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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OPINION**

**ON THE CONSTITUTIONAL SITUATION**

**IN UKRAINE**

**Adopted by the Venice Commission  
at its 85<sup>th</sup> Plenary Session,  
Venice (17-18 December 2010)**

**On the basis of comments by:**

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## I Introduction

1. By letter dated 21 October 2010, Mr Dick Marty, Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, asked the Venice Commission to give an opinion on the constitutional situation in Ukraine.
2. The Venice Commission invited Ms A. Nussberger, and Messrs D. Maus, G. Papuashvili, E. Tanchev and K. Tuori to act as rapporteurs.
3. On 29 and 30 November 2010, the Venice Commission delegation travelled to Ukraine to meet with the different authorities concerned, including the Constitutional Court, the Presidential Administration, the Minister for Foreign Affairs, the Minister for Justice, the Supreme Court as well as the representatives of the opposition. The present Opinion is based on the members' and experts' comments as well as on the information obtained during the study visit to Ukraine.
4. The present Opinion was adopted by the Venice Commission at its 85<sup>th</sup> Plenary session (Venice, 17-18 December 2010).

## II. Scope of this Opinion

5. The present request has to be seen against the background of the recent constitutional developments in Ukraine. On 30 September 2010, the Constitutional Court of Ukraine adopted a decision whereby it declared the Law on the amendment to the Constitution No. 2222, adopted on 8 December 2004, unconstitutional and required that laws subsequently adopted be brought in line with the previous Constitution of 1996.
6. The Venice Commission was asked to give its Opinion on:
  - the constitutional situation in Ukraine, following the Constitutional Court's Judgment of 30 September 2010;
  - the measures to be taken to bring the new constitutional framework in line with European standards and norms.
7. The aim of the present assessment therefore, is not to assess the Constitutional Court's Decision, but to examine its consequences and point towards the future, in particular towards a more balanced and coherent constitutional reform.

## III. Constitutional developments in Ukraine since 1996

8. The recent constitutional history of Ukraine is marked by the political confrontation and competition between various groups within society. Back in 1996, despite its shortcomings from a legal point of view, the adoption of the Constitution was seen as an important step in the establishment of the country's basic institutional setup and the character of the new state.
9. The 1996 Constitution has established a presidential-parliamentary type of institutional regime. It provides for a strict separation of powers between the President and Parliament; both are elected for a fixed four -year term and neither controls the tenure in office of the other. The Cabinet of Ministers is subordinate to the President and is accountable to Parliament.
10. In its 1997 Opinion on this text, the Commission said that "*While the text establishes a strong executive under the leadership of a powerful President, checks and balances are present which should prevent recourse to authoritarian solutions. The principles of the Rule of Law are well reflected in the text of the Constitution. The setting up of democratic local government as well as the important role assigned to the Constitutional Court should contribute to the establishment of a democratic culture in Ukraine*". It also pointed out however, that

*“several provisions of the Constitution remain unsatisfactory from a legal point of view. These inadequacies have political reasons and can be explained by the fact that it was necessary to reach a political compromise to have the Constitution adopted”<sup>1</sup>.*

11. The Commission thus called on Ukraine to *“take into account the opinion of the Commission as well as the relevant Council of Europe standards”* when implementing these provisions of the Constitution. It stressed that *“The Constitution will have to pass the test of practice and the difficult economic situation of Ukraine may delay the full implementation of the new principles and endanger the realisation of the positive achievements of the text. Particular attention will have to be paid to the adoption of legislation ensuring that the Transitional Provisions of the Constitution do not lead to the maintenance of elements of the old system during a considerable period of time (Conclusions).”*

12. In practice however, the 1996 Constitution resulted in a concentration of powers in the hands of the President and in a constant legislative-executive confrontation.

13. As from 2003, the Venice Commission has been in favour of a comprehensive constitutional reform that strengthens the powers of Parliament, while warning against establishing a system that is not coherent. In its Opinion on the three draft laws that propose Amendments to the Constitution of Ukraine, the Commission welcomed and strongly supported *“efforts aimed at strengthening the position of Parliament with respect to the President”*, and underlined that *“...any reformed system of government chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts”* (§ 93)<sup>2</sup>.

14. The Commission, as well as the PACE, were concerned notably about a constant power struggle between the different State organs with which the country was confronted ever since the highly controversial All-Ukrainian referendum in 2000. The Law on the Cabinet, drafted to clarify the status, powers and responsibilities of the Cabinet *vis-à-vis* the President and Parliament, became a symbol of executive-legislative deadlock on constitutional issues<sup>3</sup>.

