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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION
ON THE DRAFT LAW OF UKRAINE
AMENDING THE CONSTITUTION

PRESENTED BY THE PRESIDENT OF UKRAINE

Adopted by the Venice Commission
at its 79th Plenary Session
(Venice, 12-13 June 2009)

based on comments
by

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I. INTRODUCTION

1. By letter dated 6 April 2009 the Permanent Representation of Ukraine to the Council of Europe asked the Venice Commission to give an opinion on the draft revised Constitution submitted by the President of Ukraine to the Verkhovna Rada of Ukraine on 13 March 2009. The text of the draft appears in document CDL(2009)068. It was obviously translated hastily and the text is often scarcely comprehensible. Some remarks made in this Opinion may be due to problems of translation.

2. The present opinion is based on comments by Ms Nussberger (Germany), Mr Paczolay (Hungary), Ms Suchocka (Poland) and Mr Tuori (Finland) as well as by Mr Marcou (France, expert of the Directorate General of Democracy and Political Affairs). It was adopted by the Venice Commission at its 79th Plenary Session in Venice on 12-13 June 2009.

3. The draft has to be seen against the background of the present constitutional situation in Ukraine. The 1996 Ukrainian Constitution was amended in December 2004. These amendments weakened the- previously very strong- powers of the President in a somewhat unfortunate manner (cf. the assessment by the Venice Commission CDL-AD(2005)015). Following this revision the powers of President and Government are ill-defined and overlapping and this has contributed to a constant inter-institutional conflict which threatens to paralyse the functioning of the state institutions. There have therefore been a number of efforts to revise the Constitution and the Venice Commission adopted in particular an opinion on the so-called Shapoval draft (see document CDL-AD(2008)015).

4. The presidential proposal is thus a further attempt to finally arrive at a constitutional reform. Its main goal is to find the best way to solve the tension existing in Ukraine among the President, Parliament and the Council of Ministers, as well as to guarantee more efficiency of the state power by a better division of functions and by avoiding a dualism in the functioning of executive power. As it has been pointed out in the explanatory note: *“These complex changes to the Constitution are also evoked by practical implementation of its provisions(...) imperfections of the checks and balances system which should have been securing balance and integrity of this mechanism”*.

5. Under the terms of Article 155 of the current Constitution any constitutional reform has to be approved by a two-thirds majority in the Verkhovna Rada, amendments to Chapters I, III and XIII of the Constitution in addition have to be approved by a referendum. The present draft is the proposal of a new version of the Constitution, which- while often similar to the present text- contains amendments to all Chapters. It thus requires for its adoption both the two-thirds majority of the constitutional composition of the Verkhovna Rada and approval by referendum.

II. COMMENTS ON THE TEXT

Preamble and Section I – General Principles

General comments

6. The draft law includes only minor changes to the Preamble and Section I (General Principles).

Preamble

7. The Preamble was changed in some details to reflect basic political decisions on the future of Ukraine such as the reference to the unity of the State, to the multi-national composition of the Ukrainian people and to the integration in the European community (“is an integral part of the European community”). Every State is free to determine basic principles in the Preamble; what is considered to be relevant in this context cannot be assessed from the legal point of view. It is also a symbolic amendment to claim that the Constitution is adopted “by the Ukrainian people” and not by the “Verkhovna Rada on behalf of the Ukrainian people”.

Article 2

8. In Art. 2(3), a new provision lays down a basic rule to be respected when defining the territorial organisation: the territorial structure of Ukraine is based on the principles of the “*balanced socio-economic development*” (Art 2(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.

Article 3

9. This article provides for a clearer hierarchy of administrative territorial units, 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(3) and is no longer confused with a settlement in itself (as is the case in the present Constitution and in the law on Local Self-Government of 1997)¹. 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)². 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(4). The Autonomous Republic of Crimea is considered as a unit of the *oblast* level (Art 3(3) as this is already the case under the present constitutional arrangements. The same applies to Kyiv according to Art 86(3), and to the transitional provisions.

10. Art 3(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(3). This is confirmed by the fact that, 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 eliminated³.

Article 8

11. Art. 8 of the draft law includes new provisions on local self-government. It is particularly welcome that throughout the draft again uses the term of local self-government, as opposed to the Shapoval draft which used local government. However, the meaning and legal significance of the new provision in Art. 8(3) (“*The State provides adherence to the Constitution of Ukraine and laws during exercising local self-government*”) remains unclear. The same goes for Art. 8(4) (“*The rights of local self-government are protected by the court.*”)

Article 10

12. Art. 10(2) confirms the primacy of international treaty-law over contradicting domestic law. This new provision is to be welcomed.

Article 12

13. The provision on citizenship was transferred to the section on general principles. The provision that a citizen of Ukraine cannot be expelled or surrendered to another State might cause problems in connection with the international obligations of Ukraine on the basis of the Rome Statute. Many constitutions have been changed in order to comply with the demands of international law in this context.

¹ This proposal is consistent with the Concept of Administrative-Territorial Reform of September 2008 (also appraised by the CoE).

² Art 3(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(3).

³ 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.

Article 16

14. According to a new provision in Art. 16(1), "*property shall not be used to the detriment of the rights, freedoms and dignity of a person, interests of society, deteriorate ecological situation and natural qualities*". The proposed provision includes legitimate considerations justifying restrictions on the use of property. However, taking into account the direct effect of the Constitution (Art. 9(2)), the provision may lead to legal uncertainty. Therefore, it is recommendable that it contain a reference to more detailed regulation through ordinary law.

Article 18

15. According to Article 18(1) "*the State guarantees the freedom of political activity not prohibited by the Constitution of Ukraine*". In comparison with the Constitution in force (Art. 15), reference to prohibitions through law has been deleted. As stated in the opinion on the Shapoval draft, this would explicitly eliminate the (ab)use of the provision as a constitutional authorisation for further restrictions on political activities. On the other hand, it has to be acknowledged that legal regulations on political parties will always be necessary. The new wording must not be misinterpreted.

Section II: Human and citizens' rights, freedoms and duties**General comments**

16. The section on human and citizens' rights, freedoms and duties is in large parts modelled on the provisions proposed in the Shapoval draft. Therefore, the Venice Commission can uphold its generally positive assessment (CDL-AD(2008)015).

