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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE DRAFT CONSTITUTION OF UKRAINE

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

On the basis of comments by

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I. INTRODUCTION

1. At its meeting of 18 March 2008 in Paris the Monitoring Committee of the Parliamentary Assembly decided to ask the Venice Commission to provide an Opinion on the draft Constitution of Ukraine prepared by a group of scholars headed by Professor Shapoval. Mr Bartole, Ms Nussberger, Mr Paczolay, Ms Suchocka and Mr Tuori were appointed as reporting members and provided comments on the draft (documents CDL(2008)53, 54, 67, 66 and 52). *The present Opinion, which is based on these comments, was examined and adopted by the Venice Commission at its 75th Plenary Session in Venice from 13 to 14 June 2008.*

2. The draft examined is not an official draft and was not endorsed by any State organ. It is nevertheless an important element in the ongoing discussion on constitutional reform in Ukraine and one of the documents in the file of the National Constitutional Council established by President Yushchenko. The comments made on the draft should therefore be of some importance for the present and future efforts to revise the Constitution of Ukraine or to adopt a new Constitution.

II. COMMENTS ON THE DRAFT

Chapter I – General Principles

General comments

3. 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.

Article 3

4. The wording of Article 3 (1) has been clarified according to the suggestion made by the Venice Commission in its Opinion on the Constitution of Ukraine of March 1997 (CDL-Inf(1997)2). 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*".

5. In Art. 3 (2) the word "freedoms" has been omitted in the statement that human rights and their guarantees determine the essence and orientation of the activity of the State. The title of Chapter II still refers to rights and freedoms.

Article 5

6. 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 of the draft (Chapter XIII in the present Constitution). It deserves to be emphasised that such a provision cannot be appealed to as a justification for circumventing the explicit constitutional provisions on amendment procedures.

7. 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 institutionalise 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.

Article 7

8. The new version of Art. 7 states that "the State recognises and guarantees the local government". The reference to local government instead of local self-government is a step back with respect to the existing Constitution. The provisions of Chapter IX of the draft show that this is not a purely accidental change.

Article 9

9. Art. 9 (2) of the draft Constitution introduces an explicit provision on the primacy of international treaties with respect to domestic law. This provision is welcome.

Article 10

10. 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.

Article 18

11. 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 (Art. 15), reference to prohibitions through law has been deleted. This positive change would explicitly prevent the (ab)use of the provision as a constitutional authorisation for further restrictions on political activities.

Article 21

12. 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 for the immediate future, in a comprehensive redrafting of the Constitution such an amendment can be defended.

Chapter II – Human and citizens' rights, freedoms and duties

General comments

13. Generally the Venice Commission's positive assessment of the human rights section of the current version of the Constitution (CDL-INF(1997)002) also applies to the draft. 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 criticised in the current version of the Constitution have been amended, some other problems remain.

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

15. It is noted with satisfaction that in several cases the limits of possible restrictions have been made more concrete. This applies e.g. to foreigners' rights. Exceptions to the applicability of fundamental rights to foreigners 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 draft the reasons which may justify 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 also explained more in detail. Whereas the current

[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."

Constitution only allows for exceptions “for entry into a dwelling place”, the new version refers to entry, examination and search. This change responds to practical needs as in most cases it is necessary not only to enter, but also to search a dwelling.

16. 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).

17. 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.

18. To sum up, most of the changes with respect to the current Constitution are improvements. On the whole, the text remains nevertheless quite similar to the current Constitution.

Article 25

19. Whereas according to the current Constitution the “content and scope” of the existing rights and freedoms shall not be diminished, the draft only refers to the “scope”. This change might be detrimental if it were understood as allowing changes of the material substance of the rights.

Article 26

20. This Article on the rights of legal persons is new. 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 for 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.

Article 28

21. 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.

22. 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 in Art. 47. 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 Zeitschrift 2005, p. 124 et seq); but this need not be taken into consideration by Ukraine.

Article 31
23. The death penalty is now clearly and explicitly abolished. Although it was already previously declared unconstitutional by the Constitutional Court, this additional clarification is highly appreciated.

