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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

COMMENTS

**ON THE PRELIMINARY DRAFT CONSTITUTION OF UKRAINE
(Doc. CDL (95) 28)**

**PART IV
THE EXECUTIVE**

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European Commission for Democracy
through Law

Observations on the Draft Constitution
of Ukraine*

by

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Observations on Part IV: The Executive

1. The Draft provides for a rather balanced presidential system, with considerable parliamentarian and popular checks. This executive regime is embedded in a constitutional system based on the principles of a pluralist, rule of law-oriented social democracy (priority of constitutional law including human rights rules contained in international legal acts, II/58; recognition of fundamental rights and freedoms; periodical renewal of political mandates by general, free, equal, and secret elections; separation of powers; independence of judiciary; constitutional jurisdiction; public powers to be exercised on the basis and within the limits of law; restriction on constitutional rights and freedoms only if prescribed by constitutional laws necessitated by overriding public interests, proportional and compatible with the principles of a democratic, law-based social state II/42, etc.).
2. The President of Ukraine is elected by popular vote for a period of 5 years on the basis of general, equal and direct suffrage by secret ballot; he/she may not hold this office for more than two successive terms, IV/2.

*based on the English translation in Council of Europe doc. CDL (95)28; references are to unofficial parts introduced by the Secretariat of the Venice Commission.

Although the quorum of at least 50% of electors for a valid election appears to be rather high, this is certainly justifiable in view of the principle of democracy and the powers of the President.

What should be clarified is Art. 5 sec. 2/IV: Will this "second round" also take place if in the first round (Art. 5 sec. 1/IV) the quorum of 50% of electors had not been reached? Art. 5 sec. 2 speaks only of the case if no candidate has obtained the majority of the votes of electors casting a vote. In other words: Does the "second round" in order to lead to a valid election also require the quorum of Art. 5 sec. 1 sentence 1? If so, this might prolong election of a president for an unforeseeable space of time, and therefore cannot be recommended. Because it is, as a rule, not to be expected that in a new election, which has to be fixed in a rather short space of time participation of the electorate will substantially increase and reach a mark above 50%. The present proposal of the Draft seems to have been influenced by the Russian law on the election of the President which in this point caused hot debates in the Russian Duma.

3. The Draft provides for the possibility of a vote of non-confidence in the president expressed in a national referendum, Art. 102/III. The constitutional consequences of such vote of non-confidence, nevertheless, remain somewhat doubtful: Art. 11/IV which deals with the termination of the mandate of the president does not mention dismissal from his/her office as a consequence of a vote of non-confidence. While such possibility is certainly covered by the idea of democracy, it is rather unusual in presidential systems for good reasons:

Responsibility to the people (electorate), as a rule, is effectuated by the periodical renewal of political mandates through elections (in regard of heads of states the periods last between 4 and 7 years).

To provide, in addition, for a popular vote of non-confidence in the president is to introduce a serious permanent element of instability in the system of government which may in the

long run prove to be fatal to the whole political system (the art of co-habitation between president and prime minister and his majority in parliament being rather rare).

The periods of office of the president and of the Supreme Rada of Ukraine differ (5:4 years Art. 2/IV, Art. 97/III), even disregarding prior terminations of mandates. The possibility of holding seriously opposed political views by president, on the one, and the majority of the Supreme Rada on the other hand, can not at all be excluded, nor can it be excluded that a majority in the Supreme Rada will launch a popular movement for holding a referendum on a vote on non-confidence in the president (such referendum requires the decision, at its discretion, of the Supreme Rada or the initiative of at least 3 million electors followed by the decision of the Supreme Rada to hold such referendum, Art. 102 no. 2/III; in view of the whole electorate 3 million is no high quorum). If the quorum for a referendum should be assembled, the Supreme Rada might be inclined to use it for some time as threat towards the president and his executive, even more so, as the Supreme Rada at its own discretion and without such popular initiative may decide to hold a referendum on non-confidence in the president.

There appear to exist good causes in other presidential systems not to provide for votes of non-confidence in the president. The decisive disadvantage of presidential systems anyway is the possibility of a stalemate situation between president and a majority of parliament which, e.g., may block the legislative program of the president (a fate experienced, e.g., to a large extent by US-president Kennedy).

