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COMMENTS

ON THE DRAFT LAW ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE

by

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The draft of the law "on amendments to the constitution of Ukraine" is basically aimed at reforming the government of that Republic substituting a quasi-parliamentary government for a quasi-presidential government, but it also implies many changes which modify the balance of the relations between the constitutional bodies of the State and would not be required by the apparent adoption of the main features of the parliamentary model. The most important feature of these modifications is the introduction of a bicameral Parliament with the transfer to the new Chamber of Regions of some functions which are presently entrusted to the Supreme Rada. Another important change affects the membership of the Constitutional Court whose appointment will be reserved to the President of the Republic and the new Chamber of Regions without any intervention of the judiciary: the adoption of such a change would cancel the present balanced arrangement of the membership of the Court which guarantees the constitutional judge against the danger of being completely controlled through appointments made by political bodies or political parties only. Also the procedure of the revision of the Constitution should be changed.

1. In dealing with the proposal of creating a Chamber of Regions (Articles 75 - 76 of the draft) we have to keep in mind that the Regions (oblasts) don't have a clear constitutional coverage in the Constitution which provides for the existence of their deliberative bodies and for some functions of them (Articles 140 - 143). Article 141 provides for the election of the chairman of an oblast council (who leads the executive staff of the council) by the respective council, but Article 140 does not necessarily require the direct election of an oblast council as far as it states that oblast councils are bodies of local self-government that represent the common interests of territorial communities of villages, settlements and cities. If this is the political basis of the Chamber of Regions, the representative authority of the new body shall not be comparable to the authority of the National Assembly - that is the other Chamber of the Supreme Rada which has to be directly elected by the people. The novelty could modify the balance of the power in the government of the Republic of Ukraine with some advantages for the President and the Cabinet of Ministers. Notwithstanding the pro-parliamentary choice of the draft, which should emphasize the powers of the directly elected Chamber of the Supreme Rada, the National Assembly will not any more concur (Article 85 of the draft) in the appointment of some constitutional judges, the Human rights Representative, the Chairman and the Board of the national Bank, the national Council on television and radio broadcasting, central electoral Commission, the relative functions being transferred to the Chamber of Regions as well as the functions of electing judges for permanent term, granting consent for the appointment of the general Prosecutor and withdrawing confidence from him. It is evident that the proposed modifications will not affect only the relations between the superior bodies of the State, but also the internal functioning of the concerned organs and institutions.

As a matter of fact, the draft does not take the chance of clarifying the meaning of some provisions of the Constitution presently in force, or it creates new problems about their compatibility with the European standards. For instance, it is still difficult to understand whether the President and the new Chamber shall of Regions be bound by the proposals on the appointment of judges submitted by the High Council of justice (Article 131 of the constitution), while - on the other side - the independence of the judges of the Parliament is endangered by the provision limiting the term of the elected judges to ten years (Article 85 third alinea no. 13 of the draft).

Moreover it should be underlined that the draft does not give any suggestion with regard to the election of the members of the Chamber of Regions, therefore it does not exclude the possibility

of their appointment by the executive bodies of the oblasts without any intervention of the parties which are in the minority in the oblast councils.

2. It is evident that the draft is aimed to deal with the problem of the political difficulties of Ukraine, but it offers solutions which don't still convince the author of this comment and look contradictory.

It provides for the election of the National Assembly on a proportional basis (Article 76 of the draft), which is not a useful mean to avoid the present fragmentation of the Supreme Rada. It is still not clear the real meaning of the rule providing for the establishment of a permanent parliamentary majority (Article 83 of the draft), which is apparently disconnected from the election of the Premier and the appointment of the Ministers, even if it is aimed to give continuity and coherence to them. The permanent majority looks as a stable association whose formation, organization and activities shall be ruled by three different sources of law (Constitution, the relevant statute and the law on the parliamentary procedure). We can imagine that the purpose of the provision is insuring the stability of the relations between the political parties concurring in the formation of the permanent majority, but it is difficult to understand how it can be coordinated with the freedom of choice and decision which is insured to the political parties by the Constitution according to the European standard. Alliances between political parties depend on the free choice of the parties concerned, and they last as long as the governing bodies of the political parties find convenient to stick to the negotiated agreements. The establishment of a legal association does not add anything to the stability of a parliamentary majority.

On the other side, the draft is very severe in providing for the pre-term termination of the staying in office of a member of the Parliament in the event of his/her expulsion or leaving from the parliamentary faction of his/her party (Article 81 of the draft). The provision is evidently aimed at strengthening the power of the political parties, but it certainly conflicts with the principle of the free mandate: it is true that this principle is not explicitly stated in the Constitution, but it should be derived by the overall interpretation of the text.

3. The rigidity of the provisions concerning the permanent parliamentary majority is evident if we look at the rules governing the relations between the President, the Cabinet and the Parliament. The Prime Minister is elected by the national Assembly on the basis of a nomination submitted by the President on the proposal of the permanent parliamentary majority (Article 114 of the draft): therefore the draft requires the previous formation and organization of a permanent majority, which can waste time without coinciding with the immediate election of the Premier and the appointment of the Ministers. Why don't it provide for the formation of the majority at the same time of the election of the Premier? Probably the draft is aimed at giving a say to the President in all the procedure, but, perhaps, a less baroque solution could have been envisaged. Another complicating element is the exclusion of the Supreme Rada from the appointment of some important Ministers (Internal affairs, Emergency situations, Foreign affairs, Defence) which is left in the hands of the President on the basis of a proposal of the Prime Minister (Article 106 of the draft): apparently these Ministers should not be removed from the office individually, but only through a vote of no confidence regarding all the Cabinet, therefore they have a constitutional status different from that of the other Ministers.

