Strasbourg, 2 June 2009 **CDL(2009)097***

Opinion no. 534/2009 Eng. Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW OF UKRAINE AMENDING THE CONSTITUTION

PRESENTED BY THE PRESIDENT OF UKRAINE

by

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Summary

Overall, the LSG provisions of the new Constitutional draft would enhance the decentralisation in Ukraine, and help clarify the distribution of responsibilities between central and local governments. The draft is mostly consistent with the ECLSG, and with the current concept of the ATR (administrative-territorial reform). It is favourable to IMC (inter-municipal cooperation). However, the CoE recommends a number of improvements. Some provisions need to be revised, shortened, or even passed on to the legislator. Specific recommendations include:

- to reconsider the creation of the Senate, as the composition foreseen in the draft would entail an unequal representation of the regions (oblasts);
- to improve the definition of LSG, bringing it more in line with the definition given by the European Charter of Local Self-Government;
- to set limits to LSG entitlement to delegate its powers;
- to distinguish the right to conclude agreements and establish joint institutions / inter-municipal co-operation (IMC) structures to perform tasks of common interest from the right to belong to associations;
- to recognise the *rayon* and *oblast* self-governments' own role and sphere of competencies, and the existence of supra-municipal interests of the rayon and oblast communities;
- to present the provisions on LSG and on State executive bodies in two separate chapters, to avoid the confusion of two very different kinds of public authorities;
- to provide explicitly for full compensation of the financial burden resulting from delegation of powers from state to LSG;
- to improve provisions on administrative supervision and, in particular, to delete the provision which authorises a control of local governments' actions not only on their conformity with the Constitution and the law, but also on their compliance with government decisions;
- to review and simplify Articles 156, 157, and 159 which are too detailed.

The present appraisal of the draft Law "On Amending the Constitution of Ukraine" was prepared by the DGDAP - Directorate of Democratic Institutions, in cooperation with the CoE expert, Professor Gérard Marcou (France). It focuses only on provisions which concern local self-government.

The current Constitution devotes three chapters to: the territorial organisation of the State (Chapter IX); the Republic of Crimea (Chapter X), and local self-government (Chapter XI). In the draft, these matters are joined in a single Chapter IX: "Local Self-Government and Territorial Structure of State Power". However there are other fundamental provisions in the draft which refer to or have an impact on LSG (local self-government). The present report discusses the most significant LSG provisions.

Fundamental provisions on the right of local self-government

There are three fundamental provisions on LSG in the draft:

- Article 6, stating that the people of Ukraine *"exercise power directly and through bodies of state power and bodies of* ***local self-government****"*.
- Article 8, according to which, "in Ukraine, local self-government is recognised and guaranteed". It also indicates *"the local self-government is exercised by the communities' residents directly and through bodies of local self-government"* and that the LSG rights *"are protected by the court"*.
- Article 155 which contains the definition of LSG.

The explicit recognition by the draft of the right to LSG is to be commended. However, improvements are certainly possible, starting from the definition of LSG in Art 155, par. 1.

According to this provision LSG is "*the right and ability of the community residents to regulate and manage the public*[1] *affairs of local significance in the interests of local residents*[2] *within the limits envisaged by the Constitution of Ukraine and laws*".

The comparison of this definition with the one in Article 2 of the European Charter of Local Self-Government (ECLSG) shows that the draft could be improved. A first issue is that, following the reference made by Art 155, par.2, to Art 3, par.3, second line, the communities which are entitled to LSG rights are those of the *"cities, towns, villages or associations of several settlements"*. This is problematic as *rayon* and *oblast* communities are not recognised as such, although LSG are elected also at these upper territorial levels.

In addition the definition given by Art 155:

- refers to "residents" but not to the elected local authorities, who will normally exercise the LSG rights;
- does not guarantee explicitly that a "substantial share" of public affairs will be regulated and managed by the local communities and their bodies.

Territorial organisation and local self-government

Provisions on LSG of Chapter IX of the draft are to be considered together with its Art 3. This article provides for a clearer hierarchy of Administrative Territorial Units (ATUs), with three levels: municipal (*hromada)*, district (*rayon)* and regional (*oblast*) units.

The *hromada* becomes an institution that can be based on various kinds of settlements (Art 3, par. 3) and is no longer confused with a settlement in itself (as it is the case in the present Constitution and in the law on LSG of 1997)[3]. The draft makes it impossible for a municipality to be included in another municipality (Art. 155 par.3). As a consequence, city districts which could be created freely by municipal councils (Art 157, par.3) will no longer be vested with municipalities' rights. These provisions would bring a positive change.

However, they might create a problem for Kyiv (and Sevastopil), since the draft gives no constitutional ground for a special status of the capital city (or other cities)[4]. Instead, the draft provides for the possibility to confer by law the status of an *oblast* or of a *rayon* to some cities, depending on the number of inhabitants (Art 3, par.4).

