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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

O P I N I O N

ON THE DRAFT CONSTITUTION OF UKRAINE (Text approved by the Constitutional Commission on 11 March 1996 (CDL (96) 15)

adopted at the 27th Meeting of the Venice Commission on 17-18 May 1996

on the basis of contributions from:

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Introduction

The European Commission for Democracy through Law has for a considerable period been actively involved in the process of drafting a new Ukrainian Constitution. Already in 1993 members of the Commission submitted written comments on the draft proposed at that time and held an exchange of views with its authors. At its 24th meeting on 8-9 September 1995 the Commission adopted an Opinion on the present constitutional situation in Ukraine following the adoption of the Constitutional Agreement between the Supreme Rada of Ukraine and the President of Ukraine on the basic principles of the organisation and functioning of State power and local self-government pending the adoption of the new Constitution of Ukraine.

Members of the Commission also commented on the preliminary draft for a new Constitution submitted in 1995 and held two exchanges of views with the group of legal experts entrusted by the Constitutional Commission with the task of drawing up a revised draft. The present draft therefore partly already reflects previous efforts of the Commission.

This opinion was adopted by the Commission at its 27th meeting in Venice on 17-18 May 1996. On this occasion the Commission also endorsed the comments made by Ms Hanna Suchocka (Poland) in document CDL (96) 25. These comments were received too late to be integrated into the present opinion.

Section I

General Principles

General Comments

The general principles are in line with international standards and show the willingness of Ukraine to become a democratic European State protecting Human Rights. The Constitution is the highest legal norm (Article 8) and the bodies of legislative, executive and judicial power exercise their functions within the limits established by the Constitution (Article 6, paragraph 2).

A weakness of the draft, which does not specifically concern the general provisions but may be mentioned here, is that there is no coherent set of rules on the state of emergency. There are some provisions, in particular Article 38, paragraph 3, Article 60, paragraph 3, Article 87, No 10, Article 92, No 26, Article 105, paragraph 1, No 18 and Article 155, paragraph 2. The conditions for proclaiming a state of emergency are however not defined in the Constitution itself and this task in entirely left to the ordinary legislator (Article 92, No 26). It would also seem useful to expressly give to the Constitutional Court control of the acts proclaiming the state of emergency and its extent. On the other hand the list of rights and liberties which cannot be restricted in a state of emergency is extremely long: eg. Articles 27, **30**, 42, 51. This seems unrealistic.

Comments on specific articles

Article 6

Article 6 provides for a division of power between the legislative, executive and judicial branches. This approach is however not consistently maintained throughout the text. The Constitutional Court has a separate section which is not even placed after the section on the system of justice.

Article 3

The formulation of Article 3, paragraph 1 "the human being ... is recognised in Ukraine as the highest social value" gives, at least in translation, the impression that the individual is seen in function of society and not in its inherent value and dignity, which precedes the state, is unique, irreplaceable, and incomparable.

Article 9

International treaties ratified by Ukraine are incorporated by this provision into the internal legal order, apparently at the level of ordinary law. It would be logical to equally incorporate customary international law and generally accepted principles of international law.

Section II

Rights and freedoms of the person and the citizen

General Comments

General assessment of the Section

This section of 49 Articles is very long. The catalogue of rights and freedoms protected is vast and exhaustive and the text shows the willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights and to ensure that these rights are implemented in practice.

Nevertheless the Section has also a number of weaknesses:

- there is a lack of structure within the Section, which contains 49 Articles but no subdivisions;

- the very exhaustive character of the list including rights of a social, economic and environmental character poses problems for their guarantee by the courts;

- the possible restrictions and limitations of fundamental rights often seem to go too far.

The lack of structure in the Section

This question is not a purely theoretical and systematic one but it may have repercussions on the level of implementation of the rights guaranteed.

In effect, necessarily the 49 Articles of the Section contain legal provisions of a varied character:

- some provisions have the character of a programme for the Ukrainian legislature without guaranteeing specific rights, like, for example, Article 48, paragraph 2: "basic secondary education is compulsory."

- certain provisions contain structural principles for the functioning of the legal order which have to orient the legal life in the future but which cannot be considered as individual rights in a strict sense, *inter alia* the principle that norms have to be published, the principle of non-retroactivity of norms and the principle *ne bis in idem* (Articles 52, 53 and 56);

- there are certain provisions containing what has been defined in legal science as institutional guarantees protecting certain institutions from future intervention of the ordinary legislature, the definition of marriage in Articles 46 of the draft is an example;

- certain provisions like Article 31 on the freedom of association allow far-reaching restrictions putting into question their character as individual rights;

- Article 61 to 64 contain duties;

- even though most Articles of the Section are formulated as true subjective rights (has the right to....), these rights have a different structure and content as some of them correspond to traditional fundamental rights and liberties, whereas others have the character of social rights where the active intervention of the State is indispensable to fully realise the right (eg. the right to housing in Article 42) or are new fundamental rights associated with new technological developments (eg Article 27, paragraphs 2-4 concerning self-determination with respect to information and the environmental rights in Article 45).

