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- DRAFT -

OPINION ON THE PRESENT CONSTITUTIONAL SITUATION IN UKRAINE FOLLOWING THE ADOPTION OF THE CONSTITUTIONAL AGREEMENT BETWEEN THE SUPREME RADA OF UKRAINE AND THE PRESIDENT OF UKRAINE

on the basic principles of the organisation and functioning of the State power and local self-government pending the adoption of the new Constitution in Ukraine

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I. The adoption of the Constitutional Agreement.

1. The Ukrainian authorities have taken the unusual step of concluding a Constitutional Agreement between the President and Parliament which for most purposes serves as an interim Constitution. This is to be explained in the light of the recent history of Ukraine and the present political situation.

2 After having declared the State sovereignty of Ukraine and the primacy of its laws over those of the URSS in July 1990, the Ukrainian Parliament adopted the Declaration of Independence of Ukraine on 24 August 1991: this Declaration was confirmed by referendum on 1 December 1991.

Notwithstanding that the Declaration of July 1990 had provided for some principles which were in conflict with principles in the Ukrainian Constitution of 20 April 1978, that Constitution remained in force and was only partially amended for the particular purpose of ensuring the transition of Ukraine from the communist regime to freedom, democracy and the rule of law. Some further amendments, in respect of which the required majority of two thirds of the total number of the People's Deputies of Ukraine was obtained, were subsequently approved, but the necessary consent has not been achieved for a completely new draft Constitution. Ukraine therefore still maintains in force the old amended socialist Constitution.

3. The Supreme Rada of Ukraine and the President of Ukraine, which are the only two directly elected national bodies of Ukraine, decided to settle their differences by adopting a constitutional agreement on the basic principles of the organisation and functioning of the State power and local self-government in Ukraine pending the procedure aimed at adopting the new Constitution of Ukraine. After difficulties and discussions, the agreement was approved by a law of the Supreme Rada and - later - a compromise was adopted by law for its enforcement and for the approval in the future of the new Constitution. But neither the first Act nor the second one obtained the required majority of two thirds of the members of the Supreme Rada.

4. On the basis of the preamble of the Agreement, and according to the dispatches of the RIA news agency, both the majority of the Supreme Rada and the President recognise that the content of the 1978 Constitution (even in its amended text) and that of the new law conflict in some parts. Nevertheless they apply the rules that, on the one hand, "the legislation of Ukraine shall be effective in the part which is not contrary to the rules" of the new law and, on the other hand, that "the provisions of the applicable constitution of Ukraine shall be effective only in the part which complies with the present constitutional agreement" (art. 61 I and II of the Agreement).

5. As the Agreement has been adopted by law, it cannot be treated as a mere constitutional convention, that is a political agreement between the supreme elected bodies of the country on the ways of implementing the Constitution in force. But the failure to approve the law by the required majority has the consequence that the old Constitution cannot be superseded by the new law. Nevertheless this was and is the objective of Parliament and of the President: pending the procedure aimed at the approval of the new Constitution, they agreed to apply the new principles set forth in the law "On State power and local self-government in Ukraine" on the basis of their good will, and having regard to their mutual concessions and compromises.

The present position, then, is a transitory solution which does not imply the abrogation of the old Constitution but - instead - implies the suspension of its rules concerning the State power and local self-government in Ukraine, or rather those rules which do not comply with the new principles. This solution is obviously based on a political agreement, but the content of this agreement is not the new principles, but rather the decision of the governing bodies of Ukraine to settle their differences and to abide by principles which are generally accepted and have been adopted by a parliamentary law. It is not a solution respectful of the constitutional hierarchy of the sources of law provided for by the Ukrainian Constitution of April 1978. Nevertheless, it is a solution which complies with the principle of legality insofar as it binds the Ukrainian governing bodies to adhere to an identified and stable statute approved by Parliament and not to an informal, political, agreement only which might be susceptible to constant change. Frankly speaking we have to acknowledge that there has been a rupture in Ukrainian constitutional continuity, but it is a transitory rupture only until such time as the full legality of the normative order is restored through the adoption of the new Constitution.

II. Assessment of the present constitutional situation

A. The 1978 Constitution

6. The force of only a part of the old Constitution is suspended. For instance, its chapters 5 and 6 are still in force and shall be enforced to the extent that they do not contradict the constitutional Agreement, or rather comply with it. This is an important feature of the present constitutional order in Ukraine because the Supreme Rada has not been able to adopt a new bill of rights since the Declarations of Ukrainian sovereignty and independence.

