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CONSOLIDATED OPINION ON THE UKRAINE CONSTITUTIONAL REFORM PROJECT

Adopted by the Venice Commission
at its 47th Plenary Meeting
(Venice, 6-7 July 2001)

I. General remarks:

While some proposals for amendment are made to clarify existing arrangements, most of them intend to *reduce the powers of the President* and therefore *to diminish the predominance of his role in the system*. Changes concern in particular his *control over the Executive*. Concerning the issue of nomination and of dismissal of the Government, but also of other important state officials, a transfer of power is made from the President to the Verkhovna Rada in the draft amendments. *It is planned that Government be closely linked to Parliament instead of being controlled by the President*. The intention is that, in future, the Cabinet, and not the President, holds the control over the organisation of the Executive.

The "transfer of power" as an idea cannot be criticised, but the amendments planned are not always coherent when considered in the light of the general structure and current situation of the country. For example, the link between parliamentary factions and their mandate, combined with the possibility of the dissolution of the Assembly, if it does not agree to a proposal of the cabinet of ministers within 60 days, might prove to be a dangerous tool in the hands of a new majority. The new majority could control the Government and restrain the (not unimportant) minority (those currently led by the former speaker). Also, the possibility of an impeachment procedure for the President for a breach of oath should be given a secure legal basis, so that it will not become a political lever.

Taken as a whole, the draft has a tendency to direct the present presidential regime towards a parliamentary regime and to improve the balance of the powers of the state. If such a step appears to be founded, it depends, as a last resort, on a political choice. On the other hand, the draft is marked by the concern to stabilise the new parliamentary-led system. However, the proposed solutions to stabilise the system seem to go too far (see comments on points 1 and 2 below). In addition, the proposal to enlarge the motives for an impeachment procedure against the president (see point 23 below) could lead to problems.

II. In detail:

Point 1 seems a very dangerous amendment. To link the mandate of a national deputy to membership of a parliamentary faction or bloc *infringes the independence of the deputies and might also be unconstitutional* (for instance with regard to Articles 5 and 79), bearing in mind that Members of Parliament are supposed to represent the *people* and not their parties.

According to the constitution in force, the status of the national deputy is based on the great tradition and principles of free pluralist democracies. Among others, it concerns (a) the principle of representation of the people and of the nation as a whole and not just a part, or a specific group of people or a territorial part of the country, and (b) the freedom of will and its manifestation as a member of parliament (non imperative mandate). The introduction of a new paragraph 2 to Article 81, as suggested, would question those two principles.

(a): According to the constitution in force, the national deputy is elected through universal, equal and direct vote, by the people for a period of four years (see Articles 71 para. 1, 76 para. 1, 38 para. 1, etc.) and receives his or her parliamentary legitimacy through elections (see Articles 5 para. 2, 69, 70, etc.). His or her status is one of 'national' deputy. During his or her mandate, the deputy should not have another representative mandate (Article 78 para. 2). He takes an oath: 'I swear allegiance to Ukraine. I commit myself with all my deeds to protect the sovereignty and independence of Ukraine, to provide for the good of the Motherland and for

the welfare of the Ukrainian people' and 'to abide by the Constitution of Ukraine and the laws of Ukraine, to carry out my duties in the interest of all compatriots' (Article 79 para. 2 and 3). The deputy's mandate cannot be revoked on an individual basis by the people (Article81 para. 1) and can be terminated before the end of the Verkhovna Rada's mandate only in the specific circumstances listed in Article 81 para. 2 points 1-5, Article 78 para. 2 and 3, Article 79 para. 5, Article 81 last para.

(b): In the exercise of his or her duties and obligations, the national deputy, who is only subjected to his or her oath, is free to follow his or her convictions, and cannot be held responsible for his or her votes, declarations, or opinions expressed in parliament or in committees (Article 82 para.2). The status of deputy also brings immunity (inviolability) against arrest or criminal proceedings (Article 80 para. 1 and 3). This reinforces and confirms his or her independent status with regard to the Executive.

The proposal to insert in Article 81 a new para. 2, as proposed would put the parliamentary bloc or group in some ways above the electorate which, in return, is unable to revoke individually a parliamentary mandate conferred through election for four years.

In particular, the establishment of a constraining link between an elected national deputy (who belongs to the electoral list of a party or bloc of parties) and his or her parliamentary group or bloc has the effect that a breach of this link (withdrawal or exclusion of a deputy belonging to a particular parliamentary group or bloc from his or her parliamentary group of bloc) would therefore *ipso facto* put an end to the parliamentary mandate of the deputy concerned. This would be contrary to the principle of a free and independent mandate. Even if the question of belonging to a parliamentary group or bloc is distinct from the question of submission to the group or bloc's discipline in concrete situations, freedom of mandate implies the deputy's right to follow his or her convictions. The deputy can be expelled from the parliamentary group or bloc, or can leave it, but the expulsion or withdrawal from the group or bloc should not involve the loss of the deputy's mandate. Without underestimating the importance of parliamentary groups and their ability to promote stability and efficiency, membership of a parliamentary group or bloc does not have the same status as that of a deputy elected by the people. This distinction is decisive for a parliament representing the people where deputies comply with their convictions and oath. The distinction between membership of a parliamentary group or bloc and a parliamentary mandate as such is also decisive for internal democracy within the parliamentary groups or blocs, as they protect, as a last resort, the freedom of the deputy's mandate and minority groups against excessive pressure from the majority group or bloc and thus lessen the problems of possible breaches of a deputy with his group.

Point 2 at first glance seems acceptable, as it is meant to give stability to the form of the Cabinet of Ministers.

