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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT LAW AMENDING THE CONSTITUTION
OF UKRAINE
PRESENTED BY PEOPLE'S DEPUTIES
YANUKOVYCH, LAVRYNOVYCH, ET AL.**

on the basis of comments by

**Ms Angelika NUSSBERGER (Substitute member, Germany)
Mr Peter PACZOLAY (Member, Hungary)
Ms Hanna SUCHOCKA (Member, Poland)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Introduction

1. *The Minister for Foreign Affairs of Ukraine, Mr Volodymyr Ogrzyzko, in November 2008 asked the Venice Commission to examine draft amendments to the Constitution of Ukraine presented by People's Deputies Yanukovych, Lavrynovych et al.*

2. *During a visit of a Commission delegation to Ukraine in early February 2009 it became clear that this draft was prepared in a different political situation and that at present it is no longer under serious consideration. The present opinion is therefore relatively brief with a focus on major issues which seem relevant for future discussions on constitutional reform in Ukraine.*

3. *The present opinion was adopted by the Venice Commission at its ... Plenary Session in Venice on ..., on the basis of comments by Ms Nussberger (Germany), Mr Paczolay (Hungary) and Ms Suchocka (Poland)).*

Preliminary remarks

4. The Venice Commission has underlined on several occasions the need for constitutional reform in Ukraine¹. In the view of the Commission, the main focus of such reform should be to clarify the respective powers of President, government and parliament. The current system has become dysfunctional and gives rise to many conflicts following the constitutional revision of December 2004. On the other hand, it is not desirable to go back to a system of excessive presidential powers as was the case before this constitutional revision.

5. The draft under consideration pursues these objectives and aims at establishing strong parliamentary government in Ukraine. While this would appear welcome at first sight, the text goes definitely too far and creates the risk of a rule by the majority party or coalition without checks and balances.

Proposed amendments to Chapter II on Human and Citizens' Rights, Freedoms and Duties

6. The draft contains a number of amendments to this Chapter of the Constitution. The most important amendment is probably the amendment to Article 29.(3) reducing the time period, during which a person can be detained preventively without a judicial arrest warrant, from 72 to 24 hours.

7. Some provisions, such as the amendments to Articles 43 and 49, seem of a mainly programmatic nature. This is not the approach recommended by the Venice Commission² but similar provisions can also be found in other European countries. The provisions on remuneration for labour according to amount and quality, on access to health care, legal assistance at public cost, etc, are not so much reflecting the institutions of a welfare state but rather resemble the general wording of the respective provisions of socialist constitutions.

8. In addition, some specific comments on the new provisions and additions may be made.

9. The supplement to Article 22 banning "legal acts worsening the situation of citizens" is worded much too broadly and may lead to misunderstandings. Many legal act may "worsen" the situation of all or a group of citizens, but are justified on the basis of the general welfare or

¹ See in particular documents CDL-AD(2005)015 and CDL-AD(2008)015.

² See already the Opinion on the Constitution of Ukraine CDL-INF(1997)002, in particular the General Comments on Chapter II.

other reasons accepted as restrictions to human rights under the ECHR, if they are proportionate and fixed by law.

10. The “inalienable right to life” is one of the most fundamental rights enshrined in all human rights codifications (cf. Article 2 ECHR). It should never be confused with the controversial social “right to health”. Adding the term “health” in Article 27 is therefore counterproductive.

11. The supplement to Article 63 goes beyond what is usually expected as procedural human rights guarantees. While accused persons have to have the right to consult a lawyer, this does not apply to witnesses.

Proposed amendments to Chapter IV on the Verkhovna Rada

12. The key element of the draft is probably the proposed election system (amendment to Article 77). In addition to the – welcome - introduction of open lists within the framework of the proportional system, the amendment provides that the party receiving the highest number of votes in elections will automatically get an absolute majority of at least 226 seats in the Verkhovna Rada.