15. The 1996 Constitution was amended in December 2004 by the Law on amendments to the Constitution No. 2222. The constitutional changes provided a strong impetus for transforming the Ukrainian political system from a presidential-parliamentary system to a more parliamentary one. In its Opinion on the amendments to the Constitution of Ukraine, adopted on 8 December 2004, the Commission praised the positive changes brought about by the amendments, in particular those *“increasing the parliamentary features of the political system”*. The previous very strong powers of the President were weakened in a somewhat unfortunate manner<sup>4</sup>. According to the Commission’s Opinion on the 2004 Constitution *“a number of provisions, such as the rights of legislative initiative conferred on both the Cabinet and the President, or the President’s role in foreign and defence policy might lead to unnecessary political conflicts and thus undermine the necessary strengthening of the rule of law in the country. In general, the constitutional amendments, as adopted, do not yet fully allow the aim of the constitutional reform of establishing a balanced and functional system of government to be attained”<sup>5</sup>.*

16. The Commission thus considered that, *“in order to bring the Law on amendments into compliance with the principles of pluralist democracy and the rule of law, the Law should be further discussed and some improvements made.”*

17. It also pointed out that the constitutional amendments were adopted too rapidly and with some procedural violations, an opinion largely shared by many political actors in the country. It thus stressed in its Opinion that *“taking the time necessary for finding a real consensus among*

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<sup>1</sup> Opinion on the Constitution of Ukraine, as adopted in June 1996, CDL-INF(1997)002.

<sup>2</sup> Opinion on three draft laws proposing Amendments to the Constitution of Ukraine CDL-AD(2003)019.

<sup>3</sup> President Kuchma vetoed the Law eight times and it is only in 2007 that the Law was finally adopted.

<sup>4</sup> Cf. the assessment by the Venice Commission in its Opinion on the amendments to the Constitution of Ukraine adopted on 8 December 2004, CDL-AD(2005)015.

<sup>5</sup> *Ibid.*

*all political forces and the civil society on a well-balanced and coherent constitutional reform would secure the legitimacy of the new Constitution and the political system in Ukraine<sup>6</sup>.*

18. The issue of further constitutional reform remains high on the political agenda ever since.

19. In late 2007, 102 deputies applied to the Constitutional Court of Ukraine (hereinafter: CCU) requesting it to declare the Law on Amendments to the Constitution of Ukraine n° 2222 unconstitutional. The authors claimed that the Law had violated the procedure for its review and adoption as it was adopted in December 2004 without receiving the obligatory opinion of the Constitutional Court of Ukraine regarding its conformity with articles 157 and 158 of the Constitution (as required by Article 159 of the Constitution). In its ruling of 5 February 2008<sup>7</sup>, the Constitutional Court of Ukraine stated that when the Law No. 2222 took effect on January 1, 2006, its provisions and clauses became an integral part of the Constitution, and the Law itself lost its legal force<sup>8</sup>. The Court therefore rejected the application<sup>9</sup>, based on its non-conformity with the constitutional petition requirements, given in Article 39 of the Law on the Constitutional Court<sup>10</sup>.

20. The efforts to revise the 2004 version of the Constitution continued, and several new draft amendments to the Constitution were prepared by various political forces in the country. The Venice Commission was again involved in this process. In 2008, it adopted an Opinion on the so-called "Shapoval draft Constitution"<sup>11</sup> and a year later, it gave its legal assessment of the draft constitution presented by the then President Yuschenko<sup>12</sup>. In this Opinion, the Commission welcomed the improvements contained in the presidential draft with respect to the 2004 Constitution, but considered that it does not seem to attain its main aim of putting an end to the constant institutional conflicts between the main state organs. This was due mainly to the fact that this draft also maintained a semi-presidential system with a double executive and areas of potential conflict between the President and the Cabinet of Ministers remained.

21. Due to a lack of consensus, in October 2009, the *Verkhovna Rada* of Ukraine (Parliament) removed all proposals for changes to the Constitution from its agenda.

22. In February 2010, Mr Yanukovich won the presidential elections in the country. However, the formation of the new Government faced some difficulties due to the fact that the majority coalition (consisting of President Yanukovich's Party of Regions, Mr Lytvyn's eponymous bloc and the Communist Party) fell seven votes short of a required majority of 226 members. In early March, the Ukrainian *Verkhovna Rada* amended the Law on the Rules of Procedure of Parliament with respect to the provisions for the formation of a ruling coalition. The new provisions now stipulate that a parliamentary majority is established on the basis of the number of individual MPs that support such a coalition. These changes to the Rules of Procedure allowed a new governing coalition to be established.

