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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON

THE DRAFT LAW ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE

on the basis of comments by

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Introduction

1. In its letter dated 8 April 2003, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe asked the Venice Commission to give an opinion on the Draft Law "On Amendments to the Constitution of Ukraine" (hereinafter referred to as "Draft Law") (CDL (2003) 32).

2. On 6 March 2003, the President of Ukraine, Mr. L. Kuchma, submitted the Draft Law in question to the Verkhovna Rada (Parliament) as well as for a nation-wide public debate, which was scheduled to be completed on 15 May 2003.

3. The Venice Commission invited Ms F. Flanagan, and Messrs S. Bartole, G. Batliner and K. Tuori to act as rapporteurs on this issue.

4. On 14 May, Mr. Zadorozhniy, the Permanent Representative of the President of Ukraine in the Verkhovna Rada informed the Venice Commission that the Draft Law was to be revised taking into account the proposals and opinions expressed during the nation-wide debate, and in particular the results of the meeting of the President of Ukraine, the leaders of the Verkhovna Rada and the Cabinet of Ministers, as well as the leaders of the main political parties, which was planned for the beginning of June 2003. An ad hoc commission headed by the Ukrainian Minister of Justice would then prepare a final draft text to be submitted to the Verkhovna Rada.

5. As the new proposal for constitutional amendments to be submitted to the Verkhovna Rada had not been available before the start of the Venice Commission's June session, the present opinion, based on the comments by the rapporteurs (CDL (2003) 35, 34, 33 and 31, respectively) concerns the Draft Law as it was prepared by the President of the Ukraine, and submitted to the nation-wide public debate on 6 March 2003.

I General remarks

6. Three years after the controversial All-Ukrainian constitutional referendum took place (on 16 April 2000), the new Draft Law proposes numerous amendments to the text of the 1996 Constitution currently in force, aimed at the redistribution of powers between the three main constitutional organs: the President, the Verkhovna Rada, and the Government, with a view to ensure transition towards a more parliamentary form of governing.

7. The choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts.

8. The Commission will examine the main amendments proposed in the Draft Law, which concern the transformation of the Verkhovna Rada into a bi-cameral body, the All-Ukrainian referendum, the relations between the President, the Verkhovna Rada and the Cabinet, the procedure for the formation of the Cabinet, and the provisions on the judiciary.

II All-Ukrainian referendum

9. The Draft Law proposes amendments to Article 74 in relation to an "All-Ukrainian Referendum" called on the popular initiative of a certain number of citizens. According to the new provision, all laws "except the laws on taxes, budget and amnesty" thus also including laws on constitutional amendments, "can be adopted by an All-Ukrainian referendum". In this context, the Commission welcomes the provision stating that "the procedure set out in Chapter XIII of the Constitution, whereby amendments to its Chapters I, III and XIII are first submitted to and adopted by the Verkhovna Rada", continues to apply.

10. Apart from the procedural, institutional and temporal guarantees, Chapter XIII also contains important substantive limits (Article 157.1). In order to ensure that these are also respected, the Commission would favour explicitly including in the proposed text, that the adoption of the amendments is to be done "in order *and in compliance with the substantive requirements* provided for by Chapter XIII".

11. The Commission observes that constitutional amendments to all other chapters of the Constitution (except those mentioned under point 9 *supra*) may be adopted by the referendum, without participation of the Verkhovna Rada. This also means that a single majority in a referendum would replace the requirement of a qualified majority necessary for the adoption of a constitutional amendment, provided by Article 155 of the current Constitution.

12. In accordance with new Article 74, laws and other decisions adopted by an All-Ukrainian referendum shall "*have the highest legal force and do not require approval by the bodies of state power or officials*." Contrary to the rules under the current Constitution, the new Article 74 would therefore permit the adoption of "laws and other decisions" including certain constitutional amendments by referendum, without such measures requiring any parliamentary authority or input. The issue of the subject matters and the scope of "other decisions" to be adopted by referendum are left open.

13. The effect of the proposed change would be that the Verkhovna Rada would not be the "*sole body of legislative power in Ukraine*" (new Article 75). Furthermore, the text formulated through the popular initiative and submitted to the referendum would presumably be the final one. It could not be subsequently modified by any authority, not even by the people. Indeed, the people vote by affirmative (yes) or by negative (no).

14. Such a proposal does not conform with the Venice Commission Guidelines for Constitutional Referendums[1] which provide for an obligatory role of Parliament each time a popular initiative or extraordinary referendum is held. Indeed, already in it its Opinion on the Draft Constitution of Ukraine[2] the Commission stated that "*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.*

[1] Doc. CDL (2001) 10, para. N, p.6.

