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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION[1]
ON THE AMENDMENTS TO THE CONSTITUTION OF UKRAINE REGARDING THE TERRITORIAL STRUCTURE AND LOCAL ADMINISTRATION AS PROPOSED BY THE WORKING GROUP OF THE CONSTITUTIONAL COMMISSION IN JUNE 2015

Endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015)

On the basis of comments by

Ms Hanna SUCHOCKA (member, Poland)
Mr Kaarlo TUORI (member, Finland)
Mr Alain DELCAMP (Expert, Congress of Local and Regional Authorities of the Council of Europe)

[1] For the follow-up to this opinion, see CDL-AD(2015)029rev.

I. Introduction

1. At the Venice Commission's 103rd Plenary Session (19-20 June 2015), the Speaker of the Verkhovna Rada of Ukraine and Chair of the Constitutional Commission, Mr Volodymyr Groysman, requested the Commission to prepare an urgent opinion on the draft amendments to the constitution of Ukraine relating to the territorial structure and local administration, proposed by the working group of the Constitutional Commission (CDL-REF(2015)021, hereinafter "the draft amendments").

2. Ms Hanna Suchocka and Mr Kaarlo Tuori were appointed as rapporteurs, together with Mr Alain Delcamp, expert of the Congress of Local and Regional Authorities of the Council of Europe.

3. The present opinion was prepared on the basis of the contributions of the rapporteurs; it was sent to the Ukrainian authorities as a preliminary opinion and made public on 24 June 2015. It was subsequently endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).

II. Background

4. The Constitutional Commission was established on 3 March 2015 by decree no. 119/2015 of the President of Ukraine. Its task is to prepare amendments to the current Constitution which the President will submit to the Verkhovna Rada for adoption. By decree no. 190/2015[2] of 31 March 2015 the President determined the composition of the Commission with the Speaker of the Verkhovna Rada as the chair. Two of the authors of this opinion, Ms Suchocka and Mr Delcamp, were appointed by the President as international observers on the Commission, together with Messrs Giakoumopoulos and Palermo from the Council of Europe and other representatives of international organisations and bodies. Within the Commission, three working groups were created, one of which deals with decentralisation.

III. Scope of the present opinion

5. This opinion examines proposed amendments relating to several articles of the constitution of Ukraine and aiming at introducing decentralisation in Ukraine. In the light of the urgency, it deals only with the main issues and does not assess the amendments exhaustively. To the extent that the draft amendments under consideration are similar to previous draft amendments examined by the Venice Commission, reference is made to the relevant opinions.[3]

6. This opinion is based on an informal English translation of the draft amendments: certain comments may be due to inaccuracies of the translation.

IV. Analysis

Article 85

7. New item 29 of Article 85 of the Constitution sets forth the power of the Verkhovna Rada to establish and liquidate administrative-territorial units and to establish and amend their names and boundaries. It further adds the power to classify settlements (this term replaces the previously employed term "localities") as cities and to name and rename settlements. It should be noted that settlements will not be local self-government units (see the paragraphs relating to

[2] See www.president.gov.ua.

[3] See in particular Venice Commission, Opinion on the draft law amending the constitution of Ukraine submitted by the President on 2 July 2014, CDL-AD(2014)037.

new article 133 below) but only geographical sites and their populations. This addition therefore does not seem necessary and may create confusion.

8. Item 30 mentions possible exceptions provided for in the Constitution to the power of the Verkhovna Rada "to call for ordinary and extraordinary elections to local institutions of self-governance". It is unclear from the draft amendments what these exceptions would be: the added part of item 30 should therefore be deleted.

Article 92

9. Article 92 item 19 of the Constitution provides that "the legal regime of the martial law and a state of emergency, zones of an ecological emergency situation" may be determined exclusively by law. The draft amendments add to the matters which need a legislative basis "the order of functioning of the state authorities and local self-government bodies in the state of emergency or martial law, environmental emergency". This constitutional addition does not appear necessary as the provision already covers these issues. Any necessary additional regulation may be provided for in the law on the Martial Law. Item 21^1 of Article 106 should also be deleted for the same reason.

Article 106 item 8^1 and Article 144 paragraphs 3 and 4

10. Item 8^1 gives the President the power to "terminate the powers of the head of the community, composition of the community, district, regional council, in cases provided for in the Constitution of Ukraine". This provision relates to new Article 144, which empowers the President to terminate early the powers of self-government bodies "If head of community, community council, district and regional councils go beyond the scope of powers envisaged by the Constitution and the laws of Ukraine applicable to the local self-government bodies, and pose a threat to the sovereignty of the state, territorial integrity or other threat to the national security".

