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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW AMENDING THE CONSTITUTION

OF UKRAINE

SUBMITTED BY THE PRESIDENT OF UKRAINE ON 2 JULY 2014

endorsed by the Venice Commission
at its 100th plenary session
(Rome, 10-11 October 2014)

On the basis of comments by

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I. Introduction

1. In the spring 2014, the Venice Commission was asked by the Verkhovna Rada of Ukraine to assist in the preparation of amendments to the constitution of Ukraine (the constitution currently in force appears in document CDL-REF(2014)012). Mr S. Bartole, Ms R. Kiener, Messrs P. Paczolay, G. Papuashvili, J-C. Scholsem, Ms H. Suchocka, Messrs E. Tanchev and K. Tuori were appointed to act as rapporteurs. Mr A. Delcamp (expert, Congress of Local and Regional Authorities of the Council of Europe) and Mr G. Marcou (expert, Directorate General of Democracy of the Council of Europe) also participated in the assessment, focussing on decentralisation.

2. On 25 May 2014, presidential elections were held in Ukraine, which resulted in Mr Petro Poroshenko becoming President of Ukraine.

3. At its 99th Plenary Session (13-14 June 2014), following the announcement by the Ukrainian authorities that they would seek the Commission's assessment of the draft amendments to the constitution before the summer recess, the Venice Commission gave mandate to the rapporteurs to transmit the preliminary opinion based on their assessment to the Ukrainian authorities prior to its submission at the Plenary Session of October 2014.

4. President Poroshenko prepared a set of constitutional amendments, which he submitted to the Verkhovna Rada on 2 July 2014 (CDL-REF(2014)027). No public discussion of these amendments took place. By a letter of the same date, transmitted to the Secretary General of the Council of Europe on 7 July 2014, President Poroshenko requested the Venice Commission to prepare an opinion on these draft amendments "in the shortest time possible, in view of the need to consider this document during the current session of the Verkhovna Rada of Ukraine".

5. The present preliminary opinion was sent to the Ukrainian authorities on 24 July 2014. It was subsequently endorsed by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014).

II. Scope of the present opinion

6. The present opinion contains an assessment of the main amendments set forth in the draft law under examination. It does not cover the amendments exhaustively. This opinion is based on an informal English translation of the draft amendments: certain comments may be due to inaccuracies of the translation.

III. Analysis of the draft amendments

Article 81 – "imperative mandate"

7. It is proposed to delete paragraph 6 of the current Article 81 reading that: "*The authority of a People's Deputy of Ukraine shall terminate prior to the expiration of his/her term in office if […] 6) his or her failure, as having been elected from a political party an electoral bloc of political parties), to join the people's deputies' faction representing the same political party the same electoral bloc of political parties) or his/her secession from such a faction*; […] "

8. It is further proposed to delete the last paragraph of the current Article 81 which reads: "*Where a People's Deputy of Ukraine, as having been elected from a political party an electoral bloc of political parties), fails to join the people's deputies' faction representing the same political party the same electoral bloc of political parties) or exits from such a faction, the highest steering body of the respective political party electoral bloc of political parties) shall decide to*

terminate early his or her authority on the basis of a law, with the termination taking effect on the date of such a decision".

9. As the Venice Commission has previously, repeatedly stressed, the so-called "imperative mandate" weakens the parliament as it interferes with the freedom and the independence of the deputies; it is also inconsistent with the constitutional principle that deputies represent *the people* and not the political parties to which they belong (CDL-AD(2005)015, para. 12, CDL-AD(2003)019, paras. 56 to 58). The removal of the imperative mandate of the deputies of the Verkhovna Rada is therefore to be welcomed. The Ukrainian political parties will have to change the manner of nominating parliamentary candidates to ensure that they are not susceptible to vote buying.

