

The Proposed Constitution of Ukraine

A Legal Perspective

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The present draft of Ukraine's Constitution, as the previous drafts, continues to underline the tension that exists between trying to forget the past while at the same time trying to preserve the social ideals that the past system never lived up to. As evidenced by the 26 October 1993 proposed Constitution, it is obvious that the drafters are inclined to obtain, and provide for the Ukrainian people, guarantees of political freedoms and liberties they never possessed. At the same time, however, they appear to be leery of the radical social change that has come with the demise of the Soviet Union.

An example of this ambivalence is that the draft is replete with provisions for the early dismissal of officers and entire branches of government. The people, on their own initiative, can dismiss the president (Art. 139), deputies of the Supreme Rada (Art. 104), and the entire Supreme Rada at once (Art. 116.2). In addition, one branch can dismiss another branch. For example, the president can call for a nation-wide referendum to prematurely dismiss the Supreme Rada (Art. 135). If the referendum fails, however, the Supreme Rada may then dismiss the president. The Supreme Rada can call for a similar referendum against the president and risk dismissal in the event of failure. Moreover, the Supreme Rada can prematurely dismiss the judges of the Constitutional Court (Art. 198) and the Cabinet of Ministers (Art. 144). This draft seems to take the concept of "checks and balances" to an extreme that unduly hinders the operation of government.

As a second example of the drafters' ambivalence, much of the Constitution is dedicated to the creation and preservation of those individual liberties that were suppressed during the Soviet years. Some illustrations from the text of the draft itself include the right to freely travel in and outside Ukraine (Art. 26), the right to privacy of correspondence and telephone conversations (Art. 25), the right of association (Art. 31), the right to defend one's life (Art. 21), the right to the access of government information about oneself (Art. 30), freedom from censorship (Art. 90), freedom from being used in medical or scientific experiments (Art. 23), and freedom from torture and inhumane treatment (Art. 23).

All of these protections are illustrative of the Ukrainian people's legitimate fear of a reemergence of a Soviet-style regime. Ironically, on the

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other hand, the proposed draft illustrates the fear (and lack of confidence in a capitalist system) that Ukrainians seem to have in the radical socio-economic change that will result in abandoning the social aspects of a socialist/Communist system. Some examples include provisions that guarantee full employment to all citizens (Art. 39), the right to housing (Art. 43), and the right to health protection (Art. 44), the right to rest and leisure (Art. 40), to a clean environment (Art. 72) and to participate in a full cultural life (Art. 47).

Other interesting characteristics of the proposed draft Constitution are its length, descriptiveness, and attempt to be all-encompassing (everything from ecologically safe household items [Art. 46] to paid vacations [Art. 40] is covered). This presents potential problems.

First, by being so explicit and descriptive, the provisions may prove to be too difficult for a new government to enforce in whole. Consequently, if some of the provisions are enforced while others are ignored, the public's confidence in the document as a real Constitution that protects and safeguards individual liberties could be diminished.

Second, the document at times incorporates phrases and clauses that seem extremely difficult, if not impossible, to define. For example, the Constitution incorporates seemingly undefinable phrases like, "priority of universal human values" (Art. 11) and provisions like, "A wage . . . has to provide a minimum living for a worker and his family that corresponds to the scientifically substantiated physiological and social-cultural needs of the person" (Art. 39). In addition, the draft guarantees compensation for "moral damages" (Art. 27). Therefore, it seems that by attempting to cover every conceivable problem in their effort to protect and guarantee rights of the citizens of Ukraine, the drafters may inadvertently cause the opposite effect to occur if the Constitution proves to be unenforceable. It seems impossible to enforce language that is impossible or difficult to define.

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Third, granting so many rights to a person increases the chances of conflict with another person's rights. In resolving the conflict, rights will be restricted. For example, Article 36 guarantees the right of private ownership, a right important for establishing a free market economy. Article 36 also states, however, that the right of private ownership shall not infringe the rights of others. What if the right of private ownership infringes another's right to rest and leisure? There are at least 53 rights listed in Parts II through IV of this draft; any right declared by the proposed Constitution faces many potential restrictions due to a conflict with the sheer number of enumerated rights.

A Constitution may include positive and negative rights. Negative rights protect against government interference by limiting the role of government.

They establish basic private rights and personal freedoms—such as freedom of speech, press, religion, assembly, etc. Negative rights are enforceable under the rule of law. A court may declare a policy or enactment of the government improper or illegal. Positive rights require the government to do something for the benefit of the individual. However, they are practically unenforceable. A Constitution which gives rights that cannot be enforced would not be considered a serious legal document. Therefore, the presence of positive rights in the Constitution may curtail protections which stem from negative rights.