23. This legislative amendment however, seemed to contradict Article 83 of the Constitution according to which the governing coalition in *Verkhovna Rada* must be formed by "a coalition of parliamentary factions" and not individual deputies<sup>13</sup>. According to the Constitutional Court's decision on the constitutionality of Article 13 of the Law on Status of the People's Deputies of

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<sup>6</sup> Ibid.

<sup>7</sup> Decision of the Constitutional Court, case No. 6-u/2008, of 5 February 2008.

<sup>8</sup> See point 3 of the Decision's motivational part.

<sup>9</sup> See .

<sup>10</sup> Article 39§2.3 requires the subject of the constitutional petition to provide a "full title, number, date of adoption, source of publication (provided that it was published) of the legal act which constitutionality (separate provisions thereof) is disputed or which needs to be officially interpreted".

<sup>11</sup> See CDL-AD(2008)015.

<sup>12</sup> CDL-AD(2009)024.

<sup>13</sup> This provision was introduced in the Constitution through the 2004 amendments in the aim of increasing the level of political responsibility of both the Cabinet of Ministers and of parliament. The Rada, having formed the Cabinet, was supposed to work more closely with it.

Ukraine, given in June 2008, leaving - or even not joining - a faction of the political party, on a list of which an MP was elected, is contrary to the Constitution.<sup>14</sup> In the words of the Court, “staying of a Deputy in a parliamentary faction of the political party (or the electoral block of parties) on a list of which he or she was elected, is his or her *constitutional duty and not the right*”<sup>15</sup> (emphasis added).

24. However, on 6 April 2010 – deciding upon an appeal from a number of opposition deputies asking for the official interpretation of Article 83 of the Constitution<sup>16</sup> and the review of the constitutionality of Article 59 of the Law on the Rules of Procedure of Parliament - the CCU seems to have given a different interpretation on this matter, which goes into the direction of allowing individual deputies in the *Verkhovna Rada* to take part in the formation of a parliamentary coalition.<sup>17</sup>

25. Thereafter, in July 2010, 252 deputies of Ukraine applied to the Constitutional Court with a request to recognise as non-conforming to the Constitution the Law on Introducing Amendments to the Constitution No 2222 (hereinafter, the “Law No.2222”). Again, the ground for this Law to be recognised as unconstitutional was the fact that it had violated the constitutional procedure for its adoption (i.e. Article 159 of the Constitution).

26. As mentioned above, on 30 September 2010, the CCU (hereinafter, “the 30 September Judgment”) issued a Decision declaring Law No. 2222 unconstitutional “due to a violation of the constitutional procedure of its consideration and adoption”<sup>18</sup>. The main argument is that the *Verkhovna Rada* has overstepped its competences fixed in Article 159 of the Constitution, as it cannot amend the Constitution without a Constitutional Court opinion. In fact, according to Article 159 of the Constitution, a draft law on introducing amendments to the Constitution can only be considered by the *Verkhovna Rada* “upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution”. In this context, the Constitutional Court may analyse three questions: are human and citizens’ rights abolished or restricted? Is the revision of the Constitution oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine? Have the amendments already been introduced?

27. The 30<sup>th</sup> September Judgment of the Constitutional Court is based exclusively on the analysis of the differences between Law No. 2222 and Law No. 4180, as only the latter, but not the former had obtained the opinion by the Constitutional Court. The Court does not examine whether the amendments could have been declared at the time as not being conform to the requirements of Articles 157 and 158 of this Constitution.

28. Based on the Constitutional Court reasoning in the 30 September Judgment, it seems that it is the 1996 version of the Constitution that is in force in Ukraine since 1 October 2010.

#### **IV Assessment of the present constitutional situation**

##### **A. Constitutional Court – The 30 September Judgment**

29. It is not the task of the Venice Commission to review decisions by national constitutional courts, which are the institutions with the authority to provide a final interpretation of the Constitution. The Commission therefore refrains from taking a position on whether this Decision of the Court is justified or not. Nevertheless, some general remarks seem appropriate.

30. There is no generally accepted standard in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process. In its recent Report on Constitutional Amendment<sup>19</sup>, the Venice Commission noted that while some

<sup>14</sup> See Judgment of the CCU, Case No. 12-rp/2008, of 25 June 2008, point 5.1 of the motivational part.

<sup>15</sup> *Ibidem*, point 5.3.

<sup>16</sup> Related to formation of governing coalition.

<sup>17</sup> See Judgment of the CC of Ukraine, Case No. 11-rp/2010, of 6 April 2010, point 1 of the resolutive part.

<sup>18</sup> See Judgment of the Constitutional Court of Ukraine, Case No. 1-45/2010 of 30 September 2010, point 1.

<sup>19</sup> See CDL-AD(2010)001.

