Strasbourg, 3 June 2009 **CDL(2009)096***

Opinion no. 534/2009 Eng. Only

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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GENERAL REMARKS

The present constitutional system of Ukraine from many aspect is not appropriate. The deficiencies of the 2004 constitutional reform were criticized by the Venice Commission, too.[1] Thus a constitutional reform is a necessity for the stability of the country which is a vital European interest. Recently, several constitutional drafts have been prepared by experts (e.g. a working group lead by V. M. Shapoval), by politicians (Tymoshenko), by political institutions (National Constitution Council). I leave aside the chances of adopting the present draft submitted by the President, and I focus only on the legal solutions of the text.

At large, the draft offers a balanced system of the power branches. What is successfully avoided is the concentration of power. The proposal tries to avoid the ineffective functioning of the State which is one of the main problems of the present system. This explains the restructuring of the parliament, and the introduction of the two-chambers system. This would also open up the possibility of the representation of territorial interests. Even if no federal solution is introduced, the composition of the Senate is a step towards the territorial representation as senators are elected from the Autonomous Republic of Crimea, each oblast, the city of Kyiv and cities which bear the status equal to oblast. Therefore one should not be so critical with the introduction of the second chamber.

The response to the dramatic division of the country is a crucial point.

Section III: PEOPLE'S WILL

Currently, the referendum can be organised on the basis of the Constitution of Ukraine and the 1991 law on all-Ukraine and Local Referendums (with amendments in 1992). As an opinion of the Venice Commission underlined the law was never harmonised with the constitution.[2]

The Draft constitution submitted by the President of the Republic under the title of "People's will" gives a more detailed regulation of the elections than the present constitution (31 paragraphs instead of 9). The regulation is essentially the same as the present one but elevates several provisions to the constitutional text. It reflects also the continuing efforts made by other constitutional drafts to change and improve the electoral system, and especially the regulation of the referendum.[3] This chapter of the draft draws upon even in details of the draft constitution of Ukraine prepared by a working group headed by Mr V.M. Shapoval.[4]

The general principles of the elections are the same as at the present. A strong accent is put on equal and direct suffrage, as a new provision underlines that "all voters have equal amount of votes and vote in person" (Art. 76). A new provision (article 76.4) does not allow to hold local elections at the same time with the regular parliamentary or presidential elections. This limitation is acceptable, other countries also keep apart national and local elections. New provisions are introduced on the exclusion of certain officers from running at elections. Thus in the case of a quite large group the important right to be elected is restricted. This restriction is acceptable, even if some legal systems are more permissive during the campaign period, and similarly strict only after having gained the mandate incompatible with the office or position held before.

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1 Recently, a political explanation became widespread according to which the present dysfunctional system was a parting gift from the old regime, an arrangement negotiated in return for Yushchenko's victory. A. Karatnycky and A. J. Motyl, The Key to Kiev. Foreign Affairs May/June 2009. p. 109. Yushchenko himselfs propagates this view (Kyiv Post, 7 May).

2 CDL-INF (2000)14, para 7.

3 CDL-AD(2009)003 Comments on the draft Law on the all-Ukrainian referendum by Mr O. Lavrynovych.

4 Opinion 462/2008.

The forms of direct democracy are extended besides referendum to popular initiative and local initiatives. Thus the draft introduces a new institution compared to the Constitution presently in force: the people's initiative as a form of direct democracy. As the constitutional text suggests, the people's initiative is a specific kind of the referendum initiated by a certain number of voters.

Articles 78 – 83 define and specify the different types of referenda made possible by the draft constitution. These are the following:

– Mandatory referendum:

The two cases are – as under the present constitution – the amendment of the constitution and the alteration of the territory of Ukraine; such decisions can be made only by an all-Ukrainian referendum (article 78).

– Abrogative referendum:

(Article 79) opens the possibility to submit a draft law repealing – entirely or partly – an effective law on popular initiative. The requirements to initiate such type of referendum are quite severe (but more permissive as the present regulation, the present requirements are the double of those proposed): it may be initiated on the request of no less than one and a half million citizens of Ukraine eligible to vote, and on the condition that the signatures in favour of designating the referendum have been collected in no less than two-thirds of the *oblasts*, with no less than 50,000 signatures in each oblast. The double requirement of a relatively high number of signatures, and that they should be collected in no less than two-thirds of the *oblasts*, proves that there is a real support in the population for an all-Ukrainian referendum.

