



CENTRE OF EXPERTISE FOR GOOD GOVERNANCE

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Preliminary comments on the Draft Law of Ukraine “On Amendments of the Constitution of Ukraine”

*The present Overview was prepared by the Centre of Expertise for Good Governance, Democratic Governance
Department of Directorate General II – Democracy*

1. Introduction

1. On 3 February 2020, the Chair of the Committee on State Building, Local Governance, Regional and Urban Development, Mr Andriy Klochko, requested, in a letter addressed to the Director General on Democracy, Ms Snezana Samardzic-Markovic, the support of the Council of Europe in the current constitutional reform process concerning decentralisation in Ukraine.

2. The current comments examine the proposed reforms included in the Draft Law “On Amendments to the Constitution of Ukraine (On Decentralisation of Power)”, registered by the President of Ukraine to the Verkhovna Rada under registration n° 2598 and subsequently withdrawn for further consultations. It addresses mainly the issues specifically identified in the above-mentioned letter. It was prepared by the Directorate General on Democracy in co-operation with experts of the European Commission of Democracy through Law (“Venice Commission”) and of the Congress of Local and Regional Authorities (“Congress”).

2. Current situation of the Constitutional reform in Ukraine

3. The much-needed Ukrainian constitutional reform was conducted in two stages.

4. The first part of the reform was conducted in respect of the judiciary and the law introducing the constitutional changes was adopted by the Verkhovna Rada in June 2014. The Venice Commission formulated one opinion on the draft presented for discussion (CDL-AD(2015)027) and an opinion on the final draft as submitted by the President of Ukraine to the Verkhovna Rada on 25 November 2015 (CDL(2015)057).

5. The second part of the constitutional reform concerned the decentralisation of power and was submitted by the President of Ukraine to the Verkhovna Rada on 16 July 2015. This text was the subject of two Venice Commission opinions:

- CDL(2015)037 - Draft Opinion on the Temporal Validity of Draft Transitional Provision 18 of the Constitution of Ukraine
- CDL-AD(2015)028 Opinion 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)

6. It must be underlined that the Venice Commission opinions on this text were largely positive. The draft law was adopted in the first reading but was never presented for a second reading.

7. A new text was prepared and introduced by President of Ukraine V. Zelenskyi and subsequently withdrawn for further consultations. The current commentary is part of these consultations. In general, the current text is relatively similar to the previous one, advised favourably by the Venice Commission, with the notable exception that Draft Transitional Provision 18 (the so-called “Minsk Agreement clause”) has been abandoned.

3. Analysis of the text in line with the request

8. The current comments follow broadly the structure of the questions raised by the Chair of the Committee on State Building, Local Governance, Regional and Urban Development in his request. However, in view of the unitary character of most articles, each of them is only analysed once, in their entirety. The text of the articles appears in *italics*, with the new elements in ***italics bold***. The main recommendations appear in the text in **bold**.

9. The current amendments are, like the Constitution itself, of various levels of detail, political importance, prescriptiveness and legal utility. The translation into English, which was mostly used by the authors, is also not always perfect and the formulations can sometimes be improved. However, the comments do not refer to the drafting technique but only to the respect of the democratic principles, of the European Charter on Local Self-Government (henceforth “the Charter”) and other Council of Europe standards and to the prospect of creating a well-functioning local government system.

Administrative territorial structure

10. The main changes in respect of the administrative territorial structure appear at articles 132, 133 and 140.

Article 132

*“Article 132. The territorial structure of Ukraine shall be based on the principles of **unitariness, unity and integrity of the territory of the State, decentralisation of power, subsidiarity and ubiquity of local self-governance**, balanced and **sustainable** socio-economic development of **territories**, while taking into consideration their historical, economic, ecological, geographic, and demographic characteristics as well as ethnic and cultural traditions.”*

11. The main changes in Article 132 are:

- The introduction of the principle of “unitariness” (Ukrainian: *унітарності*);
- The replacement of the principle of “combination of centralisation and decentralisation in the exercise of state power” by that of “decentralisation of power”;
- The introduction of two very important and powerful principles: subsidiarity and ubiquity of local self-governance (*субсидіарності і повсюдності місцевого самоврядування*);
- The introduction of the word “sustainable” and the reference to “territories” instead of “regions”.

12. The changes are to be welcomed:

- Ukraine remains indeed, under the proposed revised Constitution, a unitary state, despite having (like most unitary European countries) special arrangements for some areas, either appearing in the Constitution (Autonomous Republic of Crimea) or to be set out in further legislation (Kyiv and Sevastopol);
- The principle of decentralisation of power is intended to become stronger and usefully replaces the previous, confusing, one;
- The principle of subsidiarity is a powerful principle and represents the implementation of Art. 4 para 3 of the Charter, which describes it (without naming it specifically): “*Public responsibilities shall generally be exercised, in preference, by those authorities which are*

closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.”

- The principle of ubiquity (also sometimes translated as omnipresence – *повсюдності*) means that all the territory of Ukraine will be occupied by local authorities. This represents a stark contrast with the current system, where municipalities only occupy (and sometimes own) the built area; transferring all land to municipalities is a very effective measure of empowering them and has been suggested by the Council of Europe for a long time.
- A focus on sustainability, raising it at the level of a constitutional principle is a positive development. So is the idea that all territories, not only regions are to benefit from a balanced and sustainable development.

Article 133

*“Article 133. The system of the administrative territorial structure of Ukraine shall include **administrative territorial units: hromadas, okruhs, oblasts, the Autonomous Republic of Crimea, the cities of Kyiv and Sevastopol.***

The territory of Ukraine shall be comprised of hromadas. The hromada shall be the primary unit in the system of administrative territorial structure of Ukraine.