Article 82 – competence of the newly elected Verkhovna Rada

10. Pursuant to new paragraph 2 of Article 82, "*The Verkhovna Rada of Ukraine is competent if at least two-thirds of a total constitutional number of People's Deputies have* [not only] *been elected and* [but have also] *taken the oath*."

11. The Ukrainian authorities have explained this proposed amendment by referring to the possibility foreseen in Article 79 of the Constitution that an elected candidate may refuse to take the oath, thus losing his/her mandate.

12. This amendment therefore serves the purpose of ensuring a more effective functioning of the legislature and is not objectionable, although it could be the occasion for reciprocal blackmailing between the political factions.

Article 83 § 5 and 7, Article 90 § 2 – parliamentary coalition

13. New paragraph 5 of Article 83 replaces the previous procedure of formation of a "coalition of people's deputies' factions" with the following procedure of formation of a "parliamentary coalition": "*On the basis of a common ground achieved between various political positions, a parliamentary coalition shall be formed in the Verkhovna Rada of Ukraine to include a majority of People's Deputies of Ukraine within the constitutional composition of the Verkhovna Rada of Ukraine.*

14. The Ukrainian authorities consider that this amendment improves the procedure currently in force, which only allows the creation of a coalition by "factions of deputies". Nevertheless, the Constitutional Court of Ukraine in its judgment No. 11-рп/2010 ruled that the constitution must be interpreted in such a way that any individual people's deputy who initiates the establishment of a coalition of factions in parliament has the right to take part in the formation of a parliamentary factions' coalition, irrespective of whether or not he or she is a member of a faction of deputies.

15. In this respect, the amendment might indeed represent an improvement. The Venice Commission, however, has previously expressed doubts as to the capacity of a formalised procedure of formation of a parliamentary coalition to enhance political stability and as to its compatibility with the freedom of choice of the political parties (CDL-AD(2005)015, par. 16). These doubts still pertain.

16. The only constitutional task of the parliamentary coalition as an entity is putting forward the candidate for Prime Minister. According to the Ukrainian authorities, the formation of the coalition is an instrument for verifying the capability of the new parliament (indeed, if the coalition is not formed within 30 days the President may dissolve parliament - Article 90 of the Constitution; it is unclear if the President has the power to propose a new candidate before dissolving the Rada). In the opinion of the Venice Commission, however, the test of the

existence of a parliamentary majority should be the vote of the Prime Minister and the Government. There is no need for a formalised majority.

Article 83 § 6, Article 85.12, Article 106 par.1.9 and par. 1.9[1], Article 114 par. 3-5 - Formation of the Cabinet of Ministers

17. Under the proposed amendments (6 and 7), the phase of nomination of the Prime Minister becomes distinct from the phase of formation of the government. The parliamentary coalition proposes a candidate to the President within thirty days from the date of its first meeting or within thirty days from the date when the activities of a parliamentary coalition in the Verkhovna Rada are terminated. The President disposes of fifteen days to submit the proposal to the Verkhovna Rada, which gives him some power over the formation of the government. The appointed Prime Minister subsequently proposes the other members of the government to the Verkhovna Rada. The draft amendments therefore strengthen the position of the Prime Minister and of the Verkhovna Rada in respect of the President. This is to be welcomed as a contribution towards a balanced system of governance within a mixed parliamentary-presidential system.

18. The power of the President to submit directly to the Verkhovna Rada the candidates for Minister of Defence and Minister of Foreign Affairs (the President has special responsibilities in the areas of national security, defence and foreign policy) is removed and replaced by the need for the President and the Prime Minister to agree on the candidates for these two ministers. This is also welcome as a step towards the abolition of the double status of these ministers and towards an increased coherence in the formation of the government. This overlapping competence, however, may be a source of conflicts between the Prime Minister and the President. In this respect, it should be also noted that previous recommendations of the Venice Commission aimed at avoiding these conflicts – notably the removal of the responsibility of the Government towards the President – have not been followed.

