



CENTRE OF EXPERTISE FOR GOOD GOVERNANCE

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**Opinion on amendments to the Law of Ukraine  
on “Local Self-Government in Ukraine”  
regarding early termination of power of  
village, settlement, city councils**

The present opinion was prepared by the Centre of Expertise for Good Governance, Democratic Governance  
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The authorities of Ukraine are considering amendments to the Law of Ukraine on “Local Self-Government in Ukraine” to define a balanced procedure on early termination of functions of elected mayors and councils in local communities where many conflicts cannot find satisfactory solutions.

The question of accountability and early termination of functions of local self-government bodies in Ukraine was discussed at a Strasbourg-format meeting which took place on 25 February 2019 in Kyiv,<sup>1</sup> within the framework of the Council of Europe Programme “Decentralisation and local government reform in Ukraine”. The Conclusions of this meeting can be found in appendix and should be taken into account when preparing any further legal drafts in this respect.

The present opinion answers to the request formulated by the Parliamentary Committee on State Building, Regional Policy and Local Self-Government (n° 04-14/13 – 2953 dd. 8 November 2019). It deals briefly with the amendments to the Law of Ukraine “On local self-government in Ukraine” proposed in the draft law (registration n° 9178).

### **European standards**

The European Charter of Local Self-Government gives no precise guideline in this respect. This question refers to the principles of democratic institutions and especially to the status and powers of elected representatives rather than to the principles of local self-government. It must be conceived in an appropriate way by each country, considering its national law and political practices.

The Charter provides in §2 of Article 3 – “Concept of local self-government”, that the right of local authorities to regulate a substantial share of public affairs under their own responsibility shall be exercised by councils or assemblies composed of members freely elected “*and which may possess executive organs responsible to them*”. The interpretation of the expression “responsible to them” has created uncertainties. The Supreme administrative Court of France (*Conseil d’Etat*) had issued a primary recommendation to the Government not to ratify the Charter because the French law had not recognised the possibility for local assemblies to dismiss their executive authority, though it is elected by the council<sup>2</sup>. This interpretation was modified later by considering a broader signification of the term “responsibility”.

The *Explanatory Report* of the Charter is quite short on this subject. It mentions that the right of self-government « *normally entails a representative assembly with or without executive bodies subordinate thereto* ». The sentence is not very specific. What is optional: the existence of an executive body or the fact that it is subordinated to the assembly? The concept

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<sup>1</sup> Meeting on Sanctions against local elected members (dismissal of mayors, elected members and assemblies) in Ukraine (“Strasbourg format” – in camera moderated negotiations among national stakeholders), Kyiv, 25 February 2019.

<sup>2</sup> Declaration contained in the instrument of ratification deposited on 17 January 2007: « *The French Republic considers that the provisions of Article 3, paragraph 2, must be interpreted as giving to the States the possibility to make the executive organ answerable to the deliberative organ of a territorial authority.* »

of *subordinate* may also be discussed<sup>3</sup>. Basically, the executive body is accountable for the implementation of the decisions of the council, especially for the budget and other financial acts. It can also be asked to provide information to the council, e.g. in the form of (oral and written) reports.

Each authority must have full power to exercise its own functions in the limit of the law, as provided in Article 7 of the Charter which states in §1: “The conditions of office of local elected representatives shall provide for free exercise of their functions”.

Article 7.1 of the Charter reads: “The conditions of office of local elected representative shall provide for free exercise of their functions.” Article 7.3 further provides: “Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles”. The Charter is silent on the potential reasons for ineligibility or incompatibly, leaving to the national legislator the task to draw these limits and conditions.

The Explanatory Report to the Charter mentions: “this paragraph provides that disqualification from the holding of local elective office should only be based on objective legal criteria and not on ad hoc decisions. Normally this means that cases of incompatibility will be laid down by statute. However, cases have been noted of firmly entrenched, non-written legal principles, which seem to provide adequate guarantees.”

The Charter therefore leaves a great freedom of appreciation to the national law, or possibly to the Constitution, to define the scope of the accountability, the procedures and the implications thereof. One of the implications can be the launching of a procedure of dismissal. This is however often not seen as a form of accountability, but rather as a “sanction”, to be applied only when there are serious reasons for it.