Since these rights have a different character it would seem advisable to classify and systemise them in a way making it possible to foresee different types of protection for each of them, the efficiency of which may vary in function from the content of the right concerned. The lack of such a structuring in the Section may be to the detriment of the traditional fundamental rights and liberties which provide true individual subjective rights and the protection of which has to appear clearly in the text of the Constitution.

Section II should therefore be divided into different subsections and varying rules for the protection by the courts should be introduced into these subsections.

The range of the rights protected

This issue is closely related to the preceding issue. Article 150 of the draft enables the Constitutional Court to resolve issues of the constitutionality of laws and other legal acts the constitutionality of which will also depend on the respect for the fundamental freedoms contained in this section. In addition, Article 50 gives the task to protect all human rights and freedoms to the courts in general. However the catalogue of rights is so rich and vast that this risks being unrealistic. As set out above, for different categories of rights the same wording "every person has the right..." is used, but for many of these rights it will be impossible for a court to apply them directly. This concerns for instance Article 43 ("everyone has the right to a standard of living sufficient for himself or herself and his or her family, including sufficient nutrition, clothing and housing") or Article 45, paragraph 1 ("everyone has the right to an environment which is safe for life and health, and to the recovery of damages inflicted through violation of this right.")

In some instances, for example in Article 27, paragraph 4, the right to judicial protection of a certain right is specifically guaranteed. However this should not mean that judicial protection exists only for the rights where this is expressly mentioned as this would exclude the main part of traditional fundamental freedoms.

Therefore, a specific mention of the rights the protection of which is ensured by the ordinary courts should be introduced into the Constitution. The general formulation contained in Article 50, paragraph 1 is too wide and therefore insufficient.

The possible restrictions of fundamental rights

It is appreciated that the Constitution protects constitutional rights and freedoms from being abolished (Article 17, paragraph 2 and Article 155, paragraph 1, see below). The existence of the rights as such is therefore protected and this might be reinforced by introducing a clause on the protection of the essence of the right similar to Article 19, paragraph 2 of the German *Grundgesetz*: "in no case may the essence of a basic right be encroached upon."

As regards restrictions of fundamental rights, Article 60, paragraph 2, proclaims that "such restrictions shall be minimal and correspond with the principles of the democratic state". This means that all legal restrictions may not go further than necessary (principle of proportionality) but also that they should not lead to the abolishment of the right (Article 17, paragraph 2 alone and together with Article 60 paragraph 2). There is however a large number of articles containing specific conditions for the restriction of rights by the legislature and the circumstances allowing the legislature to restrict the rights are often extremely ambiguous and wide and give him a free hand to interfere to a very large degree. This concerns in particular Article 27, paragraph 2 where the link between the circumstances allowing the restriction (interests of national security, economic well-being and human rights) and the right itself (protection against the use of confidential information concerning a person without his or her

knowledge) seems questionable, Article 28 where the restrictions are very general (for the protection of national security, public order, health and morality of the populations, or the rights and freedoms of others) and Article 31 (interests of national and social security, the protection of health and morals of the population or the protection of the rights and freedoms of other people).

To this vast array of possible restrictions concerning specific articles, Article 60, paragraph 1 adds a general clause allowing restrictions of rights and freedoms "in order to protect the rights and freedoms of other persons, national security, and the protection of the health and morality of the population". It is not quite clear in the various translations whether only the legislator or also the executive is empowered to proceed to restrictions of fundamental rights by virtue of this provision.

In any case, such a provision is problematic since a number of rights should be guaranteed without any restriction, in particular those included in Articles 22, 23, 50, 53, 55, 56, 57.

It is therefore proposed to delete the last phrase of Article 60 and to replace the provision by the following text: "constitutional rights and freedoms may not be restricted except in cases prescribed by the Constitution and laws adopted in accordance with it." The circumstances allowing restrictions should be spelled out in the various articles.

Legal persons

It would be useful to include in the text a provision on the rights of legal persons. Such a provision might be inspired by Article 19, paragraph 3, of the German *Grundgesetz* - "The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits."

Comments on specific Articles

Article 22

In this Article it should be expressly stated that the death penalty is abolished.

Article 24

The last paragraph should be worded in more a precise way. Article 5, paragraph 4, of the European Convention on Human Rights could usefully serve as a model.

Article 25, paragraph 2

The words "pursuant to the law" should be added at the end ("in the basis of a court decision pursuant to the law").

Article 28

The restrictions of the freedom of movement allowed by this Article are excessively large and should in all cases be subject to a previous judicial decision.

Article 29

The prohibition of censorship should be transferred from Article 12 to this Article.

Article 32, paragraph 4

As in Article 25, paragraph 2, the words “pursuant to the law” should be added at the end.

Article 35

The rights granted by this Article seem too vast, in particular the obligation to reply imposed on the public authorities.

Article 36

The second paragraph might be worded “every person has the right to own, acquire, alienate, use...”.

The full reimbursement of value in paragraph 7 may lead to financial problems.