Several adjacent hromadas shall constitute an okruh.

The procedure for forming and liquidating, establishing and changing boundaries of, naming and renaming hromadas, okruhs, oblasts, as well as the procedure for forming, naming, renaming, and categorising hromadas as villages, settlements or cities shall be prescribed by law.

The legal status of Kyiv as the capital of Ukraine and the city of Sevastopol in the system of administrative and territorial structure of Ukraine shall be determined by laws of Ukraine.”

13. The first paragraph of Article 133 is to be highly welcomed as it introduces a long-due clarification and systematisation. It replaces the previous provision which included a full list of various types of entities, some without real legal existence and of very different levels and natures (“Autonomous Republic of Crimea, oblasts, rayons, cities, rayons in cities, settlements and villages”). It becomes finally clear that from now on there are three levels of subnational government, i.e. hromadas (municipalities), okruhs (sub-regional authorities) and oblasts (regions) plus the Autonomous Republic of Crimea and the two cities with special provisions, and that they will all be referred to as “administrative territorial units”. Such changes bring the Ukrainian system of local self-government more in line with consolidated European practice.

14. The second and third paragraph of this article explain the new notions of hromada and okruh and that the principle of ubiquity applies to hromadas. It is probable that this principle will not apply to okruhs as, depending on their specific competences, many cities will likely be excluded from the composition of okruhs and cannot be considered, in light of the current definition, as being (also) okruhs themselves. It will probably not apply to the oblasts either if the entities with special status are not considered to be oblasts or parts of oblasts. The omission of okruhs and oblasts from the scope of the principle of ubiquity supports such reading of the second and third paragraph.

15. The fourth and fifth paragraphs make it possible for legislation to establish the rules for changing the administrative territorial structure and the status of Kyiv and Sebastopol.

16. It has to be noted that the Venice Commission has similarly evaluated the new changes and assessed positively the draft amendments related to Art. 132 and 133.¹

Article 140

*“Article 140. Local self-governance is the right **and capacity** of a hromada **to address, either directly or through local self-government authorities and their officials** resolve locally significant issues within the framework of the Constitution and the laws of Ukraine.*

Hromada is a primary entity of local self-governance.

Hromada shall exercise local self-governance directly through elections, local referendums, local initiatives or in other forms prescribed by law.

Hromada council and executive bodies of hromada council shall be local self-government authorities of a hromada.

Hromada council shall facilitate the activity of public self-organisation bodies established under the law and the hromada charter and, for this purpose, may vest them with funds and property.

Okruh and oblast councils shall be local self-government authorities that represent and implement common interests, defined by law, of hromadas of the respective okruh or oblast.

The status of a hromada mayor, deputies of hromada, okruh, and oblast councils, the procedure for formation, reorganisation and liquidation of hromada council’s executive bodies, executive committees of okruh and oblast councils, and the scope of their powers shall be defined by law.

The matter of managing city districts shall be referred to the competence of the respective hromada councils.”

17. The first paragraph is a reflection of the definition of local self-government Art 3.1 of the Charter: *“Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population”*. **The formulation in the Charter seems however to be superior and it could be reproduced here.** It speaks about “regulating and managing” (which is more specific and powerful than addressing/resolving), it speaks about “own responsibility” and “the interest of the local population”. In the Ukrainian draft, it is not clear whether the authorities of the hromadas will have the power to issue regulations and also why individual officials, who do not constitute a legal authority (collectively as a council or individually as a mayor) need to have a

¹ See Venice Commission, Opinion 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), CDL-AD(2015)028, paras. 21-25.

constitutional recognition. Individual officials normally act on behalf of the authority, which should also bear the responsibility for their acts or omissions.

18. In the third paragraph the adverb “directly” (*безпосередньо*) seems to be misplaced as elections are normally not seen as a direct way of exercising self-government by citizens. As a note, in the English version, throughout the text “local self-governance” should be in fact understood as “local self-government” (*місьцеве самоврядування*).

19. The fourth and seventh paragraph seems to introduce the idea that a local council will have more than one executive bodies, which does not seem to be in line with the rest of the text. According to Art. 141.3 only the hromada council and the mayor are directly elected and the mayor heads the executive body of the hromada council. Correspondingly, the fourth paragraph of Art. 140 could provide that the hromada council and the mayor are the organs of the hromada.

20. The sixth paragraph maintains a distinction between the first and the other two levels of sub-national government. It states that the okruh and oblast councils represent not the interests of respectively the okruh and oblast population, but of the component hromadas. The issue of the legal personality of these entities is also not clear: will the legal entity be, like in the case of the hromada, the community of the okruh or oblast, or their councils? Does this mean that the okruh and oblast councils are somehow subordinated to the hromada councils? In general, the Council of Europe does not recommend establishing hierarchical relations between subnational levels of government. Of course, there are notable exceptions such as in case of federal or quasi-federal states, where regional authorities can have precedence or even rule over local authorities, or on the contrary, when the higher level is more of an inter-municipal co-operation entity and the component local authorities may have precedence over it in decision making (e.g. the case of the Greater London Authority).

21. The last paragraph is slightly confusing. City districts are introduced for the first time. What does “managing” mean? This is an issue of heated debate currently and the Council of Europe will soon organise a Strasbourg format on the issue of the status of the Capital City of Kyiv. Does it mean that they can be created by law but under the authority of the City council (as current draft laws on the status of Kyiv on which the Council of Europe has given opinions foresee) or that they can only be created by the City itself? What about their competences and budget? Are they part of the “management” to be reserved to the City council or can they be framed by the law?

