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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW OF UKRAINE AMENDING THE CONSTITUTION

PRESENTED BY THE PRESIDENT OF UKRAINE

by

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1. The new draft law "On the amendments to the Constitution" has been proposed by the President of Ukraine. It is a yet another draft in a series of drafts proposed by different authorities to revise the Ukrainian Constitution. The main goal of all the drafts is to find the best way to solve the constitutional tension existing in Ukraine among the President, Parliament and the Council of Ministers, as well as to guarantee more efficiency of the state power by a better division of functions and by avoiding a dualism in the functioning of executive power. As it has been pointed out in the explanatory note: "These complex changes to the Constitution are also evoked by practical implementation of its provisions(…) imperfections of the checks and balances system which should have been securing balance and integrity of this mechanism". The scope of changes to the Constitution is so large that they are proposed in the form of an entirely new Constitution and not only as a set of amendments.

2. Ukraine is not the only country where one may notice tensions between the role of president elected in general elections and the role of prime minister as a head of the executive power. There is no doubt that the general election of a president differently situates and legitimizes his office. In essence, very often it is interpreted as a departure from the classic parliamentary system. The Polish contemporary, constitutional history is here very significant. L. Walesa elected president in general election submitted to the Parliament a draft Constitutional Act. The draft clearly slanted the country's form of government towards a semi-presidential system. It made the president the **supreme** head of the executive authority with wide competences.[1] The Parliament, however, wanted to use the opportunity to restrict, rather than to enlarge, presidential powers. As a result, the presidential draft got substantially changed in committee. The president did not accept those changes, and called on the Speaker of the Sejm to withdraw the draft. The need to redefine mutual relations between the organs of state authority was becoming extremely urgent. Hence, the minute withdrawal of the presidential draft was approved, a parliamentary draft was prepared. To a large extent, that parliamentary draft incorporated the work of the previous constitutional commission and effectively represented a modified version of the original presidential draft. The result of the committee's efforts was the Constitutional Act of 17 October 1992, so called the Small Constitution Considering the conditions in which it came into being, 'the Small Constitution' was unable to resolve the conflicts that arose from the previous constitution. On the contrary, it generated new conflicts of competences The President, consequently interpreted many prerogatives inscribed into the Small Constitution in the light of the presidential, rather than parliamentary, system. Real tension between the written Constitution and the actual state of affairs was then bound to emerge. Some problems have been solved later on by passing the new Constitution in 1997. Nevertheless the conflict between the role of the President elected in general election and the government still exists. The best example is the latest decision of the Polish Constitutional Tribunal on the delimitation of roles between the President and the government in foreign affairs.

3. The new draft as well as the current constitution accept the principle of separation of powers. There are no changes in the new wording. Art. 7 of the draft, like art. 6 of the current Constitution says that: "State power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power." It is not specified which organs belong to which power. (For example, the Polish Constitution regulates that legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President and the Council of Ministers, and the judicial power in courts and tribunals (art. 10).) However the text of the Ukrainian draft provides a basis for the same interpretation in the Ukrainian system. The legislative power is vested in Verkhovna Rada and the Senat, the executive power in the President and the Cabinet of Ministers, and the judicial power in courts.

[1] Only the president could appoint a prime minister and, upon the latter's motion, members of the government. The Sejm would retain the right of holding a no-confidence vote in the government, but the final decision in the matter would bee taken by the president. It was he who could decide whether to accept the government's resignation or dissolve the Sejm. The draft also authorised the president to independently announce a referendum.

4. The new draft is based on the assumption that the principle of general election of the President should be decisive in defining the new description of some competences of the president, especially in foreign affairs and security. . One can notice here a visible influence of the American model of a strong presidency. However the newly proposed system is not purely presidential, but can be described, like the present one, as semi presidential. The most important and characteristic element of the parliamentary system, that is the double executive power vested in the President and the Cabinet of Ministers, has been maintained. The draft, however, proposes to enhance some of the constitutional competences of the President, especially in the area of foreign policy.

5. The Senate. In accordance with this general line there is also the proposal to create new organ in the system of power in Ukraine, i.e. the Senate, modeled on the American system. The Senate is seen as a "less political" body because of the system of election of Senators. The Senat consists of three senators who are elected in the Autonomous Republic of Crimea, each region (oblast), the City of Kyiv, and at the communities that has the same status as oblast. The former Presidents (not moved from the office by the procedure of impeachment) are also members of the Senate. Some part of senators is re-elected every two years. The Senate can be seen as an instrument which should balance the competences of Verkhovna Rada. The main role of the Senate is to participate in the legislative process, and replaces the Verkhovna Rada in the process of the nomination of various states' organs. One has a doubts does the role of the Senate seen as a less political body is not overestimated.