Article 83 para.8 – parliamentary opposition

19. Article 83 also provides in a new paragraph that the "*Activities of a parliamentary opposition are guaranteed in the Verkhovna Rada of Ukraine*." In principle, the constitutional entrenchment of the rights of the opposition is to be positively assessed. The Venice Commission, however, has previously expressed the view that institutionalising the notion of parliamentary opposition seems incompatible with Ukraine's rather pluralistic political environment insofar as "it can have adverse impacts on the freedom and independence of the mandate of the deputies, which could result in cementing the parliamentary adhesion and loyalties of a majority group" (CDL-AD(2007)019). While the Ukrainian authorities have indicated that the law on the rules of procedure of the Verkhovna Rada could well provide for the possibility of an independent MP not to join either the majority or the opposition, the concerns previously expressed by the Commission are not dissipated.

20. In addition, the Commission notes that the content of this guarantee is totally left to the parliamentary Rules of procedure. In this respect, the Venice Commission has previously expressed the view that "parliamentary Rules of Procedure should preferably be regulated so as to make it difficult for a simple majority to set aside the legitimate interests of the political minority groups" (Report on the role of the opposition on a democratic parliament, CDL-AD(2010)025, par. 96).

Article 83 para. 9, Article 85 par. 1 and Article 89 par. 3 – law on the parliamentary Rules of Procedure

21. Under a proposed new amendment, the parliamentary Rules of procedure must be adopted in the form of a law, while under current Article 83 there is no such obligation. It should be noted, however, that Article 92 par. 1.21 of the Constitution in force provides that "*the organisation and operational procedure of the Verkhovna Rada of Ukraine, the status of People's Deputies*" "*are determined exclusively by the laws of Ukraine*" and that the parliamentary Rules of procedure currently in force were adopted in the form of a law. The Ukrainian authorities have also informed the Commission that the Constitutional Court of Ukraine has repeatedly emphasized the need for a formal law (decisions No. 1-8/2008, No. 1-40/200830/2009 and others). This amendment therefore does not appear to bring a substantial change.

22. The Venice Commission however stresses that parliaments should be able to organise their work independently. The adoption of a formal law entails the intervention of the President (Article 106 par. 1.30). The requirement that the parliamentary rules of procedure should be adopted through a formal law therefore represents a step backwards in terms of independence of the parliament and separation of powers.

Article 85 par. 1.12[1], Article 106 par. 1.14 – appointment of the Head of the Security Service

23. Under the new amendments, the Head of the Security Service will still be appointed by the Verkhovna Rada upon proposal of the President, but his or her dismissal will be exclusively in the hands of the President.

24. According to the Ukrainian authorities, this amendment is prompted by the need for the President, who has a special constitutional duty to guarantee Ukraine's independence and national security, to react quickly if a dismissal is necessary, without depending on the lengthy parliamentary procedures.

25. There is no uniform practice in Europe concerning the manner of dismissal of the Head of Security Services and the involvement of parliament, but it is common to find provisions for security of tenure, subject to removal for wrongdoing (Report on the democratic oversight of the Security Services, CDL-AD(2007)016, par. 146). Under the Ukrainian constitution, there is no such guarantee, nor are the grounds for dismissal indicated. This amendment obviously strengthens the powers of the President vis-à-vis those of the Verkhovna Rada.

Article 85 par. 1.12[2], Article 106 par. 1.14[2] – appointment of the Head of the State Bureau of Investigation

26. The State Bureau of Investigation is a new institution established under the new Code of Criminal Procedure of Ukraine to take over the investigation and anti-corruption tasks from the Public Prosecutor's Office.

27. The constitutional amendments in question aim at giving constitutional entrenchment to this new institution. They foresee the same mechanisms of appointment and dismissal which are envisaged for the Prosecutor General (appointment by both the Verkhovna Rada and the President, dismissal by the President only, on no specified grounds) and grant the Verkhovna Rada the power to force the Head of the State Bureau of Investigation to resign through a vote of non-confidence.

