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COMMENTS ON THE DRAFT CONSTITUTION OF UKRAINE

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1. General Remarks

The draft constitution of the Ukraine offers a good basis for a new constitution. Naturally there are still several theoretical and practical problems to be solved. In this memorandum attention will be focused especially on articles concerning human and civil rights and freedoms (part I), executive power (chapter 20) and local and regional self-government (part V). Before considering these questions I would like to comment on the structure of the draft constitution and pay attention to some problems of a legal-technical nature.

Only One Constitution

There are currently different kinds of constitutional systems in the world. There are countries which have no written constitution, countries which have several constitutional laws and also countries which have only one constitution. It is of course not possible to judge which is the best system, since many factors, especially the historical and legal traditions of the country in question, condition such an evaluation.

At least theoretically, a single constitution can be considered a desirable objective. From this point of view it is positive that in the Ukrainian draft constitution the alternative of a single constitution has been chosen. However, the question of constitutional laws in addition to the constitution itself is problematic. It might be worth considering dropping this type of enactment.

Naturally there is no obstacle to requiring a qualified majority (e.g. a majority of two thirds) when legislation dealing with certain issues is to be enacted.

The Length of the Constitution

The draft constitution of the Ukraine is quite a long document (258 articles), but it corresponds to the present-day expectations for a single constitutional document of a nation state.

Ideology

The draft constitution cannot be described as an ideological one though certain liberal-democratic values are quite clearly confirmed by it. According to art. 1 the Ukraine is a *democratic* and *social* state and adheres to *the rule of law. Priority of rigths* (articles 2 and 5), *popular sovereignty* (art. 3.1-2), *division of powers* (art. 3.3) as well as *pluralism* (art. 6) are also set out in the part concerning the general principles of the constitutional system.

Balanced Regulation

In drafting a constitution there is firstly the essential question of deciding the issues to be included in the constitution and secondly the important question of how detailed the constitutional provisions should be.

A constitution should include provisions concerning at least the following issues:

- appointment, authority and functions of the supreme state organs and their competence in respect of each other
- civil rights
- revision of the constitution and enactment of other legal norms.

The draft constitution covers unquestionably all the above mentioned issues and also other provisions generally included in a constitution (e.g. state

symbols). More problematic is whether the draft constitution is unnecessarily detailed. Some articles in the draft constitution seem to be overly detailed (e.g. the provisions concerning meetings and demonstrations). On the other hand the provisions are in some parts too general (e.g. election of the President of the Republic and regulation concerning the Cabinet).

Undoubtedly it is a difficult and demanding task to achieve balanced regulation. However, the principal rule should apparently be an aspiration for relatively concise but clear wording. A certain kind of dignity should imbue the text of the constitution as well. The articles should be as if carved in stone. This point is of great pedagogic significance too, if the articles of the constitution are to become familiar to the citizens and part of everyday life.

The Order of Arrangement

The draft constitution forms a fairly coherent whole. In certain parts (civil rights) even new ways of arranging the articles have been adopted. This topic will be taken up later on in the detailed examination.

In a constitution internal references to other articles should be avoided. In this respect the draft has succeeded rather well. In certain parts, however, there are such references, for example to article 208. The provisions ought to be formulated at least so that only the former articles are referred to, not the latter ones.

Gender Neutrality

The use of gender neutral terminology through out the draft sets a good example to be followed by constitution drafters in other countries.

The Approval of the Constitution by a Referendum

Presumably the new constitution will be approved by a referendum, seeing that this is the way to obtain a judicial legitimation from the people directly. The other alternative would be that of a national assembly elected particularly for the enactment of the constitution.

2. Human and Civil Rights and Freedoms (Part I)

General Remarks

The list of civil rights is quite comprehensive. Even a few innovations concerning the order of arrangement have been adopted in the draft constitution. For instance the right to property, which in many states is reckoned among the civil and political freedoms, is included in chapter 4 concerning economic, social, ecological and cultural rights.

In certain states also the rights to participate and linguistic rights have been enacted in the constitution. In addition one could mention that in the ongoing civil rights reform in Finland the question of including the rights of children in the Constitution has been up for consideration.

Attention should be paid to the formulation of the rights when drafting the provisions further. The aim should be that the gap between the constitutional provisions and the social reality would not be too wide. The rights stated in the constitution should be realistic. On the other hand, it is important to include all the significant values in the constitution.

