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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

DRAFT OPINION

ON THE CONSTITUTION OF UKRAINE

on the basis of the contributions submitted by:

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Draft Opinion
on the Constitution of Ukraine

Introduction

By letter dated 10 July 1996 the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Mr Hågard, asked the Commission to give an assessment of the new Constitution of Ukraine from the point of view of human rights, the rule of law, parliamentary democracy and the rights of minorities.

It is recalled that the Commission adopted at its 27th meeting on 17-18 May 1996 an opinion on the draft Constitution of Ukraine (CDL-INF(96)6) and that the Constitution finally adopted is based on the draft already examined by the Commission on this occasion. Since the text of the Constitution has now been finalised, not all comments made in the previous opinion are repeated in the present text. The present opinion emphasises those issues which seem relevant for the further development of the constitutional structure of Ukraine and with respect to the monitoring carried out by the Parliamentary Assembly of the Council of Europe.

The opinion is based on written contributions from Mr Bartole (Italy), Mr Batliner (Liechtenstein), Mr Klu_ka (Slovakia), Mrs Milenkova (Bulgaria) and Mr Steinberger (Germany), as well as from Mr Delcamp (Congress of Local and Regional Authorities of Europe). Previous comments submitted with respect to the drafts by Mr Aguiar de Luque (Spain), Mrs Suchocka (Poland) and Mr Svoboda (Czech Republic) have also been taken into account, as well as discussions during the 28th and 29th meeting of the Commission.

Chapter I

General Principles

This chapter deserves a positive assessment and has been improved further with respect to previous drafts. Like the rest of the Constitution, this chapter reflects Ukraine's determination to be a democratic, social and law-based state (see in particular Article 1).

The important elements of the rule of law have found a proper expression in this chapter:

– the Constitution has the highest legal force and its norms have direct effect; laws and other legal acts are adopted on its basis and have to conform to it (Article 8);

– the principle of separation of powers is recognised and the bodies of the legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws (Article 6);

– the principle of legality has found a further clear expression in Article 19;

– the constitutional provisions concerning human rights are directly applied by the courts (Article 8, para. 3).

Article 9 makes ratified international treaties part of internal law. While references to customary international law and generally accepted principles of law are still missing in this article, a reference to generally acknowledged principles and norms of international law has been introduced into Article 18 concerning the foreign policy of Ukraine.

A further positive change is that Article 5, para. 2, now states that "the people exercise power directly and through bodies of state power *and bodies of local self-government*".

A criticism of drafting remains in that Article 3 still considers the human being as the highest social value and not simply the highest value.

Chapter II

Human and Citizens' Rights, Freedoms and Duties

General comments

First of all, it should be noted that the catalogue of rights protected is very complete and that it shows a willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights and to ensure that these rights are implemented in practice. It is also very much appreciated that Articles 22 and 157 guarantee the protection of the essence of human rights by forbidding the abolition of human rights by way of constitutional amendment. Of particular importance are also Article 8, para. 3, and Article 55, para. 1, providing that human rights are directly applied and protected by the courts.

On the other hand, certain weaknesses pointed out in the opinion of the Commission on the draft Constitution remain, concerning in particular the lack of structure in this chapter and the use of the same wording for social, economic and environmental rights on the one hand and for fundamental freedoms on the other. Reference is made in this respect to the Commission's previous opinion.

The Commission is aware that in the former socialist countries there is a tradition of enshrining a large number of social rights in the Constitution and that the societies in these countries are strongly attached to this tradition.