28. The Venice Commission considers that the work of State Bureau of Investigation has to be based on the law and not on political expediency. It therefore expresses the same reservations and makes the same recommendations as those relating to the system of dismissal of and non-confidence in the Public Prosecutor (see below).

Article 106 par. 1.12 – appointment of the Chairperson of the National Bank of Ukraine

29. The power of the President to submit a proposal of the appointment and the dismissal of the Chairperson of the National Bank of Ukraine is already foreseen under current Article 85 par. 1.18 of the Constitution, and had been omitted in current Article 106. This amendment merely remedies this technical mistake.

Article 85 par. 1.12 - Appointment of the Heads of the State Committee on Television and Radio Broadcasting of Ukraine and of the State Property Fund of Ukraine

30. Under current Article 85 par. 1.12, the Verkhovna Rada appointed, upon submission of the Prime Minister, the Heads of the State Committee on Television and Radio Broadcasting of Ukraine and of the State Property Fund of Ukraine. Under the new amendments, this competence disappears from Article 85 and therefore becomes a competence of the Prime Minister only.

31. The Ukrainian authorities have explained that these two bodies were set up in 1995 and have lost most of their meaning and importance with the increasing privatisation of both the media and of property. Their constitutional entrenchment and the involvement of parliament do not appear to be justified anymore. The Venice Commission does not have any objections.

Article 85 par. 1.12, Article 106 par. 1.9^2 - Appointment of the Chairperson of the Antimonopoly Committee of Ukraine

32. The competence to appoint and dismiss the Chairperson of the Antimonopoly Committee of Ukraine is removed from the Verkhovna Rada and the Prime Minister and is given to the President. The President further acquires competence to appoint and dismiss "the heads and members of national commissions regulating the natural monopolies, communications, information penetration as well as securities and financial services markets".

33. According to the Ukrainian authorities, as the main function of the Antimonopoly committee is to control the government and other executive bodies, it is illogical that the government should be involved in the appointment of its Head, while the President is well placed to exercise an efficient control. No reason is given however for the exclusion of parliament from this process.

34. This amendment clearly strengthens the powers of the President vis-à-vis those of the Verkhovna Rada.

Article 106 par. 1. 14^1 and Article 107 – Head of the Foreign Intelligence Service

35. Pursuant to the amendments, the President "appoints to office and dismisses from office the Head of the Foreign Intelligence Service of Ukraine". The latter also becomes an ex-officio member of the Council of National Security and Defence of Ukraine, chaired by the President. According to the Ukrainian authorities, the Head of the FIS is already appointed and dismissed by the President, but the constitutional entrenchment of this institution serves the purpose of involving its Head in the Council of National Security and Defence.

36. This amendment strengthens the powers of the President.

Article 90 – President's power of pre-term dissolution of the Verkhovna Rada

37. Article 90 in the first place brings a clarification, granting the President the power to dissolve the Verkhovna Rada prior to the expiry of its term in case of failure by the Verkhovna Rada to form a coalition of parliamentary factions within "thirty days" (instead of "one month"). While this clarification is not objectionable *per se*, the Venice Commission has already expressed doubts as to the need for a formalisation of a parliamentary faction (see above) and therefore has reservations as to the possibility to dissolve the newly elected Rada if it fails to do so.

38. The President's power of dissolution is further extended to the case in which *the members of the Cabinet of Ministers of Ukraine have not been appointed within sixty days following the resignation of the authority of the Cabinet of Ministers of Ukraine according to Part One, Article 115 of the Constitution of Ukraine*, that reads "*the Cabinet divests itself of its power before the newly elected Rada*". Under the current text, the President may dissolve the Verkhovna Rada only if it fails to appoint the government within sixty days from *the dismissal* of the Cabinet of Ministers (following a vote of non-confidence by parliament). The amendments therefore introduce a new case of dissolution of the newly formed Rada, in case it fails to form a government within sixty days. Here too, it is unclear if the President may propose a new candidate prior to the dissolution of the Verkhovna Rada.