7. In effect, the constitutional provisions on the fundamental rights, freedoms and duties of the citizens of Ukraine are drafted in a very old fashioned way, respectful of the principles of socialist law and - especially - of the theory of the material guarantee of rights and freedoms. Their main purpose is to entrust the State authorities with the obligation to create the material conditions for ensuring the enjoyment by citizens of their rights and freedoms. This arrangement implied, on the one hand, that the State authorities should focus on the material protection more than the legal and judicial guarantees of rights and freedoms and, on the other hand, that their enjoyment and the enjoyment of the material guarantees of these rights and freedoms were restricted to those who complied with the political obligations of the socialist regime. An example of a wording of a fundamental freedom not compatible with international standards is Art. 48 which makes it possible to severely restrict freedom of expression and assembly.

8. Nevertheless the maintenance in force of these provisions, which are unaffected by the constitutional Agreement, can offer ground for interventions by the Constitutional Court when the law establishing this body is adopted in due course. Even if they are drafted according to the socialist theory of law, the constitutional provisions concerning fundamental rights and freedoms can constitute a basis for the judicial review of legislation in the field. They could be corrected and integrated by some of the principles received in the Ukrainian legal order through the Declaration of sovereignty adopted in July 1990 and the partial amendments of the Constitution. Obviously in this way fundamental rights and freedoms could benefit from only a weak and transitory entrenchment in the constitutional system, but such an entrenchment would be a bridge to the adoption of new statutes on the implementation of rights and freedoms and on their reception in the Ukrainian legal order through the signature and ratification of international instruments in the field.

B. The General Provisions of the Constitutional Agreement

PREAMBLE

9. The preamble only defines the purpose of the law as being "desirous to reform State power on the principles of strict delimitation of functions between its legislative and executive branches as a necessary prerequisite for overcoming of economy, social and constitutional crisis". The preamble is silent in relation to the judicial power. Nonetheless it is clear that judicial reform is the fundamental prerequisite for the economic, political and social transition. This anomaly must be rectified in the preamble because the constitutional Agreement contains numerous sections dealing with judicial power, including section V.

ARTICLE 2

10. The beginning of Article 2, which provides that power belongs to the people and that the people are the sole source of power, corresponds to classical constitutional law doctrine. The article continues by stating that the people exercise this power both directly, i.e. by referendum, and through the system of public and local self-government authorities. The accent is thus put on direct democracy, following the doctrine of self-government prevailing during the perestroika period.

This may threaten the constitutional character of the system of government and endanger political stability. It is recommended that the structures of a representative political system be clearly established, and that at the same time various forms of direct participation by the people be foreseen.

ARTICLE 5

11. Paragraph 1 of this Article sets out the principle of the supremacy of human rights. It is to be regretted that this is not taken up again, e.g. in Articles 24, 31 and 43 (with the exception of Art. 37). The Russian experience shows that this paragraph can have practical importance for the work of the Constitutional Court of Ukraine, in particular when applying Art. 17, N°. 27.

C. The Supreme Rada

12. The Agreement contains a mixture of various forms of government. While some parts retain certain features of the Soviet system, other parts introduce certain principles and constitutional arrangements typical for countries like France and the United States. There is no clear decision in favour of a parliamentary or a presidential form of government. Even if the elements of presidentialism prevail, presidential government is far from being realised in its pure form. When establishing a new constitutional system, particular attention has to be given to the form of government. Clarifying this question would have enabled certain contradictions to be avoided.

ARTICLE 6

13. It is not clear how the elections are to be conducted under a mixed majoritarian-proportional system. The essence is that in fact every electoral system is majoritarian-proportional or proportional-majoritarian. Generally, each system bears some elements of the other one, but one prevails over the other. This paragraph must clarify which of the two systems will be adopted or whether in fact both elements will be adopted e.g. by introducing a second chamber/senate.

ARTICLE 7

14. This article provides that the Supreme Rada carries out its work in sessions of 2 types, ordinary and extraordinary, without defining the length of the sessions. This opens the door to the old Soviet practice of limiting the sessions of representative bodies to short periods destined simply to rubberstamp decisions already taken.

Experience shows that the legislative agenda of parliament tends to be overburdened during periods of transition, and it is therefore appropriate to provide for long-lasting sessions enabling the legislature to become an effective forum for public discussion of the fundamental questions of society.

Political practice in Bulgaria is instructive in this respect. The Constitution provides that the National Assembly acts continuously, and the Assembly is therefore in session during the whole year with the exception of brief Christmas and Easter holidays as well as one month in the summer.

ARTICLES 9 et seq.

