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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT CONSTITUTION OF UKRAINE

Prepared by a Working Group headed by Mr V.M. Shapoval

by

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Preliminary remark:

The draft constitution has been originally prepared by a working group lead by Mr V. M. Shapoval. As we have learned, the draft has been amended on several points, and for the moment is not taken seriously by political actors as a possible ground for drafting the constitutional amendments. Rather political actors – including the National Constitution Council – are preparing their own drafts.

CHAPTER III – ELECTIONS, REFERENDUM, PEOPLE'S INITIATIVE

Chapter III is one of the three chapters of the present Constitution, the amendment of which requires a referendum (under Article 155 of the Constitution in force of 2006).

The chapter introduces a new institution compared to the Constitution presently in force: the people's initiative as a form of direct democracy (Article 71).

As the constitutional text suggests, the people's initiative is a specific kind of the referendum initiated by a certain number of voters. The present Constitution is definitely more restricted on the possibility of initiating a referendum, while the draft gravely enlarges it.

Articles 74 – 77 define and specify the different types of referenda made possible by the draft constitution. These are the following:

1. The exclusive field of referendum is a decision to alter the territory of Ukraine: under Article 75 such decision can be made only by an all-Ukrainian referendum (mandatory referendum).

2. Article 76 opens the possibility to submit a draft law repealing – entirely or partly – an effective law on popular initiative (abrogative referendum). The requirements to initiate such type of referendum are quite severe (but more permissive as the present regulation): it may be initiated on the request of no less than one and a half million citizens of Ukraine eligible to vote, and on the condition that the signatures in favour of designating the referendum have been collected in no less than two-thirds of the *oblasts*, with no less than 50,000 signatures in each oblast. The double requirement of a relatively high number of signatures, and that they should be collected in no less than two-thirds of the *oblasts*, proves that there is a real support in the population for an all-Ukrainian referendum. After having proved the necessary support in favour of the referendum, the President of Ukraine proclaims it. The draft establishes four prohibited subjects on which it is not allowed to held e referendum, namely taxes, budget, amnesty, and ratification or denunciation of international treaties. The list of the prohibited subjects is short but essential, and is usual in the practice of countries allowing for referendum by popular initiative.

3. Constitutional referendums:

3.1 Mandatory constitutional referendum

Three chapters of the constitution have to be submitted to referendum in order to amend them on popular initiative. These three chapters are Chapter I on general principles, Chapter III on elections, and Chapter X on constitutional amendment procedures. The necessary popular support for such an initiative is similarly to the previous case is one and half million citizens. Having attained that support the constitutional amendment may be submitted to the Verkhovna Rada.

Article 160 of the draft stipulates another case of constitutional referendum: The law amending the Constitution of Ukraine or the revised Constitution of Ukraine shall be adopted by an All-Ukrainian referendum called by the President of Ukraine.

3.2 Optional constitutional referendum: the amendment of the other chapters of the constitution requires only the support of one million citizens in order to be submitted to the Verkhovna Rada.

In both cases there is only the requirement of an absolute number of citizens in favour of the initiative; the territorial requirement set in Article 76 does not appear here. The explanation for the difference might be that this initiative is not automatically proclaimed by the President to referendum, but it is submitted to the Verkhovna Rada. The further procedure is not regulated by the constitution but by the Law on Referendum. Currently, the referendum can be organised on the basis of the Constitution of Ukraine and the 1991 law on all-Ukraine and Local Referendums. The law on referendums in force was adopted in 1991 (with amendments in 1992). As the Opinion of the Venice Commission underlined the law was never harmonised with the constitution.[1] In 2008 two draft law on the referendum have been prepared in Ukraine.

4. Legislative referendum

A draft law on issues falling within the areas regulated by law may be submitted to the Verkhovna Rada of Ukraine on popular initiative supported by no less than 100,000 citizens of Ukraine eligible to vote. This is the genuine legislative popular initiative that is made possible on issues that belong to the competence of the legislative branch. This is the usual solution for defining the scope of the popular referendum. But the required threshold is surprisingly low.