Article 121, Article 122, Article 85 par. 1.25, Article 106 par. 1. 11 – Public Prosecutor's Office

39. The reform of the Public Prosecutor's Office has been the focus of the Venice Commission's attention and concern for several years. Upon its accession to the Council of Europe, Ukraine took up the commitment that "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[1]". Such reform has regrettably not been accomplished to date.

40. One of the most criticised features of the Ukrainian Public Prosecutor's Office was its power *"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*", a reminiscence of the old system of the Soviet prokuratura.

41. The Commission therefore welcomes very much the proposal to remove from Article 121 of the Constitution this supervisory power (current paragraph 5). This amendment would represent an important step towards the achievement of a Public Prosecutor's Office in line with Council of Europe standards (CDL-AD(2009)024, par. 95; CDL-AD(2009)048, par. 95), including in the light of the European Charter of Local Self-Government. The Venice Commission therefore urges the Ukrainian authorities to remove this power once and for all.

42. The Venice Commission has previously recommended also removing from Article 121 of the Constitution the function (paragraph 2) of "representation of the interests of a citizen or of the State in court in cases determined by the law" (CDL-AD(2013)025, par. 25, 28 and ff.; CDL-AD(2009)048 par. 24). This power is problematic because of the ability thereby conferred to participate in any legal proceedings where such interests are seen to arise - regardless of the wishes of the individual and even his or her capacity to act on his or her own behalf (and thus contrary to his or her right of access to court under Article 6 of the European Convention) - and to apply to court whenever considered necessary and to appeal any court decisions concerning those interests. It is moreover unjustified because (a) the Prosecutor General is also mandated

[1] A detailed description of these standards is contained in previous Venice Commission opinions, for example in CDL-AD(2013)025, par. 8 and 9.

to act in pursuit of the state interest and this could clearly run counter to the interests of the individual being represented and (b) bodies such as the Ombudsperson are more suited to espouse the interests of the individual against the state. Regrettably, the Ukrainian authorities have not followed this recommendation.

43. The Venice Commission had also previously expressed the view that the dependence of the Prosecutor General on political organs undermines the independence or autonomy of the prosecution service (CDL-AD(2013)025, par. 14). In a State governed by the rule of law, prosecutorial work has to be based on the law and not on political expediency (CDL-AD(2006)029, par. 34).

44. Under the current constitution the Prosecutor General is appointed by the President with the consent of the Verkhovna Rada (with no qualified majority) for a renewable mandate of five years, and is dismissed with the same procedure. The Constitution does not lay down any grounds for his or her dismissal. The Verkhovna Rada has the power to take a vote of non-confidence in the Prosecutor General, which results in his or her resignation of office.

45. The Ukrainian authorities consider that there is an imbalance between the Rada and the President, as the latter does not have the power to force the resignation of the Prosecutor General through a vote of non-confidence; in their view this imbalance transforms the prosecutor's office into a political instrument with exclusive influence of the Verkhovna Rada. The draft amendments under examination aim to correct this imbalance by modifying the manner of dismissal of the Prosecutor General, removing the involvement of the Verkhovna Rada and leaving it totally in the hands of the President.

46. The Venice Commission considers however that the amendment in question instead of duly removing the political dependence of the Prosecutor General from parliament would add the political dependence of the Prosecutor General from the President, which would clearly, irremediably undermine the independence or autonomy of the Prosecutor General (see CDL-AD(2009)024, par. 94). The dismissal of the Prosecutor General should not be the exclusive responsibility of the President and the Verkhovna Rada should not have the right to express a motion of no confidence (which is a purely political instrument) in the Prosecutor General who is not a member of the government.