## **European practice**

There is no dominant model regulating the dismissal of mayors in Europe; local self-government systems are still very different. In federal States (Germany, Switzerland, Belgium, Austria), where local self-government is a competence of the federated States (Land, Canton, Region), there are various electoral laws and rules on the relations between the executive authority and the assembly. Few countries have a formal procedure allowing the municipal council to decide the end of the office of the holder of the executive power (henceforth “mayor”), this exists only if the mayor is elected by the deliberative authority (henceforth “council”) and where it exists its use is very exceptional.

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<sup>3</sup> However, there are no real problems with these provisions of the Charter as we see in the Report of the Congress: « *Comparative analysis on the implementation of the European Charter of Local Self-Government in 47 member States on the basis of the recommendations on local and regional democracy in member States* », by Xavier CADORET and Karim VAN OVERMEIRE (32nd SESSION CG32(2017)22 final 28 March 2017)

## Comments and recommendations concerning the draft law

1. The current law of Ukraine “On local self-government in Ukraine” provides for the possibility of the council to dismiss the mayor, which is at the same time undemocratic and inefficient. It is undemocratic because the council and the mayor are both elected directly and accountable in front of the citizens, so they have the same degree of democratic legitimacy. It is inefficient because it is likely to be used each time there is a strong disagreement between the council and the mayor; the advantages of the direct election of mayors (more democratic accountability and more checks and balances between institutions) are therefore almost annihilated while the disadvantages (likelihood of political divergences and conflicts between the deliberative and the executive authorities) are exacerbated.
2. **The Council of Europe therefore strongly welcomes the initiative to eliminate the possibility given to the local council to dismiss the mayor.**
3. The solution proposed, i.e. to make it automatic that the council is also dissolved if it decides the early termination of the functions of the mayor (referred to during the Strasbourg format meeting held on 25 February as the “suicide option”) is undoubtedly a big step forward. It would make negotiations and compromise between the two directly elected local authorities more likely and it would strongly diminish the number of mayors who are dismissed or forced to resign. As such, it can be supported by the Council of Europe.
4. **However, the Council of Europe recommends that the procedure of dismissal of mayors by local councils be eliminated altogether.**
5. The current Law of Ukraine “On local self-government” provides for a procedure of “recall”, i.e. dismissal of the mayor by local referendum; however, as the law on local referendum has not been adopted yet, this procedure is inapplicable.
6. If not properly framed, the procedure of recall of mayors creates a danger of creating something which is close to an imperative mandate (specifically excluded in many European constitutions) and is not a widely-spread European practice. This issue is also raised by the Venice Commission in its 2009 Report “on the imperative mandate and similar practices”, where it states that the imperative mandate “is generally awkward to Western democracies”<sup>4</sup>. However, this procedure does exist in a few European countries (and several non-European ones) and, if properly framed legally, it can remain an exceptional tool which would not threaten the principle of the representativeness of mandates. This is also the conclusion reached by the Venice Commission in its 2018 report (still a draft) on the recall of mayors<sup>5</sup>. **If the Ukrainian authorities desire to maintain the possibility of recall of mayors, its procedure should be clearly stipulated, including the necessary safeguards and limitations**

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<sup>4</sup> DL-AD(2009)027 par. 11.

<sup>5</sup> CDL(2018)022 par. 75.

**(as concluded in the Strasbourg-format meeting of 25 February but also in the above-mentioned Venice Commission report), either in the revised Law on local self-government, or in a Law on local referendum.**

- 7. It is therefore recommended that the question of accountability of elected officials be the subject of a more in-depth revision of the Law of Ukraine “On local self-government” in order to give legal life to the various types of accountability (democratic, political, legal, administrative) as concluded during the 25 February Strasbourg format meeting.**
- 8. It is also recommended that a Law on local referenda be prepared and adopted in line with the conclusions of the above-mentioned meeting.**

## Meeting on accountability of local elected representatives in Ukraine

25 February 2019, Kyiv

### CONCLUSIONS

The meeting took place within the framework of the Council of Europe Programme “Decentralisation and local government reform in Ukraine”. It was conducted in a “Strasbourg format”, *i.e.* in camera negotiations among all national stakeholders moderated by international officials.