6. The President of Ukraine. The general description of the role of the President is the same as in the current Constitution. Art. 112 states that "President of Ukraine is the Head of State. Is the guarantor of sovereignty, territorial indivisibility and security of the state, the observance of the Constitution of Ukraine, human and citizens' rights and freedoms". The competences of the President are regulated in art. 118. According to a new provision the President exercises **leadership** in the spheres of foreign policy, defense and national security. By introducing directly into the Constitution the word "leadership" in the above mentioned areas, the drafters intended to underline the guiding role of the President in these areas and thus delimit the power of the Cabinet of Ministers. It is doubtful though, whether this formula is sufficiently clear. It does not belong to legal language, it is rather a political description which can lead, in practice, to misinterpretation and conflicts. Some doubts could be raised also concerning the new proposal according to which the president contributes to the coordination of state bodies, organs of local self-government. This should be rather a competence of the Cabinet of Minister.

7. One may consider as a positive solution the abrogation of the constitutional provision which gave the President the right to propose to the Verkhovna Rada the names of candidates to the offices of the Minister of Defence and the Minister of Foreign Affairs. The new proposal eliminates the double status of ministers, members of the Council of Ministers, guaranteeing a coherent procedure of government forming.

8. Art. 118 p. 5 seems unclear. Do all decisions of the President listed in point 5 need to be approved by the Senate (which seems correct) or only those allowing the entry of military formations of Armed Forces of other states to the territory of Ukraine?

9. Art. 126 maintains the current constitutional description of the Cabinet of Ministers as the highest body within the executive power system. This formula has always raised some doubts especially in a system where there are two organs of executive power and one of them is elected in general election. Which of the two should be defined as the highest one? How can one define, within the executive power system, the relationship between the president, who exercises his leadership for example in the sphere of defense, and the Cabinet of Ministers, which is defined as the highest body within executive power.

10. A positive solution proposed by the draft is the elimination of the double responsibility of the government, introduced by the amendments to the Constitution in 2004. In the light of the current Constitution (art.113) the government is responsible to the President and to Verkhovna

Rada. This type of responsibility must cause tensions among all three organs. Thus the proposed solution contains a much clearer principle of responsibility of the Cabinet of ministers.

11. In my opinion, one of the greatest weaknesses of the proposed regulation is a kind of deconstitutionalisation of the competences of the Cabinet of Ministers. I do not see any reason for such a regulation. Art. 116 of the present Constitution contains quite a long list of the competences of the Cabinet of Ministers. The new art. 131 regulates only more technical competences but not the substantial ones. Does it mean that the Cabinet of Ministers is deprived of all the competences (which should not be the case) or rather that they are supposed to be regulated by a lower act (a law on the Cabinet of Ministers). In my opinion this solution is not justified. The Constitution which describes the Cabinet of Ministers as the highest body in the executive system should also regulate the scope of the substantial competences of such a body.

12. Judiciary. The Venice Commission several times expressed its opinion on the Judiciary system in Ukraine. One of the most elaborate opinions regarded the draft "Law on the Judiciary" and the draft "Law on the Status of Judges of Ukraine" (CDL-AD(2007)003) In those opinions VC made some indications concerning the future amendments to the Constitution that should better guarantee the independence of the Judiciary. The new draft of the Constitution in many points follows the indications of the Venice Commission.

13. One of the crucial problems was the question of appointment of judges. The current Constitution provides two categories of judges, those appointed for a period of time (nominated for the first time) and judges nominated for unlimited period of time. The new draft in art. 141 replaces the provision of art. 126 and provides for only one category of judges appointed for permanent terms. This solution is in line with European standards. The second problem regarding the appointments of judges concerns the organ which is authorized to appoint judges. The Venice Commission pointed out that the "appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, it would be necessary to change Article 128 of the Constitution." (CDL-AD(2007)003). The Presidential draft proposes the new regulations in this area in art. 142. "Judges of the Supreme Court and judges of high specialized courts are appointed by the Senate within the recommends by the High Council of Justice, judges of other courts to appoint and dismiss the post of President of Ukraine by the Supreme Council of Justice (?).not clear!! In accordance with law." Instead of Verkhovna Rada the decision will now be taken by the Senate. But the Senate is also a part of the Parliament. Would it be possible for the Senate to be more apolitical than Verkhovna Rada? It was one of the crucial arguments that justified the introduction of the Senate to the Ukrainian system of power. The electoral system to the Senate is different than that to the Verkhovna Rada and in the opinion of the drafters the Senate would not be so strongly involved in political game. For the moment it is difficult to say how significant this change is, and to what extent it will guarantee better the non political character of the appointments of judges. It depends also on the rules of procedure adopted by the Senate for the process of appointment of judges.