Article 33
24. 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

Article 37
25. The reasons for restrictions on the freedom of movement have been clarified; the general clause contained in the current Constitution is to be 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 39
26. In the current Constitution the freedom of religious belief entails the right to an alternative, non-military service. In the draft only a vague wording is to be found that a relief from a duty for reasons of religion or other convictions is possible in "instances established by law." The provision on the prohibition of forced labour does not mention an alternative service either (Article 47).

Article 46
27. In this Article an obligation of the State had been introduced which reminds of the former socialist conception: "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 justifiable and, if yes, how.

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

Article 67
29. As suggested in the 1997 Opinion of the Venice Commission, the principle of proportionality has been introduced for restrictions of human rights. The catalogue of rights not to be restricted in emergency situations has not been changed. It was criticised for being unrealistically long.

Chapter III – Elections, Referendum, People's Initiative

General Comments
30. Chapter III is one of the three chapters of the present Constitution, the amendment of which requires a referendum (under Article 155 of the current Constitution). The Chapter introduces a new institution compared to the Constitution presently in force: the people's initiative as a form of direct democracy (Article 71). As the constitutional text suggests, the people's initiative is a specific kind of the referendum initiated by a certain number of voters. The present Constitution is more restrictive on the possibility of initiating a referendum, while the draft considerably enlarges this possibility.

31. As the Venice Commission underlined earlier "Direct consultation of the people via referendum has long been the subject of heated discussion between legal and political experts, sociologists, politicians, and indeed the general public."[2] The Venice Commission

[2] Referendums in Europe – an Analysis of the Legal Rules in European States. CDL-AD (2005)034, para 12.

addressed several times the topic of referendum. Recently, it summed up its standpoint in the Opinion on the Finnish constitution. Enlarging the possibility of holding referendums, or the introduction of their binding effect or of popular initiatives, is a political choice. However, it is a slippery slope. In the case of negative experiences or even abuse of the tool of referendum, it is very difficult to withdraw the means offered to the people by this specific form of direct democracy. Politicians and political parties would face serious difficulties when explaining such a withdrawal. Therefore, any widening in the regulation of referendum requires special caution.[3] Enlarging the scope of referendums, and lowering the necessary thresholds, may be dangerous and undermine the ordinary functioning of representative democracy. Previous experience in Ukraine and other CIS states provides another reason for a prudent approach.

Article 74

32. Some general issues related to all-Ukrainian referendums are regulated by this Article. An All-Ukrainian referendum is effective if the majority of citizens of Ukraine eligible to vote participated in the voting. Decisions at an All-Ukrainian referendum are approved by the majority of citizens of Ukraine who participated in the voting. This double majority requirement is reasonable. As for the binding effect of a successful referendum, the draft envisages that decisions approved by an All-Ukrainian referendum are mandatory and may be repealed or modified only at an All-Ukrainian referendum, unless otherwise prescribed by the referendum. The binding effect of a successful referendum is not in any way limited in time.

Article 76

33. This Article creates the possibility to submit a draft law repealing – entirely or partly – an effective law on popular initiative (abrogative referendum). The requirements to initiate this type of referendum are quite strict (but less so than the present regulation): it may be initiated on the request of no less than one and a half million citizens of Ukraine eligible to vote, and on the condition that the signatures in favour of calling the referendum have been collected in no less than two-thirds of the oblasts, with no less than 50,000 signatures in each oblast. Fulfilment of the double requirement of a relatively high number of signatures and their collection in no less than two-thirds of the oblasts proves that there is real support in the population for an all-Ukrainian referendum. The draft establishes four subjects on which it is not possible to hold a referendum, i.e. taxes, budget, amnesty, and ratification or denunciation of international treaties. The list of the prohibited subjects is short but essential, and corresponds to the practice of countries allowing for referendums by popular initiative.

Article 77

34. This Article introduces the possibility of popular initiatives for amendments to the Constitution. Requirements are less strict than for the abrogative legislative referendum (one million for most chapters of the Constitution, one and a half million for Chapters I, III and X but without any territorial requirement). The initiative is then submitted to the Verkhovna Rada for decision. Article 160 deals with the mandatory constitutional referendum (see below).

