Strasbourg, 26 May 2008 **CDL(2008)052***

Opinion 462/2008 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT CONSTITUTION OF UKRAINE

Prepared by a Working Group headed by Mr V.M. Shapoval

by Mr Kaarlo TUORI (Member, Finland)

*****_This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.._

1. In accordance with the division of labour between the rapporteurs, the following comments focus on, in addition to Chapters IV-VI, Chapter I and Chapter X of the Draft Constitution.

2. Most of the proposed amendments to Chapter I concern the rearrangement of the provisions already included in the present constitution. The need for such a rearrangement is not always evident. Substantial amendments are but few.

3. In art. 5(2) of the Draft Constitution, the provision according to which "the right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its authorities or officials" has been retained. This provision may give rise to incorrect interpretations as to the exclusive significance of the amendment procedures laid down in Chapter X (Chapter XIII in the present Constitution). It deserves to be emphasized that such a provision cannot be appealed to as a justification for circumventing the explicit constitutional provisions on amendment procedures-.

4. According to Art. 5 (4) of the Draft Constitution "the people and each citizen of Ukraine have the right to offer resistance to anyone who infringes on the independence and territorial integrity of Ukraine or attempts to violently overthrow the constitutional order, if other means prescribed by the Constitution of Ukraine cannot be used". It is questionable whether the constitution should institutionalize such general emergency powers, which can be exercised by all citizens – jointly or separately – and which do not presuppose any formal declaration of emergency. The proposed provision is not conducive to constitutional and legal stability.

5. Art. 9(2) of the Draft Constitution includes an explicit provision on the primacy of international treaties in regard of domestic law. The provision is welcome.

6. Art. 10(1) of the Draft Constitution lays down the principle according to which everything which is not legally prohibited is permissible. The necessity of such an explicit statement in the Constitution can be questioned. Art 10(2)[1] should be transferred to Art. 4 which lays down the principle of the Rule of Law.

7. Art. 12(3) includes a new provision according to which "the free development, use and protection of Russian and other languages of national minorities is guaranteed in Ukraine". The provision, in itself, is welcome but it should be complemented by more explicit provisions on linguistic rights in Chapter II. The exact legal relevance of Art. 12(3) and Art. 12(5)[2] remains unclear.

8. Art. 18(3) of the Draft Constitution provides that "the State guarantees the freedom of political activity not prohibited by the Constitution of Ukraine". In comparison with the Constitution in force, reference to prohibitions through law has been deleted. This would explicitly eliminate the (ab)use of the provision as a constitutional authorization for further restrictions on political activities.

9. Art. 21(2) of the Draft Constitution includes a provision on the possibility of a transfer of sovereign rights in case Ukraine accedes to the European Union. Although this is not an issue of foreseeable future, in a comprehensive redrafting of the Constitution, such an amendment can be defended.

---

[1] "The state authorities, local government authorities and officials are obliged to act only on the grounds, within the scope of authority, and in the manner prescribed by the Constitution of Ukraine and laws."

[2] "The use of languages in Ukraine is guaranteed by the Constitution of Ukraine and is specified by law."

10. The legal relevance of Art. 23(2)[3] should be specified in the context of the provisions on local self-governance in Chapter IX. The same holds for Art. 7, which states that "the State recognises and guarantees the local government" obviously. The latter provision can be criticized for referring to only local government instead of local *self*-government.

11. The proposed amendments to Chapters IV-VI do not entail fundamental changes in the mutual relations of the main political bodies, i.e. the Verkhovna Rada, the President and the Cabinet of Ministers. The President would continue to exercise relatively wide powers.

12. In the formation of the Government, the position of the President would in fact be at least formally enhanced. The appointment of the ministers on the submission by the Prime Minister would be transferred from the Verkhovna Rada to the President. However, this change would probably not change the present balance of power, because, obviously, the President is bound to follow the submission of the Prime Minister.