European countries explicitly provide for such a possibility<sup>20</sup>, the *posterior* judicial review of adopted constitutional amendments is a relatively rare procedural mechanism. In some countries, judicial review of constitutional amendments is in theory possible, but has never been applied in practice<sup>21</sup>. In others, it has been rejected on the basis that the courts as state organs cannot place themselves above the constitutional legislator acting as constitutional power. A system which has firmly rejected judicial review of constitutional amendments is the French system, under which this is not considered within the competence of the *Conseil Constitutionnel* (or any other court), because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution)<sup>22</sup>.

31. While the Ukrainian Constitution (in its two versions, from 1996 and 2004) explicitly provides for a mandatory *preliminary* review of a draft law on constitutional amendments (see above, paragraph 24), it remains silent as to the possibility of the CCU to review the constitutional amendments once they have entered into force. In 2006, an amendment to the Law on the Constitutional Court specifically excluded “*laws of Ukraine on introducing amendments to the Constitution of Ukraine that entered into force*” from the jurisdiction of the CCU<sup>23</sup>.

32. Nevertheless, such a review was made possible by a decision of the CCU adopted in June 2008, whereby the Court declared this provision of the Law on the Constitutional Court as unconstitutional<sup>24</sup>.

33. In this regard, the Venice Commission observed a certain inconsistency in the case-law of the CCU: as mentioned above, in its Decision adopted just four months earlier (in February 2008), the CCU considered that once they have entered into force, the constitutional amendments become an *integral part of the Constitution* and the Law on which they are based ceased to exist (see above, paragraph 19 of the present opinion).

34. The Commission also noted, with some surprise, that the 30 September Judgment does not refer to the Decision of February 2008 and does not explain the difference between the petition of 2007, and the petition of July 2010.

35. It also considers highly unusual that far-reaching constitutional amendments, including the change of the political system of the country - from a parliamentary system to a parliamentary-presidential one - are declared unconstitutional by a decision of the Constitutional Court<sup>25</sup> after a period of 6 years. The Commission notes however, that neither the Constitution of Ukraine nor the Law on the Constitutional Court provide for a time-limit for contesting the constitutionality of a law before the CCU.

36. As Constitutional Courts are bound by the Constitution and do not stand above it, such decisions raise important questions of democratic legitimacy and the rule of law.

37. It is clear that a change of the political system of a country based on a ruling of a constitutional court does not enjoy the legitimacy which only the regular constitutional procedure for constitutional amendment, and preceding open and inclusive public debate can

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<sup>20</sup> See for example, Germany, Bulgaria, Romania or Turkey (cf. CDL-AD(2010)001, paragraph 230).

<sup>21</sup> For example, Norway.

<sup>22</sup> Cf. the French Constitutional Council No 92 – 312 of 2 September 1992, § 34: “*Considérant que, dans les limites précédemment indiquées, le pouvoir constituant est souverain ; qu’il lui est loisible d’abroger, de modifier ou de compléter des dispositions de valeur constitutionnelle dans la forme qu’il estime appropriée*”

<sup>23</sup> Section IV.3.1 of the Law on the Constitutional Court.

<sup>24</sup> Cf. Judgment of the Constitutional Court No. 13-rp/2008, of 26 June 2008.

<sup>25</sup> There are only very rare examples of similar practices such as the Decision of the Constitutional Court of Kyrgyzstan declaring the existing and the former version of the Constitution unconstitutional (see the Venice Commission Opinion on Kyrgyzstan (CDL-AD(2007)045). Another example is the Decision of the Supreme Court of Colombia in 1983, which declared unconstitutional the Legislative Act on the reform of the Constitution in its entirety, on procedural grounds (see Decision of the Supreme Court of Colombia, Act No. 51 of 3 November 1981 on *Inexequibilidad de la reforma constitucional. Acto Legislativo Numero 1 de 1979*).

bring. As it stressed in its 2005 Opinion on the amendments to the Constitution of Ukraine, *“taking the time necessary for finding a real consensus among all political forces and the civil society on a well-balanced and coherent constitutional reform would secure legitimacy of the new Constitution and the political system in Ukraine”*<sup>26</sup>.

38. In the Venice Commission’s opinion, the jurisprudence of a Constitutional Court has to be consistent and based on convincing arguments in order to be accepted by the people. Changes in the case-law have to be well-founded and explained in order not to undermine legal certainty. The principle of legal certainty, being one of the key elements of the rule of law, also requires that when declaring a constitutional amendment unconstitutional the time elapsed since its adoption is taken into account. Moreover, when a court’s decision is based on formal or procedural grounds only, the substantive effect of such a decision should also be taken into account. In other words, the final decision should be based on a proportionality test where the requirement of constitutionality should be balanced against the negative consequences of the annulment of the constitutional amendment in question.

