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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW OF UKRAINE AMENDING THE CONSTITUTION

PRESENTED BY THE PRESIDENT OF UKRAINE

by

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The Venice Commission has been asked to provide an opinion on the Draft Law on Amending the Constitution of Ukraine proposed by the President of Ukraine. This draft law incorporates many of the changes that were already contained in the Draft Constitution prepared by a working group headed by Mr. Shapoval on which the Venice Commission has adopted an opinion on its 75th Plenary Session. It is to be welcomed that many of the changes seen as positive developments have been taken up in the new draft. Some of the changes criticized have been changed; some problematic elements remain. Therefore it is necessary to give a detailed comment on the present draft.

General remarks

The law proposed aims at amending the Constitution, not at elaborating a new Constitution. This fundamental political decision is justified by the fact that the changes to the Constitution do not reverse the existing system, but only modify and adapt provisions that have been deemed not to be efficient and adequate. This approach is highly welcomed by the Venice Commission. As has been pointed out in Opinion CDL-AD(2008)015 amendments to a Constitution are preferable to the elaboration of an entirely new constitution because of the advantage of symbolic continuity and constitutional stability.

According to the explanatory notes given the amendments are necessary because of insufficient human rights guarantees, handicaps in the organisation and functioning of the State mechanism and imperfection of the mechanisms of checks and balances.

The most relevant institutional changes are the replacement of the mono-cameral system of the Verkhovna Rada by a bi-cameral system with a Chamber of deputies and a Senate, the introduction of additional elements of direct democracy and changes in the status of the Autonomous Republic of Crimea. Although the territorial structure is changed to a certain degree, there is no radical departure of existing solutions; especially Ukraine is still defined as a unitary State and does not include elements of a federal structure.

The structure of the constitution has been changed in some important details. Thus there is no longer a special chapter on the Prokuratura, but it is integrated in the chapter on Courts and Justice. One chapter is devoted to the territorial organisation and local self-government and also includes special regulations on the Autonomous Republic of Crimea; the special chapter has been deleted. The change of the structure of the Constitution corresponds to substantial changes in those areas.

Preamble

The Preamble was changed in some relevant details that show basic political decisions on the future of Ukraine such as the confession to the unity of the State, to the multi-national composition of the Ukrainian people and to the integration in the European community ("is an integral part of the European community"). Every State is free to determine basic principles in the Preamble; what is considered to be relevant in this context cannot be assessed from the legal point of view. It is also a symbolic amendment to claim that the Constitution is adopted "by the Ukrainian people" and not by the "Verkhovna Rada on behalf of the Ukrainian people".

Section I - General principles

Section I defines the basic principles of the Ukrainian State and contains basically the same fundamental principles as the previous constitution.

Article 6

The text of article 6 para. 2 was not changed. But in the present version of the Constitution the idea that "the right to determine and change the constitutional order in Ukraine belongs exclusively to the people of Ukraine and shall not be usurped by the State, its bodies or

officials" contradicts the procedure for constitutional amendment fixed in the last part of the Constitution as a referendum on constitutional changes is not always required. Contrary to that, in the proposed new version of the Constitution there is no longer any tension between the general statement contained in Article 6 and the concrete procedure on amendment in Art. 167 et seq. (cf the assessment on the enhanced elements of direct democracy below).

Article 3 / Article 8

The regulation on Ukraine as a unitary State and on local self-government is more comprehensive, but changed in two substantial ways. In the new version there is no longer a special status guaranteed to Kyiv and Sevastopol. This guarantee is replaced by an open provision that cities with a certain number of inhabitants may have equal status as an oblast or district (cf. Artícle 3 para. 3 of the new version vs. Art. 133 para. 3 of the present version). Furthermore, the territorial parts of Ukraine are no longer enumerated; their status is only determined by law (Article 3 para. 4 of the new version vs. Art. 133 para. 2 of the present version). According to the transitory provision (No. 10) there is a guarantee for certain oblasts that they will not be eliminated, but only for five years. This shows the tendency of the new version of the Constitution to diminish the constitutional guarantees for self-government, especially since the Chamber of Deputies has the competence to change the territorial units (see below). It might be an element of stability to fix the territorial subunits in the text of the Constitution itself.