13. The details of this proposal will be the object of a separate Venice Commission opinion on the draft law amending the law on the election of People’s Deputies of Ukraine introduced by Messrs Portnov and Lavrynovych. The aim of the new electoral system would be to provide for a stable parliamentary majority in Ukraine. Due to the political situation in Ukraine it is not to be expected that any of the existing parties can win an absolute majority in elections based on the existing proportional single nation-wide constituency system. Governments built on coalitions are seen to be fragile. The lack of a stable majority has indeed been a serious problem and the aim of increasing stability seems legitimate. Nevertheless, the means used, i.e. an extremely important artificial bonus raises serious concerns.

14. This bonus system that resembles a solution used at French regional elections would seem rather unusual for national elections. The Venice Commission report on electoral systems (overview of available solutions and selection criteria) by Christophe Broquet and Alain Lancelot contains the following considerations on bonuses :

“77. Bonuses are mandates granted to the most successful list before the distribution of seats strictly speaking is carried out. They are principally used for local elections. In the French regional elections, a bonus equivalent to one quarter of the seats is given to the list which ends up in the lead in the conclusive round. For elections to the Corsican Assembly, three bonus seats are granted. Likewise, half the seats are granted directly to the leading list in the case of municipal elections in municipalities of more than 3,500 inhabitants. Bonuses can sometimes exist in other forms. For instance, the 1953 Italian Act provided that linked lists obtaining more than 50% of the votes were to receive 64.5% of the seats. Consequently, these bonuses enable government majorities to be conferred on assemblies and hence avoid the necessity of bargaining with extremely minority parties.”³

15. As the system creates an “artificial absolute majority”, the real support for a political party existing among the voters is not mirrored in the distribution of the seats. A party with quite a low level of support may obtain an absolute majority of the seats. This problem is exacerbated by the fact that the – parallel- amendments to the electoral code foresee to apply the bonus following a second round of voting with the participation of the two parties having obtained the highest number of votes in the first round. The final distribution of seats thus risks seriously

³ See CDL-AD(2004)003.

distorting the results achieved in the first round. The system also seems not suitable for the situation of Ukraine. The political situation in Ukraine is characterised by a very marked division concerning political preferences between Western Ukraine on the one hand and Eastern and Southern Ukraine on the other hand. An election system which leads to a polarisation between two blocs therefore risks exacerbating the division within the country. Moreover, if one party has to win the absolute majority on the basis of the electoral system, a balanced representation of the different regions cannot be achieved. Therefore such a system cannot be seen as adequate to strengthen the unity of the country.

16. In addition, such a system is not very transparent for voters without special knowledge in election systems. Combined with other constitutional provisions and amendments, it contributes to an excessive concentration of power in the hands of the leadership of the strongest party.

Proposed amendments on the forming of the Government

17. Since the proposed electoral system guarantees a majority for a single party, it seems very strange that the provisions on a coalition of Deputies forming the majority in the Rada, which were introduced in 2004, are maintained. This coalition even gets increased importance due to a transfer of presidential competencies to it.

18. A number of amendments in different chapters of the Constitution concern the forming of the government (amendments to Articles 83, 85 no. 12, 106 no. 9 and 10, 114). They take away from the President any role in the forming of the government. The Prime Minister would be elected upon the proposal of the majority coalition and the ministers would be elected upon the proposal of the prime minister. No checks and balances with respect to the powers of the majority would remain. The President would no longer even formally appoint the members of the Cabinet of Ministers.

Proposed amendments to Chapter V- President of Ukraine

19. The main thrust of the amendments is to weaken the position of the President. Article 102, which describes the position of the President as the Head of State, would simply be deleted. This would create an unusual gap in the constitutional system as the role of the Head of State is traditionally important including in international relations. Article 105.(1), granting immunity to the President during his term of office, would also be deleted.

20. Article 111 on the impeachment of the President is amended in a way that the procedure no longer corresponds to an impeachment but to a vote of no confidence by the Verkhovna Rada in the President, who is directly elected by the people. As grounds for impeachment the purely political notion "for commission of acts damaging the interests of Ukraine" would replace the legal notion "if he or she commits state treason or other crime". Legal guarantees such as the involvement of the Constitutional and Supreme Court in the procedure would be removed.

21. These different amendments, together with the new procedure for forming the government, would have the effect that the President is no longer an independent actor in the political system. They would make him dependent on the parliamentary majority and deprive him even of his symbolic role.

