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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

COMMENTS ON THE DRAFT CONSTITUTION OF UKRAINE

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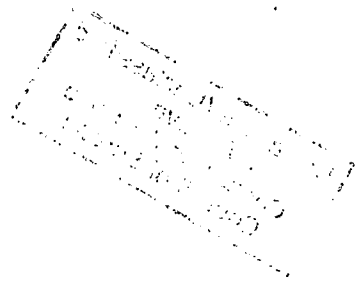

1 GENERAL REMARKS

The general impression is most favourable. The draft gives a sound basis for a true democratic constitution — including instruments for checks and balances — and the principles of human rights and the rule of law are thoroughly taken into account. What can be questioned is especially the wealth of details and technicalities which could make the constitution difficult to work smoothly and the fact that the draft also includes a varity of "rights" which in reality must be described as political goals. Taken into account the difficulties to amend the Constitution these circumstances may cause problems for the future. In the following I will concentrate my remarks on a few issues, preferably ones that have not been touched upon at the meeting in Venice in November.

2 HUMAN RIGHTS AND CIVIC SOCIETY

The real, enforcable freedoms and rights are quite well protected and limitations imposed by means of an ordinary law are — in the spirit of the European Convention — permitted only for certain purposes (art. 14 and arts. on specific rights, e.g. art. 29). Along with these classical rights the draft Constitution contains, however — both in part I and part II — a varity of most respectable social rights and other commitments which can only be described as political goals. Some of them are worked out in detail and promise the citizens a standard of living that could be difficult to cater for. As I see it, there is an obvious risk for disappointments among the population if the Constitution promises too much. Basically, it depends on the economic situation if the commitments can be fulfilled; there are obviously no guarantees. If we in the West have learned anything from the present recession that is that social welfare laws as well as other regulation which is supposed to provide the citizens with different kinds of benefits are without real value in the absence of a sound economy. It could be advisable to act with some restraint in this area,especially where constitutional regulation — so diffucult to modify — is concerned. If the citizens find that these rights are not to be taken seriously, there is a risk that they might get the impression that the same applies to the classical rights as well.

3 ACCESS TO OFFICIAL DOCUMENTS

According to art. 30 "every citizen, in a manner described by law, has the right to access information about him or her and also official documents which are kept in state bodies and institutions, bodies of local and regional self-governance. This right may be abridged by law for the purpose of protecting state or commercial secrets." The wording of the provision indicates that access to official documents only refers to information about the person who asks for the document concerned. So, he obviously has to give reasons for his request and there is no access to official documents in general, independently of their contents. Further more, this limited right can be restricted by law for rather unspecific reasons.

In Sweden the very far-reaching principle of public access to official documents – which applies not only to written texts but also to recordings that can be read, listened to or understood in some other way only with the use of technical equipment – has been regarded as so vital to an open society that it for years (in fact since 1766) has in detail been laid down in the Constitution. It is not a question of just furnishing a person concerned with information about himself. Every citizen has in principle – of course there must be exceptions – access to any document kept by an authority. The principle guarantees not only the citizens but also the press and other mass media access to important material. Therefore, I will make reference also to the rather indeterminate art. 101 of the Ukranian draft Constitution concerning the right of the mass media to obtain information about activities of the authorities.

If you really want a firm system of insight into public affairs which includes effective remedies the Swedish principle of public access to official documents might be taken into consideration. To illustrate the principle in more detail I enclose an abstract from Wade/Ragnemalm/Strauss: Administrative Law – The Problem of Justice (Vol. I, Giuffrè, Milan, 1991), including my survey on the subject. (Appendix 1.)

4 PRIVATE OWNERSHIP – MARKET ECONOMY

Though there are some articles aimed at recognizing and protecting private ownership, I have got the general impression that the authors of the draft basically are somewhat sceptical to private ownership. I am not sure that the draft provides for a system of market economy as we know it. So, art. 67 excludes e.g. forests and animals from private ownership and art. 70 indicates that the drafters are not too keen on foreign investments. That could be a mistake from an economic point of view. Anyhow, it seems hardly appropriate to state such limitations in the Constitution.

