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POLICY ADVICE

**On the Revision of the Constitution of Ukraine:
Provisions on the Territorial Organisation of State and
Local Self-Government**

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Introduction

This Council of Europe policy advice on the review of the provisions of the Constitution of Ukraine pertaining to the territorial organisation of State and local self-government was requested by the Constitutional Assembly of Ukraine within the framework of the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Government of Sweden).

The 1996 Constitution of Ukraine has recognised local self-government rights of citizens in their territorial communities. It includes three chapters on this matter: chapter 9 on the territorial organisation (art.132 and 133), chapter 10 on the autonomy of the Republic of Crimea (art.134 to 139), and chapter 11 on local self-government (art.140 to 146). Additionally, the chapter 6 on the Cabinet of Ministers and other organs of the executive power should be considered. According to article 118 of this chapter, the executive power is exercised by the local State administration in districts, regions and in the cities of Kyiv and Sevastopol. Moreover, several other provisions concern local government in the first part on "general principles" and in the chapter on the Parliament. All these provisions provided a basis for the 1997 law on local self-government, and for other relevant pieces of legislation currently in force.

Some of these constitutional provisions have become an obstacle to a decentralisation reform and strengthening of the local self-government system in Ukraine. Furthermore, they do not comply with the provisions of the European Charter of Local Self-Government (ECLSG), ratified by Ukraine. The constitutional review of 2004 contained several amendments to remove obstacles to further decentralisation, but these amendments were not adopted. In 2009 another draft law on amendments to the Constitution of Ukraine on local self-government matters was prepared, but these amendments (also appraised by CoE) were again abandoned.

The drafts of Concept of Local Government Reform prepared in 2012 and 2013 and supported by CoE¹ refer to the necessity to pass constitutional amendments in order to implement the Reform. Such amendments should be passed in the second stage of the Reform, between 2013 and 2015. The President of Ukraine had mentioned the need of constitutional amendments a number of times, including in his speech to the Municipal

¹Please see three CoE appraisals CELGR/LEX 4/2012, CELGR/LEX 6/2012, and CELGR/LEX 5/2013, available at <http://www.slg-coe.org.ua/category/documents/appraisals/>

Hearings of 2011, and his decree of 25 January 2012 (n°31) on the creation of the Constitutional Assembly.

This policy advice document takes into account the previous discussions and CoE recommendations on the constitutional revision. The first part of the document proposes a concept of the constitutional framework of local self-government to support decentralisation and strengthening of local democracy in Ukraine. The second part proposes some concrete amendments to the Constitution. The main purpose of this document is to provide a basis for further discussion with and between Ukrainian stakeholders.

I. Concept of the constitutional framework of local self-government

First, the relationships between Constitution, legislation and local self-government have to be clarified, especially with regard to the commitment of Ukraine to the ECLSG. Second, it is necessary to take stock of several basic principles of the Constitution that have never been disputed. Third, the local government system resulting from these discussions, should be outlined with due consideration of the European experience. This will include the place and the functions of the local State administration in the context of the Reform.

1. Constitution, legislation and local self-government

Ukraine ratified the ECLSG in 1997, one year after the promulgation of the Constitution and two months after the first basic law on local self-government.

According to article 13, the Charter is applicable to all categories of local authorities, unless at the time of ratification, specific categories to which it is applicable are designated. In the absence of such a designation, the Charter is applicable to all local authorities in Ukraine. However, due to the ambiguities of the Constitution of Ukraine regarding the concept of local authority, the scope of the application of the Charter is unclear. Indeed, the only local authorities *stricto sensu* are the cities, villages and settlements within which "territorial communities" (*hromadas*) exercise their self-governing rights (art.140 of the Constitution). District (*rayon*) and regional (*oblast*) councils represent "common interests" of "territorial communities"; they are local self-government bodies (paragraph 4), but they are not local authorities in the sense of the Charter and they do not

elect own executive bodies. The present status of district and regional councils is therefore a limitation to the scope of the application of the Charter. Nevertheless, due to the conditions of the ratification of the Charter by Ukraine any reform establishing self-governing local authorities at the intermediate levels would extend the application of the Charter to these levels.

