

## MEETING ON THE DRAFT CONSTITUTION OF UKRAINE (Kiev, 31 May - 2 June 1993)

### Secretariat memorandum

1. At the invitation of Mr Leonid Yuzkov, Chairman of the Working Group of the Constitutional Commission of Ukraine, the Rapporteurs on Ukraine Mr Ragnemalm, Mr Bartole, Mr Niemivuo and Mr Schweisfurth, accompanied by Mr Lamponi as Secretary, travelled to Kiev on 31 May - 2 June 1993.

Written reports were submitted by Mr Bartole (CDL (93) 27 and Addendum), Ms Botusharova (CDL (93) 28), Mr Niemivuo (CDL (93) 30) and Mr Rogati (CDL (93) 29).

2. Upon their arrival in Kiev, the Rapporteurs were informed that a new draft of the Constitution had been approved, which introduced changes notably in the chapters on Human Rights and on Territorial Structure, but without altering the substance of the previous version. Since the new draft was not available in English, the Rapporteurs decided to limit themselves to comments of a general nature on the latest draft in their possession (CDL (93) 22).

### Constitutional Commission

3.3.3. The Rapporteurs met with the Working Group first and with the plenary Commission later. A list of participants is appended.

4. The Rapporteurs were given a brief description of the present political situation in the Parliament, which is characterised by a weak party structure.

The 450 members of the unicameral Parliament are split into a large number of parties of unclear connotations in the political spectrum. This gives rise to a very confrontational climate, with the population being wary of political parties which all call themselves democratic but fail to take clear stands.

5. During the discussions on the draft constitution, the following main points were raised.

### Human rights

- The list of human rights appears to be exhaustive and in line with international instruments, but some of these rights seem to be more political goals than real, enforceable rights. The Ukrainian hosts explained that this is due to the constitutional tradition prevailing in the country, and to the fear that the people might not appreciate a constitution without such provisions.
- It is not clear why certain rights of a universal nature were recognised only to citizens, and not to everyone. It is not sufficient to delegate the determination of all the rights of foreigners to an ordinary law, as is at present envisaged.
- Restrictions to the rights should be modelled on the corresponding provisions of the European Convention on Human Rights.
- Articles should be shortened and drafted with a more careful and precise wording, in order to eliminate any misunderstanding or ambiguity: the ordinary citizen must be able to understand the Constitution.
- Art 105 (need to speak the State language in order to be eligible to Parliament) and Art 107.2 (Deputies not permitted to carry out entrepreneurial activities) are unduly discriminatory.
- The People's Legal Defender (Ombudsman), as foreseen in Art 58, is an indispensable institution, complementing the role of the courts of law, to guarantee protection and actual implementation of human rights. The decision to delete this article from the draft and to confer the powers of the Defender to the Procurator General is regrettable and should be reviewed.

### Division of powers

- Five centres of power could be recognised in the draft Constitution: the People, the President, the Cabinet, the Parliament and the Judiciary (including the constitutional court). In general terms, it must be said that the division of competencies and the system of checks and balances are not clearly defined.
- The People has the power to revoke the President (Art 150), the National Assembly (Art 128.2) and even individual Members of Parliament (Art 109.6), which are unusual and unwise provisions.  
Coupled with an extensive power of introducing legislation, in competition with Parliament, by means of referendum, this gives the People an excessive share of power with potentially destabilizing effects.
- Explicit provisions on the mode of election of the President are missing, there being only hints in Article 144 that it should be by direct popular vote.
- The Cabinet is in an awkward situation: Art 157 says at the same time that it is the highest body of executive power and that it is subordinated to the President, which is contradictory.  
Another contradiction exists between Art 158, by which the Cabinet is subject to the vote of confidence of the Parliament, and Art 148, by which the President may dismiss the Parliament when it expresses no confidence in the Cabinet. Also, the President should logically be able to dismiss the Cabinet, but Art 158 in fine requires that he should raise the issue of confidence before the Parliament. The draft as it stands seems to result from an attempt to compromise between certain features of presidential and of parliamentary systems which are however irreconcilable: the Rapporteurs advised that a clear-cut option be chosen.
- The National Assembly detains the legislative powers (Art 101 and following), but the President may issue "decrees and orders", the nature of which, legislative or otherwise, is not clear. Decrees of a purely administrative and executory nature are better left with the Cabinet.
- All the judges of the Constitutional Court would be elected by the Parliament, which would not guarantee sufficient independence to the Court when it is called upon to settle disputes between the powers of the State (Art 218). Election of one third of the judges by Parliament, one third by the President and one third by the judiciary was recommended.

- In order to further guarantee the independence of the Constitutional court, judges should only be elected for one non-renewable term. If appointment for life was preferred, the minimum age requirement of 35 years of age seems too low; the Court would become too conservative over the years and be an obstacle to evolution.