5 DECISION-MAKING OF THE NATIONAL ASSEMBLY

The decision-making of the National Assembly seems to be rather difficult. The main rule (art. 148) demanding a majority of the total number of members – not of the members present – for a decision to be made could be harmful for the efficiency of the parliament.

6 POPULAR INITIATIVES

Several articles show a limited commitment to the principles of representative democracy. Of course, it is possible to combine such a type of democracy with a system where referenda play a significant role. But I find it strange to entrust groups of the population with the power to adopt a no-confidence motion against the National Assembly (art. 154) and to give such groups the right to submit bills to the National Assembly and so take a direct part in the legislative process (art. 157); see also arts. 138, 186 and 256. It could be put into question if such a system is practicable especially in a big country like Ukraine. Is it, for example, possible to control the authenticity of the signatures of such popular motions?

7 THE JUDICIARY

The National Assembly shall execute parliamentary control over the judicial power (art. 136). In what ways is this control supposed to take form?

Accordning to art. 141 the exclusive prerogatives of the Council of Delegates include (5) the creation of the "Supreme Certification and Disciplinary Commissions of the judges". Art. 210, on the other hand, states that the Council of Deputies shall create the "Supreme judicial certification and disciplinary commission". So, two different bodies are supposed to create what seems to be the same commission. Some doubts also arise concerning the powers of this commission – which may be defined as a sort of administrative authority – as it is supposed to impose disciplinary measures against judges. Should it not be more appropriate to reserve that power to an organ within the judiciary?

According to art. 240 the chairman, the vice chairmen and the other members of the Constitutional Court shall be elected by a secret ballot. I cannot see the reasons for such secretiveness where the election of judges is concerned.

Quite properly questions relating to the constitutionality of certain laws and legislative acts shall be decided by the Constitutional Court (art. 239). It then seems inappropriate to make this also a duty of the President (art. 178).

8 THE PROCURACY AND THE NATIONAL HUMAN RIGHTS COMMISSIONER – AN OMBUDSMAN?

According to the draft Constitution the monitoring of the correctness of administrative decisions is supposed to take place through the employment of appeals to a court of law. So, if a citizen is deprived of his constitutional rights or in some other way effected by a wrong decision he has access to such a legal remedy. Violation of the law or hostile or insufficient behaviour on the part of the authorities or the officials can, however, appear in many other forms than through formal decisions. Are there any means for the protection of the citizens from harassments and different kinds of unjust treatment and for promoting efficiency within the administration?

As I understand the provisions concerning the Procuracy (arts. 220-223) the task of this institution – besides dealing with the common duties of a procecutor – primarily is to act on its own initiative to promote legality within the administration and not to investigate complains from the general public. In the draft there is, however, also mention of an institution for the protection of human rights within the sphere of parliamentary control – the Commissioner of the National Assembly for Human Rights; how this institution is supposed to work is not clear from the wording of the text (art.140).

As in many countries all over the world it has been proven useful to introduce an independent office of the Ombudsman to which the citizens may turn with complaints about authorities and officials, I will promote the idea through the enclosed summary of a lecture held in September 1991 (then being an Ombudsman myself).(Appendix 2.)

Appendix 1

From
Wade/Ragnemalm/Strausss: Administrative Law – The Problem of Justice
(pp 343-349)

3. Public Access to Official Documents

In Sweden the principal rule that the citizens have free access to official documents has a very long history. What is known as the *principle of public access* was recognized as early as in the 1766 Freedom of the Press Act and ever since then it has been regarded as so vital to the Swedish legal system that it merits a place in the Constitution. It is now mentioned in Chap. 2 of the IG and is regularized in detail in Chap. 2 of the FPA [1].

The principle is not merely deeply rooted but is also a living reality in Swedish society. The administration is well aware that it is working in the light of publicity, and the principle is widely known and is often made use of, not only by representatives of the press and other mass media but also by ordinary citizens. Every proposed limitation of the free access to official documents is met with great suspicion and a strong body of public opinion is usually methodically organized in defence of the principle of public access.