22. It is therefore recommended that the relations between the levels of sub-national government be clarified and that the text be streamlined. While the status of okruhs is of a lesser importance, for a country of the size and complexity of Ukraine, it would be advisable to have regions (oblasts) which represent the interests of the population of the oblast and have a solid degree of self-government and directly elected authorities. Also, the issue of city districts should better be left to the ordinary law or at least it should be added to the last paragraph “in the conditions of the law”.

Article 92

“Article 92. The following are determined exclusively by the laws of Ukraine:

...

16) legal status of administrative territorial units; legal status of the city of Kyiv as the capital of Ukraine and the city of Sevastopol in the system of administrative territorial structure of Ukraine,”

23. Item 16 of Art 92 adds Sevastopol but excludes the possibility for the law to create “special status of other cities”. This is not conflicting with European standards although, in practice, having a possibility to adopt laws offering special provisions for big cities other than Kyiv, in line with future demographic, economic and social development would be useful. Several countries in Europe, even far smaller than Ukraine (e.g. Moldova) have special legal arrangements for big cities which are not their capital.

State executive power (the new Prefect institution)

24. As this is one of the most controversial innovations of the Constitution among Ukrainian stakeholders, the general position of the Council of Europe needs a few preliminary explanations.

25. **The first explanation** concerns the very existence of the Prefect institution.

26. The essence of the status of the prefect is that it cumulates two important functions: that of co-ordinating state services which are deconcentrated² in the territory and that of supervising local authorities’ activity. Placing these two powers under the same institution creates a powerful state authority at the sub-national level. It would be also possible to place these two functions under different institutions, which would probably be more protective of local self-government.

27. The Council of Europe does not recommend one solution or the other. Both are in line with the Charter and other Council of Europe standards. A majority of European countries, in particular those which have transitioned towards democracy after 1989 and have subsequently conducted decentralisation reforms, have chosen to cumulate the two competences, in line with the “Prefect model”.

28. The new Prefect institution is supposed to replace another very powerful one, that of Head of Local (oblast or rayon) State Administration, which also cumulates two important functions: the function (or authority) of co-ordinating deconcentrated state services (which would be taken over by the Prefect) and that of executive authority of the oblast or rayon (in the future okruh) council. The latter conflicts with Art. 3 paragraph 2 of the Charter: *“This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them”*. As such, abandoning the institution of Head of Local State Administration in favour of the Prefect one as it is proposed in this draft law constitutes a significant improvement in respect of the level of local self-government and of compliance with international obligations of Ukraine. Of course, it is expected that the okruhs and oblasts, which are to be dealt with in the law, will indeed have their own executive authorities, accountable in front of the respective elected councils, failing which the

² The current opinion follows Council of Europe terminology, including a distinction between decentralisation (full transfer of competences to self-governing bodies with elected authorities) and deconcentration (transfer of the execution of state competences to territorial agencies of state authorities); in the UK, these terms correspond more to devolution and respectively decentralisation.

reform would be useless or even damaging. The draft amendments mention executive committees of okruh and oblast councils but their status and powers are not clearly defined.

29. **The second element which needs an explanation** is the position of the Council of Europe on the procedure of supervision on local authorities' action (or lack thereof).

309. Efficient supervision is one of the most important elements of a solid local self-government system. No country in Europe relies on a system where the only supervision of legality of local authorities' acts is done by the citizens themselves simply because of the large asymmetry of information between citizens and their authorities. This problem is compounded by local authorities' relative inexperience to manage new tasks in case of recent decentralisation, by the continuous legal and technical complexification of local governance and, in the last decades, by the slow but sure disappearance of small local independent newspapers in favour of corporate media, and then of online sources of information (social media in particular), which led to diminishing levels of scrutiny over local authorities' activity (or lack thereof).

31. However, excessive supervision risks paralysing local self-government and destroying the very benefits decentralisation is supposed to bring. It is therefore paramount to find a balanced system whereas, as the Charter puts it, *"the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect"*. The previous system of supervision by the *Prokuratura* was criticised by the Venice Commission and has rightly been abandoned.

32. The Charter has an article (Art. 8) dedicated to supervision and the Committee of Ministers adopted two recommendations on this issue: Rec(1998)12 on supervision of local authorities' action and Rec(2019)3 on the supervision of local authorities activities.

33. In some countries, there are several authorities which perform this supervision; however, a majority of European states comply with a provision included in Rec(2019)3, which recommends to member States *"to clearly define a general supervisory authority"*.

34. Art. 8 of the Charter introduces the 3 fundamental principles which any supervision system should comply with:

- legality (supervision to be exercised only in case and by procedures provided specifically by law);
- functional autonomy (supervision over own competences should normally concern only legality, while for delegated competences it can also concern expediency);
- proportionality (intervention to be kept in proportion to the interests which it protects).

35. Moreover, Rec(1998)12 recommends to member States:

- To provide that, unless the contrary is provided for by law, local authorities exercise their own competencies;
- To favour the attribution of "own" competencies over the delegation of competencies, resulting in a reduction of expediency supervision;
- To enumerate clearly, in statutory provisions, the acts subject to supervision;
- To limit compulsory ex officio administrative supervision to acts of a certain significance;
- To reduce a priori administrative controls (those where the involvement of a government authority is necessary for a local decision to take effect or be valid).

36. The Council of Europe organised in April 2018 a Strasbourg format on the issue of the administrative supervision. During that meeting, a consensus was found among stakeholders for the creation of a very light system of supervision, which would be one of the most flexible and protective of local self-government in Europe. That system could either operate individually or be attached to the Prefects (possibly with some provisions offering a degree of protection for its autonomy, objectivity and professionalism) in the event of a revision of the Constitution and was further developed into a draft law which the Council of Europe advised favourably.

