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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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**COMMENTS ON THE
DRAFT CONSTITUTION OF UKRAINE**

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

**by
Ms Angelika NUSSBERGER
(Substitute member, Germany)**

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Introduction

The Parliamentary Assembly has asked for an opinion on the draft of the new Ukrainian Constitution prepared by a working group at the request of the President (Shapoval draft).

The following comment is focused on the human rights section of the draft and also gives some preliminary comments on Chapters IV to VI of the Constitution.

I) Comments on the human rights section of the draft of the Ukrainian Constitution

According to the drafters the prime concern of the new Constitution is to strengthen the constitutional guarantees of civil rights and freedoms. Therefore a close scrutiny of the human rights provisions is necessary.

Generally speaking, the Venice Commission's positive assessment of the human rights section of the former version of the Constitution can be upheld (CDL-INF (1997)002e). The catalogue of rights protected continues to be very complete and shows willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights. Some of the issues criticized in the current version of the Constitution have been amended, some problems remain.

1) Improvements on the basis of the Venice Commission's comments to the current version of the Constitution

The following changes react to critical comments of the Venice Commission and are therefore appreciated, albeit some aspects might still be further improved.

The wording of Article 3 has been clarified according to the suggestion made by the Venice Commission. Whereas in the former version of the Constitution it was stated that the "human being, his or her life and health ... are recognised in Ukraine as the *highest social value*", the new draft considers them to be the "*highest value*".

A provision on the rights of legal persons has been included (Article 26). It refers only to legal entities registered on the territory of Ukraine thus excluding foreign legal entities active in Ukraine without registration and not-registered Ukrainian legal entities (if registration is not a precondition of the creation of a legal person). The wording of the provision might cause problems as registration might become a precondition for the exercise of basic human rights not only for foreign, but also for Ukrainian corporations. For example, the arbitrary refusal to register an organisation would not be covered by the human rights provisions of the Constitution.

The death penalty is explicitly abolished (Article 31). Although it is de facto already banned from the current legal system, this constitutional clarification is highly appreciated.

The reasons for restrictions on the freedom of movement have been clarified; the general clause contained in the former version has been replaced by the reference to restrictions "established by a court in accordance with the law in the interests of national security, public order, prevention of crime, protection of public health or rights and freedoms of others." (Article 37).

The right to a fair hearing of his or her case by an independent and impartial court has been inserted (Article 58).

2) Problems persisting in the draft of the new Constitution

It is noted that the catalogue of rights not to be restricted in emergency situations has not been changed. It had been criticized for being unrealistically long.

The wording of economic, social and cultural rights is still identical to the wording of civil and political rights. Especially if there are no further qualifications to the rights guaranteed unrealistic expectations might be created. It depends on the courts to interpret these rights without interfering in the field of activity of the legislator. It must be secured that the difficulties in implementing economic, social and cultural rights must not have negative consequences for the direct implementation of civil and political rights.

3) Comments on other changes

(a)

In both versions of the Constitution it is stated that there is single citizenship in Ukraine. The current version adds that "the grounds for the acquisition and termination of Ukrainian citizenship are determined by law." This sentence is not repeated in the new version of the Constitution. Identical regulations on citizenship are to be found in Article 25 of the current and Article 29 of the new draft of the Constitution. It is not clear why the provision in the section on general principles has been cancelled. But it seems that the guarantees provided for by the more detailed provision are adequate.

The equality principle has been changed in a relevant way. First, equality is not only guaranteed "before the law", but also "before the court". This seems to be obvious, but can be stressed in a situation where the population does not have much confidence in the judiciary. Furthermore the list of criteria that cannot be used as justification for different treatment has been changed. "Place of residence" has been omitted, whereas "place of birth" and "national minority affiliation" has been added. Whereas the latter changes are to be welcomed, it is not clear why the place of residence has been taken out of the list. The special advantages and privileges for women mentioned in the current Constitution have been abolished. This is in conformity with the new approaches to gender equality abstaining from granting women special privileges, especially if they are based on a traditional conception of the different roles of men and women. On the other hand the paternalistic prohibition of hazardous work for women is upheld. This is in line with ILO Conventions, especially Convention No. 45 concerning the employment of women in underground work in mines of all kinds. The European Court of Justice considers such an approach as discriminatory (ECJ C-203/03 (Commission v. Austria), *Europäische Grundrechte Zeitung* 2005, p. 124 et seq); but this need not be taken into consideration by Ukraine.