15. The text provides for two kinds of organs at the top of the Supreme Rada:

- the Bureau of the Supreme Rada, composed of the Chairman and Vice-Chairman of the Supreme Rada of Ukraine, the chairmen of standing commissions, and the heads of parliamentary groups and factions in the Supreme Rada of Ukraine.

- the President/Chairman assisted by Vice Chairmen with more extensive competences.

This seems to be too much. It would be preferable to make a choice between the two classical systems of chairing a Parliament: collective bureau or speaker. In the former case, the Bureau would have to be made smaller to become more effective. In the latter case, a consultative body composed of the heads of parliamentary groups and standing committees should be set up.

The text also gives the Chairman powers not proper for the holder of such an office, in particular to submit together with the President of the Republic proposals for the appointment of the Chairman of the Constitutional Court as well as of half the judges. This confers too much power on the chairman, and may induce him to enter into competition with the President of the Republic. It is preferable that the Chairman acts only as an intermediary and that the initiative in these cases lies with deputies of parliamentary groups.

ARTICLES 13 and 14

16. The rules on the legal status of the Deputies will be contained in a separate law. Certain questions like parliamentary immunity and the character of the mandate of the Deputies should however be settled by the Constitution itself.

ARTICLE 15

17. The right to initiate legislation in the Supreme Rada of Ukraine is given to people's deputies, the standing commissions of the Supreme Rada, the President of Ukraine, the Cabinet of Ministers, the Supreme Court and the Highest Arbitration Court of Ukraine.

The Deputies certainly need to have this right. It is questionable whether it should be given to the Supreme Court and the Highest Arbitration Court. Law-making is political by its nature and the judiciary should remain outside politics, concentrating on applying the laws.

Nor does it appear to be the best solution to give the right to initiate legislation both to the President and to the Cabinet of Ministers. This can lead to divergencies within the executive power as to the policies to be pursued. In general, the principle of harmony of the executive requires that only one

organ submit draft laws to Parliament. Preferably this would be the government since it is politically responsible before the Supreme Rada. As a compromise, draft laws might be prepared by the government but submitted to the Supreme Rada following presidential approval.

The procedure for urgent consideration of certain bills provided for in Art. 15, para.2, appears to be a good solution, enabling the executive to determine priorities and to pursue a steady and effective policy.

ARTICLE 17 No. 1

18. This paragraph does not make a distinction between Constitution-making and legislative powers, and thereby gives one State organ the possibility to unilaterally change the rules of the game. At least there should be provision for different procedures and majorities for the adoption of the Constitution.

The Supreme Rada is empowered , following a rule already established by Art. 97, para. 19, of the old Constitution, to provide official interpretation of the Constitution, laws, codes and other codified acts. On the other hand, the courts are independent (article 37 par. 2) and they obey only the law (article 37 par. 3). The question is whether courts are bound to follow the official interpretation of the Supreme Rada, and more generally whether this represents the beginning and end of judicial independence. It does not seem rational to give the Supreme Rada such a competence of interpretation if one sets up a Constitutional Court.

ARTICLE 17 No. 17

19. The power of the Rada to announce the election of the President and accept his resignation is questionable. The Head of State derives his power directly from the nation as a whole and should therefore not depend on the legislature. The first function could be entrusted to the Central Electoral Commission and the second to the Constitutional Court.

ARTICLE 17 No. 10

20. While Art. 6 provides for a 4 year mandate, this paragraph gives the Supreme Rada the possibility to dissolve itself and hold early elections. This may lead to the possibility of exercising pressure on Parliament, including pressure from non-constitutional bodies. If it is contentious whether the separation of powers requires a fixed mandate or allows early dissolution, dissolution should at least be limited to conflicts between the institutions. If one wishes to retain the possibility of early dissolutions, the possible grounds for such a step should at least be enumerated.

ARTICLE 17 No. 15 / ARTICLE 24 No. 9

21. The functions of the Defense Council should be clarified to avoid conflicts with the Council of National Security chaired by the President (see Art. 24, para. 9).

ARTICLE 17 No. 17

22. It is questionable to have the Chairman of the Constitutional Court elected by the Supreme Rada. Experience in post-totalitarian States shows that this may politicise (and delay) not only the establishment but also the work of the Court, and that it places the Chairman in a difficult position, incompatible with the status and object of the Court.

ARTICLE 17 Nos. 18 and 20

23. The appointment of the highest judges is of particular importance. A question arises when we see that, under Nos. 18 and 20, the appointing authority (Parliament) is also competent to dismiss. No. 20 adds to this: "according to the procedure established by the law", but this addition is missing from No. 18 with respect to the chairman of the supreme court.