### Other questions

- The impeachment of the President (Art 155) should be limited to "intentional and serious" violations of the Constitution. It should not be pronounced by Parliament alone, but by Parliament after a recommendation by the Constitutional Court.
- The envisaged prohibition of double nationality is unwise and unjustified, since it frustrates legitimate aspirations to acknowledgment of their identity by persons belonging to minorities. It also runs counter to prevailing trends in Europe, and in the Council of Europe in particular.
- For the same reasons, more than one State language can very well be foreseen, as is often the case in multicultural States.
- Two levels of local government should be foreseen e.g. regions and municipalities. Whether they should be hierarchically subordinated to one another or should both derive their competencies from Acts of the central power will depend on the more or less decentralised structure that one wishes to recognize to the State.

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The Rapporteurs were received by the President of the Republic Mr Leonid Kravchuk.

The President, who is also co-Chairman of the Constitutional Commission, declared that the draft Constitution was born in the Ukrainian culture, although it drew a lot from foreign examples, and should be looked at with this in mind.

The draft had been forwarded to the Parliament, but discussions on the procedure for adoption were still open. A referendum on the main principles (e.g. choice between presidential and parliamentary systems, structure of local government, etc) was envisaged, after which Parliament would adopt the text according to the constitution now in force.

The Rapporteurs informed the President of the outcome of their meetings with the Constitutional Commission, and expressed the view that the draft Constitution contained considerable improvements compared to previous drafts but that further progress was needed in the fields of human rights and division of powers.

Concerning the procedure for adoption, they recalled that only the People detained the "pouvoir constituant": the proper procedure would be either a referendum on the whole text, or the adoption of the text by a constituent assembly elected for that purpose.

The Rapporteurs reiterated the readiness of the Commission to continue co-operation with Ukraine in the process of constitutional reforms.

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The Rapporteurs held a separate meeting with the General Prosecutor Mr Shyshkin and his closest collaborators. The main issues discussed were the following.

### Role of the "Prokuratura"

Mr Shyshkin explained that the Prokuratura is an institution stemming from the time of the Russian Empire, endowed with vast responsibilities including:

- ensuring enforcement of criminal law (and of civil law when it is in the interest of the State)
- supervision of prosecutors
- monitoring of a large sector of State economy
- defence of the interests of the State in Court.

The very latest draft of the Constitution foresaw that the Prokuratura should also carry out the tasks attributed in previous drafts to the People's Defender (Ombudsman).

The Rapporteurs considered that the People's Defender should be a completely separate authority, with tasks that could not be exercised by the same office that has the job of prosecuting citizens, lest citizens lose any confidence that their rights will really be protected.

Mr Shyshkin, who is also Deputy Co-Chairman of the Constitutional Commission, agreed with this analysis and undertook to report to the Constitutional Commission.

### System of Courts

At present, two branches of the judiciary coexisted, having competence over matters of, broadly speaking, civil law: the "courts of arbitration" or "economic courts"(settling cases when the two parties are legal persons) and the ordinary courts (settling cases when one of the parties is a physical person).

The Rapporteurs advised that this distinction would no longer be justified in a market economy State, and recommended that a more modern approach be chosen: either a division of competencies between ordinary courts and administrative courts, or the attribution of the whole competence to ordinary courts.

In addition, a Court of Auditors should be established, which would take over the control over the finances of the local authorities, now exercised by the Ministry of Finance.

### Independence of the judiciary

The Rapporteurs considered that certain practical measures should be taken in order to ensure the independence of the judiciary, in particular

appointment for life after a competitive examination. When appointing judges under Art 173, the President of the Republic should have no discretion. Of course, a fair salary was also a means of guaranteeing independence.

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At the end of their stay, the Rapporteurs gave a Press Conference. The Ukrainian television carried extensive reports of the meetings with the Constitutional Commission and with the President.

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The Rapporteurs and the Secretariat wish to put on record their gratitude for the hospitality offered during their stay in Kiev.

## APPENDIX

### LIST OF PARTICIPANTS

#### European Commission for Democracy through Law

Mr Hans RAGNEMALM, Justice of the Supreme Administrative Court of Sweden  
Prof Sergio BARTOLE, Professor at the University of Trieste, Italy  
Mr Matti NIEMIVUO, Director at the Department of Legislation, Ministry of Justice, Finland  
Prof Theodor SCHWEISFURTH, Professor at the University of Frankfurt/Oder, Germany  
Mr Roberto LAMPONI, Deputy Secretary of the Commission

#### Constitutional Commission of Ukraine

##### Members of Parliament

Mr Shyshkin, General Prosecutor, Prokuratura of Ukraine  
Mr Nossov  
Mr Golubets  
Mr Gopei  
Mr Sleduev  
Mr Korniyev  
Mr Shulga, Head of the Parliamentarian Group on Relations with the Parliamentary Assembly of the Council of Europe  
Mr L. Yuzkov, Head of the Working Group of the Constitutional Commission  
Mr Golovaty, President of the Ukrainian Legal Foundation

##### Members of the Working Group

Mr Matsyk  
Mr Kozubra  
Mr Kopeichikov  
Mrs Tichonova  
Mr Kozniyenko  
Mr Zayets  
Mrm Martinenko