17. The catalogue of rights protected continues to be very complete and shows willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights. It is especially welcome that many of the positive changes made by the Shapoval draft in comparison to the present Constitution have been upheld. This applies e.g. to the definitive abolition of the death penalty (Art. 28(2)), to the introduction of new rights such as the right to family and respect for family life, the right to review by a higher court and the right to seek pardon or mitigation of the sentence, to the redefinition of some of the citizens' rights as rights of everybody as well as to the concretisation of some of the restrictions. It is particularly welcome that the principle of proportionality has been explicitly introduced into the text of the Constitution.

18. Nevertheless, some problems remain. Thus, e.g. the list of rights that can be restricted in cases of emergency still seems to be excessively long. The status of the social guarantees has not yet been clarified. It will be the task of the constitutional case law to further elucidate the guarantees and to interpret them in such a way that they are not only of theoretical value, but effectively applied in practice.

Article 25

19. Article 25 provides that "*the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws*" ... This very apodictic statement that is also contained in the present constitution might cause problems if laws are necessary to solve conflicts between different human rights and solutions are only possible based on compromise formula.

Article 27

20. The catalogue of criteria not allowing for any "privileges or restrictions" has been widened and now also contains the criterion "minority affiliation". This might cause problems, as minority protection on the basis of international law requires accepting some sorts of privileges (e.g. use of the mother tongue; special schools). It is important to interpret Article 27 in the light of Article 56 which allows the use of minority languages).

21. The article does no longer contain a provision on affirmative action in favour of women. This is in conformity with new approaches to gender equality abstaining from granting women special privileges, especially if these are based on a traditional conception of the different roles of men and women.

Article 28

22. As in the Shapoval draft the death penalty is clearly and explicitly abolished. Although the death penalty was already previously declared unconstitutional by the Constitutional Court, this additional clarification is highly appreciated.

Article 30

23. The right to family and respect for family life was added. Yet, it has to be stressed that in the former version the aspect of non-interference in family life was formulated in a clearer way.

Article 32

24. In contrast with the regulation in other constitutions, the provision on disability has not been inserted in connection with the principle of equality. The draft stresses the State's obligation aiming at independence, social integration and full-fledged participation in social life. The practical application will prove the efficiency of this approach.

Article 33

25. Article 33 regulates the human rights guarantees for foreigners, but provides neither a constitutional minimum guarantee, nor circumscribes possible legal restrictions. The Shapoval draft was clearer in this regard since it provided that human rights of foreigners can be *"restricted only by laws for the purpose of protection of national security or territorial integrity"*.

Article 34

26. It is welcome that in the case of an arrest a confirmation by a court is necessary within 24 hours and not only within 72 hours.

Article 37 / Article 55

27. Article 37 grants to every citizen the right to examine information about himself/herself, that is not a State secret. The problem is that this wording allows an arbitrary definition of what a State secret is. Therefore the individual is not effectively protected. In this context it is also questionable in how far information on the environment can be classified as "state secret". This would undermine the rights guaranteed in Article 55.

Article 48 et seq.

28. In connection with the comprehensive list of social rights contained in the draft it is worth to quote the Venice Commission's assessment in its last opinion on the Shapoval draft:

"The wording of economic, social and cultural rights is still identical to the wording of civil and political rights. Especially if there are no further qualifications to the rights guaranteed, unrealistic expectations might be created. It depends on the courts to interpret these rights without interfering in the field of activity of the legislator. It must be secured that the difficulties in implementing economic, social and cultural rights must not have negative consequences for the direct implementation of civil and political rights."

Article 57

29. It might be mentioned that the protection of the results of the intellectual and creative activities is not only contained in Article 57 (2), but also in Article 46.

Article 58

30. The wording of Article 58 (Everyone has the right to protect his/her rights and freedoms against violations and infringements by any means not forbidden by law) differs from a very similar provision in Article 28 para. 3: *"Everyone has the right to protect his/her life and health,*

life and health of other people from illegal encroachment.” For the sake of clarity duplications should be avoided, especially if the wording is not consistent.

Article 59

31. The introduction of a right to a fair trial is a positive change of the text.

Article 68

32. Article 68 explains that the restrictions of human rights must be proportional to the aim set forth by law and necessary in a democratic society. It thus takes up the formula used in the ECHR. This change is welcome.

33. The list of rights which can be restricted in emergency situations is excessively long. The conditions required for declaring a state of emergency or martial law are nowhere defined in the draft.

Article 73

34. Article 73 takes up an innovation that was already proposed in the Shapoval draft. It is therefore appropriate to quote the Venice Commission’s comment on the relevant provision:

“This Article on the rights of legal persons is new. It refers only to legal entities registered on the territory of Ukraine, thus excluding foreign legal entities active in Ukraine without registration and not-registered Ukrainian legal entities (if registration is not a precondition for the creation of a legal person). The wording of the provision might cause problems as registration might become a precondition for the exercise of basic human rights not only for foreign, but also for Ukrainian corporations. For example, the arbitrary refusal to register an organisation would not be covered by the human rights provisions of the Constitution.”

Section III: People’s Will

General comments

35. The draft provides a more detailed regulation of elections and referendums than the current Constitution. On elections, the regulation is essentially the same as at present but several additional provisions are included in the text of the Constitution. This reflects also the continuing efforts made by other constitutional drafts to change and improve the electoral system, and especially the regulation of the referendum.⁴ This chapter of the draft draws again heavily on the draft constitution of Ukraine prepared by a working group headed by Mr V.M. Shapoval.

36. Section III clearly enlarges the possibilities of direct democracy. The scope for popular initiatives is very much extended, local popular initiatives are introduced into the Constitution, constitutional amendments always require approval by referendum and the possibilities of holding referendums are expanded. On the other hand, in a controversial and arbitrary way, the draft tries to limit the possibility of holding referendums by enlarging the scope of prohibited subjects in an ambiguous way which will make control by the Constitutional Court very difficult.