35. A draft law on issues falling within the areas regulated by law may be submitted to the Verkhovna Rada of Ukraine on a popular initiative supported by no less than 100,000 citizens of Ukraine eligible to vote. This is the genuine legislative popular initiative that is made possible on issues that belong to the competence of the legislative branch. The solution for defining the scope of the popular referendum seems quite usual but the required threshold is surprisingly low.

[3] CDL-AD(2008)010.

Chapter IV - Verkhovna Rada of Ukraine

General comments

36. 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. It is welcome that the problematic provisions on parliamentary factions and their coalitions, included in Art. 83 of the present Constitution, have been deleted. Article 95 on dissolution of the Rada should be reconsidered.

Article 78

37. This Article reduces the number of deputies from 450 according to the current Constitution to 350.

Article 82

38. 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 the third paragraph of this Article.

Article 85

39. As regards the so-called imperative mandate, the Venice Commission has repeatedly underlined its incompatibility with European standards. The complete dependence of the individual deputy on the party or electoral bloc is not compatible with the role a deputy has to play in a free parliamentary system. 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.

Article 89

40. The appointment and dismissal of the Ombudsperson as well as of other holders of independent offices should preferably require a qualified majority. Dismissal from such offices should be possible only on specific grounds.

Article 90

41. The introduction of this form of interpellation is welcome. It should however not replace the possibility for individual deputies to put questions as provided for under Art. 86 of the current Constitution.

Article 91

42. The draft does not take up the earlier proposal by the Venice Commission to introduce the constructive vote of no confidence, i.e. the parliament can express its lack of confidence in the Prime Minister only by electing a new Prime Minister.

Article 95

43. Neither of the alternatives of the regulation on the pre-term termination of the authority of the Verkhovna Rada is satisfactory. As the deputies of the Verkhovna 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 (1) would lead to dissolutions also in situations where dissolution could be avoided. According to the text proposed the authority of the Verkhovna Rada "may be terminated pre-term by the President after consultations …". According to the text these consultations do not have any specific consequences. Even if the Chairman of the Verkhovna Rada, the Prime Minister and the leaders of parliamentary factions are opposed, the President can dissolve the Verkhovna Rada. Moreover, no grounds justifying the dissolution have to be provided.

44. The optional variant based on an All-Ukrainian referendum seems worse. Referendums are not an appropriate means for solving a short-term political crisis. The referendum risks

prolonging the crisis since after a successful referendum new elections will be required. The procedure makes the President an active player in the political power-game and lays the ground for open political controversies between the Verkhovna Rada and the President. It can also be criticised for granting to the Verkhovna Rada the power to dismiss a popularly elected President for political reasons.

Article 96

45. This Article maintains the requirement of the current Constitution that nearly all decision of the Rada require the majority of its constitutional membership. This makes decision-making excessively difficult, especially if there is only a thin majority. In accordance with usual parliamentary practice, for most decisions the majority of deputies present and voting should be sufficient once a quorum has been established.

Article 99

46. As in the current Constitution, a two-thirds majority is required to override the presidential veto.

Chapter V – President of Ukraine

General comments

47. The balance of powers between President and Cabinet of Ministers would remain largely unchanged. The President would clearly dominate in the area of foreign policy. As experience has shown, this can lead to problems and conflicts during periods of "cohabitation" between a President and a Cabinet of Ministers of different political orientation. There are different devices in constitutions of European states with a relatively strong presidency to avoid or solve such conflicts. As an example, under Art. 58 of the Finnish Constitution, "the President makes decisions in Government on the basis of proposals for decisions put forward by the Government."

Article 104

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

Article 110

49. Items 1 et seq. of this Article maintain the dominant role of the President in the areas of foreign policy, national security and defence. Since foreign policy nowadays is closely intertwined with domestic policy, coordination between governmental and presidential action has to be ensured. The example of the Finnish Constitution, which also gives to the President a strong role in foreign policy, provides a useful model in this respect (cf. the general comments on this Chapter above).

50. There are no objections to defining the President's role in situations of war and emergency as predominant. Nevertheless the division of roles in item 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 seems advisable to grant to the President only a power of "first reaction" and to clarify that such a decree looses 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 is recommended to grant to the parliament a right of approval also in this area.