The Charter does not determine how the guarantees, institutions and tasks of local authorities should be shared between the Constitution and the legislation of each country. But there should be a constitutional basis, as article 2 of the Charter implies: "The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution". According to further articles of the Charter, "basic powers and responsibilities" (art.4), the administrative supervision of local government activities in order to ensure the compliance with the law and constitutional principles (art.8) and the principles of local self-government protected by judicial remedies (art.11) are provided by the constitution OR by the legislation. As a matter of fact, whereas powers of local authorities can be determined by constitutional provisions of European countries, matters of responsibilities are usually left to legislation, except in federal states or states with regional autonomies where legislative power is exercised by the regional authorities.

As a consequence, the constitutional provisions on local self-government in European countries are focused on basic principles and powers and on institutional aspects of local self-government. Compared to other European countries, the provisions of the Constitution of Ukraine on local self-government are too detailed. The purpose of constitutional provisions on local self-government is to recognise local self-government rights and to protect them, to define the basic structure of the territorial organisation of the government and to provide for compliance with the law. **Therefore, amendments to the Constitution of Ukraine should concentrate and streamline constitutional provisions on key issues of local self-government, and leave other issues to relevant legislation.**

2. Basic principles of the Constitution of Ukraine on local government

Constitutional amendments on local self-government and on the territorial organisation of the State have to be based on several principles laid down in present Constitution and supported by a large consensus.

Art. 2: "Ukraine is a unitary State". This principle rules out any reform oriented towards a basic change in the constitutional nature of the regions.

However, this principle has to be reconciled with the arrangements of chapter 10 of the Constitution on the Autonomous Republic Crimea (ARC). Special status is also provided for the cities of Kyiv and Sevastopol (art.133 and 140).

Art.5: "The people exercise the power directly and through organs of State power and organs of local self-government". This means that local, district, and regional councils are a representation of the people, not just an assembly established to manage administrative tasks.²

Art.7: "In Ukraine, local self-government is recognised and guaranteed". Local self-government is therefore one of the basic principles of the Constitution.

Article 140: The local government system is based on settlements and on the first tier of local government, e.g. on the municipal level, since district and regional councils are only a representation of "common interests" of the various "*hromadas*" within their boundaries. The first tier is thus limited to settlements, but the principle that local self-government rights are exercised in first place at the municipal level reflects the idea that local authorities of the first tier are the basic level of decentralisation where citizens can exercise their rights.

Article 118: "The executive power in regions, districts, and in the cities of Kyiv and Sevastopol is exercised by local state administrations". This article provides for extensive powers to these administrations. Heads of the local State administrations are appointed by the President of Ukraine on the basis of a proposal of the Cabinet of Ministers and they are accountable to them. Article 119 details the tasks of local State administration. There have been discussions on the tasks of local State administration, and whether or not it should be maintained at the district level, but the principle of a State administration at the local level, at least the regional level, has not been disputed.

The CoE recommendation is that the amendments to the Constitution should rely on the following principles: **Ukraine is a unitary State; there are special status for the Republic of Crimea and for the cities of Kyiv and Sevastopol; the main level for the exercise of the self-government rights of citizens is the municipal level; there is also a**

² Sweden is the only other country in Europe where the Constitution gives such a broad interpretation of the people's sovereignty (1:1). It is therefore inconsistent that, at the same time, they are not entitled to form their own executive bodies.

network of the State administrations at the regional and eventually at the district levels.

3. Constitutional framework of the local government

These proposals are based on the following principles:

- a unified concept of municipality as the first tier of local government;
- a unified concept of local authority;
- a three-tier system, with cities of district significance holding powers of municipalities and of districts;
- districts and regions as territorial communities with own councils and elected executives;
- a constitutional basis for the development of local democracy;
- a constitutional basis for the local State administrations and their key functions;
- a financial basis of local self-government in the Constitution and the duty of the State to ensure equalisation between local governments;
- a constitutional basis to the legal protection of local self-government.