47. The Venice Commission considers that the appointment and dismissal of the Prosecutor General by both the President and the Verkhovna Rada should be maintained, as an expression of the principle of co-operation among state organs making it possible to avoid unilateral political nominations (CDL-AD(2010)040, par. 35). The no confidence vote by parliament in the Prosecutor General should be removed. In addition, for the institution to be in line with Council of Europe standards, the Prosecutor General should be appointed for a single term, either considerably longer than five years or until retirement. The grounds for dismissal (serious violations of the law) should be laid down in the constitution, or at the very least the constitution should refer to a law setting out these grounds.

Articles 118 and 119 – removal of local state administration

48. In the present system, the state administrative agencies perform simultaneously the executive functions of the central state power and the regional and district level self-governments. In the proposed system, regional and district councils will elect independently their own executive bodies, chaired by their president, and accountable to them. State administrations at the regional and district level will be removed, as Articles 118 and 119 will be deleted. This shift towards local self-governance deserves to be commended. As a consequence of this constitutional reform, a large part of the personnel of these State administrations should be transferred under the authority of the new regional and district executive authorities of the councils.

Articles 132, 133, 140 and 141 - new territorial structure

49. The territorial structure of Ukraine will not be based on "*the combination of centralisation and decentralisation*" as is now the case but only on "*decentralisation in the exercise of state power"*. The new elements of "*ubiquity and capability of self-government authorities*" and of "sustainable development of administrative and territorial units" are introduced. This represents the basis for a sound decentralisation system in Ukraine and is to be welcomed.

50. According to new Article 133, Ukraine will clearly have three levels of administrative and territorial units: regions ("oblast" is no longer used here), districts ("raion") and communities ("gromada"). The main change is in the definition of the community: "*an administrative and territorial unit created according to the procedures established by law which includes one or several residential settlements (village, settlement, city) as well as the adjacent territories*". This is a positive development. The reference to adjacent territories to fall within the competence of the community (and not, as now, of the district) means that planning powers and taxes levied outside the limits of the settlement will go to the community: the territory of Ukraine should be totally divided into communities. This reform might enable the establishment a modern municipal government in accordance with the principles and the spirit of the European Charter of Local Self-Government. It will also enable to restructure the territories of the communities to avoid the current superposition of different entities.

51. Article 133 lists the regions of Ukraine exhaustively. While this choice may have political justifications in the pluralistic and conflicting situation of Ukraine, the constitutional entrenchment and the cementing of the existing regions does not seem indispensable.

52. New Article 140 par. 1 gives a definition of local self-government which replicates Article 3 of the European Charter of Local Self-Government, which is very positive.

53. The concept of "community" is only applied at the level of the first tier of local self-government. Local self-government bodies at the district and regional levels only represent the common interests of the communities of their territory. Nonetheless, the new amendments establish an independent executive authority of the district and regional councils, which are qualified as "local self-government bodies". This is a positive change.

54. Under new Article 141, the mayors of village, cities, districts and oblasts will be elected (only the mayors of the communities directly).

55. Paragraph 9 of Article 140 recognises the role of self-organisations bodies of the population and provides that municipal councils may assign some of the powers of their executive bodies to such self-organisation bodies. This is already regulated by a law.

Articles 140 and 143, the principle of subsidiarity

56. Article 140 par. 6, in line with the European Charter of Local Self-Government, introduces the principle of subsidiarity. It is for the law to determine the actual tasks to be performed at each territorial level.

57. Article 143 par. 1 provides that "*local self-government bodies and their executives resolve the issues of local self-governance ascribed to their competence by law*". This provision will have to be interpreted in the light of the principle of subsidiarity set forth in Article 140, i.e. of the principle of the general competence clause. It would be appropriate to reformulate it in terms of attribution of competences to the lower levels for all matters not specifically reserved by law to the upper levels. It would also be appropriate to set forth the principle that upper local self-government authorities do not supervise lower self-government authorities.