Expressed in simple terms, it is usually said that the principle of public access serves three main ends. It constitutes a guarantee of *legal security*, of *efficiency* of administration and of a true *political democracy*.

The principle constitutes an active means for ensuring a cor-

1. A modern presentation in English is Håkan Strömberg, *Press Law in Sweden*, included in *Press Law in Modern Democracies*, Ed. Pnina Lahaw, 1984 (Longman).

IG = Instrument of Government
FPA = Freedom of the Press Act
} Parts of the Constitution
SAC = Supreme Administrative Court

rectly-functioning administration not merely in view of the fact that the person who is involved in a dispute with an authority has access to the documents that are relevant; according to Swedish law the party to a dispute has right of access to all the relevant documents, even those that are secret where other persons are concerned [2]. Just as important is the fact that the authorities generally work in the knowledge that their activities are the object of supervision by the public at large and can at any time be subject to the light of publicity. This preventive effect is of course reinforced by the fact that the principle of public access is most often made use of by the press, radio and TV, which can disseminate what they have uncovered. Supervising the efficiency of the administration can be achieved not only by studying the contents of official documents but also by noting that documents that have been requested do not yet exist; so the principle of public access can counteract not only error in work actually carried out but also indolence and passivity on the part of the administration. The other aspect of the matter — and one that is positive for the authorities — is that faith in the honesty, impartiality and efficiency of public officials is strengthened by the fact that they are not allowed to carry out their work behind closed doors.

The importance of the principle of public access for the development and strengthening of political democracy lies above all in the fact that insight into the administration provides a sound basis for the political debate. As a result of the fact that the mass media continuously disseminate information concerning what they have gathered by making use of the principle of public access, conditions are created in which an informed political discussion can take place with the participation of well-informed citizens. In this connection it should be noted that ordinary citizens — without any professional training — traditionally play a direct role in Swedish administration, above all as members of local administrative bodies. Familiarity with the work of public authorities is therefore quite widespread.

Even if in recent years the principle of public access has made

2. On this point see section 7.5.3 below.

some progress in many other countries it could perhaps be claimed that it has been applied most widely in Sweden. A brief and very simplified reference will be made here to the essential features of the Swedish system that derive from the following main rule incorporated in Chap. 2 Art. 1 of the FPA: « To further free interchange of opinions and enlightenment of the public every Swedish national shall have free access to official documents ».

It will be evident even from this fundamental rule that it is not merely a question of guaranteeing the *press and other mass media* access to important material. *Every Swedish citizen* has the same right of access. What is more, *foreigners* are, in principle, on an equal footing with Swedish citizens in this respect, though their right is not guaranteed in the Constitution and can therefore be restricted by a law that need not be based on any specific authorization laid down in the FPA. At the present time, however, no discriminatory regulations of this kind exist.

Of great importance in the practical application of the principle of public access is the fact that no special *reason* needs to be given in connection with a request to have access to an official document. That the main purpose of the principle is said to be to further « free interchange of opinions and enlightenment of the public » does not mean that the document must be one of particular interest to the general public or that access is limited just to the person who intends to publicize and spread what he has learnt. Official records are accessible also to anyone who wishes to examine them, for example, for private or commercial reasons. In Chap. 2 Art 14 of the FPA the authorities are expressly forbidden from enquiring not only into the applicant's reasons for his request but also into his *identity*. Consequently, citizens have no need to fear that their approaches will lead to reprisals from the authorities. However, the right to preserve one's anonymity and give no reason when requesting access to a document is curtailed by the ordinance which states that the applicant must supply the authority with any information that is required to enable it to judge « whether there is anything that prevents access to the document in question »; this proviso refers to the implem tion of such secrecy regulations as permit

the surrender to certain persons, or for special purposes, of documents that are normally secret (see below) [3].

It is also important in the practical utilization of the principle of public access that a document that is requested should be presented for examination on the spot *without delay*, or as soon as possible, and that the applicant shall *not* be required to *pay a fee*. The applicant also has an express right to be supplied with a *transcript* or *copy* of the document, but then he will be required to pay a fee, which usually is quite small [4].

