

FROM CENTRAL CONTROL TO LOCAL RESPONSIBILITY:

DECENTRALISATION IN UKRAINE¹

EXECUTIVE SUMMARY

Decentralisation has been discussed in Ukraine ever since the country's independence. Major benefits of decentralisation include: Moving away from a Soviet system of central control that transformed into an apparatus of corruption; ensuring better development across the country; deepening democracy by letting local bodies decide on local affairs and fostering a sense of local responsibility in a big country that is accustomed to await decisions from the often far-away capital; and allowing the national government to focus on national challenges only, thus enhancing its efficiency.

Despite these discussions and benefits, there has been no serious attempt at decentralisation as the centralised system served the political elites. The 2015 draft proposals for decentralisation are thus a milestone in trying to transform Ukraine's governance and to bring power much closer to the people concerned. At the preliminary approval stage on 31 August, they achieved the necessary absolute majority of votes, but it is uncertain if it will master the 2/3 majority required for the final adoption. Most MPs of the two coalition parties voted against the bill. The proposed constitutional changes have become so controversial that they led to violent demonstration in front of parliament and an attack costing the lives of four policemen.

Two problems have bedevilled this reform process: First, there was little public information and debate on what this reform is

about. Rather than a crowning achievement of a national effort to reform the country, the reform proposal was perceived by many as an attempt by the executive to hammer out a far-reaching reform with unknown consequences. Second, in the context of the Russian-supported violent takeover in Eastern Ukraine, the innocent idea of decentralisation achieved a different, sinister connotation. Opponents of the reform argue that any passing of power to the sub-national level encourages secessionism. These concerns were kindled by the fact that additional last-minute provision, section 18, was added to the bill allowing special arrangements in certain territories – a nod to the Minsk II agreement. Most of those who did not approve the bill on 31 August concluded that Section 18 would directly implement the most controversial aspects of the Minsk II, such as exemption from criminal liability for armed groups, a role for local self-government bodies in the appointment of judicial personnel and a role for local militia. However, this is not the case. The bill does not address any of these three aspects. They would have to be regulated by separate ordinary legislation.

This briefing paper seeks to demystify the reform bill on decentralisation² aimed to establish a new system of local self-government and territorial organisation on the constitutional level. It is a complex legal document that cannot be boiled down to the slogans of *#victory* or *#treason* (*#перемога* or *#зрада*), both still dominating media and public debates. Its content is comparable to decentralisation

¹ This briefing paper was written by Andriy Kozlov, representative of Democracy Reporting International at the Constitutional Commission of Ukraine, with contributions from Michael Meyer-Resende, Ruslana Vovk and Mykola Gnatovsky of Democracy Reporting International.

² See the draft law on amending the Constitution of Ukraine as to the decentralisation of power of 1(15) July 2015, No. 2217a, available in Ukrainian at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55812; also available in English (unofficial translation) at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2015\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2015)022-e).

in many other EU countries. If adopted, it would eliminate the infamous 'power vertical' which provides significant *de jure* and *de facto* powers over local affairs to the national executive.

Even if some provisions could be strengthened further to underpin the local self-government, the reform bill represents a massive step forward in giving the local level responsibility over local affairs. Local affairs would be dealt with by elected representatives at three sub-national levels: Communities, as the lowest level, rayons at the next level and oblasts as the highest sub-national level. Prefects would have limited rights of supervision on behalf of the central power. Their role would however be much less intrusive than that of the current general prosecutor. The reform would shape the country's agenda for a long time and should therefore be well understood.

1. THE STATUS QUO AND REFORM PROCESS UNTIL NOW

Currently the constitutional provisions on the territorial structure and self-government of Ukraine are laid down in these constitutional articles:

- a) Art. 85, para 29-30 (Title IV) – authority of the Verkhovna Rada (the parliament of Ukraine) related to the establishment, reorganisation and liquidation of administrative and territorial units and appointment of local elections;
- b) Art. 118-119 (Title VI) – organisation and authority of the state executive in districts and oblasts, cities of Kyiv and Sevastopol;
- c) Art. 132-133 (Title IX) – territorial structure of Ukraine;
- d) Art. 140-146 (Title XI) – local self-government.

