



Strasbourg, 30 September 2004
Opinion no. 305 / 2004

Restricted
CDL(2004)096
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

**ON THE PROCEDURE OF AMENDING
THE CONSTITUTION
OF UKRAINE**

by

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1. The Venice Commission adopted an opinion (CDL-AD(2003) 019) on three draft laws (no. 3207-1 dated 1 July 2003, 4105 dated 4 September 2003 and 4180, dated 19 September 2003) containing amendments to the Constitution of Ukraine at its plenary session on 13 December 2003. The Venice Commission aired its apprehension with regard to the legitimacy of the nature of many of the proposed reforms and the procedure of amending the Constitution which does not seem to be conducted in a manner consistent with the Council of Europe standards and respect for the rule of law.

2. Pursuant to Article 159 of the Constitution of Ukraine all three draft laws were submitted to the Constitutional Court of Ukraine (CCU) for an opinion on their conformity with the requirements of Articles 157 and 158 of the Constitution. The CCU had already declared (30 October 2003) that draft law no. 4180 (which is almost identical to draft law no. 4105) was in conformity with Articles 157 and 158 (1).

3. Following the urgent debate in the Parliamentary Assembly on 29 January 2004 and the subsequent adoption of the Resolution 1364 (2004) which strongly criticised the proposed adoption of constitutional amendments in the midst of a political power struggle on the eve of presidential elections – the Parliamentary Assembly asked the Ukrainian authorities to abstain from unconstitutional acts or actions in view of the constitutional reform and carry out free and fair presidential elections in October or face a challenge to credentials of the Ukrainian delegation and, possibly, questioning of the country's status as a member of the Council of Europe. The PACE Monitoring Committee adopted a statement on 22 June 2004 urging the Ukrainian authorities to conduct the election process with absolute impartiality and respect for Council of Europe standards and to allow all candidates to compete on fair and equitable grounds. **In this regard it requested the opinion of the Venice Commission on the issue whether the procedure of amending the Constitution of Ukraine is in conformity with the Assembly's resolutions 1346 (2003) and 1364 (2004).**

4. Attempts to push through constitutional reforms ignoring the provisions of the Constitution of Ukraine appear to have been taking place during the period of preparation for the presidential elections.¹ Following the adoption of the PACE Resolution 1364 (2004) on "Political Crisis in Ukraine", the Verkhovna Rada cancelled some of the contested constitutional amendments in draft law no. 4105, notably those pertaining to changing the modalities of presidential elections and the limited tenure of judges, at the first reading of the **extraordinary** meeting of the Verkhovna Rada on 3 February 2004. Article 155 of Ukrainian Constitution requires a draft law introducing amendments to the Constitution of Ukraine to be adopted at two consecutive ordinary sessions of the Verkhovna Rada of Ukraine, with no less than two-thirds of the constitutional composition of the Verkhovna Rada having voted in favour. In this respect the legality of the voting at the extraordinary session of 3 February 2004, which was opened on the very morning that a regular session of the Verkhovna Rada should have commenced in keeping with Article 83 of the Ukrainian Constitution, remains highly questionable. On 16 March the Constitutional Court found draft law no. 4105 (as amended) to be in compliance with Articles

¹ Cf., Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe: Follow-up to Assembly Resolution 1364 (2004) on the Political Crisis in Ukraine (Information note on the co-rapporteurs' visit to Ukraine (27 May – 3 June 2004).

157 and 158 of the Constitution. The Constitutional Court did not question the legitimacy of constitutional amendments during the extraordinary session.²

5. On 7 April the Verkhovna Rada approved Resolution no. 1673-IV on the order of consideration of draft law no. 4105 in the stage of final approval, establishing the procedure and two important provisions: (a) that during the consideration of draft law neither additions thereto or any exclusions were allowed, and (b) that in case the draft did not receive the minimum of 2/3 votes (300) it would be deemed rejected.³

6. On 8 April draft law no. 4105 was rejected at its second reading not receiving the minimum of 2/3 votes by missing 6 votes. In mid-May the both President Kuchma and Verkhovna Rada Speaker Lytvyn announced the cancellation of draft no. 4105.

