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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

C O M M E N T S

ON THE DRAFT CONSTITUTION OF UKRAINE

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Comments on the Draft of the Constitution of Ukraine

I. General remarks

Discusing the draft of the Constitution of Ukraine one can not neglect the political context around the new constitution. Everybody coming from the post-communist countries understands it very well, that problem of passing new constitution is not only of legal nature but especially of political one. The nature of debates seems to depend more on political than legal considerations.

First of all the very crucial political questions must be answered, i.e.: 1. model of the separation of power or the unity of power tipical for communist system, 2.the relationship between the parliament, president and government, 3. decentralised or centralised state, 4.the scope of social rights in the constituition,

One can agree that all the questions are common for constitutional debates in all countries. In post-communist countries however they all are of a very political nature. Each of them play very important role in political games between the representatives of new and old system. The answer must be done in such a way not to destroy the whole constitution-making process. It must be find a real political consensus and even compromise around all the questions. Only having this in mind, we can comment the draft of the ukrainian constituition.

The way of the Ukraine to the draft we discuss today was very difficult. I find however the draft as a great succes

of new political forces, as a succes of all those forces they would like to make a very clear division between old and new system and to have Ukraine as an independent state.

2.Political system

As I mentioned before,one of the crucial questions that should be answered in the first line was a problem of separation of power. In all communist countries the basic rule for organizing the structure of state,s organs was the principle of unity of power. The principle of unity of power which in doctrin was to mean the dominance of the legislative branch of power [parliament was proclaimed the highest state body in all communist constitutions], boiled down in practice to the domination of the communist party structure.It was reduced to the concept whereby the supreme position within the system of state organs was enjoyed by the party - not one of these organs [parliament]. So it was very obvious, that to the new constitutions the principle of unity of power has not been included.

In the presented draft of ukrainian constitution there is also a "divorce" with the unity of power and come back to very clasic pronciple of separation of power. The general rule in art.6 stats that: "State power in Ukraine is executed on the basis of its separation into legislative, executive and judicial branches. Bodies of the legislative, executive and judicial branches execute their authority within the limits determined by the Constitution". The authors of the draft have proposed the presidential-parliamentary system as a model of relationship between parliament, president and government. It is not a clear

presidential system, [american one] which is rather not accepted by european countries. It is more similar to the french system, but it is not a copy of a french one. The president is empowered with very strong competences. Art.105 enumerates the competences. Among them such a competences as: [president] appoints heads of rayon and oblast state administrations by the submission of the Prime-Minister and discharges them [p.10]; creates, reorganizes and liquidates ministries and departments, as well as the other central bodies of the executive power [p.13]; revokes acts of the Cabinet of Minister of Ukraine, central and local bodies of executive power and those of the Government of the Crimean Autonomy [p.14]. In this context I have some doubts concerning the power of the president to revoke acts of the Cabinet of Minister. This right of president seems to me be rather ambigeous but also dangerous. It is a very controversial provision. There is no limit to this power. What are the circumstances when president can revoke act of government i.e when act is not legal or is politically incorrect ?; In the light of chapter XIII, art.145 and 150 it is a role of Constitutional Court to resolve issues on constitutionality of laws and other legal acts to the Constitution and issues official interpretations of the Constitution and laws. Having such a clear provisions of the constitution there is no place for presidential acting. One can understand, that presidential right to revoke the acts of government can be used only for political reasons. But what are the criteria of "political validity"? It can lead to the tensions between two parts of executive power. It can also be obstacle for building the true democratic structure.

There are also other provision which can involve competences problem between president and parlament. Art. 111 states that Cabinet of Ministers is subordinated to the President and is accountable to the National Assembly. [It is a very similar to the French system]. It is however very difficult to make clear division between "subordinated" and "accountable". In my opinion this wording give much more power to president and in fact make government responsible [accountable] to president not to parliament. Art. 113 states also that Cabinet of Ministers is established for the period of the term of the President of Ukraine, not for the period of parliament. It makes accountibility to parliament rather illusionary.

