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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAWS ON THE ALL-UKRAINIAN REFERENDUM AND ON LOCAL REFERENDUM OF UKRAINE

by

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I. General observations

1. As underlined in previous opinions, making extremely long, too detailed, reiterative, confusing and extremely rigid laws is problematic, 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 simply very difficult 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.

2. In particular, the draft contains many detailed provisions which probably should only be treated setting up general rules, to be developed by Government decrees, even with the approval of the Central Election Commission as a mainly technical body. That is the case, for instance, of the content required for the different applications foreseen in Articles 79, 80.3 and 81.4. Or of provisions referred to the features and procedures for making and delivering the ballots (Arts. 93 and ff.), the measures required for the premises (number of square meters, etc.: Art. 96), the preparations for voting (97), the content of protocols (105), etc.

3. In addition, most of the provisions 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 formation of polling stations (Section V, Articles 42-47), the system of Electoral (or Referendum) Commissions (Section VI, Articles 48-62), preparation of Voter Registers (Sect. VII, Arts. 63-71), and so on.

II. Particular considerations

4. Once that has been said, it may also be added that the draft solutions face quite properly the main questions raised by the organization of a referendum. The classification of all-Ukrainian referendums, the definition of actors and their respective functions and responsibilities, the principles which have to preside the conduct of the voting, the rules about the question posed in the referendum or –very important- the legal effects of the different kinds of referenda (Article 4 and Section XIII, Articles 128 to 132)…

5. All those extremes are reasonably treated. In particular, it may be highlighted the clear requirements set up with respect to the question posed in the referendum (only one question, Art. 14.3; precise and clear wording, Art. 23.6; principles of unity of form, of content and of the subject, as requirements, Art. 24.1).[1] Or the –logical, even when it implies repetition of some rules- option for repeating, in as much as it is possible, the structure of territorial constituencies and polling stations already used in the previous Legislative elections (Arts. 42.2, 44.2 and 46.2).

6. Of course, some others points may be discussed, and some mistakes –possibly due to problems in translation- may be pointed out.

7. Article 3.1 defines four different types of referendum (constitutional, confirmatory, legislative and general). But, immediately after, paragraphs 3.2 to 3.5 talk about “constitutional, treaty-related, legislative and general” referendums, so using a different term (“treaty-related” referendum) also used in other provisions (e.g.: 4.2, 14.6, 15.3, etc). And Article 129 refers to a “ratification referendum”. It should be clarified if those terms mean the same, or not; if it is so, the name of the type should also be unified; and, in case they are different, differences should be cleared out.

[1] See Code of good practice on Referendums (CDL-AD(2007)008), III.3 and III.4.

8. From a general point of view, comparative practice shows that it is quite usual that the social and political actors (parties, unions, associations…) split with regard to particular questions posed in referenda. The French experience in the debate on the European Constitutional Treaty (2005) is one of the most recent, and clearest, examples, with almost all major parties divided. This experiences should be taken into account, because they show that it is very difficult to build all the organization of the referendum on the basis of a registration of parties "as supporters or opponents of the question of the referendum" (Art. 79; see 76.1)..

9. For instance, it is not clear why referendums have to be held in separate terms, and cannot coincide with other referendums or elections (Art. 19.5). This rule, which has an evident internal logic, may in a given moment appear to be rigid and create problems. Circumstances may be relevant, and thus this kind of rigidities may be unfunctional.

10. From a different perspective, the paragraphs 4 to 6 of Article 27 (restrictions concerning the calling of a referendum) would be possibly better in Article 26 ("review of the referendum question"), since they do not in fact refer to "restrictions", but set the rules for refusing the referendum, as a result of the review.

11. There is no doubt about the difficulties to guarantee the respect of the principle of equality of vote. Nevertheless, it is arguable that it may justify any control on the treatment by the media to the different political positions about the referendum issue. The principles of freedom of speech and free press imply that, at least, private media may have their own positions, and therefore may favor their own opinions and give them wider and better coverage.

12. This principle should be applicable to public media –in the measure that they are funded by public means and, therefore, they "belong" to the public opinion, where there are different opinions, as the very organisation of the referendum shows.[2] And it may also be applied to the conditions of paid publicity (i.e.: advertisements should not be more expensive for different subjects in the same media), as it is provided for with relation to the utilisation of building (premises) in Article 86.8. But it is constitutionally arguable – and politically and socially is not realistic - to order that all media, independently of their ideological bias, treat "equally and impartially" to the parties to the process of referendum, and give "objective and balanced coverage of the positions for and against the referendum question", as Art. 7.4 affirms. And it is very difficult to guarantee the principle of "freedom of campaigning, equal access of all parties to the referendum process… to mass media irrespective or their form of ownership, except the mass media founded (owned) by parties to the referendum process" (Art. 16.2.5; emphasis added). There may perfectly be many media which are not founded (owned) by parties to the referendum process, but which may be clearly linked to any of them by strictly ideological or interest reasons. In any case, this issue is treated in Articles 89 to 91, which once more are too detailed.

13. Quite logically, because it is always one of the main arguable points in any electoral law, the provisions about the funding of referendum may also raise theoretical and practical questions. For instance, the attempt to establish too rigid rules may face serious difficulties of implementation.

14. Once more, it seems unnecessary to detail all forms of "referendum campaigning" (86.3), to repeat similar rights for official and international observers (Arts. 83.8 and 84.6; it should be better to list, first, the common rights; and, afterwards, the distinctive ones).

15. The same could be said with reference to the detailed rules about the "citizens' meeting" required to form "a group initiating" a referendum (Art. 32). It is evident that those groups have

[2] See also Code of good practice on Referendums (CDL-AD(2007)008), para I.3.2.

to respect certain rules, but their origins may vary, and some place should be left to the spontaneity of social life.

16. The Section XII, referent to challenging of decisions, actions or inaction with regard to the referendum process is, once more, too detailed. Even when the initial remission to the procedure established in the Code of Administrative Justice of Ukraine (Article 116.2) could lead to think of a different option. In fact, after an absolutely superfluous paragraph (116.1), the draft opts for a system of detailed lists for defining the "complaining parties" (117) and the "challenged parties" (119), instead of using some general formulae, such as "those subjects which are parties [or have legitimate interests] in the referendum process", or "decisions, actions or inactions which may affect to the rights or the legitimate interests of any party in the referendum process". The same reflection could be referred to the provisions about the "content of complaints" (Art. 121), or on the contents of "decisions of the hearing party" (Article 124).

17. Finally, the reference made by Article 26.2 to the 19.1 seems to be a mistake.