Most of the draft is spent on granting rights to Ukrainian citizens and people in general. In certain sections, however, the draft declares obligations of the citizens, instructing citizens on what they must do. For example, Article 39 requires employers to provide safe working conditions; Section Six lists a series of obligations, including the duty to pay taxes and protect Ukraine; Article 78 obligates parents and children to take care of each other. While goals enumerated in these articles are admirable, it seems inconsistent to proclaim obligations in a document that is to guarantee rights and freedoms. Instead of obligating a person to benefit another, the drafters should rewrite these goals in the form of rights of the beneficiary.

Section Four of the draft Constitution attempts to guarantee social, ecological and cultural rights. Yet, how does one realize these rights? A court would be powerless to instruct the government to fulfill these guarantees. The government, in turn, will not have the financial ability to implement these rights. Such constitutional aspirations only weaken the Constitution, they do not preserve the authority or credibility of either the judiciary or the government. A better place for such "guarantees" of positive rights is in the Preamble or Declaration of Purpose, where they would be viewed as goals for which the nation strives. The Czech Constitution defines these positive rights as aspirations, not to be enforced by the courts.

Section Four of this draft needs modification. While this draft has made many improvements over earlier drafts, there still exist ambiguities regarding private property and enterprise that can hinder the economic reform which must accompany and compliment the political reform.

Ukraine is experiencing an intense discussion on economic reforms. The aim is to introduce a free market economy as a foundation for the economic policy of the nation. The desire for a free market system requires a change from the old command-administrative system. The cornerstone for this change is the principle of private ownership of property in its fullest meaning. Without private property there cannot be a free market economy. The draft contains many limitations which contradict free market principles. Economic rights are guarantees to individuals against governmental encroachment (negative rights); they should not be placed in the same section with cultural and ecological aspirations (positive rights).

Unlike earlier drafts, this draft does not require private property to serve the interests of society at large (Art. 36). While property rights are still subject to "prevailing legislation," removal of the requirement to serve society quells the fear of the extent the government will want to regulate

and control private property, the economy and/or the market system.

Unfortunately, the status of organizations which are formed for the purpose of entrepreneurial activity, as opposed to the individuals or citizens who form or own them, is still uncertain. For example Article 9 guarantees the equality of various forms of ownership, and forms of entrepreneurship. However, Article 36 gives "citizens" the right to private property and further states that "everyone" has the right to protect his ownership. Does this

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mean that entrepreneurial organizations do not have such rights?

Another example is Article 38 which states that "citizens" have the right to entrepreneurial activity not prohibited by law. Does this mean only in their individual capacity or does it include any organization which they own, individually or as part of a group, such as shareholders?

Article 68 guarantees "freedom of enterprise, contracts and conscientious and non-excessive competition." It also states that the state will not interfere with the direct economic activity of "private and municipal enterprises." Does the term "enterprise" encompass all forms of entrepreneurial activity, including sole proprietorships, partnerships, corporations, cooperatives, etc.?

The transition from a command system to a market economy is difficult, but it is necessary to spur investment in Ukraine. This investment improves not only the quality of economic life of the people in Ukraine, but also Ukraine's relations with other nations throughout the world.

For the transition from a command to a market economy to succeed, Ukraine must also move from a command legal system to the rule of law—the very foundation of a market economy. Indeed, Article 6 espouses the principle of the rule of law. The Constitution must therefore establish the judiciary as an independent, impartial body. The credibility of an independent judiciary must be reinforced in the public consciousness. It is important that the public understand that under the rule of law, a court can rule in favor of an individual and against the state. The judiciary should not only be independent but co-equal in power with the legislative and executive branches of government.

In the United States, the independence of the judiciary has been guaranteed by the Constitution. The protections of life tenure and non-reduced salary are guaranteed so that federal judges will not fear losing their positions and getting salary cuts if they make decisions that are unpopular with the president or Congress. This protection is imperative for the existence of a democracy.

The independence from interference by the executive and the legislative branches lends credibility and trust to judicial decisions. This separation of power represents an important protection in the American constitutional system. It provides the necessary "checks and balances" on the scope of governmental activity.

This draft has made improvements in establishing the judiciary as a co-equal branch. The process of appointing judges is better defined (Art. 154). Moreover, tenure provisions have been established for judges of the Supreme Court and the Higher Economic Court (Art. 154). In addition, judges' material independence has been endorsed to a degree. Article 152 declares that the state must budget spending to guarantee material independence and social protection for judges. Furthermore, the spending cannot be altered without the consent of the Constitutional Court and the Higher Economic Court.

