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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION
ON THE PROCEDURE OF AMENDING
THE CONSTITUTION
OF UKRAINE

Adopted by the Commission
at its 60th Plenary session
(Venice, 8-9 October 2004)

on the basis of comments by
Ms Finola FLANAGAN (Member, Ireland)
Ms Herdís THORGEIRSDOTTIR (Substitute member, Iceland)
Mr Kaarlo TUORI (Member, Finland)

I. Introduction

1. *At its last meeting on 22 June 2004, the Monitoring Committee of the Parliamentary Assembly held an exchange of views on the political situation in Ukraine. On this occasion, it expressed great concern about the current pre-election environment, and in particular considered “that the on-going constitutional reform, which is in principle highly needed, should be postponed until after the presidential election and then be conducted in a democratic and transparent manner”¹. The Parliamentary Assembly itself also strongly criticised the proposed adoption of constitutional amendments on the eve of presidential elections in its Resolution 1364 (2004) on political crisis in Ukraine.*
2. *In this context, by a letter of 28 June 2004, the Monitoring Committee requested the Venice Commission to provide an opinion on whether the procedure of amending the Constitution of Ukraine is in conformity with European standards.*
3. *Ms. Finola Flanagan, Ms Herdis Thorgeirsdottir and Mr Kaarlo Tuori were appointed to act as rapporteurs on this issue.*
4. *The present opinion, which was drawn up on the basis of their comments, was adopted by the Commission at its 60th Plenary Session (Venice, 8-9 October 2004).*

II. Background

5. The constitution that is currently in force in Ukraine was adopted on 28 June 1996. On 6 March 2003, the President of Ukraine, Mr. L. Kuchma, submitted the Draft Law “On Amendments to the Constitution of Ukraine”² to the Verkhovna Rada (Parliament) and opened a nation-wide debate on constitutional reform in the country (hereinafter: “Draft Law”). This Draft Law was latter on withdrawn by the President.
6. Three other proposals have been submitted to the Verkhovna Rada : the first Draft Law on amendments to the Constitution of Ukraine, prepared by Parliamentary Deputies A. Matviyenko and others (no. 3027-1 of 1 July 2003); the second Draft Law on amendments to the Constitution of Ukraine, prepared by Parliamentary Deputies S.B. Havrish and others (no. 4105, of 4 September 2003); and the third Draft Law on amendments, prepared by Parliamentary Deputies S.B. Havrish and others (no. 4180 of 19 September 2003). Draft Laws no. 4105 and no. 4180 were identical with the exception of their final provisions. These two proposals differ only in the dates in which they would come into effect and be implemented. Draft law no. 3207-1 differs in some of its proposals but many important proposals are similar in effect to those of draft no. 4105 and no. 4180.
7. In conformity with the Constitution³, the three Draft Laws on amendments have also been submitted to the Constitutional Court of Ukraine for opinion. The Constitutional Court delivered

¹ Statement by the Monitoring Committee on 22.06.04.

² Draft Law no. 3027.

³ Article 159 states that a draft law on amendments will be considered by the Verkhovna Rada upon an opinion of the Constitutional Court of Ukraine declaring compliance of the draft law with the requirements of Articles 157 and 158 of the Constitution.

its judgments in October and November 2003. In its rulings, it declared two provisions of Draft law no. 3027-1 to be contrary to Article 157. As to Draft Laws no. 4105 and no. 4180, they were declared constitutional, although the Court expressed some hesitation as to a number of its provisions, thus making these Draft Laws eligible for further consideration by Parliament.

8. The Venice Commission commented in detail on each of these Draft Laws in its Opinion (CDL-AD (2003) 019) dated 8 December 2003. The Opinion, whilst welcoming the efforts to reform the system of Ukraine's government to bring it closer to European democratic standards, nonetheless was critical of many aspects of each of the Draft Laws.

III. Main steps of the constitutional reform process

9. The main steps of the progress of the three Draft Laws are set out in some detail in the following paragraphs. In this respect, the Commission wishes to stress that no text of the amended versions of the Draft Laws has been provided but only a 'Comparative Table' providing an outline of amendments.⁴

Draft Law no. 4105

10. On 24 December 2003 Draft Law no. 4105 was submitted to the Verkhovna Rada for its first reading and vote. Though the open ballot was conducted by a show of hands and certified by personal signatures by the National Deputies⁵, the Draft Law received the necessary majority and was adopted by the Verkhovna Rada. Following the criticisms expressed by the Council of Europe Parliamentary Assembly and other international organisations, during its extraordinary session of 3 February 2004, the Verkhovna Rada amended Draft Law no. 4105 in order to take into account a number of recommendations made by the Venice Commission. It notably withdrew the Draft Law's clause that provided for election of the President of Ukraine by Parliament rather than by the people as is currently provided for in the 1996 Constitution as well as the amendment proposing that judges be elected for a ten-year term with the possibility of re-election.

