Strasbourg, 14 March 2014 **CDL(2014)019***

Opinion no. 762 / 2014 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON

"WHETHER THE DECISION TAKEN BY THE SUPREME COUNCIL OF THE AUTONOMOUS REPUBLIC OF CRIMEA IN UKRAINE TO ORGANISE A REFERENDUM ON BECOMING A CONSTITUENT TERRITORY OF THE RUSSIAN FEDERATION OR RESTORING CRIMEA'S 1992 CONSTITUTION IS COMPATIBLE WITH CONSTITUTIONAL PRINCIPLES"

On the basis of comments by

Mr Peter PACZOLAY (Honorary President)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Evgeni TANCHEV (Member, Bulgaria)
Mr Kaarlo TUORI (Member, Finland)

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

I. Introduction

1. By letter dated 7 March 2014 the Secretary General of the Council of Europe, Mr Jagland, asked the Venice Commission to provide an opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles".

2. Mr Paczolay, Ms Suchocka, Mr Tanchev and Mr Tuori were appointed as rapporteurs for this opinion.

3. The present opinion was adopted by the Venice Commission at its … session in Venice on …

4. On 6 March 2014 the Supreme Rada (Council) of the Autonomous Republic of Crimea adopted a Resolution "On the all-Crimean referendum". According to the Resolution, the voters are given two options: "1) Do you support the reunification of the Crimea with Russia as a subject of the Russian Federation? 2) Do you support the restoration of the Constitution of the Republic of Crimea as of 1992 and the status of the Crimea as a part of Ukraine?" Article 3 of the Resolution provides that the option supported by the majority of votes shall be deemed a direct expression of will by the Crimean population.

5. On the ballot paper the two questions appear as alternatives, i.e. the voters are not asked to say yes or no to each question but they can either vote for the first or the second alternative.

6. The Resolution was passed on the basis of Articles 18(1)(7) and 26(2)(3) of the Constitution of the Autonomous Republic of Crimea. Article 18(1)(7) provides that among the powers of the Autonomous Republic of Crimea is "calling and holding of republican (local) referendums upon matters coming under the terms of reference of the Autonomous Republic of Crimea". In turn, according to Article 26(2)(3) "passing of a resolution upon holding of a republican (local) referendum" belongs to the powers of the Supreme Rada". These provisions are based on Article 138.2) of the Constitution of Ukraine according to which the "organising and conducting local referendums is within the competence of the Autonomous Republic of Crimea".

7. In order for the referendum to be constitutional and legal, it would be required that the issues to be put before the voters are issues which can be the object of a local referendum under the Constitutions of Ukraine and the Autonomous Republic of Crimea. The Constitution of Ukraine enjoys supremacy over the Constitution of Crimea as an autonomous republic. Ukraine is a unitary state and in such a state autonomous regions enjoy autonomy only to the extent powers were transferred to them by the central authorities

8. According to Article 135 of the Constitution of Ukraine, "regulatory legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea and decisions of the Council of Ministers of the Autonomous Republic of Crimea shall not contradict the Constitution and laws of Ukraine and shall be adopted in accordance with and in pursuance of the Constitution of Ukraine, laws of Ukraine, acts of the President of Ukraine and the Cabinet of Ministers of Ukraine". A corresponding provision is included in Article 28 of the Constitution of the Autonomous Republic of Crimea: "The statutory acts of the Supreme Rada of the Autonomous Republic of Crimea and the Council of Ministers of the Autonomous Republic of Crimea upon any and all matters regarding the powers of the Autonomous Republic of Crimea shall conform to the Constitution of Ukraine and Ukrainian laws." An act which is contrary to the Constitution of Ukraine is therefore also contrary to the Constitution of Crimea.

II. Alternative 1: Unification with Russia

9. The first alternative propose to the voters, for Crimea to join the Russian Federation, would imply secession from Ukraine. The question is whether the Constitution of Ukraine allows referendums on secession.

10. It is true that the Constitution of Ukraine, in particular its Article 69, recognises referendums as an expression of the will of the people. This does, however, not mean that any referendum is automatically constitutional. On the contrary, there are numerous provisions of the Ukrainian Constitution which show very clearly that the secession of a part of the territory of the country cannot be the object of a local referendum.

