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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# COMMENTS

# ON THE DRAFT LAW ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE

**By**

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1. The following comments concern the Draft Law on Amendments to the Constitution of Ukraine which was submitted by the President to the Verkhovna Rada on March 6 this year. The main proposals in the Draft Law concern the transformation of the Verkhovna Rada into a bi-cameral body and strengthening to a certain extent the parliamentary traits of the political system. In addition, there are also proposals with regard to, e.g., the provisions on the referendum and the judiciary.

**The Verkhovna Rada**

2. Ukraine is a unitary state, except for the Autonomous Republic of Crimea (Chapter X of the Constitution). In addition, the Cities of Kyiv and Sevastopol have a special status, determined by laws (Article 133). *By contrast, the regi*ons (oblasts) mentioned in Article 133 are administrative entities with no autonomous status. Although there are no established European standards on the choice between a mono- and bi-cameral parliament, in practice the latter system has mainly been adopted by states with a federal or at least a regional structure.[1] The feasibility of a bi-cameral system in a unitary state like Ukraine can be doubted. Ukraine has had difficulties in establishing a well-functioning political system. The introduction of the proposed Chamber of Regions could further complicate the political system and jeopardize the possibilities to attain a stable political (parliamentary) majority.

3. The provisions in the Draft Law on the composition and election of the Chamber of Regions are very scarce. According to the proposed Article 76(2), "three representatives each from the Autonomous Republic of the Crimera, regions the cities of Kyiv and Sevastopol are elected to the Chamber of Regions". If a bi-cameral system is adopted, the Constitution should include basic provisions also on the election of the Chamber of Regions.

4. According to the President's proposal the Number of the deputies of the National Assembly would be lowered to 300 (the Verkhovna Rada has at present 450 members), and the deputies would be elected on a proportional basis. In order to enhance the efficacy of the Parliament, the decrease of the amount of deputies is to be welcomed. The reform of the electoral system, in turn, would reduce its complexity. However, fragmentation has constituted one of the problems in the Ukrainian political system, and a proportional electoral system might not be the best remedy to that problem. If the intention is to introduce a threshold of votes required for entry in the Parliament – as would be advisable in a proportional system - the basic provision on it should be included in the Constitution.

5. The proposed amendments contain provisions whose aim is to increase the stability and efficacy of the functioning of the Verkhovna Rada. A new

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[1] *The term "regional structure" is used here in the sense of "regional state".*

provision in Article 81 would lay down that a deputy who resigns or is expelled from the parliamentary faction of the party or electoral bloc of parties on whose list he or she has been elected loses his or her mandate. 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 proposed procedure would also give the parties the power to annul electoral results. It is to be strongly recommended that the proposed provision be deleted from the Draft Law. It should also be mentioned that the Venice Commission has already in its opinion CDL INF (2001) 11 heavily criticised a corresponding proposal.

6. According to par. 7 of Article 81(2), a deputy would lose his or her mandate on the basis of an absence for 20 days without valid reasons from the Verkhovna Rada's meetings. Such a sanction seems exceedingly severe, especially in the absence of any preceding lesser sanctions.

7. Article 83 of the Draft Law includes provisions on the creation of a "permanent parliamentary majority". According to Article 114, this majority would propose to the President the Prime Minister Candidate. In addition, the President would, according to Article 90, have the power to dissolve the National Assembly, in case a permanent parliamentary majority is not created within the time limits provided for by Article 83. Otherwise, the role of this majority in the functioning of the Verkhovna Rada is left open. This also makes it impossible to take a position on the advisability of the proposed arrangement. In any case, if the arrangement is adopted, the role and functioning of the "permanent parliamentary majority" should be regulated in the Constitution and not be left to a statute of lower rank. If its functions are limited to the formation of the Cabinet, the need for specific provisions on the formation of the majority can be doubted.

**The Relations between the President, the Cabinet and the Verkhovna Rada**

8. The aim of moving the political system into a more parliamentary direction can be seen in the proposed procedure for appointing the Cabinet. According to Article 115, the appointment of Prime Minister would be transferred from the President to the National Assembly. The President would, however, retain the power to propose the Candidate. Other ministers would be appointed by the Parliament on the proposal of the Prime Minister. However, the President would appoint certain key ministers: the ministers of foreign affairs, defence, internal affairs and emergency situations.