51. Item 13 of the draft would transfer the appointment of judges from the Verkhovna Rada to the President. Such a change, together with the role accorded to the High Council of Justice (Arts. 133-135), could enhance the independence of the judiciary (cf. the comments on Art. 133 below).

52. The- important- right of the President to veto laws should also be mentioned in this Article (cf. Art. 99).

Article 111

53. It should be further clarified which issues can be regulated by presidential decree. 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 to what extent 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, item 18), on the other hand citizenship can be established exclusively by the laws (Article 97). Countersignature of certain decrees by the Prime Minister or the competent minister could also be envisaged.

Article 112

54. This Article maintains the present strong role of the National Security and Defence Council which is unusual in European democracies. The role of this body should be clearly limited to national security and defence, it should be purely advisory and not encroach on the responsibilities of the democratically elected state organs.

Article 116

55. It should be specified which crimes justify the opening of an impeachment procedure.

Chapter VI – Cabinet of Ministers of Ukraine

General comments

56. The main changes in this Chapter concern the formation of the Cabinet of Ministers. The solution proposed there is quite problematic.

Article 120

57. As regards the appointment of the Prime Minister, the role of presenting a candidate to the Verkhovna Rada is taken away from the President. By contrast, for the appointment of the ministers the position of the President would be at least formally enhanced. The Ministers would no longer be appointed by the Rada but by the President on the submission of the Prime Minister. 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.

58. It is welcome that there is no longer a distinction in the appointment procedure between the bulk of the Cabinet of Ministers and the ministers for foreign affairs and defence.

59. The timeframe of twice 15 days for the nominated Prime Minister, to submit the programme of activities of the Cabinet to the Verkhovna Rada and for the Rada to approve it, seems quite short. Non-approval of the programme in this timeframe would automatically lead to 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. The dissolution of the Verkhovna Rada and the appointment of an interim government should be possible only once it is indisputable that no other solution to the political deadlock exists. If one such effort to form the government fails, there may still be possibilities for forming a government through the Rada..

60. In addition, a 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.

61. Finally, it does not seem logical that in this situation the President, who normally plays only a purely formal role in the appointment of the Prime Minister, gets complete discretion to appoint a prime minister and cabinet with full powers responsible only to him. In a situation of deadlock the outgoing Prime Minister could remain in office in a caretaker capacity.

Chapter VII – Courts and Justice

General comments

62. In this Chapter the draft contains a number of important improvements with respect to the present situation. On the other hand, the draft does not change the fundamental principles laid down in the current Constitution as the basis of the system of courts and the judiciary in Ukraine. Taking into consideration all the proposed changes, there seems again no need for the adoption of an entirely new Constitution. The proposed changed can be introduced by way of amendments to the existing Constitution.

Article 128

63. The new third paragraph would open the way for recognition of the jurisdiction of the International Criminal Court on the conditions prescribed by the Rome Statute of the International Criminal Court. This is a positive move.

Article 129

64. This is an improved version of the present Article 125. The system of courts remains the same as it is now.

Article 130

65. Art. 130 regulates (in the same way as the existing Art.130) the financial guarantees for the functioning of the courts and the activity of judges in a separate part of the state budget. The only new provision in this article is a clear statement that expenditures to support courts may not be decreased compared to the previous fiscal year. This proposal can be accepted.

Article 131

66. This Article establishes (as does Art. 129 of the current Constitution) the main principles of judicial proceedings, which are listed in items 1 to 8). There are 2 additional new principles of judicial proceedings compared to the existing constitution (i.e. item 1 “rule of law” and item 6 “reasonable periods of proceedings”). Art. 131 must be read in the light of Chapter I on “General principles” as well as Chapter II “Human and Citizen’s Rights, Freedoms and Duties” of the Constitution. The principle of the rule of law is a general principle and not only a specific principle of judicial procedure. Art. 4 of the draft rightly states that “the principle of the Rule of Law is recognised and effective in Ukraine”. One may have doubts whether it is useful to repeat this principle in Art. 131. If it were to be repeated, it should be clearly distinguished from the principle of legality in item 2. The addition of item 6 “reasonable period of proceedings” is welcome despite its declaratory character.