Article 10

Article 10 introduces an explicit provision on the primacy of international treaties with respect to domestic law. This provision is welcome.

Article 12

The provision on citizenship was transferred to the section on general principles. The restrictive wording of the provision that a citizen of Ukraine cannot be expelled or surrendered to another State might cause problems in connection with the international obligations of Ukraine on the basis of the Rome Statute. Many constitutions have been changed in order to comply with the demands of international law in this context.

Article 18

According to Article 18 para. 1 "the State guarantees the freedom of political activity not prohibited by the Constitution of Ukraine". As stated in the opinion on the Shapoval draft this would explicitly eliminate the (ab)use of the provision as a constitutional authorisation for further restrictions on political activities. On the other hand it has to be realised that legal regulations on political parties such as regulations on taxes will always be necessary. The new wording must not be misinterpreted.

Section II - Human and citizens' rights, freedoms and duties

The section on human and citizens' rights, freedoms and duties is in large parts modelled on the provisions proposed in the Shapoval Drafts. Therefore, the Venice Commission can uphold its generally positive assessment (CDL-AD(2008)015). 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. It is especially welcomed that many of the positive changes in the Shapoval Draft in comparison to the present Constitution have been upheld. This applies e.g. to the definitive abolition of the death penalty (Art. 28 para. 2), to the integration of new rights 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, to the redefinition of some of the citizens' rights as rights of everybody as well as to the concretisation

of some of the restrictions. It is especially highly welcomed that the principle of proportionality has been explicitly introduced into the text of the Constitution.

Nevertheless, some problems remain. Thus, e.g. the list of rights that can be restricted in cases of emergency still seems to be excessively long. The status of the social guarantees has not yet been clarified. It will be the task of the constitutional jurisprudence to further elucidate the guarantees and to interpret them in such a way that they are not only of theoretical value, but effectively applied in practice.

Article 25

Article 25 provides that "the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws" …" This very apodictic statement that is also contained in the present constitution might cause problems if laws are necessary to solve conflicts between different human rights and solutions are only possible based on compromise formula.

Article 27

The catalogue of criteria not allowing for any "privileges or restrictions" has been widened and now also contains the criterion "minority affiliation". This might cause problems, as minority protection on the basis of international law requires to accept some sorts of privileges (e.g. use of the mother tongue; special schools). It is important to interpret Article 27 in the light of Article 56 which allows the use of minority languages).

The article does no longer contain a provision on affirmative action in favour of women .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.

Article 28

As in the Shapoval draft the death penalty is clearly and explicitly abolished. Although it was already previously declared unconstitutional by the Constitutional Court, this additional clarification is highly appreciated.

Article 30

The right to family and respect for family life was added. Yet, it has to be stressed that in the former version the aspect of non-interference in family life was formulated in a clearer way.

Article 32

Different from the regulations in other constitutions the provision on disability has not been inserted in connection with the principle of equality. Contrary to that the draft stresses the State's obligation aiming at independence, social integration and full-fledged participation in social life. The practical application will prove the efficiency of this approach.

Article 33

Article 33 regulates the human rights guarantees for foreigners, but provides neither a constitutional minimum guarantee, nor circumscribes possible legal restrictions. The Shapoval draft was clearer in this regard since it fixed that human rights of foreigners can be "restricted only by laws for the purpose of protection of national security or territorial integrity".

Article 34

It is welcome that in the case of an arrest a confirmation by a court in necessary within 24 hours and not only within 72 hours.

Article 37 / Article 55

Article 37 grants to every citizen the right to examine information about himself/herself, that is not a State secret. The problem is that his wording allows an arbitrary definition of what a State secret is. Therefore the individual is not effectively protected.

In this context it is also questionable in how far information on the environment can be classified as “state secrets”. This would undermine the rights guaranteed in Article 55.

Article 48 et seq.

In connection with the comprehensive list of social rights contained in the draft it is worth to quote the Venice Commission’s assessment in its last opinion on the Shapoval draft:

> 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.

