the Constitutional Court for opinion as to their conformity with Articles 157 and 158 of the Constitution. While the Court had no objections against the draft submitted by the President, it declared the proposal of the Deputies on parliamentary immunity unconstitutional and considered their proposal for a second chamber incomplete and not ripe for consideration (see below).

6. On 13 to 15 September 2000 a delegation of three members of the Commission (Mr Bartole from Italy, Mr Batliner from Liechtenstein and Mr Malinverni from Switzerland) visited Ukraine and had extensive meetings with representatives of the Presidential Administration, the Verkhovna Rada, the Constitutional Court, the Ministry of Justice, the Ministry for Foreign Affairs and the Central Electoral Commission as well as informal talks with opposition politicians.

II. The procedure for implementing the referendum

7. As pointed out in the Commission's opinion of 31 March 2000, the Ukrainian Law on all-Ukraine and Local Referendums was adopted in 1991 (with amendments in 1992), well before the Ukrainian Constitution (28 June 1996), and never harmonised with it. All interlocutors of the Commission delegation in Ukraine recognised the need for the adoption of a new law on referendums. There are at present no applicable legislative rules for the calling and the implementation of the referendum. The implementation of the referendum can only be based on the decision of the Constitutional Court on the constitutionality of the referendum of 27 March 2000 in which the Court declares:

> "If approved by an all-Ukrainian referendum by people's initiative, the questions formulated in paragraphs 2, 3, 4, 5 of Article 2 of the Decree of the President of Ukraine 'On calling the all-Ukrainian referendum by people's initiative' are binding for consideration and taking decisions according to the procedure established by the Constitution of Ukraine, in particular, by its Chapter XIII 'Introducing amendments to the Constitution of Ukraine', and by the laws of Ukraine'".

8. This decision cannot remedy the lack of applicable legal rules. A number of procedural questions remain open. In particular it remains unclear whether following the referendum the results were automatically referred to the Verkhovna Rada or whether somebody

(who?) had to submit a proposal to it. In practice this problem was solved by having recourse to the constitutional procedure for amending the Constitution provided for in Article 154 of the Constitution. This provision gives the right of initiative to the President or one third of the Verkhovna Rada.

9. Also important is the fact that Ukrainian law contains no solution for the conflict arising if the necessary two-thirds majority for amending the Constitution cannot be reached within the Verkhovna Rada. The Constitution cannot be amended without a positive vote by the Verkhovna Rada and the deputies are free to approve the proposals or amend or reject them. In the first reading the presidential draft got 251 votes in the Verkhovna Rada. This falls short of the 300 votes required in the final reading for amending the Constitution. It is therefore possible that the results of the referendum as expressed during the referendum will not be implemented. This would be an unsatisfactory result following a nation-wide referendum.

10. This confirms the critical assessment of the referendum and the rules applicable to it made in the Commission's opinion of 31 March 2000. Nevertheless, it is certainly a lesser evil than abandoning the principle of the free mandate of the Deputies and disregarding the clear rules on amending the Constitution, which require the consent of two-thirds of the Verkhovna Rada. The Commission therefore welcomes the fact that all the official interlocutors it met during the delegation's visit acknowledged that the Verkhovna Rada cannot be forced to vote for the constitutional amendments. Both the representatives of the Presidential Administration and of the Ministry for Foreign Affairs referred to a statement made by President Kuchma in a meeting with the Ukrainian ambassadors to European countries on 26 to 27 August 2000 in which the President stated that he would adhere to the constitutional rules for amending the constitution and not dissolve the Verkhovna Rada if the required majority for the constitutional changes cannot be reached.

11. In conclusion, the Commission welcomes this commitment and highlights the need for new legislation on referendums in Ukraine.

III. The draft submitted by the President

General features

12. The draft presented by the President is a concise text. It only contains the proposals for constitutional amendments approved during the referendum in reply to three of the four questions. With respect to the fourth question, the introduction of a second chamber, the President has not included any proposals in his draft but has set up a commission of experts with representatives of various State bodies with the task of preparing a concrete proposal. This Commission also has the task of preparing the changes in ordinary legislation required as a result of the referendum.

Proposed constitutional amendment to reduce the number of Deputies

13. The first proposal of the President is to amend, in accordance with the results of the referendum, Art. 76 of the Constitution to reduce the number of members of the Verkhovna Rada from 450 to 300. It is up to the Verkhovna to decide on this amendment,

which meets with no objections from the point of view of the Commission, provided it enters into force only following new elections.

Proposal to limit parliamentary immunity

14. In accordance with the results of the referendum, the President proposes to delete section 3 of Article 80 of the Constitution, which provides: "National Deputies of Ukraine shall not be held criminally liable, detained or arrested without the consent of the Verkhovna Rada of Ukraine." The Commission continues to have serious misgivings with respect to this proposal.

