

**OPINION ON THE PROVISIONS CONCERNING THE ORGANISATION AND STATUS OF LOCAL AND REGIONAL AUTHORITIES UNDER THE NEW CONSTITUTION OF UKRAINE**  
**(adopted on 28 June 1996)**

by  
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**Opinion for the attention of the European Commission for Democracy through Law on the provisions of the new Constitution of Ukraine adopted on 28 June 1996 regarding the organisation and status of local and regional authorities**<sup>[1]</sup>

**1. Follow-up to the previous comments on the draft Constitution, 24 February 1996 (Strasbourg, 10 April 1996, doc. CDL(96) 18)**

First of all I should point out that most of the comments on the status and organisation of local and regional authorities as defined in the original draft Constitution have been taken into account.

The new version of the Constitution, which is in fact more specific on many points, endeavours to distinguish as far as possible between "bodies" of "State power" (which it systematically explains are "bodies of executive power")<sup>[2]</sup> and bodies of local self-government.

This is made particularly clear in Article 5, which stipulates, as we had suggested, that "the people exercise power directly and through bodies of *State power and bodies of local self-government*". The separate status of the two categories of bodies and the fact they derive their legitimacy from one source alone (the will of the people) are thus made very clear from the outset, viz the preamble. This separation is also specified in Articles 38 (ex 33) and 39 (ex 34), etc.

Care is also taken not to burden bodies of local self-government with responsibilities without financial compensation by affirming specific citizens' rights (Article 47 (ex 42), the right to housing, and Article 49 (ex 44), health protection<sup>[3]</sup>).

More importantly, the third paragraph of the old Article 101 (now 102), which empowered the President to co-ordinate State and local bodies, and the second paragraph of the old Article 116 (now 118), which placed the bodies of local self-government under the authority of the executive, have been deleted. The new wording of Article 118 is much more specific and complete and removes all ambiguity on the matter. Article 119 is also much more explicit than the former Article 117.

Chapter IX on the territorial structure of Ukraine and the new Chapter XI on local self-government (which we shall refer to as "decentralised" in order to distinguish it from the situation in Crimea) very aptly clarify the status and organisation of the new structures - which include the city districts and the cities of Kyiv and Sevastopol ("oblast cities").

Since these two chapters contain most of the provisions relating to decentralised local and regional structures, it might be useful to compare the new provisions they set out with the articles of the European Charter of Local Self-Government and the principles generally defended by the Council of Europe in connection with regional administration.

**2. The new provisions in the light of the principles of local and regional self-government**

**2.1 The place of local self-government principles in the legislative hierarchy (Articles 2 and 3)**

The requirement that the rules should be set out by law or, if possible, by the Constitution, was already satisfied in principle and is now even better respected since the definitions given by the Constitution are more precise and detailed.

We might note that to abolish the second chamber, which was more firmly rooted in the territory, is perhaps to remove what would have been an additional safeguard for the future (for instance, this chamber would have had the power to modify boundaries<sup>[4]</sup>). Unless there has been a mistranslation, it is hard to see why the National Assembly should organise local elections (Articles 85 (30) and 92 (20)), but presumably it is only responsible for establishing the rules for organising elections. Similarly, we might wonder about the advisability of empowering a national deputy to conduct an inquiry into the functioning of the decentralised local authorities. Such supervision is normally a matter solely for the members of locally elected councils (Article 86).

**2.2 Organisation and legitimacy of the new local and regional self-governing bodies**

The Constitution confirms that the administration will comprise two, or even three tiers, if we consider the new city districts and the fact that the councils can set up "bodies of direct administration", but only the bodies closest to the grass roots are elected directly (apparently this does not apply to oblast or district councils, although this is not specified).

There is also a plain difference in the executive bodies, which are elected directly at local level but indirectly at regional level. The fact that the Chairman of the executive body also chairs the council obviates a difficulty encountered in central European countries in which executive bodies are elected separately but their chairmen do not chair the council.

The separation between local authorities on the one hand and oblasts and districts on the other is clearer, and is in fact unambiguous - the latter manage common interests rather than co-ordinating.

The various decentralised local authorities can also freely engage in co-operation based on agreements.