Article 57

It might be mentioned that the protection of the results of the intellectual and creative activities is not only contained in Article 57 para 2, but also in Article 46.

Article 58

The wording of Article 58 (Everyone has the right to protect his/her rights and freedoms against violations and infringements by any means not forbidden by law) is not compatible with a very similar provision in Article 28 para. 3: “Everyone has the right to protect his/her life and health, life and health of other people from illegal encroachment. For the sake of clarity duplications should be avoided, especially if they are not consistent.

Article 59

The introduction of a right to a fair trial is a positive change of the text.

Article 68

Article 69 explains that the restrictions of human rights must be proportional to the aim set forth by law and necessary in a democratic society. It thus takes up the formula used in the ECHR. This change is welcome.

Article 73

Article 73 takes up an innovation that was already proposed in the Shapoval draft. It is therefore appropriate to quote the Venice Commission’s comment on the relevant provision:

> 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.

Section III - People's Will

Chapter III clearly enlarges the possibilities of direct democracy. As pointed out already in Opinion CDL-AD(2008)015 this is generally a matter of political choice. The Venice Commission explicitly refers to its general comments on elements of direct democracy in its Opinion CDL-AD(2008)015. As elements of direct democracy are dominant in the new draft it is appropriate to quote the relevant comments here:

> 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."1 The Venice Commission 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.2 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 76

Article 76 contains explicit guarantees of the democratic standards of elections. As in many other constitution the basic question of the electoral system is not fixed in the Constitution. With regard to the experience of the Ukrainian democracy in the past it might be recommendable to fix at least the basic elements of the electoral system in the Constitution. The regulation that local elections and parliamentary elections must not be held at the same time as presidential elections makes sense. This is the practice in other constitutional systems as well.

Article 78

Article 78 states that – contrary to the present version of the Constitution - constitutional amendments can be made exclusively by referendum. It is questionable if such a restriction is practicable. Experience in other constitutional systems shows that minor changes of the Constitution are part of the political everyday business. For instance, the German constitution was changed more than 50 times during 60 years of existence. Only a few of the changes were fundamental ones.

On the other hand, the provision that changes of the territory and transfer of sovereign powers are possible only on the basis of a referendum can be found in many European constitutions.

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

[2] *CDL(2008)002.*

Article 79 et seq.

As explained above, the large amount of elements of direct democracy might undermine the representative system the constitutional organisation is based on. On the other hand, the provision that an all-Ukrainian referendum is allowed only once a years is arbitrary.

The wording that the referendum "is designated by the President" is not clear as it does not explain the competences of the President in this context. He might be allowed to control only the formal prerequisites or even control the contents of the referendum.

Section IV - National Assembly of Ukraine

The system of government proposed remains a mixed parliamentary and presidential system. The Government is dependent on the Deputies' Chamber as it is approved by it, is responsible to it and can be dissolved on the basis of a vote of no confidence. At the same time the President has the right dissolve the Government without giving any reason.

A new element of the governmental system proposed is the introduction of a second chamber (Senate). The composition of the Senate differs substantially from the composition of the Deputies' Chamber. The senators are elected for a six-years-term in different regional sub-units. Furthermore, there is a specific minimum age-limit of the deputies (35 instead of 18 years) presupposing more experience. The Senate thus introduces an element of local representation and enhances the continuity of parliamentary representation as the senators are not elected in the same rhythm as then members Deputies' Chamber. This might be helpful for the stabilisation of the Ukrainian parliamentary system.

The political process has to show if such a second chamber will be accepted and prove to be an efficient element in the system.

Article 90

As already stressed several times, it is recommendable to have exhaustive regulation of incompatibilities in the Constitution and not to leave them to the level of ordinary laws.

Article 91 et seq.

It is highly appreciated that the new draft does not contain an imperative mandate.

Article 97

Article 97 contains a comprehensive list of competences of the Parliamentary Assembly. Some of them raise problems.

Thus the Chamber of Deputies has the right to "adopt by the law decisions on establishing and altering the boundaries of administrative and territorial units, establish and abolish oblasts, districts". It is not clear in how far local referenda in the sense of Article 82 are indispensable preconditions in this respect. It is recommendable to change these provisions in order to guarantee a sufficient level of self-determination for the local population (see below). In this respect elements of direct democracy are extremely valuable.

