

Parliamentary Assembly Parliamentary Assembly



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Political crisis in Ukraine

Report

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

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Summary

The recent stormy disputes in the Verkhovna Rada over a preliminary adoption of a draft law on constitutional amendments and the controversial ruling by the Constitutional Court of Ukraine extending President Kuchma's right to run for a third term of office in the 2004 Presidential elections have brought the Verkhovna Rada's winter session to a forced premature halt on 15 January 2004.

The Assembly voices its concern over the reasons that have prompted the political deadlock in the country and calls upon the Verkhovna Rada to resume the discussions on the constitutional amendments through an open and public dialogue, taking into account all recommendations of the Venice Commission. The Assembly is of the opinion that carrying out constitutional reforms a few months before the Presidential elections is unacceptable and recommends to this end that all discussions on amendments pertaining to the Presidential elections be postponed until after the elections of 31 October 2004. It calls upon the Ukrainian authorities to make sure that the elections will be free, fair and transparent and conducted in a manner consistent with Ukraine's freely undertaken commitments as a member state of the Council of Europe.

I Draft resolution

1. The Parliamentary Assembly is deeply troubled by the recent developments relating to the political reforms and the upcoming presidential election in Ukraine and in this context refers to its Resolutions 1179 (1999), 1239 (2001), 1244 (2001), 1346 (2003) and in particular to Recommendation 1451 (2000) on the reform of the institutions in Ukraine, which clearly stated that *'... if the constitution were to be amended through non-constitutional means, it recommends that Ukraine's membership of the Council of Europe be suspended'*. The Assembly notes that the Ukrainian authorities have indeed ignored this particular provision of its Recommendation 1451 (2000), having recently initiated a procedure which is not in compliance with the Rules of Procedure of the Verkhovna Rada or Article 19 of the Constitution of Ukraine.

2. The Assembly deeply regrets that the Ukrainian authorities, including the President of Ukraine and the Ministry of Foreign Affairs, consider the activities of the Council of Europe, namely the Assembly's monitoring procedure, the visits of the co-rapporteurs of the Monitoring Committee and their statements as "interference in the internal affairs of Ukraine". In this regard, it recalls that Ukraine has voluntarily accepted the obligations arising from its membership according to the Statute of the Council of Europe. Therefore, the Assembly finds such a stand of the Ukrainian authorities as groundless and unjustified.

3. The Assembly supports any sincere aspirations by both the executive and the legislative authorities of Ukraine to pursue democratic reforms that would aim at substantially strengthening the legislative power and enhancing the independence of the judiciary, thus contributing to a greater separation of powers and an improved system of checks and balances as required by the standards of the Council of Europe.

4. The nature of the reforms as well as the system of governance chosen is an internal affair of any sovereign state, but only as long as they are carried out with due respect to the fundamental law of the country.

5. In this respect, the Assembly reiterates that the current Constitution in force since 1996 constitutes the main domestic legal instrument on the basis of which the country can develop a genuine democracy and insists on strict respect of its provisions, in particular as regards amendments to the Constitution, whatever their necessity and appropriateness.

6. Within this context, the Assembly is convinced that any decision reforming the constitutional election rules taken on the eve of Presidential elections is likely to be biased and divisive and therefore considers the timing of the current debate on constitutional reform highly inappropriate.

7. The Assembly deplores the short-term goals that have been guiding the recent debates. It believes that the true motives behind the recent push for political reforms, which has resulted in a parliamentary crisis in the country, is the intention of the current authorities to stifle any possibility of finding a political alternative for the exercise of power in Ukraine.

8. The Assembly strongly regrets the fact that the crisis in the Verkhovna Rada has been sparked by the lack of debate on the draft amendments to the Constitution and the motions tabled by the opposition in this regard. The Assembly finds this unacceptable in a democratic state abiding by the rule of law.

9. At the same time, it deplores the means the opposition has resorted to in retaliation in order to block the regular work of parliament.

10. The Assembly refers to the opinion of the European Commission for Democracy through Law ("Venice Commission") adopted on 13 December 2003 which welcomed the efforts made to bring the Ukrainian system closer to European democratic standards but concluded that *"the precise solutions chosen in the various drafts do not yet seem to have attained that aim and introduce other amendments to the Constitution that would appear to be a step backwards"*.

11. The Assembly deplores the fact that none of the recommendations of the Venice Commission have been taken into account in the course of the revision of the three Draft Laws (n° 3207-1, 4105 and 4180) by the Constitutional Court of Ukraine nor by the *ad hoc* parliamentary Constitutional Committee before submitting the Draft Law N° 4105 for discussion in the Verkhovna Rada. The Assembly therefore urges the relevant Ukrainian authorities to take into account all recommendations made so far by the Venice Commission and to continue to hold an open and effective dialogue with the Commission with a view to further improving the draft laws currently under debate.