37. **The third element of clarification** concerns the power of the supervisory authority (in this case the prefect) to suspend systematically acts which he or she considers illegal, while at the same time sending them to the administrative court for decision.

38. The Council of Europe does not advise to introduce this power as, absent very carefully drafted legislation and monitoring of implementation, it creates a significant risk of abuse and it restricts the extent of local autonomy. The Council of Europe normally recommends less intrusive procedures, such as a request to a Court to suspend in an emergency procedure and pending deliberations on the substance only those acts which are likely to produce consequences which are difficult or impossible to reverse (usually referred to as the “French Prefect model”). At the very least, the Council of Europe recommends that the suspensive power of the supervisory authority not be systematic but reserved to exceptional cases where the implementation of the decision would produce consequences which are serious and difficult to reverse.

39. However, the suspensive power remains in line with the Charter and in half of the Council of Europe member States the supervisory authority has this power. In about a third of European countries, the supervisory authority (also) has the (far stronger) power of annulling contested documents (the “Polish Voivode model”) and in some even that of establishing sanctions over the local authorities concerned.

40. The provisions concerning the prefect, the supervision mechanism and the suspensive power are not very dissimilar from those presented in the draft law introduced in 2015 and on which the Venice Commission expressed a positive opinion. Of course, the opinion of the Venice Commission does not mean that the solutions examined are the best or the most efficient, but only that they do not contradict democratic principles and European standards.

41. After these general comments, the specific articles will be analysed one by one.

Article 118

*“Article 118. The executive power in **okruhs** and oblasts shall be executed by **prefects and territorial bodies of central executive authorities**.*

*The composition **of a prefect office is formed by a prefect**.*

A prefect shall be appointed and dismissed by the President of Ukraine upon submission of the Cabinet of Ministers of Ukraine.

The prefect’s tenure in the same okruh, oblast or the city of Kyiv and the city of Sevastopol shall not exceed three years.

A prefect shall be a civil servant.

When exercising his/her powers, a prefect shall be accountable to and controllable by the President of Ukraine and the Cabinet of Ministers of Ukraine.”

42. In the first paragraph, “executive power” (in the text in accusative form “*Виконавчу владу*”) is understood as “state executive power” and not executive power of okruh and oblast councils, which should (hopefully, in the future legislation) have executive authorities accountable to them as the Charter requires. It would obviously be against the Charter to entrust prefects, like the current Heads of Local State Administration, with the executive authority of oblast and okruh councils. **To ensure legal clarity it is recommended to expressly use the syntagma “state executive power”.**

43. Typically, as the main role of the Prefect is to coordinate state services which are subordinated to the Government (the supervisory function should be a distant second role), it is expected that the Prefect would be mainly accountable to and supervised by the Government (e.g. Prime Minister, Minister of Interior, or, even if more cumbersome, the Cabinet of Ministers), as it is the case in most European countries which have this institution, but not the President, who normally has no role in ordinary administrative affairs. The mode of nomination and dismissal of Prefects (by the President but only upon submission by the Cabinet of Ministers) also gives pre-eminence to the Government. In France for example, the role of the President is strictly symbolic and exercised in his or her quality of Chair of the Committee of Ministers, but the prefects are subordinated to the Prime Minister and the Minister of the Interior. It should be avoided that, in case the President and the Government are of opposed political affiliations (“*cohabitation*”), two different “verticals of executive power” appear, conflicting, controlling and possibly even paralysing each other. The constitutional provision should be formulated in such a way not to create such conflict. **It is therefore recommended that the accountability of the Prefect be in front of the Government, not the President.**

44. The provision contained in the fifth paragraph is to be very much welcomed: indeed, one of the risks of such institution, where appointment is done by political authorities, is that it becomes very political, which would conflict with its role, essentially administrative and technical. The Venice Commission also commended this change.³ A specific law on the status of the prefect (or a specific section in the law on local self-government) should normally ensure the implementation of such provision: accession to the pool (corps) of (potential) prefects through competition as the Law on Civil Service provides for, etc.

45. The second paragraph raises however serious concerns. What is this office and why should a civil servant like the prefect have the constitutional authority to form it?⁴ Is this the total administration supporting the institution (the “Prefecture”)? In such case it would not really need constitutional mention and it should surely be formed of civil servants appointed following competition, like other civil servants in the rest of the administration. Does this mean that every 2-3 years, when the prefect is “rotated”, the composition of this office will change completely? This would lead to excessive politisation and loss of institutional memory. Or is this a sort of small, restricted “private office” composed of a few persons who could exceptionally be appointed autonomously by the Prefect? But

³ See Venice Commission, Opinion CDL-AD(2015)028, para. 16.