– Optional constitutional referendum:

The amendment of the constitution on popular initiative requires only the support of one and half million citizens in order to be submitted to the Verkhovna Rada.

– Legislative referendum:

A draft law on issues falling within the areas regulated by law may be submitted to the Verkhovna Rada of Ukraine on popular initiative supported by no less than 100,000 citizens of Ukraine eligible to vote. This is the genuine legislative popular initiative that is made possible on issues that belong to the competence of the legislative branch. This is the usual solution for defining the scope of the popular referendum. But the required threshold is surprisingly low.

Some general issues related to all-Ukrainian referenda are regulated by the draft, too.

An All-Ukrainian referendum is effective if the majority of citizens of Ukraine eligible to vote participated in the voting. Decisions at an All-Ukrainian referendum are approved by the majority of citizens of Ukraine who participated in the voting (article 80). This double majority requirement is reasonable.

After having proved the necessary support in favour of the referendum, the President of Ukraine proclaims it.

The draft enlarges the scope of the prohibited subjects on which it is not allowed to hold a referendum (the present constitution prohibits only referendum on taxes, budget, and amnesty).

The draft adds the following prohibited subjects that may not be a subject to an all-Ukrainian referendum called on popular initiative:

- laws on rights and obligations of the citizens and their guarantees,
- dues and fees, compulsory payments,
- legal responsibility,

- consent to be bound by international treaties of Ukraine or the termination or the suspension of international treaties of Ukraine.

The last limitation is acceptable, and is usual in the practice of countries allowing for referendum by popular initiative. However the other three prohibitions are too vague. Basically all laws might affect the rights and duties of citizens, and this opens the way to potentially exclude all subjects from referendum by interpreting this provision broadly. (According the draft the Constitutional Court has to decide on the constitutionality of the popular initiatives.) Cases belonging to "Legal responsibility" are not clear, and vague. It would be necessary to avoid indicating prohibited subjects that open the way to uncertainty and arbitrary interpretation.

A further limitation is regulated in article 79.4: an all-Ukrainian referendum called on popular initiative may not be held more than once a year. This restriction aims at keeping referenda in a reasonable channel, and avoid to abuse the institution to limit representative democracy. However, it is not clear the philosophy beyond the enlarging of the possibility of referenda, and introducing new obstacles to it.

As for the binding effect of a successful referendum the draft envisages that decisions approved by an All-Ukrainian referendum are mandatory (article 80.5).

Articles 82-83 introduce at constitutional level the institution of local referenda which is to be welcomed.

To sum up: the draft seriously enlarges the possibility of making use of referendum, and lowers the required number of citizens supporting the popular initiative. For example, the Constitution in force in order to call an All-Ukrainian referendum is by popular initiative requires the support of no less than three million citizens of Ukraine.

As the Venice Commission has earlier underlined "Direct consultation of the people via referendum has long been the subject of heated discussion between legal and political experts, sociologists, politicians, and indeed the general public."[5]

The Venice Commission has addressed several times the topic of referendum. Recently, it has summed up its standpoint in the opinion on the Finnish constitution. Enlarging the possibility of holding referendums, or the introduction of binding effect, or popular initiative is fully depending on the background political decisions. However, it is a slippery road. In the case of negative experiences or even abuse of the tool of referendum, it is very difficult to withdraw the means offered to the people in this peculiar form of direct democracy. Politicians and political parties would face serious difficulties when explaining such a withdrawal. Therefore, any widening in the regulation of referendum requires special cautiousness.[6]

The proposed regulation enlarges the possibility of holding referenda. On the other hand, in a controversial and arbitrary way, tries to limit the possibility of holding referenda by enlarging the scope of prohibited subjects, by investing the responsibility of the constitutional control of popular initiatives to the Constitutional Court.

Section VIII: CONSTITUTIONAL COURT OF UKRAINE

The proposals of the draft are close to the present-day regulation. The most important changes follow from the proposed system of checks and balances.

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5 Referendums in Europe – an Analysis of the Legal Rules in European States. CDL-AD (2005)034, para 12.