The Autonomous Republic of Crimea (ARoC) is considered as a unit of the *oblast* level (Art 3, par.3) as this is already the case under the present constitutional arrangements. The same applies to Kyiv according to Art 86, par.3, and to the transitional provisions.

[1] The English translation is not very accurate: "social affairs" should be "public affairs".

[2] Again, the English translation is wrong. In Articles 155, 156 and 159, the English translation refers alternatively to "residents" and "citizens". The Ukrainian version uses "residents" consistently.

[3] This proposal is consistent with the Concept of Administrative-Territorial Reform of September 2008 (also appraised by the CoE).

[4] Art 3, par.2, of the draft only states that Kyiv is the capital city of Ukraine, while the present Constitution provides for a special status for Kyiv and Sevastopil (Art133, par.3).

Differently from the present Constitution, the draft does not include a list of the *oblasts*. This has a major implication: the existence of the *oblasts* is not guaranteed and the existing oblasts may be eliminated[5].

Indeed, Art 3, par.5, of the draft ascribes the responsibility to determine the territorial structure to the legislator. This could facilitate streamlining the territorial organisation of Ukraine with a broader competence of the legislator to change the boundaries and the number of units of each of the categories listed in Art 3, par.3.

The Constitution gives however a basic rule to respect in defining the territorial organisation: the territorial structure of Ukraine is based on the principles of the "*balanced socio-economic development*" (Art 2, par.3); this implies a commitment of the national government to achieve such a structure, taking into account "*historical, cultural and ethnical peculiarities*", as mentioned in the same provision.

Finally, the draft includes a proposal of establishing a Senate as a chamber of regions. This is not consistent with the fact that the draft also seeks to reinforce the "unitary" state. Also, if a true regional representation were to be guaranteed, it is difficult to understand why all regional units would have the same number of representatives while there are important demographic inequalities between these units (e.g. 4.6 million inhabitants in the Donetsk *oblast*; 900 thousand inhabitants in the Chernivtsi *oblast*). This would lead, in practice, to great inequality between voters (the weight of their votes) in different regions.

Right to associate and to co-operate

A number of provisions may facilitate co-operation between municipalities or with councils of the upper level: the possibility to delegate powers to other councils on the basis of an agreement (Art 157, par.4); the possibility of agreements for joint projects or joint financing of enterprises and organisations (Art 158, par.2); the possibility to establish voluntary associations to resolve common issues (Art 160, par.1); the right to exercise trans-border co-operation with LSG bodies of other countries (Art 160, par.2). These changes would also be positive, especially if Ukraine keeps a high number of small municipalities, since the scope of the territorial reform has not been decided yet. However, some improvements would be required.

On the one hand, the possibility of delegation should not be unlimited and cannot lead to void the local authorities of certain core functions[6]. Therefore, the recommendation is to complete the relevant provisions with a formula making possible a judicial review, e.g., "The delegation should not deprive the delegating council of the substance of self-government: the budget and the accounts may not be delegated."

On the other hand, the right to delegate or conclude agreements in not sufficient and it is necessary to recognise the right to form consortia or other joint institutions / inter-municipal co-operation (IMC) structures to perform tasks of common interest. This right shall clearly be

[5] The transitional provision 10, which makes it impossible to "eliminate" the existing oblasts for a period of five years from the entry into force of the new constitution, is "*a contrario*" explicitly admitting that they can be eliminated after this initial period.

[6] Art 157, par. 4, and Art 159, par. 5, do not limit the scope of the powers that municipalities may delegate to other councils on the basis of an agreement. As a consequence, it would be quite possible to have municipalities stripped of most responsibilities on the basis of an agreement with the district council or with the municipality of the neighbouring city. This flexibility is probably being used to bypass obstacles to the consolidation of municipalities, but the requirement of an agreement may not suffice to avoid abuses.

distinguished (as in Art 10 of the ECLSG) from the right to belong to associations for the protection and promotion of common interests.[7]

Relationships between municipalities and the district and regional councils

The draft keeps in line with the current Constitution regarding the relationships between municipalities and the district and regional councils. The councils, as well as their elected executive bodies, will not represent specific territorial interests at the district or regional level, but they will continue to "represent the common interests of municipalities" (Art 159, par.1), although councils will be directly elected (par.2).

This should be considered further: it seems important to recognise the *rayon* and *oblast* self-governments' own role and sphere of competencies, and the existence of supra-municipal interests of the rayon and oblast communities (which are different from the common interest of the *hromadas*). If this is not the case, direct elections of rayon and oblast councils (although most welcomed and commended) would make little difference in practice.

