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OPINION ON THE DRAFT CONSTITUTION OF UKRAINE
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CHAPTER III
THE PEOPLE'S POWER

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GENERAL COMMENTS

The first thing to note is that the draft Constitution of Ukraine dealt with in these comments is a considerable improvement on the Constitutional Agreement. Enormous efforts have been made to clarify the conceptual framework behind the preferred form of Government and to produce a precise formulation of a number of constitutional ideas and principles. As a result, the new constitutional system seems relatively complete.

We cannot help feeling that in this draft the authors have basically opted for the American presidential system of government. This fact alone clashes with comparative constitutional law, which has shown that the American model of the strict separation of powers is never very successful outside the USA.

This commentary concentrates on the issue of the people's power, which has been fairly successfully interpreted, even if the drafters have failed to study a number of principles and to bring them to their logical conclusion.

Article 3 of the draft Constitution sets out a fairly comprehensive and highly competent definition of the various dimensions of the principle of the people's sovereignty.

We also welcome the fact that the draft Constitution develops the concept of self-government by the people by separating the government authorities, which express the will of the nation, from the regional self-governing bodies, which express the interests of the autonomous local communities.

However, it should also be noted that various forms of direct democracy are overemphasised in terms of the exercise of public power. The draft Constitution provides for the widespread use of such instruments as national and regional referendums, the early termination of the mandates of people's deputies and votes of no confidence by the people in the Supreme Rada.

Granting the people direct power is a very noble principle, but it is also rather inadvisable because it seldom provides a solid basis for a complete system of government.

Experience throughout history has shown that only one form of direct democracy, namely the election, provides a legitimate basis for any democratic power. Elections enable us to establish the institutions of representative democracy, and therefore we should also logically accept other forms of direct democracy in the constitutional system, provided that they are used in a complementary manner only. The latest trend in developing constitutional democracy is to set up a solid system of representative government and then complement it with popular participation through the various forms of direct democracy.

Shifting the centre of gravity of the representative democracy system towards direct democracy can easily produce an undesirable result, namely undermining the public institutions and consequently upsetting general political stability. Such a contingency can never be precluded when the economy is in crisis, ie when difficult, unpopular decisions have to be taken that can achieve positive results only after much time and effort. Overemphasising the forms of direct democracy can encourage populism and demagogy, and in extreme circumstances even lead the authorities to shirk their responsibility to take weighty but necessary decisions, thereby paralysing the political process.

No systematic distinction is drawn between the "constituent power" and the "constituted powers" whether in the Constitutional Agreement concluded between the Supreme Rada and the President or in the draft Constitution. The approach adopted - over and above the "sovereign right to constitute" (see Art. 6 of Part I, "General Provisions") - does not produce sufficiently clear-cut "rules of the game" for all participants in the political process because it is based on the premise that the rules can be unilaterally changed by the national representative institution.

COMMENTS ON SPECIFIC CONSTITUTIONAL PRINCIPLES

The fundamental constitutional principles - the sovereignty of the people and the separation of powers - are very competently set out in Art. 3 of the draft Constitution. The only possible objection concerns the introduction of a "counterbalance-and-deterrence mechanism" (see Art. 3 para. 6). If this is a theoretical formula it would be preferable to develop it implicitly in relations between the institutions as part of the apportionment of their powers under the Constitution.

Art. 92 of Part IV, "People's Power", contains an inherent contradiction, laying down that the "sovereign will" of the people is implemented through "national and local referenda". Given that the people's will is sovereign in character, it can only be expressed and implemented through national referenda, whereas the will expressed through local referenda cannot be sovereign because the latter are acts of local or regional self-government carried out within the territory of a limited section of the national population.

Article 94 of the same Part of the draft lays down that decisions to hold national referenda are to be taken by the Supreme Rada. This is probably not the ideal solution because the Supreme Rada is Ukraine's national legislative body, and most questions on which a referendum is liable to be held are of a legislative nature and therefore fall within its jurisdiction. This would mean that the Supreme Rada would have to organise referenda on questions which it itself was empowered to settle. The method adopted may look democratic, but it virtually invalidates the very idea of holding referenda.

It might in fact be more appropriate to introduce the so-called compulsory referendum for constitutional questions, reserving the possibility of optional referenda for legislative matters coming under the jurisdiction of the Supreme Rada. The latter type would involve a "popular initiative", ie a referendum held at the proposal of a certain section of the national population.

The idea of a compulsory referendum is set out in Art. 95 of the draft Constitution and relates to changes in the national territory and the conclusion of inter-state alliances. The foregoing proposal is aimed at extending the scope of the compulsory referendum by including all constitutional

matters.

THE LEGAL SITUATION OF THE SUPREME RADA OF UKRAINE

The definition of the functions of the Supreme Rada as set out in Art. 96 of the draft should be improved. The first sentence of this provision states that the Supreme Rada is the "sole legislative body " of Ukraine, an idea which is immediately repeated in the second sentence, affirming that it discharges "legislative" functions.

It is highly unfortunate that this provision mentions the Supreme Rada's "constituent" function directly after its legislative role.

Any provisions relating to the adaptation or amendment of the Constitution should preferably be set out in a separate section of the new Constitution. The reason is to be found in Art. 102 para. 1 of the draft, which lays down that revisions or amendments to the Constitution might be approved by a subsequent national referendum.

If we accept the idea of a ratifying referendum, ie a compulsory referendum on all constitutional matters, the "constituent power" in fact belongs to the nation, which has the last and most important say in the matter. Accordingly, the Supreme Rada does not wield the "constituent power", but is only empowered to put the corresponding proposals to the nation, which has the sovereign right to give the final decisions thereupon.