In the law the term *document* does not apply only to written texts or pictures; it also covers recordings that can be read, listened to or understood in some other way only with the use of technical equipment. In view of, above all, the increasing use of computers in administration it is of course vital — if the principle of public access is not to be undermined — that the term document is not restricted to include only written documents of the traditional kind.

For a document to be regarded as *official*, and thus as accessible to all according to the principal rule, all that is required in principle is that it is kept by an authority. In this connection the term *authority* is assigned a wider meaning than usual and covers all state and municipal bodies — that is to say, the Riksdag, the Government, courts of law, administrative authorities and municipal assemblies. The decisive criterion is that the document is *kept* by an authority and so it does not in principle matter what it contains. It may be concerned with a final decision announced by the authority, but it could also involve various documents produced while some matter was being dealt with. Documents which are not connected with any specific matter and deal generally with the work of the authority are also included. The document in question can

3. As an example it may be pointed out that information concerning someone's health or other personal circumstances is confidential within the health and medical services, unless it is obvious that the information can be divulged without detriment to the person concerned or his immediate family. From this it follows that if a person requests to be allowed to study a medical record, his chances of gaining access are much better if he is a close relative of the patient or a member of the medical profession than if he is a journalist or a scandalmonger.

4. When the fee is being fixed no account is therefore taken of the cost of retrieving and replacing the document; SAC Reports 1985 2:9.

emanate from the authority itself or from elsewhere — other authorities or private subjects — and it could deal with information, enquiries or arguments relating to factual situations or legal issues. It is in principle of no importance if, from the point of view of the author, the document appears as a finished product or merely as a preliminary draft which will subsequently be replaced by a final definitive version [5]. However, the last-named principle applies in full only as regards documents that have been produced by someone other than the authority and which have *been received* by the authority. As regards documents that *originate within* the authority, and in order to ensure that the administration can work undisturbed, it is stipulated that any documents produced while a matter is being dealt with are not to be « regarded » as official until the issue in question has been finally decided [6]. This means that the time at which the document becomes official and accessible will in this case be deferred, even though the document is de facto kept by the authority.

It is obvious that the access to official documents must be subject to quite a number of restrictions. There are other interests, public as well as private, — for example those relating to national security and personal privacy — which sometimes take priority over the right of public access. However, the FPA (Chap. 2 Art. 2) lays down definite limits to the possibility of enjoing *secrecy*. The restrictions are of a formal as well as a material kind.

To begin with, the restrictions must be *scrupulously* specified in provisions of a *specific act of law* — at present the Official Secrets Act from 1980 — or in some other law to which the specific act makes reference. This means that the secrecy regulations must not be framed in a way that gives the authorities discretionary powers. The use of the term « scrupulously » emphasizes that the grounds

5. Two medical statements by experts that were of a preliminary, draft nature and had been submitted to the National Board of Health and Welfare, were thus regarded as incoming official documents received by the Board, even though they did not contain the final views of the experts; SAC Reports 1958:55.

6. The FPA contains in part quite complicated rules which specify in respect of documents of various kinds the point of time when a document that originates within the authority is to be regarded as official; in this connection these rules are not dealt with.

on which an authority can refuse to allow access to a document must be clearly indicated in the wording of the law.

Secondly, secrecy may be enjoined only for certain special *purposes* set out in the Constitution. These purposes are 1) the security of the Realm or its relations to a foreign state or to an international organization, 2) the central financial policy, the monetary policy, or the foreign exchange policy of the Realm, 3) the activities of a public authority for the purpose of inspection, control or other supervision, 4) the interest of prevention or prosecution of crime, 5) the economic interests of the State or the communities, 6) the protection of the personal integrity or the economic conditions of individuals and 7) the interest of preserving animal or plant species. It must be emphasized that a document shall not be kept secret simply on the ground that making it available could endanger one of the interests mentioned. The Constitution merely indicates the general purposes for which secrecy *can* be stipulated. Thus it is a question of a directive to the *legislator*, not to the executive authority. If secrecy is really to be applied in a particular case then there has to be a carefully and precisely worded regulation to this effect in the Official Secrets Act.