11. It seems fully justified that the President of Ukraine, in his or her capacity as guarantor of the constitution and of local self-government, should have the power to intervene – more rapidly and efficiently than the Verkhovna Rada - when the self-government bodies overstep their constitutional and legal competences and pose a threat to the sovereignty, territorial integrity and security of the state. The President's power, however, should be limited to *suspending* – as opposed to terminating – the powers of the self-government bodies, and Item 8^1 and Article 144 paragraph 3 should be amended accordingly. A short deadline should be put to the Constitutional Court to decide the matter. The self-government bodies should immediately resume their powers in case the Constitutional Court ruled that the President's suspension decision was unconstitutional and the interim authorised government official should immediately cease his or her functions. In the opposite case, new local elections should be immediately called by the Verkhovna Rada. This should be explicitly provided for in the Constitution.

12. Article 144 provides for the possibility for the affected local self-government authority and for at least 45 MPs to bring the President's decision before the Constitutional Court. However, to guarantee constitutionality the President should be obliged to subject on his or her own initiative the matter to the Constitutional Court for final decision taking (similarly to what is provided under para. 2 of Article 144 in respect of decisions by the Prefect).

13. There is a contradiction between paragraph 7 of Article 141 providing for a deadline of 90 days from the termination decision for calling pre-term elections, paragraph 3 of Article 144 providing for the possibility for the mandate of the interim government official to last "up to one year" (which is unnecessarily long if elections are called within 90 days) and paragraph 9 of Article 141 providing for the calling of elections in the last week of the mandate of the interim

government official (which could be later than the 90 days if the mandate exceeds this duration).

Article 118

14. The draft amendments would put an end to the present system, where the state administrative agencies perform simultaneously the executive functions of the central state power at the regional and district level and of the regional and district level self-governments. In the new system, executive state administration functions and local self-government will be clearly separated. State administrations at the regional and district self-government level[4] will be removed and replaced by the prefects and the territorial units of central executive bodies. Community, regional and district councils will elect independently their own executive bodies, chaired by their president, and accountable to them. This shift towards local self-governance deserves to be commended.[5]

15. The draft amendments maintain for the prefects in the regions and in the districts the manner of appointment provided for in the current Constitution for the heads of the local state administration (appointment by the President upon recommendation of the Cabinet of Ministers[6]). The draft amendments, however, exclude the participation of the Cabinet of Ministers in the dismissal of the prefects, granting an exclusive power to the President. This change does not appear to be justified. The prefects are responsible to both the President (presumably for their functions of supervision of local self-government) and the Cabinet of Ministers (for their executive state administration functions), so that both the President and the Cabinet of Ministers should have a say in their dismissal. This is required also by the following paragraph of Article 118, which sets forth that 'the prefect shall be responsible to the President and *responsible and subordinated* to the Cabinet of Ministers. The current system of termination of powers by the President *upon recommendation by the Cabinet of Ministers* should therefore be retained for the prefects.

16. Article 118 provides that "prefects are state officials"; this means that they are selected on the basis of professional criteria and not on the grounds of political affiliation. This change deserves approval. This sentence could be put at the beginning of Article 118.

17. The power of the prefect to form his or her office does not deserve constitutional entrenchment and should be moved to the level of ordinary law.

Article 119

18. Item 4 of Article 119 should be reformulated so as to explicitly limit the prefect's power "to "co-ordinate and organise the activity of territorial units of central executive bodies and local self-government bodies" to cases of emergency and martial law, as such power may not be a general one with respect to local self-government bodies.

19. The second paragraph of the last Item of Article 119 should be understood as meaning that acts relating to executive state administration may be revoked by the Cabinet of Ministers, while acts relating to local self-government may be revoked by the President, consistently with Article

[4] The future of the civil servants composing such administration should be regulated by law.

[5] See Venice Commission, Opinion on the draft law amending the constitution of Ukraine submitted by the President on 2 July 2014, CDL-AD(2014)037, para. 48.

[6] Instead of nomination by the president, as provided in the amendments submitted last year and on which the Venice Commission had reservations: see Venice Commission, Opinion on the draft law amending the constitution of Ukraine submitted by the President on 2 July 2014, CDL-AD(2014)037, paras. 62 and 63.

118. It would be preferable to specify these respective competences, in order to avoid possible misinterpretation of parallel overlapping competences, which could lead to conflicts.

Article 121

20. The deletion of paragraph 5 of Article 121 and the ensuing removal of the competence of the Public Prosecutor's Office to supervise compliance by local self-government bodies with the law and constitutional principles is to be strongly welcomed.[7] This is an urgent change in order to provide the new law on the Prosecution Service with a solid constitutional foundation.

Articles 132 and 133

21. The draft amendments introduce a new "administrative-territorial"[8] structure for Ukraine, based no longer on "the combination of centralisation and decentralisation" as provided by the constitution in force, but on "decentralisation in the exercise of state power". The new principles of "ubiquity and capability of self-government authorities" and of "sustainable development of administrative-territorial units" are introduced in Article 132. This represents the basis for a sound decentralisation system in Ukraine in line with the European Charter of Local Self-government and is to be welcomed.[9] The principle of subsidiarity, which is enshrined in Article 143, could be mentioned in this provision too.

22. According to the revised Article 133, the administrative-territorial structure of Ukraine will have only three levels: communities, districts and regions.