12. The Assembly launches an urgent appeal to the parties represented in the Verkhovna Rada to resolve their problems in a peaceful manner through an open dialogue and full respect for parliamentary rules and regulations by means of:

i. securing the legitimacy of any constitutional reform by admitting that, in this instance, the Rules of Procedure of the Verkhovna Rada failed to be respected by all parties concerned, taking into account that “voting by raising hands” in parliament is not provided for by law, including the Rules of Procedure;

ii. proceeding to an open debate on all three Draft Laws (n° 3207-1, 4105 and 4180) on constitutional amendments which would involve a proper public information and a nation-wide popular discussion on these issues, especially pluralistic political debates on national TV and Radio channels;

iii. fully taking into account the recommendations of the Venice Commission while amending the Constitution and in particular reconsidering their position regarding the imperative mandate of national deputies, the limitation to ten years of the judges' tenure and the extension of the mandate of the Prosecutor General, which all conflict with the principles of democracy and the rule of law;

iv. ensuring that the next presidential election be held as scheduled and for the term prescribed in the current Constitution, in view of the fact that changing the election modalities immediately before the elections are due can only but confuse the electorate;

v. agreeing to submit any constitutional changes relating to the term and mode of election of a president to a nation-wide referendum as proposed by the Venice Commission.

13. The recent rulings of the Constitutional Court have once again shown the vulnerability of the independence of the judiciary in Ukraine. In the earnest belief that only a fully independent judiciary can provide the stability that is necessary to establish the rule of law, the Assembly is concerned by the ruling of the Constitutional Court of Ukraine of 25 December 2003 (N° 22-rp) as it corresponds neither to the present nor to the previous Constitution of Ukraine in force when President Kuchma was first elected in 1994. The Assembly still hopes that the President of Ukraine will demonstrate democratic responsibility by stepping down at the end of his second term as foreseen by the Constitution of Ukraine.

14. With regard to the forthcoming Presidential elections in October 2004, the Assembly shares the concern of many Ukrainian citizens that the election may not be truly free, fair, open and transparent. It maintains that any form of authoritarian practices like intimidation of voters, pressures on elections commissioners, curtailing the freedom of expression or bias of the media in favour of the candidate of the ruling party is clearly unacceptable.

15. The Assembly urges the President of Ukraine to submit to the parliament, without any delay, the proposed candidates to fill the seats in the Central Electoral Commission which are vacant since the expiry of the mandate of the former incumbents.

16. In the light of the above findings, the Assembly calls upon the Secretary General of the Council of Europe to urgently appoint a Special Representative in Ukraine whose mandate should be to follow current political developments in Ukraine, to provide advice and Council of Europe expertise if and when needed and generally to enhance and co-ordinate the ongoing co-operation with Ukrainian authorities.

17. It also considers that the activities relating to the Council of Europe media action plan agreed with Ukraine should be stepped up in order to achieve a noticeable improvement of the general

framework in which media operate and to promote substantial changes in the media culture in view of the forthcoming election campaign.

18. The Assembly is also concerned about the recent events in the town of Mukachevo and recommends that the Congress of Local and Regional Authorities of the Council of Europe observe that the new elections of the Mayor of Mukachevo be held in a free and unbiased manner.

19. The Assembly is of the opinion that the recent infringements of the voting procedures in the Verkhovna Rada violate Ukraine's obligations under Article 3 of the Statute of the Council of Europe. If any further attempts should be made to push through political reforms by amending the Constitution in a manner which is not prescribed by law and by unconstitutional means, or if Ukraine should fail to guarantee free and fair elections on 31 October 2004, the Assembly may decide to challenge the credentials of the Ukrainian Delegation in accordance with Rule 9 of the Assembly's Rules of Procedure and subsequently may decide to request the Committee of Ministers to suspend the membership of Ukraine in the Council of Europe in accordance with Article 8 of the Statute of the Council of Europe.

II. Explanatory memorandum by the co-rapporteurs

I. INTRODUCTION

1. The political deadlock resulting from the turbulent events of the end of the year in the Verkhovna Rada (Parliament) of Ukraine over the constitutional reform and the forthcoming presidential elections scheduled for 31 October 2004 show to what extent Ukraine stands at the crossroads today of either integration as a full-fledged member among the European democracies or reversion to a country where the principles of rule of law are selectively applied and undermined for the benefit of those who are in power.

2. The Parliamentary Assembly has closely followed the democratic reform process in Ukraine since the latter joined the Council of Europe on 9 November 1995.

3. The Ukrainian authorities have regularly expressed their determination to meet European standards and criteria that underpin true democracy. In this respect the Assembly welcomes and supports the efforts in Ukraine to reform the system of government in a way that would bring the country closer to those democratic standards. The commitment undertaken by Ukraine upon joining the Council of Europe and ratification of the European convention of human rights was to do its utmost to ensure an effective political democracy and full respect for fundamental rights and freedoms.

4. In its Resolution 1179 (1999) on the "Honouring of obligations and commitments by Ukraine", the Assembly deplored the lack of achievement in separating the judicial, legislative and executive powers as well as the continuing control and determination to hold political power by the executive bodies, which was regarded as having unduly influenced the presidential elections in October 1999.

5. The Recommendation 1451 (2000) on the "Reform of the Institutions in Ukraine" further stipulated that in the event of the constitution being amended through non-constitutional means, the Assembly would recommend the Committee of Ministers to suspend Ukraine's membership in the Council of Europe. In a recent Resolution 1346 (2003) the Assembly again voiced its concern over the manner in which the Ukrainian Constitution was to be amended, issuing a clear signal to the Ukrainian authorities that procedural norms must be scrupulously respected and that the opinion of the Venice Commission should be meticulously taken into account. This due process has clearly been disregarded by the Ukrainian parliament in the recent constitutional amendment procedures.