As is well-known, it is of the utmost importance in any democratic State that judges can perform their duties in absolute independence, i.e. independent in particular of government and Parliament. The mere possibility of dismissal for no other reason than that executive or legislative authorities are displeased at a judicial sentence would impair the independence of judges.

Further examination of the dismissal procedures is therefore necessary.

ARTICLE 17 No. 24

24. To give the Supreme Rada the right to initiate referendums does not make much political sense. In using this power the legislature would abandon its own proper function. It would be better to give this possibility to the Head of State, who could use it in exercising his functions as an arbitrator. This is the practice of the French Fifth Republic.

ARTICLE 17 No. 27

25. This veto power is not justified. The assessment of the constitutionality of decrees should be reserved to the Constitutional Court. One could foresee that the entry into force of decrees is suspended until the decision of the Constitutional Court.

ARTICLE 17 para. 4

26. The Russian experience shows the usefulness of this provision.

RELATIONS BETWEEN THE SUPREME RADA AND THE GOVERNMENT
- Art. 17 para. 23, Art. 22, Art. 33

27. The accent should be put on the collective responsibility of the government, including the possibility of a vote of no-confidence in some members. Such a vote should require an absolute majority and not an ordinary majority. Parliamentary control mechanisms, like questions and interpellations, should be foreseen, and these should be distinguished from sanction mechanisms, like a vote of no-confidence.

Consideration might be given to enabling the government to ask the Supreme Rada for a vote of confidence on certain occasions, e.g. when submitting a bill proposed by the government. This would allow the executive to put pressure on the Deputies and to pursue a continuous and effective policy.

The question whether the President should have the power to dissolve the Rada when it passes a vote of no-confidence in the government is obviously very controversial. From press reports, it appears that the non-existence of such a possibility was a precondition of the Rada's acceptance of the constitutional Agreement.

There is also an ambiguity concerning the relationship between Articles 22 and 33. On the one hand, after the Programme of its Activity of the Government of Ukraine has been approved by the Supreme Rada of Ukraine, the latter may express its distrust of the Government of Ukraine no earlier than after one year of governmental activities but, on the other hand, Article 33 determines that whenever the draft State Budget of Ukraine has not been submitted in good time, the Supreme Rada of Ukraine may take a vote of non-confidence in all or particular members of the Cabinet of Ministers of Ukraine. Accordingly, the Supreme Rada of Ukraine could take a vote of no-confidence (i.e. distrust) within the one year "safe period" of governmental activities. It must be clarified as to whether Article 33 is an exception to Article 22, or whether it should be amended to be subject to Article 22.

D. The President

ARTICLE 23

28. The 2/3 majority of members of the Supreme Rada required to override a presidential veto on draft legislation is extremely high in the difficult period of transition of Ukraine. It may lead to a blocking of legislative activity and to conflicts between the institutions of the State. Consideration might be given to foreseeing that the veto can be overridden by an absolute majority of the members of the Supreme Rada.

ARTICLE 24 No. 2, ARTICLE 27 para. 2

29. According to Art. 24, No. 2, the President addresses messages to the people of Ukraine. According to Art. 27, para. 2, he may address messages on pressing issues to the people and to the Supreme Rada. Are these the same or different kinds of messages?

ARTICLE 24 No. 6

30. The President of Ukraine is empowered to repeal acts by central and local public executive authorities including acts by executive authorities of the Autonomous Republic of Crimea whenever they are incompatible with the Constitution and laws of Ukraine, or with decrees and orders of the President of Ukraine. This means that the President is exercising a similar role to a court of the highest instance that deals only with questions of law and not of fact. The problem is that there is no judicial control over the President of Ukraine (i.e. executive). Traditional democratic constitutions grant this power to the judiciary, i.e. to constitutional or ordinary courts.

ARTICLE 24 para. 2

31. This provision merits approval, but it should be qualified "except cases provided for by the Constitution of the Ukraine and the present law" (cf. Art. 17 para. 4).

ARTICLE 25

32. The President of Ukraine is empowered to interpret decrees and orders which are binding on the whole territory of Ukraine. This could be acceptable if the interpretation only bound the executive. The right to bind the private sector (namely the citizens of Ukraine) properly belongs only to the judiciary. See also above the remarks on Art. 17 N°. 1.

The power given to the President in para. 2 to enact decrees on economic reform not governed by the applicable legislation seems necessary in view of the Russian experience.