The competence of naming and renaming inhabited localities, districs and oblasts does not seem compatible with basic requirements of minority protection.

Article 98

The right to an inquiry exists only in connection with the Action Programme. It might be reflected if parliamentary inquiries should not be foreseen on a broader basis.

Article 99

It seems to be arbitrary to restrict the vote of no confidence to once per year. A better system would be to introduce a constructive vote of no confidence (see the comments in the Opinion on the Shapoval draft).

Article 100

The list of the competences of the Senate also raises some problems.

Whereas according to Artícle 100 para. 2 it is the Senate which designates an all-Ukrainian referendum, according to Article 78 the same competence rests with the President. It is not clear in which way the two State organs should cooperate in this context.

The right to terminate the authorities of the Supreme Council of the Autonomous Republic of Crimea shows that autonomy is quite limited (see below).

Article 103

The right of the President to dissolve the Deputies Chamber without giving any reason has already been expressly criticised in the Shapoval draft. The statement of the Venice Commission can be repeated here:

> 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.

Article 104

The comments on the Shapoval draft can also be quoted in relation to the regulation on the majority required for taking decisions in the Chamber of Deputies:

> 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 105

It is interesting to note that the extensive list contained in the present Constitution on all the questions that have to be regulated by law has been replaced by a more abstract formula and

thus reflects the German doctrine of the "Gesetzesvorbehalt". The adoption of laws is required in order to regulate the "most important social relations", to define rights and obligations of citizens and for some additional basic questions. This approach follows the one accepted in other constitutional systems. It is an important first step. An assessment of the progress made can be given only with a view to the practical implementation.

The basic distinction concerns both acts adopted by the Government and acts adopted by the President. The problem is that the competences conferred on the President in foreign policy concern to a large degree "the most important social relations" and human rights as well (cf. the suspension of many human rights in the case of emergency and war). Thus the redistribution of competences on the basis of the Constitution is not compatible with the requirement contained in Article 105.

Problems also arise in connection with the right to citizenship and the right to asylum. In this context the former Opinion of the Venice Commission can be once more quoted:

> 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).

Article 107

It might be unrealistic to grant the Senate only 15 days to approve or to reject a law, especially if the legal project is very complex.

Article 108

In most constitutional systems the President has the right to block a law by his veto. Nevertheless, the requirement to adopt a law vetoed by the President by two-thirds of the general composition of the Deputies' Chamber is a very high hurdle.

Section V - President

It should be mentioned that according to the constitutional system presented in the draft the President is outside of the system of balance of power as he is not considered to be a part of the executive. The President is granted a wide range of powers to influence decision-making in all three branches of government (e.g. dissolution of the Parliament, veto rights, right to propose candidates for constitutional judges, leadership foreign policy). Therefore the improvement of the system of checks and balances that was one of the aims of the amendment of the Constitution, cannot be said to have been achieved.

Article 112

Article 112 might be a typing error. The content of the provision is not understandable in the English version.

Many constitutions especially in the countries of Eastern Europe grant the President the competence "to guarantee the human and citizens' rights and freedom". As this is the basic task of the Constitutional Court on the basis of the constitutional complaint it is not quite clear in how far this provision confers concrete rights to the President or is just meant as a general description of the status of the President.

Article 113

Article 113 contains the important restriction that the President can only be elected for two consecutive terms. This is a traditional element in the American constitutional system that has been transferred to many European countries.

It might be helpful to fix the basic provisions of the electoral system of Presidential elections in the Constitution.

Article 118

Article 118 contains an extensive list of competences of the President. Some of them can be considered as problematic.

The competence for deciding on foreign policy, defence and national security lies both in the hands of the President and the Cabinet of Ministers. While the President "exercises leadership", the Government is responsible for the "implementation of foreign policy". This form of division of power confers a very strong position to the President.

This is especially true as the President has a predominant position in emergency situations. His decrees can be checked by the Senate only ex post. It is not clear what happens if the Senate does not approve the decrees. The use of armed forces is possible even without any approval of another constitutional organ. In this context the previous comment of the Venice Commission has to be recalled:

> 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.

