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COMMENTS

ON THE THREE DRAFT LAWS PROPOSING AMENDMENTS TO THE CONSTITUTION OF UKRAINE

by

Ms Finola FLANAGAN (Member, Ireland)

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I. General

1. Three proposals to amend the Ukrainian Constitution of 28 June 1996 have been submitted to the Venice Commission for examination (CDL (2003) 86). They are Draft Laws 3207-1 of 1 July 2003 (CDL (2003) 79), 4105 of 4 September 2003 (CDL (2003) 80) and 4180 of 19 September 2003 (CDL (2003) 81). Draft Laws 4105 and 4180 are identical except for their Final Chapters XVI which concern the scheduling of forthcoming presidential and parliamentary elections.

2. The most significant elements and general thrust of the three draft laws involve a redistribution of the powers of the President, the Verkhovna Rada and the Cabinet and which is directed towards a more parliamentary form of government and a less presidential one. As was pointed out in an Opinion of the Venice Commission in relation to a previous Draft Law on amendments to the Constitution of Ukraine (CDL (2003) 41) "[the] choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts." Hence, in principle, the proposal to move towards a more parliamentary form of government is in order and compatible with democratic government.

3. However, within the Draft Laws there are a number of specific provisions which give cause for concern. These are set out below. In addition, generally speaking, it can be said that the schemes of the draft constitutions are difficult to follow and related provisions are often scattered throughout the text. This difficulty is exacerbated by virtue of the incomplete system of numbering which makes it difficult to refer to related provisions where necessary. Such difficulties are not conducive to a widespread general awareness of the terms of the Constitution.

II. Draft Law 3207-1

National Deputies

4. Draft Article 78 provides that National Deputies shall not have another representative mandate, be in the civil service or hold other official positions in bodies of state power or in their institutions or agencies arising from them. This type of prohibition appears regularly in the laws of other states and is acceptable as it reasonably excludes occupation incompatible with that of being a member of parliament or dual representation.

5. The draft Article also prohibits National Deputies from engaging "in entrepreneurial activity or other activity on a remunerative basis (except teaching, scholarly and creative activity), [and prohibits membership] of a governing or steering body of an enterprise, association or organisation that aims to gain profit". In the event of a Deputy being found to be engaged in incompatible activity, she or she must resign either from the activity or from being a National Deputy.

6. These latter categories of prohibited activity cover a wide range of activity in which the majority of people running for election would be engaged in one form or another. It is unclear whether the list of prohibited activities is intended to comprehend the holding of shares in commercial companies and the meaning of "entrepreneurial activity" (drafts 4105 and 4180 prohibit "business activities") is uncertain. Such a broad prohibition might prove to be a significant disincentive to potential candidates. Whilst it is a matter of policy to be decided by individual states what category of activity is incompatible with being a member of parliament, nonetheless it would be important to ensure that activities deemed incompatible are not such as to dissuade a significant section of the population from running for election. Other parliamentary democracies have rules requiring their members of parliament to declare interests that have the potential to compromise independence with appropriate sanctions where rules are breached. Whilst these regimes are not foolproof in removing all conflicts of interest that arise or situations that compromise independence, neither would the Rules in the proposed draft Article 78. Rules requiring declarations of interests etc would not have the possible disadvantages described above where almost all gainful or entrepreneurial activity is prohibited.

7. Draft Article 81(2)(5) provides that where a National Deputy "fails to exercise his or her authority for four months without good excuse" his or her authority terminates by decision of a majority of the Verkhovna Rada. Such a sanction would be very severe particularly where there is no preceding lesser sanction.

8. Draft Article 81(4) provides that "where a National Deputy…elected on the basis of the electoral list of a political party…splits off from the parliamentary faction of a party or fails to join it, the authority of the National Deputy shall terminate…pursuant to a court judgment." Whilst the need for this provision in the Draft Law is presumably to promote stability and the effectiveness of the governing party or bloc where fragmentation of parliamentary blocs is a problem, it would also have the effect of weakening the Verkhovna Rada by interfering with the free and independent mandate of the National Deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Verkhovna Rada. This very point was made in the Venice Commission's Opinion CDL (2003) 41 in relation to a similar provision in a previous Draft Law to amend the Constitution.

