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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# COMMENTS ON

# THE DRAFT LAW ON THE ALL-UKRAINIAN REFERENDUM by Mr O. LAVRYNOVYCH (Member of Parliament of Ukraine)

**Endorsed by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008)**

**prepared by**

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## I. Introduction

*1. The Venice Commission was asked on 15 February 2008 by the Chairman of the Verkhovna Rada of Ukraine, Mr A. Yatseniuk, to comment the two Draft Laws on the All-Ukrainian Referendum and on Local Referendum of Ukraine presented by Mr Olexandr Lavrynovich (Registration No. 1374 - CDL-EL(2008)025) and Mr Yuriy Kliouchokovskyi (Registration No. 1374-1 - CDL-EL(2008)009), Members of Parliament.*

*2. The Commission named Mr Péter Paczolay and Mr Ángel Sanchez Navarro to provide their comments on both draft laws. The following comments prepared by Mr Sanchez Navarro were endorsed by the Commission in Venice at its 77th Plenary Session (Venice, 12-13 December 2008).*

## II. General remark

3. As it was underlined in previous opinions, once more it has to be regretted the option for making extremely long, too detailed, reiterative, confusing and extremely rigid laws, at least in the electoral field where clear rules are especially necessary. The result is a Law which –even assuming the problems arising from translation to English- is very complex and confusing, and will possibly be very difficult for citizens to understand, for political actors to handle, and for electoral bodies and courts to deal with.

4. Most of the provisions of the draft referred to the organisation of the referendum could perfectly be dealt with in an unified Electoral Code, making it unnecessary to repeat –and making it much easier to understand- many rules related to the establishment and operation of polling stations (Chapter III, articles 23 ff), the legal status of their members (article 28), preparation of Voter Registers (Art. 31), and so on. Curiously enough, the wording of article 31.7 of the draft seems to have departed from the same point, when talking about a term "prior to the day *of voting at the election or referendum*".

5. But, on the contrary, the final clause of the draft declares "of no further effect" just "part" of the Law "on an all-Ukrainian and Local Referendums". Thus, the final result of the approval of this draft should be that where today there is a Law, in the future there will be two.

## III. In particular: formal considerations

6. The Draft submitted by Mr. Lavrynovych (43 articles, 37 pages, 18.911 words) is much shorter that the one presented, some months ago, by Mr. Kliuchkovsky (133 articles, 194 pages, 89.229 words). In particular, and in comparison with the latter, the examined draft –rightly- avoids setting up general rules on many aspects which are probably left to be developed by Government decrees, even with the approval of the Central Election Commission as a mainly technical body (content of applications, features and procedures for making and delivering the ballots, measures of the ballot premises, etc.)

7. However, the draft is still much too long, and it may result in similar reflections. For instance, one wonders if article 33.13, which rules the marks that the voter has to put in the ballot to vote for or against the question submitted to referendum, deserves to be included in a Law.

8. In addition, it has to be underlined that this text (be it originally or because its translation into English), has a number of drafting problems. For instance, the draft tries to rule a specific kind of referendum, the "all-Ukrainian" one, instead of enacting a complete Electoral Code. If this option is assumed, and the whole text refers to the same kind of referendum, its complete name should almost disappear from the draft. But it is not so: the terms "all-Ukrainian referendum" appear 522 times! Even the apparent synonymous "National referendum" (much clearer and shorter, at least in English) is used only three times, in Arts. 3, 5 and 8.