11. The Constitution of Ukraine makes it very clear that the sovereignty and territorial integrity of the country are fundamental principles of the Ukrainian constitutional order. Article 1 of the Constitution refers to Ukraine as a sovereign country. Article 2 of the Constitution is worded as follows:

> *"The sovereignty of Ukraine extends throughout its entire territory.*
>
> *Ukraine is a unitary state.*
>
> *The territory of Ukraine within its present border is indivisible and inviolable."*

Already in its study on "Self-determination and secession in constitutional law" (CDL-INF(2000)002), the Venice Commission noted that "Affirmation of the indivisibility of the state plainly implies outlawing of secession…"

12. Article 2 shows that the indivisibility of the territory of Ukraine is one of the highest values of the Ukrainian Constitution and is an indication that a referendum on secession cannot be constitutional in Ukraine.

13. Chapter X of the Constitution on the Autonomous Republic of Crimea does not contradict but confirms this approach. Article 134 of the Constitution refers to the Autonomous Republic of Crimea as an "inseparable constituent part of Ukraine". As regards referendums, Article 138.2 of the Constitution explicitly limits the competence of the Autonomous Republic of Crimea to "organizing and conducting local referendums". Issues of altering the territory of Ukraine cannot be decided by a local referendum. Article 73 of the Constitution of Ukraine explicitly provides:

> *"Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum."*

14. Since Chapter X of the Constitution of Ukraine defines Crimea as an inseparable constituent part of Ukraine, the secession of Crimea would require amending the Constitution of Ukraine. Such a constitutional amendment is however, prohibited by Article 157.1 of the Constitution of Ukraine which provides:

> "The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine."

15. It is therefore clear that the Ukrainian Constitution prohibits any local referendum which would alter the territory of Ukraine and that the decision to call a local referendum in Crimea is not covered by the authority devolved to the authorities of the Autonomous Republic of Crimea by virtue of Article 138 of the Ukrainian Constitution. Since Article 28 of the Constitution of the Autonomous Republic limits the authority of the Supreme Soviet of the Autonomous Republic to matters within the authority of the Autonomous Republic under the Ukrainian Constitution, the decision also violates the Constitution of the Autonomous Republic.

16. If the Constitution of Ukraine does not allow a referendum on secession, this does not in any way contradict European constitutional standards. Rather, it is typical for constitutions of Council of Europe member states not to allow secession. In its Report on "A general legal reference framework to facilitate the settlement of etno-political conflicts in Europe" (CDL-Inf(2000)16 the Venice Commission noted:

> *"The principle of territorial integrity commands very widespread recognition - whether express or tacit - in constitutional law. On the other hand, constitutional law just as comprehensively rules out secession or the redrawing of borders. This should come as no surprise since that branch of law is the very foundation of the state, which might be deprived of one of its constituent parts if such possibilities were provided for."*

17. This does not mean that the notion of self-determination would be alien to European constitutional law. However, in its Report on "Self-determination and secession in constitutional law" quoted above, the Venice Commission concludes that self-determination is understood primarily as internal self-determination within the framework of the existing borders and not as external self-determination through secession.

18. The decision of the Ukrainian constituent power not to grant a right to secession can therefore not be criticised on the basis of European constitutional standards.

III. Alternative 2 – Return to the 1992 Constitution

19. According to the second alternative provided for in the referendum, a return to the 1992 Constitution of the Autonomous Republic, Crimea would remain part of Ukraine. The constitutional objections to the first alternative therefore do not apply. A consultative referendum on increasing the autonomy of Crimea would be possible as a local referendum within Crimea. However, since this second alternative is provided not as a separate question but only as an alternative to secession, it cannot be regarded as valid on its own. In any case such a referendum could not be regarded as binding. According to Article 136 of the Constitution of Ukraine, the Constitution of the Autonomous Republic has to be approved by the Verkhovna Rada. It could only be regarded as a consultative local referendum on the basis of Article 48.2 of the Constitution of the Autonomous Republic of Crimea which is worded as follows: "The Supreme Rada of the Autonomous Republic of Crimea may, by a resolution of an advisory republican (local) referendum, make motions on alterations regarding the limitation of the status and powers of the Autonomous Republic of Crimea, the Supreme Rada of the Autonomous Republic of Crimea and the Council of Ministers of the Autonomous Republic of Crimea determined by the Constitution of Ukraine and Ukrainian laws." The compatibility of the 1992 Constitution with the Constitution of Ukraine, which was adopted in 1996, would then have to be ascertained.