39. Finally, it is also important for such a decision to include unambiguous transitory provisions and set a precise time-limit for bringing lower-order norms and the functioning of state institutions into harmony with the Constitution in force.

## **B. Legal consequences of the Constitutional Court’s Judgment**

40. The main consequence of the 30 September Judgment of the Constitutional Court is the reinstatement of the pre-existing legal contents of the 1996 Constitution.

41. In some countries, the principle of automatic restoration of the pre-existing legal norms has been explicitly entrenched in their constitutions<sup>27</sup>. In some others, with constitutional review systems that are similar to the Ukrainian system, such as Bulgaria for example, the automatic restoration effect was proclaimed through the Constitutional Court’s case-law<sup>28</sup>. In both cases however, it refers only to the lower-level norms and not the constitution itself.

42. Although the Ukrainian Constitution does not contain any specific provision on this issue, the 30 September Judgment gave an answer to this question in its motivational part, where it stated that *“...the recognition of Law No. 2222 as unconstitutional in connection with a violation of the procedure of its consideration and approval means the renewal of the previous wording of the norms of the Constitution of Ukraine, which were amended and excluded by Law No. 2222 (p. 12)”*.

43. A number of ambiguities concerning implication of the 30 September Judgment remain. For example, the CCU did not provide an answer to the issue of the functioning of the state institutions; the Prime Minister, who was nominated according to the procedure given in the 2004 version of the Constitution can now be dismissed by the President, without consent of Parliament.

44. However, only two main issues are addressed in the present Opinion: the length of the parliamentary term and bringing national legislation into conformity with the 1996 Constitution.

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<sup>26</sup> Cf. CDL-AD(2005)015, para. 53.

<sup>27</sup> For example, the 1920 Austrian Constitution and the 1976 Portuguese Constitution.

<sup>28</sup> It may be interesting to mention that this rule was challenged on the ground that automatically resurrected norms have later on been amended by norms proclaimed unconstitutional by the Constitutional Court, the fact that not only leads to ambiguity and legal uncertainty, but also contradicts Article 22.4 of the Law on the Constitutional Court of Bulgaria. According to this provision, the effect of unconstitutional norms has to be dealt on a case by case basis by Parliament itself.

a) *Length of the parliamentary term*

45. Both the President and Parliament had been elected on the basis of the Constitution of 2004: the Parliament in September 2007 for a term of five years, and the President in January 2010 for a term of five years. According to the 1996 Constitution, which, according to the CCU's Judgment is now in force, the parliamentary term is four years, which would mean that the next parliamentary elections should be held in the Spring of 2011, i.e. the last Sunday in March of the fourth year of the mandate of the deputies (Article 77 of the Constitution). On the other hand, according to the 2004 version of the Constitution, regular elections of the *Verkhovna Rada* take place on the last Sunday of the last month of the fifth year of the mandate of the deputies (Article 77 of the Constitution), i.e. in September 2012.

46. This situation was at the origin of two recent constitutional petitions:

47. In early October, the parliamentary majority submitted a project to amend the Constitution, extending the length of the term of Parliament and local government bodies by one additional year (from four to five years). This action of Parliament might be interpreted as implicitly acknowledging the fact that, under the present circumstances, the length of the parliamentary term of office is four years.

48. In conformity with the constitutional provisions on amendment, this draft constitutional amendment has been sent to the CCU for review. The Court gave its positive opinion on this draft amendment on 19 November 2010. However, the final approval of this constitutional amendment will not be given until the beginning of February 2011 (when the next session of Parliament will begin).

49. In parallel to this, the Central Election Commission (hereinafter, the "CEC"), which should initiate the formal start of the elections 105 days before the election date (i.e. on 22 November 2010, in case the 1996 Constitution applies) requested the Constitutional Court's interpretation of Article 77 of the Constitution<sup>29</sup>. At the moment of writing this Opinion, the case is still pending before the Constitutional Court, and the CEC has not yet declared the start of the election campaign.

50. It is not the task of the Venice Commission to speculate on the future decision of the CCU on this matter. It wishes to stress, however, that it is of the utmost importance to re-establish legal certainty, overcome the constitutional crisis and provide for a legitimate basis for the exercise of power in the country.