9. In the same sense, the terms "specialised [or "in charge of"] conducting an all-Ukrainian referendum" (particularly useless, provided that the whole law is specifically ruling this kind of referendum) is repeated not less than 200 times, making it almost unbearable to read the text. In quantitative terms, just deleting those expressions the draft would lose 2 pages, 1.000 words and more than 6.000 characters. And, in terms of quality, the results are undeniable. See, e.g., the proposed drafting of article 15.5:

> "Upon 5 days from the date of registration of the *group of initiators specialized in the conduct of an all-Ukrainian referendum*, the Central Electoral Commission is to issue a certificate on registration and identification passes to all the members of the *group of initiators specialized in the conduct of an all-Ukrainian referendum*, according to the requirements and procedures set forth by the Central Election Commission. The certificate on the registration of the *group of initiators specialized in the conduct of an all-Ukrainian referendum* shall indicate the timelines for the signature collection, which are defined during the registration of the first *group of initiators specialized in the conduct of an all-Ukrainian referendum* on a certain question submitted for an all-Ukrainian referendum".

10. It seems evident that the same provision would be much shorter and better drafted (at least, in English) by deleting the second, third and fourth use of the terms in italics, and by assuming that the draft is aimed at ruling just one kind (all-Ukrainian or National, see Art. 3) of referendum:

> "Upon 5 days from the date of registration of the *group of initiators of a referendum*, the Central Electoral Commission is to issue a certificate on registration and identification passes to all its members, according to the requirements and procedures set forth by the Central Election Commission. The certificate shall indicate the timelines for the signature collection, which are defined during the registration of the first *group of initiators* on a certain question submitted for referendum".

11. The problem is that this reiteration is continuous throughout the text, so that a similar re-drafting could be possible in many other provisions (see, e.g., Arts. 25, 26, 28, 29… many of whose paragraphs repeat three or four times the same – and useless - expression.

12. Apart from that, other repetitions must also be noted. For instance, Art. 1.2 defines "an all-Ukrainian referendum" as "a way for Ukrainian citizens to adopt decisions on issues of national importance by a secret vote". But Art. 3.1 says that "an all-Ukrainian referendum called by the public initiative is a way of citizens to adopt decisions on all issues…" And Art. 5.1 insist on saying that "An all-Ukrainian referendum on changing the territory of Ukraine is a way for citizens to approve/disapprove a draft…" Obviously, the general features of referendum should not be repeated when describing the differences among its various kinds.

13. Repetition of rules is also constant. For instance, in Chapter II ("Proclaiming an all-Ukrainian referendum") equal rules are to be found in articles 10.2, 10.5, 11.2 and 12.2 (date of the referendum); in 10.3, 10.6, 11.3 and 12.3 (date of publication). Article 1 also repeats some rules which were first fixed in articles 3.2 and 3.3; as it happens with articles 16.9 (paragraph 4) and 20.12; with 20.6.2) and 20.6.3), with articles 18.4 (paragraph two) and 19.

14. In strictly technical terms, the option for making remissions to particular points of such a complex text seems very risky, because any minor reform has to be extended to various articles. For instance, article 17.2 fixes a particular timeframe ("no later than at 18:00 of the last day of the period"). But the following point (17.3, *in fine)*, refers to "the timeframe as specified in paragraph two of this article"; whilst 17.4, paragraph two refers to "the term as specified in paragraph two of this article". Apart from the –usual- complex wording (it should be much easier

to say “in the same timeframe”), the problem is clear: if, for example, points one and two were merged, or if a new paragraph were added… it should be necessary to reform also those two references.

## IV. Substantial remarks

15. Once that has been said, some points deserve special consideration, and some mistakes – possibly due to problems in translation - may be pointed out.

16. Article 6 limits to one “the number of issues to be submitted” to referendum (6.3) and prohibits holding referenda “on the same day” as any political elections (6.2). These rules are in theory quite logical, but it is not clear at all that they should be fixed as legal – absolute - rules, because it may perfectly happen – and in practice, it is quite common in comparative terms- to hold a referendum on the same election day, or with other different referendums. Of course, this possibility is much easier if the whole referendum organisation (voter lists, polling stations and commissions) is common with the electoral one.

17. It seems that the principle of “universal suffrage” at the age of 18 should have constitutional recognition, and therefore should not be set up in different particular laws, as this text does when defining the rights to vote at a referendum, to take part in its initiation and to participate in other legal actions related to it (article 8.1).