4. In addition to the possibility of a vote of non-confidence in the president with constitutional consequences not spelled out by the Draft (possibly a more political expectation that the president than may resign), the president may be dismissed from office if he is successfully impeached for flagrant violation of the Constitution and (or?) laws of Ukraine, Art. 14/III Draft. The procedure requires the initiative of at least one third of the constitutional membership of the

Supreme Rada. The decision on dismissal requires a majority of at least three fourths of this membership.

Considering that the political weapon of a referendum on non-confidence in the president is to a considerable extent in the hands of the Supreme Rada one may have serious doubts whether it is appropriate to give also the decision on impeachment to (three fourths of) the Supreme Rada. The criteria for impeachment are strictly legal criteria: flagrant violation of the Constitution and (or?) laws of Ukraine. Would it not be more appropriate to entrust such kind of decision to the Constitutional Court of Ukraine? Will members of the Supreme Rada withstand the temptation to have political considerations influencing their vote on the impeachment? Would decision by an independent court not be considered by the general public to enjoy greater legitimacy and accordingly meet more acceptance, strengthen the confidence and respect in the integrity of the constitutional system and the rule of law?

5. While the powers of the president comprise to form the government (Arts. 8 no. 7; 17/IV Draft), the Supreme Rada holds the power to approve personal membership of the government of Ukraine (Art. 102 no. 13/III Draft).

It might need clarification whether this power of the Supreme Rada applies only to the situation that the president, e.g. after his election, forms a new government (the foregoing government is terminated upon termination of a president's mandate, Art. 17 sec. 2/IV), or will also apply to any further personal change in the composition of the government.

It appears that the Supreme Rada not only may disapprove of the membership of the Government as a whole but also of individual members. The result may be that the president is hampered to form a Government composed of persons which he considers to be the most competent ones to carry out his political programme.

As far as procedure of approval (or disapproval) is concerned it might be considered to cast such decision not until a (new) government may have presented its programme to the Supreme Rada.

6. A serious check on the executive power of the president and his government might prove the power of the Supreme Rada of Ukraine to legislate (in the form of laws) on principles and main directions of foreign policies as well as on principles of foreign economic and customs policies, Art. 103 nos. 21, 24 Draft/IV.

It is quite unusual for traditional presidential (France, USA) as well as parliamentary systems to restrict and limit a priori in the form of laws the principles and directions of the foreign policy of the executive; the constitutions, rather, reserve Parliament the power to approve of important engagements in foreign affairs after they have been specified on the international level. The solution as provided in the Draft may give rise to frequent constitutional disputes between the Supreme Rada and the President and so may hamper or even paralyse a steady continuous foreign policy of Ukraine and so become detrimental to the public weal of Ukraine.

7. Among the powers of the President enumerated in Art. 8 Draft it should be made clear in no. 1 whether the President may give notice to international treaties only with the prior consent of the Supreme Rada or even without such prior consent.

8. In view of the President's power under Art. 8 no. 1 of the Draft to represent Ukraine in international relations and conduct negotiations the provision in Art. 10 of the Draft, that he may not delegate his powers to other persons or bodies would appear to rigid. Hardly any president of a state will have the time to conduct himself negotiations on international treaties. (One might of course, interpret the term "delegation" rather strict so as not to comprise such negotiations if conducted in the name of the President).

9. Art. 9 of the Draft provides for a competence of the President within the limits of his powers to issue normative acts. It might be clarified that such acts must not only keep within his constitutional powers but must also not contravene against

existing laws. In other constitutional systems it is even provided that norms which are f.i. binding upon the inhabitants of the state may only be issued by the executive power if the executive power is authorized by a law of the legislator which in advance states the goal and the scope of such norms.

A similar consideration might be applied to Art. 19 of the Draft (normative orders by ministries).

10. In Art. 26 no. 4 of the Draft dealing with the functions of the Prosecutor's Office, it might be provided that the Prosecutor's Office shall be subject to decisions of courts in the sphere of enforcement of criminal penalty and during the enforcement of other measures involving temporary deprivation of liberty.