The President is also granted the right to establish courts according to the procedure determined by law, to define court constituencies. As this is a very sensitive area it might be better to fix courts in advance in the Constitution. A similar provision is now contained in Article 106 no. 23.

Article 124

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

Section VI - Cabinet of Ministers

Article 128

Article 128 introduces a new system for the determination of the personal composition of the cabinet of ministers. The President entrusts no longer the parliamentary coalition forming a majority in the Verkhovna Rada with the task to build a government, but proposes the post of Prime Minister to the political party which has received the largest number of seats in the elections. If this solution fails the party which has received the second larges number of seats

can propose a candidate. If this solution also fails, the President determines the candidate. If he is not approved, the Parliament will be dissolved.

This system seems to be clear as it might help to avoid "bargaining" in order to build a government. Yet, as there is no absolute majority to be expected in the elections the system privileges the President and fortifies his position in the power system.

Section VII - Courts and Justice

The changes proposed in sections VII are seen as the basis for the reform of the legal system.

Article 134

In view of basic requirements of independence of judges it is generally not recommended to have judges elected by the public.

Article 135

There is a new provision inserted the content of which is not very clear. According to Article 135 "courts shall not decide on the execution of powers of other bodies or officials, except in cases defined by law." It is difficult to understand, how this provision should be compatible with the basic requirements of human rights protection that, as a rule, leads to a judicial decision on the (mis)use of powers by the State authority.

Article 137

It might not be necessary to repeat the principle of the "rule of law" in this context as it is already contained in Article 5. At the same time it is good to introduce the requirement of a "reasonable time for considering the case" in the list of main principles of judicial proceedings.

Procedural requirements concerning criminal justice are taken out (prove of guilt, right to defence, prosecution by the Prosecutor on behalf of the State). This is acceptable since they are already contained in other sections of the Constitution.

Article 139

The idea that judges are granted immunity like deputies is upheld in the new draft of the Constitution. Whereas according to the present version of the Constitution a judge can be detained or arrested with the consent of the Verkhovna Rada, now it can be detained and arrested with the consent of the Senate. As decision-making in the Senate might be less politicised this can be seen as a progress. Nevertheless, it is worth to repeat the comments already made on this topic:

> 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 140

The wording of this provision is not understandable.

Article 141

It can be seen as a real progress that judges shall be appointed for permanent terms. It is reasonable to fix a minimum age of 27 years and to determine experience and professional level by law.

Article 142

Judges of the highest courts are appointed or dismissed by the Senate on recommendation of the High Council of Judges; judges of lower courts are appointed by the President. This means that judges are no longer elected. It seems that the new procedure is less politicized and more transparent and open; this is welcome.

Article 143

It might be dangerous to allow the dismissal of a judge from office for the "breach of oath". The oath a judge has to pronounce is not fixed in the Constitution. This provision might be (mis)used to get rid of judges as the provisions used in the oath will necessarily be very vague.

Article 144

The composition of the High Council of Justice is an improvement as it seems to be quite balanced.

Article 145

The provisions on the Procuratura do no longer form a special section of the Constitution. Most of the changes were already contained in the Shapoval draft. The only new element is the exclusion of the conduction of pre-trial investigations. In this context the comments on the Shapoval draft may be repeated:

> 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".

Section VIII - Constitutional Court

Article 147

The number of judges has not been changed, by the procedure of nomination. According to the new draft it is the exclusive competence of the President to propose candidates for the court. They are elected by a two-thirds majority of the whole composition of the Senate. As pointed out already in the last comment a mixed system of nomination is generally better:

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 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.[3] *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

Article 150

Concerning the dismissal of constitutional judges it has to be said that the solution found in the Shapoval draft was better. There it is generally the Court which decides. Only in the case of a breach of the oath the decision is taken by the Verkhovna Rada. Nevertheless, here, too, the vagueness of the reproach to have broken the oath might lead to misuse and endanger the independence of the Court.