If a regulation restricting access to an official document is incorporated in the Official Secrets Act in order to further ends other than those specifically listed — for example, if it is obvious that its main purpose is to shield the authorities from criticism — then such a regulation is unconstitutional. Under the regulations relating to the control of legislation, which are dealt with in chap. 6 below, this means that the secrecy regulation is to be ignored, and that in compliance with the main rule concerning public access to official documents the material requested must be made available. This will also be the result if the secrecy regulation has come into being in a way contrary to the formal requirements noted above, for example, if secrecy has been prescribed not in the Official Secrets Act or in a law to which this Act makes reference, but in a regulation emanating from the Government or an administrative authority.

Mention should be made of the fact that certain regulations that are not concerned with secrecy also have been incorporated in

Chap. 15 of the Official Secrets Act. In actual fact these regulations — over and above what is prescribed in Chap. 2 of the FPA — are designed to make it easier for citizens to consult official documents. The most important of them is the one requiring the authorities to register and systematize all documents in such a way that enables them to be easily identified and rapidly produced. Here there are also far-reaching regulations concerning accessibility of information stored in data banks, including one main rule stating that an authority shall on request afford an individual an opportunity himself to use a terminal or other technical aid in the possession of the authority in order to acquaint himself with data recorded on computer tapes. As a complement to the central constitutional rules concerning the duty of the authorities to make official documents available they are also required on request to supply extracts from an official document — for example, by telephone or letter.

A request to be allowed access to a document should as a rule be addressed to the authority that keeps the document. Should the request be refused the applicant can appeal to a *court of law* against the decision. If the refusal is made by a general court of law, an appeal may be considered by a superior court and ultimately by the Supreme Court. In other cases — that is to say, the majority — the appeal may be heard by an administrative court with the SAC as the highest instance. In such cases no special dispensation is needed to have them heard by these two supreme courts. The only exception is concerned with a decision by a minister relating to documents that are kept in his own department, and then any appeal against such a decision is addressed to the Government. It is worth noting once again that the Swedish administrative authorities do not come under the various ministries, which means that their decisions in such matters can always be tested by the courts. The stipulation mentioned above — that the authorities must « immediately » respond to a request for access to an official document — has its counterpart where appeals are concerned in the rule which states that consideration of an appeal should be « expedited ».

SEMINAR ON JUDICIAL OR OTHER SUPERVISION OF THE ADMINISTRATION 1991
11-12 September, Venice

Appendix 2

THE OMBUDSMAN

Rapporteur: Hans Ragnemalm (Sweden)

1 BACKGROUND AND PURPOSE

The office of the Swedish Parliamentary Ombudsman - the first institution of that kind in the world - was created in 1809 as a result of a revolution, whereby the King was dethroned. A new Constitution was created that included provisions for the election of a special Parliamentary Prosecutor, called Ombudsman. This new institution was intended to constitute a guarantee of balance of power between Government and Parliament and a shield for the ordinary citizen against any despotic exercise of power by the authorities which came under the Government. Whenever an official was found at fault the Ombudsman instituted legal proceedings against him or, in minor cases, requested disciplinary measures.

In important respects the institution has retained its original character to this very day. The main duty of the Ombudsman is nowadays to safeguard the rule of law and to protect the rights and freedoms of the individual. This is done by ensuring that the authorities and their personnel properly fulfil their obligations in all respects. Still, however, the activities of the Ombudsman are constitutionally regarded as a part of the parliamentary control of the Government. This control is divided between the Parliament and its Ombudsman in such a way that the Parliament itself supervises the activities of the Cabinet and the Cabinet Ministers, whereas the Ombudsman supervises the public administration.

2 THE EXTRAORDINARY CHARACTER

One of the basic ideas behind the creation of the institution of the Ombudsman is that it should be an extraordinary one. The Ombudsman should be acting outside the ordinary judicial and administrative processes. He should not function as an instance of appeal. So, the task of preserving the rule of law and protecting the rights and freedoms of the individual can in no way be left exclusively to the Ombudsman. This institution can only complement the ordinary law-preserving organs.