Overall, the **provisions of the Constitution of Ukraine on local self-government and on the territorial organisation of government should be shorter than they are now; they should leave more discretion to legislation.**

3.1. A unified concept of municipality as the first tier of local government

The municipality should be the first tier of local government, and its area should not be limited to settlements. On the contrary, the boundaries of municipalities should be delineated in such a way that there is no part of the territory left outside of municipal boundaries. This is the case in all European countries³.

The *hromada* should coincide with the municipality, and not the contrary. This means that the constitutional provisions should facilitate the formation of municipalities with the capacity to perform local self-government functions. The political guidance should be taken from the

³ The only exception in Europe is Russia and, outside Europe, Canada, where there are large unpopulated areas.

ECLSG: municipal governments should manage a substantial part of public affairs under their own responsibility.

This means that **the distinctions between cities, settlements, and villages considered as different administrative units by article 133 of the Constitution, should be removed.**

All municipalities should have equal powers, subject to provisions of special legislation for specific purposes, and to the status of cities of district significance that are in addition vested with powers exercised by distinct district self-government bodies.

The advantages of this modern concept of a municipality include: 1) extended scope of the planning powers of the municipal authorities, and hence better development strategies and land use, so that local authorities do not have to depend on the State administrations; 2) enlarged tax basis of the local authorities and a property tax as own resource of municipalities.

Constitutional provisions do not refer to the territorial reform, but they should not become an obstacle to the territorial reform. **Therefore, the provision of article 140, defining the territorial community (*hromada*) as the inhabitants of villages or of voluntary associations of several villages, should be removed,** because the principle of voluntary association might become an obstacle to the amalgamation of municipalities in the future.

3.2. A unified concept of local authority

In a unitary State, all local authorities have the same legal nature, there is no hierarchy between them and they are all subject to national legislation and to central government regulations issued on the basis of the law. Therefore, **the provision in article 133 of the Constitution of Ukraine providing a list of regions (*oblasts*) as a constitutional norm should be removed.**

Only federal states have a list of federal entities in their constitutions, because they are political bodies and constituent parts of the federation. In countries with regional autonomies, only regions with a special status have occasionally an individual constitutional recognition (case of ARC).

Furthermore, the legal subject is the territorial community, not the institutions established by the law that represent this community.⁴

3.3. A three-tier system

Due to the size of Ukraine, it is justified to keep a three-tier system of local government: municipality, district, and region. Most large European countries have three tiers of local government.

As already pointed out, in a unitary State the distribution of tasks among government levels is a legislative matter. The list of powers in paragraphs 1 and 2 of article 143 is confusing and unnecessary, and therefore, **these paragraphs could be deleted.**

By contrast, the Constitution could include the general competence clause for the municipal level; it is to be further discussed whether to extend it to the district and region levels or not.

3.4. Districts and regions with own councils and elected executives

Districts and regions should be recognised as territorial divisions within which citizens exercise their self-government rights through election and through other citizen participation procedures, and hence as territorial communities of their own.

At present, district and regional councils do not have the legal power and the administrative capacity to execute their decisions and regulations. They depend on the State administration. This issue has been discussed in for many years and the new draft Concept of the reform of local self-government includes the commitment to change this situation through constitutional amendments. This means that **the constitutional amendments have to provide for the election by the district and regional councils of their own executive bodies, vested with the power to prepare and execute the decisions and regulations adopted by the respective councils.** However the Constitution should not determine the mode of election, and leave it to the legislation.

3.5. Constitutional basis of local democracy

There should be a constitutional commitment to develop local democracy at all levels of local government. This commitment should include the

⁴ In Western Europe, only in the UK **local councils** are legal subjects and not the local **community** of which they are an organ.

election of councils and their executive bodies (electoral procedures and terms of mandate should be detailed in the legislation).