While these changes advance the judiciary's status as a co-equal branch, further changes will confirm that equality. For example, although Article 152 allows the Constitutional Court and Higher Economic Court to prevent a decrease in spending for the courts, it also allows the Supreme Rada to prevent an increase in spending. Thus the state budget could designate a raw amount of money for court maintenance, as opposed to a percentage of the budget, and the Supreme Rada could freeze that amount over the years.

The draft only sets the number of judges on the Constitutional Court. It does not provide for the number of judges on the other supreme courts. This opens the possibility for court packing.

The draft is ambiguous in granting immunity to judges. On one hand, Article 152 states that the law guarantees the immunity of judges. On the other hand, Article 160 retains the provision declaring that the state will pay material and moral damages caused by judicial error. The latter provision should be eliminated. In addition, the draft grants parliamentary immunity only to Constitutional Court judges. All judges should be granted parliamentary immunity. The parliamentary immunity clause in Article 103, however, does not protect against accusations of slander or insults. If these exceptions to immunity are interpreted broadly, there will be no true immunity.

Article 148 prohibits the creation of extraordinary or special courts, as well as special extra-judicial bodies. This prohibition should be reevaluated and rewritten when it concerns special courts. There may be a real need to establish special courts. In the United States, Congress has created special courts to deal with tax matters, veterans affairs and a forum where citizens may sue the government.

The draft Constitution establishes a judicial power which has three supreme courts: a constitutional court, a court of general jurisdiction, and an economic court. An alternative proposal establishes only two higher courts, a Supreme Court of General Jurisdiction and a Constitutional Court. The Higher Economic Court's function would be merged with the Supreme Court of General Jurisdiction. Another alternative currently under vivid discussion is to establish one Supreme Court, with three divisions: a constitutional division, a general jurisdiction division, and a division for specialized courts (this is especially true considering the recent politicized process of nominations of judges to the Constitutional Court. Also, there is duplication of jurisdiction between the Supreme Court of Ukraine and the Higher Economic Court).

The Constitutional Court is entrusted with the authority to interpret the Constitution. The power to review questions of constitutionality are vital in establishing a rule-of-law framework within which democracy can flourish. Earlier drafts allowed the court to review the constitutionality of the actions of the executive and legislature *sua sponte* and to initiate legislation. The current draft does not allow these actions. Article 199 states that cases are considered based on the recommendations from other entities. This provision now helps to prevent judicial abuse of power. In addition, by removing the Constitutional Court's ability to initiate legislation, this draft furthers the principle of separation of powers.

The Constitutional Court, as part of the judiciary, should be incorporated in Part VIII and not listed separately in Part X.

The procurator is placed within the judicial branch and charged with interpreting and applying the law. Article 161, however, provides the procurator with supervisory powers over the executive to ensure adherence to the law. The procurator also prosecutes state cases in the courts. Those who are responsible for ensuring a fair and impartial hearing of disputes must in no way be connected to the parties in dispute.

The current draft has reinstated the Representative of the Supreme Rada of Ukraine (Protector of the People's Rights). Articles 58 and 59 give the Representative the power to monitor the legality of actions of officials regarding the rights and freedoms of people. The Representative is closely tied to the legislative branch; he is named and dismissed by Supreme Rada, and he reports to the Supreme Rada on the state of protection of the people's rights. One would think, however, that the people would have some access to the Representative. The draft is silent on that point. Citizens may seek review of their rights on their own, however, by filing with the Constitutional Court after the Supreme Court has rendered a decision (Art. 199).

There is some overlap in authority between the Representative and the procurator. Both are appointed by the Supreme Rada and both monitor constitutional freedoms. There are significant differences, however. The procurator monitors only the acts of "bodies of state executive authority and local self-government" while the Representative can monitor "officials" in general. It also seems that the Representative is more of an advisor to the Supreme Rada while the procurator can actively challenge constitutional violations in court. Additionally, the procurator serves a definite ten-year term (Art. 162), whereas the Representative seems to come and go at the Supreme Rada's will (Art. 107.19). Moreover, the Representative is not barred from other work and political activity, unlike the procurator (Articles 163, 153). This implies that the Representative office will exist only during certain instances.

The draft declares that the status and procedure for the Representative's activities will be defined by constitutional law (Art. 58). This draft, however, lacks sufficient definition of the status and procedure. Future drafts should discuss individuals' access to the Representative and how the Representative and procurator interact, assuming they do, when their authority overlaps.

Article 156 states that judicial power shall be executed by a judge individually, by a collegium of judges and by a jury. Does this provision guarantee a trial by jury to every individual?

