Strasbourg, 13 June 2005

CDL-AD(2005)015
Or. Engl.

Opinion no. 339 / 2005

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE AMENDMENTS TO THE CONSTITUTION OF UKRAINE ADOPTED ON 8.12.2004

Adopted by the Commission at its 63rd plenary session (Venice, 10-11 June 2005)

on the basis of comments by

Mr Kaarlo TUORI (Member, Finland)
Mr Sergio BARTOLE (Substitute member, Italy)
Ms Finola FLANAGAN (Member, Ireland)

Introduction

1. By a letter from 21 April 2005, Mr Roman Zvarych, Minister of Justice of Ukraine, requested the Venice Commission expertise on the Law on Amendments to the Constitution of Ukraine as adopted on 8 December 2005 (CDL (2005) 036).

2. Messrs Kaarlo Tuori and Sergio Bartole and Ms Finola Flanagan, members of the Venice Commission's Working Group on constitutional reform in Ukraine examined this Law.

3. The present opinion was prepared on the basis of their comments and adopted by the Venice Commission at its 63rd Plenary Session (Venice, 10 – 11 June 2005).

I. Background

4. In April 2003, at the request of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Venice Commission got actively involved in the process of constitutional reform in Ukraine. In December 2003, the Commission adopted its opinion on three draft laws on amendments to the Constitution of Ukraine (CDL-AD (2003) 19). 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, notably the mandate of the National Deputies, the President's position in the appointment of Government, and the independence of judiciary.

5. On 22 June 2004, the Monitoring Committee of the Parliamentary Assembly held an exchange of views on the political situation in Ukraine. On this occasion, it expressed great concern about the pre-election environment, and considered, in particular "*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*".[1] The Parliamentary Assembly itself also strongly criticised the proposed adoption of constitutional amendments on the eve of presidential elections in its Resolution 1364 (2004) on political crisis in Ukraine.

6. On 23 June 2004, the Verkhovna Rada of Ukraine voted on the third of the three draft laws on amendments to the Constitution previously examined by the Commission, i.e. Draft Law no. 4180, and approved it in the first reading.

7. Draft Law no. 4180 was amended prior to its adoption; the modifications included provisions on the election of the President and the term of office of judges, thus taking into account two of the recommendations made by the Commission in its opinion of December 2003. Nevertheless, many of other provisions which had been criticised remained in the text. Furthermore, a number of political forces within Ukraine and most international organisations questionned the legitimacy of the voting procedure on various texts of draft amendments as well as the very procedure of adoption in the first reading of Draft Law no. 4180.

8. Following a request by the Monitoring Committee of the Parliamentary Assembly, in October 2004 the Venice Commission adopted its opinion on the procedure of amending the Constitution in Ukraine (CDL-AD (2004)030), which noted the complicated and hurried way in which several constitutional amendments had been proposed, amended and voted on, with each proposal being subjected to a process of further amendments in the process. In this opinion, the

[1] *Statement by the Monitoring Committee on 22.06.04.*

Commission also stressed that constitutional reforms and their entering into force should not be subject to short-term political calculations.

9. Further to the political crisis which had arisen after the presidential elections, on 8 December 2004 the Verkhovna Rada of Ukraine adopted the Law on amendments to the Constitution (hereinafter: "the Law on amendments") that had as its basis Draft Law no. 4180. Although the Law on amendments, as adopted, takes into account many of the comments the Commission made in its previous opinion (CDL-AD (2003) 019), some of the Commission's criticism retains its pertinence.

II. Analysis of the Law on amendments as adopted on 8 December

A. National Deputies' mandate

10. The Commission welcomes the amendment to Article 81 § 2 (6) on national deputies' mandate which removed from the text the provision providing for the termination of a deputy's mandate on his or her dismissal from the parliamentary faction to which he or she belonged at the time of the election.

11. On the other hand, it is to be regretted that according to the revised Article 81 § 2 (6), a deputy's mandate would be terminated on his or her leaving or not joining the parliamentary faction to which he or she belonged at the time of the election. The relevant decision would be taken by the highest steering body of the respective political party, or election bloc of political party (Article 81 § 6).

