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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE

by

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1. In his decree submitting to nationwide discussion the Draft Law of Ukraine "On Amendments to the Constitution of Ukraine", the President of Ukraine described the law as dealing with

> "*…the issues of redistribution of constitutional powers between the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine, transition from the Presidential-Parliamentary to Parliamentary-Presidential form of governing…"*

2. The aim of the proposed changes is that of improving the Ukrainian system of government in a changing political environment. The Draft Law deals only with institutional issues. The most important amendments to the Constitution that are proposed in the Draft Law set out in the succeeding paragraphs.

3. **Bicameral parliament**
The Draft Law would replace the unicameral parliament/legislature, the Verkhovna Rada, with a bicameral parliament. (New Art. 75) The two new chambers would be a) a 300-seat **National Assembly** with all People's Deputies in it elected on a proportional basis from party lists and b) a **Chamber of Regions** with three representatives from each of the 24 regions of Ukraine and three each from the cities of Kiev and Sevastopol and from the Autonomous Republic of Crimea. Together, the two chambers would make up a third organ, the Verkhovna Rada with its own specific functions.

4. The division of responsibilities between the three chambers is set out in the Draft Law at Article 85. Broadly speaking, some of the most significant matters are conferred on the Verkhovna Rada as comprised of both chambers for example, introducing amendments to the Constitution, determining the principles of domestic and foreign policy, approving the law on the State Budget, declaring war and concluding peace and impeaching the President.

5. The National Assembly generally adopts laws and is the primary law-making chamber, approves certain national programmes and appoints the Prime Minister and most members of the Cabinet. It also may consider the issue of the responsibility of the Cabinet and adopt a resolution of no confidence in the Cabinet.

6. The Chamber of Regions, amongst other functions, approves laws adopted by the National Assembly, approves decisions of the President in relation to the use of the armed forces, controls the implementation of the State budget, appoints certain chairpersons and members of important committees and state organisations, elects one half of the Constitutional Court and other judges and establishes and abolishes districts.

7. The nature and make up of the legislature is a matter of constitutional choice and can take many forms and is tailored to the requirements of individual states and their circumstances. The Draft Law is expressed to have the aim of "transition from the Presidential-Parliamentary to Parliamentary-Presidential form of governing". In this context, it is unclear how the introduction of this particular bi-cameral arrangement will advance the desired transition. The purpose of having two chambers must be to provide an appropriate internal balance of powers which ensures the quality of legislation. In this regard, could the division of responsibilities and the requirement that the Chamber of

Regions approve the laws passed by the National Assembly, in a state where political fragmentation is a serious impediment to the effective working of government, add to the problem by creating an additional legislative layer? The possibility is also created by the Draft law (Articles 82 and 85) of any matter within the competence of either chamber being submitted to the Verkhovna Rada sitting as a joint chamber. How or when this should happen is not detailed. It would be important to ensure that significant changes, such as the creation of a bicameral legislature, would indeed have the effect of bringing about the transition towards a more parliamentary system. In the context of a national discussion of the proposals for change, there is a need that significant proposals have a clearly explained and readily understood purpose.

8. **Appointment of Prime Minister and Cabinet**
The current Constitution (Articles 106 and 114) provides for the appointment and termination of the appointment of the Prime Minister by the President with the consent of more than one half of the Vehkhovna Rada and provides for the appointment by the President of members of the Cabinet of Ministers on the submission of the Prime Minister.

9. The Draft Law changes this constitutional arrangement to one where "the Prime Minister is appointed by the National Assembly on submission of the President…" (new Articles 106 and 114) and the candidate for the position of Prime Minister is submitted to the National Assembly "by the President…on the proposal of the permanent parliamentary majority…" Subject to comment at paragraph 12 below, these changes would promote the move towards a more parliamentary system.

10. The new provisions provide that most Cabinet Ministers are appointed by the National Assembly. However, four key ministers continue to be appointed by the President, namely the Ministers of Internal Affairs, Emergency Situations including the consequences of Chernobyl, Foreign affairs and Defence. Under the Draft Law the President would also retain the power of appointment of other important positions, namely the Heads of the State Tax Administration, the Customs Service, the Security Service, the Committee of the protection of the State Border and the Heads of Local State Administrations. Under the Draft Law the President retains the right of legislative initiative and his proposals are "not postponable" and are "considered out of turn by the Verkhovna Rada". The People's Deputies, the Cabinet and the Supreme Court (see below paragraph 18) would also have the right of legislative initiative in the Verkhovna Rada". The Draft Law does not therefore go as far as it might in moving towards a parliamentary system of government and it is not clear why this should be so. It leaves the President with considerable powers despite the nominally parliamentary system proposed. There is a danger that maintaining a part presidential, part parliamentary system in this way may not lead to a clear and uncomplicated system with well defined roles.