The Constitution has to provide for the direct participation of citizens in decision-making as an alternative to decision-making by the council, but without determining the participation procedures, and for the enforcement of the principles of transparency and accountability.

The principles of transparency and accountability are not only for citizens, but also for councillors. They include access to official information, possibility to assess the relevance and the merits of the decisions of the local authority. The principle of accountability involves an appropriate audit system (internal and external) and can be extended through a recall procedure.

3.6. Constitutional basis for the local State administrations

Decentralisation implies the transfer of numerous tasks from the State administration to local governments. This has to be supported by the transfer of human and financial resources. This does not mean that the State administration should disappear from the local level. Indeed, in all countries with decentralised local government there is a local State administration with supervisory functions (over local authorities) and own responsibilities (with regard to State functions and administration).

In unitary states, it belongs to national legislation to work out the distribution of tasks between central and local governments in all public policy fields; the sectoral legislation is very important.

Ukraine has two kinds of the State administrative bodies at the local level: the local State administrations in each district and each region, and the local branches of central executive bodies, ministries or State committees.

The Constitution of Ukraine should set out only the basic principles of the State organisation at the local level. There are two issues for the local State administration: the relationship with local self-government and the relationships with local branches of central executive bodies. The issues at stake are ensuring the implementation of central government (State) policies, their coordination at local level and compliance with the law.

The decentralisation will shift most of operational tasks to the local self-government bodies, and the local State administration will keep only a supervisory function. According to the ECLSG, this supervision should be limited to the legality of the decisions (art.8).

Another issue is that the consistency of the implementation of the State policies locally would benefit from the stronger authority of the head of the local State administration over the heads of the local branches of the central executive bodies. This could be reflected in the Constitution, subject to some exceptions determined by the law. With the transfer of tasks to local self-government, this should be easier to achieve, and State offices at the local level could focus more on broader policy issues rather than on operational tasks.

3.7. The financial basis of local self-government

The current Constitution does not provide for real financial autonomy of local self-government. Article 142 mentions "revenues of local budgets" and "other resources" in the list of the "material and financial basis of local self-government", but does not guarantee any kind of revenues. Paragraph 3 of this article provides that the State participates in the formation of local government budgets, and financially supports local self-government, but there is no specific commitment, especially for equalisation (although in practice the budget code establishes a national equalisation system). The only commitment is to compensate the costs of State tasks delegated upon local self-government bodies (art.143, par.3).

The amendments should establish a constitutional basis for local self-government finance. The Constitution should recognise, as a minimum, that local authorities are entitled to own tax resources regulated by the law, and that they are entitled to a share of national tax resources commensurate to the standard costs of the functions that they have to perform. The Constitution should also include a commitment for an equalisation system aimed at ensuring equality before the law for all citizens as regards the services provided to them in execution of the law, and supporting economically deprived areas.

3.8. A constitutional basis to the legal protection of local self-government

Articles 144 and 145 of the Constitution provide for local self-government rights. Decisions of local self-government bodies can be cancelled only if they do not comply with the Constitution or with the law; local self-government rights are under judicial protection.

These provisions, however, concern only own local government tasks. As regards delegated tasks, these are performed under the control of the respective central executive bodies (art.143, last paragraph). This involves the power for central executive bodies to give direct instructions

to local authorities for these tasks and to assess the compliance with those instructions (control on the merit/expediency of the measures taken).

The problem in Ukraine is that the distinction between own and delegated tasks in sectoral legislation is very often unclear, and rules on expenditure for the functions subject to equalisation according to the budget code are very rigid. This is a technically difficult issue that cannot be solved by constitutional amendments. One way of resolving this problem could be to replace the traditional control by a fair auditing and evaluation system, making it possible for central executive bodies to assess whether objectives are met by local authorities.⁵

II. Constitutional amendments on local self-government: specific recommendations

Below is the list of concrete proposals for the revision of the Constitution. The numbers of the articles of the present text is kept, and all articles where local government or the local State administration mentioned are reviewed. The official text in Ukrainian language is used as a basis.