It is proposed to reword paragraph 9 as follows: “the use of property may only be restricted by law in order to protect the rights...”.

Article 37

The freedom to choose a profession should be included. Proposal: “every person has the right freely to choose a profession or occupation or to conduct entrepreneurial activity...” As regards paragraph 4: “the State protects by law...”

Article 38, paragraph 3

Again the words “pursuant to the law” should be added after “verdict of a Court”.

Article 50, paragraph 2

It is indispensable to also include the right to have access to independent and impartial tribunals competent to render decisions in civil and criminal cases. See also comments on Section VIII below.

Article 60

See the comments above. The first paragraph should read “constitutional rights and freedoms may not be restricted except in cases prescribed by the Constitution and laws adopted in accordance of it.”

Section III

Elections. Referendum

General Comments

It is to be welcomed that the present text no longer contains provisions inspired by too radical a concept of direct democracy, like for example the possibility of dissolving Parliament or expressing non-confidence in the President through a referendum. This shows that the text is moving in the right direction by providing stability for the main institutions.

Comments on specific articles

Article 68, paragraph 1

According to this provision both the National Assembly and the President can call a referendum. This may lead to useless competition between both institutions and referendums may become arms in the political struggle between them. It is recommended that only one organ should have the right to organise referendums, and the most appropriate organ seems to be the Head of State who, as a single person, receives his powers directly from the people. The National Assembly being the legislature, it seems unlikely that it will be disposed to submit questions to a referendum which it might resolve within the limits of its own competence.

As regards the dates of the referendum, it might be considered whether the President should have the sole authority to fix the dates for referendums or whether he should be obliged to consult the government and the Presidents of both Chambers of the National Assembly. If the President alone calls the referendum and fixes its dates, it may easily assume an authoritarian character within the framework of the so-called plebiscitarian democracy.

Article 68, paragraph 2

The so-called popular or people's initiative creates many problems both from a pratical and theoretical point of view. The text does not make it very clear under which circumstances such popular initiatives could take place. It is in particular recommended to avoid the possibility of amending the constitution through a referendum, since this apparently democratic procedure may easily be abused for populist purposes. The possible subject matters of a peopole's initiative should therefore be clearly defined excluding the possibility of constitutional amendments.

A more restrictive alternative version of popular initiative would be to provide for the possibility of submitting draft bills to the National Assembly which would be obliged to discuss these bills and decide on them. A popular initiative according to this model opens up to citizens the possibility to participate in the legislative process while leaving the final word to the legislature.

Section IV

The National Assembly of Ukraine

General Comments

The balance of powers

The present text clearly marks a step forward in the development of the constitution making process in Ukraine. It provides for a fairly good balance of power between the various State organs. Even though it is clear that the drafters of the Constitution are oriented towards a semi-presidential form of government, not all questions on the form of government are clearly settled. In addition, it would seem appropriate to strengthen the parliamentary element in the relations between the National Assembly and the executive. The excessive strengthening of the executive power can become self-defeating. If, on the one hand, a strong executive is necessary for governing effectively and implementing reforms, on the other hand, if not successful, the persons exercising these wide powers may lose all capacity for effective action. It should also not be forgotten that the national representative body also has purely political functions, in particular to integrate political and social forces and to mobilise support and legitimise the policy pursued in practice. Therefore it is recommended to provide for more numerous and varied procedures of parliamentary control on the actions and intentions of the government and the various ministries.

The introduction of a second chamber

The setting up of a bicameral legislature - the National Assembly is composed of the Chamber of Deputies and the Senate - divides the legislature into two parts and provides an internal balance of powers. This will without doubt contribute to the quality of legislative action and to a more moderate political climate within the country. However it is necessary to define more precisely the tasks of both chambers. Otherwise the result will be a simple duplication of their functions, especially when the balance between the political forces is similar in both chambers.

The hierarchy of norms

The Constitution is the supreme norm (see last paragraph of the preamble, Article 6, paragraph 2 and Article 8, paragraph 2). Below this level the situation is less clear. The technique of enumerating the fields to be determined by ordinary legislation (Article 92) raises several questions: are matters not mentioned here outside the powers of the ordinary legislator (Article 71 and Article 84, paragraph 1, No. 4)? Who is competent to legislate in the field not covered: the president (Article 105, paragraph 1, No. 26 and paragraph 2), the Cabinet of Ministers (Article 114) or nobody?

In the fields to be determined exclusively by the ordinary legislator, may there be infralegal norms adopted by another organ? What is the position of the universals, decrees and

directives of the President (Article 105, paragraph 2) in the hierarchy of norms? The President exercises other powers provided by the Constitution (Article 105, paragraph 1 No. 26), protects "rights and freedoms of citizens" (Article 103, paragraph 3) and has extensive powers to organise the executive branch (see Article 105, paragraph 1, No. 13, but also Article 118).