⁴ Venice Commission has expressly stated that “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”, *ibidem*, para 17.

why would a civil servant supposed to perform technical functions have such exorbitant authority and why would he or she need constitutional guarantees for this? **It is therefore highly recommended to abandon such provision and make sure that the office of the Prefect, whatever it is, is staffed by regularly appointed civil servants.**

46. The principle of the rotation of prefects is a sound one and can only be supported, although its constitutional recognition may not be indispensable *per se*. In any case setting such a rigid ceiling in the Constitution seems excessive. On the substance, three years sounds like a good enough average, but may be too low as a ceiling. As an example, prefects in France are submitted to very fast rotation (on average less than 2.5 years) but in 2014 the French *Cour des Comptes* deplored this as being far too fast. On the procedure, setting such absolute limit in the Constitution itself may be too rigid to account for various cases of uncertainty and *force majeure*: is it acceptable that such a provision forces a prefect to be changed in the middle e.g. of an emergency crisis generated by a natural disaster? **It is therefore recommended that the principle of compulsory and systematic rotation of prefects be included in the Constitution, but the precise ceiling and specific conditions and exceptions be left to the law.**

Article 119

“Article 119. A prefect within the respective territory shall:

1) exercise administrative supervision over the observance of the Constitution and laws of Ukraine by local self-government authorities;

2) direct and co-ordinate activities of territorial bodies of central executive authorities and exercise administrative supervision over their observance of the Constitution and laws of Ukraine, acts of the President of Ukraine and the Cabinet of Ministers of Ukraine;

3) ensure interaction of territorial bodies of central executive authorities with local self-government authorities upon introduction of martial law, state of emergency or environmental emergency;

4) make submission to the President of Ukraine for suspension of an act, adopted by a hromada council, hromada mayor, by okruh or oblast council, which is inconsistent with the Constitution of Ukraine and poses a threat of violation of state sovereignty, territorial integrity, or a threat to national security, and for temporary suspension in connection with this powers of hromada mayor, hromada council, okruh, oblast council;

5) exercise other powers defined by the laws of Ukraine.

A prefect, on the grounds and in the manner prescribed by law, issues acts that shall be binding within the relevant territory.

Acts issued by prefects in exercise of their powers referred to in paragraph 1 of part 1 of this Article may be withdrawn by the President of Ukraine, while those issued in exercise of the powers referred to in paragraphs 2 and 3 of part 1 of this Article may be withdrawn by the Cabinet of Ministers of Ukraine.

Acts issued by prefects in exercise of the powers referred to in paragraph 5 of part 1 of this Article shall be withdrawn by the President of Ukraine and, in the instances prescribed by law shall be withdrawn by the Cabinet of Ministers of Ukraine.”

47. The first problem raised by this article is the order of paragraphs of the first part. The main task of a Prefect should not be the supervision of the legality of local authorities' activity. As an example, in France, the staff dedicated to this task in a typical Prefecture represents somewhere around 5% (and not more than 10%) of the total – and the percentage of the time dedicated by the Prefect him/herself to this is definitely even smaller than that. **It is therefore recommended to put these paragraphs in the order of the importance of the tasks mentioned.**

48. The second problem is that there is no distinction between okruh and oblast Prefects in respect of the administrative supervision. Are local authorities submitted to the administrative supervision of both authorities? Clearly this would be suboptimal and too cumbersome. Is there a hierarchy between prefects of the two levels which would allow the oblast prefect to overrule the okruh one and function as an instance of administrative recourse? **Of course, the law can and should be explicit on many issues, but these basic principles of the new institution of Prefect should be already well set out in the Constitution. It may be better to use the term prefect only at the level supervising local self-government and use a different term at the other level.**

49. During the April 2018 Strasbourg format meeting dealing with the supervision over local authorities' acts and omissions it was convened that such supervision should only be established at oblast, and not at rayon level. While the future okruhs will likely be larger than the current rayons and their competences will be different, **the usefulness of including supervision among the competences of okruh government representatives it not clear unless there are plans to merge oblasts into far bigger ones and having such task at oblast level would become difficult.** Account taken of the current number of oblasts and the envisaged final number of local authorities, each oblast should contain on average around 60 local authorities; organising (legality) supervision at the level of okruhs, even after the probable consolidation into 100-150 okruhs, may be too intrusive. In France, it is true that it is the “département” which mainly ensures legality supervision, but each “département” has on average around 360 local authorities plus several powerful forms of intermunicipal co-operation, with their own legal status, competences and taxing powers.

50. The supervision seems to concern only the legality of local acts (with the notable exception of acts which seem to be incompatible with the Constitution and threaten national sovereignty, territorial integrity and security, covered under the next section). This may mean either that there will be no delegated competences or that supervision remains only of legality also for the delegated competences, which although different conceptually would mean in practice almost the same thing. Local and regional authorities in many European countries also have some delegated competences, e.g. the management of the civil registry, the conclusion of marriages and the organisation of elections. Another solution would be to open the possibility to have competences specifically delegated by law, while by default all competences would be own, and to have the possibility to exercise, as the need may be, expediency supervision on delegated competences.

51. This article also builds a system whereas the President can “withdraw” acts issued by the Prefect in respect of the legality supervision function (part 1 of paragraph 1) and, unless otherwise provided for by law, any act issued in the exercise of other powers given to the Prefect by law. Here again,

the subordination of the Prefect to the President seems to be strong (although in respect of other tasks it is the Cabinet of Ministers which can withdraw corresponding acts). Why is it that the President should interfere in what should be a simple and technical process of legality supervision? **It is not recommended to give the President the power to interfere in administrative affairs and to overrule the Prefects over their decisions stemming from their legality supervision function. Such power should belong to the courts.** Of course, this does not concern the issue of violation of the Constitution and threat to the national sovereignty, territorial integrity and security, dealt with elsewhere.

52. **It is also recommended to insert the principle of “proportionality” as it appears in the third paragraph of Art. 8 of the Charter and that supervision should be the subject of a specific piece of legislation or of a section in the law on local self-government.** The principle of proportionality is one of the most important principles of the Charter and its non-respect would be a clear violation of the Charter. This principle excludes lengthy bureaucratic procedures, systematic supervision of all texts and the politisation and abuse of supervision authority. While it is true that such principle could theoretically be subsequently stated in the law, as it stands, the current text seems to introduce a disproportionate balance between the power of the state administration and of the local self-authorities, which seems to be incompatible with the spirit of the Charter.