6. Following the decision of the Monitoring Committee of 7 January 2004 to request holding an urgent debate on the "constitutional crisis in Ukraine" at the January part-session and the subsequent approval of this decision by the Assembly Bureau on 12 January 2004, the co-rapporteurs of the Monitoring Committee on Ukraine carried out a fact-finding visit to Ukraine from 18 to 20 January 2004 in order to collect information and to assess the situation. During their visit, they met with national deputies from Ukraine's majority, opposition and the communists in the Parliament, as well as with the media, NGOs and the heads of the Parliament, Constitutional Court, presidential administration, Ministry of Justice and the Prosecutor-General's Office (Appendix I). All these discussions have fed into the present report.

7. As a result of their visit, the co-rapporteurs are convinced that the initial title of the motion tabled for the urgent debate referring to "constitutional crisis" does not adequately reflect the nature of the crisis (the existing constitution being in force without prejudice), and to this end propose the wording of the debate to be changed to underline the deadlock in the process of political struggle in general.

8. The co-rapporteurs are grateful to the Ukrainian parliamentary delegation for making their best effort to organise the visit in accordance with their requests and priorities, regardless of the short notice and religious holidays in the country.

II. THE BACKGROUND OF RECENT CONSTITUTIONAL REFORM

9. The constitution currently in force in Ukraine, adopted on 28 June 1996, has established a presidential-parliamentary type of institutional regime with the national system of governance comprising three main institutions: the Parliament (Verkhovna Rada), the highest legislative body, made up of 450 deputies elected for four years; the President, who is the Head of State and the Chief Executive, elected for five years; the Cabinet of Ministers led by the Prime Minister, who is appointed by the President and approved by the Verkhovna Rada. The President, on the proposal of the Prime Minister, appoints the members of the Cabinet.

10. Leonid Kuchma, the President of Ukraine, has been in power since 1994. He first sought changes to the country's political system by organising a seriously misnamed "Referendum at the People's Initiative" soon after being re-elected President in 1999. Despite its grave deficiencies and inacceptance by the international community including the Council of Europe, the 2000 referendum results are publicly relied on to this day. The motives behind this referendum, i.e. establishing a smaller, more divided, pliant and controllable Verkhovna Rada subject to the President's power of dissolution and a subservient judicial branch, have continued to drive the President and his administration in the four-year long history towards pushing through the so-called "political reforms".

11. The fact that a large number of judicial as well as economic reform initiatives have been ignored by the government in favour of pushing through these "political reforms" supports the contention that the "reforms" sought by the current regime are nothing more than cover for its drive towards preserving power.

12. The slow progress Ukraine has made towards becoming a full-fledged democracy is a result of the absence of the rule of law and a functioning system of checks and balances. Although legal norms exist, as a rule they are not applied to those in positions of authority, but are selectively applied either to those without influence or to those in opposition in order to repress. The former communist elite which has retained a practically unbroken hold on power in Ukraine since independence in 1991 is accustomed to retaining an iron grip upon all aspects of political, economic and social life, and seeks to maintain and to re-establish control over society at all cost.

13. Under these circumstances the existing constitutional system has been repeatedly denounced by both parliamentary factions and individual deputies who have been proposing radical amendments to the current constitution, notably towards strengthening the position of Parliament with respect to the President.

14. However, the constitutional debate pursued throughout the last year clearly reveals that the claims about strengthening the legislative branch have been used mostly as lip-service to camouflage the real intentions of both the pro-presidential forces and the opposition – to maintain a strong executive branch or dictate ideas that serve their personal goals in the power struggle.

15. In **March 2003**, the President submitted a Draft Law, registered under N° 3207, on amending the Constitution of Ukraine to the Verkhovna Rada and announced the opening of a nation-wide public debate, which was scheduled to be completed on **15 May 2003**.

16. The Monitoring Committee of the Assembly asked the Venice Commission to give its opinion on the proposed reform on **8 April 2003**. The public debate was carried through yet the President recalled this draft proposal a few months later. At its part-session in June, the Assembly adopted Resolution 1346 (2003) in which it stressed that "*in the process of amending the Constitution of Ukraine all provisions of the constitution in force should be thoroughly respected, in particular as regards the procedure of amending the constitution*". It called on the Ukrainian authorities to fully co-operate with the organs of the Council of Europe in this regard and in particular to take account of the opinions of the Venice Commission during the process of amending the constitution.

17. The President submitted a revised version of his proposal in **July 2003**. This presidential proposal was followed and replaced by three draft laws proposed by different groups of parliamentarians of the Verkhovna Rada, which were submitted to the Constitutional Court of Ukraine:

- 1st Draft Law on amendments to the constitution of Ukraine no. 3207-1 of 1 July 2003, prepared by Parliamentary Deputies A. Matviyenko and others;
- 2nd Draft Law on amendments to the Constitution of Ukraine no. 4105 of 4 September 2003, prepared by Parliamentary Deputies S.B. Havrish and others (commonly known as the Medvechuk-Sydorenko draft), and
- 3rd Draft Law on amendments no. 4180 of 19 September 2003, prepared by Parliamentary Deputies S.B. Havrish and others.

18. The Constitutional Court, having considered the three draft Laws concluded that they complied (with an exception of one provision in the Draft Law N° 3207-1) with the rules on amending the Constitution of Ukraine, thus making them eligible for further consideration by the Parliament.

