Strasbourg, 3 December 2003

Restricted
CDL (2003) 95
Or. Engl.

Opinion no. 230 / 2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE THREE DRAFT LAWS PROPOSING AMENDMENTS TO THE CONSTITUTION OF UKRAINE

by

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1. The following comments concern three draft laws on amendments to the Constitution of Ukraine submitted to the Constitutional Court of Ukraine (CDL (2003) 86). The first draft law carries registration number 3207-1 (CDL (2003) 79), the second one 4105 (CDL (2003) 80) and the third one 4180 (CDL (2003) 81). The second and the third draft law are identical except for the final provisions.

2. The proposals share the general aim of strengthening the parliamentary traits of the Constitution and, correspondingly, enhancing the position and powers of the Verkhovna Rada, the Prime Minister and the Cabinet of Ministers at the expense of the President. At the same time, the draft laws try to provide remedies for the difficulties in forming stable political coalitions. As the Venice Commission has repeatedly stated, the choice between a presidential and a parliamentary system is a political issue, to be decided by the country in question. Both systems can be brought into harmony with democratic standards. However, when the choice between a parliamentary and a presidential system has been made, individual constitutional regulations should constitute a coherent whole without internal contradictions. Nor should they give rise to unnecessary situations of political conflict. If a presidential system is chosen, certain minimum requirements of parliamentary influence and control should be fulfilled. In a parliamentary system, in turn, basic requirements arising from the principle of the separation of powers should be respected.

   In addition to provisions on the mutual relations between the main constitutional organs – the Verkhovna Rada, the President, the Prime Minister and the Cabinet of Ministers - the draft laws also include proposals concerning certain other issues, such as the position of individual members of the Verkhovna Rada, as well as the election and the tenure of judges.

I. Draft Law 3207-1

The position of individual deputies

3. According to Art. 78, other incompatibilities of a deputy's mandate with other types of activity than those explicitly enumerated in the Constitution could be established by a law. The incompatibilities should be exhaustively regulated by the Constitution.

4. According to Art. 81 para 2(5), "the deputy's failure to exercise his or her authority for four months" would terminate his or her mandate. In case of such a failure, lesser sanctions should be applicable before the termination of the mandate.

5. According to Art. 81 para 4, a deputy would also lose his or her mandate, if he or she resigns from the parliamentary faction of the party (or a block of parties) on whose list he or she has been elected, or fails to join the faction. The proposed provision aims at enhancing political stability. However, such a provision would contradict the free and independent mandate of the deputies and transform them from representatives of the people to representatives of political parties. The requirement of a court judgement does not remove the problematic character of the proposal.

The relations between the Verkhovna Rada, the President, the Prime Minister and the Cabinet of Ministers

6. As a general assessment, the proposed provisions on the appointment, dismissal and resignation of the Prime Minister and other members of the Cabinet of Ministers (Art. 85 para 1(12); Art. 106 para 1(6); Art. 114-115), the parliamentary responsibility of the Cabinet (Art. 113) and the dissolution of the Verkhovna Rada (Art. 90 para 3) can be said to form a coherent whole.

7. Provisions on the appointment of the Prime Minister and the other members of the Cabinet of Ministers are divided into three articles (85 para 1(12), 106 para 1(6) and 114), which can be criticised. The Prime Minister is appointed by the Verkhovna Rada on the proposal made by the President. The President, however, is bound to present the candidate nominated by the largest party (or electoral block of parties) or, if this party or electoral block refuses to nominate a candidate, by the second largest party or electoral block, or, if these candidates are rejected by the Verkhovna Rada, by a parliamentary coalition representing the majority of f the Verkhovna Rada. The procedure seems quite complicated and the provisions may be deemed excessively detailed. However, with a view on the difficulties Ukraine has confronted in the formation of workable political coalitions, the provisions can perhaps be defended.

8. The Prime Minister appoints the other members of Cabinet of Ministers. However, he or she has to agree with the President on the candidates to the offices of Ministers of Foreign Affairs, Internal Affairs, Defence and Emergency Situations (Art. 114 para 7). This requirement, although further complicating the procedure for forming the Cabinet, can be defended with reference to the powers of the President in the respective fields. The Prime Minister's decision on the composition of the Cabinet is still in need of an approval by the Verkhona Rada (Art 85 para 1(12)). This is a further complication in the procedure but can be deemed to enhance the parliamentary character of the system.

9. The cases in which the President may dissolve the Verkhovna Rada are exhaustively defined in Art. 90. This is a commendable solution from the point of view of constitutional and political stability.