The competences of the Constitutional Court were enlarged in a relevant way as the possibility of a constitutional complaint was inserted. As in many other constitutional systems the Court is called upon to decide on the constitutionality of the law on which the decision in a concrete case is based. This amendment is to be welcomed.

In several cases the Constitutional Court does not take a decision, but give an opinion. The legal consequences of such an opinion are not quite clear. According to Article 154 they are mandatory, final and shall not be appealed. But it is not clear if they are also binding on all the other State organs.

Section IX - Local Self-Government and Territorial Structure of State Power

In comparison to the Shapoval draft the title was changed and the idea of “local self-government” reinserted. This is a positive move; the Venice Commission had assessed the replacement of “local self-government” by “local government” very critically. Nevertheless, it is deplorable that there is no longer a separate chapter on the Autonomous Republic of Crimea. The tendency to diminish the constitutional rights of the Autonomous Republic of Crimea should be reconsidered because of the many legal and political implications of such a constitutional change.

Article 155

Thus it is a negative feature of the new draft that some competences of local entities in the field of organisation (such as the administration of city districts, popular self-organisation contained in Article 140 of the present Constitution) are not contained in the draft. The same applies to the guarantee of a specific status of Kyiv and Sevastopol.

Article 162

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

The present version is explicit about the competences of the bodies of local self-government: “Bodies of local self-government, within the limits of authority determined by law, adopt decisions that are mandatory for execution throughout the respective territory.” Contrary to that the new version is not clear: “Local authorities accept acts that are required to perform within the relevant administrative-territorial units”. There might also be problems of translation in this context.

The possibility of suspension of the acts connected with an appeal to court has been preserved. The new version is more precise as it explains that the newly created heads of State administration are responsible.

It is deplorable that there is no longer any judicial guarantee of local self-government (Article 145 of the present Constitution).

Article 163

There are also relevant changes of the scope of competences of the Autonomous Republic of Crimea. It has no longer the right to organise and conduct local referendums. Furthermore, the property belonging to the Autonomous Republic of Crimea is no longer mentioned.

The procedure of adoption of the constitution of the Autonomous Republic of Crimea has been changed as well. Whereas according to the regulation in the present constitution it is adopted by the Verkhovna Rada of the Autonomous Republic of Crimea and approved by the Verkhovna Rada of Ukraine by one-half of its constitutional composition is now “approved by law”. This means that the President can use his right to veto the law. It is to be seen as a relevant change to the constitutional status of the Autonomous Republic of Crimea.

Article 164

In the wording of Article 164 the term “normative regulation” has been replaced by “regulation”. The list of issues has not been changed.

It is remarkable that there is also one provision that enlarges the scope of self-government. Thus the Head of the Council of Ministers of the Autonomous Republic of Crimea is appointed and dismissed without the approval of the President of Ukraine. But this has to be seen in the context of the competences accorded to the new organs of the State administration as parallel administrative structure.

Article 166

The regulation contained in Article 166 is new: The heads of State administration in the Autonomous Republic of Crimea are appointed and dismissed by the President. Thus the creation of a structure of State administration has been proposed that has not existed up to now. This is also a clear sign of a reduction of self-government. According to the present Constitution there is only a Representative Office of the President of Ukraine in the Autonomous Republic of Crimea. Representation is different from administration.

The idea behind the changes seems to be that the new State administrative entities fulfil the competences of the prokuratura in the field of supervision of the observance of human and citizens’ rights and freedoms (cf. transitional provision No. 12).

Article 167

As already mentioned there are no longer different procedures for the amendment of the Constitution according to the part of the Constitution that is targeted. A referendum is required for all amendments (see above). The popular initiative for the amendment of the Constitution is an additional new element of direct democracy (on direct democracy see above).

Section XII - Transitional Provisions

The last part of the Constitution contains regulations on the continuity and discontinuity of existing State organs regulated in the constitution. It might be mentioned that it would be recommendable to clearly state that the restriction of the Presidential power to two consecutive terms applies despite the amendment of the Constitution. This question has given rise to difficulties in many new democracies; there was also a constitutional dispute in Ukraine. Such problems could be avoided with an univocal solution in the chapter on the transitional provisions.