The Sessions of the National Assembly

Articles 81 and 82 of the draft provide for a working of the National Assembly on a sessional basis with two regular sessions of undefined length and extraordinary sessions held upon request. This seems not the best way to organise the functioning of the national legislature during a period of political instability and radical reform of the legal system. Sessions of short duration were typical of the Soviet system of government. The effect is well known: it deprived the national representative body of real power and influence in the political life of the country. Therefore it is preferable to clearly define the length of the sessions of the National Assembly by fixing the duration of the two ordinary sessions or even accepting one longer session (for example nine months), as envisaged in the French reform of 5 August 1995. On the other hand, the extreme alternative adopted in Bulgaria in 1991, to foresee one permanent session should also be avoided since continuous political activity leads to a bad quality of parliamentary work.

Comments on specific articles

Article 74, paragraph 2

According to this provision Senators are elected through direct elections in multi-member constituencies. This leads to the assumption that a system of proportional representation, pehaps based on party lists, is envisaged. As a result the strength of the political forces in the Senate might be equivalent to their strength in the Chamber of Deputies and therefore both Chambers might in a certain way duplicate each other. Therefore the alternative of providing for one member constituencies merits consideration. The advantage would be to establish a more distinct basis for territorial representation of the regions and to make the Senators themselves more independent from the political forces having proposed them as candidates and supported them during the election campaign.

Article 80, paragraph 3 and 4

The text provides that the respective chamber may terminate the mandate of a Parliamentarian if he violates the provisions on incompatibility and that such a decision will be subject to appeal in court. It is however difficult to accept that the decisions of a chamber of the National Assembly should be subject to control by an ordinary court and it its preferable to provide for judicial review by the Constitutional Court.

Article 81, paragraph 4

The role of the dean of age should be defined more precisely. It should be provided that under his chairmanship the deputies swear their oath and elect the presidents of the two chambers.

Article 82 paragraph 1

As mentioned above, it should be constitutionally guaranteed that parliamentary sessions are long enough to enable the legislature to function well.

Article 83, paragraph 1

According to this provision a majority of at least two thirds of deputies or senators present at the meeting is required if the public is to be excluded from a session of the chamber. This requirement seems excessive. A simple majority would seem sufficient, accompanied by an obligation to publish the decisions taken at the session *in camera*.

Article 84, paragraph 1, No 2

As mentioned above, it would be preferable to reserve the possibility to call a referendum to the President, with the exception of the referendums on issues of altering Ukraine's territory as foreseen under Article 69.

Article 84, paragraph 1, No 9

It would be preferable to give a decisive role in impeachment procedures to the Consitutional Court. See the remarks below concerning Article 109.

Article 85, No 1 and 2 in conjunction with Article 90, paragraph 2

Under Article 85, No 1, the Chamber of Deputies has the power to ratify the appointment of the Prime Minister. Under Article 85, No 2, it has the power to consider and adopt decisions on the programme of activity of the Cabinet of Ministers. The appointment of the Prime Minister and the approval of the government programme are closely linked and therefore it would be preferable to have one sole procedure combining both decisions. This would also influence the scope of Article 90, paragraph 2, which provides that the Chamber of Deputies may be dismissed by the President if it rejects twice the government programme.

Article 86

Article 86 concerns the parliamentary control of government. Under present circumstances this control has to be continuous and comprise a number of different forms. In the draft it is foreseen that a simple enquiry may be transformed after discussion of the response into a vote of no-confidence. This entails a danger of artificial escalation of conflicts and it would be preferable to separate the various procedures.

Article 93, paragraph 1

This article gives the right of legislative initiative also to the President. This should be avoided since the President is not politically responsible before Parliament and since laws are legal means to implement concrete policy. Therefore the right of legislative iniative, as concerns the executive, should be reserved to the government and not be given to the President. If the government presents a bill, it thereby expresses its wish to implement its programme.

Article 94

The requirement of a two-thirds majority in the Chamber of Deputies in the event of contradictions between it and the Senate concerning a draft law is excessive. Such a high requirement may hamper the legislative process in a period of dramatic political and economic reforms.

Article 95, paragraph 4

The required majority of two-thirds of the members of both chambers to overcome a suspensive veto of the President is again excessive and may hamper legislative activity. The absolute majority of members of both chambers would seem sufficient.

Section V

President of Ukraine

General remarks

As far as this section is concerned, the draft provides for considerable improvements as compared to earlier texts.

In particular it is to be welcomed that the provision requiring a quorum of at least 50% of electors participating in the election of the President in order that the election shall be deemed valid, has been dropped in the present draft. This avoids unforseeable prolongations in the election of the President.

It is a further improvement that the present draft no longer provides for a vote of no-confidence in the President by popular referendum (see also the remarks above concerning Section 3) or parliamentary vote. This would have introduced a serious permanent element of instability into the system of government.

It has already been set out in the comments on Article 95, that the majority of two-thirds of the members of each Chamber required to overrule the President's veto against a law passed by the National Assembly appears rather high.