Article 132

67. This Article affirms the principle of independence of judges and establishes some guarantees. There are no substantive changes as regards the immunity of judges compared to the existing Constitution. In particular, the decision on authorising the arrest or detention of judges remains in the competence of the Verkhovna Rada, while it is a decision which should be taken by a court or the High Council of Justice. Two additions are proposed according to which: “the State ensures the personal security of judges and their families.” and “The professional interests of judges shall be protected in the manner prescribed by law”. These guarantees do not belong into the Constitution and would have a more appropriate place in a law.

Article 133

68. Art. 133 retains the existing solution of a 5 years "probationary period" for judges before they are appointed for a permanent term. This solution is problematic since it may impair the impartial adjudication by a judge who may issue rulings or verdicts with a view to his or her future permanent appointment. Even if it exists in several countries, the institution of probationary judges is not in full conformity with universal standards. The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: *"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".* In the case of the draft the problem is exacerbated by the excessively long period of 5 years.

69. The Article also introduces new requirements for judges to ensure that they are more experienced and better prepared. The drafters propose to raise the age for the appointment to the office of a professional judge from 25 to 35 as well as to raise the period of professional experience required from 3 to 5 years. These proposals are acceptable and further weaken the case for a probationary period for judges. It is also positive that the requirement of 10 years residence in Ukraine to be appointed as a judge is removed.

70. It is also welcome that according to the draft all judges are appointed by the President on the proposal of the High Council of the Justice while at present judges are elected by the Verkhovna Rada if their term of office is permanent. As it was stated by the Venice Commission in its position paper on judicial appointments (CDL-JD(2007)1rev): "The involvement of parliament in the process may result in the politicisation of judicial appointments. In the light of European standards the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. Elections by parliament are discretionary acts, therefore even if the proposals are made by a judicial council, it cannot be excluded that an elected parliament will not self-restrain from rejecting candidates. Consequently, political considerations may prevail over the objective criteria." It is clear that under the proposed system the President may reject candidates only exceptionally, and that he or she would not be allowed to appoint a candidate not included on the list submitted by the Council.

Article 135

71. Art. 135 introduces some amendments describing more precisely the general role of the High Council of Justice as being vested with responsibility to form the professional judiciary. This is exactly the role of High Council of Justice and this precision is welcome. The drafters should go further and add the role of the Councils being guarantor of the independence of courts and judges. This is important in the situation when judges are appointed by the President on the submission by the High Council of Justice. The main task of the Council is to safeguard the independence of the third power and the individual judges. Its proposed competencies don't vary from the competencies in the current Constitution.

72. In Art. 135 there are new proposals concerning the composition of the High Council of Justice which are aimed at the depoliticisation of the Council. The numbers of members would be reduced to 15 instead of 20. The Verkhovna Rada, the President, the congress of judges of Ukraine, the employees of prosecutorial authorities of Ukraine and the defence lawyers of Ukraine each would appoint three members. The Verkhovna Rada and the President have to choose the members appointed by them from among the retired judges to avoid nominating politicians. The institution of ex officio members (Chairperson of the Supreme Court, Minister of Justice, Procurator General) is eliminated. This proposal is an improvement on the present situation.

Article 136

73. One of the key proposals in this draft is the part on the prosecutor's office. There would no longer be a separate Chapter on the procuracy as in the current Constitution. The respective

rules would be included in Chapter VII on Courts and Justice. One may presume that in the drafters' view the procuracy should be more closely connected with the courts, not with executive power, and this can be seen as positive solution. The constitutional regulation is, however, of very general nature. This could suggest that the entire concept of the new prosecutor's office is not yet completely elaborated.

74. This being said, Article 136 is an important step forward. The drafters propose to deprive the prosecutors of the function of supervision over the respect for human rights and freedoms and over the observance of laws on these issues by the organs of executive power, bodies of local self-government and their officials, as set forth in paragraph 5 of Article 121 of the current Constitution. The proposal is in accordance with the European guidelines on the role of prosecutor's office and in line with Ukraine's commitments to the Council of Europe. The right of the prosecution to protect human and citizen's rights and freedoms was always criticised by Venice Commission. In its Opinion on the draft law amending the law of Ukraine on the Office of the Public Prosecutor (CDL(2004)083) the Commission states in paragraph 17: "*It is recommended that this representation should be limited to cases where the public interest is involved and where is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask State assistance or not".*

Chapter VIII – The Constitutional Court

General comments

75. The Chapter on the Constitutional Court is basically similar to the Constitution in force. The amendments are partly positive, partly more disputable.