The proposed draft suggests substantial amendments to these provisions. The draft text was developed by the Constitutional Commission established by President Poroshenko on 3 March 2015, comprising now 64 members.³ It was adopted by the Commission on 26 June with an absolute majority (two "no" votes). The process of elaboration was not particularly transparent.⁴ The text was positively reviewed by the Venice

Commission.⁵ Indeed the Constitutional Commission had addressed all the comments and suggestions that the Venice Commission had made in their preliminary opinion in June.⁶

The draft was submitted to the Verkhovna Rada by the President on 1 July with some minor editorial amendments.⁷ However, the presidential administration added the closing and transitional provisions in the draft that were new (the President, not the CC is the subject of a constitutional amendment initiative, so he had a formal right to do so). The draft was marked as urgent.

On 15 July, the draft was updated by the President to include a provision indicating that "the specifics of the local self-government in certain districts of Donetsk and Luhansk oblasts shall be determined by a separate law".⁸ Through the update the provision was transferred from transitional and closing provisions of the draft bill to transitional provisions of the Constitution itself. In other words, what first appeared as the explanatory provisions in a bill now became proposed constitutional changes. Reportedly the President acted under pressure by the German and French governments⁹ that wanted to make sure that the amendments could be seen to

5 See the Preliminary Opinion of the Venice Commission of 24 June 2015 on the Constitutional Amendments regarding the Territorial Structure and Local Administration of Ukraine, CDL-PI(2015)008-e, available at:

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)008-e). The Venice Commission found the proposed amendments well-drafted, providing for the decentralisation model based on the principle of subsidiarity and largely compatible with the European Charter of Local Self-Government, thus deserving support (see para. 21, 34, 38). The abolition of supervisory powers of the office of the public prosecutor (see para. 20, 38) was welcomed specifically, as well as clauses on local finance (see para. 32, 38). Being critical at some points, the VC suggested that prefects should not only be appointed but also dismissed by the President only upon recommendation of the Government (see para. 15, 39), that the President as a guarantor of the Constitution should only suspend – not to terminate – powers of the local self-government bodies where they act in breach of the Constitution posing a threat to the sovereignty, territorial integrity and national security with the introduction of effective guarantees of self-government continuity (see para. 12) and that a prefect should have the power only to suspend – not to terminate – the acts of the local self-government on the grounds of non-compliance with the Constitution and laws (see para 37). It was also noted that a provision to the effect that some categories of administrative/territorial units or special arrangements for or within administrative/territorial units may (only) be created by law should be added – aiming in particular to regulate the peculiarities of the local self-government in certain districts of Donetsk and Luhansk oblast according to Minsk II (see para 27, 39). The position of the Venice Commission was further confirmed in its final Opinion of 26 October 2015, available at:

<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282015%29028-e>.

6 See para 30 of the Secretariat Memorandum on the Compatibility of the draft law on amending the Constitution of Ukraine as to the decentralisation of power as submitted by the Verkhovna Rada to the Constitutional Court of Ukraine on 16 July 2015, of 26 October 2015: "Key recommendations were followed, as well as most of the other recommendations, with a few – mostly minor – exceptions", available at:

<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282015%29029-e>.

7 The only substantive change was related to decreasing from 180 to 120 days the term of extraordinary elections to be held if the local self-government body that violates the constitutional provisions threatening sovereignty, territorial integrity or national security.

8 See Art. 10 (4) about the enactment of Art. 2-9 of the Law of Ukraine On establishing the "specific arrangements", available in Ukrainian at:

<http://zakon.rada.gov.ua/go/1680-18>. Though technically valid, the Law cannot be enforced until the other party to negotiations creates the preconditions for its fulfillment, i.e. the retreat of all militants and securing open and free local elections in full conformity with the Ukrainian law in the currently "occupied territories".

9 See for example (in German): <http://www.faz.net/aktuell/politik/westliche-einflussnahme-der-albtraum-ukrainischer-politiker-13753144.html>.

3 For more on the Constitutional Commission see DRI's factsheet (5 other members and 1 expert observer were added since May), available at http://democracy-reporting.org/files/factsheet_constitutional_commission_english_1.pdf in English and http://democracy-reporting.org/files/factsheet_constitutional_commission_ukrainian.jpg in Ukrainian.