12. Keeping the proposed procedure in the Constitution give the parties the power to annul electoral results. It might also have the effect of weakening the Verkhovna Rada itself by interfering with the free and independent mandate of the deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament. As the Commission has stressed in its previous opinion, linking a mandate of a national deputy to membership of a parliamentary faction or bloc is also inconsistent with the other constitutional provisions bearing in mind that Members of Parliament are supposed to represent the *people* and not their parties[2].

13. The Commission thus strongly recommends that Article 81 § 2 (6) and 81 § 6 be removed from the Constitution. Instead, the free and independent mandate of the deputies should be explicitly guaranteed.

B. Amendments with respect to the relationship between the President, the Verkhovna Rada and the Government

14. As regards the relationship between the main constitutional bodies in Ukraine, the Law on amendments has brought some positive changes, increasing the parliamentary features of the political system. The text nevertheless contains some provisions that raise concern as they give certain powers to the President that might undermine the independence and effectiveness of the Government.

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[2] *The oath to be taken by Deputies contained in Article 79 of the Constitution expresses this clearly. See CDL-AD (2003)019, para. 56 – 58.*

Coalition of parliamentary factions

15. Pursuant to Article 83 § 6, "a coalition of deputies' factions and groups of deputies" representing a parliamentary majority should be formed in the Verkhovna Rada of Ukraine. Such a coalition is to be formed following "the results of elections and on the basis of a common ground achieved between various political positions". The formation of the coalition should take place within a month after the opening session of a newly elected Verkhovna Rada or the termination of the activities of a previous coalition. Such a coalition will nominate the candidate for the Prime Minister and propose candidates for membership of the Cabinet (Article 83 § 8).

16. It may be questioned whether such a formalised procedure for forming a parliamentary majority would contribute to enhancing political stability in Ukraine. Furthermore, it could hardly be seen as compatible with the freedom of the choice and decision guaranteed to political parties by the Constitution, in conformity with European standards in this field. Generally speaking, alliances between political parties depend on the free choice of the parties concerned, and will last as long as the governing bodies of the parties find it convenient to stick to the negotiated agreements. In addition, a coalition government may give disproportionate power to small parties and therefore be unrepresentative.

17. The aim of ensuring political stability in Ukraine could also be attained without infringing the principles of the independent mandate of the deputies and the free choice of the political parties.

18. Following the example of the German Constitution, Article 87 of the Constitution of Ukraine, relating to the issue of the responsibility of the Cabinet of Ministers, could be amended to provide that the Verkhovna Rada may express its lack of confidence in the Cabinet only by electing a successor of the Prime Minister by the vote of a majority of its Members[3]. Such an amendment would allow a new majority coalition of political factions to be created within the Parliament at the moment of the introduction of the motion of no confidence.

19. The amendment of Article 87, again following the German example, would also implicitly require the removal of Article 90 § 2 (1), which gives the right to the President to dissolve the Verkhovna Rada in case of a failure to form, within one month, a coalition of parliamentary factions.

20. In the light of these considerations and bearing in mind the new electoral system based on proportional representation (Final and transitional provisions, paragraph 3) which will further favour a stronger link between the parties and the elected deputies, the Commission considers the requirement to form a parliamentary coalition to be excessive and would strongly favour its removal from the Constitution.

Appointment of the Prime Minister

21. With respect to appointment of the Prime Minister and formation of the Cabinet, the changes brought about by the Law on amendments are rather limited with respect to the Draft Law No. 4180 previously commented on by the Commission in its December 2003 Opinion. It is still a coalition of parliamentary factions that remains empowered to nominate the

[3] *See Article 67 of the German Constitution. The new Polish Constitution of 1997 has also introduced this rule (see Article 158 § 1). See also Article 113 § 2 of the Spanish Constitution.*

candidate for the Prime Minister and propose candidates for membership of the Cabinet (Article 83 § 8).

22. The inability of the parliament to form a coalition and form the government will result in the dissolution of the Verkhovna Rada and extraordinary elections (Article 90 § 1 (2)). The Commission notes that paragraph 4 of the same article introduces a one-year ban on another early termination of the Parliament. Yet, the Constitution does not give any solution to any potential crises caused by the newly elected Parliament's inability to form a stable majority and agree on formation on the Cabinet.