The grounds for these amendments are detailed above in section I. For the amendments which were not explained, a short explanatory note is provided.

Art. 2, 5, and 7: no change required

Art. 14: amend paragraph 2 as follows:

“The right of property to land is guaranteed. This right is acquired and realised by citizens, legal persons, **local governments** and the State, exclusively in accordance with the law”.

Explanatory note:

Article 142 of the Constitution mentions movable and immovable properties as parts of the material basis of local self-government in Ukraine. It is therefore necessary to recognise the right of local self-governments to purchase and own land in accordance with the law.

Art. 19: no change

⁵ This was done in Sweden through the local government law of 1991.

Art. 38: amend paragraph 1 as follows:

“Citizens have the right to participate in the administration of state **and local government** affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government”.

Explanatory note:

State and local government affairs are distinct spheres of public affairs although closely interrelated. This amendment will make this article on basic rights more consistent with the chapter on local self-government and with the European Charter on Local Self-Government.

Art. 39, 40, 42, 47, 49, 53, 56, 69, 70, 71: no change

Art. 85: Amend point 29:

“establishing and abolishing **regions**, districts and **cities of district significance**, establishing and altering the boundaries of **regions**, districts and **cities of district significance**, assigning **municipalities** to the category of **cities of district significance**, naming and renaming **regions**, districts and **cities of district significance**”.

Explanatory note:

The definition of the matters within the authority of the Verkhovna Rada has to be amended in accordance with the local government reform that is contemplated and be consistent with the definition of Ukraine as a unitary State in article 2 of the Constitution.

It is inconsistent with the constitutional determination of Ukraine as a unitary State to provide for a constitutional guarantee of the existence of each region, of its name and of its boundaries. As explained in section I, the list of regions should be removed from the Constitution. As a consequence, the Verkhovna Rada should have the power to establish or abolish a region, to establish or alter its boundaries, to name it or rename it, as it is the case for districts.

With the territorial reform, there is no justification anymore to grant the title of city to a territorial community, while such a title has no legal or practical consequence. But the case of cities vested with district powers (cities of district significance), as they exist now, should be kept. In this case, the Verkhovna Rada should have the same powers with regard to them as it has with regard to rural districts.

Art. 86, 92: no change

Art. 95: amend paragraph 1 as follows:

“The budgetary system of Ukraine is built on the principles of just and impartial distribution of social wealth ~~among citizens and territorial communities~~”

*Alternatively, replace the deleted words by: “**among citizens and of equalisation among local governments**”.*

Explanatory note:

The wording “territorial communities” in this article will not be consistent with the formulations derived from the local government reform, and is too focused on the municipal level whereas the equalisation should not be limited to that level. Furthermore, it will be more consistent to mention the principle of equalisation in the part on local government.

Art. 118 and Art. 119: to be replaced by Article 118 as follows:

“Art. 118.

1. The local State administration ensures in its jurisdiction:

- the execution of the Constitution and the laws of Ukraine, the acts of the President of Ukraine, the acts of the Cabinet of Ministers and of other central bodies of executive power;
- the compliance with the law and public order;
- the legality oversight upon local government acts;
- the implementation of State programmes for socio-economic, health and cultural development, for environmental protection and, in places of compact residence of indigenous peoples and national minorities, of State programmes for their national and cultural development.

2. The local State administration is organised by the law.

3. The Head of the local State administration is appointed and dismissed by the President of Ukraine upon submission by the Cabinet of Ministers. He/she is the representative of the executive power and of all central bodies of the executive power in its jurisdiction, except courts and local offices of the prosecution and subject to exceptions provided by the law. To that extent he/she has authority on local bodies of the executive power on behalf of the respective central bodies of the executive power”.

Explanatory note:

Articles 118 and 119 are too detailed for a Constitution; they include a number of provisions that should be laid down by the legislation or even by government regulations.

