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

1. The English translation of the draft amendments is not very clear. Therefore, some of the following comments may derive from linguistic misunderstandings. The comments focus on the Preamble and Section I, the provisions on the Autonomous Republic of Crimea (Art. 163-166) and Sections IV-VI. Special attention will be paid to changes proposed to the Constitution in force.

Preamble and Section I

2. The draft law includes only minor changes to the Preamble and Section I (General Principles). In Art. 2(3), a new provision lays down the principles on which the territorial structure is based. The proposed provision takes into account relevant factors.

3. Art. 8 of the draft law includes new provisions on local self-government. However, the meaning and legal significance of the new provision in Art. 8(3) ("The State provides adherence to the Constitution of Ukraine and laws during exercising local self-government") remains unclear. The same goes for Art. 8(4) ("The rights of local self-government are protected by the court.")

4. Art. 10(2) confirms the primacy of international treaty-law over contradicting domestic law. This new provision is to be welcomed.

5. According to a new provision in Art. 16(1), "property shall not be used to the detriment of the rights, freedoms and dignity of a person, interests of society, deteriorate ecological situation and natural qualities". The proposed provision includes legitimate considerations justifying restrictions on the use of property. However, taking into account the direct effect of the Constitution (Art. 9(2)), the provision may lead to legal uncertainty. Therefore, it is recommendable that it contain a reference to more detailed regulation through ordinary law.

Provisions on the Autonomous Republic of Crimea

6. In the present Constitution, provisions on Crimea are included in a separate Chapter (Section), which enhances their significance. By contrast, in the draft law the provisions form part of Section IX entitled Local Self-Government and Territorial Structure of State Power. It is to be recommended the special status of Crimea is confirmed by dedicating to it a special section of the Constitution.

7. In the draft law, the provisions on Crimea are organized differently from the present Constitution. The present order, which starts from the provision on the constitution of the Autonomous Republic of Crimea, corresponds better to the respective importance and inter-connections of the provisions.

8. According to Art. 163 of the draft law, the competences of the Autonomous Republic of Crimea would remain the same, with one exception. There is no provision on local referendums, and neither does Section III (People's Will) provide for the possibility of a referendum at the level of the Autonomous Republic of Crimea. This can be regarded as an unwarranted weakening of self-government.

9. Art 165(1) implies that in the exercise of its powers, the Verkhovna Rada of the Autonomous Republic of Crimea would be bound, not only by the Constitution and laws of Ukraine, but also by the acts of the President and the Cabinet of Ministers. This is to be considered problematic from the point of view of the autonomous status of Crimea. Even restrictions through law in fields where the Constitution explicitly grants legislative powers to the Autonomous Republic of Crimea are questionable.

10. The present Constitution includes a provision on the President's power to suspend, for reasons of nonconformity with the Constitution of Ukraine and the laws of Ukraine, normative legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea, with a simultaneous

appeal to the Constitutional Court of Ukraine in regard to the constitutionality of the acts at issue. According to Art. 165(2) of the draft law, the power of suspension would be transferred to the head of state administration in the Autonomous Republic of Crimea, appeal to the Constitutional Court would be replaced by "judicial recourse" and the reference to the mere control of constitutionality would be dropped. In order to guarantee the autonomous status of Crimea, the references to the Constitutional Court and the constitutional nature of the control should be retained.

11. Art. 100 para 5 includes a provision the power of the Senate to dissolve, on the submission of the President and after receiving the opinion of the Constitutional Court, the Verkhovna Rada of the Autonomous Republic of Crimea on the grounds of a violation of the Constitution of Ukraine. Such an extreme measure should only be possible provided that the Constitutional Court has found a violation of the Constitution and endorsed the measure. Moreover, the provision should be transferred to the same context as the other provisions on Crimea, preferably a separate section of the Constitution.

Provisions on the Main Political Bodies and their Inter-Relationships

12. For reasons which are not entirely clear the draft law has opted for a bi-cameral representative system, including the Chamber of Deputies, consisting of 300 members elected for a four-year term, and the Senate, consisting of senators elected from the Autonomous Republic of Crimea, the City of Kyiv and the oblasts for a six-year term. The former Presidents would also have the right to become senators.

13. It may be that the bi-cameral system including the Senate with senators elected for a six-year term is expected to enhance the stability of the political system. However, bi-cameralism complicates legislative and budgetary processes and may introduce new causes for political dead-locks. In addition, except for the autonomous position of Crimea, the territorial structure of Ukraine is not based on federalist or even regional principles. For this reason, bi-cameralism seems rather artificial. All in all, the expected benefits and the possible disadvantages should be carefully weighed against each other.

14. The draft law does not really address the issue of dual executive power, which constitutes one of the main background factors to Ukraine's political instability. The President's present powers would remain largely as they now are, and the draft law does not imply any dissolution of the present situation of parallel governmental and presidential administrative machineries. On the contrary, the fact that the President would retain the right of legislative initiative and that presidential bills, declared urgent, would enjoin primacy in parliamentary deliberations implies an important role of the President and the presidential administration in ongoing legislative processes.

15. However, some of the proposed changes point to the strengthening of the parliamentary traits of the political system. Thus, according to the draft law, the Prime Minister and the other ministers would be appointed by the Chamber of Deputies instead of the President (Art. 128), and the Cabinet of Ministers would no longer be responsible to the President. These changes are to be welcomed.

16. If the formation of the Cabinet of Ministers failed, the President would dissolve the Chamber of Deputies (Art. 128 (5)). In addition, the President would have the power to dissolve the Chamber of Deputies even in other cases where he/she finds it expedient (103(3)). For the sake of political stability, it could be preferable to tie the President's power of dissolution to explicitly defined conditions.

17. Political stability could also be enhanced by adopting the German system of a constructive vote of non-confidence instead of the proposed unlimited power of the Chamber of Deputies to dismiss the Cabinet of Ministers (Art. 99(2)).

18. The present Constitution includes a provision on the exclusive legislative competence of the Verkhovna Rada (Art. 92). By contrast, the draft law does not contain a corresponding provision. However, a provision on the issues to be regulated through parliamentary laws is needed to protect the legislative powers of the National Assembly and to ensure the clarity of the hierarchy of legal norms.

19. According to Art. 118 para 5, the President would have the power to declare martial law and a state of emergency. Art 100 para 7 lays down that it falls to the Senate to approve the President's declaration. Art. 68(2), in turn, provides for the possibility of restricting enumerated fundamental rights under martial law or in a state of emergency. However, the draft law does not include any provision on the situations where martial law or a state of emergency could be declared. Such a provision would be recommendable.

20. Art. 90(3-4) of the draft law includes provisions on positions or activities which are incompatible with the status of a people's deputy or a senator. Furthermore, additional incompatibilities could be established through law. However, it is preferable not to grant an ordinary parliamentary majority the power to establish such incompatibilities. All the incompatibilities should be laid down at the constitutional level.

21. According to Art. 97 para 11, the Chamber of Deputies would appoint and dismiss the Authorized Human Rights Representative of the National Assembly. A requirement of a qualified majority is recommendable to ensure the non-political nature of the decisions.