Proposed amendments to Chapter VI – Cabinet of Minister of Ukraine. Other Bodies of Executive Power

22. Articles 118 and 119 on the local state administration would be amended, replacing the present state administration, which partly depends on the President, by representative offices of the Cabinet of Ministers. In a parliamentary democracy it is indeed appropriate that the state

administration at local and regional level is subordinate to the government and not to the President. The effects of these amendments on local self-government would have to be studied in more detail.

Proposed amendments to Chapter VIII- Justice

23. The proposed amendments seem internally inconsistent. At the level of principle, the amendments introduce new wordings, e.g. in Article 126.(1) and (2), which indicate a strong commitment to judicial independence. As regards the implementation of these principles, the amendments would, however, be a dangerous step back.

24. The main innovation in the draft is that judges of all levels would be directly elected by the people for a five year term. This would contradict European standards and practice. Only in some Swiss cantons some judges are directly elected. Historically the election of judges by the people was proposed by Lenin but not implemented even in the Socialist countries. While the Polish Constitution of 1952 provided for such elections, the provision was never applied. According to European standards, in particular Recommendation (94)12 of the Committee of Ministers of the Council of Europe, all decisions on the career of judges have to be based on merit. An election by the people is always a political act. It would not be based on an objective assessment of merit but would lead to a politicisation of the judiciary.

25. The election for a limited term of office makes the judges very dependent and raises many questions: What are the limits and guarantees of independence of judges elected in general elections? What kind of electoral promises could be given by a judge in an electoral campaign? What is the procedure to revoke a judge? These are only some of the important questions as regards the status of judges and the role of judiciary.

26. During the visit of a Venice Commission delegation to Ukraine the proposal was defended as a – desperate- means of combating corruption in the judiciary. It seems, however, not likely that direct elections would be an effective means against corruption. On the contrary, the judges, or the people having financed their election campaigns, would be tempted to try to recover the costs of the campaign.

27. The proposal for direct popular election of judges therefore has to be rejected. Under these circumstances it does not seem necessary to enter into the more technical details of the proposal. Nevertheless, it might be mentioned that it is not necessary to stipulate specific “social and property rights” for judges. On the contrary, non-pecuniary remuneration for judges, which involves a discretionary element in its distribution, is deemed to endanger the independence of judges.

Conclusions

28. In the light of the proposed amendments the existing semipresidential system would be transformed into a system with a dominant role of parliament. The mere fact of changing the system and passing from a more presidential to a more parliamentary system seems not unusual and may even be welcome. One can observe this situation in various countries, especially in those in transition. The role of the President, the scope of presidential competencies and specifically the relationship between President and government and the tensions arising on this ground led in many post-communist countries (but not only in such countries) to constitutional reforms. Frequently presidential powers were limited, as, for example, in the Polish case by the 1992 so-called Small Constitution and then in 1997 by the new Constitution.

29. In the case of the present draft, however, the situation is much more complex. The proposed amendments do not only change the semipresidential system into a parliamentary one, but they completely change the general rules establishing the structure of the democratic system. The powers of the President would in many cases be transferred to a structure called "coalition of Deputies' factions in the Verkhovna Rada". This can transform the Ukrainian state into a kind of a "party state". A part of a state organ (the coalition of deputies' factions) would play the role of a state organ (parliament). The normal role of the "coalition of factions" in a democratic system is to support the government and to play an important role inside the parliament. It should never become an independent structure in the system of separation of power, in addition to the organs of the state. In the communist period the political party was placed above the organs of the state. While it was certainly not the intention of the drafters to re-establish a similar system, one has to bear in mind that some reminiscences of the previous system remain. Questionable solutions should therefore be avoided.

30. To sum up, the draft seems problematic in many respects. The proposed electoral system seems questionable and ill-suited to conditions in Ukraine, power is too concentrated in the leadership of the strongest party or coalition, the role of the President is weakened to an excessive degree. The proposal to have judges elected by the people for a fixed term contradicts European standards. The Commission can, therefore, only welcome that, at the moment, the draft no longer seems to be seriously pursued in Ukraine.