Comments on specific Articles

Article 105, paragraph 2

It is to be appreciated that the power of the President to issue universals, decrees and directives that are mandatory for execution in the territory of Ukraine must have a basis in the constitution or laws and must serve the purpose of implementing the Constitution and laws. While it is rather rare to provide for normative powers of a President in the constitution itself, his powers in the draft Constitution of Ukraine are very broad, which in a difficult period of transition may be acceptable. It is, nevertheless, worth discussing whether normative acts of the President under Article 105 should be binding only on the executive branch, while normative acts touching upon the rights or duties of private individuals should only be issued in the form of a law or in the

form of decrees authorised by a specific law providing expressly for the issue of such decrees, and determining their purpose and limits. In US American, German and other legal orders, it is a constitutional principle contained in the principle of the functional separation of powers, that essential normative determinations over a subject matter must be made by the legislature itself and must not be left to the implementing normative power of an executive organ.

Article 109

It has already been pointed out in the comments concerning Article 84, paragraph 1, No 9 that the procedure of impeachment has a largely legal and constitutional character making it appropriate to give decision making power to the Constitutional Court. Nevertheless it has to be acknowledged that the procedure has been considerably improved with respect to previous drafts by providing, prior to the decision of the National Assembly, for an examination of the case by the Constitutional Court and receipt of its conclusion about the observance of the procedure of investigation and consideration provided for by the Constitution, as well as for a prior decision of the Supreme Court of Ukraine whether the charges brought constitute a serious crime.

Section VI

The Cabinet of Ministers of Ukraine and other bodies of the executive branch.

General Comments

It is an improvement that the present draft no longer provides for "approving the personal membership of the government of Ukraine" by the Supreme Rada, as the prior draft did, but only provides for the power of the Chamber of Deputies to ratify the appointment of the Prime Minister of Ukraine on the proposal of the President of Ukraine. The former draft might have seriously paralysed the President in forming a Cabinet of Ministers composed of persons he considers to be the most competent in carrying out his political programme.

The present draft leaves open what the consequences would be if the Chamber of Deputies (whose majority may well be in political opposition to the President) repeatedly refuses to ratify the President's proposals for appointment of the Prime Minister. Therefore the danger of a stalemate between President and Chamber of Deputies cannot be excluded. A solution might be, as suggested in the comments on Articles 85 No 1 and 2 and 90, paragraph 2, to establish a link between the decisions of the Chamber of Deputies on the person of the Prime Minister and on the programme of the government. The power of the President to dissolve the Chamber of Deputies would then also exist in the case of its repeated refusal to approve the appointment of the Prime Minister.

Comments on specific articles

Article 114, paragraph 2

The power of the Cabinet of Ministers to pass binding orders provided for by Article 114,

paragraph 2, of the draft should be subject to certain express limitations: their binding force should be restricted to executive authorities or if going beyond, for instance touching upon rights and obligations of private individuals, should require an authorisation by a law determining the essential contents and scope of such orders. Otherwise the normative powers of the legislature might be circumvented or undermined.

Section VII

The Procuracy

General Comments

The draft is encouraging, especially by contrast to previous drafts. The powers and competences of the procuracy are defined in a way indicating a fundamental transformation of the former so-called prokuratura. This is a crucial step towards democracy in Ukraine. The procuracy acts on behalf of the State in court and plays a dominant role in pre-trial investigations.

Comments on specific articles

Article 119, No 5

According to this provision the procuracy has to represent the interests of the State or a citizen in court in cases that are determined by law. It is recommended that this representation should be limited to cases where the public interest is involved and where there is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask for State assistance or not.

Article 121

The Law on the organisation and procedure of the Office of Procurator should define the procuracy as a system of relatively independent authorities preferably organised in correspondence to the court system. It would be for the higher authority to control the level immediately below. However, the highest authority should not directly control the lowest one. In this way, the system of prosecution would be protected against direct political intervention or influence.

Section VIII

The System of Justice

General Comments

This section should be examined in the light of Article 50 of the draft Constitution. Article 50, paragraph 1, provides that all human rights and freedoms shall be protected by the courts and paragraph 4 gives the right to everyone to appeal for the protection of his or her rights and freedoms to judicial and other institutions of the United Nations and the Council of Europe.

Article 50, paragraph 2, guarantees everyone the right of appeal to a court against decisions, actions or inactions of the bodies of state power, bodies of local self-government or public officials. It is to be welcomed that in this way the judicial control of administrative authorities is established and a constitutional basis for administrative jurisdiction is provided. In civil and partly in criminal matters, there will, however, be no such previous decisions of a public body. It is nevertheless indispensable to provide also for civil and criminal matters a constitutional right to have access to independent and impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights.

It does not seem necessary to get rid of the inquisitory principle completely but the stress should be put on the adversarial principle.

Comments on specific articles

Article 122

To avoid any ambiguity concerning the relationship between the judiciary and the executive, one might add in the first sentence of Article 122 the words “and exclusively”.

Article 124, paragraph 3

According to this fundamental provision, the first appointment of a judge shall be for a term of five years. The process of the transformation of the judiciary means that people with very limited professional experience will be appointed.