37. As pointed out already in Opinion CDL-AD(2008)015, the scope for direct democracy is generally a matter of political choice. As elements of direct democracy are very pronounced in the new draft, the Venice Commission reiterates its earlier comments made in CDL-AD(2008)015:

“As the Venice Commission underlined earlier “Direct consultation of the people via referendum has long been the subject of heated discussion between legal and political

⁴ CDL-AD(2009)003 Comments on the draft Law on the all-Ukrainian referendum by Mr O. Lavrynovych.

experts, sociologists, politicians, and indeed the general public.”⁵ The Venice Commission addressed several times the topic of referendum. Recently, it summed up its standpoint in the Opinion on the Finnish constitution. Enlarging the possibility of holding referendums, or the introduction of their binding effect or of popular initiatives, is a political choice. However, it is a slippery slope. In the case of negative experiences or even abuse of the tool of referendum, it is very difficult to withdraw the means offered to the people by this specific form of direct democracy. Politicians and political parties would face serious difficulties when explaining such a withdrawal. Therefore, any widening in the regulation of referendum requires special caution.⁶ Enlarging the scope of referendums, and lowering the necessary thresholds, may be dangerous and undermine the ordinary functioning of representative democracy. Previous experience in Ukraine and other CIS states provides another reason for a prudent approach.”

Article 76

38. The general principles applicable to the elections are the same as at present. A strong accent is put on equal and direct suffrage, as a new provision underlines that “*all voters have equal amount of votes and vote in person*” (Art. 76). A new provision (article 76(4)) does not allow to hold local elections at the same time with the regular parliamentary or presidential elections. This limitation is acceptable, other countries also keep apart national and local elections.

Article 77

39. New provisions are introduced excluding the holders of certain offices from running at elections. Thus in the case of a quite large group the important right to be elected is restricted. This restriction is acceptable, even if some legal systems are more permissive during the campaign period, and similarly strict only once the candidates have gained the mandate which is incompatible with the office or position held before.

Article 78

40. Article 78 states that – contrary to the present version of the Constitution, where this applies to specific chapters only - constitutional amendments can be made exclusively by referendum. It is questionable if such a restriction is practicable. Experience in other constitutional systems shows that minor changes of the Constitution are part of the political everyday business. For instance, the German constitution was changed more than 50 times during 60 years of existence. Only a few of the changes were fundamental ones. On the other hand, the provision that changes of the territory and transfer of sovereign powers are possible only on the basis of a referendum can be found in many European constitutions.

Article 79

41. This article opens the possibility for a popular initiative to submit to referendum a draft law repealing – entirely or partly – an effective law (abrogative referendum). The requirements to initiate such type of referendum are quite strict (but less so than the present regulation, the present requirements are the double of those proposed): it may be initiated on the request of no less than one and a half million citizens of Ukraine eligible to vote, and on the condition that the signatures in favour of calling the referendum have been collected in no less than two-thirds of the *oblasts*, with no less than 50,000 signatures in each oblast. The fulfilment of the double requirement of a relatively high number of signatures, and that they should be collected in no less than two-thirds of the *oblasts*, proves that there is a real support in the population for an all-Ukrainian referendum.

⁵ *Referendums in Europe – an Analysis of the Legal Rules in European States*. CDL-AD (2005)034, para 12.

⁶ CDL(2008)002.

42. Paragraph 2 enumerates matters not subject to an abrogative referendum (the present Constitution prohibits only referendums on taxes, budget, and amnesty). The draft adds the following matters:

- laws on rights and obligations of the citizens and their guarantees,
- dues and fees, compulsory payments,
- legal responsibility,
- consent to be bound by international treaties of Ukraine or the termination or the suspension of international treaties.

43. The last limitation is acceptable and usual in the practice of countries allowing for referendum by popular initiative. However, the other three prohibitions are too vague. Basically all laws may effect the rights and duties of citizens, and this opens the way to potentially exclude all subjects from an abrogative referendum by interpreting this provision broadly. (According to Art.152 of the draft the Constitutional Court decides on the constitutionality of the popular initiatives.) The notion of “Legal responsibility” is not clear and vague. It is necessary to avoid indicating prohibited subjects that open the way to uncertainty and arbitrary interpretation.

44. A further limitation is specified in article 79(4): an all-Ukrainian referendum called on popular initiative may not be held more than once a year. This restriction aims at avoiding an excessive use of referendums but seems somewhat arbitrary.

Article 80

45. According to this article an All-Ukrainian referendum is effective if the majority of citizens of Ukraine eligible to vote participated in the voting. Decisions at an All-Ukrainian referendum are approved by the majority of citizens of Ukraine who participated in the voting (article 80). This double majority requirement is not unreasonable.

Article 81

46. A draft law on issues falling within the areas regulated by law may be submitted to the Verkhovna Rada of Ukraine on popular initiative supported by no less than 100,000 citizens of Ukraine eligible to vote. This is the genuine legislative popular initiative that is made possible on issues that belong to the competence of the legislative branch. This is the usual solution for defining the scope of the popular initiative. But the required threshold is surprisingly low.

Articles 82-83

47. These articles introduce at constitutional level the institution of local referendums. This is to be welcomed.

Section IV – National Assembly of Ukraine

General comments

48. The draft opts for the introduction of a bicameral system. This is a political choice which has both advantages and drawbacks. Since the territorial structure of Ukraine is not based on federal or regional principles, a bi-cameral system is not a natural choice. Nevertheless, even in a unitary system, it can improve territorial representation and, due to the longer term of office of the Senate, enhance continuity. On the other hand, bi-cameralism complicates legislative and budgetary processes and may introduce new causes for political dead-locks.

49. The Senate seems to be seen by the drafters as a “less political” body due to the system of election of senators. It consists of three senators who are elected in the Autonomous Republic of Crimea, each region (oblast), the City of Kyiv, and in the cities that have the same status as an oblast. The former Presidents, who were not removed from the office by the procedure of impeachment, are also members of the Senate. One third of the Senate is elected every two years. The Senate can be seen as an instrument which should balance the competences of Verkhovna Rada. The main role of the Senate is to participate in the legislative process, and to

replace the Verkhovna Rada in the process of the appointment to important positions in the state. One may have doubts whether this role of the Senate as a less political body is not overestimated.

50. All in all, the expected benefits and the possible disadvantages of a second chamber should be carefully weighed against each other.

Article 86

51. As regards the composition of the Senate, the draft provides that 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*; 900.000 inhabitants in the Chernivtsi *oblast*). This would lead, in practice, to great inequality between voters (the weight of their votes) in different regions.