The following are a few recommendations to be considered in securing the independence of the judiciary:

—Judges should be provided with a lifetime tenure, or tenure until a specified retirement age.

—The judiciary should be guaranteed a fixed percentage of the government budget.

—Judges should be removed by impeachment only and involuntary transfer of judges should be prohibited.

—Judges should be guaranteed full immunity.

—Court decisions should be published.

—A code of professional conduct and responsibilities for judges, lawyers and advocates should be established.

This author has three general observations concerning the territorial structure of Ukraine. First, Part IX mixes federalist and unitarist principles of regional and local government without sorting out these different principles. Federalist principles emphasize regional and local self-government organized and operated by citizens to meet their needs within the general framework of national and state (local) constitutions. Unitarist principles emphasize regional and local governance as administrative extensions of central executive power. Second, it mixes a rule which emphasizes the idea that local governments can do only what they are explicitly authorized to do by state law, with home rule. Home rule emphasizes the idea that local governments can exercise any powers that are not explicitly denied to them and that do not violate the laws of their authorizing government. Third, and as a result of these mixed principles, the many institutional provisions seem to set up a very cumbersome structure of government more likely to produce conflict and turf battles than intergovernmental cooperation and coordination.

The previous draft Constitution seemed to place many limits on local self-government. This draft expands the rights of self-government. Both drafts support "territorial self-organization of citizens" (now Art. 188). This draft allows citizens to incorporate their own municipalities, towns and villages (Art. 190).

The draft also articulates the status of the Republic of Crimea and the oblasts. The draft declares the Republic of Crimea autonomous, although the Constitution of the Republic of Crimea may not conflict with the Constitution and laws of Ukraine (Art. 167). Section Twenty-one of the draft is devoted to the oblasts and allows the oblasts to independently resolve issues relegated to their authority.

Earlier drafts offered a parliamentary system of government for Ukraine. Although this draft has shifted some executive power from the Supreme Rada to the president, the system is still parliamentary. The drafters seem uncertain as to whether they are establishing a parliamentary republic or a

presidential one. For example, the Supreme Rada no longer has power over the principles and fundamental directions of foreign policy. Instead, the president supervises and implements foreign policy (Art. 133.7) with the aid of the Cabinet of Ministers (Art. 145.5). By giving this power to the executive branch, foreign policy will be more consistent. The relationship between the legislative and the executive branches, however, is still not based on equality. The Supreme Rada has the power to dismiss the prime minister and other ministers (Art. 144). In fact, the legislative branch can dismiss the entire Cabinet of Ministers at once. Moreover, the Supreme Rada chooses eight of the fifteen judges on the Constitutional Court (Art. 196). These provisions create an unreasonable legislative interference in the affairs of the executive. Therefore, the powers of each branch must be further redefined.

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The source of legitimacy in a democratic system is its success in competitive elections. In order to foster greater participation and involvement by the people, frequent elections to the Supreme Rada should be provided. The terms for members of the Supreme Rada should be shortened. This practice will place less stress on requirements for national non-confidence referenda, which are extremely expensive. Moreover, the majoritarian system and extremely high requirements for voter turnout should be modified so that the election process is not so energy and time consuming. Election laws should encourage pluralism and provide for competition among political parties.

There are some ambiguities in the provisions relating to the state budget (Compare Art. 124 ¶1 with ¶3), the resignation of Constitutional Court judges (Compare Art. 198.1 with Art. 107.10), the president's power to dismiss the prime minister (Art. 133.5), and the president's participation in and appeal of impeachment proceedings (Art. 141). These provisions should be revised to resolve the inconsistencies.

Finally, the writing of the Constitution should be entrusted to a Constitutional Assembly elected especially for this purpose. The draft then should be submitted in a referendum for popular approval. This process would give legitimacy to the Constitution of Ukraine. After the ratification of the Constitution, the Constitutional Assembly should be dissolved.

The process of adopting a new constitution that will receive political consensus could take some time. Therefore, during this transitional phase, it is imperative for the Supreme Rada to enact constitutional laws to protect individual rights and to delineate the respective powers of each of the branches of government: legislative, executive, and judicial.

In conclusion, this author would recommend that the text of the Constitution be shortened. Specifically, the writers should limit those sections which refer to aspirations and purposes, strengthen the sections on judicial review, protection of individual rights, and separation of powers,

define the sphere of activity of the government and guarantee the independence of the judiciary. What is needed is a credible document that will have the confidence of the people.

This is an important historical moment for Ukraine. Adopting a constitution will serve as an additional attribute of Ukraine's statehood. Ukraine must create a constitution with a good chance to become a foundation for both freedom and the rule of law.