[2] Doc. CDL-INF (1996) 006, p. 8.

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."

15.The Commission observes that the proposal for a directly effective system of referendum, which by-passes parliament entirely, would have the effect of reducing the power and effectiveness of Verkhovna Rada, which would be particularly undesirable in the stated context of strengthening parliament's powers vis à vis the President.

III Bi-cameral parliament

16. One of the proposed amendments to the Constitution of Ukraine is the substitution of existing unicameral parliament for a bicameral one (new Article 75). The two new chambers would be a) a National Assembly where the number of People's Deputies in it would be reduced to 300 (at present 450 members), elected on the proportional basis, 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.

17. The nature and make up of the legislature is a matter of constitutional choice, can take many forms and is tailored to the requirements of individual states and their circumstances[3]. Nevertheless, although there are no established European standards on the choice between mono- and bi-cameral parliaments, in practice the latter system has been mainly adopted by states with a federal or, at least, a regional structure.[4] Ukraine is a unitary state, except for the Autonomous Republic of Crimea (Chapter X of the Constitution). In addition, the Cities of Kiev and Sevastopol have a special status, determined by laws (Article 133). In contrast, the *oblasts* are administrative entities with no autonomous status.

18. Although the proposed reform aims at resolving political difficulties, it does not seem feasible in a unitary state like Ukraine, and it proposes solutions that are not very convincing.

- *The elections of the chambers*

19. In the Commission's view, decreasing the number of deputies of the National Assembly is to be welcomed in order to enhance the efficacy of the Verkhovna Rada. The reform of the electoral system, proportional basis from the party lists established by new Article 76 would in turn reduce its complexity. However, fragmentation has constituted one of the problems in the Ukrainian political system, and a proportional electoral system might not be the best remedy to that problem. If the intention is to introduce a threshold of votes required for entry in the Verkhovna Rada – as would be advisable in a proportional system - the basic provision on it should be included in the Constitution.

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[3] Doc. CDL-INF (2000) 11, par. 44.

[4] The term "regional structure" is used here in the sense of "regional state".

20. The Draft Law gives no provisions on the election of the members of the Chamber of Regions. Thus, their appointment by the executive bodies of the regions (*oblasts*), without any intervention of the parties in the minority in any given oblast council, may not be excluded.

21. In this regard, the Commission notes that the constitutional provisions on local self-government are rather scarce (Articles 140 to 143). In accordance with Article 141, the respective council elects the chairman of an oblast council. However, Article 140 does not require the direct election of an oblast council itself, inasmuch it states that oblast councils are bodies of local self-government that represent the common interests of territorial communities of villages, settlements and cities.

22. If this were to be the political basis of the Chamber of Regions, the representative authority of the new body would not be comparable to the authority of the National Assembly. The proposed change risks modifying the balance of power in the Republic of Ukraine's government, giving the advantage to the President and the Cabinet of Ministers.

- *Competences (division of responsibilities) of the chambers*

23. Under the proposed Article 85, 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.

24. The National Assembly would generally be competent for adopting laws and would be the primary law-making chamber, but it would also enjoy some new powers such as nominations (the Prime Minister and most members of the Cabinet), and dissolution of the government (new Article 85.4). The Chamber of Regions, amongst other functions, would be empowered to approve laws adopted by the National Assembly, control implementation of the State budget, and appoint certain chairpersons and members of important state institutions and organisations.

25. The Draft Law, (Article 85.2), also creates the possibility of any matter within the competence of either chamber to be submitted to the Verkhovna Rada sitting as a joint chamber. However, who has the authority to demand for the submission of an issue to the Verkhovna Rada, or when this should happen is not detailed.

26. The Commission regrets that, notwithstanding the pro-parliamentary choice of the draft which should emphasize the powers of the directly elected chamber, the National Assembly will no longer have any say in the appointments of constitutional judges, the Human Rights Representative, the Chairman and Board of the National Bank, the National Council on Television and Radio Broadcasting, and the Central Electoral Commission. These functions now being transferred to the Chamber of Regions as well as those of electing judges for permanent term, granting consent for the appointment of the general Prosecutor and withdrawing confidence in him.

27. The proposed modifications risk affecting not only the relations between the superior bodies of the State, but also the internal functioning of the concerned organs and institutions.

28. In any case, 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, significant proposals must have a clearly explained and readily understood purpose.

IV People's Deputies mandate

29. In accordance with the proposed amendments, a 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 (Article 81.2 al. 6). 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 the Verkhovna Rada 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.

