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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE PROCEDURE OF AMENDING THE CONSTITUTION OF UKRAINE

by

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1. At its plenary session on 13 December 2003, the Venice Commission adopted an opinion on three draft laws on constitutional amendments (no. 3027-1, no. 4105 and no. 4180) in Ukraine (CDL-AD (2003) 019). All the three draft laws were also submitted to the Constitutional Court of Ukraine for opinion. On April 2004, the Ukrainian Parliament voted on the draft law no. 4105 which failed to receive the majority required by Art. 155 of the Constitution. However, the process of constitutional reform was relaunched in June on the basis of the draft law no. 4180, which was put on the first reading on 23 June.

On 22 June the Monitoring Committee of the Parliamentary Assembly of the Council of Europe had called the Ukrainian authorities to postpone the constitutional reform until after the presidential elections of October 2004. On 28 June the Monitoring Committee decided to request the Venice Commission's opinion on whether the procedure of amending the Ukrainian Constitution is in conformity with European standards and the Ukrainian Constitution itself.

2. Chapter XIII of the Constitution of Ukraine includes three provisions which aim at preventing repeated attempts to amend the Constitution. According to Art. 156(2) "the repeat submission of a draft law on introducing amendments to Chapters I, III and XIII of this Constitution *on one and the same issue* is possible only to the Verkhovna Rada of Ukraine of the next convocation" (*italics* added). According to Art. 158(1), "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". Finally, Art. 158(2) lays down that "within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution".

3. The main constitutional problem concerning the procedure of amending the Ukrainian Constitution is whether the revival of the process on the basis of the draft law no. 4180 was in breach of Art. 158(1). The wording of this provision does not, unlike that of Art. 156(2), include the phrase "on one and the same issue". In addition, it is not self-evident that the contents of this phrase could be added to the provision by way of interpretation. It can namely be argued that the scope of application of Art. 158(1), concerning all amendments to the Constitution, has intentionally been defined in stricter terms than that of 156(2), concerning only amendments to Chapters I, III and XIII, and that such a difference between the two provisions can be rationally justified.

Thus, even substantial arguments can be presented for interpreting Art. (158(1) according to its wording and as preventing only the renewed submission of the same draft law which has already been voted down by the Verkhovna Rada. This would seem to lead to the conclusion that Art. (158(1) of the Constitution did not preclude the revival of the amendment process on the basis of the draft law no. 4180.

4. However, attention should be paid to the fact that the draft law no. 4180 largely overlaps the previous draft law no. 4105 which in April did not receive the required majority. In fact, the draft laws were identical as to their wording, except for transitional provisions regarding the scheduling of elections and entering into force of the constitutional reform. Thus, it can be argued that although the draft law no. 4180 has formally been submitted to the Verkhovna Rada separately from the draft law no. 4105, the two draft laws overlap to such an extent that Art. 158(1) should be applied. This interpretation can be defended even if it is accepted that this provision's scope of application is narrower than that of Art. 156(2), and that the phrase "on one and the same issue" cannot, by way of interpretation, be extended to Art. 158(1).

5. Art. 159 of the Constitution lays down that a draft law on constitutional amendments has to be submitted to the Constitutional Court for an opinion "on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution". On 30 October 2003, the Court declared the draft law no. 4180 to be in conformity with Articles 157 and 158(1) of the Constitution. However, it has to be stressed that with regard to Art. 158(1), the situation has essentially changed since October 2003 and that the opinion given then does not cover the situation which has arisen because of the vote in April on the draft law 4105. Thus, a new opinion of the Court on the conformity of the draft law no. 4180 with Art. 158(1) would have been needed before the revival of the process in Verkhovna Rada.

6. Constitutional amendments should only be made after extensive, open and free public discussions and in an atmosphere favouring such discussions. Amendments should, as a rule, be based on a large consensus among the political forces and within the civil society. As the Venice Commission already stressed in its opinion (CDL-AD (2003) 019), constitutional reforms and their entering into force should not be subject to short-term political calculations. It is evident that hurried constitutional amendments shortly before politically important presidential elections contradict these requirements.