Article 142 – Local finance

58. New Article 142 removes the role of the central government in the process of formation of the revenues of the budget of the local authorities, thus strengthening the financial independence of local self-government. This provision is welcome.

59. The amendment removes the paragraph of co-operation between territorial communities on the basis of agreements in order to finance jointly enterprises, organizations or institutions of various kinds in their common interest. According to the Ukrainian authorities, this amendment is due to the fact that raions and regions, contrary to now, will dispose of their own financial resources, which will make it possible to finance co-operation between territorial agreements. This does not seem a sufficient justification for deleting this paragraph, which should rather be retained.

60. It is proposed to delete current paragraph 3 of Article 142, which sets out the principles that: "the State participates in the formation of the revenues of the budget of local self-government" and "financially supports local self-government". The Ukrainian authorities have explained that this paragraph represents the very basis of the centralisation of power in Ukraine, which is why its removal is central to the envisaged reform. Financial support by the State, however, is indisputably a necessity, and indeed Article 142 mentions as sources of material and financial basis for local self-government "a part of national taxes", presumably in view of the equalization of resources. The principle of financial support by the State for local self-government, therefore, should be given constitutional entrenchment.

Article 106 par. 1.8[1], par. 1.10 and par. 1.16, Article 107[1], Article 144 and Article 151 last paragraph – Supervision of Local Self-Government

61. According to Article 8 of the European Charter of Local Self-Government, the supervision exercised upon local authorities is aimed only at ensuring compliance with the law and has to be exercised "in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect."

62. Following the welcome removal of paragraph 5 of Article 121, the competence to supervise compliance by local self-government bodies with the law and constitutional principles will be removed from the Public Prosecutor's Office. New Article 107[1] grants this competence to "representatives of the President in regions and raions", appointed and dismissed exclusively by the President (Article 106 par. 1.10).

63. The main tasks of the President's representatives are the supervision of compliance with the laws and the constitution by the local self-government authorities and local branches of the central executive agencies and the co-ordination of the interaction between the central executive authorities. This gives the President considerable power over local self-government and over the government, a power which overlaps with that of the government and is a source of confusion and even conflict. In the opinion of the Venice Commission, these supervision and co-ordination tasks are rather governmental tasks. Appointment by the President could possibly be provided for in a transitional provision for the current period, in view of his role as guarantor if the indivisibility of Ukraine, but not as the main rule.

64. The procedure of supervision is different in case of suspected unconstitutionality or suspected illegality of decisions of the Supreme Council of the Autonomous Republic of Crimea or of local self-government bodies: in the first case, the President's representative defers the relevant decision to the President, who decides whether to suspend it and at the same time refer it to the Constitutional Court. If the Constitutional Court finds that the decision is unconstitutional, the President may "terminate early the authority of the Verkhovna Rada of the

Autonomous Republic of Crimea or a local government" (Article 106 par. 1.8[1]). There is no reference to the degree of seriousness of the violation of the constitution: this appreciation is therefore unduly left to the President and raises an issue of proportionality of the sanction (the dissolution of an elected body).

65. If a President's representative finds that a local self-government's decision is illegal, he or she may suspend it and at the same time refer it to an administrative court.

66. In the opinion of the Commission, this double regime opens the way to direct conflicts between the President, on the one hand, and the local self-government bodies or the government, on the other hand. In addition, the dividing line between unconstitutionality and illegality of a decision is not always identifiable. It would seem more appropriate to provide for referral of decisions, both in case of suspected unconstitutionality and of suspected illegality – by the President's representatives to the administrative courts, which may then, if need be, raise a question of constitutionality before the Constitutional Court.

Article 143 par.2 – special status of Russian and minority languages

67. A new provision empowers villages, settlements, cities, districts and oblast councils, "*in accordance with a procedure established by law, to provide a special status of the Russian language and other languages of national minorities within the boundaries of the corresponding administrative and territorial units*."