Article 138

76. The Article would reduce the number of judges from eighteen to twelve. The draft does not clarify the procedure of how this reduction would be carried out and whether presently acting judges would be dismissed. Thus this provision raises serious doubts regarding judicial independence and the autonomy of the Constitutional Court.

77. The same Article regulates the appointment of judges. Under the Constitution in force constitutional judges are recruited through three different channels: the President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine. According to the draft the judges of the Constitutional Court would be appointed on the submission of the President of Ukraine by a two-thirds majority of the total membership of the Verkhovna Rada. In another case the Venice Commission welcomed the shift from the system of exclusive direct appointment of constitutional judges by the President to the mixed system providing for the election or appointment by the three main branches of power because this system has more democratic legitimacy.[4] *A contrario*, abandoning this system and moving to a combination of nomination of candidates by the President and their election by parliament is not welcome, although the proposed solution as such is acceptable and known in other countries. Moreover, in the present situation in Ukraine the proposed system could easily lead to deadlocks and the monopoly of presenting proposals gives an extremely strong role to the President.

78. The requirement of 15 years of professional experience risks completely excluding younger judges from the Constitutional Court. This may be detrimental, especially in a new democracy.

[4] CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.

Article 139

79. The draft amends the procedure of the dismissal of judges of the Constitutional Court. The present Constitution authorises the organ that elected or appointed the judges to dismiss them (Articles 126 and 149). The draft proposes a much better solution: the Constitutional Court decides on the dismissal of the constitutional judges (Article139). The only exception is when the judge breaches the oath (Article 134, subparagraph 6 of the first paragraph). In this case the judge is dismissed from office by a decision adopted by no less than two-thirds of the total membership of the Verkhovna Rada based on an opinion of an *ad hoc* investigative commission. This article as a whole would definitely strengthen the independence of the Constitutional Court and its judges.

Article 140

80. The competences of the Constitutional Court are regulated similarly to the present text. The proposal is better insofar as it brings together all the competences in Articles 140-141 of the Chapter on the Constitutional Court, while in the Constitution in force some competences are determined in other chapters (e.g. Articles 137 and 154). Another amendment in the draft is that the interpretation of the laws is taken away from the competence of the Constitutional Court. This clarifies the powers of the Constitutional Court. The Constitutional Court is the final interpreter of the Constitution, while statutory interpretation is, as a rule, the task of the ordinary courts.

Chapter IX – Territorial Organisation of Power in Ukraine

General comments

81. This Chapter of the draft replaces the current Chapters of the Constitution on Territorial Structure, the Autonomous Republic of Crimea and Local Self-Government. This formal change already diminishes at the symbolical level the status of the autonomy of Crimea and of local self-government.

82. A more detailed study of the articles confirms that this is indeed the main thrust of the draft compared to the current Constitution:

- the status of the Autonomous Republic of Crimea would be changed, depriving it of normative powers; this implies that the autonomy of the Republic is reduced, even if the adoption of its Constitution does no longer require the approval by the Verkhovna Rada of Ukraine;
- local self-government becomes local government;
- the relations between communities, oblasts and districts are not clear: is there and where is a guarantee of the functions of the communities against the State, the territorial state administrations, and the oblasts and the districts?

83. The general impression is that the draft would like to use the revision of the text of the Constitution to implement a policy of centralisation, increasing the powers of the territorial structures of the state administrations and reducing the powers of the entities of the local government and of the Republic of Crimea.

84. By contrast, the revision does not resolve the issue of double responsibility of the local state administration to the President and the Cabinet of Ministers. It maintains presidential powers in this area. This is in contradiction with the basic choice made in Chapters V and VI which gives to the Cabinet of Ministers the main responsibility for domestic policy.