11. Thus amended, the Draft Law has again been submitted to the Constitutional Court for opinion. In its ruling of 18 March 2004, the Constitutional Court considered that the bill, as amended on 3 February 2004 does not contradict the Ukrainian Constitution.

12. In spite of the modifications made to the text, on 8 April 2004, Draft Law no. 4105 was rejected at its second reading, receiving 294 votes instead of a two thirds majority of at least 300 votes. In mid-May, both President Kuchma and Verkhovna Rada Speaker V. Lytvyn announced the cancellation of the draft no. 4105.

Draft Law no. 3207-1

13. On 23 June 2004, the Draft Law no. 3207-1 failed to obtain the necessary approval.

⁴ The source: Verkhovna Rada web page of resolution #4180-III

http://195.230.149.70:7777/pls/zweb_n/webproc4_1?id=&pf3511=18452,

⁵ Ambassade d'Ukraine communiqué de presse *2 *Chronology of the process of the Constitutional reform in Ukraine as of 3 February 2004*

Draft law no. 4180

14. On 23 June 2004, the Verkhovna Rada also voted on Draft Law no. 4180 and approved it by 276 votes on a first reading, thus exceeding the required majority of 226 votes.

15. It should be noted that the text of the approved Draft Law (originally identical to Draft Law no. 4105 when first introduced) had been amended in a manner similar, but not identical, to the amendments to Draft Law no. 4105. The modifications were those concerning election of the President by the Verkhovna Rada thus reverting to the original 1996 Constitution's position and concerning the election of judges also reverting to the 1996 Constitution's position (see *supra*, Para. 9). A new addition to Draft Law no. 4180 was to increase the retirement age of the Constitutional Court's judges by five years to age 70. No reason is given in the Comparative Table as to why this should be done. Whilst these changes would go some way towards meeting the recommendations made by the Commission in its previously mentioned opinion (CDL-AD (2003) 019), many of other provisions which had been criticised remain.

16. The Commission wishes to stress that the version voted on in June session was therefore not entirely the same as the version submitted to the Constitutional Court in October 2003 or commented on by the Commission itself. Thus, a new opinion of the Constitutional Court on the conformity of the draft Law no. 4180 *as amended* with Article 158 would have been needed *before* proceeding to the vote by the Verkhovna Rada, in accordance with the constitutional procedure.

17. At any rate, the result of these votes is that the only remaining proposal before the Verkhovna Rada is the revised Draft Law no. 4180 which is identical in most respects to the Draft Law no. 4105 that was defeated in a vote of the Verkhovna Rada a mere few months ago.

18. If the second vote on Draft Law no. 4180 is to be taken, it would be on the agenda of the Verkhovna Rada during its autumn session.

IV. Constitutional procedure for amendments to the Constitution: Analysis

19. Chapter XIII of the 1996 Constitution deals exclusively with the process of its amendment, and indicates the high constitutional importance attached to this process. In particular, Article 159 of the Constitution requires the Constitutional Court to express its opinion on whether proposals to amend the Constitution maintain the pre-existing standard of human rights and maintain Ukrainian territorial indivisibility as provided for in Article 157. In addition, the Constitutional Court must express its opinion on whether an amendment conforms with the procedural requirements of Article 158 which provides as follows:

“The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law”
(emphasis added)

20. Therefore an issue clearly arises as to whether it is in conformity with the Constitution for successive and largely similar schemes of amendments to be re-submitted within one year of failing to be adopted by Parliament. It is expressly provided for in Article 159 of the

Constitution that this very issue, i.e. compliance with the requirements of Article 158, be considered by the Constitutional Court and an opinion given by the Court on that issue. This issue, which would have arisen when Draft Law 4105 was defeated on 8 April 2004, should therefore be referred to the Constitutional Court for its opinion.

21. In contrast to Article 158, Article 156 provides that “[the] repeat submission of a draft law on introducing amendments to Chapters I, II and XIII of the Constitution on one and the same issue is possible only to the Verkhovna Rada of the next convocation” (emphasis added). None of the three Draft Laws in question here propose amendments to these chapters. Article 156 would therefore not apply to the current proposals of amendments to the Constitution.