4 See p. 2, para 2.1 of DRI's Briefing Paper No. 56 "Constitutional Reforms in Ukraine: an Update on Recent Developments and Debates", available at: http://democracy-reporting.org/files/update_on_constitution_making_en.pdf.

fully comply with the agreements made in Minsk on 13 February ("Minsk II").¹⁰ These changes drew particular criticism by those who see the law as a gateway to secessionism.

The Verkhovna Rada's Committee on Legal Policy and Justice¹¹ recommended inclusion of the bill into the parliamentary agenda. A day later, on 16 July, the draft was included into the agenda and forwarded, as required under the Constitution, to the Constitutional Court for an opinion as to the compliance with Art. 157-158 of the Constitution.¹² On 30 July, the Constitutional Court declared the constitutionality of the amendments.¹³ After receiving the Constitutional Court's conclusion, the Verkhovna Rada preliminarily approved it with 265 votes at the extraordinary plenary session held on 31 August.¹⁴

2. WHAT'S IN THE BILL AND WHAT IS NOT?

Contrary to what some experts expected, the bill contains neither a list of constitutionally guaranteed local self-government rights nor a list of exclusive competences. This brings a degree of uncertainty as any right currently held by the self-government can be easily transferred to the State by an ordinary law, with almost no legal remedy.

The changes of the law are well-drafted¹⁵ providing for a wide range of structural changes, as summarised in the following tables:

Territorial structure	
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A <i>commune (hromada)</i> becomes a basic administrative and territorial unit. The whole territory of Ukraine will be subdivided into <i>communes</i> .	Art. 133 (2)
A commune will be composed of a settlement or several settlements (villages, urban villages, cities).	Art. 133 (6)
The Verkhovna Rada will form communes ab initio according to the law.	Art. 85 (1) para 29; and para 2-3 of Closing and Transitional Provisions ¹⁶
A few communes will make up a <i>district (rayon)</i> .	Art. 133 (3)
The Autonomous Republic of Crimea and oblasts will be considered <i>regions</i> . The list of oblasts will no longer be specified in the Constitution.	Art. 133 (4)

While the current three-level administrative structure remains intact, a completely new administrative and territorial unit is introduced: a *commune (hromada)*. It substitutes what until now has been a panoply of different basic units. Since all the communes will have equal powers it will be all about the effective governance and responsible choice of priorities and local self-government as well as cooperation with the neighbouring communes. Those that succeed with this task are likely to attract human resources with competitive skills necessary for further development. Those that don't will have to reconsider their electoral choice and the ways of making their local councilors more accountable.

There is some risk in the proposed draft. Communes as administrative and territorial units should be established "from scratch" by the Verkhovna Rada. There is no deadline for this. At the same time, only new communes enjoy the new extended powers according to the Final and Transitional Provisions of the draft (para 3). Such uncertainty in terms of time may vest the parliament with improperly ample powers. It paves the way for the state exercising pressure on the communes, in particular, with regard to their consociation or merger with the other communes in exchange for a necessary parliamentary decision and, consequently, leads to new self-government legal capacity.

An additional problem may be that the Constitution does not set a minimum population for a commune (while forming a commune is a basic right for the existence of the local self-government). The newly established communes may be too small to sustain themselves. However, this problem can be tackled by ordinary laws.

¹⁰ Minsk II agreement directly refers to a specific law in the context of the constitutional reform:

"Conducting the constitutional reform in Ukraine, with the new constitution coming into force by the end of 2015, providing for decentralisation as a key element (taking into account the characteristics of individual areas of the Donetsk and Luhansk oblasts, agreed with representatives of these areas), as well as the adoption of the permanent legislation on the special status of individual areas of the Donetsk and Luhansk oblasts in accordance with the measures specified in Note [1], until the end of 2015. (See Notes) [...] Notes: Such measures, in accordance with the Law "On the special order of local government in individual areas of the Donetsk and Luhansk oblasts," include the following: [...]."

¹¹ See the Conclusion of the Committee of 15 July 2015, Minutes No. 29 (abridged version), available in Ukrainian at:

http://w1.c1.rada.gov.ua/pls/zweb2/webproc77_1?pf35401=351035&pcaption=%C2%E8%F1%ED%EE%E2%EE%EA%20%EA%EE%EC%B3%F2%E5%F2%F3%20%2015.07.2015.

¹² 288 ayes, see http://w1.c1.rada.gov.ua/pls/radan_gs09/ns_golos?g_id=3277.