53. Part 4 of paragraph 1 will be examined under the next Article (see section c).

Suspension and dismissal of local authorities

Article 144

*“Article 144. Under the law, councils and mayors of hromadas, executive bodies of hromada councils, okruh and oblast councils, executive committees of okruh and oblast councils **adopt decisions** that are mandatory for execution in the respective territory.*

*A **prefect shall suspend acts adopted by local self-government authorities and officials** due to their in compliance with the Constitution or the laws of Ukraine, with a parallel legal recourse.*

*In the event that an act has been adopted by a council, mayor of a hromada, okruh or oblast council, which is inconsistent with the Constitution of Ukraine and poses a threat of violation of state sovereignty, territorial integrity, or a threat to national security, the **President of Ukraine, upon submission from a prefect, shall decree a suspension of the respective act with a concurrent recourse to the Constitutional Court, suspend the powers of a mayor of a hromada, members of hromada, okruh or oblast council, and appoint a temporary state commissioner. The temporary state commissioner shall direct and manage operation of respective executive bodies of a hromada council, an executive committee of an okruh or oblast council.***

Legal status of the temporary state commissioner shall be defined by law.

This decree of the President of Ukraine shall be considered by the Constitutional Court of Ukraine within seven calendar days.

Where the Constitutional Court has found an act adopted by a mayor of a hromada, hromada, okruh or oblast council to be in conformity with the Constitution of Ukraine, any acts issued by the President of Ukraine under paragraph 3 of this Article shall lose their force.

Where the Constitutional Court has found the act adopted by a mayor of a hromada, hromada, okruh or oblast council to be inconsistent with the Constitution of Ukraine, the Verkhovna Rada of Ukraine, upon submission from the President of Ukraine, shall terminate early powers of a mayor of a hromada, hromada, okruh or oblast council, and shall call pre-term elections in the manner prescribed by law.”

54. In the second paragraph, it should be understood that the Prefect shall suspend the acts which he or she believes to be against the Constitution or the law not due to (or for the motive of - з *мотивів* in original) this reason, as in a system based on the rule of law only a Court can establish such violation, and that in parallel the Prefect will formulate an appeal (not recourse) (in the text, in the instrumental case, *зверненням*) to the Court. **It is recommended to reformulate this power in order to avoid (the impression of) entrusting the Prefect with an authority which can only belong to the Court, that of judging compliance with the Constitution and the law.**

55. The other paragraphs of Art 144 create a mechanism for suspending and possibly dismissing local and regional authorities. In such mechanism, the Prefect, beyond his or her power to suspend and send to the Court an act which, he or she believes, violates the Constitution (as paragraph 2 provides for), will also submit the act to the President for the suspension of the issuing authority if the act also threatens national sovereignty, territorial integrity or security. It is understood that the two conditions (violating the Constitutions and posing one of the three threats) are cumulative. Here again, the language is affirmative (the act “is inconsistent” with the Constitution) although for the moment there is nothing more than a suspicion of the Prefect.

56. Furthermore, the language is imperative for the action of the President: he or she “*shall decree a suspension of the respective act with a concurrent recourse to the Constitutional Court, suspend the powers of a mayor of a hromada, members of hromada, okruh or oblast council, and appoint a temporary state commissioner*”. The intervention of the President in this case seems legitimate as he or she is, as Art. 102 of the Constitution puts it, “the guarantor of the state sovereignty and territorial integrity of Ukraine, the observance of the Constitution of Ukraine [...]”. In the same vein, the Venice Commission highlighted that such a power of the President is fully justified *inter alia* since he or she is able to intervene “more rapidly and efficiently than the Verkhovna Rada – when self-government bodies overstep their constitutional and legal competences and pose a threat to the sovereignty, territorial integrity and security of state”⁵. In addition, this prerogative should be limited to suspending the powers of the self-government bodies, which is followed by the draft Art. 144.

57. However, this seems to leave no margin for appreciation to the President, who becomes a simple executant of a Constitutional obligation. **In order to give the President a margin of appreciation, a better formulation would be “may” rather than “shall”** (in the original version, the sentence is in the present tense, which also represents an obligation, not a right for the President to take action).

⁵ See Venice Commission, Opinion CDL-AD(2015)028, para 11.

Moreover, the deadline given to the Constitutional Court (7 days) may be too short for the more difficult cases. Assumingly, this short term was chosen to give effect to the Venice Commission's recommendation that "a short deadline should be put to the Constitutional Court to decide the matter"⁶. Nevertheless, seven days may seem *prima facie* unreasonable for cases of a certain complexity and difficulty and a more appropriate formulation that would require the Constitutional Court to review the complaint without delay is recommended. Moreover, the Constitutional Court should not be limited to examining the constitutionality of the act of the self-government organ but should decide whether the constitutional grounds for suspension were present, it being understood that the Court may leave a margin of appreciation to the President as to whether the act constituted a serious threat or not.

Article 85

"Article 85. The powers of the Verkhovna Rada of Ukraine comprises:

...

*29) creation and liquidation of **hromadas, okruhs, oblasts**, establishing and change of their boundaries, assigning **hromadas** to the category **of villages, settlements, cities**, designation and change of names of **hromadas, okruhs, oblasts upon submission of the Cabinet of Ministers of Ukraine;***

30) early termination of powers of hromada mayor, chairperson of hromada, okruh, oblast council in the manner prescribed by the Constitution of Ukraine;

..."