Article 90

52. Art. 90(2-4) of the draft law includes provisions on positions or activities which are incompatible with the status of a people's deputy or a senator. Furthermore, additional incompatibilities could be established through law. However, it is preferable not to grant to an ordinary parliamentary majority the power to establish such incompatibilities. All the incompatibilities should be laid down at the constitutional level.

Article 92 et seq.

53. It is highly appreciated that the new draft does no longer provide that a member of parliament loses his mandate if he or she does no longer belong to the political party on whose list he or she was elected (so-called imperative mandate).

Article 97

54. Article 97 contains a comprehensive list of competences of the Parliamentary Assembly. Some of them give rise to remarks.

55. According to Art. 97 No. 11, the Chamber of Deputies would appoint and dismiss the Authorized Human Rights Representative of the National Assembly. A requirement of a qualified majority is recommendable to ensure the non-political nature of the decisions.

56. The Chamber of Deputies has the right (No. 12) to "*adopt by the law decisions on establishing and altering the boundaries of administrative and territorial units, establish and abolish oblasts, districts*". It is not clear in how far local referendums in the sense of Article 82 are indispensable preconditions in this respect. It is recommendable to change these provisions in order to guarantee a sufficient level of self-determination for the local population (see below). In this respect elements of direct democracy are extremely valuable.

57. The competence of naming and renaming inhabited localities, districts and oblasts (No. 15) does not seem compatible with basic requirements of minority protection.

Article 98

58. The right to an enquiry exists only in connection with the implementation of the Action Programme. It might be considered to provide for such enquiries on a broader basis.

Article 99

59. It is positive that the Verkhovna Rada cannot dismiss individual ministers but only express no confidence in the Cabinet as a whole. It seems to be arbitrary to restrict the vote of no confidence to once per year. A better system would be to introduce a constructive vote of no confidence (see the comments in the Opinion on the Shapoval draft).

Article 100

60. Art. 100 No. 5 includes the power of the Senate to dissolve, on the submission of the President and after receiving the opinion of the Constitutional Court, the Verkhovna Rada of the

Autonomous Republic of Crimea on the grounds of a violation of the Constitution of Ukraine. Such an extreme measure should only be possible provided that the Constitutional Court has found a violation of the Constitution and endorsed the measure. Moreover, the provision should be transferred to the same context as the other provisions on Crimea, preferably a separate section of the Constitution.

Article 103

61. The right of the President to dissolve the Deputies Chamber without giving any reason has already been expressly criticised in the Shapoval draft. The statement of the Venice Commission can be repeated here:

“Neither of the alternatives of the regulation on the pre-term termination of the authority of the Verkhovna Rada is satisfactory. As the deputies of the Verkhovna Rada get their mandate directly from the voters for a certain period of time, there should be compelling reasons for a pre-term termination. The suggested Article 95 (1) would lead to dissolutions also in situations where dissolution could be avoided. According to the text proposed the authority of the Verkhovna Rada “may be terminated pre-term by the President after consultations ...”. According to the text these consultations do not have any specific consequences. Even if the Chairman of the Verkhovna Rada, the Prime Minister and the leaders of parliamentary factions are opposed, the President can dissolve the Verkhovna Rada. Moreover, no grounds justifying the dissolution have to be provided.”

Art. 104

62. The comments on the Shapoval draft can also be quoted in relation to the regulation on the majority required for taking decisions in the Chamber of Deputies:

“This Article maintains the requirement of the current Constitution that nearly all decisions of the Rada require the majority of its constitutional membership. This makes decision-making excessively difficult, especially if there is only a thin majority. In accordance with usual parliamentary practice, for most decisions the majority of deputies present and voting should be sufficient once a quorum has been established.”

Article 105

63. It is interesting to note that the extensive list contained in the present Constitution on all the questions that have to be regulated by law has been replaced by a more abstract formula and thus reflects the German doctrine of the “Gesetzesvorbehalt”. The adoption of laws is required in order to regulate the “most important social relations”, to define rights and obligations of citizens and for some additional basic questions. This approach follows the one accepted in other constitutional systems.

Art. 107

64. It might be unrealistic to grant to the Senate only 15 days to approve or to reject a law, especially if the draft is very complex.

Art. 108

65. In most constitutional systems the President has the right to block a law by his veto. Nevertheless, the requirement to adopt a law vetoed by the President by two-thirds of the composition of the Deputies' Chamber is a very high hurdle.

Section V – President of Ukraine

General comments

66. The draft law does not really solve the issue of dual executive power, which constitutes one of the main background factors to Ukraine's political instability. The President's present powers would remain largely as they now are, and the draft law does not imply any change in the

present situation of parallel governmental and presidential administrative machineries. On the contrary, the fact that the President would retain the right of legislative initiative and that presidential bills, declared urgent, would enjoy primacy in parliamentary deliberations implies an important role of the President and the presidential administration in ongoing legislative processes. The introduction of a second chamber and easier recourse to national referendums are likely to weaken the position of the Cabinet of Ministers with respect to the President. On the other hand, the new rules on forming the cabinet of Ministers should make this body more cohesive

Article 112

67. The general description of the role of the President is similar to the current Constitution. Part of the text is, however, not comprehensible in the English translation. The new provision, according to which the President contributes to the coordination of state bodies, organs of local self-government, could be questioned. This should rather be a competence of the Cabinet of Minister.

68. Many constitutions, especially in the countries of Eastern Europe, grant to the President the competence "to guarantee the human and citizens' rights and freedom". As this is the basic task of the judiciary and in particular of the Constitutional Court, it is not quite clear in how far this provision confers concrete rights to the President or is just meant as a general description of the status of the President. There is a risk of abuse of such provisions.

Article 113

69. Article 113 contains the important restriction that the President can only be elected for two consecutive terms.

Article 118

70. Article 118 contains an extensive list of competences of the President. The abrogation of the constitutional provision which gave to the President the right to propose to the Verkhovna Rada the names of candidates to the offices of the Minister of Defence and the Minister of Foreign Affairs is positive. The new wording eliminates the double status of ministers, members of the Council of Ministers, guaranteeing a coherent procedure of forming the government.

71. Other powers are more problematic. According to a new provision (No. 1) the President *exercises leadership in the spheres of foreign policy, defense and national security.* ", while the Cabinet of Ministers is responsible for the *"implementation of foreign policy"*. By introducing directly into the Constitution the word "leadership" in the above mentioned areas, the drafters intended to underline the guiding role of the President and thus limit the power of the Cabinet of Ministers. It is nevertheless doubtful, whether this formula is sufficiently clear. It does not belong to legal language; it is rather a political description which can lead, in practice, to misinterpretation and conflicts.