These arrangements are not contrary to the Charter, but we might make two remarks:

the system is liable to be rather complicated because it superimposes several structures which can apparently take a variety of forms;

some Congress members might be surprised that the regional level is not elected by direct suffrage. However, this is not prohibited under the Constitution, which in fact does not even mention this matter. It is perfectly acceptable to wait until the new institutions are established and stabilised

before taking any further steps.

The important point, as confirmed by the transitional provisions, is that **there will be a changeover from appointed executive bodies to elected executive bodies which are answerable to their councils** (Chapter XV, 7).

### 3. Powers

A proper distinction is drawn between delegated and independent powers. The Constitution places independent powers first, and sets out a general jurisdiction clause: "the right ... to independently resolve issues of local character within the limits of the Constitution and the laws of Ukraine" (Article 140, first paragraph).

It is perhaps unfortunate that the powers are listed in a rather concise manner, since they concern fundamental issues (budget, ownership, and the organisation and control of former State enterprises). Where other powers are concerned, reference is made to individual pieces of legislation.

By the same token, the powers of the districts and oblasts should be listed more fully (Article 143).

### 4. Legal certainty

The new text has made no progress in the matter of the status of elected officials, even though consideration has evidently been given to the comments set out in document CDL(96)18.

The Constitution now clearly prohibits the holding of a second representative mandate (Article 78, 2nd paragraph); the regulations on incompatibilities have been relaxed (in the previous text a local elected official could not be an entrepreneur), and a reference is made to separate legislation (Article 42, 2nd paragraph). The issue of party membership has been revised (Article 37, 2nd paragraph), but the scope of the provision with respect to local executive bodies is difficult to assess.

The regulations on legal acts are affected by the new general provision which stipulates that publication, or indeed notification, is a precondition for their applicability (Article 57, 2nd paragraph).

The control system was already satisfactory and has not changed: the authority responsible is designated, ie the corresponding State body of executive power (Article 143, last paragraph). Such control cannot concern lawfulness: an act can only be suspended and simultaneously referred to court. It is to be hoped that the law will develop a system to protect local authorities against indefinite suspension.

### 5. Legal freedom

Local authorities are granted the right of association. International co-operation is not mentioned (Article 142).

On the other hand, the right to recourse to judicial remedies for "the rights of local self-government" is proclaimed, even if it is not clearly organised (Article 146).

### 6. Finances

The right to levy taxes is proclaimed.

The same applies to compensation for delegated charges.

There are evidently two possible sources of financing: they may be local (though loans are not mentioned) or else consist of transfers (in cash or in kind) from the State. However, the Constitution only clearly stipulates that such transfers can be made to districts and oblasts (which can redistribute them) or relate to delegated powers.

Nevertheless, a number of general articles stipulate that the State is primarily responsible for providing given services (Article 47, "The State creates conditions ..." (housing); Article 49, "Health protection is ensured through State funding ..."). Local authorities and their associations must ensure that these rights are respected by applying to the courts or the legislator.

In conclusion, the provisions of the new Ukrainian Constitution on local and regional authorities, which have been considerably clarified and fleshed out as compared with the previous version submitted to the European Commission for Democracy through Law, seem generally to comply with the principles defended by the Council of Europe, particularly in the European Charter of Local Self-Government which Ukraine is about to sign. It will be interesting to compare the actual organisation of the regional levels (districts and oblasts) with the principles set out in the European Charter of Regional Self-Government which is currently being prepared. The text is short enough to permit further developments and changes.

In the short term we should pay particular attention to the manner in which the provisions on the independent powers of the various decentralised bodies and those relating to finance are developed and implemented in the Local Government Act which the Supreme Rada is currently considering<sup>[5]</sup>. This act will be particularly crucial in terms of enabling the various councils to organise their administrative and decision-making structures in conformity with local realities.

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[1] This opinion will not deal with the issue of Crimea, as this was the subject of an excellent paper by Professor BARTOLE.

[2] Throughout the text up to and including the heading of Chapter VI, which deals with the Cabinet of Ministers. See my proposal on p. 12 of the previous opinion.

[3] On the other hand, the provision of free medical assistance is deliberately imposed on both local and State bodies (for simplicity's sake we shall use the word "local" to refer to departments subordinate to bodies of local self-government).

[4] On the other hand, the oblasts are given a constitutional safeguard (Article 133).

[5] An additional opinion will be drawn up on the preliminary draft of 19 September 1996.