Moreover Article 87 of the draft entrusts to the President or to a group of members of the Parliament the power of asking the National Assembly to consider the issue of responsibility of the Cabinet and adopt a resolution of no confidence. Such a provision is unusual in a

parliamentary government and strengthens the position of the President who may dissolve the National Assembly if a permanent majority is not formed within the termination of the previous one, or if after the resognation of the members of the Cabinet new members are not elected to replace them within sixty days, or the State budget is not approved before December 1st.

But the President is allowed to interfere with the functioning of the Parliament without the cooperation of the Cabinet also in many other ways which are unusual in a parliamentary government: for instance, by requesting special sessions of the Supreme Rada (Article 82 of the draft), by exercising the right of the legislative initiative (Articles 82 and 93 of the draft), by defining a draft law as not postponable and obliging the two Chambers to consider it at joint meeting (Article 93 of the draft). And eventually his veto can be overcome only by no less than two-thirds of the constitutional composition of the National Assembly when he asks a repeat consideration of a law by this body.

Taking into account all these elements and the fact that the Cabinet is responsible to the President and not only to the Parliament, we can argue for the conclusion that the President has substantial powers to control or stop the political initiatives of the Cabinet, while this is not the case for the Cabinet itself with regard of the initiatives of the President, whose acts don't always apparently require the countersignature of the Premier or of a Minister: the provision of the last alinea of Article 106 of the Constitution is not amended but as far as some details are concerned. The Cabinet is responsible to the President and not only to the Parliament. Moreover the draft does not imply the abrogation of the previous alinea of the same article according to which " the President of Ukraine, on the basis and for the execution of the Constitution and the laws of Ukraine, issues decrees and directives that are mandatory for the execution on the territory of Ukraine ": the meaning of this provision is still ambiguous, it is not clear if it adds some new powers to the presidential functions listed in Article 106 of the Constitution, or if it only states a general rule about the presidential acts which are adopted in the exercise of those presidential functions.

As a matter of fact the Ukrainian government could develop as presidential government only partially corrected by the adoption/addition of some provisions reminding us the model of parliamentary government. Therefore, if the aim of the legislator is to put at the centre of the system of government the Parliament, we can say that the draft is not completely satisfying and it is still keeping the leadership of the President in the relations between the superior bodies of the State.

These conclusions can be better appreciated if we take into account the fact that the President has still the power of taking part in the appointment of the membership of some important bodies of the State, and, therefore, he concurs - mainly with the Chamber of Regions (or - only sometimes - with the National Assembly) - in the exercise of powers which are specially relevant in designing the main features of the State in action. Obviously the relevance of the President' role would have been emphasized if he were elected before the elections of the Parliament, and his election could influence the choice of the electors with regard the members of the two Chambers. According to the draft the President shall be elected after the election of the Parliament, and therefore his election will not have the effect which is well known to the French constitutional experience where it frequently happened that the results of the parliamentary elections conformed to the results of the presidential elections. The solution adopted by the draft (Article 77) may cause political conflicts between the Parliament and the President which will not be settled very easily.

4. With regard to the sources of law, two points deserve some remarks.

The rigidity of the relations between the Parliament, the Cabinet and the President will be increased by the provision requiring the determination through law of the principles of domestic and foreign policy, which can become mandatory even for the individual subjects while they should be aimed at binding the Cabinet and the Parliament only while giving to the first the necessary freedom and flexibility in implementing the will of the second.

But the most worrying provision of the draft is the second alinea of Article 74. It explicitly states that "laws and other decisions adopted by an All-Ukrainian referendum has the highest legal force and do not require approval by the bodies of state power or officials". My guess is that such a provision can imply that the adoption by an All-Ukrainian referendum of a law aimed at revising the Constitution does not require any intervention of the parliamentary bodies of the Republic of Ukraine. The only exceptions apparently are the amendments to Chapters I, III and XIII of the Constitution which should require the adoption by all-Ukraine referenda "in the order provided for by Chapter XIII of the Constitution of Ukraine", according to the rule introduced in the second alinea of Article 74 itself of the draft.

Therefore at the same time the draft suggests the amendment of the ordinary procedure for the adoption of the amendments of the Constitution and keeps the special procedure to amend Chapters I, III and XIII of the Constitution. It should require to be adopted with the special procedure required by the Chapter XIII presently in force. It should be obvious that the proposed reform cannot be applied to the draft under consideration.

In any case the proposal of enlarging the role of the All-Ukrainian referenda in the field of the constitutional amendments is apparently conflicting with the purpose of introducing a quasi parliamentary government because it emphasizes the plebiscitary features which are present in the Ukrainian government reducing the deliberative powers of the Parliament even if Article 85 of the draft entrusts to the Supreme Rada the function of calling an All-Ukrainian referendum "on the issues stated by article 73 of this Constitution".

University of Trieste, May 26^{th,} 2003 (prof. Sergio Bartole)