68. This provision offers a solution to the very sensitive issue of the protection of the Russian language and of regional and minority languages (there are seventeen languages officially recognised by the Ukrainian law). This provision, however, raises issues of harmonisation with Article 10 of the Constitution, with the Council of Europe standards on minority protection, notably Article 8 ECHR, the Framework Convention on the Protection of National Minorities and the European Charter on Regional or minority languages, and with the statutory guarantees (notably under the Law of Ukraine "on Principles on State Language Policy") for citizens to address the authorities either in Ukrainian or in Russian and to use other languages at the regional and local levels irrespective of the support of more than 50 percent of the local government council.

IV. Conclusions

69. The draft constitutional amendments under consideration follow in some respects previous recommendations of the Venice Commission; the envisaged abolition of the imperative mandate and of the general supervisory powers of the Public Prosecutor's Office are long awaited and are to be welcomed. The abrogation of the supervisory powers of the Public Prosecutor's Office is a particularly important step forward, finally complying with a commitment undertaken by Ukraine when joining the CoE.

70. The envisaged shift towards decentralisation is also to be commended. The territorial structure of Ukraine will be based no more on "the combination of centralisation and decentralisation" as is now the case, but only on "decentralisation in the exercise of state power". Regional and district councils will elect independently their own executive bodies, chaired by their president and accountable to them. State administrations at the regional and district level will be removed. Thanks to the new definition of "community", the territory of Ukraine should be totally divided into communities. The principle of subsidiarity is duly introduced. These are positive elements, which should be welcomed. This reform might enable the establishment of a modern municipal government in accordance with the principles and the spirit of the European Charter of Local Self-Government. Certain amendments and improvements are nevertheless necessary.

71. The draft constitutional amendments bring about a shift of power from the parliament towards the President. The latter is notably granted the competence to appoint and dismiss certain key high state officials without the involvement of any other State organs. Regrettably, the constitution does not lay down the grounds for dismissal, nor does it defer to the law on this point (this is true also as regards Constitutional Court judges). The President will appoint representatives in regions and raions with the task of supervising local government and co-ordinating the state administration. The President's powers are therefore, overall, considerably strengthened.

72. The draft amendments under consideration do not address the judiciary. The Ukrainian authorities have explained that the President was barred from submitting amendments to the provisions on the judiciary because a set of proposed amendments to these provisions was already pending before the Verkhovna Rada. The first set of amendments has now been rejected, so that it is again possible to address this area. The Venice Commission has repeatedly urged the Ukrainian authorities to amend the constitutional provisions on the judiciary. The Commission had also supported the drat amendments which have just been rejected by the Verkhovna Rada, and regrets that this long-awaited and extremely urgent reform has not yet taken place. The Commission urges once again the Ukrainian authorities to proceed swiftly to the reform of the judiciary in conformity with the applicable standards of independence.

73. To the knowledge of the Venice Commission, the Ukrainian civil society has neither been informed nor consulted on the amendments under consideration. If the exceptional circumstances prevailing in Ukraine today may have justified an exceptionally speedy preparation of the amendments, the Venice Commission wishes to reiterate that it is essential in order for a constitutional reform to succeed that it should be prepared in an inclusive manner, notably through broad public consultations. The draft amendments under consideration will therefore have to be submitted to public discussion in the course of the subsequent procedure and before their final adoption.

74. The need for constitutional reform in Ukraine is obvious and urgent. A constitution, however, is not only a temporary political act: it is the legal foundation of the state. Amendments to the constitution should be sustainable and the constitution should be stable also in the longer perspective.

75. The Venice Commission has been informed that the President of Ukraine intends to revise the draft constitutional amendments, on the basis not only on the principles and standards of the Council of Europe in the field of constitutional development, but also on broad political and public consensus. The Venice Commission welcomes this intention; it hopes that this preliminary opinion will assist the President of Ukraine and stands ready to continue to co-operate in this endeavour.