22. It has been argued⁶ that since the words “on one and the same issue” do not appear in Article 158 there is no prohibition on introducing successive proposals - which do not amend chapters I, II and XIII - to amend the same provisions within the same year or within the same convocation. In favour of this approach, it could also be sustained that the scope of application of Article 158 § 1, concerning all amendments to the Constitution, has intentionally been defined in stricter terms than that of Article 156 § 2, relating only to amendments to Chapters I, III and XIII of the Constitution, and that such a difference between the two provisions can be rationally justified. Thus, even substantial arguments can be presented for interpreting Article 158 § 1 according to its wording and as preventing only the renewed submission of the same draft law which has already been voted down by the Verkhovna Rada. This would seem to lead to the conclusion that Article 158 §1 of the Constitution did not preclude the revival of the amendment process on the basis of the draft law no. 4180.

23. On the other hand, attention should be paid to the fact that the draft law no. 4180 largely overlaps with the draft law no. 4105, which previously failed to receive the required majority. Thus, it can be argued that although the draft law no. 4180 has formally been submitted to the Verkhovna Rada separately from the draft law no. 4105, the two draft laws overlap to such an extent that Article 158 §1 should be applied. This interpretation can be defended even if it is accepted that this provision’s scope of application is narrower than that of Article 156 § 2, and that the phrase “on one and the same issue” cannot, by way of interpretation, be extended to Article 158 § 1.

24. The difference of opinion on the interpretation of Article 158 would seem to be well known and widely debated. The Deputy Chairman of the Constitutional Court of Ukraine has also acknowledged two possible approaches – without suggesting an answer.⁷

25. The task of the Constitutional Court of Ukraine is to guarantee the supremacy of the Constitution as the fundamental law of Ukraine. The activities of the Constitutional Court are themselves regulated by the Constitution. It is the only body with constitutional jurisdiction in Ukraine and the only body to decide on the conformity of laws and other legal acts with the Constitution. The Commission therefore considers that it is essential that the Constitutional Court rule on this issue as required by Article 158.

⁶ Information note on the co-rapporteurs’ visit to Ukraine (27 May- 3 June 2004) – AS/MON (2004) 22 June 2004 paragraphs 28 and 29.

⁷ Ibid paragraph 29.

26. The general thrust of Chapter XIII of the Constitution on amending the Constitution is to regulate the amendment process closely, and specifically to limit the frequency with which such amendments may be introduced. It would be inconsistent with the spirit and clear general intention of this Chapter if the same amendments could be proposed without any limits as to time simply by including them in different proposals with different registration numbers. This would permit, as has in fact happened, a repeated introduction of the same or similar amendments. This could continue until such time as some version is passed by Parliament.

27. There is a clear value in requiring a certain reasonable lapse of time before the re-introduction of the same or similar amendments ; it allows adequate time for debate, both public and parliamentary, on and assessment of a proposal as well as a useful cooling-off period especially during times of political turmoil such as the present. It also allows for stability for the existing constitution to operate and limits constant political interference with and manipulation of the basic legal text governing the distribution of powers which has been decided upon by the people in a popular vote.

V. Conclusion

28. In its previously mentioned opinion of 13 December 2003 (CDL-AD(2003) 029), the Venice Commission stressed the need to secure the legitimacy of any constitutional reform in Ukraine. It notes the complicated and hurried way in which a variety of constitutional amendments have been proposed, introduced, amended and voted on with each proposal being subjected to process of further amendments in the process. It wishes to stress that constitutional amendments should only be made after extensive, open and free public discussions and in an atmosphere favouring such discussions. Amendments should, as a rule, be based on a large consensus among the political forces and within the civil society.

29. A considerable overlap still exists between all three draft laws and particularly between Draft Laws no. 4105 and no. 4108. All three proposals for amendments to the 1996 Constitution involve a redistribution of the powers of the President, the Verkhovna Rada and the Cabinet. Yet, on 31 October 2004, Ukraine is to hold presidential elections. The Venice Commission has already stressed in its opinion (CDL-AD (2003) 019), that constitutional reforms and their entering into force should not be subject to short-term political calculations.

30. The Commission wishes to point out that the Constitution of Ukraine adopted on 28 June 1996 is still in force, and its provisions have not so far been amended. It remains the primary legal instrument which governs Ukraine and the allocation of power within it and its provisions must be strictly complied with in relation to all matters it concerns but most especially in the context of proposals and adoption of amendments to it. It is only in this way that democracy and the rule of law will be fully respected. To the extent that an authoritative interpretation of the provisions of the constitution on amending the Constitution seems required, a decision by the Constitutional Court of Ukraine should be sought.