19. It should be noted that the scope of the Court's review is limited, given that the Constitution specifies the exact criteria on which the review should be based. The latter is limited to examine compliance of the draft law with the requirements of Articles 157 and 158 of the Constitution. Article 157 prohibits any amendment to the Constitution that can be detrimental to the country's independence or territorial integrity, or entails the abolition or restriction of human rights and freedoms guaranteed. As to Article 158, it sets forth a number of technical restrictions.

20. The three Draft Laws were also sent to the Venice Commission, which adopted an opinion at its 57th Plenary meeting on **13 December 2003**, emphasising that none of the drafts offered a consistent and fully democratic solution that would propose a coherent political structure and respect the separation of powers.

21. Having received the conclusions of the Constitutional Court, the Verkhovna Rada passed a decision by 239 votes on **9 December 2003** by which it charged the *ad hoc* Commission of the Verkhovna Rada on the Elaboration of the Ukrainian Legislation on Amending the Constitution of Ukraine to review all three Draft Laws, and to submit them to the Parliament for preliminary approval on **23 December 2003**. The Commission, however, decided to carry out relevant work only on the basis of the Draft Law N° 4105, a compromise draft between the Presidential administration and the communists¹. This draft, more widely known as the Medvedchuk-Symonenko draft, calls for abbreviating the presidential term for the October 2004 elections to two years, with the election of a president by the parliament in 2006, notwithstanding opinion polls indicating that the overwhelming majority of Ukrainians support preserving direct presidential elections.² In a recent interview to *Zerkalo Nedeli*, Mr Lytvyn, Speaker of the Verkhovna Rada, admits that this draft law "gives even more powers to the future president. He will have more levers to influence the Rada; he will be placed above Parliament, which is absurd. He will be empowered to dissolve Parliament, veto any law..."

III. THE PARLIAMENTARY CRISIS OF 23 DECEMBER – 15 JANUARY

22. The underlining reason for the urgency of debating constitutional amendments at the end of December was the fact that if new rules were to be applied to the next Presidential election in October 2004, the Verkhovna Rada would have to endorse one of the Draft Laws by at least 226 votes before its winter-holiday recess starting as of 16 January 2004. According to Article 155 of the Ukrainian Constitution, the procedure of constitutional amendments requires two steps. First, the amendments need to be approved in the first reading by a simple majority (at least 226 of the 450 votes). Second, they must be approved by a two-thirds majority (at least 300 votes) at the legislature's next regular session.

¹ The otherwise in opposition Communist Party has been essentially in favour of strengthening the parliamentary prerogatives at the expense of presidential ones. They have therefore offered their support for the constitutional reform in exchange for the introduction of a fully proportional, party-list system of parliamentary elections.

² The Razumov polling agency state that the constitutional changes are opposed by public opinion in Ukraine, where 86.5 percent of the population believe that the head of state should be elected by universal suffrage. Only 4.7 percent of Ukrainians support electing the president through parliament.

23. On **22 December 2003** the *ad hoc* Commission of the Verkhovna Rada approved the Medvedchuk-Symonenko draft with a number of mainly technical amendments yet without having reviewed the Transitional Provisions. The latter provisions include the guarantee of preserving direct national elections of the head of state in 2004. This alarmed the opposition (represented by Viktor Yushchenko's "Our Ukraine" fraction, the Socialist Party of Ukraine and Yulia Tymoshenko's bloc) who feared that in the final vote the Transitional Provisions would be removed and in 2004 the President would be legally elected by the Verkhovna Rada.

24. The pro-presidential factions, in their turn, suspected the opposition of reluctance to proceed with reform. A vote on the Medvedchuk-Symonenko draft scheduled for **23 December 2003** was preceded by persistent efforts by the opposition to block the parliamentary proceedings in order to prevent a vote. Despite various solutions proposed by the Speaker of the Verkhovna Rada in the course of negotiations (including a suggestion to postpone the discussion until 15 January or to hold an open discussion broadcasted on Radio and TV), the opposing parties did not reach a compromise on that day. Early on **24 December**, opposition members barricaded entrances to the hall, but later relented and opened the doors. The protest was, however, kept by blaring horns inside the chamber in attempt to block the vote and allegedly putting out of order 225 of the individual electronic voting systems. The pro-governmental factions responded to this obvious violation of the Rules of Procedure by the opposition with an equally obvious violation of the Rules: the form of voting was changed in an improper manner and the majority deputies supported the draft - without discussing it - by mere raising of hands without a formal vote-count, resulting in an alleged count of 276 votes "in favour". This vote was reportedly certified by personal signatures of the Peoples' Deputies³.