On the other hand, the situation has now changed fundamentally with respect to the socialist period in Ukraine, since the country now has a Constitution which is to be applied directly by the courts and which gives to the courts the task to protect the rights set out in the Constitution. Care has therefore to be taken not to overburden the courts with tasks they cannot fulfil by treating without distinction rights which can be implemented directly by the courts and other rights which have to be implemented on the basis of parliamentary statutes and executive action. For this reason, it is unfortunate that generally the wording "everyone has the right to" is also applied to social, economic, cultural and environmental rights. In many cases, e.g. Article 47 on the right to housing and Article 49 on the right to health protection, the sentence immediately following according to which the state creates conditions for the fulfilment of this right may indicate that the right cannot be implemented directly by the courts. Other rights like the right to a sufficient standard of living (Article 48) and to a safe environment (Article 50) are however in

no way qualified and therefore risk creating unrealistic expectations. If the courts prove unable to fully implement these rights, this risks additionally undermining the credibility of the constitutional provisions guaranteeing the protection of fundamental freedoms.

The possible restrictions of human rights

The Ukrainian Constitution adopts a correct approach by providing for the possible restrictions article by article and not by means of a common, necessarily vague, general clause covering without distinction all rights. The newly introduced Article 64, para. 1, according to which constitutional human and citizens' rights and freedoms cannot be restricted, except in cases envisaged by the Constitution of Ukraine, takes up a recommendation made in the Commission's opinion on the draft and closes an important gap in the protection of human rights.

Unfortunately, together with the general clause on the possible restrictions of human rights contained in the previous Article 64, para. 1, the previous paragraph 2 of the same Article containing the principle of proportionality has also been deleted. Since many of the restrictions permitted by the individual articles of the Constitution, e.g. the restrictions on freedom of thought and speech authorised by Article 34, para. 3, are quite large, it will be essential that the Ukrainian Constitutional Court interprets the various restrictions of human rights as being subject to a general principle of proportionality.

It would also have been useful to include a provision on the rights of legal persons.

Comments on specific articles

Article 27

It is regrettable that capital punishment does not seem to be abolished (no arbitrary deprivation of life instead of no deprivation of life).

Article 33

In the Commission's previous opinion, it was criticised that the draft allowed restrictions on freedom of movement for too large a catalogue of reasons. Now this catalogue has been replaced by a clause generally allowing restrictions established by law. This makes, without any limitations, the constitutional protection of the freedom of movement subject to derogations by ordinary statute.

Article 55

It is very important that Article 55, para. 2, grants the right to everybody to challenge decisions by public bodies and thus provides a constitutional basis for the judicial control of administrative authorities. It is however regrettable that no provision guaranteeing the constitutional right of access to independent and impartial tribunals also in civil and criminal matters has been added.

Article 64, para. 2

The catalogue of rights which may not be restricted in emergency situations seems unrealistically long, e.g. the references to Articles 47 and 56.

Chapter III

Elections, Referendum

This chapter merits a positive assessment. It is welcome that the text no longer contains provisions inspired by too radical a concept of direct democracy but provides for an adequate balance between representative and direct democracy.

In particular, it seems correct that Article 85, No. 2 limits the power of the Verkhovna Rada to designate an all-Ukrainian referendum to issues of altering the territory of Ukraine. Taking into account the potential instability of frontiers of the countries of the Commonwealth of Independent States and the problems of minorities inevitably resulting from the destruction of the former Soviet Union, the provision in Article 73 that the territory may be altered only by referendum seems legitimate and may constitute a supplementary guarantee for the sovereignty of the state and its territorial integrity.

The introduction of the popular initiative, as set out in Article 72, enables citizens to take part in the legislative process. It provides for an additional means of popular control of the functioning of the state organs. It is also fully appropriate that issues of taxes, the budget and amnesties are excluded from the possible scope of referenda by Article 74.

Chapter IV

Verkhovna Rada of Ukraine

General comments

The text of the Constitution as adopted differs substantially from the draft which was the subject of the previous opinion by the Commission insofar as the bicameral parliament envisaged by the draft has been replaced by a unicameral one. However, in other respects, the chapter is very similar to the previous draft and certain questionable provisions contained in earlier texts, like the requirement of a 50% quorum for the validity of parliamentary elections, have been dropped.

Article 75

The general description of the role of the Parliament given in this Article is both appropriate and concise.