51. The Constitution itself does not specify who should determine the date of the parliamentary elections. The *Verkhovna Rada* is empowered to set the date for the presidential and for the local elections, but not for its own. The CCU is the only authority competent to give the official interpretation of the constitution. Last year, the CCU was requested to pronounce itself on the then President Yushchenko's constitutional petition regarding the date of the presidential elections<sup>30</sup>. In its Decision, the CCU stated that in setting the date for elections, it was guided by the norm of the Constitution *current on the day that the judgment was taken*. As Article 17.1 of the Law on Presidential Elections and the *Verkhovna Rada* Resolution on setting regular elections for President of Ukraine reproduced the wording of the 1996 version of the Constitution, the Court declared both acts as contrary to Article 103.5 of the 2004 version of the Constitution in force<sup>31</sup>.

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<sup>29</sup> Article 77 reads: "Regular elections to the *Verkhovna Rada* of Ukraine shall be held on the last Sunday of March of the fourth year of the term of the *Verkhovna Rada* of Ukraine. Early elections to the *Verkhovna Rada* of Ukraine shall be appointed by the President of Ukraine and shall be held within a 60 day period from the day of publication of the decision on the early termination of the powers of the *Verkhovna Rada* of Ukraine. The procedure for electing the people's deputies of Ukraine shall be established by law".

<sup>30</sup> Presidential polls in Ukraine have traditionally been held on the last Sunday in October - but Mr Yushchenko took power in January 2005, three months after mass protests followed the fraudulent election victory of Mr Yanukovich.

<sup>31</sup> According to the CCU decision: "...from 1 January 2006, this provision of the Constitution (Article 103.5) has a new wording, under which the presidential elections in Ukraine are to be held on last Sunday of the fifth year of



52. The Venice Commission wishes to recall the importance of the role of constitutional courts in putting into practice democracy, the rule of law and the protection of human rights. The state constitutional courts are the institutions which can, by interpreting the wording of the constitution prevent the arbitrariness of the authorities by giving the best possible interpretation of the considered constitutional norm at the given time.

53. The Commission strongly hopes that the CCU, as the only authority competent to give the official interpretation of the state constitution, will take its decision on this matter very soon and preferably before the end of the year, thus contributing to ensuring the rule of law and the stability of the country in a difficult moment of its constitutional history.

b) *Bringing the legislation in line with the 1996 version of the Constitution*

54. In conformity with 30 September Judgment, the state authorities are required to “urgently” harmonise normative legal acts with the 1996 Constitution. Again, the lack of transitional provisions or a specific time-limit provoked legal uncertainty and became the subject of controversy between the majority and the opposition.

55. During its visit to Ukraine, the representatives of the Ukrainian authorities informed the Commission that the process of legislative reform is almost finalised with most of the relevant laws being already modified to conform to the 1996 Constitution. The recently adopted Law on the Cabinet of Ministers addresses the main issues in this regard.

56. Among others, the Law on the Cabinet empowers the President to appoint the Prime Minister, with the consent of more than half of the constitutional composition of Parliament (Article 8), and the Cabinet members, upon proposal by the Prime Minister (Article 9). The Cabinet is responsible to the President of Ukraine and is under the control and accountable to Parliament (Article 1.3). The Government can be dismissed as a result of the adoption of the no-confidence motion against the Cabinet, the President's decision on the resignation of the Cabinet, the resignation of the Prime Minister or his/her death (Article 12). In addition, the Government must resign after the new President is elected (Article 11). The Cabinet programme is based on the electoral programme of the President, to be submitted for consent to the *Verkhovna Rada* (Article 10.1 and 10.2).

57. The Law on the Cabinet of Ministers of Ukraine is of crucial importance for the functioning of the executive branch in the country. It is therefore particularly important that its provisions reflect a proper co-ordination with the Constitution in force. The Venice Commission did not have the opportunity to assess this new Law in detail. It wishes to note, however, that a number of provisions of the Law appear to give rise to concern. These are threefold.

58. First, according to Article 25.2, the Cabinet of Ministers is obliged, *inter alia*, to ensure the implementation of acts issued by the President as well as of the “instructions” (“*doruchennya*”) by the President. A number of interlocutors met during the November visit to Kiev informed the Commission that in practice, this kind of “instructions” may be given to both the Cabinet as a whole and the individual ministers within the Cabinet. This prerogative however, is not contained in Article 116 of the 1996 Constitution.

59. Second, the presidential acts issued within the limits of the defined powers must be “confirmed” by the premier and the responsible minister “by appending their signatures” to the act within a five-day term (Article 25.3). In this regard, the Commission recalls that the countersignature requirement allows the setting of limits to the discretionary power of the President in certain fields and prevents him or her from pursuing his or her own personal policy. While this provision explicitly refers to the mechanism of countersignature envisaged by the Constitution (Article 106.2), its wording and the very short deadline may undermine its

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office of the President. The provisions of the first part of Article 17 of the Law thus violate Article 103.5 of the Constitution of Ukraine” (Cf. CCU Decision No. 10-pn/2009, of 12 May 2009, paragraph 3.3).

relevance in practice. In addition, the Law on the Cabinet remains silent as to the possible legal consequences of the Prime Minister/responsible minister refusing to sign an act of the head of state.