E. The Judiciary

ARTICLE 38 - The Constitutional Court

33. In envisaging the future role of the Ukrainian Constitutional Court one has to be very prudent. From a strictly legal point of view, the Court cannot be entrusted with the task of checking the implementation of the constitutional Agreement. This would put the Court in the difficult position of dealing with a statute which contradicts the Constitution in force without having been approved by the majority required for the amendment of the Constitution. Moreover, as far as the matter of the organisation and functioning of the State power and local self-government in Ukraine is concerned, an intervention of the Constitutional Court is apparently unthinkable. The provisions of the Agreement establish a constitutional equilibrium between the supreme bodies of the State which is based only on the search for political compromises and is aimed at avoiding the danger of a showdown between them. This construction is confirmed by the RIA news agency which has emphasised that Parliament, or rather the Supreme Rada, approved the agreement without adopting "articles giving the president the right to disband Parliament and setting out a procedure for the impeachment of the President".

The interpretation of the Ukrainian situation would have been certainly different if we had accepted the idea that because of the difficulties of a quick approval of the new Constitution, the constitutional Agreement was approved with the purpose of completely substituting it for the old Constitution. In this case the implementation of the Agreement would not have depended on a political compromise between the supreme bodies of the State, but the interested authorities would have pretended to vest it with a legal force which it does not have. The Agreement should have been read as the new Ukrainian Constitution, and the Constitutional Court should not have been obliged to stick to the old hierarchy of the sources of law and to recognise the primary role of the old Constitution.

But even in this hypothesis the Constitutional Court should have been entrusted with the task of the judicial review of legislation on the basis of the old constitutional provisions concerning fundamental rights and freedoms. In any case, the content of the constitutional Agreement does not allow for an interpretation which implies the abrogation of the articles of the old Constitution in the matter.

ARTICLE 42

34. This article determines the appointment of judges. One clear constitutional principle of judicial independence is the term for which judges are appointed. The term should be of sufficient length so as to promote and protect the independence of judges. The constitutional Agreement does not provide such protection. See also the remarks on Art. 17 paras. 18-20 above.

ARTICLE 43

35. Within the norms of a democracy, the Prosecutor General's office is only empowered to act on behalf of the State.

The Office does not play any legal role in private law. Accordingly, article 43 (7) is inconsistent with this principle. The prosecutor's powers should be confined to protecting material and other interests of the State. Usually only the courts are empowered to protect rights of citizens and legal persons (including the State).

Article 43 (2) is unclear as to the extent of the Prosecutor General's power: is his power confined to breaches of the legislation before the courts or does it extend to control of court decisions.

Article 43 is proof that the legal position and power of the Prosecutor General's Office is substantially the same as it was under the totalitarian regime.

ARTICLE 45

36. This article is inconsistent with article 43, in relation to the independence of prosecutors. They could not be independent on the one hand and be subordinated to the Prosecutor General's Office on the other.

F. Local self-government

ARTICLE 47 et seq.

37. There is no clear consecration of the principle of local self-government. These provisions give the impression that local authorities remain in a similar position to that obtaining during the Soviet period, as part of the executive. It has to be admitted that questions of local self-government in post-Soviet States have not been clarified in constitutional law theory, and that the implementation of local self-government is difficult in these States due to a lack of experience.

G. Conclusion

The present constitutional situation in Ukraine is ambiguous, and this ambiguity is reflected in some of the remarks made. The only possible solution was indeed the establishment of a transitory order with the partial suspension of the old constitutional bodies and the political commitment of the supreme constitutional bodies to stick to the provisional rules adopted by the Parliament without a qualified majority. The conclusion of the Agreement and continued respect for its provisions under the conditions of political struggle during a period of transition marked by confrontation between the executive

and the legislative is an example of an attempt to reach a "civilised legal" solution to problems, in the interest of the aims set out in the preamble. If the present situation does not meet all the standards of the Council of Europe, the signature and the ratification (with internal implementation) of international instruments in the field of human rights and fundamental freedoms by Ukraine would help the establishment of a constitutional order in Ukraine coherent with the obligation of implementing democracy, fundamental rights and freedoms and the rule of law.

The text of the constitutional Agreement bears the marks of a period of transition, in many respects it represents admirable progress, but the future Constitution of Ukraine will have to provide for more stable and principled solutions, in particular:

- the human rights chapter will have to be in conformity with international standards.
- the independence of the judiciary will have to be fully safeguarded, and judicial functions reserved to the courts.
- the powers of prosecutors will have to be reduced to a level found in Western Europe.
- there will have to be stable rules which cannot be changed unilaterally by the participants in the political process.