IV. Compatibility of the referendum with European constitutional principles

20. While the first requirement for the validity of the referendum is that it may not contradict the provisions of the Constitution of Ukraine, this is by no means sufficient. It is also necessary that the referendum complies with basic democratic standards for the holding of referendums, such as those established by the Venice Commission's Code of Good Practice on Referendums (CDL-AD(2007)008). In its Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the organization of referendums with applicable international standards (CDL-AD(2005)041) the Venice Commission noted (at 11):

> *"11. Any referendum must be organised in full conformity with internationally recognised standards. A consideration of these standards must begin with an examination of European standards. …*
> *12. The internationally recognised fundamental principles of electoral law, as expressed for example in Article 3 of the First Protocol to the ECHR and Article 25 ICCPR, have to be respected, including universal, equal, free and secret suffrage. For a referendum to give full effect to these principles, it must be conducted in accordance with legislation and the administrative rules that ensure the following principles:*
> *- the authorities must provide objective information;*
> *- the public media have to be neutral, in particular in news coverage;*
> *- the authorities must not influence the outcome of the vote by excessive, one-sided campaigning;*
> *- the use of public funds by the authorities for campaigning purposes must be restricted."*

21. A number of circumstances make it appear questionable whether the referendum of 16 March 2014 can be held in compliance with international standards. Such circumstances are:

- Ukraine does not at the moment have a law regulating local referendums. It is therefore not clear according to which legal rules the referendum will be carried out.
- While the Venice Commission has not made a comprehensive assessment of the current situation in Crimea, the massive public presence of (para)military forces is not conducive to democratic decision making.
- Concerns have been expressed, including by the OSCE with respect to the freedom of expression in Crimea;
- The period of only 10 days between the decision to call the referendum and the referendum itself is excessively short.
- On 11 March the Supreme Rada adopted a declaration on the independence of Crimea. This raises doubts with respect to the legal effects of the referendum and the neutrality of the authorities.

22. Moreover, the referendum question is not worded in a neutral way. It provides two alternatives: independence or return to the 1992 Constitution. It is not possible to directly express the wish to maintain the current Constitution. In addition, the reference to the 1992 Constitution is ambiguous. This text underwent major changes in September 1992, making it much clearer that the Autonomous Republic is part of Ukraine. Does the referendum refer to the original text adopted in May or the revised text as amended in September? The Code of Good Practice on Referendums requires (at I.3.1.c) that "c. The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote."

23. It also has to be taken into account that the referendum concerns an issue of outstanding importance. In its opinion on Montenegro quoted above, the Venice Commission also noted (at 24) that "*the issue at stake is possibly the most important decision that a political community may take by democratic means: its independence. Hence, the matter requires the broadest possible commitment of the citizens to the resolution of the issue."* The Venice Commission recommended serious negotiations among all stake holders to ensure the legitimacy and credibility of the referendum and such negotiations subsequently took place.

24. With respect to the referendum of 16 March the Venice Commission can only note that no negotiations aiming at a consensual solution took place before the referendum was called. Due to the multi-ethnic composition of the population of Crimea (Russian, Ukrainians, Tatars and others) such negotiations would have been particularly important.

V. Conclusions

25. The Constitution of Ukraine like other constitutions of Council of Europe member states, provides for the indivisibility of the country and does not allow the holding of any local referendum on secession from Ukraine. This results in particular from Articles 1, 2, 73 and 157 of the Constitution. Chapter X of the Constitution shows that this prohibition also applies to the Autonomous Republic of Crimea and the Constitution of Crimea does not allow the Supreme Soviet of Crimea to call such a referendum. Only a consultative referendum on increased autonomy could be permissible.

26. Moreover, it seems more than questionable whether current circumstances in Crimea allow the holding of a referendum in line with European democratic standards. Any referendum on the status of a territory should be preceded by serious negotiations among all stakeholders. Such negotiations have not yet taken place.