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Present Realities of the Ukrainian Constitution

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Ukraine's Constitution has been a long time in the making. Way back in 1710, Ukraine adopted its first Fundamental Law under the rule of Hetman Pylyp Orlyk. Ukraine has had several Fundamental Laws since then. Finally, in 1996, after prolonged, dramatic and heated political debate, Ukraine got its current Constitution. According to the Venetian Commission, a leading constitutional law organization, this Supreme Act of Ukrainian legislation is one of the best-drafted constitutions in Europe. The Fundamental Law includes what appears to be the lengthiest list of personal rights and freedoms of any European nation state.

The Constitution gains more and more significance in our State. Courts are developing many precedents for protecting human rights and other legitimate interests of citizens based directly on the rules of the Constitution. In many instances, Ukrainian laws have been voided by the Constitutional Court of Ukraine for contradicting the Constitution. Recently, we have seen the Fundamental Law gain new significance in Ukraine's political life. However, there are still several challenges that hinder the creation of a truly effective Constitution and legal system in Ukraine.

Ukrainian Legislation Needs to be Adjusted to the Rules of the Constitution

—The Constitution stipulates the adoption of almost 50 laws to regulate the rapid development of Ukraine and its balanced legal system. However, two thirds of those constitutional laws have not yet been adopted. They include such important Draft Bills as *On the Rules of the Verkhovna Rada (Parliament) of Ukraine*, *On Special Inquiry Commissions*, etc. Moreover, many laws, including some adopted after the Constitution was written, contain provisions which are inconsistent with the rules of the Constitution. The harmonizing of legislative acts that clash with the Constitution has been ignored over the past decade.

Article 22 of the Constitution states that “during adoption of new laws or introduction of amendments to the laws currently in effect, restricting the content and scope of existing rights and freedoms shall not be allowed”. This provision is routinely degraded by the authorities, as it is no secret that, for instance, activities in many industries have been strictly regulated compared with 1996. There is no doubt that this has complicated the exercise of the freedom of business activity — one of the constitutional rights. Also, the institution of the jury system, stipulated by Articles 124, 127 and 129 of the Fundamental Law is completely ignored.

The legitimacy of certain important rules stated in Ukraine's codes and laws also raises doubts. For instance, Article 13 of the



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Constitution states that land is the property of the Ukrainian people. The definition of “Ukrainian people” is set out in the Fundamental Law Preamble: “citizens of Ukraine of all nationalities”. Article 14 of the Constitution further clarifies that land can be owned by individuals and legal entities in accordance with the statutory procedure. It logically follows that land can only be owned by Ukrainian citizens both directly or through the public authorities that represent them, and through legal entities. Title to land of foreign citizens and legal entities, although permitted by the *Land Code of Ukraine* under certain conditions, is, therefore, doubtful because it would appear to violate Article 13 of the Constitution. In our opinion, it would be expedient to get the Constitutional Court's official interpretation of this important issue.

The Bias of the Constitution's Internal Rules

This problem became obvious after the amendments to the Constitution adopted during the “Orange Revolution” in December 2004.

We will refrain from delving into the political reasons behind the changes to the Constitution, and review their results instead. The changes related to the sharing of powers among the Rada, the Government and the President. Apart from general supervision by the Prosecutor's Office, an archaic Soviet-era rule has been restored. Almost all of the amendments are of an unreasonable, unjustified and inconsistent nature, caused in part by the extreme haste in which they were adopted, and by the lack of professionalism of those who drafted the amendments. The amendments have thrown relations among the three branches of power completely out of balance.

The consequences were immediate. The parliamentary elections in March 2006 were followed by a long political crisis in Ukraine, and the unreasonable changes to the Constitution were

a primary contributing factor to this crisis. As always, it started in the Rada. Before the Constitution was amended, the operation of Parliament had been governed by the law pursuant to Article 82 of the Constitution. After the amendments had been made, the word "law" disappeared and the Rules changed their status from that of a "law" to an internal procedural document. However, Article 92 still prescribes that Parliament's operation is organized and implemented exclusively on the basis of the provisions of laws. At present, the Rada's Rules are not "law" and the Rada has no constitutional right to be guided in its activities by the provisions set out in the Rules.

As paradoxical as it may seem, the Parliamentary Coalition, heads of the Rada and the Ministers of the Cabinet of Ministers hold their position on the basis of Parliament's internal rules of procedure, not on the basis of the law as required by Article 92 of the Constitution. The obvious conclusion is that the legislative and executive power branches have been formed in violation of the Constitution.

Also, the recent amendments to the Fundamental Law have numerous systemic errors. The Government is appointed by a majority vote of the Parliament. But who currently appoints the heads of regional and district state administrations? The section of the Constitution that regulates Presidential activities does not set out such powers for the President. Although the section on the Cabinet of Ministers (Article 118, part 4) says it is the President who appoints these heads, why are these powers not listed as pertaining to the President's office? The question is not merely rhetorical, because it raises an even more important question: whose orders must a governor follow, the President's or the Prime Minister's?

Also, the President can nominate several Ministers to be approved by the Rada (Article 114, part 4). Interestingly, it is not certain what will happen if the Parliament rejects or dismisses persons nominated by the President. If special laws were passed, they might give us some answers.

Therefore, we still have not switched to the promised parliamentary form of government. Moreover, the unreasonable changes to the Constitution have led at least to a partial paralysis of the legislative and executive branches.

In our opinion, the said flaws can only be remedied on the basis of the procedure stipulated in the Constitution, i.e. decisions of Parliament supported by 300 votes of People's Deputies. Unfortunately, no other solution exists.

Authorities' Disrespect for the Constitution

Ukraine's Fundamental Law imposes several important responsibilities on many public authorities, such as their immediate tasks, supervision, legislation improvement, etc. Unfortunately, for some reason, we see continual violations of, disregard for, and neglect of the relevant Constitutional rules, e.g. in the actions of the President (who, by the way, is charged with ensuring the observance of the Constitution), other supreme state bodies and lower-level bureaucrats.

Some of the actions taken by Ukrainian presidents have violated the Constitution. For instance, according to Article 107 of the Constitution of Ukraine: "the President of Ukraine is the Chairman of the Council for National Security and Defense of Ukraine" (CNSD). Article 106 clearly stipulates that "the President of Ukraine cannot assign his powers to other persons or bodies". And yet, pursuant to *Presidential Decree No.208/2005 dated 8 February 2005*, clause 3, some of the powers of the President of Ukraine, vested with him under the *CNSD Act of Ukraine*, were assigned to the Secretary of the CNSD. The latter obtained the right to lead CNSD meetings upon a written request from the CNSD

Chairman (i.e. the President). The President's responsibility to sign or veto laws within 15 days after he receives them from the Rada Chairman (the term prescribed by Article 94 of the Constitution) has also not always been complied with.

Another recent example of disrespect for the Constitution is the prolonged blocking by the previous Rada of Constitutional Court judges taking their oath of office, as required by Article 17 of the *Constitutional Court of Ukraine Act of Ukraine* approved in furtherance of Article 153 of the Constitution.

If the top authorities sometimes neglect the rules of the Constitution, lower bodies will certainly do the same too. Disrespect for the law at the top trickles down to the bottom, and today, we frequently encounter "professional lawyers" disparaging the rules of the Constitution.

The impact of the Constitution of Ukraine on society is becoming more and more tangible. Nevertheless, we would like to call upon Ukrainian public authorities, lawyers and individuals to use their best efforts to overcome the problems that remain within the scope of the Constitution's provisions and, most importantly, to start respecting the country's Fundamental Law.

PRO file

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