13. According to Art. 120 of the Draft Constitution, the non-approval of the Programme of Action submitted by the nominated Prime Minister would automatically lead the dissolution of the Verkhovna Rada and the appointment by the President of the Prime Minister and, on his or her submission, the other ministers, who would only be responsible to the President. However, the dissolution of the Verkhovna Rada and the appointment of an interim government should be possible only after it is indisputable that no other solution to the political deadlock exists. In addition, the deadlock may result not only from the non-approval of the Programme but also from the failure of the parties to form a majority coalition and of the Verkhovna Rada to nominate a Prime Minister. The provisions on the formation of the government should provide also for this eventuality.

14. The draft constitution includes two alternative regulations with regard to the dissolution of the Verkhovna Rada. According to the first alternative, the President retains the power of dissolution, but he or she can exercise it only after consultations with the Chairman of the Verkhovna Rada, the Prime Minister and the leaders of the parliamentary factions. According to the second alternative, the President may submit the issue to a referendum. If his or her proposal is not approved in the referendum, the Verkhovna Rada may terminate his or her mandate with two-thirds majority. It is not entirely clear whether the second alternative also includes the President's discretionary power to make his or her decision without recourse to a referendum. However, irrespective of this unclarity, the procedure proposed in the second alternative can be criticized for making the President an active player in the political power-game, for granting the Verkhovna Rada the power to dismiss for political reasons a popularly elected President and for laying ground for open political controversies between the Verkhovna Rada and the President.

15. The criteria of the incompatibility of the parliamentary mandate with other types of activity should be exhaustively regulated in the Constitution and not left to the level of ordinary laws, and thus to majoritarian decision-making, as is proposed in Art. 82(3) of the Draft Constitution.

16. Art. 86 of the Draft Constitution would retain the present problematic provisions on the power of a political party or an electoral bloc of parties to terminate the mandate of a deputy. By contrast, the provisions on parliamentary factions and their coalitions, included in Art. 83 of the present Constitution, have been deleted. This would be a welcome change.

17. The decisions on the appointment and dismissal of the Ombudsman in the Verkhovna Rada should require a qualified majority (Art. 89, para 23, of the Draft Constitution).

---

[3] "The status of the capital city of Ukraine – Kyiv – is established by a separate law."

18. According to Art. 90 of the Draft constitution, “no less than 50 Deputies of the Verkhovna Rada of Ukraine have the right to submit, at a session of the Verkhovna Rada of Ukraine, an inquiry to the Cabinet of Ministers of Ukraine concerning the issues relating to the exercise of its authority”. To submit questions to the government should be an individual right of the deputies, as is the case according to the present Constitution (Art. 86).

19. Art. 110, para 13, of the Draft Constitution would transfer the appointment of the judges from the Verkhovna Rada to the President. Such a change, together with the role accorded to the High Council of Justice (Art. 133-135 of the Draft Constitution) would enhance the independence of the judiciary.

20. Art. 98 would introduce a popular legislative initiative. This is a political choice, to be decided on grounds of political expediency.

21. In Chapter X, concerning the amending procedure of Constitution, the introduction of a popular initiative is proposed. Such an initiative would require the support of one million or – if the draft law includes amendments to Chapters I, III or X - a million and a half voters (Art, 159). The introduction of such a popular initiative, too, is a political choice, unhindered by any European standard.

22. The provisions of Chapter X are not very clearly formulated. However, it seems that Art. 160 regulates the procedure to be followed when amending Chapters I, III or X or when adopting a new Constitution, whereas Art. 161 would concern other constitutional amendment. If this interpretation is correct, the procedure would remain unchanged. Thus, only draft laws involving amendments to Chapters I, III or X, would have to be submitted to a referendum.

23. In the provision on non-permissible amendments (Art. 163(1) of the Draft Constitution), reference to “the liquidation of the independence or violation of the territorial integrity of Ukraine” (Art. 157 of the present Constitution) has been deleted. The reason for this is not clear.

24. In accordance with the proposed changes to Chapter I, as well as to Chapers IV-VI, the amendments to Chapter X (Chapter XIII in the present constitution) consist, to a large extent, mainly of a rearrangement of the provisions in force. The number and extent of proposed substantive amendments do not warrant the issuance of a new, wholly revised Constitution.