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OPINION

UKRAINE

THE PRESENT CONSTITUTIONAL SITUATION

by

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THE PRESENT CONSTITUTIONAL SITUATION IN UKRAINE.

Before expressing some remarks concerning the present constitutional situation in Ukraine, I would like to summarize the developments which have led Ukraine to the declaration of independence, to the constitutional reforms adopted in the period between April 18th, 1991, and September 21st, 1994, and - eventually - to the adoption of the law on State power and local self-government.

After having declared the State sovereignty of Ukraine and the primacy of its laws over those of the URSS in July 1990, the Ukrainian Parliament adopted the declaration of independence of Ukraine on August 24th, 1991: this declaration was confirmed by referendum on December 1st, 1991.

Notwithstanding the declaration of July 1990 had provided for some principles which were conflicting with the principles of the Ukrainian constitution adopted on April 20th, 1978, this constitution was kept in force and was only amended in view of the purpose of insuring the transition of Ukraine from the communist regime to freedom, democracy and the rule of law. But during all these years the Ukrainian Parliament has not been able to adopt a completely new constitution. Some amendments were approved: for them the required majority of two thirds of the total number of the People's Deputies of Ukraine was obtained, while a completely new draft of the constitution has not got the necessary consent. Ukraine still keeps in force the old amended socialist constitution.

Pending such a situation the Supreme Rada of Ukraine and the President of Ukraine, which are the only two directly elected national bodies of Ukraine, decided to settle their differences by adopting a constitutional agreement on the basic principles of the organisation and functioning of the State power and local self-government in Ukraine pending the procedure aimed at adopting the new constitution of Ukraine. After difficulties and discussions the agreement was approved by a law of the Supreme Rada and - later - a compromise was

adopted by law for its enforcement and the approval in the future of the new constitution. But neither the first act nor the second one obtained the required majority of two thirds of the members of the Supreme Rada.

On the basis of the preamble of the agreement (I mean the first act, because I have never seen the second act) and according to the dispatches of the RIA news agency, both the majority of the Supreme Rada and the President recognize that the content of the constitution adopted in 1978 (even in its amended text) and that of the new law conflict in some parts. Nevertheless they stick to the rules that, on one side, " the legislation of Ukraine shall be effective in the part which is not contrary to the rules " of the new law and, on the other side, " the provisions of the applicable constitution of Ukraine shall be effective only in the part which complies with the present constitutional agreement " (art. 61 I and II of the agreement).

Having the agreement been adopted by law, we cannot treat it as a convention of the constitution only, that is a mere political agreement between the supreme elected bodies of the country on the ways of implementing the constitution in force. But the failed approval of the law by the required majority does not allow the superseding of the old constitution by the new law. Nevertheless this was and is the purpose of the Parliament and the President: pending the procedure aimed at the approval of the new constitution they agreed to stick to the new principles set forth in the law " On State power and local self-government in Ukraine " on the basis of their good will, mutual concessions and compromise.

It is a transitory solution which does not imply the abrogation of the old constitution but - instead - implies the suspension of its rules concerning the State power and local self-government in Ukraine, or rather those rules which don't comply with the new principles. This solution is obviously based on a political agreement, but the content of this agreement is not the new principles, the content is the decision of settling the differences between the governing

bodies of Ukraine and sticking to principles which are generally accepted and have been adopted by a parliamentary law. It is not a solution respectful to the constitutional hierarchy of the sources of law which is provided for by the Ukrainian constitution approved on April 1978. Nevertheless it is a solution which complies with the principle of legality as far as it binds the Ukrainian governing bodies to the obedience to a previous and stable statute approved by the Parliament and not to an informal, political, always changing agreement only. Frankly speaking we have to acknowledge that there is a rupture of the Ukrainian constitutional continuity but it is a transitory rupture only in view of the restoring of the full legality of the normative order through the adoption of the new constitution.