The choice between a presidential and a parliamentary system is a political one to be made by the country in question. The proposed transition into a more parliamentary direction cannot as such be criticised. The system should, however, be as clear as possible, and the provisions should not open possibilities for unnecessary complications and political conflicts. Thus, the feasibility of still retaining for the President a quite strong controlling position in the formation of the Cabinet can be doubted.

9. The proposed provisions on the formation of the Cabinet imply that the Cabinet should enjoy the confidence of both the National Assembly and the President. Article 113 of the Draft Law also lays explicitly down that the Cabinet is "responsible", not only before the Verkhovna Rada, but also before the President. Article 87, in turn, would grant the President the power to initiate a procedure of no-confidence in the National Assembly. Such a power would be quite exceptional in international comparison. It would also further complicate the relations between the primary constitutional organs. It would also make of the President such a player in the political power game, which does not fit the role of the Head of State in a mainly parliamentary regime. It is to be recommended that the constitutional provisions establish an explicit requirement of confidence only in the Cabinet's relation to the Verkhovna Rada.

10. An active role in daily politics would also be provided for the President by his legislative initiative according to Article 93(1). This initiative would be not parallel but even superior to that of the Cabinet because of their privileged position on the agenda of the Verkhovna Rada Article 93(2)). The provisions on legislative initiative of the President would also constitute a possible cause for political conflicts, and their deletions from the Draft Law should be seriously considered.

11. It seems that the President's suspensive veto power with regard to laws passed by the Verkhovna Rada would be enhanced through the Draft Law. The President would have the power not only to return laws to the Verkhovna Rada for re-consideration but even to propose "substantiated" and "formulated" changes to them. Such a veto power, which would include a power to amend laws passed by the Verkhovna Rada, could only be overcome by a two-third majority in both of the Chambers. Such a transferral of the Verkhovna Rada's legislative power could not be recommended even in a presidential system.

12. In Article 90 of the Draft Law, the President's power to dissolve the National Assembly is mainly limited to situations where a Cabinet, supported by a parliamentary majority, cannot be formed. This can be considered an appropriate use of the institution of dissolution. By contrast, it can question whether difficulties in the approval of the State Budget constitute a political crisis grave enough to justify the dissolution of the Parliament.

**Other Issues**

13. According to a new provision in Article 74, laws and other decisions which have been adopted in an All-Ukrainian Referendum would not require any further approval by state bodies. An exception is, however, made with respect to draft laws on amendments to Chapters I, III and XIII of the Constitution. At present, Article 156 contains specific provisions on referenda concerning amendments to these chapters, and, thus, these provisions would remain in force. Unclear is whether the drafters' intention is that in other cases of constitutional amendment, a single majority in a referendum would replace the

requirement of a qualified majority, provided for by the present Article 155 of Constitution. If that really is the intention, its desirability can be questioned.

14. Article 84(3) gives the majority the power to decide on the restrictions to the publicity of the meetings of the Verkhovna Rada. The Constitution should also include a definition of the situations where this power can be exercised.

15. Article 93(1) of the Draft Law grants even the Supreme Court the power of legislative initiative. Such a competence is not in harmony with the principle of the separation of powers.

16. According to a proposal included in Art 126 of the Draft Law, judges would no longer be appointed for life but for ten years. Time-limited appointments as a general rule can be considered a threat to the independence of the judiciary.

**Concluding Comment**

17. As the delegation of the Venice Commission was informed during its visit in Kyiv on February 25-26 this year, an ad hoc commission on constitutional reform has been set up in the Verkhovna Rada, and the Constitutional Court has already given its opinion on some proposals for amendments to the Constitution. In the Presidential Address on March 5, where he introduced the proposals examined above, President Kutschma did not at all refer to the proposals drafted within the Verkhovna Rada. It would be highly desirable that the main constitutional organs would work in close co-operation during the future stages of the constitutional reform.