25. The opposition claims that the vote on constitutional amendments had been illegal on the following grounds:

- The Constitutional Commission had made 51 amendments to Draft Law n° 4105 that had already passed the examination of the Constitutional Court. As a result, it was an entirely different document that the deputies were given only on 23 December morning and were required to vote half an hour later in the affirmative ;
- This amended draft should have been distributed 14 days prior to voting;
- No debates were held in the Parliament on the proposed amendments;
- No voting took place in the Assembly hall as prescribed by the Rules of Procedure (by means of electronic voting or by other means decided by the parliament);
- Following an investigation, three sub-committees of the Verkhovna Rada's Committee on Rules of Procedure adopted a report on 15 January 2004 establishing that the original decision N° 3207-P8 distributed to MPs a day before on 23 December 2003 regarding the procedure of voting on legislative draft n° 4105, foresaw the standard procedure of voting by ballots and a majority of MPs adopted this procedure by signature. The procedure distributed on 24 December however, had clearly been falsified since it foresaw voting by show of hands instead of by ballots;
- No decision was taken by the Verkhovna Rada on voting on amendments by other means than established for such type of taking decisions;
- Prevented by the opposition to take the seat in a determined place, the Speaker organised "voting" in an unusual way by raising hands, himself being removed to the rear of the session hall and entering through the back door normally used by the technical personnel
- This "new" type of voting took place in circumstances when:
 - Members of the Parliament were not informed on the intention of the Speaker to start voting in an "unusual way"
 - The speaker could not be heard in the hall;
 - The number of the "raised hands" was not counted. Heads of factions simply called out the number of their members voting "for". E.g., the National Democratic Party claimed that all their 14 members had voted for, whereas two of the members were

³ The co-rapporteurs have requested to see this list of signatures, which has been ignored by the majority parties, thus casting doubts on its content and existence. The Speaker of the Verkhovna Rada has claimed that these lists are "available in the Parliamentary majority secretariat, and will be produced in the case of a court hearing" (*Z.N.*, 19 January 2004)

known to have been sitting at a Counting Commission meeting outside the session hall;

- As can be observed from videotapes, some people voted with two hands
 - The Counting Committee of the Verkhovna Rada was holding its meeting in another room deciding on how to organise voting
 - The number of the votes “in favour” appeared to be officially known to the MPs only from the media on the basis of signatures which were supposed to have been collected at an unknown time, by unknown persons, and in an unknown way.
- Such method of voting was recognised by the Speaker himself as “a deviation from the usually accepted way of voting in the Parliament” (in a letter of Mr Lytvyn to Peter Schieder, dated 9 January 2004)
 - Notwithstanding that this method of voting was “a deviation”, the Speaker has formalised its results as a Resolution of the Verkhovna Rada which was signed by him, stamped, and sent to the constitutional Court as required by a normal procedure.

26. The adopted draft provides for:

- A country-wide poll in October 2004 for a new president with reduced powers and reduced two-year term;
- The election of Ukraine’s next president by parliament in 2006 with a 2/3 majority votes for a term of 5 years;
- The 2006 parliament to be elected on the basis of party lists;
- MPs’ mandate to be raised from 4 to 5 years;
- MP’s to be stripped of his/her parliamentary mandate if he/she fails to participate in plenary sitting for more than 60 days, quits the caucus of the party that placed him/her on the ballot, or fails to suspend his/her salaried activity outside the parliament, except for ministerial posts
- The president’s right to propose the entire Cabinet of Ministers to be limited to four officials: prime minister, defence minister, foreign minister, and head of the Security Service;
- The prime minister to propose all other cabinet members as well as the heads of state committees. The prime minister will also nominate all regional governors;
- The parliament to be given the right not only to approve cabinet members and other high-ranking officials, but also to dismiss them;
- The president may dissolve the parliament if it fails to form a pro-government coalition within 30 days, form a cabinet within 60 days, elect a president within three months, or convene for more than 30 days during the ongoing session;
- Judges’ tenure to be limited to 10 years, against the current unlimited tenure;
- Age limit for Judges of the Constitutional Court to be extended from 65 to 70;
- Extension of the functions of the Public Prosecutors

27. **On 26 December**, President Kuchma uttered a warning that “*constitutional changes must be made constitutionally and not by destructive antidemocratic methods that should rather be applicable during a revolution*”. Nevertheless, he declared the voting on the draft amendments legitimate.

28. Meanwhile, two decisions of the Constitutional Court of Ukraine “added fuel to the fire”. On **25 December** it ruled that President Leonid Kuchma could run for a third term of office even though the country’s Constitution limited a state leader to two terms. The other ruling stated that “*an act of the Verkhovna Rada is essential to call the election of the President of Ukraine*”. After this the opposition started to worry that the presidential election as such may never take place since to disrupt the adoption of the “essential act” is much easier than to gather 300 votes in support of constitutional amendments. Without this resolution the elections would not take place and the government may not even need President Kuchma’s third term. Nor would they need adjustments to the Constitution.

29. **On 12 January** the three parliamentary opposition groups proposed a nationwide referendum to resolve the ongoing dispute in Ukraine over direct versus indirect election of the president, claiming that, under the Ukrainian Constitution, any curbs on the rights of voters may be introduced only via referendums. At the meetings with heads of factions, several constructive proposals were made by the Speaker to bring the parliament out of its deadlock, however, none of them was considered acceptable to the opposing sides.

30. **On 13 January**, the Speaker conceded that the Verkhovna Rada was caught in an intractable "parliamentary crisis" and adjourned the session a day early.

31. **On 14 January**, the three Sub-Committees of the Verkhovna Rada's Committee on the Rules of Procedure, Deputies' Ethics and Organisation of the Work decided that the voting of the 24 December 2003 did not correspond to the Rules of Procedure of the Verkhovna Rada and recommended the President of the Verkhovna Rada to call back the signatures. A petition signed by 52 national deputies was sent to the Constitutional Court of Ukraine on **16 January**, calling the voting procedures unconstitutional.