Moreover the force of only a part of the old constitution is suspended. For instance its chapters 5 and 6 are still in force and shall be enforced as far as they don't contradict the constitutional agreement, or rather they comply with it. This is an important feature of the present constitutional order in Ukraine because the Supreme rada has not been able to adopt a new Bill of rights since the declarations of the Ukrainian sovereignty and of the independence of the Ukraine.

Actually the constitutional provisions on the fundamental rights, freedoms and duties of the citizens of Ukraine are drafted in a very old fashioned way respectful to the principles of the socialist law and - specially - of the theory of the material guarantees of the rights and freedoms. Their main purpose is the entrusting of the State authorities with the obligation of creating the material conditions which insure the enjoyment by the citizens of their rights and freedoms. This arrangement implied, on one side, that the State authorities did take care of the material protection more than of the legal and judicial guarantee of the rights and freedoms and, on the other side, that their enjoyment and the enjoyment of the material guarantees of these rights and freedoms were restricted to the people who complied with the political obligations of the socialist

regime.

Nevertheless the keeping in force of these provisions which are unaffected by the constitutional agreement, can offer a ground for interventions of the Constitutional Court when the law necessary for the establishment of this body will be adopted. Even if they are drafted according to the socialist theory of law, the constitutional provisions concerning fundamental rights and freedoms can be the basis of a judicial review of legislation in the field. They could be corrected and integrated by some of the principles received in the Ukrainian order of law through the declaration of sovereignty adopted in July 1990 and the partial amendments of the constitution. Obviously in this way fundamental rights and freedoms could get only a weak and transitory entrenchment in the constitutional system but such an entrenchment would be a bridge to the adoption of new statutes concerning the implementation of the rights and freedoms and their reception in the Ukrainian order through the signature and ratification of international instruments in the field.

But in envisaging the future role of the Ukrainian Constitutional Court we have to be very prudent. From a strictly legal point of view we cannot entrust the Court with the task of checking the implementation of the constitutional agreement. If we did such a choice, we would put the Court in the difficult position of dealing with a statute which contradicts the constitution in force without having been approved by the majority required for the amendments of the constitution. Moreover, as far as the matter of the organisation and functioning of the State power and local self-government in Ukraine is concerned, an intervention of the Constitutional Court is apparently unthinkable. The provisions of the agreement establish a constitutional equilibrium between the supreme bodies of the State which is based only on the research of political compromises and is aimed at avoiding the danger of a showdown between them. This construction is confirmed by the RIA news agency which emphasized that the Parliament, or rather the Supreme Rada approved the agreement without adopting " articles giving the president the right to di-

sband the parliament and setting out a procedure for the impeachment of the president ".

The interpretation of the Ukrainian situation whoul have been certainly different if we had accepted the idea that - pending the difficulties of a quick approval of the new constitution - the constitutional agreement was approved with the purpose of completely substituting it for the old constitution. In this case the implementation of the agreement would not have depended on a political compromise between the supreme bodies of the State, but the interested authorities would have pretended for it to a legal force which it does not have. The agreement should have been read as the new Ukrainian constitution and the Constitutional Court should not have been obliged to stick to the old hierarchy of the sources of law and to recognize the primary role of the old constitution.

But even in this hypothesis the Constitutional Court should have been entrusted with the task of the judicial review of legislation on the basis of the old constitutional provisions concerning fundamental rights and freedoms. In any case the content of the constitutional agreement does not allow an interpretation which implies the abrogation of the articles of the old constitution in the matter.

The solutions submitted in this paper probably look ambiguous but ambiguous is the present situation in Ukraine, where people looking for a constitutional compromise are not able to get the required majority for changing the constitution. Therefore the only possible solution is the establishment of a transitory order with the partial suspension of the old constitution and the political engagement of the supreme constitutional bodies of sticking to the provisional rules adopted by the Parliament without a qualified majority. If the present situation does not meet all the standards of the Council of Europe, the subscription and the ratification (with internal implementation) of international instruments in the field of human rights and fundamental freedoms by Ukraine would help the advent of a constitutional order in Ukraine coherent to the obligation of implementing democracy, fundamental rights and freedoms and the rule of law.