Section IX

Territorial Structure of Ukraine

Article 130

Article 130 looks like a kind of political programme and its normative content is very poor. The relationship between centralisation and decentralisation is not clearly determined and it is left to the legislator to establish a balance between these two different purposes in the absence of clear criteria for this balance, especially whether one or the other purpose should prevail.

Article 131

This article shows a preference for decentralisation when it states that the system of administrative and territorial structure of Ukraine "is composed" of the Crimean Autonomy, oblasts, raions, cities, municipalities and villages. But Articles 116 and 117 imply the existence of a local organisation of the state executive power, chaired by the heads of the appropriate state administrations who obviously are accountable to the central state bodies.

As regards the methods of decentralisation, it has to be borne in mind that it can be implemented in two different ways: either in the form of autonomous self-governing communities or in the form of decentralised state bodies. Although both of these solutions are mentioned in the Constitution, the question of co-existence of decentralisation and centralisation is not clearly settled in the same way as it is settled, for instance, in Article 5 of the Italian Constitution where the preference for local self-government is evident.

It could be advisable to transfer Article 130 to Section I of the draft and connect it to Article 7, while Section IX could be enriched with more precise and clear provisions.

Section X

The Crimean Autonomy

Section X of the draft Constitution does not offer a clear blueprint of the Crimean Autonomy.

The Statute of the Crimean Autonomy

According to Article 132, paragraph 2, the Statute of the Crimean Autonomy shall be approved by the National Assembly of Ukraine in accordance with the order determined for the adoption of the laws of Ukraine. It results from press releases, but the text of the decision is not available to the Commission, that the Parliament of Ukraine has in principle approved a Constitution of the Autonomous Republic of Crimea but has sent back certain provisions to the *Verkhovna Rada* of Crimea for reconsideration. It is therefore not quite clear whether this text has really entered into force. In addition, it seems that the text was approved by a simple majority of the deputies and not by the majority required for constitutional laws. It would therefore seem that this Constitution of the Autonomous Republic of Crimea corresponds to the Statute of Crimean

Autonomy provided for in Article 132 of the draft Constitution.

The only formal constitutional basis of the Crimean Autonomy is therefore the text of the Ukrainian Constitution itself, which does not have many provisions on the matter and leaves a large space of discretion to the Ukrainian legislator. Since approval of the Statute is given in accordance with the order determined for the adoption of ordinary laws, the Ukrainian legislator will have a free hand dealing with the implementation of the provisions of the Ukrainian Constitution concerning the Crimean Autonomy and it will be able to modify the Crimean Constitution at any time, extending or curtailing the content of the Crimean Autonomy without the participation of the Crimean institutions.

The protection of the competences of the Crimean institutions

According to Article 150 of the draft, the *Verkhovna Rada* of the Crimean Autonomy can ask the Constitutional Court of Ukraine to review the constitutionality of laws and legal acts of the National Assembly, acts of the President of Ukraine and acts of the Cabinet of Ministers. This is a very important provision because it provides for a jurisdictional guarantee of the Crimean Autonomy, entrusting its most important body with the power of asking for a decision of the Constitutional Court when acts of the Ukrainian institutions conflict with the Ukrainian Constitution and - specifically - with the constitutional provisions concerning the Crimean Autonomy.

But a constitutional judgment requires the existence of a fixed yardstick according to which the constitutionality of the acts submitted to the review by the Constitutional Court has to be evaluated. In respect to the Crimean Autonomy the Constitutional Court only disposes of a very poor yardstick, because only a few relevant elements of the Crimean Autonomy are provided for in the Ukrainian Constitution and a review by the Court is obviously restricted to the observance of the Ukrainian Constitution by the Ukrainian governing bodies. When the Constitution leaves the hands of the legislator free, the judicial review of legislation is a very limited guarantee. Therefore the Crimean *Verkhovna Rada* could not complain about possible restrictions of the Crimean Autonomy adopted - for instance - by the Ukrainian legislator in exercise of his freedom of choice.

On the other side, according to Article 133 of the draft, “Normative legal acts of the Crimean Autonomy shall not contradict the Constitution and the laws of Ukraine”. This provision implies that Crimean normative acts do not have a previously fixed field of competence with respect to the authority of the Ukrainian legislator. The borders between Ukrainian legislation and Crimean normative acts can always be changed at the discretion of the Ukrainian legislature who will be free to change the competences of the Crimean “legislator” and overruling the decisions of the Constitutional Court adopted on the basis of the previous Ukrainian legislation.

The mentioned flaws are especially evident if it is kept in mind that the draft does not provide a list of the items or matters which are given to the competence of the Crimean institutions: the Ukrainian legislator is entrusted with the task of providing for that list and may enrich or curtail it on the basis of his own discretion. There is a danger that the Ukrainian legislator will act to promote his own interest, if it is true that, when enriching the competence of the Crimean institutions, he has to curtail his own competence and the other way round.