32. In order to pass a final decision on amending the Constitution, a relevant Draft Law must be adopted during the next session of the Rada. A two-thirds majority, 300 votes, is required for a constitutional amendment to become final. It is impossible to predict whether and under which conditions the Verkhovna Rada will start the next session that is scheduled for 2 February.

IV. CONCERNS OF THE CO-RAPPORTEURS

33. The forced premature end to the Verkhovna Rada's winter session has naturally prompted fears among Ukrainian population and the international community alike for the country's stability and democratic development, notably in view of the planned presidential elections scheduled for later in the year.

34. It should be understood that the choice between a more parliamentary or presidential form of government is a free political choice of every sovereign state, which neither the co-rapporteurs nor the Council of Europe on the whole would intend to interfere in. Nor does the Council of Europe take sides with any political parties in the country. Regardless of that, whatever the system chosen, such a fundamental change should be done in accordance with pre-established rules and mature respect for pluralism of opinion. Amendments to laws should be as clear as possible, with provisions that would not create room for unnecessary complications and political conflicts.

35. A young emerging democracy that aspires to win respect among its partners needs first and foremost to learn to be accountable to its own people through clear and unbiased information, but also be open up to international scrutiny and dialogue. The recent constitutional reforms have been cloaked in the fog of misinformation and confusion, giving grounds to many speculations and a loss of confidence among the Ukrainian population.

Goals and timing of the constitutional reform

36. The co-rapporteurs are deeply concerned about the short-term goals and political ambitions of both the pro-government and opposition camps within this debate. They deplore the fact that very few future-oriented debates on the Constitution have taken place.

37. Despite the slogans applied on both sides about turning the country into a parliamentary rather than presidential democracy, it is clear that the recent constitutional debate holds in itself a camouflaged (though legitimate) power struggle between the Presidential administration and the opposition. While the former are trying to cling to the power, being aware that none of their potential candidates would be able to reap the victory in a nation-wide presidential ballot, the latter are doing their utmost to prevent the possible constitutional manipulations that would destroy their otherwise easily predictable chances for victory and, under these circumstances, trying to preserve maximum power for a strong presidency.

38. This leaves little doubt that the hasty constitutional debate urged by the parliament's pro-president majority has been primarily devised to prevent the opposition from winning the next elections or to limit the next presidential term to 18 months rather than to promote a democratic reform that would help to set up a proper system of separation of power and checks and balances in governing the state.

39. It is also evident that if adopted at the second reading in its present form, Ukraine will get an abortive constitution. The president will be chosen by a popular vote for 18 months at best. Under such circumstances the people may lose interest to turn up at polling stations, thus opening ample opportunities for falsification of results. The strongest opposition candidates would risk being

disqualified by the ruling power using their financial, administrative, and media resources. Even if an opposition candidate won the race, he or she could not produce any tangible results because of the short time and having to fight the possible sabotage by the former authorities. In each variant Ukrainians could not count on any improvements, because instability would certainly tell on the country's economy, on its major trading partners and investors' attitude.

40. The rapporteurs wholeheartedly welcome the country's efforts for democratic reform and its willingness to align to European standards, however, the timing of pushing through any reforms on the eve of the presidential elections can not be considered acceptable, especially in a situation where there is no political consensus over the reform. The country needs to demonstrate democratic maturity by conducting a free and fair election campaign in 2004, avoiding last minute highly divisive fundamental constitutional changes.

41. Introducing constitutional changes takes a long time, which is why it is important that the opposition and parliamentary majority in Ukraine sit down at the negotiation table to find a compromise, having carefully discussed each paragraph of the draft law on political reform. These discussions should be accompanied by an open and transparent public debate over the adaptation of the fundamental law to the realities of a modern and democratic society, and aligning it to European standards.

Legitimacy of the preliminary adoption on 24 December 2003

42. As regards the voting procedures followed in the Verkhovna Rada on 24 December, the co-rapporteurs are adamant that the Rules of Procedure have to be respected under any circumstances, but especially when applied to such serious legal issues as constitutional amendments.

43. They regret that the recent events at the Verkhovna Rada have greatly damaged the credibility of the legislative power with the pro-reform population. The circumstances in which the "preliminary adoption" of the amendments took place on 24 December have led to a serious drop of confidence in the process of reforms in the country.

44. The co-rapporteurs condemn the means the opposition has resorted to in order to block the voting. Physical abuse and rowdy behaviour are totally unacceptable, no matter how serious or desperate the situation may look. Parliamentary ethics foresees abiding to the rule of law and respect for procedures. Everywhere in the world, the opposition is a minority, and thus in opposition to the ruling majority. And yet, opposition leaders somehow manage to enter into tactical alliances with authorities for the sake of the nation's benefit or to legibly inform the public about their views.

45. Counting the numerous irregularities and obstructions on all sides regarding the voting of 24 December does indeed put the legitimacy of the adoption of the amendments into serious doubt. These doubts are further reinforced by the fact that the parliamentary majority of the Verkhovna Rada has shown no willingness to this day to co-operate with the PACE by providing any documentary evidence to the co-rapporteurs to prove their claims (texts and rules of procedure adopted, lists of signatures proving the majority favouring the adoption of the amendments), despite numerous requests and insisting while in Kyiv and thereafter.