One can have fears that all this provisions giving such a special position for president in extremal conditions can lead to authoritarian system. I think that this dangerous is not only of imaginatory nature but quite real one in the system, where the omnipotent role of first secretary of a party is stil vivid.

3. Problem of social and economic rights

The cataloque of human rights is very wide and expressed in very detailed way. It is also a common experience for all post-communities countries. Having to do in the past with a violation of human rights on the large scale, new democracies would like to put to the constitutions all guaranties agains such violation in the future. The best examples are art. 31 and 32. Big part of the guarantees included to the constitution could be however a matter of ordinary law.

I think that more douts arise when we analize the social and economic rights included to the constitution. The discussion on the scope of social rights in the constitution was very crucial in all post-communist countries. Discussion upon their normative character is a much more complex one and opinions as to the need for their constitutional regulation greatly vary, extending from the liberal doctrine which denies the need for constitutional inclusion of these rights to the socialist doctrines which favour their very detailed formulation.

Discussion upon these issues has clearly shown that these are not purely doctrinal controversies, but, on the contrary, issues deeply rooted in the social and economical realia of the post-communist countries. These rights did not constitute a relevant element of the constitutional matter in democratic-liberal countries. On the other hand, they were vastly expanded in the constitutions of the countries ofreal socialism and such detailed constitutional inclusion used to be considered as an indicator of the progressive character of the communist system. These rights, and particularly the right to work interpreted as the principle of full employment, played the role of fundamental slogans in the communist system. These rights however, were considered to be of propagandistic or declarative rather than normative importance. They constituted a peculiar kind of socio-economic principle of an authoritarian state, rather than individual rights.

Under the new conditions, when societies face with huge unemployment and lack of security the inclusion of the

social and economic in the constitution has been recognised to be one of the forms of search for the guaranty of the right to work and return to previous solutions. Hence the intense pressure for wide scope od the social rights in the constitution.

The latest public opinion polls in Poland show that 59% of the respondents support inclusion of social rights and particularly the right to work in the new constitution, whereas only 24% would like the new constitution to be predominantly a guaranty of political and human rights. This does not mean questioning the rights themselves, but only supporting the supremacy of socio-economic rights over traditional ones. Such an attitude is undoubtedly the legacy of the communist system as well as fears resulting from the current socio-economic transformations which constitute a danger to these rights.

I think, that it is also a reason, why the catalogue of social rights is so detaily regulated in the new ukrainian constitution.

I would like to give some warning concerning such a wide scope of these rights in the constitution.

Discussion upon the concept of the constitutional inclusion of these rights indicates, that it is in this respect most prone to fall into the trap of fictitious rights. It is paradoxical that for example the right to work is ensured by the constitution of Spain, a country where unemployment levels far exceed the average for Western Europe and the USA. At the same time, current experience indicates that unemployment levels drop faster in the USA than in Western Europe, although declarations

as to the formal guaranties of the right to work as well as constitutional inclusion of the state's right to intervention in favour of reducing the unemployment are far more articulate in Europe. Hence an obvious conclusion, that interdependence between constitutional inclusion of the right to work and reduction of unemployment levels is practically non-existent. It is undoubtedly the result of the particularly normative character of the right to work.

As pointed out in literature, these rights do not have the capacity of the subject rights. They are expressed in the way tipical for the communist constitution. Constitution is a legal act. It is clearly stated in art.8 ["the Constitution is the highest legal authority"] Such an articles like 42, 43 have purely declaratory character. They change the nature of this part of constitution into political document, kind of declaration. They do not constitute such a warrant to lay a claim against organs of the state as the traditional laws. It will be very difficult to claim, for example, the right to housing before Constitutional Court.

I am however strongly convinced that all the opinion are given not for stoping the constituion-making process but for making better constitution. How far the critical legal remarks could be accepted by ukrainian authorities it is also a problem of political decision.