15. It is true that there are Western democracies, in particular within the Common Law tradition, which do not recognise the principle of the absolute immunity of members of parliament from arrest and detention and only recognise immunity for statements made in parliament. However, these are countries with a long democratic tradition where an arbitrary arrest of opposition politicians on spurious grounds seems unthinkable. This contrasts with the situation in Ukraine, where democracy is quite recent and where opposition politicians express the fear of being arrested on a pretext if not protected by this provision. Moreover, according to Transitional Provision 13 of the Constitution, the pre-constitutional procedure for arresting persons remains in force until 28 June 2001 and according to Transitional Rule 9 the procuracy is still governed by the former rules. The members of the Verkhovna Rada, once deprived of their immunity, could therefore be arrested and kept in detention without judicial intervention. This is certainly a situation in which the freedom of opinion and decision of parliamentarians could be impaired.

16. During the delegation's visit to Ukraine, the official interlocutors accepted the need for legal provisions providing a certain degree of protection for the Deputies after the deletion of section 3 of Article 80 of the Constitution. The intention seems to be to provide some protection under ordinary law.

17. The Commission is of the opinion that the proper place for a basic rule on parliamentary immunity is within the Constitution and points out that parallel rules on immunity for example for judges are contained in the Constitution itself (Art. 126 s. 3). Deleting section 3 of Article 80 of the Constitution now, pending the adoption of a law, would also entail the risk that for some time there would be no protection and this at a time when the constitutional provisions concerning arrest and detention have not yet entered into force. This seems unacceptable. In order to take account of the result of the referendum, it could be envisaged to reduce the immunity of Deputies to the level presently enjoyed by judges under section 3 of Article 126 of the Constitution: "A judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court." A parallel rule for members of parliament should be part of the Constitution and not of an ordinary law and should enter into force simultaneously with the abrogation of the present rule.

Proposal for facilitating the dissolution of the Verkhovna Rada

18. The third proposal of the President is to add a new section 3 to Art. 90 of the Constitution with the following text:

> "The President of Ukraine may also terminate the authority of the Verkhovna Rada of Ukraine prior to the expiration of the term, if within one month the Verkhovna Rada of Ukraine fails to form permanently acting parliamentary majority or in the event that within three months it fails to approve the State Budget of Ukraine elaborated and submitted by the Cabinet of Ministers of Ukraine pursuant to the established procedure."

and to make a corresponding technical amendment to Art. 106 of the Constitution.

19. Currently the Verkhovna Rada may only be dissolved if within thirty days of a single regular session the plenary meetings fail to commence. This is very restrictive and increased possibilities of dissolution cannot be rejected from the outset.

20. As regards the first proposed new ground for dissolution, that is the failure to form a permanently acting parliamentary majority within one month, the intention behind the proposal, i.e. to force the Deputies to be consistent and to contribute to stable government is understandable and even welcome. The inability of the Verkhovna Rada to form a clear majority has certainly had negative consequences for Ukraine and contributed to the low pace of reforms in Ukraine. The wording of the proposal seems, however, seriously flawed.

21. As regards the timeframe of one month, it is in no way defined when this period is supposed to start. The most plausible interpretation would seem to be within one month of the elections or of the first meeting of the newly elected Verkhovna Rada. Dissolution at this moment, however, risks reproducing the same composition of the Verkhovna Rada and in any case it seems impossible to determine at this early stage whether there is a "permanently acting parliamentary majority". Another possible but extremely far-fetched interpretation would be to establish a link with the preceding section and to let the thirty days start at the beginning of each regular session (the Verkhovna Rada under Art. 83 of the Constitution has two regular sessions per year). It seems, however, contradictory to speak of the "forming" of a "permanently acting" majority twice a year and the rationale behind the link between regular sessions and forming of a majority is not very obvious. Either way, this provision is unclear.

22. The other element, the forming of a "permanently acting majority" is not much clearer. This notion is defined nowhere. The alternative draft submitted by the 152 Deputies tried to define it by providing for a kind of "corporation" of the majority within the Verkhovna Rada. The latter approach risks entering into conflict with the free mandate of Deputies. It also seems impossible for there to be a legal requirement for such a stable or permanent majority to exist since no member of parliament or party can be prevented from leaving the majority in case of disagreements. To be meaningful, the notion of majority has to be linked to a specific event. Under the Ukrainian Constitution there seem to be two moments of particular significance for the forming of a majority: the consent by the Verkhovna Rada (Art. 87 no. 12) to the person of the Prime Minister and the approval of his or her programme (Art. 87 no. 11). Instead of introducing a vague concept of permanent majority it would be better to link the possibility of dissolution to the repeated refusal of the Verkhovna Rada to consent to the nomination of the Prime Minister (proposed by the President) or to failure to approve his or her programme.