58. Part 29) of this article expands the previous powers of the Verkhovna Rada to all types of administrative territorial units. While in most countries these powers belong to executive authorities (after proper consultations, in line with the Charter), in Ukraine there is a long history of the Verkhovna Rada taking these decisions, which has the advantage of ensuring more consultations at the highest political level but also the disadvantage of a possible excessive politisation of the issues concerned.

59. The extension of these powers seems to represent a significant weakening of oblasts which, in the current Constitution, benefit from constitutional recognition and protection. The Charter does not prescribe the number of levels of self-government and only offers clear protection to the local one, the existence of the other being more or less at the discretion of the national law makers; it can therefore not be assessed that this provision conflicts with the Charter, although it is unclear how, for a country as big and diverse as Ukraine, the weakening of regions can be beneficial. This issue should however be examined in light of the specific competences and resources which the law will grant to oblast councils.

60. The fact that the Verkhovna Rada no longer has the constitutional authority to schedule regular elections at local level, with the exception of pre-term elections in accordance with the Art. 144, does not seem to raise a major difficulty in the presence of proper electoral legislation. As the

⁶ *ibidem.*

Venice Commission remarked in a 2007 report⁷, the authority in charge of setting the date of the elections varies from one European country to the other: in a select few such date is prescribed in the Constitution, in many cases in the electoral legislation, and in some it is given to the executive authority (exceptionally even to the Speaker of the Parliament), usually within an interval established by law.

Elections

61. Art. 141 only raises a question mark in respect of the relation between its first and third paragraphs:

Article 141

“Article 141. The right to vote in the elections of mayors of the hromada, deputies of the hromada, okruh, and oblast councils shall be held by those citizens of Ukraine who reside permanently within the respective hromada, have reached the age of eighteen by the date of the election, and have not been declared incompetent by a court.

...

The procedure for electing deputies of okruh and oblast councils shall provide for representation of hromadas within the respective okruh or oblast and shall be prescribed by law.”

62. It is not clear how the procedure for electing deputies of okruh and oblast councils can provide for the representation of hromadas if they are elected directly by the citizens of the hromada. It would be better to provide that these councils are elected by the citizens residing in the respective territory. This is also in line with Congress recommendation 369 (2015)⁸ and 419 (2018)⁹. If the formulation only means that the electoral rules must take the municipal borders into account, it is not problematic. **It is therefore recommended to clarify the procedure of electing representatives at regional and sub-regional level or to send this procedure entirely to the electoral law.**

Functioning of the local and regional authorities

Article 142

Article 142. The material and financial basis for local self-governance is:

1) land, movable and immovable property, natural resources, other hromada-owned communal facilities;

⁷ See Venice Commission, Report on Choosing the Date of an Election, adopted by the Council for Democratic Elections at its 22nd meeting (Venice, 18 October 2007) and the Venice Commission at its 72nd plenary session (Venice, 19-20 October 2007), CDL-AD(2007)037.

⁸ See Recommendation 369 (2015) on Electoral lists and voters residing de facto abroad adopted by the Congress of Local and Regional Authorities on 25 March 2015.

⁹ See Recommendation 419(2018) on Voting rights at local level as an element of successful long-term integration of migrants and IDPs in Europe’s municipalities and regions adopted by the Congress of Local and Regional Authorities on 6 November 2018.

2) local taxes and dues, a portion of national taxes and other revenues of local budgets.

The State shall ensure proportionality between financial resources and scope of powers held by local self-government authorities, as defined by the Constitution and laws of Ukraine.

Any changes to competence of a local self-government authority shall be effected concurrently with the respective changes to the allocation of financial resources.

The State shall compensate local self-governments for expenses incurred as a result of decisions made by state authorities.

Hromadas may pool, on a contractual basis, hromada-owned facilities and budgetary funds to implement joint projects or to provide joint funding for (maintenance of) communal enterprises, institutions and organisations, and to establish respective bodies or services for this purpose.

63. Most elements of this article seem to be broadly in line with the Art. 9 of the Charter, although the latter article is superior in respect of providing a solid base for local self-government. This article of the Charter mentions:

- *“adequate resources of their own”*, of which they can dispose freely;
- *local resources which are commensurate with the responsibilities*. This requirement is covered in the second paragraph of the Article although the word “proportionality” should be replaced by “adequacy” (indeed, a proportionality of e.g. 1% of between resources and needs remains a proportionality but it would clearly not be adequate);
- *part at least of resources to be derived from taxes and charges of which they have the power to determine the rate*. This condition seems to be respected in the current draft, as local taxes are understood as taxes whose rate and/or base can be modified by local authorities (as opposed to shared taxes, mentioned later in the same paragraph). The paragraph also mentions local dues (in fact more precisely “charges” or “fees” – *збори*), most of which are typically also own resources;
- *Diversification in order to ensure buoyancy and keeping up with costs*. Depending on the exact mix of resources, a combination of local and shared taxes and local charges as provided for in the current draft could be sufficiently buoyant to allow to keep pace with the evolution of costs. It can therefore be considered that this condition is also fulfilled.

64. The parts of the Art. 9 of the Charter which are not reflected in the current draft concern:

- *The need for an equalisation system in order to allow for the protection of the financially weaker municipalities*. A system based solely on local taxes and fees and on a portion of shared taxes risks to produce significant financial differences between municipalities and tensions and risks to the solidity of the administrative structure of the country. Such inequalities may be derived from different fiscal bases or from objectively different spending needs of different local authorities and they should be partially compensated through (vertical or horizontal) financial transfers. Without an equalisation system, it would not be possible to ensure “balanced and sustainable socio-economic development of territories,” as

Article 132 requires. There is no country in Europe where no municipality receives any transfer (grants or subventions) and no country where there is no element of equalisation introduced in the local finance system.

