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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**

**ON THE PROCEDURE OF AMENDING  
THE CONSTITUTION  
OF UKRAINE**

**by**

**Ms Finola FLANAGAN (Member, Ireland)**

1. On the eve of the Presidential election set for 31 October 2004 and in the context of political deadlock in relation to constitutional reform in its report of 22 June 2004 the Monitoring Committee speaks of “further attempts to push through constitutional reforms ignoring the provisions of the Constitution...” (paragraph 7). In this context the Monitoring Committee seeks “... an opinion of the Venice Commission on the issue whether the procedure of amending the Constitution of Ukraine is in conformity with the Assembly’s resolutions 1346 (2003) and 1364 (2004)...”<sup>1</sup>

2. Three separate proposals to amend the 1996 Constitution contained in Draft Laws numbered 3207-1 dated 1 July 2003, 4105 dated 4 September 2003 and 4180 dated 19 September 2003 were submitted to the Verkhovna Rada in [?]. Drafts 4105 and 4180 were identical with the exception of their final provisions. These two proposals differ only in the dates in which they would come into effect and be implemented. Draft law 3207-1 differs in some of its proposals but many important proposals are similar in effect to those of draft 4105 and 4180.

3. The Venice Commission commented in detail on each of these Draft Laws in an Opinion (CDL (2003)93) dated 8 September 2003. The Opinion, whilst welcoming the efforts to reform the system of Ukraine’s government to bring it closer to European democratic standards, nonetheless was critical of many aspects of each of the Draft Laws. These proposals for constitutional reform have all occurred in the months running up to the presidential election. They all involve a redistribution of the powers of the President, the Verkhovna Rada and the Cabinet. The Parliamentary Assembly and its Monitoring Committee have expressed great concern about the current pre-election environment and the Monitoring Committee has expressed its opinion “that the on-going constitutional reform, which is in principle highly needed, should be postponed until after the presidential election and then be conducted in a democratic and transparent manner, in strict compliance with the existing constitution and taking into account the advice of the Venice Commission.”<sup>2</sup> The Parliamentary Assembly strongly criticised the proposed adoption of constitutional amendments on the eve of presidential elections in its Resolution 1364(2004).

4. All three Draft Laws were submitted to the Constitutional Court pursuant to Article 159 of the Constitution for an opinion on their conformity with Articles 157 and 158. The Constitutional Court delivered its judgments in October 2003. As recited in opinion CDL (2003)93 the Court declared two provisions of Draft law 3027-1 to be contrary to Article 157. Draft Laws 4105 and 4180 were declared constitutional, although the Court expressed some hesitation as to a number of its provisions, thus making these Draft Laws eligible for further consideration by Parliament. So far as I am aware this remains the status of these laws *vis á vis* comment or decision by the Constitutional Court.

5. The facts as understood regarding the progress of the three Draft Laws are set out in some detail in paragraphs 6 -9 in order to ensure that the somewhat complicated progress of the laws is correctly understood. No text of the amended versions of the Draft Laws has been provided – only a ‘Comparative Table’ providing a bare outline of amendments.

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<sup>1</sup> Statement by the Monitoring Committee of the Parliamentary Assembly on the forthcoming presidential elections in Ukraine.

<sup>2</sup> Statement by the Monitoring Committee on 22.06.04

**6. Draft Law 4105**

On 24 December 2003 Draft Law 4105 had its first reading and vote. Apparently this open ballot was conducted by a show of hands and certified by personal signatures by the National Deputies.<sup>3</sup> It received the necessary majority. On 3 February 2004 the Verkhovna Rada amended Draft Law 4105 and withdrew the Draft Law's clause that provided for election of the President of Ukraine by Parliament rather than by the people as is currently provided for in the 1996 Constitution. The proposal that judges be elected for a ten-year term with the possibility of re-election was also withdrawn. However on 8 April 2004 Draft Law 4105 was rejected at its second reading, receiving 294 votes when it required a two thirds majority of at least 300 votes.

**7. Draft Law 3207-1**

On 23 June 2004 the Verkhovna Rada failed to give the necessary approval to proposal 3207-1. On [date ?] it was withdrawn by the President.

**8. Draft Law 4180**

On 23 June 2004 the Verkhovna Rada voted on Draft Law 4180 and approved it by 276 votes on a first reading, exceeding the required majority of 226. This proposal, which had originally been identical to Draft Law 4105 when first introduced, had been amended in a manner similar, but not identical, to the amendments to Draft Law 4105. A new addition to Draft Law 4180 and which did not appear to have been made to Draft Law 4105 was to increase the retirement age of the Constitutional Court's judges by five years to age 70. No reason is given in the Comparative Table as to why this should be done. The version voted on in June was therefore not entirely the same as the version submitted to the Constitutional Court in October 2003 or commented on by the Venice Commission. The same amendments were made to this Draft Law as were made to Draft Law 4105 concerning election of the President by the Verkhovna Rada thus reverting to the original 1996 Constitution's position and concerning the election of judges also reverting to the 1996 Constitution's position. Whilst these changes would go some way towards meeting the criticisms of the Venice Commission, many of other provisions which had been criticised remain.