Article 78

This Article is quite correctly based on the need for full-time parliamentarians. It would have been preferable to give some detail in the Constitution concerning the incompatibility of the mandate of a deputy with other activities.

Article 87

The requirement that only one third of the constitutional composition of the Verkhovna Rada may raise the issue of responsibility of the Cabinet of Ministers seems very high. The provision that such motions may not be submitted within one year of the approval of the programme of activity of the Cabinet of Ministers does not seem to be well thought through. The responsibility of the government may arise for issues which are of the highest importance although they did not appear in the programme of activity. Such debates also do not have as their only aim the removal of the government but they give an occasion for public debate of highly important issues which, for varying reasons, may not be dealt with adequately by the executive.

Article 90

The Constitution provides a sufficiently stable basis for the activities of Parliament. A procedure for self-dissolution is no longer envisaged and the President may dissolve Parliament only under very exceptional circumstances. The rule in Article 90, para. 1, that the powers of Parliament end only on the day of the opening of the first meeting of the following Parliament avoids periods of absence of a legislative body which may be abused by other bodies.

Article 92

This Article contains a list of areas to be determined exclusively by laws. While it is positive that these areas are reserved to a parliamentary statute, there is no general provision clarifying the relationship between statutes adopted by Parliament, the power of the President (on the basis of Article 106, para. 2) to issue decrees and directives mandatory for execution on the territory of Ukraine, and the power of the Cabinet of Ministers (on the basis of Article 117, para. 1) to issue resolutions and orders that are mandatory for execution.

Article 93

It seems questionable whether the right of legislative initiative should be given both to the President and the Cabinet of Ministers. The Head of State exercises very specific functions and should not be involved too closely in current political activities by submitting draft laws to the Verkhovna Rada.

It seems also questionable whether the right of legislative initiative should be granted to the National Bank which should remain outside the political field.

Article 94

The requirement of a two thirds majority of members of the Verkhovna Rada to overturn a presidential veto against legislation seems excessive.

Chapter V

The President of Ukraine

General Comments

The Constitution provides for a semi-presidential system which is in many ways similar to the French system without copying it. The President has very strong powers.

Certain questionable provisions contained in earlier drafts, such as the possibility of a vote of no-confidence in the President by popular referendum, have rightly been removed in the final text.

Comments on specific articles

Article 102

It is the task of the courts to guarantee the observance of human rights. It is therefore questionable to call the President guarantor of the observance of human and citizens' rights and freedoms.

It is however positive that the provision giving to the President the power to assist the co-ordination of the activity of the bodies of state power and their interaction with bodies of local self-government has been deleted.

Article 111

It is positive that the procedure of impeachment of the President is not only in the hands of Parliament but requires opinions by the Constitutional and Supreme Court.

Chapter VI

Cabinet of Ministers of Ukraine
Other bodies of executive power

General Comments

According to Article 113, para. 2, the Cabinet of Ministers is responsible to the President and accountable to the Verkhovna Rada. In practice dependence on the President prevails. For example, the term of office is linked to the term of office of the President and not of the Verkhovna Rada.

The Prime Minister is appointed by the President with the consent of more than one half of the constitutional composition of the Verkhovna Rada. The Constitution contains no provisions on what happens if the Verkhovna Rada does not accept the candidate proposed by the President but the President insists.

It seems appropriate that the composition of the government does not have to be approved by Parliament.

Article 118 and 119

These Articles have been vastly improved with respect to earlier drafts and the powers of the executive at the level of oblasts, districts, the cities of Kyiv and Sebastopol and at local level have been defined much more clearly. It is particularly positive that the provisions subordinating local authorities to the bodies of executive power at higher level have been deleted.

Chapter VII

Procuracy

The newly drafted chapter on the procuracy seems compatible with European standards although one might still wonder why a specific chapter of the Constitution is devoted to the procuracy.