72. Art. 118 No. 5 leaves some questions open. It is not clear what happens if the Senate does not approve the decrees. The use of armed forces is possible even without any approval of another constitutional organ. In this context the previous comment of the Venice Commission has to be recalled:

"There are no objections to defining the President's role in situations of war and emergency as predominant. Nevertheless the division of roles in item 6 is not quite clear. The Verkhovna Rada has to approve the decrees introducing martial law or a state of emergency. But it is not explained what are the consequences if the Verkhovna Rada declines to approve them. It seems advisable to grant to the President only a power of "first reaction" and to clarify that such a decree loses its validity if it is not approved by the Verkhovna Rada. According to the wording of the provision, the use of the armed forces in the event of a military aggression does not have to be confirmed by the Verkhovna Rada. It is recommended to grant to the parliament a right of approval also in this area."

73. Neither Art. 118 No. 5 nor Art. 100 No. 7 granting to the Senate the power to approve the President's declaration does include any provision on the situations where martial law or a state of emergency could be declared. Art. 68(2), in turn, provides for the possibility of restricting enumerated fundamental rights under martial law or in a state of emergency. Therefore it is recommended to include such a provision in the text.

Article 124

74. It should be specified which crimes justify the opening of an impeachment procedure.

Section VI – Cabinet of Ministers of Ukraine

General comments

75. Some of the proposed changes point to the strengthening of the parliamentary traits of the political system. Thus, according to the draft law, the Cabinet of Ministers would no longer be responsible to the President and the distinction between Ministers appointed on the proposal of the President and Ministers appointed on the proposal of the Prime Minister is abandoned. These changes are to be welcomed. Equally positive is the abrogation of the provisions on the formal coalition of the parliamentary majority.

Article 126

76. Art. 126 maintains the current constitutional description of the Cabinet of Ministers as the highest body within the executive power system. This formula has always raised some doubts especially in a system where there are two organs of executive power and one of them is elected in general elections. Which of the two should be defined as the highest one? How can one define, within the executive power system, the relationship between the president, who exercises his leadership for example in the sphere of defense, and the Cabinet of Ministers, which is defined as the highest body within executive power.

77. A positive solution proposed by the draft is the elimination of the double responsibility of the government, introduced by the amendments to the Constitution in 2004. In the light of the current Constitution (Art.113) the government is responsible to the President and to Verkhovna Rada. This type of responsibility must cause tensions among all three organs. Thus the proposed solution contains a much clearer principle of responsibility of the Cabinet of Ministers.

Article 128

78. The provisions on the forming of the government are much clearer than in the present Constitution and avoid recourse to a formal coalition of the parliamentary majority which was criticised by the Venice Commission in earlier opinions.

Article 131

79. Art. 116 of the present Constitution contains quite a long list of the competences of the Cabinet of Ministers. The new Art. 131 regulates only more technical competences but not the substantial ones. Does this mean that the Cabinet of Ministers is deprived of these competences (which should not be the case) or rather that they are supposed to be regulated by a lower act (a law on the Cabinet of Ministers). This solution seems not justified. The Constitution, which describes the Cabinet of Ministers as the highest body in the executive system, should also regulate the scope of the substantial competences of such a body.

Section VII – Courts and Justice

General comments

80. The Commission expressed its opinion on the judicial system in Ukraine several times. One of the most detailed opinions concerned the draft "Law on the Judiciary" and the draft "Law on the Status of Judges of Ukraine" (CDL-AD(2007)003) In those opinions the Commission provided indications on possible future amendments to the Constitution that should better

guarantee the independence of the Judiciary. In many respects the present draft follows the indications of the Venice Commission. In general, it is a clear improvement with respect to the present Constitution. In particular, the draft abandons the Soviet model of the *prokuratura* and thus complies with a commitment of Ukraine to the Council of Europe.

Article 134

81. In view of basic requirements of independence of judges it is generally not recommended to have judges elected by the public. The scope of the reference to elected judges in this Article is not clear. Article 142 on the appointment of judges does in effect rightly not provide for the election of judges by the people.

Article 135

82. There is a new provision inserted the content of which is not very clear. According to Article 135 *“courts shall not decide on the execution of powers of other bodies or officials, except in cases defined by law.”*

Article 137

83. It might not be necessary to repeat the principle of the “rule of law” in this context as it is already contained in Article 5. At the same time it is good to introduce the requirement of a *“reasonable time for considering the case”* in the list of main principles of judicial proceedings. Procedural requirements concerning criminal justice are taken out (prove of guilt, right to defence, prosecution by the Prosecutor on behalf of the State). This is acceptable since they are already contained in other sections of the Constitution.

Article 139

84. The Venice Commission already expressed its opinion that it is not appropriate that the parliament should have any role in lifting a judge's immunity. In Art. 139 of the draft the requirement of the consent of the Verkhovna Rada is replaced by the consent of the newly established Senate. This does not remove the concerns previously expressed.

85. According to paragraph 3 of this Article the State ensures the personal security of judges and their families. This goes too far. State protection can be provided to a judge only in specific circumstances.

Article 141

86. The question of appointment of judges was one of the crucial problems. The current Constitution provides two categories of judges, those appointed for a period of time (nominated for the first time) and judges appointed for an unlimited period of time. The new draft in Art. 141 replaces the provision of Art. 126 and provides for only one category of judges appointed for permanent terms. This is a welcome solution. It is also reasonable to fix a minimum age of 27 years and to determine experience and professional level by law.

Article 142

87. The second problem regarding the appointments of judges concerns the organ authorised to appoint judges. With regard to the present situation the Venice Commission pointed out that the *“appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, it would be necessary to change Article 128 of the Constitution.”* (CDL-AD(2007)003).