23. This inconsistency could be avoided by amending Article 87 as previously suggested (see supra, point 16), or by providing for an exception to the one-year ban where no candidate has obtained the confidence of the newly elected Parliament[4].

Formation of the Cabinet

24. Regarding most Cabinet ministers, the Verkhovna Rada approves the composition of the Government nominated by the Prime Minister (Article 85 § 1 (12)). The Law on amendments has maintained a distinction between the procedure in relation to the appointment of Ministers for Defence and Foreign Affairs and the remainder of the Cabinet ; the Ministers for Defence and Foreign Affairs would be appointed by the Verkhovna Rada on the *President's* nomination. The Verkhovna Rada would have the power to terminate the authority of these persons (Article 85 § 1 (12)).

25. The nomination procedure and the differences in status for such an important political organ as the Cabinet of Ministers raise concerns with regard to the necessary cohesion of the Cabinet and the exercise of its policy, especially given the specific context of the Ukrainian political system where the relations between the President and the Prime Minister may have become at times highly competitive.

26. Furthermore, pursuant to Article 106 § 1 and § 3, "the President ensures state independence, national security […] "and "administers the foreign political activity of the State". On the other hand, the government's tasks include "ensuring the state sovereignty and economic independence of Ukraine, the implementation of domestic and foreign policy of the State […]" and "taking measures to ensure the defence capability and national security […]" (Article 116 § 1, §7). These overlapping competencies may be the source of future conflicts between the president and the government(s).

27. The prominent position of the President is further manifested by Article 113 § 2, according to which the Cabinet of Ministers is responsible not only to the Verkhovna Rada but also to the President.

28. Moreover, the Law on amendments has retained Article 106 § 3, according to which "the President, on the basis and for the execution of the Constitution and laws of Ukraine, issues decrees and directives that are mandatory for execution on the territory of Ukraine". The precise meaning of this provision is ambiguous and should be clarified.

29. The Law on amendments has also maintained the power of the President to initiate the procedure of no confidence in the Cabinet (Article 87 § 1), as well as his or her right of legislative initiative.

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[4] *See Articles 99 § 5 and 115 § 3 of the Spanish Constitution*.

30. As the Commission has previously stated, such provisions do not seem coherent with the said aim of the constitutional reform, that is to say, diminishing the powers of the president and strengthening the parliamentary traits of governing in Ukraine.

Appointment and dismissal of some high officials

31. The power of appointment, on nomination by the Prime Minister, and dismissal of some important heads of public bodies (the Head of the Antimonopoly Committee, the Chair of the State Committee on Television and Radio Broadcasting and the Chair of the State Property Fund) remains with the Verkhovna Rada (Article 85 § 1 (12)). On the other hand, the Head of the Security Service would be appointed on nomination by the President, and dismissed, on the request of the President.

32. The Commission is of the opinion that the decision on appointment and dismissal of the aforementioned officials should be taken by a special, qualified majority. The offices concerned are characterised by the neutrality of their functions and require the independence and impartiality of their holders. The persons eligible for the above-mentioned offices cannot be identified with the majority or with any political party. The requirement of a qualified, special majority could guarantee the fairness of their election and of the bodies they are supposed to chair.

33. With respect to the procedure of counter-sign, according to the revised Article 106 § 4, the counter-signature of the prime minister and a designated minister on issues of "negotiating and signing international treaties" and of "national security and defence" is no longer required. This change runs counter to the general tendency of the amendments to strengthen the parliamentary features of the system and is therefore to be regretted.

34. With regard to the right of the executive to counter-sign in issues relating to the judiciary, the Commission considers that the reasons allowing the Prime Minister and the Minister concerned to refuse to sign should be clearly stated in the Constitution (see *infra*, para. 44).

C. Amendments with respect to Procuracy and judicial system

35. The Law on amendments has taken out the highly controversial provision providing for the election of judges (except those of the Constitutional Court) for a 10-year term, which is to be welcomed. However, a number of other provisions related to the judiciary remain problematic.

Prokuratura (Prosecutor's Office)

36. Transforming the role and functions of the public prosecutor's office to bring it into line with European democratic standards is one of the commitments undertaken by Ukraine when it became a member of the Council of Europe[5] (see several resolutions and recommendations of the Parliamentary Assembly on the Honouring of obligations and commitments by Ukraine, most recently Resolution 1346 (2003) and Recommendation 1622 (2003)).