Article 143

85. This Article does not use any more the expression “the combination of centralisation and decentralisation in the exercise of the state power“, which appears in the text of the current Art.132. Perhaps the change is aimed at giving a free hand to the central state in dealing with the organisation of the state administration (cf. Art. 151 of the draft which does not offer any

suggestion about the fields of administrative activity which could be concerned by decentralisation).

Article 144

86. This Article no longer contains a list of the administrative territorial units and enhances the freedom of the Ukrainian Parliament in redrafting the boundaries of the administrative territorial units without revising the Constitution.

Article 145

87. Art. 145 is similar to the current Art. 138 with some elements from Arts. 134 and 135. The adoption of the Crimean Constitution does not require anymore the approval of the Verkhovna Rada of Ukraine.

88. The Article contains, as does Article 147, a list of powers of the Autonomous Republic of Crimea. There is some overlap between the two lists, but the main idea seems to be that the acts and policies listed in Art. 145 can be adopted in the fields of activity mentioned in Art. 147. By contrast with the current Constitution, the draft deliberately avoids using the notion of normative acts of the Autonomous Republic. It can be concluded that the intention is to restrict the content of the autonomy of the Republic. There are also amendments affecting the list of the subject matters which are within the competence of the Autonomous Republic of Crimea: organising and conducting local referendums (Art. 138.2 of the current Constitution) is no longer mentioned; the Republic seems no longer to have property of its own ("managing property that belongs to the Autonomous Republic of Crimea" in Art. 138.3 of the current Constitution becomes "managing, in accordance with law, assets of state property and common property of communities within the Autonomous Republic of Crimea"). In item 6 the reference to rights and freedoms is replaced by a reference to rights only (cf. comment on Art. 3 above).

Article 146

89. Art. 146 "re-enacts" the old art. 136. There are some additional electoral rules and the text reflects that the Verkhovna Rada of Ukraine no longer adopts normative acts.

Article 147

90. This Article provides a list of the areas to be regulated by the Autonomous Republic of Crimea. The term "exercising normative regulation" in the current Constitution is replaced by "regulates". More positively, the new item 10 allows for an enlargement of the powers of the Republic.

Article 148

91. Art. 148 again differs from the current second paragraph of Art. 135 insofar as normative legal acts of the Verkhovna Rada of the Autonomous Republic are no longer mentioned. The executive powers of the Republic are to be exercised for the implementation of the national laws and acts. The draft is silent about the implementation of the decisions of the Verkhovna Rada of the Republic.

Article 150

92. This Article opens the part of the draft devoted to the general institutions of the territorial structure of power in Ukraine It corresponds to Art. 118 of the current Constitution. The Article does not relate to local government entities but to the state administrations, which exercise decentralised state powers. Their heads are responsible to the President and under the control of the Cabinet of Ministers of Ukraine. They are appointed by the President on the basis of proposals submitted by the Cabinet. The draft therefore largely maintains the situation under the current Constitution and does not reflect proposals to transfer responsibility for these administrative units to the Cabinet of Ministers.

Article 151

93. Art. 151 lists the functions of the heads of state administrations: they control the activities of the executive state authorities and of the local government authorities, control the implementation of the state budget and programmes, provide for the coordination of the mentioned authorities, and have others functions which can be given to them by the law. Their acts can be revoked by the Cabinet of Ministers of Ukraine. The presence of these provisions in this part of the Constitution and their content clearly emphasise the relevance which is given to the territorial organisation of the state power in view of a centralised control of the local government institutions.

Article 152

94. While Article 151 describes the control functions of the state administration in some detail, Article 152 provides only a very brief description of local government. The current Article 140 is not only far more detailed but also far more favourable to the idea of self-government. The notion of local self-government is replaced by local government and it seems therefore no coincidence that the concept that local residents may independently resolve issues of local character has disappeared from the text.

Article 153

95. This article corresponds to the current Article 142. Unfortunately the second paragraph has been deleted although it offered an interesting solution to the problems of co-operation between the different local entities.

Article 154

96. This Article only mentions community councils instead of councils of village, town, city, district and oblast as the current Article 141. Their terms of office are reduced from 5 to 3 years.