It would be advisable to list in the Constitution or in a special law, which could not be abrogated by the Ukrainian legislator "with the order determined for the adoption of the laws of Ukraine", the items or matters which are given to the competence of the Crimean institutions. Moreover, Article 133 could be modified preventing Crimean normative legal acts only from contradicting the Ukrainian Constitution and the principles of the Ukrainian laws. It would be advisable to have a stronger constitutional guarantee of the Crimean Autonomy: this result could be achieved through a clear constitutional division of the relevant functions between the Ukrainian State and the Crimean Autonomy, binding both on the Ukrainian legislator and the Crimean legislator.

The legal acts of the Crimean Autonomy

The draft does not speak of laws of the Crimean Autonomy, it only mentions "normative legal acts of the Crimean Autonomy" in Article 133. But these acts can be submitted for judicial review by the Constitutional Court of Ukraine like other Ukrainian laws or legal acts (Article 150).

Article 136 provides that the President of Ukraine may suspend decisions and resolutions of the *Verkhovna Rada* of the Crimean Autonomy which contradict the Constitution while simultaneously applying to the Constitutional Court of Ukraine. The question now is whether the decisions and resolutions mentioned in this Article include normative legal acts of the Crimean institutions. In this case the President's power to suspend would be inappropriate and violate the presumption of constitutionality of legal norms. It might be argued that Article 133 and Article 134 distinguish between normative legal acts on the one hand and decisions and resolutions on the other and that Article 136 therefore does not concern the normative legal acts under Article 133. But in the section on the Constitutional Court Article 150 again uses the term "normative legal acts of the Crimean Autonomy" and this provision should correspond to Article 136. There is also no positive attribution of competence to any Crimean body to adopt normative legal acts other than the decisions and resolutions mentioned in Article 134. One may therefore come to the conclusion that Article 136 indeed also refers to normative legal acts.

This should be clarified and the possibility for the President to suspend legal acts should be restricted to acts not having a normative character.

Section XI

Local Self-Government

General Comments

This section has been substantially revised in respect to earlier drafts. The text now appears sufficiently clear and precise.

Article 139

According to Article 139, paragraph 3, the Raion and Oblast Councils are formed indirectly, the Raion Council from the village, the municipality and city councils of the raion, and the Oblast Council from the raion and the city (cities of oblast importance) councils of the oblast. This has to be seen in connection with Article 138 which distinguishes between territorial communities (the residents of villages, municipalities and cities) having the right of local self-government and Raion and Oblast Councils representing the common interest of the citizenry of villages, municipalities and cities. It is therefore possible to adopt different electoral systems for both levels requiring direct elections for the territorial communities and indirect elections for the Raion and Oblast Councils which are envisaged as the assemblies of the representatives of the Councils of the territorial communities. Apparently, the Raion and Oblast Councils have under Article 141 no executive functions but only deliberative functions and the implementation of their decisions might be entrusted to the bodies of the territorial communities.

Section XII

The Constitutional Court

General comments

Section XII of the draft sets a permanent Constitutional Court. This fully corresponds to the prevailing practice in new democracies to protect the constitutionality of their own legal order by a specific, permanent and independent judicial body.

Comments on specific articles

Article 146

This Article provides that both the President and the Senate appoint one half of the judges of the Constitutional Court (see also Article 87, no. 1 and Article 105, paragraph 1, no. 19). Could the functioning of the Constitutional Court be blocked in practice by the non-appointment of judges?

Article 147

The independence of the Constitutional Court also depends on the existence of its own budget. It is important that the Court may administrate its own budget without any interference. It would be appropriate to introduce in Article 147 a provision similar to Article 129 of the draft.

Article 149

It should be confirmed *expressis verbis* in the Constitution that the decision on pre-term cessation of office of a judge of the Constitutional Court falls into the exclusive competence of the Court itself. One of the reasons for pre-termination of office being oathbreaking, it would seem useful to insert the text of the oath of the Constitutional Court judges into the Constitution (cf Article 103 for the President).

Article 150

The power to interpret officially

One of the competences entrusted to the Constitutional Court is "the official interpretation of the Constitution and the laws". While it is obvious that the Constitutional Court has to interpret the Constitution to arrive at its decisions, it seems outside the usual functions of a judicial body to adopt an official interpretation of the Constitution. What may be provided for is that the Constitutional Court can give advisory opinions, interpreting constitutional provisions with respect to certain specific problems.

For the Constitutional Court to give official interpretations of ordinary laws seems outside the scope of competences of a constitutional court. In order to determine the constitutionality of a law, the Constitutional Court will often have to interpret it. This should, however, not be a specific competence of the Court.

Lack of a provision on concrete norm control

According to Article 50 of the draft, all human rights and freedoms shall be protected by the courts. From the specific competences of the Constitutional Court, it follows *per argumentum e contrario* that the constitutional rights and freedoms have to be guaranteed and applied also by all ordinary courts. Practice in other countries shows that human rights violations are often the consequence of a simple application of laws or other norms which themselves are contrary to the Constitution. If such a violation appears, ordinary courts (which would have to respect the law until it is declared void by the Constitutional Court) should have the power to have the constitutionality of the norm reviewed by the Constitutional Court (concrete norm control, incidental norm control). Article 150, paragraph 2, limits the possibility to seize the Constitutional Court to the Supreme Court. This procedural obstacle would considerably delay and hamper the effective defence of human rights.