6 CDL(2008)002.

The appointment procedure instead of the present three-channel system (President, parliament, Congress of judges) would allow for the recruitment of constitutional judges only through a single channel: on the nomination of the President of the Republic the Senate would elect the judge by a two-thirds majority. The Venice Commission in another case welcomed the shift from the system of exclusive direct appointment of constitutional judges by the President to the mixed system providing elective or appointment powers to the three main branches of power because it has more democratic legitimacy.[7] *A contrario*, shifting away from the three-channel system to a combination of presidential candidacy and parliamentary election is not welcomed, even though the proposed solution is acceptable and known in other countries. However, the smooth functioning of the appointment system is not guaranteed by any solution.

As for the necessary requirement for the appointment of a constitutional judge, the draft removes the requirement of residing in Ukraine for the last twenty years, and diminishes the period of practical experience from 15 to ten years. Both solutions might help to enlarge the number of the possible candidates.

Article 148 contains the text of the oath. It is a very important new provision that the elected judge has to take the oath at the plenum of the Constitutional Court, and not the parliament. As we might recall, in 2005 the number of the judges of the Constitutional Court, due to a lack of appointments and elections, was only five and the Court was not able to operate. The *Verkhovna Rada* seemed to be reluctant both to appoint the four judges under its own quota and to allow for the procedure of swearing in to take place. At that time the Venice Commission proposed as one of the possible solutions to swear in the new judges before the Constitutional Court (in lack of it before the chairman of the Court).[8] The solution proposed by the draft follows the recommendation of the Venice Commission.

As regards the guarantees of judicial independence, the general rules apply for the judges of the Constitutional Court, too. Thus some reservation regarding those rules might be mentioned in regard with constitutional judges, too. I have such reservation regarding the competences of the Senate towards the judges: a judge might be arrested with consent of the Senate, and the Senate dismisses a judge. The solution guaranteeing full independence would be to endorse the plenum of the Constitutional Court with these competences. There is quite a long list of the possible reasons for dismissal, but these are clearly defined, and in case of the most delicate grounds for dismissal (the violation by the judge of requirements concerning incompatibility; and breach of oath by the judge) two-thirds majority decision is required.

As for the competences exercised by the Constitutional Court, all the present competences are kept, and two new ones are added.

An important change is the introduction of individual constitutional complaint (article 150.3). The Venice Commission in its opinions addressed the importance of the institution of constitutional complaint. The Venice Commission considered the initiative to introduce a constitutional complaint procedure to be welcomed, and declared that:

"*the possibility of individual complaint would definitely serve the better and more effective protection of fundamental rights*."[9]

In its opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey[10], the Venice Commission has outlined generally and in a comparative perspective the role and importance of the individual complaint:

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7 CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.

8 CDL-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine § 19.

9 CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the Constitutional Court).

"The institutions of Verfassungsbeschwerde in Germany and recurso de amparó in Spain are the most well-known examples of constitutional complaint. Other European countries have also established some procedures for the adjudication of constitutional complaint (among others Russia, Czech Republic, Slovakia, Slovenia, 'the Former Yugoslav Republic of Macedonia', Croatia, Portugal, Hungary, etc.).

Recent tendencies in constitutional adjudication can rightly be described as a path from the review of the constitutionality of laws to the review of the application of laws. This means a shift from the review of legislature to the review of the judiciary."

Welcoming the introduction of the constitutional complaint, we have to call the attention to the fact that this will probably change the function of judicial review (not speaking of the proportion of the case-load), and would require cautiousness.

The other new competence is the opinion on the constitutionality of issues proposed to nationwide referendum (article 152.2). This is again a competence exercised by Constitutional Courts in other countries, too (Italy, Hungary).

Article 153 on the division of labour among the plenum and the chambers is unclear.

As a conclusion, the chapter of the draft on the Constitutional Court is basically similar to the Constitution in force. The amendments reveal further improvements (as in the administration of oath, introduction of constitutional complaint), generate some reservations (as the appointment procedure), and preserve some solutions (as for the dismissal of judges) that were criticized by the Venice Commission.

Section X: INTRODUCING AMENDMENTS TO THE CONSTITUTION OF UKRAINE

The proposed rules make it difficult to amend the constitution, in such a way guaranteeing its 'rigid' character. The President, both chambers of the parliament, and popular referendum also play a part in the process, reflecting the new system of separation of powers. The most important change is that after the adoption of the constitutional amendment by qualified majority in the parliament, the President has to designate it to popular referendum. Otherwise it reflects the present arrangements.

10 CDL-AD(2004)024, paras. 26-47.