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Comments on the draft Constitution of Ukraine
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The structure of the present draft (28 January 1993) is better arranged than that of the last one (10 June 1992). The provisions concerning the territorial structure and territorial government of Ukraine are given a more rational place in the text, following the rules on the judiciary and the procuracy, which complete the organisation of the state's powers, and preceding those about the constitutional court and the revision of the constitution, which regard the guarantees of the constitution itself.

From a strictly systematic point of view Parts II and III seem, in some ways, to overlap, because provisions on ownership, entrepreneurship, ecological safety and science and culture are covered in both of them. At the same time Articles 36 and 66-69 deal with ownership, Articles 38-39 and 70-73 with entrepreneurship and the free choice of a job, Articles 46 and 74-76 with ecological safety and Articles 47 and 81-85 with science and culture. This systematic approach raises some difficulties of construction as follows :

- Article 36 states that the exercise of the right of ownership "must not violate the rights of other individuals" only, and Article 67 prescribes in general terms that "the law shall guarantee the social function of ownership", therefore introducing limits of public interest also;
- Article 36 which declare "the inviolability of private property" seems to contradict Article 69 which allows "the expropriation of private property";
- Article 72 prescribes the intervention of the State against "monopolistic activities", while, according to Article 38, the right to entrepreneurial activity is not limited;
- Article 46 has a provision concerning "the right for an ecologically safe environment", while, according to Article 76, "any violation of ecological standards" is regarded as socially dangerous and subject to prosecution by law without any regard to the individual interests of the people concerned (the provision of Article 47 of the last draft, which introduced the right to State's compensation of ecological damages, is not kept in the present draft);
- the reason is not evident which justifies the presence in the same text of the overlapping Articles 47 and 81-85.

One may guess that the provisions of Part III were introduced in order to guarantee the civil society and to prevent the return of despotism. But the same purpose would be achieved if the overlapping provisions were unified leaving no room for doubts of construction.

Bearing in mind the comments I made in a paper prepared for the European Commission for Democracy through Law on a previous version of the draft Constitution (CDL (93) 10), I fear that the powers of the government bodies in the economic field are too restricted. Forbidding the interference of the State "in the direct economic operations of the enterprises" is correct, but the problems of economic development could very frequently require interventions from the State's bodies to ensure the public interests, promoting private entrepreneurship and directing its efforts towards specific and relevant economic goals, without restoring the past communist command economy. Sometimes the provision which allows State interventions to ensure the freedom of competition and to implement the prohibition of monopolistic activities, will seem too poor. Perhaps the Ukrainian Constitutional Commission which knows the Italian Constitution very well, could draw inspiration from Article 41 of this document, where the Parliament is allowed to adopt by law programmes and controls aimed at directing and co-ordinating private and public economic activities to social purposes.

A provision is also missing which specifies the conditions which make possible the creation of public enterprises. Perhaps it could be added in the last provision of Article 67.

The provisions of Article 97 leave to the constitutional law any decision about the types of referendum which are allowed in the Ukrainian constitutional system. Only territorial referendums are mentioned in Articles 98 and 187 and political referendums are introduced in Articles 128 and 153-154, but the constitution does not give any further information about legislative referendums. Because they have effects on the force of laws, referendums aimed at the approval or abrogation of laws have to be expressly allowed by the constitution. If the Ukrainian Commission intends those types of referendum to be introduced by constitutional legislation, an explicit provision will be necessary.

Part X is a very interesting attempt at outlining a system of territorial government where Oblasts (Regions) and the Republic of Crimea live with local self-government. The legal status of the local government "shall be determined by the constitutional law of Ukraine" (Article 188): in this way their independence of the Oblasts is insured, but the provision allows the central authorities to gain an advantage over the Oblasts and the local government according to the principle "divide et impera". If the bodies of the Oblasts have the power of suspending the decisions of the bodies of the local government "pending the ruling of the relevant court" about their inconsistency with the constitution and other Ukrainian acts, they are in a good position to know the problems of the functioning of local government and to provide for them, notwithstanding the power of the central State's bodies of dissolving the bodies of local government (Articles 210 And 211).

In Article 187 I see a discrepancy between the fifth and the seventh provision: the fifth alinea requires for the change of the territories of the Oblasts the consent of the relevant Radas and of the majority of the interested populations and the final decision of the Rada of the territories, while the seventh alinea allows a change of the borders of the Oblasts by agreements and the consent of the Rada of the Territories.

Article 190 has a provision concerning the legislative competence of the Oblasts, and Article 191 regards the administrative competence of the Oblasts; the lists of the subject-matters are, in some way, different. Therefore it is not easy to understand whether the Oblasts are allowed to exercise administrative functions in the fields where they have legislative powers, and whether they have legislative functions in the fields interested by their administrative competence.

Article 193 does not state the legal status of the functions which will be delegated to the Oblasts: have the Oblasts to comply with the same rules concerning their own functions when they exercise the delegated functions? Is the Constitutional Court competent to judge conflicts concerning these delegated functions according to Article 218.2?

According to Article 202 the executive committees of the Oblasts shall be chaired by a head elected and dismissed by the Oblast Rada "on the nomination of - or on consultation with - the Prime Minister of Ukraine": this provision allows an interference of the State's bodies in the functioning of the Oblasts which contrasts with the autonomy of the Oblasts themselves. It can be the source of conflicts between the bodies of an Oblast and the central authorities when they are an expression of different political parties. There is also an obvious discrepancy between Articles 202 and 203 which has a provision about the vote of no-confidence against the head of the executive committee by the Oblast Rada.

Keeping in mind Article 124 of the Italian Constitution, it could be useful to entrust the Representatives of the President (Article 204) with the power of

co-ordinating the activities of the local bodies which are subordinate to the central organs, with the activities of the bodies of the Oblasts.

In Article 210 a provision is missing : it is not clear whether private persons only or Oblasts or State bodies also are entrusted with the right (or the power) to make a legal claim against the decisions of the local government bodies (which are supposed to be inconsistent with the Ukrainian laws) in the courts.

In my previous report I advanced some comments about the extension of parliamentary immunity to the members of the Constitutional Court (Article 215). If Article 215 has to be read with the meaning that the consent of the National Assembly is required "for stripping" the constitutional judges of their immunity (Article 108 referred to by Article 215), there is a danger that the Court will not be completely independent of the legislative body of the State. Perhaps Article 108 is quoted in Article 215 only to extend parliamentary immunity to the Court, leaving any decision to the Court itself. But my guess is that this is not the intention of the Constitutional Commission: actually the National Assembly is entrusted with the power of suspending "the authority of the judges of the Constitutional Court" even in the case of violation of their oath (Article 216.6). My suggestion is that the Constitutional Commission has to think seriously about the problem of the independence of the Court in relation to the National Assembly because the Court is the judge of the laws approved by the Assembly.

The third alinea of Article 217 leaves open the problem of the position of the Representative of the National Assembly on Human Rights when complaints of citizens on the constitutionality of laws are submitted. Can he stop these complaints? The question is specially important because the Representative is not a judge and does not have the constitutional status of the judiciary.