The meeting brought together the main stakeholders from central, regional and local government in respect of a draft law aiming at changing the current rules on the accountability of local elected representatives (draft law “On amendments to the law “On local self-government” (register No. 9178). It was organised in partnership with the Parliamentary Committee on State Building, Regional Policy and Local Self-Government and in collaboration with Prof. Georg Milbradt, Special Envoy of the Government of Germany for the Ukrainian reform agenda.

The discussion, based on a pre-defined questionnaire and moderated jointly by Mr Daniel Popescu and Prof. Georg Milbradt, led to the following conclusions:

#### **Question 1: Which are the main problems faced by Ukraine?**

Most participants agreed that:

- The fact that the directly elected mayor is dismissed not by those who elected him/her, but by the Council is a major democratic problem, which should be addressed without delay.
- There is often excessive politicisation of the relations between the Council and the Mayor.
- While there is too much political accountability of the Mayor in front of the Council, there is little legal accountability of both the deliberative and executive bodies as there is no comprehensive supervisory mechanism in place.
- There are situations of blockages of re-instated Mayors, who are subsequently unable to perform their duties.
- Upon dismissal of the Mayor, the legal provisions concerning the organisation of new elections are often not respected and the transitional period may be very long. This may offer incentives to the Council Secretary, who ensures the ad interim, to aim to become an “un-elected mayor”.
- There are situations where the court decisions are not implemented.
- The draft law No. 9178 is aimed at solving some of the above listed problems.

## **Question 2: Accountability being a large concept, can we agree to split it in four parts?**

Considering the complexity of the issue under review, it was agreed to split it into 4 (four) parts and discuss each separately:

- Democratic accountability – accountability for the expediency of decisions taken, in front of the electorate, which can dismiss elected representatives in certain conditions;
- Political accountability – accountability of one elected body in front of another one, typically of the executive (mayor, head of local authority) in front of the deliberative body (council) with main motivation being lack of confidence or political disagreement on the governance of the local community;
- Legal accountability – accountability for legality of decisions, which can be enforced by the dismissal of elected representatives following a certain procedure and in certain conditions;
- Administrative accountability – accountability for the capacity of operation (being able to function as a decision-making body) of an elected authority, which can be enforced by the dismissal/dissolution of the elected authority through a certain procedure and in certain conditions.

*Note: This simple taxonomy was adopted for the unique purpose of structuring the debates. Indeed, while administrative accountability may be seen as a part of legal accountability (failing to implement legal obligations), other type of accountability, such as criminal, civil or financial were not included in the debate as they are outside its scope.*

## **Question 3: Does Ukraine want to have a form of democratic accountability?**

*Note 1: Such mechanism exists in theory in the Ukrainian Law on Local Self-Government, but as the law on local referenda has not been adopted, it cannot be enforced.*

*Note 2: This procedure is usually called a “recall” and is not very frequent in European states, as it introduces a degree of “imperative mandate”, while most countries prefer “representative mandates”. However, it does exist in a few cases and it is not against European standards.*

While the question of imperative vs. representative mandate is an interesting theoretic debate, most participants felt that the possibility of a recall by popular referendum/plebiscite should remain in the legislation because:

- Most Ukrainian citizens request more democratic ways of taking part in decision making, and the possibility of popular recall of the Mayor is one of them;
- While it may exacerbate conflicts between the Mayor and the Council it also represents an additional layer of checks and balances;
- Eliminating this procedure from the law would give a bad signal to the population. Indeed, the CoE opinion poll on decentralisation also shows that citizens expect a high level of accountability from the local elected representatives.

It was however agreed that there should be strong limitations which should guarantee that the recall procedure would remain exceptional and would not be abused, such as:

- time limits (e.g. no recall procedure can be launched in the first and last year of the Mayor's mandate);
- frequency limits (e.g. the procedure cannot be launched more than once per year or even once per mandate);
- limits to the ability to initiate it (e.g. not less than two thirds of the Council members or 10% of the population could launch it);
- limits to the ability to approve the recall (e.g. a high quorum such as a majority of electors and a high percentage of votes; in general, it is better to avoid that the decision to recall a mayor be taken by a smaller number of voters than those who elected him/her).