General Provisions (Chapter 1)

Art. 11. An article stating that the list of civil rights is not exhaustive is probably not necessary. At any rate the formulation of the provision is not stylistically satisfactory.

Restriction Clauses. The possibility of restricting constitutional rights has been included in the form of *general clauses* (art. 12.2 the rights of others, art. 14.2 legitimate aim, art. 14.3 prescribed by law, proportionality, adherence to the democratic order). This solution certainly has some advantages, but reduces at the same time the normative force of the provisions on specific rights. In case the scope of allowed restrictions could be formulated separately for each right, the rights would achieve better protection against infringements. Some articles include a separate limitation clause (e.g. arts. 29 and 30).

Derogation Clause. The meaning of art. 14, para. 4, is not very clear. Does it mean that other rights and freedoms than those enumerated in the provision may *not* be derogated from? Or that other rights and freedoms may be derogated from also in other situations than those mentioned in the provision? In any case, stricter qualifications, including a requirement of full observance of international (human rights and humanitarian law) obligations, should be thought of.

Minority Rights. The rights of minorities are guaranteed in article 13, which, in regard to its relevant parts, closely follows article 27 of the UN Covenant on Civil and Political Rights (CCPR). An explicit clause on positive state measures has, in addition, been written as art. 13, para. 3. The subjective criterion for determining a minority, set out in art. 13, para.2, might, however, cause problems in the interpretation and application of art. 13, para. 3. If self-identification is the sole criterion for belonging into a minority, an indirect consequence could be that positive state measures for the encouragement of ethnic minorities are destined to remain quite limited.

Citizenship (Chapter 2)

The draft constitution can be understood as an example of a phenomenon that could be called the "rebirth" of citizenship, familiar from the Baltic states. As contemporary trends in Western Europe suggest a decline in the

importance of the institution, new states emerging within the geographical area of the former Soviet Union seem to seek a solution to their ethnic and political problems from categorisations based on citizenship. This might cause human rights problems, e.g. in the form of discrimination of non-citizens.

The draft constitution (art. 15) does not define the criteria for citizenship. As a rule subjects of rights are not defined as citizens (compare, however, articles 33-36, 114, 119, 127-128, 175 and 240, as well as art. 18 which seems to suggest that non-citizens would not generally enjoy *constitutional* rights in the Ukraine). On the basis of the text alone it is difficult to determine whether the use of the institution of citizenship could cause human rights problems within the Ukrainian Constitution. Paragraph 2 of article 15, however, is likely to cause practical legal problems in everyday life. It might also be in conflict with para. 3 of the same article. In our modern world with lively international contacts it does not seem feasible to apply a strict policy against double citizenship.

Civic and Political Rights (Chapter 3)

Capital Punishment. The qualifications for applying the death penalty (art. 21, para. 3) are not very far-reaching. Article 6 of the CCPR includes further guarantees. In addition, the Second Optional Protocol to the CCPR abolishes the death penalty altogether in those states which decide to accede to it. Further one could point out that in the reform under consideration in Finland the intention is to enact an explicit provision stating that nobody should be sentenced to death.

Conscientious Objection. Para. 4 of art. 28 seems unnecessary. On the basis of the jurisprudence of domestic and international courts it is quite clear that freedom of religion and conscience does not include a *general* right to refuse obeying laws conflicting with individual convictions. Present trends in multicultural Western European societies point, however, towards wider tolerance in the application of legal obligations. As a consequence, it is quite

possible that conscientious objection to legal obligations might in some *concrete* cases be understood as a legal right. Maybe such a development should not be excluded in the Ukrainian Constitution.

The special clause on conscientious objection to military service (art. 28, para. 5) is formulated in an elaborate way as the issue of non-discrimination has been explicitly taken care of by the reference to the equal length of alternative service. The grounds for objection are, however, prescribed in a very narrow way in relation to present-day international (Council of Europe, United Nations, CSCE, European Community) standards as only religious convictions are accepted as grounds for objection.