30. The proposed procedure would also give the parties the power to annul electoral results. In this regard, the Commission recalls its opinion on the Ukraine constitutional reform project of 2001[5], in which it stressed 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. Furthermore, such a rule 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"[6].

31. The Commission therefore strongly recommends that the proposed provision be withdrawn from the Draft Law.

32. In addition, according to new Article 81, paragraph 2, al. 7, a deputy would lose his or her mandate on the basis of being absent from the Verkhovna Rada's meetings for 20 days without a valid reasons. In the Commission's view, such a sanction seems exceedingly severe, especially in the absence of any preceding lesser sanctions.

V Permanent parliamentary majority

33. According to the proposed Article 83, the 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 the dissolution of the National Assembly. The provisions on the dissolution of the National Assembly do not clearly establish whether the President has the right to exercise discretion in these matters or whether he is obliged to terminate when the above-described circumstances arise. In addition, it would appear that only the National Assembly is dissolved; there is no provision, in this context, for dissolution of the Chamber of Regions.

34. The Commission also notes the absence of a definition of the permanent parliamentary majority in the Draft Law, and of a clear determination of its role in the functioning of the

[5] Doc. CDL-INF (2001) 11, p.2.

[6] *Ibidem*, p. 3.

Verkhovna Rada. According to Article 114.3, this majority would propose a candidate for Prime Minister to the President. If its functions are limited to the formation of the Cabinet, the need for specific provisions on the formation of the permanent majority is in doubt. In any case, if the proposal is to be adopted, the role and functioning of the "permanent parliamentary majority" should be regulated in the Constitution itself, and not be left to a statute of lower rank.

35. One can assume that the central idea behind these provisions is to oblige Verkhovna Rada to form a majority and a government as a basis for stability. In this respect, the Commission recalls that the Constitution of Ukraine guarantees to the political parties the freedom of choice and decision in conformity with European standards. Indeed, the Commission has already expressed its criticism towards the idea of the obligation to form a permanent parliamentary majority in its opinion on the Ukraine constitutional reform project of 2001, in which it underlined that "*cementing of parliamentary adhesion and loyalties of a majority group or bloc, however important they may be for politics, conflicts with the rule that the will of parliament is formed by deputies who in each specific case vote according to their convictions*" *Therefore, the obligation to form a permanent parliamentary majority raises the problem as to the deputies "status of freedom and independence*"[7].

VI The Relations between the President, the Cabinet and the Verkhovna Rada

36. According to the present Constitution, the President appoints the Prime Minister with the approval of the Verkhovna Rada. According to the proposed amendments, the National Assembly "on submission of the President" would appoint the Prime Minister (new Articles 106 and 114) on the proposal of the permanent parliamentary majority…" Subject to comments at paragraphs 33 – 35 *supra*, these changes would promote the move towards a more parliamentary system.

37. The Draft Law requires the forming and organising of the parliamentary majority prior to the election of the Prime Minister; in order to ensure the rapid functioning of the new government, the draft could provide for the formation of the majority at the same time of the election of the Premier.

38. Regarding other Cabinet ministers, they would be appointed by the Verkhovna Rada on the proposal of the Prime Minister. However, four key ministers would 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 proposed amendments, the President would also retain the power of appointment of other important positions such as the Heads of the State Tax Administration, Customs Service, Security Service, Committee of the protection of the State Border and Heads of Local State Administrations.

39. In this regard, the Commission notes that these four Ministers appointed by the President should not be removed from the office individually, but only through vote of confidence regarding the whole Cabinet. If this were not the case, their constitutional status would be different from that of the other Ministers.

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[7] *Ibidem*, p. 3-4.

40. The nomination procedure and differences in status for such an important political organ as is the Cabinet of Ministers, raises concerns with regard to the necessary cohesion of the Cabinet, and risks reducing the authority of the Prime Minister.

41. The rigidity of the relations between the Verkhovna Rada, the Cabinet and the President will also be increased by the provision requiring the determination through law of the principles of domestic and foreign policy (Article 85.2), which can become mandatory even for the individual subjects while they should be aimed at binding the Cabinet and the Verkhovna Rada only while giving to the first the necessary freedom and flexibility in implementing the will of the second.

- *Vote of no-confidence in the Cabinet*

42. In accordance with new Article 113 of the Draft Law, the Cabinet is "responsible" not only before the Verkhovna Rada but also before the President. Indeed, the new Article 87 would empower the President to initiate a procedure of no confidence in the National Assembly.

43. The Commission wishes to stress that such a provision would be quite exceptional in international comparison. It would also further complicate the relations between the main constitutional organs, and make the President such a player in the political power game unbefitting the role of the Head of State in a mainly parliamentary regime.