Some general issues related to all-Ukrainian referenda are regulated by Article 74 of the draft. An All-Ukrainian referendum is effective if the majority of citizens of Ukraine eligible to vote participated in the voting. Decisions at an All-Ukrainian referendum are approved by the majority of citizens of Ukraine who participated in the voting. This double majority requirement is reasonable.

As for the binding effect of a successful referendum the draft envisages that decisions approved by an All-Ukrainian referendum are mandatory and may be repealed or modified only at an All-Ukrainian referendum, unless otherwise prescribed by the referendum. The temporal binding effect of the effective and successful referendum is otherwise not limited by the constitution.

The draft seriously enlarges the possibility of making use of referendum, and lowers the required number of citizens supporting the popular initiative. For example, the Constitution in force in order to call an All-Ukrainian referendum is by popular initiative requires the support of no less than three million citizens of Ukraine.

As the Venice Commission has earlier underlined “Direct consultation of the people via referendum has long been the subject of heated discussion between legal and political experts, sociologists, politicians, and indeed the general public.”[2]

The Venice Commission has addressed several times the topic of referendum. Recently, it has summed up its standpoint in the opinion on the Finnish constitution. Enlarging the possibility of holding referendums, or the introduction of binding effect, or popular initiative is fully depending on the background political decisions. However, it is a slippery road. In the case of negative experiences or even abuse of the tool of referendum, it is very difficult to withdraw the means offered to the people in this peculiar form of direct democracy. Politicians and political parties

[1] CDL-INF (2000)14, para 7.

[2] Referendums in Europe – an Analysis of the Legal Rules in European States. CDL-AD (2005)034, para 12.

would face serious difficulties when explaining such a withdrawal. Therefore, any widening in the regulation of referendum requires special cautiousness.[3]

Enlarging the scope of referenda, and lowering the necessary threshold might be dangerous, and undermine the ordinary functioning of representative democracy.

The other articles of the chapter with slight amendments repeat the provisions of the Constitution in force.

CHAPTER VIII - THE CONSTITUTIONAL COURT

The chapter on the Constitutional Court mainly follows the present regulation with a few amendments.

Article 138 of the draft reduces the number of the judges from eighteen to twelve. The Constitution does not clarify the procedure of how to diminish the number of the judges, and the dismissal of the presently acting judges. Thus the provision in itself raises serious doubts regarding judicial independence, and the autonomy of the Constitutional Court.

The same article regulates the appointment of judges. Under the constitution in force constitutional judges are recruited through three different channels: the President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine. According the draft judges of the Constitutional Court would be appointed on the submission of the President of Ukraine by the two-thirds majority of the total membership of the Verkhovna Rada.

The Venice Commission in another case welcomed the shift from the system of exclusive direct appointment of constitutional judges by the President to the mixed system providing elective or appointment powers to the three main branches of power because it has more democratic legitimacy.[4] *A contrario*, shifting away from the three-channel system to a combination of presidential candidacy and parliamentary election is not welcomed, even though the proposed solution is acceptable and known in other countries.

The draft amends the procedure of the dismissal of judges of the Constitutional Court. The present Constitution authorises the organ that elected or appointed the judges to dismiss them (Articles 126 and 149). The draft proposes a much better solution: the Constitutional Court decides on the dismissal of the constitutional judges (Article139). The only exception is when the judge breaches the oath (Article 134, subparagraph 6 of the first paragraph). In this case the judge is dismissed from office by a decision adopted by no less than two-thirds of the total membership of the Verkhovna Rada based on an opinion of an *ad hoc* investigative commission.

This article as a whole would definitely strengthen the independence of the Constitutional Court and its judges.

The competences of the Constitutional Court are regulated similarly to the present text. The proposal is better as far it sums up all the competences in Articles 140-141 of the Chapter on the Constitutional Court while in the constitution in effect some competences are determined in other chapters (e.g. Articles 137 and 154 of the Constitution in force). Another amendment in

[3] CDL(2008)002

[4] CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey

the draft is that the interpretation of the laws is deleted from the competence of the Constitutional Court. This clarifies the competences of the Constitutional Court. The Constitutional Court is the final interpreter of the Constitution, while statutory interpretation is, as a rule, the task of ordinary courts.

As a conclusion, the chapter of the draft on the Constitutional Court is basically similar to the Constitution in force. The amendments are a mixture of improvement and deterioration.