It is a reality of modern pluralist democracies that political parties play an important role in structuring, influencing and helping the activities of the parliament and communicate them to the public. Bearing this in mind, the status of deputy can enable him or her, at parliamentary level, to associate with other deputies to form a parliamentary group, bloc or majority. This helps the formulation, transparency and stability of public life. However, the cementing of parliamentary adhesion and loyalties of a majority group or bloc, however important they may be for politics, conflicts with the rule that the will of parliament is formed by deputies who in

each specific case vote according to their convictions. This is a fundamental element of the status of deputies elected by the people.

Consequently, the obligation to form, in a constraining (and continuous?) way, a 'parliamentary majority responsible for the shaping of state policy by direct participation in the formation of the composition of the Cabinet of Ministers of Ukraine' raises the problem as to the deputy's status of freedom and independence. However, if the deputies' groups (according to the draft) are not understood as being almost an organic majority parliamentary body, and if this majority group does not threaten the constitutional freedom of individual votes, the objections indicated would lose most of their substance.

If on the other hand a majority is not formed, it is nevertheless possible that in the interest of the country, a government based on one or another minority could be formed. The proposals made by the draft do not seem to foresee such a possibility.

Point 3 transfers the main role in the nomination and dismissal of the Prime Minister from the President to the Verkhovna Rada, thus depriving the President of an important competence. It is a correction from a very presidential system towards a greater equilibrium between the Legislative and the Head of State. The amendment proposed in point 3 is closely linked to the suggestions made in Point 9.

Point 4 makes a useful precision, to the extent that certain cases can be foreseen by the law. Nevertheless parliament should not nominate subalterns.

Point 5 shifts the power in the nomination and dismissal procedure of important state officials from the President to the Parliament. This modification cannot be criticised, in so much as it falls within the process towards a parliamentary regime.

Point 6 In our opinion, even in a parliamentary regime, these tasks should not be performed by the Parliament, but by the Executive.

Point 7 attributes the main role in the appointment and dismissal of the Procurator General to the Parliament. This evolution is a positive one, as *it limits the influence of the President over the Procurator General*. Nevertheless it should not result in control of the Verkhovna Rada over the Procurator General.

Point 8, combined with point 4, might prove to be a dangerous tool, *giving the Parliament the possibility of control* (through the threat of dismissal) of high ranking state officials.

The propositions made in **point 9** seem acceptable, *except the dismissal of individual members of the government, which could make the Cabinet a puppet of the Verkhovna Rada* (see above under point 3).

Point 10 forms part of the move towards a parliamentary regime.

The contents of **Point 11** are useful because they "restore" (see above i.e. point 2) the influence of the minority.

Point 12: It is legitimate to confer the additional power of dissolution of Parliament to the President in the event that, within 60 days, the Verkhovna Rada does not agree to the Cabinet,

in order to avoid the obstruction of state functioning. However, this power, in our view, should be limited. For instance only two dissolutions within a legislative period could be allowed, so that this mode of dissolution stays confined to "situations of political emergency", and does not become a presidential tool, which can be used against the Assembly (in the event that somehow only candidates in favour of the President are suggested and not agreed to by Parliament).

Point 13: The present formula could have remained. The result would be almost identical.

Point 14 seems acceptable in essence, but the *figure of 250 deputies should be checked*, because it curiously coincides with the majority (see point II 9 of the Venice Commission's opinion on the implementation of the constitutional referendum in Ukraine, CDL-INF (2000) 14) favourable to the President before the latest events.

We can perceive no fault in **points 15 and 16**, which confer only a minor extension of power to the Cabinet of Ministers and to the Verkhovna Rada.

Point 17 is related to point 12 (above).

Points 18, 19, 20 and 21 confer more powers to the Parliament, but in reasonable measure.

Point 22: This point does not make any changes of consequence.

The extension of the procedure of impeachment to the breach of oath of the President in **point 23** is acceptable as an idea. It should nevertheless *include another element of control*, for instance the Constitutional Court, as the ideas expressed in the oath are normally very general and need to be legally "translated".

The presidential oath foreseen in Article 104 is a political oath expressed in the form of a promise. It differs from judicial oaths, which consider precise previous facts. Contrary to judicial oaths which have a clear definition, the political oath, which aims at attitudes and future acts, is by its very nature more vague. If we consider this, the question can be asked, whether the addition of motives for an 'impeachment' procedure (violation of the presidential oath), does not create more problems than it solves. As it stands, high treason or any other crime is enough to start 'impeachment' procedures (Article 111 para.1).

Point 24: We do not think there is a problem in lowering the barrier of the impeachment in the way projected.

We do not find fault with the reorganisation of interim power described in **point 25**. It fits in with the general tendency of transfer of power to the Parliament.

Concerning **point 26**, the shift of accountability of the Cabinet to the Parliament instead of to the President seems acceptable. The dropping of the limits of accountability (articles 85 and 87) is meant to *bestow the aptitude of political control* over the Cabinet to the Verkhovna Rada. Point 26 is linked in its contents to points 4 and 9.

The changes proposed in **points 27, 28 and 29** seem adequate.

No real change is proposed in **points 30 and 31.**

Point 32 is the procedural counterpart of point 9 – it cannot be disapproved of.

Point 33 limits the influence of the President over the Cabinet. Nothing to criticise here.

Point 34 has to be considered in the context of point 15.

We cannot find fault with the transfer of power from the President to the Cabinet, which is delineated in **points 35, 36, 37, 38 and 39.** It fits in with the tendency of "depresidentialisation" of the system.

Point 40 is complementary to point 7 (for comments see above).