

Some remarks on the Draft Constitution of Ukraine

by Klaus Berchtold (Austria)

The following remarks on the draft of the Constitution of Ukraine are intended to serve as a basis for discussion:

1. The right to equality before the law is not contained in the draft. Article 12 provides only for equality in the exercise of constitutional rights and freedoms, Article 50 only equal protection by the law.
2. No minority rights are embodied in the draft. This seems to me a grave lacuna, worth reconsideration.
3. It would be advisable to recognise conscientious objectors and to provide for alternative service. Something to that effect could be inserted into Article 61.
4. It would be advisable to add to Article 26 that the right to private property includes the right to buy private property.

As far as expropriation is concerned a provision should stipulate under what conditions expropriation is admissible and that in a case of expropriation adequate compensation is to be paid.

5. To Article 48 the parent's right should be added to ensure such education and teaching as is in conformity with their religious and philosophical convictions.
6. To state clearly the principle of the rule of law the following wording of Article 65, last para., might be considered: "The exercise of the executive and the judicial power shall be based on law".
7. In the context of Article 22 it should be pointed out that Article 5 of the European Human Rights Convention lists the cases in which detention is regarded lawful and admissible.

Consideration should be given to the idea to insert a right to inform or to have informed relatives after detention has taken place in order to avoid incommunicado-detention.

8. There is no provision prohibiting retroactive penal laws.
9. There are no provisions concerning political parties contained in the draft. A guarantee of the freedom to found political parties might be considered.
10. In the context of elections a most important question is left open: whether the system of proportional representation or majority representation will be introduced. For the political life of the country the choice of either system is of such importance that in my view the question should be decided by the constitution.

Nothing is said about how the number of deputies shall be divided in the constituencies.

Article 122 para. 2 stipulates that there is a valid election only if a majority of voters have participated in the elections. Such a provision, I am afraid, could endanger elections and probably create political instability.

11. As to the referendum, Article 117 para. 3 provides for a "majority of the votes of the electorate". In fact, such a provision means that those who have not participated in the referendum are regarded as voting against the referendum. I think this does not correspond to reality. In my view it would be perfectly correct to speak of the "majority of the votes cast".

12. Article 130 para. 2 provides for the resignation from their previous position for members of the National Assembly. Such a provision seems to me not useful. I fear that, if members of the National Assembly have to resign, they lose their connection with the people and get into a certain isolation not knowing the needs and wishes of those they are representing. For the members of the National Assembly this means that, after their term in parliament is over, they have lost their roots in the former professional life. Under such circumstances many able persons will not be ready to serve as deputies. It may be added that such a provision is unknown in the western constitutions.

Para. 3 stipulates the members of the National Assembly not fulfilling their duties, may be recalled by the electors. This is a complicated procedure. In view of Article 133, point 1, it might be considered to delete this provision.

13. In view of the fact that, according to Article 135 para. 2, the Assembly has "exclusive legislative powers", I wonder why it is held necessary to list the different fields of legislation.

14. Article 136, point 1, deals with reports on the execution of the state budget. To whom are such reports made? Would it not be the duty of the government to report to parliament? In fact government is executing the budget.

Point 3 makes mention of parliamentary control over the "judicial power". I regard such a control as contrary to the independence of judges.

15. The provisions concerning decision-making in parliament are very rigid. Two-thirds of the members must be present (Article 144) and a decision is taken by a majority out of the total number of members. Under those conditions, a minority of deputies may paralyse the work of parliament very easily.

16. Article 169 deals *inter alia* with the provisional budget. The question remains what will happen after the first quarter of the year if no new budget has been voted.

17. According to Article 177 the President enjoys parliamentary immunity. May parliament, and eventually which house, deprive the President of his immunity according to Article 132, last para.?

18. How shall the President guarantee the security of civil rights and freedoms?

19. In the case envisaged in Article 187 the President should not be free to dissolve or not to dissolve the National Assembly. Since the background of the situation is a heavy conflict between the National Assembly and the President it would be only consequent to provide for an *ipso facto* dissolution of the National Assembly in the case of para. 2.

20. The relationship between the President and the Cabinet is rather unclear. If a political system is established, similar to that of the US, there is nearly no place for a Cabinet in the usual meaning. What will be the responsibility of the Cabinet in view of all the Presidents powers listed in Article 178?
21. Are the councils, mentioned in Article 196, elected?
22. Article 108, I think, goes too far. I see no problem if a judge is member of a political party or a trade union. This is also true as far as Article 194 and 199 are concerned.
23. According to Article 243 a citizen may complain concerning the constitutionality of laws and other legal acts, but only through the Representative of the National Assembly for human rights. The direct complaint to the Constitutional Court would be preferable. The "Representative". Such a system - on the other side - seems to me contrary to the separation of powers because the "Representative" is a parliamentary authority.