Appointment of Prime Minister, Cabinet and others

9. On the redistribution of powers so as to increase the powers of the Verkhovna Rada at the expense of the President, draft Article 85(1)(12) provides for the appointment, on the nomination of the President, and the dismissal and acceptance of the resignation by the Verkhovna Rada, of the Prime Minister. This reverses the current position from one whereby the Prime Minister is appointed by the President with the consent of the Verkhovna Rada. This is reflected in draft Article 106(1)(9) which sets out the powers and functions of the President and in draft Article 114(2) which deals with the Cabinet. Pursuant to draft Article 85(1)(12) the Verkhovna Rada approves the composition of the Cabinet and has power to dismiss individual members on the submission of the Prime Minister. This alters the current position which involves appointment by the President on the submission of the Prime Minister.

10. Draft Article 114 sets out precisely how the President must choose his nominee for Prime Minister – he or she must first choose a nominee from the political party which has the

largest number of National Deputies. If this party refuses to nominate a candidate or the Verkhovna Rada declines the candidate the President must choose a candidate from the political party with the second largest number of National Deputies. If this does not succeed, then the President must nominate a representative of a parliamentary coalition formed on the basis that it comprises a majority of National Deputies.

11. This is an unusually prescriptive procedure but is explained by the need to oblige the Verkhovna Rada to establish a majority and for it to form a government as a basis for stability. The President would not appear to have any discretion to depart from the procedure in draft Article 114. It is not clear whether the Prime Minister - and Cabinet - thus chosen and supported by a particular majority at the time of appointment may continue in office if the Prime Minister or Cabinet is supported at any later time by a different majority of the Verkhovna Rada. It may be that this issue is affected by the rule already mentioned at paragraph 8 and contained in draft Article 81(4) which involves termination of the authority of a National Deputy who leaves the political party or parliamentary faction on foot of which he or she was elected. It would be essential to clarify any ambiguities in relation to the appointment of the Prime Minister or the formation of a cabinet or its continuance in office. It would be important to ensure that the result of the system proposed did not link the mandate of an individual National Deputy to membership of a parliamentary faction or bloc so as to infringe his or her free and independent mandate. This point was emphatically made in the Opinion of the Venice Commission on the Ukraine Constitutional Reform Project (CDL-INF (2001) 11).

12. The power of appointment and dismissal of certain important heads of public bodies is altered. For example by draft Article 85(1)(24) the President's existing power of appointment of the Head of the Antimonopoly Committee, the Chair of the State Committee on Television and Radio Broadcasting and the Chair of the State Property Fund is removed in the draft proposal and given instead to the Verkhovna Rada on the nomination of the Prime Minister. Under the proposed amendment the Verkhovna Rada would appoint half of the members of the Constitutional Court and the President half, in place of the current procedure whereby one third is appointed by the Verkhovna Rada and two thirds by the President. These draft amendments are in accordance with the idea of redistributing power between the various arms of government so as to reduce the power of the President.

Procurator General

13. By draft Article 85(1)(25) the power of appointment and dismissal of the Procurator General is given to the Verkhovna Rada on submission of the President. Currently, the President appoints with the consent of the Verkhovna Rada. The Procurator, by virtue of draft Article 121(5), is given a significant additional role of "supervision of the observance of human and citizens' rights and freedoms and the fulfilment of laws by bodies of executive power and by bodies of local self-government". A more precise delimitation of this role would be desirable. Draft Article 106(1)(16) also extends the role of the Procurator General where the Constitutional Court finds a law suspended by the President to be unconstitutional. The President my "apply to the Procurator-General" but no elaboration of the function of the Procurator is given.

Judges

14. Under the current Constitution, judges are elected by the Verkhovna Rada for permanent terms. Draft Article 128 would change this to ten-year terms with the possibility of re-election. Such a proposal was criticised by the Venice Commission in its Opinion CDL (2003) 41 observing that time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges.