It should however be noted that according to Transitional Provision 9 (see Chapter XV below) the procuracy continues to exercise the function of supervision over the observance and application of laws until new legislation has entered into force.

Chapter VIII

Justice

This Chapter also deserves a positive assessment.

Important principles of the rule of law appear in the text:

– Article 124: justice is administered exclusively by the courts;

– Article 126: independence and immunity of judges;

– Article 129: independence of judges, the main principles governing proceedings.

The introduction of the High Council of Justice is also a positive step and may contribute to strengthen in practice the independence of the judiciary.

Chapter IX

Territorial structure of Ukraine

Article 132 is still rather vague and of a more programmatic than normative character.

Chapter X

Autonomous Republic of Crimea

The text of the Chapter as adopted is more precise and coherent than the text appearing in the draft. It remains however evident that the Verkhovna Rada did not wish to give to Crimea a status comparable to a German Land or a Spanish Region. The text carefully avoids speaking about Crimean laws but only refers to "normative regulation" which has to comply not only with the Constitution of Ukraine but also with the laws of Ukraine.

Articles 137 and 138

It is positive that the text now contains a list of powers of the Autonomous Republic both in respect to normative regulation (Article 137) and to other acts (Article 138). It is however still not clear whether Crimea has a reserved sphere of competence. In principle, the power of the Verkhovna Rada of Crimea to appeal to the Constitutional Court of Ukraine should imply that there is a sphere of competence protected by the Constitution. On the other hand, Crimean normative acts have to comply not only with the Constitution but also with the laws of Ukraine. One could therefore conclude that the central authorities can legislate within the area of application of Article 137 and 138.

To avoid differences and conflicts which could destroy the Crimean autonomy, the limits of the power of central authorities to legislate in this area could be defined in three different ways:

a. One could say that the Crimean authorities have to respect national legislation which deals with issues which are in the national competence and do not coincide with the issues listed in Articles 137 and 138.

b. One could say that national legislation is competent to state the principles of law which have to be implemented by the Crimean authorities whose task is to provide for detailed regulation of the issues listed in these articles.

c. One could say that national legislation can deal with the issues listed in these articles when national interests are at stake.

The last alternative is the most flexible one but it could favour an enlargement of the national competence if the Constitutional Court accepts the central state's interpretation of the definition of national interests. It could imply a large scope for differences of opinion and conflicts.

Chapter XI

Local self-government

This Chapter merits a positive assessment. It has been further refined and improved with respect to previous drafts. The Commission notes that the expert of the Congress of Local and Regional Authorities of Europe, Professor Delcamp, has come to the conclusion that in general the provisions comply with the European Charter of Local Self-Government. The Constitution properly distinguishes between the original competence of local self-government and powers assigned to it. Article 7 of the Transitional Provisions provides for the transfer of powers to elected chairmen responsible before the respective councils.

Since many details are not settled by the Constitution itself, future development will largely depend on legislation.

Chapter XII

Constitutional Court of Ukraine

General comments

This chapter sets up a permanent constitutional court. This fully corresponds to the prevailing practice in the new democracies to protect the constitutionality of the new legal order by a specific, permanent and independent judicial body and can only be welcomed. The text adopted is mostly very similar to the draft previously examined by the Commission. However, the role of the Constitutional Court has been further developed by the Law on the Constitutional Court of Ukraine adopted in October.

This concerns in particular the powers of the Constitutional Court:

– The text of the Constitution does not provide for a procedure of constitutional complaints by individuals for violation of their human rights but it gives to the Parliamentary Ombudsman the possibility to seise the Constitutional Court. The Law on the Constitutional Court of Ukraine introduces such a procedure on the basis of the power of the Constitutional Court to officially interpret the Constitution of Ukraine (see in particular Articles 42, 43 and 94 of the Law). The scope of these provisions seems however not entirely clear.