#### **Question 4: Does Ukraine want to have a form of political accountability?**

*Note 1: Such accountability exists in the current Law on Local Self-Government and has been used multiple times; there is a risk that it would be used more frequently in the (pre)electoral period.*

*Note 2: Normally such accountability is rare and exists in Europe only as accountability of the executive before the deliberative body when the executive is NOT directly elected.*

All participants agreed that the current form of political accountability of the Mayor in front of the Council should be eliminated.

Participants generally believed that the proposal made by the draft Law under review ("On amendments to the law "On local self-government" - register No. 9178), i.e. the simultaneous dissolution of the Council which has voted to dismiss a mayor would represent a step forward and a significant improvement.

However, most participants believed that it would be preferable to abandon all and any such form of political accountability between two directly elected - and hence equally democratically legitimate - bodies.

Some participants also discussed the possibility of changing the electoral system in order to give the elected mayor a majority in the council as in the Italian experience, although this exceeds the scope of the current exercise.

#### **Question 5: Does Ukraine want to have a form of legal accountability?**

*Note: Legal accountability is accountability for breaking the law. It is not very frequent in Europe that the implementation of this accountability can lead to dismissal/dissolution of elected bodies and it is relatively difficult to define it well enough to avoid any abuse.*

There was general agreement by the majority that there should be a procedure which would be objective, well defined, not likely to be politicised and limited to very clear cases. In line with

the recommendations of the CoE and its Venice Commission, only the Court should be able to enforce such accountability (terminate mandate) and only in case of serious, repeated and voluntary violation of the law. Central government should have no power to suspend Mayors or Councils.

In view of time limits set to the meeting, not all questions were discussed in order to reach a consensus. It was however generally considered that this type of accountability should be implemented in line with provisions concerning the legality supervision of local authorities' activities or inaction (according to legal and institutional provisions agreed upon during a previous Strasbourg-format meeting).

#### **Question 6: Does Ukraine want to have a form of administrative accountability?**

*Note: Administrative accountability means that there is a procedure to dissolve a council or dismiss a mayor if the authority in question is clearly and objectively unable to perform its legal duties. It is relatively frequent in Europe, but it needs to be well defined in order to avoid any risk of being abused and any mix with other forms of accountability.*

Discussion went far beyond the intended scope related to early dismissal or dissolution and touched also the substitution issue.

Most participants agree that:

- such mechanism is needed;
- provided that the reasons to enforce administrative accountability are very clearly and objectively defined by the law and leave very little leeway to interpretation (e.g. if this procedure can be enforced only for situations like impossibility for the Council to meet e.g. for six months, impossibility to adopt a budget by a set date or absence of the Mayor from the municipality e.g. for a period of more than six months), this procedure could be extra-judicial and performed in line with the institutional arrangements discussed in respect of the mechanism for legality supervision;
- however, the person(s) in question should have judicial recourse against such decision.

#### **CONCLUDING REMARKS**

The issue of accountability of local elected representatives is complex and needs to be taken into account while preparation of all further legal drafts regarding local self-government reform.

It was in general considered that:

- the current situation, whereas the Council can dismiss the Mayor while both authorities are directly elected, is neither democratic nor efficient and should be changed as a matter of urgency;

- the draft law “On amendments to the law “On local self-government” (register No. 9178) proposes a significant step forward by proposing that, in case the Council decides to dismiss the Mayor, the Council itself is also dissolved;
- however, abandoning altogether this form of political accountability of one (directly elected) body in front of another (directly elected) body is preferable;
- it would however be better to address all issues of accountability of local and regional authorities into one comprehensive piece of legislation;
- in this latter case, a new draft law should be co-ordinated with the provisions included in the draft law on the legality supervision of local authorities’ activities, which is also a very important piece of legislation and was prepared following a compromise found during a Strasbourg format moderated negotiation meeting.