III. Draft Laws 4105 and 4180

Appointment of Prime Minister, Cabinet, President and others

15. Changes proposed in these drafts also involve an expansion of the powers of the Verkhovna Rada and the consequent decrease of the powers of the President. Various alterations are also made which increase the role of the Prime Minister and Cabinet. The Draft amendment would also have the Verkhovna Rada appoint the Prime Minister on the nomination of the President. The President would also nominate the Ministers for Defence and Foreign Affairs. Other members of the cabinet would be appointed by the Verkhovna Rada on the nomination of the Prime Minister.

16. Currently, the President appoints each member of the cabinet on the submission of the Prime Minister (Article 106(10)). The amended constitution would draw a distinction between the procedure in relation to the Ministers for Defence and Foreign Affairs and the remainder of the Cabinet. The Ministers for Defence and Foreign Affairs would be appointed by the Verkhovna Rada on the President's nomination (Article 85(12)) whereas the remainder of the Cabinet would be nominated by the Prime Minister and appointed by the Verkhovna Rada. Such different procedures for different members of the Cabinet might cause difficulty for the Prime Minister in the exercise of his authority in managing the work of the Cabinet (draft Article 114). Any such provision would need to be clearly justified.

17. These Draft amendments propose similar new provisions in relation to the consequences of a National Deputy pursuing remunerative or business activities and the comments at paragraphs 4 and 5 above apply.

18. The most significant amendment in these draft proposals, and one that is not proposed in Draft law 3207-1, is that contained in Article 103 which would have the President elected by two-thirds of the Verkhovna Rada in a secret ballot. This would replace the current constitutional provision that the President be directly elected by the citizens of Ukraine. The President would continue to be elected for a five-year term. The term of the Verkhovna Rada would be increased from four years to five years. (Article 76).

19. Ultimately, the issue of whether this alteration is constitutionally desirable is a political one. Whether elected directly by the citizens of Ukraine or indirectly by the Verkhovna Rada, the President would retain the same degree of independence, being removable from office only in accordance with the provisions of Articles 108, 109, 110 and 111. The powers of the President terminate prematurely only on resignation, inability to perform his or her role for reasons of health, removal by impeachment for state treason or other crime or on death. None of these provisions is amended by the Draft Laws. It is noted that the Verkhovna Rada would elect the President by secret ballot. The current Constitution does not otherwise provide in any way on the issue whether ballots should be open or secret. The issue of

whether election of the President should be by secret ballot or not is a significant matter of policy. There are precedents in other constitutional regimes for a secret ballot being used for election of individuals to positions in parliament and, more often for occasional particularly sensitive votes.

20. In these drafts the Prime Minister is appointed by the Verkhovna Rada on the submission of the President. The President's nominee is the National Deputy who has previously been nominated to the President by a coalition comprising a majority of the Verkhovna Rada after consultation between the President and the coalition. The purpose here is explained by the need for the Verkhovna Rada to form a majority and hence a stable government. However, these rules would not of themselves ensure formation of a majority government.

Transitional arrangements regarding elections

21. Transitional arrangements for forthcoming Presidential and Parliamentary elections differ between the two drafts 4105 and 4180. The earlier draft amendment (4105) would have a parliamentary election in 2006, as would happen pursuant to the 1996 Constitution. A presidential election by the people under current procedures, would happen as currently scheduled in 2004 but this term would be curtailed, with a new President being elected by the new Verkhovna Rada in 2006. Thereafter both the ordinary terms of the Verkhovna Rada and President would be for 5 years.

22. However, draft 4180 would have the 2004 presidential election take place under the new rules and therefore he or she would be elected by the Verkhovna Rada. A further presidential election by the Verkhovna Rada would take place in 2006. Parliamentary elections would thereafter take place in 2007.

23. Transitional arrangements or this kind can often present political difficulties. Whatever arrangement is reached, the reasons for it should be clearly explained to ensure that the reasons for it are understood and to obviate any concerns about its purpose.