46. Nevertheless, the co-rapporteurs are of the opinion that the question of legitimacy of the first reading should be solved within the walls of the Verkhovna Rada itself. They are fully aware that recognising this voting by an international body as legal may lead to serious future manipulations and violations during the second reading, with much worse consequences. However, they count on the common sense of the elected representatives of the Ukrainian people to abide by the rule of law and parliamentary procedures and to this end encourage all parties concerned to find a compromise whereupon the issues related to Article 103 (Presidential elections) should be temporarily left out of the current debates or the whole process of Constitutional amendments be postponed until after the presidential elections of October 2004.

47. The Verkhovna Rada should also be encouraged to pass a law that would regulate the rules of procedures pertaining to constitutional amendments.

Content of the reforms

48. The rapporteurs recall the Venice Commission's opinion, which concluded that none of the three draft laws (n°3207-1, n° 4105, n° 4180) had succeeded in establishing a clear and coherent system, failing to fulfil such basic democratic requirements as the separation of powers and the independence of the judiciary.

49. It is deplorable that all recent political debates have almost exclusively focused on the central issue of presidential elections, ignoring some of the highly relevant matters detrimental to the democratic development in Ukraine. The latter include several suggestions made by the Venice Commission's such as a) to ensure that the provisions on the national deputies would not link an individual deputy to membership of a parliamentary faction or block in a way infringing his or her free and independent mandate, b) to withdraw the proposed amendment on the limited tenure of judges, or c) ensuring the conformity of the role and functions of the Prosecutor's Office with European standards and the explicit commitment entered by Ukraine upon joining the Council of Europe.

50. The rapporteurs consider that the chronology of events clearly show that the Ukrainian authorities and in particular the Verkhovna Rada had no intention whatsoever to follow any of the recommendations the Venice Commission adopted at its plenary meeting on 13 December 2003, in the presence *inter alia* of M. Havrish, one of the authors of draft n° 4105, which is precisely the one that was submitted to the vote on 23 December. Seeking the opinion of such a highly respected body as the Venice Commission's on three different constitutional drafts and then not following any of its recommendations appears to be an unjustifiable waste of time and money and casts a serious doubt as to the real willingness of the Ukrainian authorities to cooperate with the Venice Commission in any meaningful way. The rapporteurs therefore strongly call on the Verkhovna Rada to take into account the Venice Commission's recommendations during the second or any future reading of constitutional amendments.

Independence of the judiciary

51. The parliamentary crisis has to some extent been stimulated by the Constitutional Court ruling of 25 December 2003 allowing President Kuchma to run for a third term of office even though the 1996 Constitution limits a state leader's office to two terms. This decision was based on the consideration that he was elected prior to the adoption of a new Constitution in 1996 and that therefore the period between 1996 -1999 could not be considered a full term in office under the new Constitution. The Constitutional Court grounded their reasoning on Part 3 Article 103 of the 1996 Constitution, which states that the new Basic Law cannot be applied retroactively.

52. Such ruling seems somewhat illogical, since the applicable law as well as the constitutional norm in force at the time President Kuchma was elected in 1994 already limited the Presidential mandate to two terms⁴.

53. The aim of any judicial system is to provide stability through the consistent and foreseeable application of the law and adherence to the Constitution. The whimsical and contradictory application of judicial rulings has far reaching negative affects, removing the cloak of respect which veils an independent judiciary and ensuring that scepticism accompanies each judicial decision.

Presidential elections of 31 October 2004

54. The capacity to hold free, fair and transparent Presidential elections will be the by far the greatest challenge for Ukraine this year, and it will determine whether Ukraine will move forward as a democratic nation supporting a civil society which protects individual rights under the Rule of Law, or will take a "step backwards", as the Venice Commission noted in its opinion.

⁴ It has been rumoured that the Constitutional court's ruling of 30 December could possibly be explained by the fact that the judges were recently given the rank of "general" and an allocation of a benefit allowance of 600,000 HRV (ca 100,000 €). Though it is obviously impossible to verify it directly, this allegation appears in line with the frequent assumption that judges in Ukraine are exposed to political pressure and intimidation when called to pronounce on political cases. The wish to be able to pass independent judgments was also expressed by the Chairman of the Constitutional Court at a recent meeting with the co-rapporteurs.

55. The course and nature of the presidential elections will largely depend upon whether or not President Kuchma will be a candidate. The Constitutional court's unprecedented decision allowing him to stand for president for a third term might significantly worsen the situation in Ukraine. It can only be hoped that the president himself will demonstrate political wisdom and keep his word not to seek re-election.

56. The question remains, however, whether the presidential administration would accept giving the opposition a fair chance. The recent dismissal by a presidential decree of the elected "Our Ukraine" mayor of Mukachevo and his replacement by an interim pro-presidential mayor, despite a ruling by the Supreme Court which confirmed that the former had been elected in a legitimate way, does not convey an encouraging signal. In fact, there is a striking similarity between the tactics applied in amending the Constitution, and the way the President handled the elections in Mukachevo. In both cases having actually lost the elections to the opposition or being afraid to lose them in the future, the President and his administration resorted to canceling the elections, or changing the election rules to ensure that they stay in power, regardless of their outcome. Both of these tactics are unacceptable for a country that claims to be on its way to Europe.