88. The present draft proposes new regulations in this area in art. 142. The English translation is barely comprehensible: *“Judges of the Supreme Court and judges of high specialized courts are appointed by the Senate within the recommends by the High Council of Justice, judges of other courts to appoint and dismiss the post of President of Ukraine by the Supreme Council of Justice (?) in accordance with law.”* It has to be noted positively that, with respect to the judges of the lower courts, parliament will no longer be involved in the appointment procedure. With

respect to the judges of the higher courts, decisions would be taken by the newly established Senate instead of the Verkhovna Rada. The Senate is also a part of the Parliament. Would it be possible for the Senate to be more apolitical than the Verkhovna Rada? This is one of the main arguments advanced to justify the introduction of the Senate into the Ukrainian system of power. The electoral system to the Senate is different from that to the Verkhovna Rada and in the opinion of the drafters the Senate would not be so strongly involved in political games. For the moment it is difficult to say how significant this change is, and to what extent it will better guarantee the non-political character of the appointments of judges. It depends also on the rules of procedure adopted by the Senate for the process of appointment of judges.

Article 143

89. The Venice Commission stated in its opinion that the principle of irremovability of judges is explicitly guaranteed in many national constitutions. It suggested to amend the Constitution of Ukraine in this respect to provide an additional guarantee. This suggestion has not been taken into account by the drafters. Articles 139 and 143 repeat the solutions that exist in the current constitution with some changes.

90. It might be dangerous to allow the dismissal of a judge from office for the "breach of oath". The oath a judge has to pronounce is not fixed in the Constitution. This provision might be (mis)used to get rid of judges as the provisions used in the oath will necessarily be very vague.

Article 144

91. The draft proposes a changed composition of the High Council of Justice. The new solution is welcome. The Council would consist of sixteen members, with the Congress of Judges appointing eight members and the President and the Senate appointing four members each. The draft does, however, not address the issue of the qualification of the persons to be appointed by the President and the Senate. In the explanatory notes it is stated that all members appointed by the President and the Senate should be retired judges. This demonstrates the intention that the High Council of Justice should be composed in a major part of judges. This is a good solution. Art. 144 also says that the chairman of the Supreme Court, the Minister of Justice and the Prosecutor General are not longer *ex officio* members of the HCJ, but that they may participate in the plenary of HCJ, at the meetings of the qualification commission of judges and the disciplinary committee of judges. This changes completely the structure of the Council which was strongly criticised by European institutions.

92. The role and competences of the HCJ are also better described, in line with European standards. *The HCJ: 1. forwarding submission on the appointment of judges to the office; 2. forwarding submission on the dismissal of judges from the office in cases stipulated by the part one of Art. 143 of the Constitution; 3. terminate the authority of judges in the cases stipulated by the part two of art. 143 of the Constitution (age 65, and death); 4. takes a decision on suspension of the judges in the cases stipulated by part three of art. 143 (in the case of the prosecution of a crime or to correct violations of the requirements for incompatibility); 5. decides to bring the judges to disciplinary liability.*

Article 145

93. The draft proposes some important and mainly very welcome changes to the Prosecutor's office. The provisions on the Prosecutor's office are to be included in the part of Constitution dedicated to the courts. This change is justified by the general role of the Prosecutor's office described by art. 145, "*Maintenance of prosecution in the court on behalf of the state is entrusted to the Prosecutor's Office*".

94. The Prosecutor General is appointed by the President with the "concern" (i.e. consent) of the Senate (at present with the consent of the Verkhovna Rada) but dismissed by the President acting alone on grounds determined by law (not by the constitution). The latter circumstance can weaken the position of the Prosecutor. The new draft excludes the possibility to take a vote of no confidence in the Prosecutor General. This solution is justified, as it helps avoid the politicisation of the prosecutor's office.

95. Particularly positive is the proposal to abolish the competence of the prosecutor (always strongly criticised by the Venice Commission), *“to supervise over the respect for human rights and freedoms and over how laws governing such issues are observed by executive authorities, bodies of local self-government and by their officials and officers”*. This provision is a typical example of a reminiscence of the old system of the Soviet *prokuratura*. The proposal to eliminate this provision from the Constitution of democratic Ukraine is therefore very welcome and an important step towards the fulfillment of the commitment of Ukraine towards the Council of Europe *“the role and functions of the Prosecutor’s Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards;”*

Section VIII – Constitutional Court of Ukraine

General comments

96. This Section is basically similar to the Constitution in force. Some amendments are clear improvements (as in the administration of the oath, the introduction of the constitutional complaint), some give rise to reservations (the appointment procedure). The draft preserves some solutions (as for the dismissal of judges) previously criticised by the Venice Commission.

Article 147

97. The proposed procedure for the appointment of constitutional court judges is identical to the one in the Shapoval draft. The Venice Commission therefore reiterates its previous comments:

“Under the Constitution in force constitutional judges are recruited through three different channels: the President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine. According to the draft the judges of the Constitutional Court would be appointed on the submission of the President of Ukraine by a two-thirds majority of the total membership of the Verkhovna Rada. In another case the Venice Commission welcomed the shift from the system of exclusive direct appointment of constitutional judges by the President to the mixed system providing for the election or appointment by the three main branches of power because this system has more democratic legitimacy.⁷ A contrario, abandoning this system and moving to a combination of nomination of candidates by the President and their election by parliament is not welcome, although the proposed solution as such is acceptable and known in other countries. Moreover, in the present situation in Ukraine the proposed system could easily lead to deadlocks and the monopoly of presenting proposals gives an extremely strong role to the President.”

98. As regards the requirements to become a constitutional court judge, the draft removes the requirement of residing in Ukraine for the last twenty years, and diminishes the period of practical experience from fifteen to ten years. Both solutions may help to enlarge the number of the possible candidates.

Article 148

99. This Article contains the text of the oath. It is a very important new provision that the elected judge has to take the oath at the plenum of the Constitutional Court, and not the parliament. It is recalled that in 2005 there remained only five judges of the Constitutional Court and the Court was not able to operate. The *Verkhovna Rada* seemed reluctant both to appoint the four judges remaining from its own quota and to allow for the procedure of swearing in to take place. At that time the Venice Commission proposed as one of the possible solutions to

⁷ CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.

swear in the new judges before the Constitutional Court (or, if this were not possible, before the chairman of the Court).⁸ The solution proposed by the draft follows the recommendation of the Venice Commission.