11. **Loss of People's Deputy's mandate for leaving parliamentary bloc**
In its opinion CDL-INF (2001) 11, the Venice Commission was of the view that linking "the mandate of a national deputy to membership of a parliamentary faction or bloc *infringes the independence of the deputies and might also be unconstitutional*...bearing in mind that Members of Parliament are supposed to represent the *people* and not their parties." The oath to be taken by Deputies contained in Article 79 expresses this clearly. The proposal in article 81(6) of the Draft Law makes a similar proposal and a People's Deputy's mandate would be terminated on his or her leaving or being expelled from the parliamentary faction from which he or she was elected. The Venice Commission Opinion

of 2001 is correct also for this proposal in the Draft Law. The Venice Commission described it as "a very dangerous amendment." It would "put the parliamentary bloc or group in some ways above the electorate which…is unable to revoke individually a parliamentary mandate conferred through election…" Whilst the idea for having this provision in the Draft Law is, no doubt, to promote stability and the effectiveness of the governing party or bloc in circumstances where fragmentation of parliamentary blocs is a problem, it would also have the effect of weakening parliament itself by interfering with the free and independent mandate of the deputies who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament.

12. **Permanent Parliamentary Majority and dissolution of National Assembly**
Article 83 of the Draft Law is an new concept. Failure of the National Assembly to form a permanent parliamentary majority "on the basis of concordance and unification of political positions" within a month of the first meeting of the chambers or within one month of termination of a previous permanent parliamentary majority may result in dissolution of the National Assembly. It would appear that only the National Assembly is dissolved; there is no provision in this context for dissolution of the Chamber of Regions. There is no definition of the permanent parliamentary majority in the Draft Law or how it is to operate and its effects are not detailed. The central idea would appear to be to oblige parliament to form a majority and a government as a basis for stability. However, it can be observed at this stage that it would be important that it be understood how such an innovation would operate and its likelihood of remedying the problems caused by fragmentation of political parties and blocs in the parliament.

13. Under the current Constitution the President may only terminate the Verkhovna Rada where it fails to commence plenary sessions within 30 days. Under the Draft Law, the President will have the additional power to terminate the new National Assembly (Article 90) in circumstances where the "permanent parliamentary majority" is not formed within one month of formation of the National Assembly. It is not clear from the translated text whether the President has the right to exercise a discretion in these matters or whether he is obliged to terminate when the circumstances set out arise.

14. The criticisms contained in the opinion of the Venice Commission CDL-INF (2001) 11 and outlined in paragraph 11 can equally be applied to the requirement for the formation of a permanent parliamentary majority i.e. that the requirement for an elected representative to adhere to a particular parliamentary party or bloc to avoid losing his or her mandate "infringes the independence of the deputies".

15. **All-Ukranian Referendum**
The Draft Law proposes amendments to Article 74 in relation to an "All-Ukranian Referendum" called on the popular initiative of a certain number of citizens. It would seem according to Article 71, paragraph 1 that all laws "except the laws on taxes, budget and amnesty can be adopted by an All-Ukranian referendum". However, the procedure set out in Chapter XIII of the Constitution, whereby amendments to Chapters I, III and XIII are first submitted to and adopted by the Verkhovna Rada, continues to apply. The new Article 74 provides that

"*Laws and other decisions adopted by an All-Ukranian referendum have the highest legal force and do not require approval by the bodies of state power or officials*."

Thus, as a change from the rules under the current Constitution, the new Article 74 would permit the adoption of "laws and other decisions" including certain constitutional amendments by referendum without such measures requiring any parliamentary authority or input.

16. It its Opinion on the Draft Constitution of Ukraine CDL-INF 1996 006e, the Venice Commission stated

"*The so-called popular or people's initiative creates many problems both from a practical and theoretical point of view. 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. The possible subject matters of a people's initiative should therefore be clearly defined excluding the possibility of constitutional amendments.*
A more restrictive alternative version of popular initiative would be to provide for the possibility of submitting draft bills to the National Assembly which would be obliged to discuss these bills and decide on them. A popular initiative according to this model opens up to citizens the possibility to participate in the legislative process while leaving the final word to the legislature."

This opinion has equal application to the Draft Law's proposal for a directly effective system of referendum which by-passes parliament entirely. Such a proposal would have the effect of reducing the power and effectiveness of Parliament which would be particularly undesirable in the stated context of strengthening parliament's powers vis à vis the President.

17. **Judges' terms of office**
The proposed changes in the Draft Law to have judges appointed for a period of 10 years (Article 126) rather than permanently with the possibility of re-election is undesirable. It has the possibility to interfere with the independence and impartiality of judges which is specially provided for. The same criticism can be made of the proposal under the Draft Law (Article 148) that the judges of the Constitutional court would be able to be appointed for a second term of 9 years rather than for a single 9 year term under the current constitution.

18. **Right of Legislative Initiative of the Supreme Court**
Whilst the constitution expressly provides for the division of state power into legislative, executive and judicial branches (Article 6), the Draft Law proposes to give a new right of legislative initiative to the Supreme Court. This proposal would neither be consistent with the separation of powers already provided for nor be desirable in itself for a court to have such a power. It would so amount to a reduction in the legislative function of parliament.