60. This last point is particularly relevant, as the Commission was told by some representatives of Ukrainian authorities and the opposition, that in practice, the mechanism of countersignature is very rarely used, if at all. It thus strongly recommends the effective use of this important principle in practice.

61. Third, Article 42.1 gives the President also the right to appoint “deputy ministers”, upon the proposal of the Prime Minister. Again, this novelty seems to transcend the bounds of the 1996 version of the Constitution.

62. These changes clearly lead to diminishing the influence of Parliament and strengthening the President’s control over the activity of the Government. In addition, the new Law on the Cabinet of Ministers as well as the whole process of harmonisation of the legislation with the 1996 version of the Constitution encounters a rather strong criticism from various actors in the country. During the Commission’s visit to Kyiv, several interlocutors met denounced the haste in adopting and implementing legislative reforms, which apparently resulted in several violations of regular legal procedures. It was thus pointed out that among others, the above-mentioned new Law on the Cabinet entered into force on 7 October 2010, only six days after the CCU’s Decision, apparently without respecting all the procedural stages. This seems to indicate that the new draft Law was prepared in advance.

63. Without having seen the Rules of Procedure and more detailed information on the various stages in the adoption procedure in Parliament, it is not possible for the Venice Commission to comment on this matter. It must be recalled however, that the 2004 version of the Constitution was annulled because of the non-observance of *procedure in making amendments to it*. The rush in adopting legislative reforms to conform to the Constitution currently in force should not come at the cost of proper democratic procedures and proper consultative process. It has to be kept in mind that all laws passed violating certain rules of procedure can be abrogated at any time by the Constitutional Court. This creates legal uncertainty and is incompatible with European standards in particular, the rule of law.

### **C. Further steps to be taken to bring the new constitutional framework in line with European standards and norms**

64. The fundamental problem in Ukraine for more than a decade has been dysfunctional institutions, a lack of checks and balances especially with respect to the powers of the President, constant clashes between the State organs and intense disputes over the Constitution. Considering current political realities, the strengthening of the powers of the President can become an obstacle for building genuine democratic structures and may eventually lead to an excessively authoritarian system, as already pointed out in the Venice Commission’s opinion on the draft constitution of Ukraine as approved on 11 March 1996<sup>32</sup>.

65. Therefore, the present constitutional situation and the 30 September Judgment should not be used as a reason to avoid a comprehensive constitutional reform called for by, *inter alia*, the Parliamentary Assembly of the Council of Europe<sup>33</sup> and the European Union<sup>34</sup>. It is clear that the current constitutional framework based on a ruling of the Constitutional Court does not enjoy sufficient legitimacy, which only the regular constitutional procedure for constitutional amendments in the *Verkhovna Rada* can ensure.

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<sup>32</sup> See CDL (1996)20.

<sup>33</sup> See PACE, The functioning of democratic institutions in Ukraine, Addendum to the Report, doc. 12357 Addendum, of 4 October 2010.

<sup>34</sup> See Resolution of 25 November 2010 on Ukraine (Doc. P7\_TA-PROV(2010)0444) and the Joint statement at the EU-Ukraine summit, held in Brussels on 22 November 2010 (MEMO/10/600).

66. In the Venice Commission's opinion, a comprehensive constitutional reform in Ukraine should strengthen the stability, independence and effectiveness of state institutions through a clear division of competencies and effective checks and balances. It should also introduce additional mechanisms and procedures of parliamentary control over the actions and intentions of the executive.

67. Moreover, a genuine constitutional reform is crucial to ensure that the legislative reform packages that are currently being developed are fully consistent with European standards and values. This concerns, first of all, the reform of the judiciary. The recent Opinion of the Venice Commission<sup>35</sup> identifies a number of problematic provisions in the Constitution which are an obstacle to a more comprehensive reform. Moreover, constitutional amendments should also facilitate the urgently needed reform of local self-government. Finally, while the return to the 2004 version of the Constitution should make reform of the *Prokuratura* - a commitment of Ukraine to the Council of Europe - easier, further amendments might also be advisable in this respect<sup>36</sup>.

68. Indeed, the transitional provisions of the 1996 version of the Constitution can no longer be used as a justification for maintaining the state of affairs that was supposed to be changed by this very text. This regards the reform of *Prokuratura* of course, but also the reform of the criminal procedure.