37. The Commission notes with regret that the Law on amendments has reintroduced the previously criticised amendment to Article 121 § 5 proposed by Draft Law No. 4180[6], giving institution the significant additional role of "supervision of the observance of human and

[5] *See Opinion No. 190 (1995) of the Parliamentary Assembly on the application by Ukraine for membership in the Council of Europe.*

[6] *See the Commission's opinion on three draft laws proposing amendments to the Constitution of Ukraine (CDL-AD (2003) 19), paras. 71-74.*

citizens' rights and freedoms and the fulfilment of laws by bodies of executive power and by bodies of local self-government".

38. The Draft Law amending the Law of Ukraine on the office of public prosecutor, adopted in the first reading by the Verkhovna Rada, and aiming to implement this constitutional amendment has also been examined by the Commission[7]. In respect of this law, the Commission came to the following conclusions:

- the draft law continues to centralise too much power in the hands of the procuracy and the Prosecutor-General, and in particular has failed to divest the procuracy of functions intended to be only transitional;
- the draft law continues to infringe the principle of the separation of powers. The Prosecutor's powers remain entwined with those of the legislative, executive and judicial branches;
- the draft law appears to confer powers on the procuracy which would be more appropriately exercised by the judicial branch;
- the relationship between the Public Prosecutor and the executive remains entangled and is not transparent;
- the provisions of Article 7 represent a potential threat to press freedom;
- the powers to represent the public and assert rights on their behalf are too widely drawn;
- the draft law continues to confer powers and responsibilities on the Public Prosecutor which go beyond the function of prosecuting criminal offences and defending the public interest through the criminal justice system. Such powers and responsibilities are inappropriate for conferral on the Public Prosecutor;
- the position of the Prosecutor is not in conformity with Recommendation Rec(2000)19;
- there is no independent check on the operation and management of the Prosecutor's Office.

39. In this respect, the Commission cannot but recall once again that such an extension of the power of the Procuracy goes against European standards in this field[8] as well as against the Ukrainian commitments made when acceding to the Council of Europe[9].

40. In a state like Ukraine where the purported aim is to enhance an effective political democracy, it is of paramount importance that the institution that supervises compliance with the rule of law is a non-political one.

41. In the same spirit, in its Recommendation 1615 (2003) on the Institution of Ombudsman, the Parliamentary Assembly emphasised "*the importance of the institution of ombudsman within national systems for the protection of human rights and the promotion of the rule of law, and of its role in ensuring the proper behaviour of public administration. Ombudsmen have a valuable*

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[7] Opinion on the Draft Law amending the Law of Ukraine on the office of the public prosecutor (CDL-AD (2004) 038).

[8] See Parliamentary Assembly Recommendation 1604 (2003) on the role of the Public Prosecutor's office in a democratic society governed by the rule of law, and paragraph 12 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe which provides that public prosecutors should not interfere with the competence of the legislative and the executive powers.

[9] See Resolution 1244 (2001) on the Honouring of Ukraine's Obligations and Commitments, in which the Parliamentary Assembly of the Council of Europe invoked the commitment of the Ukrainian authorities to change the role and functions of the Prosecutor's Office (particularly with regard to the exercise of the general supervision of legality) with the aim of ensuring its conformity with the European standards. Later on, in its Resolution 1346 (2003), the Parliamentary Assembly expressed its deep concern with the functioning of the Prosecutor's Office, and more particularly, with regard to its independence and interference with the legislative and executive power.

role to play at all levels of public administration, and they report on their activities to the political bodies to whom they are accountable"[10]

42. The Commission therefore strongly recommends that this new competence of the Prosecutor overlapping with the power of the Authorised Human Rights Representative of Ukraine to "exercise parliamentary control over the observance of constitutional human and citizen's rights and freedoms" (Article 101 of the existing Constitution) be removed from the text, and the office of the Authorised Human Rights Representative strengthened.

Appointment and dismissal of the judges of the Constitutional Court

43. Regarding the appointment of judges of the Constitutional Court, the adopted Law on amendments went back to the original wording of Article 148 of the 1996 Constitution providing that the Verkhovna Rada, the President and the Congress of Judges of Ukraine shall each appoint one-third of the judges, which is to be welcomed. The Constitution should nevertheless provide for the parliamentary election of constitutional judges by a qualified, special majority. Such a provision would oblige the majority and the minority in the Parliament to find an agreement in the selection of the constitutional judges and would ensure a more balanced membership of the Court.