3 INDEPENDENCE

According to the Constitution, the Parliament "shall elect one or more Ombudsmen". At present the office comprises four Ombudsmen, each one separately elected by the Parliament for a term of four years. By tradition, highly qualified lawyers, mostly judges, are elected Ombudsmen without reference to their political views. Once elected the Ombudsman stands entirely free.The Parliament cannot give him instructions as to which cases he should investigate, nor can the Ombudsman accept such instructions.

The Ombudsmen stand entirely free in relation to the Cabinet and the rest of the public administration. They appoint their own staff, including about 25 lawyers, most of them junior judges. The office gets its money directly from the Parliament without intervention of the Ministry of Finances.

4 JURISDICTION

By international standards the supervisory areas covered by the Swedish Ombudsmen are very wide indeed. In fact they extend over virtually all public activities. Consequently, with a few exceptions all state and local government authorities - civil and military - are supervised by the Ombudsmen, as are also all employees and officials of these authorities. Even the courts of law, at all levels, are in principle included but the Ombudsmen in this field act with considerable restraint observing the independent position of these organs laid down in the Constitution.

5 INITIATIVES

The Ombudsman can start investigations on his own initiative. Such an investigation could be based on information obtained from newspapers, radio or tele-

vision. The majority of those, however, are based on observations made during inspections. Each Ombudsman spends some weeks per year inspecting courts of law and administrative authorities all over the country. The inspections have proved to be a most valuable means to discover the whole spectrum of imperfections within public administration.

Investigating complaints from the general public is, however, the main task for the Ombudsmen. Considering the great number of such complaints - about 4.000 per year - it is essential that it is up to the Ombudsman himself to decide whether or not to investigate a complaint. In order to be able to concentrate their resources on important issues the Ombudsmen have to dismiss a great number of complaints (about 40 %) without full investigation although formally they do not fall outside the jurisdiction of the Ombudsmen.

6 MEANS OF INVESTIGATION

In their investigatory activities the Ombudsmen do not have to rely only on their own staff. In the Constitution it is expressly prescribed that every public prosecutor is obliged to assist an Ombudsman on request. That means that the police, too, can be engaged in the Ombudsman's investigations. The Constitution also prescribes that all officials are obliged to provide an Ombudsman with such information and reports as he may request. The Ombudsmen may also be present at the deliberations of a court or an administrative authority. They have access to all official files and documents. So, no document is so secret that it can be kept from an Ombudsman, and no official has such autonomy that he may refuse to answer the questions of an Ombudsman or otherwise decline to give him assistance in an investigation.

7 POWERS OF DECISION

The Ombudsman's ultimate means is his right to initiate legal proceedings against negligent officials. The right to prosecute is not frequently used but is an important basis for the authority of the office and it gives a special weight to the critical pronouncements made by the Ombudsman. The Ombudsman can prosecute any official under his supervision before an ordinary court of law for any crime committed on duty. Of great importance in this respect is that there is a special provision in the Swedish Penal Code concerning wilful or negligent maladministration (or breach of duty). Minor offences can give rise to disciplinary actions on the Ombudsman's request.

The Ombudsman's main weapon, however, is the power to admonish or criticize officials found at fault. If the Ombudsman finds a measure inadequate, improper or unwise but not punishable under criminal law, he will point out how, in his opinion, the matter should have been handled. He may also recommend rectification in one way or another.

The Ombudsman has the right to directly approach the Parliament or the Government with proposals for changes in the law, and then these highest bodies of the State are obliged to give him an answer.

8 CONCLUSION

The remarks above concern the Ombudsman institution in its original shape, still existing in Sweden. The fact that it has survived for more than 180 years and has been copied all over the world confirms the validity of the ideas behind its creation. In my opinion the conditions for a real meaningful institution of this kind can be summarized in two words - independence and power. To be effective the Ombudsman must be a free agent, working independently outside the ordinary processes and entrusted with powers concerning both initiative, investigation and decision.