44. The Commission would therefore strongly recommend deleting from the proposed amendments a provision empowering the President to initiate the procedure of no confidence in the Cabinet.

45. The Commission also regrets that Article 106.3 empowering the President "on the basis and for the execution of the Constitution and the laws of Ukraine, to issue decrees and directives that are mandatory for execution on the territory of Ukraine" was retained without clarifying whether it adds some new powers to the presidential functions as listed in Article 106, or only states a general rule about the presidential acts, adopted within the exercise of those presidential functions.

- *Other prerogatives of the President*

46. The proposed amendments would also allow the President to interfere with the functioning of the Verkhovna Rada without the cooperation of the Cabinet in many other ways unusual in a parliamentary system of government: For instance, he/she would retain the right of requesting special sessions of the Verkhovna Rada (Article 82). The President would also have the right of legislative initiative (new Article 93.1), which would be not parallel but actually superior to that of the Cabinet as presidential proposals are "not postponable" and are considered "out of turn" by the Verkhovna Rada (Article 93.2).

47 As such provisions on legislative initiative of the President would constitute a possible cause for political conflicts, the Commission would favour their deletion from the Draft Law.

48. The Draft Law also seem to enhance the President's suspensive veto power with regard to laws passed by the Verkhovna Rada. The President would have the power not only to send back laws to the Verkhovna Rada for re-consideration but even propose "substantiated" and "formulated" changes to them. Such veto power, including a power to amend laws passed by the Verkhovna Rada, can only be overcome by a two-third majority in both of the Chambers. Such a

transferral of the Verkhovna Rada's legislative power cannot be recommended even in a presidential system.

49. *In fine*, while it may be considered that the President's power to dissolve the National Assembly in a situation where a Cabinet supported by a parliamentary majority cannot be formed is an appropriate use of the institution of dissolution, it also begs the question as to whether difficulties in the approval of the State Budget might constitute a political crisis grave enough to justify the dissolution of the Parliament.

VII Election of judges

50. In accordance with the proposed amendments, judges would be elected by the Chamber of Regions for a period of 10 years (Article 128) rather than permanently. As the re-election is not explicitly excluded, it may be assumed that judges could be re-elected. The Commission is highly concerned with such a proposal, and recalls that the time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges.

51. With regard to the procedure of appointment, the Commission regrets that the Draft Law does not clarify whether the new Chamber of Regions shall be bound by the proposals on the appointment of judges submitted by the High Council of Justice (Article 131.1).

52. Regarding the appointment of the judges of the Constitutional court, under new Article 148.4, they could be appointed for a second term of 9 years (rather than for a single 9 year term under the current Constitution). In the Commission's view, such a proposal is a step backward. The risk of the possible politicising of this important judicial body is further reinforced by the proposal to withdraw the right to nominate one third of the constitutional judges from the High Council of Judges. According to the proposed amendments, one half of judges would be appointed by the President and one half by the Chamber of Regions (new Article 148. 2 and 4).

VIII Right of Legislative Initiative of the Supreme Court

53. Whilst the 1996 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 not be consistent with the principle of separation of powers, and could amount to a reduction in the legislative function of Verkhovna Rada. The Commission considers that the Supreme Court should not be directly involved in the legislative process as this risks politicising the institution of the Supreme Court, and thus endangering its independence.

CONCLUSION

54. The proposed amendments represent an attempt at resolving difficulties Ukraine has experienced in establishing a well-functioning political system by establishing a more parliamentary system of government. A number of proposed amendments do provide some additional powers to Verkhovna Rada and can be considered welcome steps in advancing such process. However, several others such as those concerning All-Ukrainian referendum, replacing the unicameral parliament by a bicameral one, obligation to form a permanent parliamentary majority, the status of the deputies, the election of judges, and in particular, retaining

considerable powers of President risk distorting the balance of powers between the main constitutional organs.

55. The Commission observes that the Draft Law does not therefore go as far as it might in pursuing its objective. Maintaining a part-presidential, part-parliamentary system in the way proposed risks not leading to a clear and uncomplicated system with well-defined roles, but keeping the leadership of the President in the relations between the superior bodies of the State.

56. However, the Venice Commission is aware of the preliminary nature of the Draft Law under consideration, and is confident that the *ad hoc* commission headed by the Ukrainian Minister of Justice will come with new proposals that might make most of the above-mentioned criticisms no longer relevant.

57. The Venice Commission remains at the disposal of the Ukrainian authorities for further co-operation in the field of this Draft Law.