The distinction between state and local government administrations

The draft brings a very important change by introducing a clear separation between LSG and state administrations at the regional and local level (as it has been the case in France since 1982). However, as mentioned before, provisions on "State Power", i.e. de-concentrated state executive bodies and their relationship with LSG authorities appear in Chapter IX. The recommendation is to present the provisions on LSG and those on State executive bodies operating at territorial level (and their administrations) in two separate chapters, to avoid the confusion of two very different kind of public authorities.

According to the draft, a head of the state administration will be appointed by the President of Ukraine in each unit of the regional level, including the ARoC (Art 166), as separate from the executive body of the regional council, whereas the regional councils and the district councils will elect their own executive (Art 159, par.6).

The state powers will be exercised locally by state authorities, while all LSG powers will be exercised by LSG bodies, except in the case when specific state duties will be delegated to LSG bodies and exercised on behalf of the state (Art 161). This provision should stimulate the development of LSG at all levels. Art 161 stipulates that the costs of delegated functions shall be covered by budget transfers or by the transfer of resources or properties. However, this provision does not guarantee that the amount of resources allocated will cover the costs of the delegated functions. Therefore, the recommendation is to modify the provision and provide explicitly for full compensation of the financial burden resulting from delegation, thus avoiding the risk that state tasks are delegated mainly to alleviate the pressure on the state budget.

The heads of state administrations will be able to establish offices in the districts and the cities to perform the state functions (Art 166, par.7). It might be suitable to specify that they shall be different from the local administration of self-government bodies.

Supervision

The heads of state administration will be in charge of supervision and they should be the main relay for the implementation of central government's policies. However, provisions on administrative supervision are not satisfactory.

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[7] This distinction is also important because the legal forms for IMC structures and the « advocacy » associations may be completely different. Joint IMC authorities should be public law authorities, while this is not necessary for local government associations *stricto sensu*.

Article 166 of the draft provides that the Head of State Administration, in the respective ATU, *"exercises control over the observance of the Constitution, laws, acts of the President of Ukraine, the Cabinet of Ministers of Ukraine by territorial offices of ministries, other central executive authorities and local governments as well as their officials"*. The same article clarifies that the Head of State Administration in the ARoC exercises this supervisory power on the acts of the Verkhovna Rada and the Council of Ministers of the ARoC.

In other terms, this article authorises a control of local government (and ARoC) actions not only on their conformity with the Constitution and the law, but also on their compliance with government decisions. This would be a major threat to true LSG and should not be admitted.

Article 162 says that the acts of LSG bodies may be suspended by the Head of state administration with a simultaneous appeal to the court, for reasons of nonconformity to the Constitution of Ukraine and to laws. This open-ended provision may raise an issue of proportionality of the interference on the exercise of the LSG rights: while the power to challenge the conformity of LSG acts in the court is perfectly legitimate (and even to be required), the possibility to decide on the suspension of their effects should be reserved to the competent court (upon request of the Head of state administration) in case this is required (e.g. for the protection of citizens' rights, which would be difficult to restore, or to avoid financial losses, which would be difficult to recover).

The Constitution and the LSG legislation

While it is commended that some basic principles are clearly stated in the draft, the scope and the large amount of detail (namely on electoral arrangements, competencies and organisational issues) may create problems[8]. Therefore, the recommendation is to review and simplify Articles 156, 157, and 159 which are too detailed.

Art 76 is sufficient for the right to vote and to be elected. There is no need to mention in the Constitution the terms of office for the local government bodies.

Concerning the scope of competencies, the lists included in articles 157 (for the municipalities) and 159 (for *rayon* and *oblasts*) as they appear in the draft are problematic.

If the intention is to exclude the possibilities of having municipal functions in the area listed for *rayons* and *oblasts*, the scope of municipal functions may be seriously reduced in practice. It is also unusual that a unique list is applicable to *rayons* and *oblasts*. These lists should therefore either be seriously reconsidered, or maybe deleted.

For the municipalities, the only provision that can be considered necessary is the general competence clause (Art 157, par.1 in fine). Rightly, the general competence clause is not granted to district and regional councils.[9]

However, an exception can be made in case of the ARoC, since the Constitution has to recognise and guarantee a special status and competences to the Parliament and the government of the ARoC.[10]

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[8] The danger of over-constitutionalisation of LSG is illustrated by the Constitution of Hungary: any change in the LSG legislation requires the same majority as for the revision of the Constitution. As a consequence, any change of some significance becomes almost impossible in a divided parliament.

[9] This is protective of municipal self-government rights (and is also consistent with the option to make them representatives of common municipal interests of their territory, although this should be reconsidered too).

[10] It could be noted that the list of competences ascribed to the ARoC and its Parliament in the draft is the same as in Art 137 and 138 of the present Constitution; the same for the possibility to delegate other functions to the ARoC.