Article 149

100. As regards the guarantees for judicial independence, this Article refers to the rules applicable to the judges of the ordinary courts. Thus, the reservations expressed above under Article 137 with respect to the role of the Senate in lifting the immunity of judges apply here as well. The solution guaranteeing full independence would be to provide the plenum of the Constitutional Court with these powers. There is quite a long list of the possible reasons for dismissal, but these are clearly defined, and in case of the most delicate grounds for dismissal (the violation by the judge of requirements concerning incompatibility; and breach of oath by the judge) two-thirds majority decision is required. The same objection applies to the role of the Senate in the dismissal of constitutional court judges. Here the solution in the Shapoval draft providing the Court itself with this power was by far preferable.

Article 150

101. The draft maintains the current powers of the Constitutional Court. However, the Authorised Human Rights Representative and the Verkhovna Rada of the Autonomous Republic of Crimea no longer appear in the list of bodies with standing to introduce a submission. The draft adds two new powers in this Article and Article 152. The most important addition is without doubt the introduction of the individual constitutional complaint against legislative acts in paragraph 3. The Venice Commission addressed in previous opinions the importance of the institution of constitutional complaint. It welcomed initiatives to introduce a constitutional complaint procedure and declared that “*the possibility of individual complaint would definitely serve the better and more effective protection of fundamental rights.*”⁹

102. In its opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey¹⁰, the Venice Commission outlined generally and in a comparative perspective the role and importance of the individual complaint: “*The institutions of Verfassungsbeschwerde in Germany and recurso de amparó in Spain are the most well-known examples of constitutional complaint. Other European countries have also established some procedures for the adjudication of constitutional complaint (among others Russia, Czech Republic, Slovakia, Slovenia, ‘the Former Yugoslav Republic of Macedonia’, Croatia, Portugal, Hungary, etc.). Recent tendencies in constitutional adjudication can rightly be described as a path from the review of the constitutionality of laws to the review of the application of laws. This means a shift from the review of legislature to the review of the judiciary.*” Welcoming the introduction of the constitutional complaint, the Commission draws attention to the fact that this will probably change the function of judicial review as increasing the case-load of the Constitutional Court.

Article 152

103. The other new power of the Court is to provide opinions on the constitutionality of issues proposed to nationwide referendum (article 152.2). This is again a power also exercised by Constitutional Courts in other countries (Italy, Hungary).

Article 153

104. The rules on the distribution of tasks between the plenum and the chambers are not very precise.

⁸ CDL-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine § 19.

⁹ CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the Constitutional Court).

¹⁰ CDL-AD(2004)024, paras. 26-47.

Article 154

105. In several cases the Constitutional Court does not take a decision, but give an opinion. The legal consequences of such an opinion are not quite clear. According to Article 154 they are mandatory, final and shall not be appealed. But it is not clear if they are also binding on all the other State organs.

Section IX – Local Self-Government and Territorial Structure of State Power

General comments

106. 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 Section/ Chapter IX: “Local Self-Government and Territorial Structure of State Power”. Having a separate Chapter for the Autonomous Republic of Crimea underlines the significance of the autonomy and the Venice Commission recommends maintaining such a separate Chapter. The provisions on Crimea are also organised differently from the present Constitution. The present order, which starts from the provision on the Constitution of the Autonomous Republic of Crimea, corresponds better to the respective importance and inter-connections of the provisions.

107. The draft brings a very important change by introducing a clear separation between local self-government and state administrations at the regional and local level (as 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 local self-government authorities appear in Section IX. The recommendation is to present the provisions on local self-government 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.

Article 155

108. According to this provision local self-government is “*the right and ability of the community residents to regulate and manage the public¹¹ affairs of local significance in the interests of local residents¹² 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. The definition refers to “residents” but not to the elected local authorities, which will normally exercise the local self-government rights and it does not guarantee explicitly that a “substantial share” of public affairs will be regulated and managed by the local communities and their bodies.

109. A further issue is that, following the reference made by Art 155(2), to Art 3(3), second line, the communities which are entitled to local self-government 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 local self-government bodies are elected also at these upper territorial levels.

110. The draft makes it impossible for a municipality to be included in another municipality (Art. 155(3)). As a consequence, city districts which could be created freely by municipal councils (Art 157(3)) will no longer be vested with municipalities’ rights. These provisions would bring a positive change.

¹¹ The English translation is not very accurate: “social affairs” should be “public affairs”.

¹² 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.

Article 156

111. 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 problems¹³. Therefore, the recommendation is to review and simplify Article 156 (as well as Articles 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.

Article 157

112. The list of competencies in Article 157(1) is too casuistic and should be replaced by a more general wording.

Article 159

113. The draft maintains the approach of 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(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.

114. The list of competencies of *rayons* and *oblasts* in Article 159(4) is 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. Rightly, there is no general competence clause for district and regional councils.¹⁴

Article 160

115. This article, together with some other provisions (the possibility to delegate powers to other councils on the basis of an agreement (Art 157(4)) and the possibility of agreements for joint projects or joint financing of enterprises and organisations (Art 158(2)) facilitates co-operation between municipalities or with councils of the upper level. These changes would 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.

116. The possibility to delegate should not be unlimited and cannot lead to deprive the local authorities of certain core functions¹⁵. Therefore, the recommendation is to complete the relevant provisions with a formula making possible judicial review, e.g., “The delegation should

¹³ The danger of over-constitutionalisation of local self-government is illustrated by the Constitution of Hungary: any change in the local self-government 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.

¹⁴ 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).

¹⁵ Art 157(4) and Art 159(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.

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 is not sufficient and it is necessary to recognise the right to form consortia or other joint institutions to perform tasks of common interest. This right should clearly be distinguished (as in Art 10 of the ECLSG) from the right to belong to associations for the protection and promotion of common interests.¹⁶

Article 161

117. State powers would be exercised locally by state authorities, while all local self-government powers would be exercised by local self-government bodies, except in the case when specific state duties are delegated to local self-government bodies and exercised on behalf of the state. This provision should stimulate the development of local self-government at all levels. It is also stipulated that the costs of delegated functions should 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.

Article 162

118. Under this Article acts of local self-government 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 local self-government rights: while the power to challenge the conformity of local self-government 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).

Article 163

119. There are two relevant changes of the scope of competences of the Autonomous Republic of Crimea. It has no longer the right to organise and conduct local referendums. This right does also not result from the provisions of Section III of the Constitution on People's Will. Furthermore, the property belonging to the Autonomous Republic of Crimea is no longer mentioned.