It is noted with satisfaction that in several cases the possibility of restrictions has been concretized. This applies e.g. to foreigners' rights. Exceptions can only be established by "laws for the purpose of protection of national security or territorial integrity." Furthermore, in the current version of the Constitution restrictions to freedom of movement can be "established by law", whereas in the new version the reasons justifying such restrictions are clearly enumerated. The vague reference to "economic welfare" used in connection with an interference with personal and family life has been replaced by clearly worded exceptions.

The scope of the interference with the inviolability of the dwelling place is explained more in detail. Whereas the current Constitution only allows for exceptions "for entry into a dwelling place", the new version refers to entry, examination and search. This change responds to the needs in reality as in most cases it is necessary not only to enter, but also to search a dwelling.

Custody as a temporary preventive measure has to be verified by a court within 48 hours, whereas in the current version of the Constitution the time interval is fixed at 72 hours.

It is also noted with satisfaction that several rights that were defined as “citizens’ rights” are now applicable to everybody (protections against unlawful dismissal, freedom of creativity, rights to the results of the creative action, trade union rights, use of communal and State property, right to labour).

Some rights have been added, such as the right to family and respect to family life and the right to review by a higher court, the right to seek pardon or mitigation of the sentence.

On the other hand duties of the State have been added that remind of the former socialist conception. Thus Article 46 of the new version states: “The State ensures the protection of all owners and businesses, and the social purport of the economy”. It is not clear if this provision is understood to be justiciable and, if yes, how.

Some clarifications are inserted in the section on economic and social rights. Whereas in the current version the number of working hours is determined by law, the new version states that it must not exceed 48 hours. On the other hand the narrow restriction on health care reforms (“The existing network of such institutions shall not be reduced”) has been lifted.

(b)

Although, as shown in the preceding paragraphs most of the changes in the new version are to be welcomed, there are also some changes reducing the human rights protection provided for in the current Constitution.

The right to an alternative military service is no longer explicitly mentioned. In the current Constitution it was mentioned in Article 35, in the new version a rather vague wording is to be found. A relief from a duty for reasons of religion or other convictions is possible in “instances established by law.” (Art. 39). The provision on the prohibition of forced labour does not mention an alternative service either (Article 47).

(c)

Some systematic changes might also be mentioned:

Social protection of the military moved from the general principles to the human rights section

It should be mentioned that the right to property has been changed. But this change is to be found in the section on “General principles”, and not in the human rights section.

(d)

In some instances the wording of the provisions has been changed without an obvious reason.

In the basic provision of Article 3 stating that human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State the word “freedoms” has been omitted. The title of chapter II still refers to rights and freedoms.

Whereas according to the former version of the Constitution the “content and scope” of the existing rights and freedoms shall not be diminished, the new version only refers to the “scope”. This change might be detrimental if it were understood to allow changes of the material substance of the rights.

II) Comments on Chapter IV to VI of the Constitution

1) Chapter IV: Verchovna Rada

The following comments do not go into the details of each provision in comparison to the regulation in the current Constitution but focus on some important points.

The regulation on the termination of the authority of a deputy (Article 85) mirrors the problems encountered with various misuses of deputies' mandates in the past. Although it is understandable to react to such forms of misuse, this must not lead to a weakening of the independent position of a deputy. According to the new draft the mandate shall be terminated on the basis of a decision of the Central Electoral Commission, if the deputy fails to comply with the incompatibility regulations. A preliminary procedure for warning the deputy is not envisaged (Article 85 para. 5)

Furthermore the provision according to which the failure of the deputy to join the parliamentary faction of the political party or electoral bloc he or she was elected for as well as the withdrawal from the party or electoral bloc leads to the termination of the mandate of the deputy does not seem to be a satisfactory approach. The complete dependence of the individual from the party or electoral bloc is not compatible with the role a deputy has to play in a free parliamentary system. The position of the Venice Commission in this respect has already been clearly elaborated. Furthermore the proposed regulation would empower the "higher leadership of the relevant political party" to counteract the voters' decisions. This would be an undemocratic move.

The catalogue of the competences of the Verchovna Rada has been broadened in a relevant way. It has the power to nominate the Prime Minister of Ukraine, to decide on the resignation of the Prime Minister and to approve the Program of Activity. Thus a truly parliamentary system has been created.

There is no general preference for any specific governmental system. The most important criteria are the stability of the democratic process on the one hand and the checks and balances between the different State powers on the other hand.

In the proposed draft the Verchovna Rada has a strong position. In the light of the principle of the separation of powers there might be some disequilibrium in the relationship between the legislative and judicial powers. It is highly unusual that the structure of the court system is not fixed in the Constitution but can be determined by the legislative branch of power by law (Article 89 No. 22). This is not compatible with the regulation in Article 129. Furthermore the Verchovna Rada can exert a decisive influence on the composition of the Constitutional Court, as it appoints to office and dismisses from office all the judges of the Constitutional Court. A more balanced composition of the court can be achieved if there is a more diverse elections procedure.