Economic, Social, Ecological and Cultural Rights (Chapter 4)

The wide coverage of economic and social rights is impressive. The inclusion of the right to property (art. 36) is a justified categorisation, and the ''social'' restriction clause (art. 36, para. 3) is an interesting innovation. The draft as a whole does not give a full explanation concerning the legal nature of economic and social rights. The text suggest that they could be justiciable and as binding as civil and political rights. Still, the solutions as regards the machinery for the protection of rights are quite traditional. Is there a danger that the central role of the Constitutional Court could in practice lead to an imbalance so that economic and social rights would be interpreted as only ''politically binding''?

All present-day constitution drafters are faced with the fact that the relationship between man and nature requires some constitutional measures aimed at the protection of the environment. Art. 47 of the draft, as well as the provision on duties towards the environment (art. 63) are well motivated provisions.

Guarantees of Rights and Freedoms (Chapter 5)

It might be worth considering rearranging some of the provisions in this chapter. For example the provision on equality (art. 50) and the procedural provisions could be placed among the civil and political freedoms. The placement of the provision on the publishing of laws and other normative acts (art. 51) could be reconsidered.

The draft provision on manifestly criminal instructions, reflecting the Nuremberg Principles, is a very interesting constitutional innovation (art. 52). Is the qualification "manifestly" necessary? Maybe it could be used in para. 2 but deleted from para. 1?

Principal Duties of People and Citizens (Chapter 6)

Is chapter 6 on the duties of people and citizens necessary? In 1992 the Finnish Bill of Rights Drafting Commission came to the conclusion that duties towards the environment should be the only constitutional duties justified as a *sui generis* case because the environment has no legal capacity.

3. State Power (Part IV)

Popular Sovereignty

The draft includes several interesting innovations concerning combining direct democracy and parliamentary representation. To mention just some of these institutions: referendum on state borders (art. 7), the right to resistance (art. 9), mandatory referendum in case of affiliation in unions with other states and military-political alliances (art. 117), the possibility of two million voters to ask for a referendum concerning the dissolution of the National Assembly or either of its two Houses (art. 154) or concerning the recall of the President (art. 186), the institution of *recall* of Deputies (art. 133) by the electors, the institution of *legislative initiative* by 300.000 voters and of *constitutional*

initiative by 2 million voters (art. 157).

All these and other corresponding institutions demonstrate a radical turn from *state sovereignty* (state power above the people) to *popular sovereignty* (power of the people itself) and, at least in part, bypassing the stage of *national sovereignty* (supremacy of a freely elected parliament). Direct democracy certainly has growing possibilities in the contemporary world, but when these features of the draft are considered together with the relatively strong presidential powers and the strong position of the Constitutional Court, one must ask: is there not a danger that the role of the elected parliament becomes too weak and that the weight of a permanent democratic structure is underdeveloped in the Ukrainian Constitution? An affirmative answer would mean that the proposed structure would include built-in possibilities for various *coups d'état.*

General Remarks on Executive Power

The subordination of the Cabinet to the President and the position of the President as receiving his or her mandate from the people seem to cause a certain degree of lack of *parliamentary responsibility* of the executive.

The provisions concerning the President are in some parts too general. There should be a constitutional provision at least on the nomination of candidates. On the other hand the qualification requirements set to the President include unnecessary, even slightly comical elements (''has reached at least the minimum level of mandatory education'').

The provisions on the Cabinet of Ministers are rather few, presumably because of the above mentioned fact that the Cabinet is subordinate to the President.

Presidential Powers

In the draft constitution the President has a particularly strong position. Several important tasks have been entrusted to him. It seems that some of the issues could be dealt with at lower levels of the administration. It might be advisable to reconsider the sphere of presidential duties. One should pay attention at least to the following aspects:

- Is it appropriate that the President interferes in any respect in the state administration at a local level?
- Material limits for the norm-giving competence of the President could be thought of (art. 182).
- Issues concerning *asylum* and *deportation* have been included in the rather lengthy list of presidential powers (art. 178, clause 25), possibly expressing their "political" nature. It might be more advantageous to stress the *legal* nature of these matters, partly due to their human rights implications and partly in order to avoid decisions in individual asylum or deportation cases becoming foreign policy matters.

4. Autonomy and Local and Regional Self-Government

The Autonomous Republic of the Crimea (Chapter 17)

The draft provisions on the autonomy of the Crimea cannot be regarded as establishing a strong autonomy, in terms of international comparison. For instance the status of the Åland islands in Finland includes certain features protecting the autonomy in respect of legislative interference by the nation state.