Art. 98 of the draft Constitution provides that the people's representatives (deputies) of Ukraine represent the electors of their constituencies and are answerable to them. Art. 101 para. 3 mentions the recall of people's deputies by the electorate, albeit in rather vague terms. However, previous texts do not mention such "recall" as a formal reason for the early termination of a deputy's mandate.

At all events, the concept of "recall" is a leftover from the so-called "imperative" mandate of the Soviet era, when constitutional theory had plethora of pseudo-democratic conceptions concerning relations between electors and elected representatives.

It would be advisable to cater for the subsequent introduction of the so-called free mandate by formally laying down that the people's representatives should express the will and interests of the whole nation. This would set the scene not only for the normal functioning of the representative institution but also for the formation of a political elite capable of taking major decisions for the sole purpose of the "common weal" of the entire nation, free of influence from private, collective, professional, local or other restrictive interests.

Art. 102, para. 1, sub-para. 1 of the draft Constitution deals with revisions and amendments to the Constitution. As already mentioned, it would be better if this subject were addressed in a separate chapter of the Constitution, and if no direct link was made with the powers of the Supreme Rada.

Art. 102, para. 1, sub-para. 11 of the draft mentions that one procedure for a motion of no confidence in the President of Ukraine is via a national referendum, which may lead to the early termination of the presidential mandate. Later on in the text, in Art. 110, a similar procedure is set out for terminating the mandate of the Supreme Rada. It should be noted that these are highly unreliable, risky procedures from the constitutional point of view, conceived in a social climate which is manifestly characterised by a crisis of confidence in the public institutions. Moreover, not only will the procedures for the vote of no confidence fail to ease the tension but they are liable to have the opposite effect and become a constant source of political instability.

The impeachment procedure provided for at the end of sub-para. 11 is fully sufficient to ensure that the Head of State shoulders responsibility for any action violating of the Constitution or damaging the higher interests of the State.

Under Art. 102 para. 12 of the draft Constitution the Supreme Rada can take decisions on the early termination of its own mandate. We would, however, advise against giving the representative institution such power to dissolve itself, as it would open the way for extreme action by the opposition against the national legislature (obstructing legislation, boycotting sessions, etc) and enable groups outside parliament to exert pressure on the people's representatives.

The Supreme Rada should be required to complete its mandate and debarred from dissolving itself, as this is the only way to guarantee the normal functioning of the national legislature. The Supreme Rada's mandate might be more in line with social developments if it were slightly shorter or if recourse were had to direct democracy facilities such as the "popular initiative" (see Art. 102, para. 2, which provides for national referenda on the initiative of at least 3 million electors).

Art. 102 para. 13 of the draft provides that the Supreme Rada shall approve the members of the Ukrainian Government. However, no details are given on the force of such approval or the possible consequences if it is withheld.

Since Ukraine lacks the American tradition of political tolerance in relations between the various branches of State power and in the corresponding procedures, the need for "approval" might cause difficult situations and complications, or might even paralyse the functioning of the executive.

Art. 107 of the draft Constitution sets forth the principle that sessions of the Supreme Rada must be open to the public, but also that some meetings may be held in private. Decisions to hold private meetings must be taken on a qualified majority of two-thirds of the total number of people's deputies. However, it is doubtful whether such a large qualified majority should be required as it might make it unnecessarily difficult to take weighty decisions relating, for instance, to national security and complex inter-state matters. Consequently, the traditional ordinary majority would be preferable in order, inter alia, to prevent ad hoc minorities from imposing their will.

Art. 109 para. 3 lays down that standing commissions can take decisions on matters falling within their jurisdiction, and that the various authorities, organisations and officials must take account of these decisions. Such a practice would make it difficult to ensure the proper implementation of the principle of the separation of powers because it would enable the standing commissions to interfere in the domain of the executive. The commissions should therefore not be given such powers, but should instead concentrate on assisting the Supreme Rada in the legislative field and in implementing its supervisory functions.

Art. 110 of the draft develops the idea of using national referenda as a means of taking a vote of no confidence in the Supreme Rada, as mentioned above. In view of the reasons and arguments already set out, paragraphs 2 and 3 of this provision should be deleted. The solution adopted is so "original" that it is virtually unprecedented in any "tried and tested" constitutional system anywhere in the world.

Art. 111 affords a wide variety of subjects the right to initiate legislation. It is particularly unsuitable to attribute this right to such judicial bodies as the Constitutional Court, the Supreme Court, the Highest Arbitration Court and the Prosecutor General of Ukraine. Drafting laws is a political act: the judiciary must remain outside the political sphere, confining themselves to implementing legislation.

Art. 113 of the draft empowers the President of Ukraine to request that the Constitutional Court declare certain laws unconstitutional before they have been signed and sent for publication. Allowing the President to submit laws to the Constitutional Court before they are published might cause unacceptable delays in the legislative process. It would be better to permit only a posteriori controls. This would minimise the danger of premeditated abuse of such power and also obviate any paralysis in the national legislature.

CONCLUSIONS

This commentary on the draft new Constitution of Ukraine has concentrated on a critical appraisal of specific problems. The fact that many provisions have not been mentioned should be taken as tacit approval of the ideas and principles which they set out.

The general conclusion is that the draft Constitution is a good basis for subsequent work. The drafters must henceforth concentrate on finding ways and means of stabilising the public institutions so that the country can create a system of government that is not only democratic but also effective.

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