57. The co-rapporteurs also feel concerned about the vacuum which has been created following the President's decision to dismiss 12 members of the Central Election Committee on 19 January. Considering the importance of the perfect functioning of this institution in the preparation of the Presidential elections, the rapporteurs hope that President Kuchma will proceed without delay to the nomination of what forms 2/3 of the composition of the Central Electoral Committee.

58. Democracy is supposed to be defended by free and independent mass media. Politically unbiased, free and transparent media and public access to it is a pre-condition for free elections. The current state of affairs of Ukraine's media raises serious questions as to whether a fair and balanced electoral contest can be held. Newspapers critical of the authorities are subject to various methods of repression, including attacks against journalists, arrests of publishers, "special attention" via tax inspectors, administrative controls over distribution and pressure on advertisers. Directives are sent to media by the Presidential administration on what and how issues and events should be covered. The use of "temniki" at the highest political level is a current practice, which the co-rapporteurs fell prey to during their recent stay in the country.

59. The co-rapporteurs reiterate their call on Ukrainian authorities, expressed in the recent Resolution 1346 (2003), *"to conduct their media policy in a way which will convincingly demonstrate respect for freedom of expression in the country. In this respect, the Assembly also calls on the Ukrainian authorities to provide the opposition with equitable access to the state-owned national TV channels"*.

APPENDIX 1

Programme of the visit of the co-rapporteurs to Ukraine Kyiv, 18 – 20 January 2004

Co-rapporteurs: Mrs Hanne SEVERINSEN (Denmark, LDR)
Mrs Renate WOHLWEND (Liechtenstein, EPP)

Secretariat: Mrs Ivi-Triin ODRATS

Sunday, 18 January 2004

1.10 pm Arrival of Mrs Severinsen and Ms Odrats
4.00 pm Arrival of Mrs Wohlwend
5.00 pm Meeting with Mr Volodymyr Lytvyn, Chairman of the Supreme Rada
7.15 pm Meeting with representatives of NGOs and the media (organised by the Information and Documentation Centre of the Council of Europe)

Monday, 19 January 2004

10.00 am Meeting with representatives of parliamentary factions and groups (list attached)
12.00 noon Meeting with Mr Victor Medvedchuk, Head of the Presidential Administration
1.00 pm Lunch hosted by Mr Boris Oliynyk, Chairman of the Ukrainian delegation to the Parliamentary Assembly of the Council of Europe
2.45 pm Meeting with Mr Mykola Selivon, Chairman of the Constitutional Court of Ukraine
4.00 pm Meeting with Mr Oleksandr Lavrinovych, Minister of Justice
5.15 pm Meeting with Mr Gennadiy Vasyliev, Prosecutor General of Ukraine (to be confirmed)
7.30 pm Meeting with Ambassadors of the Council of Europe member States in Ukraine hosted by Ambassador Monique Frank of Royal Netherlands Embassy

Tuesday, 20 January 2004

8.00 am Meeting with Ambassador Norbert Jousten, Head of the EU Delegation of the European Commission, and Ambassador David R. Nicholas, OSCE Project Co-ordinator in Ukraine
10.30 am Meeting with representatives of mass media
1.30 pm Departure to Boryspil Airport
3.15 pm Departure

Reporting committee: Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Reference to committee: Reference No. 2909 of 26 January 2004

Report adopted by the committee on 27 January 2004 (4 abstentions)

Members of the committee: Mrs Durrieu (Chairperson), Mr Frunda, Mrs Tevdoradze, Mrs Severinsen (Vice-Chairpersons), Mrs Aguiar, Mr Akçam, Mr Akhvlediani, Mr B. Aliyev, Mr André, Mr Arzilli, Mr Atkinson, Mr Baška, Mr Bernik, Mrs Bilgehan, Mr Bindig, Mr van den Brande, Mr Budin, Mrs Burbiene, Mr Cabrnock, Mr M. Cavusoglu, Mr Cekuolis, Mr Christodoulides, Mr Cilevics, Mr Colombier, Rt. Hon. Davis, Mr Debono Grech, Mrs Delvaux-Stehres, Mr Dobelis, Mr Einarsson, Mr Eörsi, Mrs Feric-Vac, Mr Glesener, Mr Gross, Mr Gusenbauer, Mr Hancock, Mr Hedrich, Mr Hegyi, Mr Holovaty, Mr Jakic, Mr Jaskiernia, Mr Jurgens, Lord Kilclooney, Mr Kirilov, Mrs Konglevoll, Mr Kvakkestad, Mr van der Linden, Mr Lintner, Mr Magnusson, Mr Martínez Casañ, Mr Medeiros Ferreira, Mr Melcák, Mr Mollazade, Mr O'Keeffe, Mr Olteanu, Mr Pangalos, Mr Rakhansky, Mrs Ringstad, Mr Rivolta, Mr Rogozin, Mr Rustamyan, Mr Sasi, Mrs Shakhtakhtinskaya, Mr Shishlov, Mr Skrabalo, Mr Slutsky, Mr Smorawinski, Mr Soendergaard, Mrs Stoyanova, Mr Surjan, Mr Tepshi, Mr Tkác, Mrs Wohlwend, Mr Yáñez Barnuevo, Mr Zacchera.

N.B. The names of those members who were present at the meeting are printed in italics.

Head of the secretariat: Mrs Ravaud

Secretaries to the committee: Mr Gruden, Mrs Odrats, Mrs Clamer.