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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

CONSTITUTIONAL AGREEMENT

UKRAINE

by

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I had opportunity of studying or consulting the following texts:

- A - Constitution of Ukraine, adopted in 1978, as amended (doc. CDL(95)25);
- B - Constitutional Agreement between the Supreme Rada of Ukraine and the President of Ukraine (including the so-called "Law on Power"), which according to reports (see memorandum mentioned sub F below) has entered into force on 7 June 1995; (doc. CDL(95)29);
- C - Report on the Legislation of Ukraine, by the rapporteurs Morenilla Rodriguez and Soyer, 6 March 1995 (doc. AS/BUR/Ukraine(1995)1);
- D - Preliminary Assessment of Ukraine's request for membership of the Council of Europe, by the rapporteur Masseret, 31 May 1995 (doc. AS/Pol(1995)19);
- E - Memorandum by Lavrynovych (deputy chairman of a parliamentary committee, without indication as to which parliament) on the Constitutional Agreement (date of fax transmission to Strasbourg: 10 July 1995);
- F - Memorandum by Holovaty, member of the Venice Commission on behalf of Ukraine, on the contempory constitutional order in Ukraine (date of fax transmission to Strasbourg: 24 July 1995).

The first question that should be asked, concerns the legal validity of the Constitutional Agreement. This Agreement, in particular the Law on Power contained therein, pretends to constitute a 'mini constitution', with a view to bridge a gap between the present political deadlock and the coming into being of a new constitution. In other words, it pretends to render inoperative (parts of) the 1978 constitution. It is beyond dispute that the conditions applicable to amend the existing constitution (art. 171), have not been fulfilled.

This formal line of argument can be set off by the recognition that no other way out seemed to be available from the existing deadlock. Holovaty's reasoning - doc. F referred to above - is rather convincing in this respect. Necessity knows no law, or rather: asked for emergency legislation.

If we accept this as the factual situation, and I can do no other, then we may accept also the legal order created by the Constitutional Agreement as legitimate, but only for an interim period, and only for as long as the parties who have concluded the Agreement, duly co-operate making progress towards the creation of a new constitutional order, in accordance with their mutual promisses.

However, this does not bring the interim legislation up to the level of a constitution. There is, therefor, no question of assessing the 'democratic quality' of something like a (lasting) constitution.

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Besides, this 'interim constitution', according to Part II of the Constitutional Agreement, consists of the Agreement itself together with those provisions "of the applicable Constitution of Ukraine ... which comply with the present Constitutional Agreement". Since the Constitutional Agreement does not contain more accurate indications as to which of the provisions of "the applicable Constitution" may, and which may not be considered as complying with the Agreement, the answer to that question has been left entirely to interpretation. Interpretation of the coherence and the mutual connection between the Agreement and the 1978 Constitution. Interpretations which may be assigned to them effectively by the parties to the Agreement, or perhaps by judgments of Ukrainian courts, but not in any authoritative way by foreign jurists.

This fact cannot but seriously impede our assessment of the democratic quality of the 'interim constitution' at present in force.

N.B. Art. 97(19) of the 1978 Constitution confers upon the parliament the "exclusive competency" to interpret the Constitution and laws of Ukraine. Not to mention here an apparent collision with the competency of the courts, this provision, if not considered by all concerned as having been abolished, might well cause confusion !

If we nevertheless try to test this interim constitution, a few remarks have to be made with regard to possible weak places in the democratic structure of the country.

Firstly regarding the relationship between government (Cabinet of Ministers) and parliament (Supreme Rada of Ukraine). As appears from art. 22(1) of the Agreement, it is the President who is charged with the duty to form a government. The parliament, in its turn, has the power to declare its "non-confidence" in all or particular members of the government, see art. 17(23) of the Agreement; also art. 33. (I assume that the term "express the distrust" in art. 22(2) and (3) is intended to have the same meaning as "declare vote of non-confidence".)

So far, so good. But what about the consequences ? When government and parliament cannot co-operate, one of them will have to give way. However, under art. 17(23) the President would seem to have no choice but to accept the resignation of (particular members of) the government. He can of course form a new government, he even has a duty to do so, but the parliament has the power to dismiss the new government also, and so on, until the parliament will be fully satisfied. This degrades the government to an executive committee of the parliament, and this, in my opinion, is not in the interest of the 'balance of powers' so fundamental to a democratic state.

The essential thing for a democratic balance of powers would be to give the President the choice: either to dismiss the government or to dissolve the parliament. In the latter case it will be the electorate who makes the final decision, and that would seem to be more in harmony with art. 2 ("the people is the sole source of the power") of the Agreement.

(As appears from press-reports concerning action taken by the Ukrainian parliament on 18 May last, the parliament did not approve articles giving the president the right to dissolve parliament. It also did not approve articles setting out a procedure for the impeachment of the president. In this connection I wish to note that, in my opinion, the two are not to be considered on the same level: while dissolution would be the counter-balance to a fully constitutional act of parliament, impeachment is the counter-balance to the possibily of unconstitutional behaviuor of the president.

N.B. Art. 114-9(2) of the 1978 Constitution provides for impeachment of the president. If this article has not been abolished by the Agreement, one wonders what the point is that came up for debate in the parliament.)

My second remark concerns the independence of the judiciary. In general design, art. 153 of the 1978 Constitution and art. 3 and artt. 36 and following of the Agreement seem effectively to warrant the independent exercise of the judicial responsibilities.

Art. 42 of the Agreement provides for an appointment procedure of all courts (presumably: of the members of all courts), except judges of the three highest courts. (It is silent about their dismissal.) Appointment of chairmen and members of the latter three is covered by art. 17 paras. (17), (18) and (20). A question arises when we see that, under paras. (18) and (20), the appointing authority (parliament) is competent also to dismiss. Para. (20) adds to this: "according to the procedure established by the law", but this addition is missing from para. (18) with respect to the chairman of the supreme court.

As is well-known, it is of the utmost importance in any democratic state that judges can perform their duties in absolute independence, i.e. independent in particular of government and parliament. The mere possibility of dismissal for no other reason than that executive or legislative authorities are displeased at a judicial sentence, would impair the independence.

Lavrynovych - doc. E referred to above - states that the adoption of the (Law on Power contained in) the Agreement has allowed for considerable steps towards reforming the judicial system and strengthening the independence of the courts.

Without questioning the justness of this statement, I still am of the opinion that, for the benefit of assessing the democratic quality of the 'interim constitution' presently in force, further examination of the dismissal procedures would be necessary.

A third and final point which has received my attention, concerns the freedom of the press. In any development towards democratic institutions, the freedom to express and disseminate critical opinions, can be a matter of vast concern to society. Art. 48 of the 1978 Constitution guarantees the freedoms of speech and of the press, but the wording of this article ("In accordance with the interest of the people .. etc.") is such that further elaboration of the provision (by legislation or jurisprudence) allows of a substantial reduction of the freedom.

(Art. 25 of the Draft Constitution of Ukraine, doc. CDL(95)28 of 6 June 1995, has been worded more straightforwardly. The only exceptions seem to have been dealt with in art. 13(3): ".. not impair rights and freedoms of others".)

The report to the Parliamentary Assembly - doc. C referred to above - has given full attention to the freedom of expression in Ukraine; see pages 32-33. It reaches the

conclusion that, in practice, the freedom of the press functions satisfactorily.

Having examined the available documents on the points mentioned above, and now surveying my notes, I must express my admiration for the great efforts put forth by the parties concerned in the Ukraine in building their own, new, democratic society.