7. In mid June the Constitutional amendments were put on the agenda again and draft law no. 4180 was approved by 276 votes on a first reading. This proposal is almost identical to draft law no. 4105 which did not receive the 2/3 majority in April apart from minor transitional provisions regarding the scheduling of elections and entering into force of the constitutional reform. According to the Deputy Chairman of the Constitutional Court of Ukraine this procedure need not raise doubts with regard to Article 156 (2) of the Constitution of Ukraine⁴ which stipulates that “the repeat submission of a draft law on introducing amendments to Chapters I, II and XIII⁵ on one and the same issue is possible only to the Verkhovna Rada of Ukraine of the next convocation.” Article 158 of the Constitution of Ukraine (on introducing amendments to the Constitution) does not contain the words “on one and the same issue”.

8. In light of the above it is possible to argue that as all three drafts had been submitted to the Constitutional Court under a different number and textual differences they might be considered as different legal documents. This approach is however extremely doubtful in light of the fact that the draft laws no. 4105 and no. 4180 overlap to such an extent that the subject matter must be regarded as the definition for the comparison of the two drafts.

9. The Venice Commission in its opinion (CDL-AD(2003) 029) on 13 December 2003 on the three draft laws to the current Constitution of Ukraine from 1996 stressed the need to secure the legitimacy of any constitutional reform in Ukraine.

10. It is imperative to look at the procedure of amending the Constitution in Ukraine in a contextual perspective. Against the background of an extreme political power struggle it is not only respect to the Constitution of Ukraine which is called into question but also the entire procedure to amend it. The international community is following in awe the harassment of the

² Cf., Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe: Follow-up to Assembly Resolution 1364 (2004) on the Political Crisis in Ukraine (Information note on the co-rapporteurs' visit to Ukraine (27 May – 3 June 2004), #22.

³ Ibid.

⁴ Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe: Follow-up to Assembly Resolution 1364 (2004) on the Political Crisis in Ukraine (Information note on the co-rapporteurs' visit to Ukraine (27 May – 3 June 2004), # 29.

⁵ Chapter I – “General Principles,” Chapter III – “Elections. Referendum.” and Chapter XIII – “Introducing Amendments to the Constitution of Ukraine.”

media in Ukraine which is seriously casting doubt on the obligation of Ukraine as a Member State of the Council of Europe in ensuring the free expression of the opinion of the people in the choice of their elected authorities.

11. The Parliamentary Assembly of the Council of Europe has declared its concern by the intimidation, repeated aggression and murders of journalists in Ukraine and the frequent abuse of power by the competent Ukrainian authorities in respect of freedom of expression.⁶ The murder of journalist Gongadze four years ago has evoked tremendous concern on the entire continent and there are serious allegations involving authorities in the disappearance of Gongadze.⁷ The general prosecutor's investigation has never dealt with this issue and journalists' associations all over the world have been campaigning for a thorough investigation and just resolution over the case,⁸ many believe that until it is dealt with, dictators and bullies everywhere will believe they have impunity to use violence to shut up journalists who write things they do not like.

12. This generally miserable situation from a human rights standpoint with persistent problems of corruption and crime where free speech is being stifled to the extent of calling seriously into question Ukraine's commitment to human rights, democratic standards and rule of law cannot be taken lightly. It is not only the situation in Ukraine which is under scrutiny but also the reaction of the Council of Europe and its institutions to this process which is being observed.

⁶ Parliamentary Assembly of the Council of Europe, resolution 1239 (2001) on Freedom of expression and the functioning of parliamentary democracy in Ukraine.

⁷ *Ibid.* Reporters without Borders called for a public trial on 15 Sept. 2004 amid new revelations about the case by the press and judicial officials.

⁸ International Federation of Journalists 16 Sept. 2004. Four years and still the fight goes on: Journalists demand justice over Gongadze.