14. The Venice Commission expressed its critical opinion on the solution that the parliament may decide on the lifting of immunity of judges. VC stated that it is not appropriate that the parliament should have any role in lifting a judge's immunity. In art. 139 of the draft the Verkhovna Rada is replaced by the Senate. I can repeat only the same doubts as presented in p. 13 above.

15. I have also strong doubts as regards Art. 139 p. 3, according to which the state ensures personal security of judges and their families. I have many times expressed the opinion that such guarantee is going to far. The state protection can be given to a judge but only in specific circumstances. This provision seems to be too wide.

16. The Venice Commission stated in its opinion that the principle of irremovability of judges is explicitly guaranteed in many national constitutions, and suggested that an amendment to the Constitution of Ukraine in this respect should provide an additional guarantee. This suggestion however has not been taken into account by drafters and de facto the art. 139 and 143 repeat the same solutions that exist in the current constitution with some changes I have pointed above. Similarly, the proposal of the Venice Commission to change the art. 125 on the system of courts (4 levels) has not been taken into account and in this area no substantive solutions are proposed by the new draft.

17. New amendments are proposed by the draft as regards the composition of the High Council of Justice and its competences. This solution is welcome. Art. 144 regulates that the HCJ consists of sixteen members. Congress of Judges appoints eight members, the President and the Senate appoints four members each of the HCJ. There are however, no constitutional indications concerning the qualification of persons nominated by the President and the Senate. In the light of the provisions of the draft, one can suppose that they may not be judges, but it is also possible that some of them or even all of them will be judges. In the explanatory notes there is information that all members appointed by the President and the Senate are retired judges. This demonstrates the intention that HCJ should be composed in a major part of judges. It is a good solution. Art. 144 also says that the chairman of the Supreme Court, the Minister of Justice and the Prosecutor General are not longer ex officio members of the HCJ, but they may participate in the plenary of HCJ, at the meetings of the qualification commission of judges and the disciplinary committee of judges. This changes completely the structure of the Council which has been strongly criticised by European institutions. The role and competences of the HCJ are also better described, in line with European standards.

The HCJ:

1. *forwarding submission on the appointment of judges to the office;*
2. *forwarding submission on the dismissal of judges from the office in cases stipulated by the part one of Art. 143 of the Constitution;*
3. *terminate the authority of judges in the cases stipulated by the part two of art. 143 of the Constitution(age 65, and death);*
4. *takes a decision on suspension of the judges in the cases stipulated by part three of art. 143 (in the case of the prosecution of a crime or to correct violations of the requirements for incompatibility);*
5. *decides to bring the judges to disciplinary liability.*

18. The draft proposes some changes in the Prosecutor's office. The provisions on the Prosecutor's office are to be included in the part of Constitution dedicated to the courts. This change is justified by the general role of the Prosecutor's office described by the art. 145, "Maintenance of prosecution in the court on behalf of the state is entrusted to the Prosecutor's Office". The Prosecutor is appointed by the President with the concern (consent) of Senate (at present with the concern / consent / of Verkhovna Rada) but dismissed only by the President on grounds determined by law (not by constitution) which can weaken the position of the Prosecutor. The new draft excludes the possibility to take a vote of no confidence in the Prosecutor General. I see this solution as justified, as it helps avoid the politicisation of the prosecutor's office. In the same direction goes the proposal to cancel the competence of prosecutor (strongly criticized by the Venice Commission), "to supervise over the respect for human rights and freedoms and over how laws governing such issues are observed by executive authorities, bodies of local self-government and by their officials and officers". This provision is a typical example of reminiscence of the old system of the soviet prokuratura. So the proposal to eliminate this provision from the Constitution of the democratic Ukraine is very welcome.

19. Conclusion. The drafters in the explanatory note stresses that the proposed constitutional reform, among others, is directed to "provision of realization of the efficient State power on the basis of a distinctive division of function.., avoidance of dualism in the executive branch and finally a global balancing of the whole State mechanism". I see some positive solutions proposed by the new draft, especially in the area of judiciary and Prosecutor's office.

Nevertheless the doubts remain; how far the new regulations on the checks and balances among the main three organs can really help to overpass the existing tensions and especially to avoid dualism in the executive branch? I think that this question is not yet answered.