18. The whole organisation of the creation of a group of initiators of a referendum (article 14) is too detailed, up to the point that it seems very difficult to combine with the basic principle of free association. In general, it may be said that some people who freely meet may decide, at any given moment, to promote a referendum (which will require, and it should not be forgotten, three millions of Ukrainian citizens’ signatures: articles 3.2 and 13.2). And it is, of course, perfectly reasonable to establish some kind of control on the procedure for that promotion by the public authorities. But the draft departs from a very different point: the purpose of calling for a referendum must be previous to a first “citizens’ meeting” whose degree of public control is probably excessive: previous notification, minimum of participants, place of celebration, written list of participants with all their personal data (full name, date of birth, place of residence…), agenda of the meeting, record of the meeting (with legal specification of the contents which have to be recorded)… All those features imply an absolute administrative (and, therefore, political) control of the meetings, making it highly unlikely to promote any kind of public discussion on issues which may be disgusting for the political power.

19. Another substantial point which seems dubious is the regulation of prohibitions for participating in the campaign for the referendum. Even when there is a well-known debate about the possibility of foreigners to participate in the political life of a country, in this case the prohibition extends to “charitable and religious organisations”, thus posing a serious doubt about the fulfilment of European standards on ideological freedom and activities.

20. In a sharp contrast with the extremely complex structure and wording of the law, the only rule relative to the “accountability for violating” the law is absolute imprecise: “individuals guilty of violating” this law “are subject to disciplinary, administrative or criminal responsibility in accordance with the laws of Ukraine” (Art. 41). In this particular point, a much more careful approach is required, because this wording seems to be an absolute blank clause.

## V. Other comments

21. When regulating the results of the referendum, article 37 seems to say (in quite confusing terms) that “in case” the question submitted to referendum is not approved (“violated?”) “The CEC acknowledges” that the “referendum as such… did not take place” (?).

22. Article 15.2 affirms that if the Central Election Commission (hereinafter, the CEC) denies the registration of the group of promoters of the referendum, "any procedures… are terminated". This provision seems to deny the right to appeal which appears in the following point (15.3).

23. Article 20.3 prohibits the publication of "sociological research" (?) and public opinion polls' results in the term of fifteen days before the referendum day. Apart from the fact that – as the experience in other countries shows - this rule is very difficult to be implemented (especially in the Internet era), its extent is very dubious (what does "sociological research exactly mean?) and the term seems clearly excessive.

24. With respect to the procedure for collecting signatures (Art. 16), the point one says that the group of promoters "has the right to freely collect signatures" for calling the referendum "*upon the receipt of the certificate*" of its registration. But the point 4 says, in apparent contradiction, that "the right to collect signatures" has to be exercised "within the three months form *the day of issuance of the registration certificate*". It seems evident that the day of issuance may not coincide with the day of receipt.

25. Article 21.1 says that "the CEC is responsible for announcing the beginning of the campaign". But the campaign is basically described in article 20, so that its beginning should be treated before.

26. Article 15.6, as the terms "petition)" which are repeated in article 16.2, 16.3, or 16.5 are hardly understandable, possibly due to difficulties in translation.

27. Polling stations are classified, according to Art. 24.4, as "average, specialized or international". But the following point (24.5) speaks about "ordinary polling stations". If it is not just a problem of translation, a single name should be used.

28. The reference made by article 24.9, paragraph one, to "paragraphs 3, 4 or 6" seems to be a mistake: probably, it should refer to paras. 6, 7 and 8.

29. Article 30 establishes a simultaneous right to appeal before a referendum commission or before the courts, something which should be avoided: the administrative path should be previous to the judicial one.

30. Many other specific issues could be pointed out, but it would be senseless: the rights of the members of commissions seem mostly obvious (29.4); the system of replacement of their chairmen is divided in two (29.1, paras. 1 and 3). The procedure for handicapped voters to vote "at the place of stay" is not clear (paragraphs 1 to 4).