## V. Conclusion

69. The recent constitutional history of Ukraine has involved constant challenges and attempts to find the right balance of powers between the President, the Cabinet and Parliament. It soon became apparent that the text of the 1996 Constitution did not, taking into account realities in Ukraine, provide for sufficient checks and balances and that there was a risk of authoritarian presidential system. The Venice Commission therefore supported, already in 2003, the efforts for constitutional reform. These efforts led to the adoption of the 2004 constitutional amendments. The change brought about by these amendments was welcome, in principle, but neither coherent nor well thought through. The amendments therefore led to increased tension, especially between the President and the Cabinet of Ministers.

70. The reinstatement of the 1996 version of the Constitution by a judgment of the Constitutional Court of Ukraine raises questions of the legitimacy of past actions, as the institutions of Ukraine worked for several years on the basis of constitutional rules later declared unconstitutional. It also raises questions of legitimacy with respect to the present state institutions, since the President and the Parliament were elected under constitutional rules that are no longer recognised as valid. The President of Ukraine, as from this judgment, enjoys far more powers than could be foreseen by the voters when he was elected. The working of the main state organs is now based on rules changed by a court and not on rules changed by the *Verkhovna Rada*, as a democratically legitimate body.

71. The issues around the terms of office and elections are rather complex and equivocal, and every decision in this respect must be based on clear and convincing arguments in order to be accepted by the people. To the extent that an authoritative interpretation of the provisions of the Constitution with regard to the next date of the parliamentary elections seems to be required, the Venice Commission believes that a decision by the Constitutional Court of Ukraine could provide the answer to this issue.

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<sup>35</sup> See the Joint Opinion of the Venice Commission and the Directorate General of Human rights and Legal Affairs of the Council of Europe on the Law on the Judicial System and the Status of Judges of Ukraine (CDL-AD (2010)026) and on the Law amending certain Legislative Acts of Ukraine in Relation to the Prevention of Abuse of the Right to Appeal (CDL-AD(2010)029).

<sup>36</sup> See the Opinion of the Venice Commission on the draft Law of Ukraine amending the constitutional provisions on the *prokuratura* (CDL-AD(2006)029).

72. The Commission also considers it to be of the utmost importance for the Ukrainian authorities to adhere to the rule of law and to observe all rules of procedure when adopting and revising national legislation to implement the Constitution, including by fully involving the opposition parties in this process. Such legislation should not be used to enlarge competences of state institutions beyond what is envisaged by the text of the 1996 version of the Constitution, as it was the case with the Law on the Cabinet of Ministers recently.

73. In the Venice Commission's opinion, the recent political and constitutional crisis in Ukraine once again revealed how urgently a true and comprehensive constitutional reform is needed in that country. The Commission has called for such a reform several times already<sup>37</sup>, and has underlined the need to secure the legitimacy of any constitutional reform in Ukraine. Such legitimacy can only be achieved if constitutional amendments are made after extensive, open and free public discussions involving the opposition and civil society, and in strict accordance with the constitutional provisions on amendment through decisions of the *Verkhovna Rada* by a qualified majority. A Constitution which is not based on large agreement of all relevant political players in the country cannot lead to political stability, as we have seen over the last years.

74. The Venice Commission strongly encourages the Ukrainian authorities to ensure that such a constitutional reform results in an effective strengthening of the stability, independence and efficiency of state institutions through a clear division of competencies and effective checks and balances. It should also introduce additional mechanisms and procedures of parliamentary control over the actions and intentions of the executive. Such a constitutional reform should also include changes in the provisions on the judiciary aiming at "laying down a solid foundation for a modern and efficient judiciary in full compliance with European standards"<sup>38</sup>.

75. Finally, as the Commission pointed out in its recent Report on constitutional amendment, "as long as the special requirements for amendment in the constitutions of Europe are respected and followed, then these are and should be a sufficient guarantee against abuse. In most countries such decisions require a qualified majority of the elected representatives in parliament, as well as other requirements. Constitutional decisions adopted following such procedures will in general enjoy a very high degree of democratic legitimacy – which a court should be extremely reluctant to overrule"<sup>39</sup>.

76. The Venice Commission therefore strongly encourages the Ukrainian authorities to engage in a process of constitutional change that is based on the regular constitutional procedure for constitutional amendments and on the democratic participation of all actors of society concerned.

77. The Venice Commission is ready to assist in this important task, should the Ukrainian authorities make a request for such assistance.

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<sup>37</sup> Cf. for example, Venice Commission opinion on the procedure of amending the Constitution of Ukraine (CDL-AD(2004)030); Opinion on the amendments to the Constitution of Ukraine adopted on 8 December 2004, CDL-AD(2005)015.

<sup>38</sup> Cf. CDL-AD(2010)003.

<sup>39</sup> *Ibid*, paragraph 236.