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COMMENTS

ON THE THREE DRAFT LAWS PROPOSING AMENDMENTS TO THE CONSTITUTION OF UKRAINE

by

Mr Sergio BARTOLE (Substitute Member, Italy)

OPINION ON DRAFTS LAWS ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE

By prof. Sergio Bartole, University of Trieste.

Three draft laws introducing amendments to the Constitution of Ukraine (CDL (2003) 86) have been submitted to the Venice Commission and all of them deal with many aspects of the constitutional organisation of the Republic of Ukraine (Draft Laws no. 3207-1 of 1 July 2003 (CDL (2003) 79), 4105 of 4 September 2003 (CDL (2003) 80) and 4180 of 19 September 2003 (CDL (2003) 81). They partially cover the relations between the superior bodies of the State, but also the internal rules of the Parliament and the constitutional position of the judges and of the members of the Constitutional Court. According to the opinion expressed in the Explanatory note appended to two of the drafts they don't require the approval by a national referendum because they are not aimed at amending provisions dealing with human and citizens' rights and freedoms: in this case Article 156 part 1 of the Ukrainian Constitution would not be in control of the revision of the Constitution. It shall apply in the case of the approval of the third as far as this draft touches the right to freedom and personal inviolability and the right to legal assistance. We'll come back to this point at the end of the paper.

All the drafts are enlarging the powers of the Parliament and revising the powers of the President: as a matter of fact their purpose is distancing Ukraine from the presidential government and approaching the model of parliamentary government. But this choice is perceived as a possible danger for the stability and continuity of the executive branch of the Republic, and therefore all the drafts introduce arrangements which should rationalize the relations between the executive and the legislative powers. On the other side, new provisions are proposed in the matter of the organization of the judiciary which deserve to be studied not only in the light of the principles of free and democratic government, but also from the point of view of the reforms which should be adopted: the independence of the judiciary could be a balancing factor of the possible amendment of the powers of the other branches of the State.

The proposals concerning the form of government of the Republic and the relations between the supreme bodies of the State mainly deserve approval, and I share the opinion expressed on these points by my distinguished colleague, Professor K. Tuori. But I would distinguish my position from the opinion he expressed with regard to the proposal of draft no. 3207 - 1 about the appointment of the Prime Minister: the procedure could seem quite complicated, but certainly it has more flexibility than the solution elaborated on this point by the other two drafts in connection with the formation of a majority coalition. It opens the way to the appointment of a prime Minister who is not the leader of the first political party. The political history of the Western democracies knows very well this kind of arrangement.

a) One of the main rationalizing factors in drafts no. 4105 and 4180 is the rule providing for the addition to Article 83 of the Constitution of a rule requiring the formation of "a coalition of deputy factions and deputy groups….to include the majority of People's Deputies of Ukraine from the constitutional composition" of the Parliament. This coalition is entrusted with the task of submitting proposals on the candidature of the Prime Minister and the Cabinet and shall be "responsible for its activity". It has to be formed one month after the first day of the session of the newly elected Assembly or from the day of the dissolution of the previous coalition.

The aim of this proposal is to substitute the legal links founded on the Constitution and the Rules of procedure of the Parliament for the merely political links normally binding a coalition of fractions and groups supporting a Cabinet in the parliamentary governments. It tries to rationalize political activities which take place outside the Parliament in view of their effects on the functioning of the Assembly and on the developments of the relations between the executive and legislative branches of the State. But it is not easy to understand whether the provision of legal links will strengthen the continuity and the unity of the majority in a better way than the political bounds which are today at the basis of the coalition of fractions and members of the Parliament which supports a Cabinet. Reading the text of the proposal one gets the impression that, in the opinion of the framers of the amendment, the continuity and the unity of the coalition should be guaranteed by the revised text of Article 81 of the Constitution, which provides for the termination of the powers of a member of the Parliament "prior the expiration of the term", when he does not join the parliamentary fraction of the political party which submitted and supported his candidature, or withdraws from this faction. The relevant decision has to be taken by the supreme managerial body of the concerned political party.

This provision conflicts with the principle of the free mandate of the elected members of the Parliament, according to which the parliamentary activities and choices of a deputy cannot influence his staying in office because he cannot be bound by instruction or directives of the electorate. Moreover it gives "the supreme managerial body" of the concerned party a power which affects the results of the elections, substituting the discretion and the will of a body, which is not a branch of the State, for the will of the electors without requiring any evidence of the differences between this will and the behaviour of the deputy. Nothing guarantees that the choice of the political party will be coherent with the will of the people, or - at least - of the electors who elected the contested deputy. As a matter of fact the constitutional position of a member of the Parliament will depend on the decisions of an organization which does not coincide with the electorate, but pretends to be representative of a part of the electorate itself.

The same conclusions apply to Article 81 of the draft law no. 3207 - 1, even if this document requires a judicial decision for the dismissal of the deputy who splits off from his parliamentary fraction or fails to join it. It should be avoided entrusting judges with the power of adopting decisions which have political nature and implies the use of political criteria of judgement.

b) All the drafts provide for the election of the judges for a ten years term with the right to be re-elected. This rule could be accepted if the decisions were to be adopted by a neutral body taking into account only the professional skills of the concerned judges and, therefore, complying with technical criteria only. But it is the Parliament which is the State's body entrusted with the task of electing and re-electing the judges, and nothing guarantees the judges against choices politically biased. The proposed amendments certainly conflict with the principles of the free and democratic government and with the ECHR.

c) Two of the drafts (no. 4105 and 4180) propose to change the membership of the Constitutional Court. The choice cannot be approved. First of all it modifies the internal equilibrium of the Court getting rid of the judges elected by the judiciary: therefore all the judges shall be elected by political bodies. Moreover the drafts don't pay any attention to the problem of the relations between the parliamentary majority and opposition. At least it would be advisable providing for the parliamentary election of the constitutional judges by a

qualified, special majority. If such a requirement is missing, there is the danger that all the judges will be elected on the basis of a choice made by the parliamentary majority and by the President who could be its leader. A provision requiring a special, qualified majority would oblige the majority and the minority in the Parliament to find an agreement in the selection of the constitutional judges and would insure a more balanced membership of the Court.

d) The requirement of a special, qualified majority should be introduced also in drafts no. 4105 and 4180 sub Article 85 when the appointment and the dismissal from the office of the Chairpersons of the antimonopoly Committee, of the State Committee for television and radio broadcasting and of the State property Fund are at stake. All these positions are qualified by the neutrality of their functions and wants the independence and impartiality of their holders. Therefore their Chairpersons should be persons who cannot be identified with the majority or with one or another political party. The requirement of the qualified, special majority could guarantee the fairness of their election and of the bodies which will be chaired by them.

e) The same requirement should be provided for in the case of the appointment and the dismissal of the General Procurator whose staying in office cannot be left to the decisions of the majority only. Therefore also the rule concerning the withdrawal of the confidence of the Parliament from the Procurator should be revised to be drafted in line with the previous remark.

f) It could be argued that the amendment of the membership of the Constitutional Court and the proposal of entrusting the General Procurator with the task of the supervision over the compliance with human and citizens' rights and freedoms requires the adoption of the amendments by national referendum according to Article 156, first part. of the Constitution.