23. The draft amendments remove the list of regions; this choice should be supported, as the constitutional entrenchment and the cementing of the existing regions do not seem indispensable.[10]

24. Pursuant to the second paragraph of Article 133, the existing "settlements" ("districts in cities, towns and villages") with the adjacent territories will constitute communities. This means that the territory of Ukraine will be totally divided into communities (with the ensuing planning and tax-levying powers belonging to them), which is a very positive development.[11]

25. As settlements are not local self-government units, it might be preferable not to mention them at all in the constitution, but only in the relevant laws. The second paragraph of Article 133 could be replaced with a formula referring to the division of the whole Ukrainian territory into communities.

26. As concerns the change of boundaries and the naming of the communities, the fourth paragraph could be replaced by an additional sentence in paragraph three, whereby the law will regulate how the will of the people who live on the territory of the community will be taken in consideration.

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[7] See Venice Commission, Opinion on the draft law amending the constitution of Ukraine submitted by the President on 2 July 2014, CDL-AD(2014)037, para. 62.

[8] Administration and territory are to be understood as different notions, only the latter having constitutional relevance.

[9] See Venice Commission, Opinion on the draft law amending the constitution of Ukraine submitted by the President on 2 July 2014, CDL-AD(2014)037, para. 49.

[10] See Venice Commission, Opinion on the draft law amending the constitution of Ukraine submitted by the President on 2 July 2014, CDL-AD(2014)037, para. 51.

[11] See Venice Commission, Opinion on the draft law amending the constitution of Ukraine submitted by the President on 2 July 2014, CDL-AD(2014)037, para. 50.

27. Under the proposed amendments, Article 133 would not leave any space for providing for special arrangements for certain administrative territorial units. This seems unfortunate since it will make it impossible in the future to adapt the legislation to the specificities of certain areas without amending the Constitution. Moreover, the draft amendments therefore do not provide a constitutional basis for proposals aimed at settling the present conflict in Ukraine. The Venice Commission considers that the authorities should add a provision in paragraph 1 to the effect that "some categories of administrative/territorial units or special arrangements for or within administrative/territorial units may (only) be created by law". This formula, albeit neutral, would nonetheless enable future legal developments in line with the Minsk agreements.

Article 140

28. Article 140 paragraphs 1 and 7 would benefit from a merger and a better wording, e.g. "local self-government shall be executed by the people living on the territory of the community both directly, through referendums and other forms established by law, and through the local self-governance bodies etc."

29. The last paragraph of Article 140 does not appear necessary in the constitution and could therefore be deleted.

Article 141

30. Under new Article 141, both the deputies of the community councils, district councils and regional councils and the heads of the communities will be directly elected. Possible different choices will therefore require a constitutional amendment.

31. Citizens previously convicted or serving a sentence will not be eligible to be elected; the criminal offences leading to ineligibility should be qualified and limited to the most serious offences, to corruption and to electoral offences.[12]

Article 142

32. Article 142 sets forth in detail the material and financial bases for the local self-government. It appropriately provides for the duty of the state to ensure the adequacy of the financial resources of the local self-government units as well as to provide financial means for additional tasks. This is in line with the European Charter of Local Self-government and is to be welcomed.

Article 143

33. This very detailed provision sets forth the powers of the territorial units and deserves to be approved.

34. Paragraph 1 item 7 of Article 143 sets forth the crucial principle of subsidiarity stipulated by the European Charter of Local Self-government, which is to be welcomed. Paragraph 3 however erroneously applies it to self-government *bodies* instead of to self-government *units*. This should be rectified.

35. The last paragraph of Article 143 requires reformulation: subordination to the executive state authorities is only justified in case of delegation of competences, which is provided in the previous paragraph, and only relates to such delegated competences. This provision should therefore read: "in cases of delegation of certain competences by the executive state

[12] See mutatis mutandis Venice Commission, preliminary report on the exclusion of offenders from parliament.

authorities, the local self-government bodies shall be subordinated to the delegating authorities".

Article 144 paragraphs 1 and 2

36. The first paragraph of Article 144 appears superfluous and could be deleted.

37. The prefect should have the power to *suspend* – instead of to terminate - the acts of local self-government on ground of non-compliance with the Constitution or the laws of Ukraine. As the constitutionality and the legality of an act may fall within the competence of different courts, Article 144 paragraph 2 should provide for the duty of the prefect to refer the matter to the "*competent"* court.

V. Conclusions

38. The draft amendments introduce a form of decentralisation in the exercise of state power which is largely compatible with the European Charter of Local Self-government. Overall, the amendments are well drafted and deserve support. The overdue abolition of the supervisory powers of the Prosecutor General is particularly welcome. The article on local finance should also be strongly supported.

39. In the opinion of the Venice Commission, however, two main changes are required:

- The power to dismiss the prefects should be given to the President *upon recommendation of the Cabinet of Ministers*;
- a provision to the effect that some categories of administrative/territorial units or special arrangements for or within administrative/territorial units may (only) be created by law should be added.

40. The Venice Commission remains at the disposal of the Ukrainian authorities for any further assistance they may request.