10. According to Art. 113 para 2, the Cabinet would be responsible to the Verkhovna Rada, and not to the President, as is laid down in the provision in force. This change would be in line with the proposed changes concerning the appointment and dismissal of the Ministers. According to para 3 of the same article, the Cabinet would be guided in its activity, not only by the Constitution, the laws, and Presidential Acts, but also by the resolutions of the Verkhovna Rada. If the proposed addition means that the Verkhovna Rada would have a general power to pass resolutions binding the Cabinet, such a power could easily lead to confusion and into a contradiction with the principle of the separation of powers.

Other issues

11. According to Art. 85 para 1(24-25), the appointments of certain officials require the approval of the Verkhovna Rada. According to para 1(37), the Verkhovna Rada would also have the power to express non-confidence in the persons appointed to their offices with its approval. Such a power would entail a kind of political parliamentary responsibility which is alien to the functioning of a modern administrative system. The establishment of a

requirement of political responsibility in the relationship between the Procurator General and the Verkhovna Rada (Art. 122 para 1) may endanger the independence that the exercise of the functions of the Procurator General presupposes.

12. According to Art. 128, the President appoints professional judges for a first five-year term. All other judges, except the judges of the Constitutional Court, are appointed by the Verkhovna Rada for a ten-year term. Both the power of appointment exercised by the Verkhovna Rada and the time-limited mandate of the judges can jeopardize the independence of the judiciary.

13. According to Art. 85, para 1(3), the Verkhovna Rada would have the power, not only to adopt laws, but also to interpret them. Such a power, whose practical purport remains unclear, would contradict the principle of the separation of powers.

14. According to Art. 121 para 5, the prosecutor's office would be entrusted with the "supervision over the observance of human and citizens' rights and freedoms, compliance with the laws on such issues by the bodies of state power, bodies of local power and their officers and civil servants". It can be questioned whether such typical ombudsman functions are in congruity with the other tasks and the historical traditions of the procuracy. A separate office of an Ombudsman would be preferable.

II. Draft Laws 4105 and 4180

The position of individual deputies

15. On the proposed provisions in Art. 78 para 3, Art. 81 para 2(6-7) see comments above in para 3-5.

The relations between the Verkhovna Rada, the President, the Prime Minister and the Cabinet of Ministers

16. The second and the third draft also provide for the appointment of the Prime Minister by the Verkhona Rada on a proposal presented by the President. According to these drafts, however, the candidate is nominated by a coalition formed according to the procedure laid down in Art. 83 (Art. 85, para 1(9)). Such a coalition representing a parliamentary majority is to formed "following the results of elections and on the basis of coordination and bringing together of political positions. The formation of the coalition shall 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. Complementary provisions on formation and organisation of the coalition, as well as of the termination of its activities would be included in the Rules of Procedure of the Verkhovna Rada. It can be doubted whether such a formalised procedure for forming a parliamentary majority contributes to the aim of enhancing political stability.

17. The Verkhovna Rada would also appoint the other ministers, the Minister of Defence and the Minister of Foreign Affairs on the proposal made by the President and the other ministers on the proposal made by the Prime Minister. Also here the exceptional procedure for appointing the Minister of Defence and the Minister of Foreign Affairs may be defended with a reference to the powers of the President in the respective fields.

18. According to Art. 83 para 5, the coalition which nominates the candidate for the office of the Prime Minister is also supposed to "form" the Cabinet and to be "responsible for its performance". What these expressions mean remains unclear.

19. Also in the drafts under examination, the provisions on the formation of the government are dispersed into several provisions which affects the clarity of the Constitution.

20. According to Art. 103, the President would be elected by the Verkhovna Rada. Whether the President is elected through direct elections by the citizens or by the parliament, is an issue of political considerations, to be decided by the country itself. Election by the Verkhovna Rada can be defended with regard to the general aim of strengthening the parliamentary traits of the political system. This solution would also be in line with diminished powers of the President.

Other issues

21. On the election of judges by the Verkhovna Rada and for a ten-year period (Art. 85 para 1(27), Art. 126 para 4 and Art. 128 para 1), see the comment above in para 12.

22. On the proposed functions of the prosecutor's office in human-rights supervision (Art. 122 para 5, see the comment above in para 14.

23. The two drafts under examination differ as to the proposed provisions on the entering into force of the reform. According to draft 4105, the presidential elections of 2004 would be held according to the present provisions and only in 2006 would the Verkhovna Rada elect the following president. According to draft 4180, in turn, the Verkhovna Rada would elect the President already in 2004. The entering into force of the reformed provisions is a political issue on which the Venice commission can hardly express an opinion. It should be emphasized, though, that constitutional reforms and their entering into force should not be subjected to short-term political calculations.

24. The transitional provisions in both the drafts also regulate the principles to be followed in the next parliamentary elections in a more detailed manner than the Constitution itself. Such ad hoc constitutional provisions should be replaced by permanent provisions in Chapter IV of the Constitution.