44. A special, qualified majority of members of the Congress of Judges of Ukraine for the appointment of one-third of constitutional judges would also be necessary.

45. The new Article 106 § 4 establishing the right of the Prime Minister to co-sign acts of appointment and dismissal of the constitutional judges could ensure a better balance in the exercise of the presidential right of election of constitutional judges, provided that the reasons allowing the executive to refuse to co-sign those acts are clearly stated. On the other hand, the requirement that the acts issued by the President relating to the appointment and dismissal of the constitutional judges be co-signed also by the "Minister responsible for the act and its implementation" raises some concerns as such provision might be a basis for interference of the executive in the functioning of the Court.

46. The Commission is aware that the specific grounds for dismissing the constitutional judges are listed in Article 126 of the Constitution. In this respect, it would strongly recommend introducing a specific requirement in Article 149 that a preliminary decision on this matter be entrusted to the Constitutional Court itself. Such a provision would strongly contribute to guaranteeing the independence of the judges.

47. In addition, the Constitution should expressly provide for the adoption of a normative act on the internal organisation and functioning of the Court, while establishing a distinction between issues to be regulated by law and issues reserved to the regulations of the Court.

D. Final and transitional provisions

48. Pursuant to the final and transitional provisions, the amendments adopted in December 2004 will enter into force on 1 September, provided that the set of amendments reforming local self-government in Ukraine is adopted before that date. Should the constitutional reform of self-government fail, most of the amendments will enter into force on 1 January 2006. The remaining amendments will enter into force on the day when the new Verkhovna Rada is elected in 2006.

[10] *Paragraph 1.*

49. The transitional provisions making the entering into force of the amendments dependent on the adoption of another set of amendments clearly reflect the context in which the amendments under examination have been adopted. Indeed, although the constitutional reform has been pending for several years, the Law on amendments was adopted in a hurried way, with the aim of solving the acute political crisis.

CONCLUSION

50. The Law on amendments as adopted in December 2004 reflects many of the Commission's comments in its previous opinions on this matter. Nevertheless, a number of provisions, such as the rights of legislative initiative conferred on both the Cabinet and the President, or the President's role in foreign and defence policy might lead to unnecessary political conflicts and thus undermine the necessary strengthening of the rule of law in the country. In general, the constitutional amendments, as adopted, do not yet fully allow the aim of the constitutional reform of establishing a balanced and functional system of government to be attained.

51. On the basis of the above considerations, the Commission considers that, in order to bring the Law on amendments into compliance with the principles of pluralist democracy and the rule of law, the Law should be further discussed and some improvements made.

Attention should particularly be given to the following:

- the provisions on the National Deputies should not link an individual deputy to membership of a parliamentary faction or bloc, thus infringing his or her free and independent mandate (a deputy must be free to leave or not join the parliamentary faction from which he or she was elected) ;
- the principles governing the mutual relations between the President, the Verkhovna Rada and the Government should be fully consistent: the President should not be given a prominent position thus undermining the necessary cohesion of the Cabinet (e.g. the President's right of legislative initiative, the right to nominate the Defence and Foreign Affairs Minister, the responsibility of the Cabinet towards the President);
- the decisions on appointment and dismissal of certain high officials and constitutional judges by the Verkhovna Rada should be adopted by a special, qualified majority;
- the role and competences of the Prosecutor General should be revised to bring them into conformity with European standards;
- the role of the Authorised Human Rights Representative should be strengthened.

52. The adoption of further amendments to the Constitution on the basis of the considerations set forth above would improve the compliance of the Ukrainian Constitution with the principles of representative democracy and the rule of law. In the opinion of the Commission, the adoption of such further amendments would be particularly welcome as additional evidence of the willingness of the new Ukrainian authorities to improve the state of democracy and rule of law in their country.

53. The Commission also wishes to stress once again that taking the time necessary for finding a real consensus among all political forces and the civil society on a well-balanced and coherent constitutional reform would secure the legitimacy of the new Constitution and the political system in Ukraine.