9. The result of these votes therefore is that the only remaining proposal before the Verkhovna Rada is the revised Draft Law 4180 which is identical in most respects to the Draft Law 4105 and which was defeated in a vote of the Verkhovna Rada a mere 2 ½ months ago.

10. The foregoing will demonstrate the complicated and hurried way in which a variety of constitutional amendments have been proposed, introduced, amended and voted on with each proposal being subjected to process of further amendment in the process. A considerable overlap exists between all three drafts and particularly between Draft Laws 4105 and 4108. The second vote on Draft Law 4180 will take place in September 2004.

11. Chapter XIII of 1996 the Constitution deals exclusively with the process of its amendment, and indicates the high constitutional importance attached to this process. In particular, Article 159 requires the Constitutional Court to express its opinion on whether proposals to amend the Constitution maintain the pre-existing standard of human rights and maintain Ukrainian territorial indivisibility as provided for in Article 157. In addition, the Constitutional Court must express its opinion on whether an amendment conforms with the procedural requirements of Article 158 which provides as follows:

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<sup>3</sup> Ambassade d'Ukraine communiqué de presse \*2 *Chronology of the process of the Constitutional reform in Ukraine as of 3 February 2004*

*“The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law”* (emphasis added).

Therefore an issue clearly arises as to whether it is in conformity with the Constitution for successive and largely similar schemes of amendment to be re-submitted within one year of failing to be adopted by Parliament. It is expressly provided for in Article 159 of the Constitution that this very issue, i.e. compliance with the requirements of Article 158, be considered by the Constitutional Court and an opinion given by the Court on that issue. This issue, which would have arisen when Draft Law 4105 was defeated on 8 April 2004, should therefore be referred to the Constitutional Court for its opinion.

12. In contrast to Article 158, Article 156 provides that “[the] repeat submission of a draft law or introducing amendments to Chapters I, II and XIII of the Constitution on one and the same issue is possible only to the Verkhovna Rada of the next convocation.” None of the three Draft Laws in question here propose amendments to these chapters and Article 158 would not apply to the current proposals to amend. It has been argued<sup>4</sup> that since the words “on one and the same issue” do not appear in Article 158 there is no prohibition on introducing successive proposals, which do not amend chapters I, II and XIII, to amend the same provisions within the same year or within the same convocation. The difference of opinion on the interpretation of Article 159 would seem to be well known and widely debated. The Deputy Chairman of the Constitutional Court has acknowledged two possible approaches – without suggesting an answer<sup>5</sup>.

13. The task of the Constitutional Court of Ukraine is to guarantee the supremacy of the Constitution as the fundamental law of the Ukrainian State. The activities of the Constitutional Court are themselves regulated by the Constitution. It is the only body with constitutional jurisdiction in Ukraine and the only body to decide on the conformity of laws and other legal acts with the Constitution. It is therefore essential that the Constitutional Court rule on this issue as required by Article 158.

14. The general thrust of Chapter XIII of the Constitution on amending the Constitution is to regulate the amendment process closely, and specifically to limit the frequency with which such amendments may be introduced. It would be inconsistent with the spirit and clear general intention of this Chapter if the same amendments could be proposed without any limits as to time simply by including them in different proposals with different registration numbers. This would permit, as has in fact happened, a repeated introduction of the same or similar amendments. This could continue until such time as some version is passed by Parliament. There is a clear value in requiring a certain reasonable lapse of time before the re-introduction of the same or similar amendments – it allows adequate time for debate, both public and parliamentary, on and assessment of a proposal and a useful cooling-off period especially during times of political turmoil such as the present. It also allows for stability for the existing constitution to operate and limits constant political interference with and manipulation of the

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<sup>4</sup> Information note on the co-rapporteurs’ visit to Ukraine (27 May- 3 June 2004) – AS/MON (2004) 22 June 2004 paragraphs 28 and 29

<sup>5</sup> Ibid paragraph 29.

basic legal text governing the distribution of powers which has been decided upon by the people in a popular vote.

15. The Constitution of Ukraine adopted on 28 June 1996 is in force and its provisions have not so far been amended. It is the primary legal instrument which governs the Ukrainian state and the allocation of power within it and its provisions must be strictly complied with in relation to all matters it concerns but most especially in the context of proposals and adoption of amendments to it. It is only in this way that democracy and the rule of law will be fully respected.