Lack of a provision on conflicts of competence

The Constitution contains detailed catalogues of competences of the various State organs which

risk not to be always precise and entail conflicts between them. It seems therefore necessary to give to the Constitutional Court a competence to decide in such cases.

Article 151

Article 151 introduces an element of preventive norm control into the draft (see also Article 159 for amendments to the Constitution). It should be clarified in the text of the Constitution if the conclusions adopted by the Constitutional Court under these procedures are legally binding or not.

Article 152, paragraph 2

According to this provision, laws and other legal acts declared to be unconstitutional by the Constitutional Court lose their force and effect from the day the decision about their unconstitutionality was adopted. It would be appropriate to provide that such a decision should be published in the Official Journal.

Section XIII

Introduction of Amendments to the Constitution

General Comments

The procedure for amending the Constitution looks very complex. This impression may be partly due to the fact that the wording of the relevant provisions is sometimes very clumsy.

Comments on specific articles

Article 155

This provision guarantees the acquis in the Human Rights field by providing that the constitutional rights and freedoms may not be abolished or restricted through amendments to the Constitution but may only be improved, enlarged or reinforced. This is in accordance with the principles enshrined in Article 3, paragraph 2, Article 16, paragraph 2 and Article 17 of the Constitution.

The wording seems appropriate since it also covers the rights guaranteed in Section I and not only the rights guaranteed in Section III.

Article 157

It is extremely restrictive to entrust the President of Ukraine alone with the power to introduce draft laws to amend Sections I, III, and XIII of the Constitution. This contradicts the principles of democracy and gives a lot of discretion to the President in shaping - for

instance - the elections and the referendums. It is true that the draft does not mention the electoral systems which have to be adopted for implementing the Constitution. Article 157 would nevertheless inhibit a change in Section III without the initiative of the President even if the political parties agreed to "constitutionalise" the choice of an electoral system.

Section XV

Transitional provisions

Article 1

Does Article 1 of the transitional provisions imply the abrogation of the previous laws and normative acts which contradict the Constitution? Or does it allow the Constitutional Court to review the constitutionality of legal acts "adopted prior to the coming of this constitution into force"? Both solutions are possible, but the question arises whether the issue of the constitutionality of old laws and normative acts can be submitted to the Constitutional Court. Since under Article 150 there is no convenient procedure for this purpose, the alternative of abrogation may look preferable. But abrogation may entail problems when the previous law contradicts a principle of the Constitution and this principle is too vague to take the place of that law in providing a legal solution for the problem concerned.

Article 4

Article 4 of the transitional provisions follows a contradictory line dealing with the judiciary. It seems advisable to elect or appoint new judges when "the judicial system of Ukraine pursuant to Article 123 of this Constitution is formed", instead of waiting for "the end of the term for which they were elected or appointed". Such a solution would guarantee a coherence to the overall functioning of the judicial system.

Conclusions

Having been actively involved in the work leading to the establishment of the present draft, the Commission is pleased to note that this text constitutes a substantive progress with respect to previous drafts, and, on the whole, seems a good basis for establishing Ukraine as a pluralistic and democratic State protecting human rights.

The Commission is aware that any Constitution is a political document and that it will always be the fruit of political compromise. It is therefore natural that such a text contains provisions, partly inspired by previous traditions, which are not satisfactory for a, in particular foreign, lawyer. In respect to the present draft, this is true of the human rights section with its vast and undifferentiated catalogue of social and environmental rights. The institutional sections reflect Ukraine's choice of a semi-presidential system and in general the provisions would seem to contribute to the establishment and functioning of stable democratic institutions though the President's powers in some respects may be regarded as excessive. It is also particularly encouraging that the procuracy has no longer the task of general legal supervision it enjoyed under the Soviet model.

The section of the draft on the Crimean Autonomy provides only little protection of this autonomy. It may have to be adapted in order to meet the aspirations of the Crimean population and may have to be brought in line with the recent decisions concerning a Crimean Constitution.

On the whole the Commission however considers that this draft is a good basis for the good basis for the adoption of the Constitution. This task seems urgent since the consolidation of Ukrainian statehood requires the adoption of the Constitution of the independent Ukrainian State. The Constitutional Agreement between President and Supreme Rada signed on 8 June 1995 provides "To recognize as necessary the creation of adequate conditions for acceleration and successful completion of the constitutional process in Ukraine in order to adopt the new Constitution of Ukraine not later than one year after the date of signature of this Constitutional Agreement." The rapid adoption of the Constitution on the basis of the present text seems therefore desirable.

As to the method of adoption, an adoption by referendum should not be excluded. The people as the sovereign could thereby express their opinion and the danger that certain political forces could afterwards try to unilaterally change "the rules of the game" would be reduced.