– The text of the Constitution provides that the Supreme Court, as well as other State organs, may appeal to the Constitutional Court with a view to a decision on the conformity of laws and other legal acts with the Constitution. Article 83 of the Law provides that if, in the course of examination of cases under general court procedure, a dispute develops concerning the constitutionality of norms, the examination of the case is suspended and the case considered by the Constitutional Court.

– The Constitution also lacks a provision on conflicts of competence. Article 75 of the Law on the Constitutional Court deals with such conflicts in the framework of the examination of cases regarding the constitutionality of legal acts. If this proves

insufficient, such conflicts might possibly also be dealt with within the official interpretation procedure of Article 150, para. 2, of the Constitution.

On the basis of the new Law, the Constitutional Court will have a very important role to play for strengthening constitutionalism in Ukraine. One may only regret that several of the provisions of the Law have not already found an expression in the Constitution.

Article 148

This Article contains an innovation insofar as one third of the judges of the Constitutional Court are appointed by the Congress of Judges of Ukraine. This may depoliticise the appointment procedure and strengthen the independence of the Constitutional Court. A provision on what happens if one of the three nominated bodies does not proceed with the appointment of judges incumbent upon it is still lacking.

Article 149

This Article extends the guarantees of the independence of judges to the judges of the Constitutional Court. Article 23 of the Law of the Constitutional Court gives to the Constitutional Court the power to decide upon the termination of authority of a judge of the Constitutional Court, with the exception of cases of incompatibility of the office with other activities and the violation of the oath, when the decision is taken by the Verkhovna Rada.

Article 31 of the same Law provides that a separate item is to be included in the state budget of Ukraine for the Constitutional Court.

The oath of the judges of the Constitutional Court is set out in Article 17 of the Law.

Chapter XIII

Introducing amendments to the Constitution of Ukraine

General comments

This Chapter makes it clear that the drafters want to have a rigid constitution difficult to amend. This should contribute to the stability of the constitutional system in Ukraine.

Article 156

It seems excessive to require for the submission of a draft law introducing amendments to certain chapters of the Constitution the participation of two-thirds of the deputies. This is the majority required for the adoption of an amendment.

Article 157

It is to be welcomed that the Constitution tries to guarantee the essence of human rights by outlawing their abolition. This provision, as well as the provision forbidding amendments

oriented towards the liquidation of the independence or violation of the territorial indivisibility of Ukraine, leave a large scope for interpretation by the Constitutional Court.

Chapter XV

Transitional provisions

Several of these provisions delay the entry into force of important provisions of the Constitution.

It has already been pointed out above under Chapter VII that Transitional Provision 9 contains no deadline for the entry into force of the new rules on the procuracy.

For a number of areas of particular relevance for human rights – the arrest, holding in custody and detention of persons suspected of committing a crime, examination and search of a dwelling place or other possessions of a person – the rules in force before the adoption of the Constitution are preserved by Transitional Provision 13 for a further five year period. This seems extremely long.

Transitional Provision 12 postpones the full entry into force of the new provisions on the judiciary and leads to discrepancies within the system during the transitional period.

Conclusions

Summing up these observations, the Commission notes with pleasure that the fairly long period it took Ukraine to adopt its Constitution as an independent State has been used to continuously improve the text and that the text finally adopted takes into account many of the comments made by the Commission on earlier drafts.

The Constitution will now have to pass the test of practice and the difficult economic situation of Ukraine may delay the full implementation of the new principles and endanger the realisation of the positive achievements of the text. Particular attention will have to be paid to the adoption of legislation ensuring that the Transitional Provisions of the Constitution do not lead to the maintenance of elements of the old system during a considerable period of time.

However, after having followed closely for several years the constitutional process in Ukraine, the Commission sees more grounds for optimism. While the text establishes a strong executive under the leadership of a powerful President, checks and balances are present which should prevent recourse to authoritarian solutions. The principles of the Rule of Law are well reflected in the text of the Constitution. The setting up of democratic local government as well as the important role assigned to the Constitutional Court should contribute to the establishment of a democratic culture in Ukraine.