- *The consultation of local authorities on the allocation of redistributed resources.* This is an important principle, although it does not absolutely need to have a constitutional recognition.
- *The preference for non-earmarked grants* – which does not need to have a constitutional consecration, in particular if their weight in the total income of local authorities is small.
- *The access to the national capital market for capital investments.* This also is not a principle which absolutely needs to be reflected in the Constitution.

65. Much as the principles of adequacy and compensation for expenses generated by other authorities' decisions are helpful for ensuring a good level of protection of local authorities, they would not be operational without further legislative qualification (or more exactly they could lead to endless legal and constitutional debates).

66. In respect of this article, it is therefore recommended to add:

- **financial transfers among the legitimate sources of funding of local authorities;**
- **a mention to an equalisation system which aims to compensate a part of the objective differences between fiscal bases and spending needs of various local authorities and**
- **a reference to the further legislation on the topic.**

Article 143

*“Article 143. **Under the law, a hromada, either directly or through hromada’s local self-government authorities and their officials, shall:***

- 1) manage the hromada-owned property;*
- 2) adopt the budget **of the respective hromada** and monitor its implementation;*
- 3) approve the programmes of socio-economic and cultural development and monitor their implementation;*
- 4) **adopt decisions in respect of local taxes and dues;***
- 5) **ensure the implementation of the outcomes of local referendums;***
- 6) establish, reorganise and liquidate communal enterprises, organisations and institutions, and shall also monitor their operation;*
- 7) address other matters of local significance referred by law to its competence.*

The competence of oblast and okruh councils shall be determined by the Constitution of Ukraine and the law.”

67. Beyond the fact that the essence of this article is typically the subject of legislation, not of the Constitution, three issues can be raised in respect of it. The first is that none of the 7 duties mentioned under the first paragraph can be assumed or performed by the hromada (community) directly. In many countries, financial decisions are specifically excluded from the competence of instruments of direct democracy (referendums). Of course, referendums can be organised on different topics and they may be consultative or decisional, but the implementation of their results is the duty of the local authority and is covered under item 5) of this article. Also, a specific Constitutional reference to hromada's officials, as already mentioned under another section, seems excessive. **It is therefore recommended to delete the part "either directly or through hromada's local self-government authorities and their officials".**

68. The second issue concerns the second paragraph, i.e. the competences of oblasts and okruhs councils. The fact that first paragraph speaks about the hromadas which are supposed to become legal entities and the second paragraph speaks about oblast and okruh councils seems to indicate that these bodies and not the communities concerned would remain the legal entities. Such choice in respect of oblasts does not appear justified.

69. The third issue concerns also the second paragraph and refers to the lack of constitutional description of their competences. It seems that discussions concerning the future of the regional and sub-regional level have not been finalised while the Constitutional reform is urgently needed in order to accomplish the main part of the decentralisation reform, which concerns the transfer of new competences and resources to the local level (to hromadas). This situation is not unique to Ukraine: adopted in a similar situation, the Constitution of Poland does not even mention the regional and sub-regional levels (voivodeship and powiat), but gives to the Parliament the right to create (and henceforth also to establish the competences of) other levels of government. It seems therefore acceptable to send the issue of the competences of okruhs and oblasts to the ordinary law on local self-government (or, as the case may be, to a special law).

4. Conclusions and recommendations

70. In general, the Council of Europe welcomes the proposed amendments to the Constitution of Ukraine on the decentralisation of power. They constitute a significant step forward in the democratisation of the country and open the door for the finalisation of the decentralisation reform, in line with European standards and best European Practice;

71. The Council of Europe particularly welcomes the changes in respect of the administrative territorial structure of the country, the introduction of the principle of ubiquity (or omnipresence) of hromadas and the termination of the institution of rayon/okruh and oblast Head of Local State Administration ("Governor") and its replacement by the more modern institution of Prefect;

72. However, the Council of Europe considers that improvement is needed or recommended in a number of fields, as explained in the current opinion, in particular:

- The definition of local self-government can be improved and brought closer to the one in the Charter;

- The relations between levels of sub-national government should be clarified;
- Changes should be made in order to avoid the politisation of the Prefect institution and to make Prefects accountable in front of the Government for most issues under their responsibility;
- The principle of proportionality should be added in line with article 8 para. 3 of the Charter;
- The powers of the prefects and the procedure of administrative supervision should be streamlined, simplified and clarified;
- The procedure for dealing with acts which (allegedly) violate the constitution and threaten national sovereignty, territorial integrity and security should give more flexibility to the President and more time and broader powers to the Constitutional Court;
- The provisions concerning local finance could be improved.

73. The Council of Europe understands and supports the initiative to avoid overregulating and to send some of the elements which are important for the success of decentralisation (such as the status and competences of okrugs and oblasts, of Kyiv and Sevastopol, further elements concerning the administrative supervision and the accountability of local elected representatives) to the ordinary law. It underlines however the importance of a number of such further laws which will be integral to the process of decentralisation and to the success of creating a well-functioning local and regional government system in Ukraine:

- Law on the Administrative Territorial Structure;
- Law on the status of okrugs and oblasts;
- Law on local self-government;
- Law on local elections;
- Law on the status of the Prefect (or a section in this respect in the law on local self-government);
- Law on administrative supervision (or a section in this respect in the laws on local self-government);
- Law on the accountability of local and regional elected representatives;
- Laws on the status of Kyiv and Sevastopol.

74. The Council of Europe stands ready to continue its support to the legislative reform concerning the decentralisation process in Ukraine.