Furthermore, they include numerous provisions that are not in accordance with the draft Concept of the local government reform. If district and regional councils are entitled to form their own executive bodies, provisions on the preparation and the execution of budgets and programmes of district and regional councils have to be deleted. For the same reason, provisions on control over State administrations by councils become groundless.

In the proposed version, the functional profile of local State administrations is designed more precisely and the powers of the heads of local State administrations are strengthened. Their functions are focused on State functions; they do not have to manage local government tasks any longer. The heads of local State administrations will have authority, not only on the local State administration, but also on local bodies of the central executive power. This should improve the consistency of the implementation of national policies. Nevertheless, it might be justified to leave some branches of the executive power outside of their authority. For example, the tax administration is usually organised independently.

The new article 118 should not specify the jurisdiction of the local State administration. It will belong to the law to organise it and determine its jurisdiction at the district and regional, or only at the regional level.

Since the local State administration will act only under the authority and on behalf of the central government, it is unnecessary to detail in the Constitution that they act under control of higher central executive bodies.

Art. 132, 133, and the Chapter on the territorial structure of Ukraine: to be deleted

Explanatory note:

Article 132 is redundant with the principles stated in articles 2, 5, 7, 10 and 11 of the Constitution.

As previously explained, it is inconsistent with the Constitution of a unitary State to give a constitutional guarantee to each existing region.

Art. 134 to 139: chapter X on the Autonomous Republic of Crimea: no change but chapter X should become chapter IX since the chapter on the territorial structure of Ukraine should be deleted.

Art. 140 to 146: chapter XI on Local Self-Government: should become chapter X, and be redrafted as follows:

“Art. 140

The citizens of Ukraine exercise their local self-governing rights in municipalities, districts and regions through the election of local self-government bodies and their direct participation in decision-making process under conditions determined by the law. They are entitled to resolve issues of local character that are not assigned to another authority within their jurisdiction and in compliance with the law.

The organisation, powers and responsibilities of local self-government bodies are determined by the law. Executive functions are vested on elected bodies. Local self-government bodies are empowered to issue decisions and regulations that are binding within their jurisdiction in order to fulfil their responsibilities.

The status of councillors and of holders of executive functions is determined by the law.

Particular aspects of the organisation and of the exercise of local self-government in the cities of Kyiv and Sevastopil are determined by the law.

Art. 141

The financial basis of local self-government includes the revenues from own tax power, tax shares, budgetary transfers, revenues from tariffs and from properties and other resources authorised by the law.

The law determines the conditions, modalities and criteria of the equalisation of the revenues to the needs and the needs taken in consideration in the equalisation for each category of local self-government unit.

State tasks may be delegated in accordance with the law upon local self-government bodies under the control of the respective central bodies of the executive power or of the head of the local State administration. The expenditure needs have to be compensated by the State budget in full on the basis of expenditure standards.

Art. 142

The Head of the State administration exercises the legality control over the acts issued by local self-government bodies and on decision projects prior to their submission to a local referendum. He/she refers the acts he/she considers unlawful to the administrative court in conditions determined by the law.

In case of a serious breach of the law, the Cabinet of Ministers may dissolve a local council or revoke the head of local government unit, subject to judicial review.

Art. 143

Self-government rights are protected by judicial procedures in conditions determined by the law”.

Explanatory note:

See section I.

Constitutional provisions have to be focused on basic norms, in order not to become an obstacle to reforms. For example, it is unnecessary to put in the Constitution the length of the mandate of local self-government bodies or to define their responsibilities.

It is also unnecessary to restate in this chapter general constitutional provisions that have been stated earlier in the text: in particular, the constitutional norm on local elections is already in article 71.

Whereas the local government reform should be at first a territorial reform, the provisions of article 142 on cooperation based on agreements between territorial communities have to be removed, because the law could put forward the formation of integrated inter-municipal bodies as a way to the territorial reform, and a constitutional guarantee for such a low level form of inter-municipal cooperation could be used against more integrated forms of cooperation.

Any matter not regulated by the Constitution may be regulated by the law in compliance with the constitutional provisions.