120. The procedure of adoption of the Constitution of the Autonomous Republic of Crimea has been changed as well. Whereas according to the regulation in the present constitution it is adopted by the Verkhovna Rada of the Autonomous Republic of Crimea and approved by the Verkhovna Rada of Ukraine by one-half of its constitutional composition, it is now “approved by law”. This means that the President can use his right to veto the law.

Article 164

121. In the wording of Article 164 the term “normative regulation” has been replaced by “regulation” although no substantive change seems to be intended in this respect. The list of issues has not been changed.

122. It is remarkable that there is also one provision that enlarges the scope of self-government. Thus the Head of the Council of Ministers of the Autonomous Republic of Crimea is appointed and dismissed without the approval of the President of Ukraine. But this has to be seen in the context of the competences accorded to the new organs of the State administration.

¹⁶ This distinction is also important because the legal forms for inter-municipal co-operation structures and the « advocacy » associations may be completely different. Joint inter-municipal co-operation authorities should be public law authorities, while this is not necessary for local government associations *stricto sensu*.

Article 165

123. Art 165(1) implies, as does the current Constitution, that in the exercise of its powers, the Verkhovna Rada of the Autonomous Republic of Crimea would be bound, not only by the Constitution and laws of Ukraine, but also by the acts of the President and the Cabinet of Ministers. This is to be considered problematic from the point of view of the autonomous status of Crimea. Even restrictions through law in fields where the Constitution explicitly grants legislative powers to the Autonomous Republic of Crimea are questionable.

124. The present Constitution includes a provision on the President's power to suspend, for reasons of nonconformity with the Constitution of Ukraine and the laws of Ukraine, normative legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea, with a simultaneous appeal to the Constitutional Court of Ukraine in regard to the constitutionality of the acts at issue. According to Art. 165(2) of the draft law, the power of suspension would be transferred to the head of state administration in the Autonomous Republic of Crimea, appeal to the Constitutional Court would be replaced by "judicial recourse" and the reference to the mere control of constitutionality would be dropped. In order to guarantee the autonomous status of Crimea, the references to the Constitutional Court and the constitutional nature of the control should be retained.¹⁷

Article 166

125. Article 166 replaces Articles 118 and 119 of the current Constitution on local state administration and Article 139 on the Representative Office of the President of Ukraine in the Autonomous Republic of Crimea. Under the current Constitution the heads of the local state administration are appointed and dismissed by the President on the submission of the Cabinet of Ministers. According to the draft they would be appointed and dismissed by the President without involvement of the Cabinet of Ministers. This does not seem in line with the role of the Cabinet of Ministers as the highest body within the executive power system.

126. As regards Crimea, the change is more substantial. According to the present Constitution there is no local state administration but only a Representative Office of the President of Ukraine in the Autonomous Republic of Crimea. Representation is different from administration. Thus the creation of a structure of State administration has been proposed that has not existed up to now. This is a clear sign of a reduction of the autonomy.

127. Generally, the Head of State Administration, in the respective territorial unit, "*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*". In other terms, this article authorises a control of local government (and Autonomous Republic of Crimea) 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 local self-government and should not be admitted.

128. The idea behind the changes seems to be that the new State administrative entities fulfil the competences of the *prokuratura* in the field of supervision of the observance of human and citizens' rights and freedoms (cf. Transitional Provision No. 12).

Section X – Introducing Amendments to the Constitution of Ukraine

129. There are no longer different procedures for the amendment of the Constitution according to the part of the Constitution that is concerned. A referendum is required for all amendments. The popular initiative for the amendment of the Constitution is an additional new element of direct democracy. The proposed rules make it more difficult to amend the Constitution,

¹⁷ Cf. also the comments on Art. 100 above.

guaranteeing its 'rigid' character. The President, both chambers of parliament, and popular referendum play a part in the process, reflecting the new system of separation of powers.

Section XII - Transitional Provisions

130. This last part of the Constitution contains regulations on the continuity and discontinuity of existing State organs regulated in the constitution. It would be recommendable to clearly state that the provision limiting the possibility of the President to be re-elected to two consecutive terms applies despite the amendment of the Constitution. This question has given rise to difficulties in many new democracies; there was also a constitutional dispute in Ukraine. Such problems could be avoided with an unequivocal solution in the Section on the Transitional Provisions.

III. CONCLUSIONS

131. The present draft shows that the process of constitutional reform in Ukraine is moving into the right direction although no reform has yet been adopted.

132. First of all, as regards the procedure, the Venice Commission welcomes that the draft was submitted by the President to the Verkhovna Rada, thus showing his acceptance of the constitutional requirement that any new version of the Constitution has to be adopted by a two-thirds majority in the Verkhovna Rada before its final approbation by referendum.

133. Secondly, as regards substance, the Venice Commission notes clear improvements both with respect to previous drafts and to the current Constitution. These improvements are particularly apparent in the Section on the judiciary, regarding in particular the appointment of judges, the composition of the High Judicial Council and the new rules on the prosecution service. The draft no longer reflects the Soviet model of *prokuratura* but a model of the prosecution service in line with European standards and in compliance with Ukraine's commitments to the Council of Europe.

134. The draft also abandons a number of questionable provisions of the current Constitution, e.g. on the formalised majority coalition in the Verkhovna Rada, on the so-called imperative mandate, the double responsibility of the Cabinet of Ministers to the President and to the Verkhovna Rada and the distinction between ministers appointed on the proposal of the President and ministers appointed on the proposal of the Prime Minister. It should strengthen the coherence of the Cabinet of Ministers.

135. On one of the major innovations of the draft, the establishment of a second chamber, opinions may differ. Advantages and drawbacks of this solution have to be weighed carefully.

136. Other proposed amendments merit a more critical assessment. The requirement that all constitutional amendments require a referendum risks making the Constitution excessively rigid and the expansion of direct democracy at the national level creates additional risks for political stability. While changes with respect to the position of the Autonomous Republic of Crimea are not dramatic, they tend to decrease the autonomy.

137. Finally, the Commission notes that the draft describes the powers of the state organs more precisely and removes a number of sources of tensions between them. Nevertheless, it is not evident that it attains its main aim of putting an end to the constant institutional conflicts between the main state organs. The draft maintains a semi-presidential system with a double executive and areas of potential conflict between the President and the Cabinet of Ministers remain.