City and Regional Self-Governance (PART VII)

The VII part of the draft constitution contains a great deal of provisions on local and regional self-government. In several new constitutions enacted in

recent years it has been considered important to regulate this issue. Apparently there is no need for a very detailed constitutional regulation. For example in Finland it has been proposed, according to a bill under consideration, to regulate the local and regional self-government in the Constitution as follows:

> "Local government is based on the self-government of the inhabitants. The grounds of the self-government shall be regulated in an act of Parliament. The preconditions for attending to the duties entrusted to the municipalities have to be secured. A municipality has a right to collect taxes. Liability to pay taxes and the grounds for the determination of a tax as well as the legal protection of a taxpayer shall be regulated in an act of Parliament.
> The issue of in what way and how extensively the self-government of the inhabitants will be applied to administrative territories larger than the municipalites shall be regulated in an act of Parliament."

The organization of the administration has been regulated in greater detail in an act of Parliament and in municipal by-laws.

5. Other remarks

The State and the Civil Society (PART IV)

The subordination of the state to the civil society is an interesting innovation corresponding to a general development through which constitutions become more societal in character while, correspondingly, moving away from their role as instruments of the state. Precisely in this connection one has to ask, whether article 88, para. 3, on the role of the state as a substitute for a child's natural parents, is not too simplistic.

Review of the Constitutionality of Laws

Ordinary Courts. Is there a danger that the proposed system of having ordinary courts petition the Constitutional Court in cases of incompatibility of laws with the Constitution (art. 217) will lead to a very limited either - or role for constitutional rights in ordinary courts?

The Constitutional Court. The draft expresses great confidence in the possibilities of a Constitutional Court to protect constitutional rights and the Constitution in general. Is such confidence justified? Or should more efforts be put into elaborating other mechanisms for the protection of the Constitution?

The enumerations in art. 245, para. 2, are not clear as they include references to items which cannot be found in art. 243. Is the intention that individual complaints concerning unconstitutionality could be decided by a three-member collegium? If this is really the intention, maybe one should require unanimity of collegiums in art. 246?

If the Constitutional Court is empowered to give some kind of preliminary rulings to ordinary courts, the final outcome of the case *Ruiz-Mateos Family v. Spain*, pending before the European Court of Human Rights, should be studied carefully. A possible implication is that the parties of the original controversy must be guaranteed a fair trial also in the proceedings before the Constitutional Court.

International Treaties and International Human Rights

Monism and dualism. Article 8 corresponds to a contemporary trend towards *"monism"* regarding the relationship of international and domestic law. The *monistic principle* seems to be expressed in article 8, para. 2 which requires no domestic enactment for the domestic validity of treaties. Article 162, however, suggests a *dualistic* method of treaty implementation as a domestic legislative act is prescribed as the primary alternative.

Primacy of international law. The issue of *primacy of international law* is logically separate from the monistic principle. In this regard the draft is not very far-reaching: "general human values" and "the commonly accepted principles of international law" are secured primacy in art. 8 para. 1.

Two matters could be taken up for discussion in this connection; (a) Should not the rapid development in the forms of international norm-giving be taken into account in the formulation of art. 8? The present wording covers only treaties and customary interantional law but bypasses such institutions as binding resolutions of international bodies. (b) In case the intention is not to give international law *general* primacy in relation to domestic law, the position of *international human rights norms* could be thought of. The reference to "general human values" in art. 8, para. 1 is quite ambiguous as the legal basis for the primacy of human rights treaties.

Parliamentary participation. Article 136 is quite traditional in the issue of parliamentary participation in treaty-making. As the creation of international law nowadays uses methods clearly differing from the traditional pattern of making treaties, the draft could lead to unnecessary limitations in the National Assembly's participation in the formation of new international obligations. The possibility of international bodies approving resolutions directly (without subsequent ratification) binding on the Ukraine (and, possibly, as in the case of the EC, also *in* the Ukraine) should be taken into account. One possible solution is to include a clause on the Assembly's possibility to follow and guide negotiations in matters that are decided by an international body. The provisions on "preliminary consent" by the Council of Deputies (art. 140, clause 3) and the Council of Delegates (art. 141, clause 6) could possibly be used as a starting-point.