Neither of the alternatives of the regulation on the pre-term termination of the authority of the Verchovna Rada is satisfactory. As the deputies of the Verchovna Rada get their mandate directly from the voters for a certain period of time, there should be compelling reasons for a pre-term termination. The suggested Article 95 para 1 does not live up to this condition. According to the solution proposed the authority of the Verchovna Rada "may be terminated preterm by the President after consultations ...". According to the text the consultations do not have any specific consequences. Even if the Chairman of the Verchovna Rada, the Prime Minister and the leaders of parliamentary factions are opposed, the President can dissolve the Verchovna Rada.

The optional variant based on an All-Ukrainian referendum is not better, as referenda are easily falsified or dominated by certain politicians in an unfair way; they do not seem to be an appropriate means for solving a short-term political crisis.

It is questionable if it is necessary to insert paragraphs into the Constitution that better fit in students' text-books on constitutional law such as Article 97 para. 1 or Article 98 para 3. These articles state the obvious, but in a way easily misunderstood. According to the wording "exclusively by the laws are established the ... citizens' rights and duties ...". It is a cornerstone of the international understanding of human rights that human rights are not established by law, but are inherent in the human person. Perhaps the Article is designed to classify possible restrictions to human rights. But it is doubtful if such a limited list is adequate to define under which circumstances legal acts are needed. It might be helpful to define general criteria (cf. the jurisdiction of Constitutional Courts on the issue, e.g. in the "Wesentlichkeitstheorie" and "Theorie vom Gesetzesvorbehalt" developed by the Bundesverfassungsgericht).

2) Chapter V: President of Ukraine

It is unclear what is meant by the statement that the President "ensures its legal succession". This might be a mistake in the translation.

It is generally convincing to define the President's role in situation of war and emergency as predominant. Nevertheless the separation of power envisaged in Article 110 para. 6) is not quite clear. The Verkhovna Rada has to approve the decrees introducing martial law or a state of emergency. But it is not explained what are the consequences if the Verkhovna Rada declines to approve them. It might be recommendable to grant the President only a power of "first reaction" and to clarify that such a decree loses its validity if it is not approved by the Verkhovna Rada. According to the wording of the provision the use of the armed forces in the event of a military aggression does not have to be confirmed by the Verkhovna Rada. It would be recommendable to grant the Parliament, here too, a right of approval.

It is not clear which problems can be regulated by decree (Article 111). According to the wording of Article 97 all the legal matters enumerated there are exempted from a regulation by decree. But it is not clear in how far individual acts are also covered. For example, there is a contradiction concerning the regulation of citizenship. On the one hand the President can adopt decisions on the acceptance for citizenship of Ukraine and the termination of citizenship (Article 110 No. 18), on the other hand citizenship can be established exclusively by the laws (Article 97).

The competences of the President enumerated in Article 110 do not comprise the right to veto laws. This is surprising as such a right is usually attributed to the President and enhances his or her position within the system of separation of powers.

It is unclear what is meant by the statement that the decisions of the National Security and Defence Council of Ukraine "are put into effect by decrees of the President". This can be interpreted as an obligation of the President or as a mere possibility. It is also not clear how this provision interacts with the regulation in Article 110 para. 6 according to which a cooperation of the National Security and Defence Council is not foreseen.

Article 116 is too vague hinting at the commission of a "crime". It should be explicitly stated which crime is meant. Furthermore, there does not seem to be a material legal control over the decision of the Verkhovna Rada. The Constitutional Court is only expected to give an opinion on the procedure of investigation and consideration of the case.

3) Chapter VI: Cabinet of Ministers of Ukraine

As the Cabinet of Ministers is defined as the “highest body in the system of executive authorities” the President cannot be considered as a part of the executive. That implies a change in the traditional understanding of the separation of powers principle leaving one pillar of the State organisation outside.

The delays set in Article 120 for the approval of a Program of Activity (15 days) seems to be very short. The pre-term termination of the authority of the Verkhovna Rada seems to be too harsh a consequence for the lack of approval to the Program of Activity within 15 days. There might be deliberations and a second and third vote. Furthermore, it is not clear how the procedure prescribed in Art. 110 para. 1-3 can function if the President nominates a Prime Minister and the authority of the Verkhovna Rada has already been terminated. It is well understood that the drafters of the Constitution want to avoid long-lasting conflicts between President, Prime Minister and Parliament over power. But the solution proposed does not seem to be well thought through.