23. Moreover a systematic aspect should not be overlooked. Under the Ukrainian Constitution the President is free to present any candidate for Prime Minister without any

requirement to appoint a candidate acceptable to the majority, and the Cabinet of Ministers is responsible first of all to the President and only in the second place controlled by and accountable to the Verkhovna Rada. This does not encourage the forming of a stable majority around the government. If one wishes to establish a clear majority within the Verkhovna Rada, one should logically also give this majority a decisive say in the appointment of the Prime Minister (as is done in the draft of the 152 Deputies).

24. As regards the second ground for dissolution, the failure to adopt the budget within three months, this seems clearly defined and the purpose of the rule is understandable. There is no objection of principle against this rule, although in a situation already characterised by a strong executive and fairly weak parliamentary power it tends to further strengthen the executive.

25. To sum up on this point, the Commission is of the opinion that the first ground for dissolution has to be defined more clearly. Otherwise the freedom of decision of the Verkhovna Rada will be impaired, as parliament will be under a threat of dissolution under conditions not clearly defined by the Constitution.

IV. The draft presented by 152 Deputies

26. As pointed out above, the draft of the Deputies has been blocked by the Constitutional Court with respect to the parts which differed from the presidential draft and has therefore lost its practical relevance. The Commission will therefore limit itself to a summary consideration of its proposals, in so far as these differ from the presidential proposals, and concentrate on the question of the second chamber with respect to which the President has not submitted a proposal but set up a Commission with the task of preparing a concrete proposal.

Proposal to limit parliamentary immunity

27. The deputies suggest replacing the requirement of consent by the Verkhovna Rada for arrest or prosecution of Deputies by the requirement of approval by the Supreme Court. The Constitutional Court declared this provision unconstitutional, in particular since the consent by the Supreme Court could be interpreted by the lower courts as prejudging the guilt of the Deputy concerned. The Commission shares the misgivings of the Constitutional Court and prefers the solution outlined above in paragraph 17.

Proposal for a second chamber

28. In its opinion of 31 March 2000 the Commission criticised the referendum question regarding the creation of a second chamber since it was far too vague to enable Ukrainian citizens to make an informed judgement. The referendum question contained no information as to the powers and composition of the second chamber, apart from a mention that it is supposed to represent the interests of the regions. It is therefore impossible to know what were the popular intentions when approving the question and a wide variety of solutions can be envisaged.

29. One other aspect was emphasised by the Commission at the time: the setting up of a second chamber risks being in contradiction with the reasons given for the referendum. The referendum was justified by the need to speed up and facilitate the legislative process, whereas the existence of a second chamber necessarily slows it down. This is a circumstance which will have to be born in mind in the design of any proposal for a second chamber.

30. As regards the content of the proposal of the 152 Deputies, the Constitutional Court of Ukraine discovered some technical flaws in it from the point of view of Ukrainian law. From the point of view of international standards, the proposal does not raise serious issues. A main concern linked to the establishment of a second chamber in Ukraine would be that this may lead to a further weakening of the role of a – then divided – parliament in a system already characterised by strong executive, in particular presidential, power. The authors of the proposal have sought to counterbalance this risk. They have given to the new Senate not only powers previously reserved to the Verkhovna Rada but also required its consent for many presidential appointments and have replaced the presidential veto on legislation by the requirement of approval by the Senate.

Transitional provisions

31. At the end of their draft the Deputies suggest amendments to Transitional Provisions 9 and 13 of the Constitution to the effect that the constitutional rules on the reform of the procuracy and on arrest and detention should enter into force on 1 January 2001. While this can scarcely be regarded as implementation of the referendum, there is now, more than four years after the adoption of the Constitution, a paramount need to implement these provisions of essential importance for the protection of human rights. The Commission therefore appeals to Ukraine to take the necessary steps rapidly.

V. Conclusion

32. In conclusion, the Commission

- notes with satisfaction the commitment by the President of Ukraine to stick to established constitutional procedures for amending the Constitution and not to dissolve the Verkhovna Rada if the latter refuses to consent to the constitutional amendments;

- underlines the need for new rules on referendums in Ukraine;

- notes that following the decision of the Constitutional Court the draft submitted by 152 Deputies is no longer practically relevant;

- notes that the proposal of the Deputies for a Senate as a future second chamber is one possible interpretation of the results of the referendum;

- notes that the President will submit his proposals for a second chamber at a later stage following the work of the Commission established by him;

- considers that the draft presented by the President of Ukraine should be amended in two respects:

  a) members of parliament have to be protected against arbitrary arrest or detention by a rule in the Constitution requiring consent of the Verkhovna Rada for the arrest or detention of Deputies;

  b) the unclear proposed ground of dissolution "if within one month the Verkhovna Rada fails to form permanently acting parliamentary majority" has to be redrafted.