Article 155

97. This Article regulates the elected oblast and district councils. Oblasts and districts are no more mentioned in art. 152 as institutions of local government and are apparently no longer regarded as an expression of the right of the people to self-government, even if they represent the “common interests of the residents of the communities“.

Article 156

98. This Article contains a detailed list of the functions of the oblast or district councils. Such a list is missing for the councils of the communities. It is not easy to explain such a choice. Does it mean that the draft would like to encourage the joint exercise of the decision making powers of a group of communities (associated in an oblast or in a district) or does it mean that the bodies of the communities are supposed to be entrusted with the implementation of the decisions of the oblast and district councils? The point should be clarified. In any case the new text presents some novelties because provisions concerning referendums, taxes and management of communal enterprises are missing (see the old art. 143).

Chapter X – Amending and Revising the Constitution of Ukraine

General comments

99. The amendments to Chapter X (Chapter XIII in the current 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. The text also does not seem clearer than before.

Article 159

100. This Article introduces the possibility of a popular initiative for revising the Constitution. This is a political choice (cf. also the comments on Chapter III above).

Articles 160-161

101. These articles are not very clearly worded. 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 amendments. 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.

Article 163

102. In the provision on non-permissible amendments reference to "the liquidation of the independence or violation of the territorial integrity of Ukraine" (Art. 157 of the current Constitution) has been deleted. The reason for this is not clear.

III. Conclusions

103. The draft examined is the draft of an entirely new Constitution. In view of this it is surprising that the draft is a fairly conservative text which is clearly based on the text of the current Constitution. While there are many amendments to the present text, a radical departure from existing solutions is generally avoided. Under these circumstances, it is not at all clear why the approach of adopting an entirely new Constitution was chosen. The changes could have been done through amendments to the current Constitution. This approach would have the advantage of symbolic continuity and would enhance constitutional stability. Constitutional stability is an important element for the stability of the country as a whole and one should not adopt a new Constitution as a "quick fix" to solve current political problems.

104. In the current situation in Ukraine the issue of new constitution vs. constitutional amendments is also of some practical importance. In Ukraine there has been a lot of speculation that the adoption of a new Constitution might be a means of getting around the constitutional requirements for amending the Constitution established by the Constitution presently in force and in particular of by-passing the Verkhovna Rada, which has to approve all constitutional amendments by a two-thirds majority of its members. Fortunately a recent decision by the Constitutional Court has confirmed that for the adoption of a new Constitution the amendment procedure in the existing Constitution has to be respected. This has always been the position of the Venice Commission.

105. While the risk of an unconstitutional adoption of a new Constitution therefore seems at present remote, a clear commitment to a procedure based on amendments instead of the adoption of a new Constitution would nevertheless still be a useful means to dispel remaining distrust as to possible intentions of the authors.

106. In addition, an approach based on amendments and not on a new Constitution would enable a clear focus on the most urgent issues. The unclear and overlapping distribution of powers between the President and the Cabinet of Ministers, partly but not exclusively due to the constitutional amendments of December 2004, is a major source of tensions and instability. The issue of the dual executive power should therefore be addressed as a priority. Other important reforms such as judicial reform could be addressed separately.

107. As regards the substance of the changes, most of the amendments can be regarded as improvements. This concerns in particular the Chapter on Courts and Justice, including the procuracy. By contrast, the Chapter on territorial organisation of power would reduce the scope of local self-government and the autonomy of Crimea. This seems a regrettable choice and one may wonder as to the justification of this approach.

108. The crucial issue for constitutional reform is however clearly the balance of powers between the state organs. Here again the draft is fairly conservative: there are many

adjustments but no major change in respective powers. On the whole the present "parliamentary-presidential" system is maintained. While this seems a reasonable approach in principle, it is unlikely to be sufficient to resolve the current tensions between the state organs and may prove again dysfunctional, especially in periods of "cohabitation". Therefore means of ensuring co-operation and coordination between President and Cabinet of Minister, such as binding presidential decisions to proposals from the Cabinet of Ministers, the countersignature of presidential acts by the Prime Minister or the competent minister and/ or the taking of presidential decisions in the presence of the Cabinet of Ministers, should be examined as to their possible inclusion in the Constitution.