¹³ Two judges wrote concurring and two judges expressed dissenting opinions, see the Conclusion of the Ukrainian Constitutional Court of 30 July 2015, No. 2-b/2015, available in Ukrainian at:

<http://ccu.gov.ua/doccatalog/document?id=281892>;

and separate opinions of judges Sas, Melnyk, Hultai and Slidenko of 6 August 2015, available in Ukrainian at:

<http://www.ccu.gov.ua/uk/doccatalog/list?currDir=281857>.

¹⁴ See the Resolution of the Verkhovna Rada of Ukraine of 31 August 2015, No. 656-VIII, available in Ukrainian at:

<http://zakon4.rada.gov.ua/laws/show/656-19>.

¹⁵ In terms of legal drafting, it creates complexities by squeezing all changes into existing seven articles in the Constitution (no new articles) in a way that is not reflecting their logic in all cases. Some issues which would be better combined in one article are spread over several articles, while some articles now deal with various issues. The text is thus ostensibly difficult to understand for non-lawyers.

¹⁶ Final and transitional provisions of the draft law "On Amendments to the Constitution of Ukraine (on decentralisation of power)".

Handover of budget and executive powers. Prefect	
<p>The centralised executive vertical will be eliminated, with local <i>state administrations</i> (oblast, Kyiv and Sevastopol, district) abolished. Instead, the newly established posts of prefects will represent the central state.</p> <p><u>Local state administrations will continue carrying their current constitutional powers</u> until executive committees of district, oblast councils and executive committees of Kyiv and Sevastopol communes are elected, yet no later than 1 March 2018.</p> <p>The first appointment of prefects shall take place upon establishment of the executive committees by oblast councils, but not later than 1 March 2018.</p> <p><u>Heads of local state administrations shall act as prefects on an interim basis</u> – until those are appointed – to supervise compliance with the Constitution and laws of Ukraine by the local self-government bodies (Art. 119 (1) para 1) and to suspend acts of local self-government bodies on the grounds of their inconsistency with the Constitution or the laws of Ukraine with simultaneous appeal to the court (Art. 144 (2)).</p>	<p>Art. 118</p> <p>Para 5 of Closing and Transitional Provisions</p> <p>Para 6 of Closing and Transitional Provisions</p> <p>Section 3, para 17 of the Closing Provisions¹⁷</p>
<p>The powers of the prefects (and until they are appointed the heads of local state administrations) will <u>exclude most of the executive functions</u> (implementing the Constitution and the laws of Ukraine, acts of the President, the Cabinet of Ministers and other executive authorities, fulfilment of regional programs and reporting thereon) and <u>local budget functions</u> (preparing and fulfilment, reporting on the fulfilment of oblast and district budgets). Delegation of the local self-government powers to them shall be discontinued. However, it will still be possible to delegate to the local self-government some powers of the central executive,</p>	<p>Art. 119 (1) para 2-4</p>

<p>subject to the respective authorities' control.</p> <p><u>Executive powers of the prefect</u> will be limited to the following:</p> <p>a) coordinating activities of territorial divisions of the central executive authorities;</p> <p>b) ensuring the fulfilment of state programs;</p> <p>c) under martial law or in the state of emergency or ecological disaster – directing and organising the activities of territorial divisions of the central executive, ensuring their coordination with the local self-government authorities.</p>	
<p>Prefect shall be appointed and dismissed by the President upon the nomination by the Cabinet of Ministers. The prefect shall be a public servant responsible to the President, accountable and subordinate to the Cabinet of Ministers.</p> <p>The provision on the prefect's accountability and subordination to the higher executive authorities, local self-government authorities to the extent of delegated powers will be deleted.</p> <p>District and oblast councils cannot hold a non-confidence vote in a prefect. Thus prefects are only accountable to the President and the Cabinet of Ministers</p>	<p>Art. 118 (3-5)</p>

In ordinary circumstances, the institution of prefects will be completely different from the current local state administrations. While the latter govern their area, new prefects will only deal with the rule of law and public order by supervising adherence to the Constitution and other laws. All the local executive powers as well as the most tangible budget powers will move to the local self-government. In other words, they should govern themselves. Only in exceptional circumstances will prefects take over some executive functions.

The wording of Art. 119 (1) para 5 "other powers [of the prefect], are determined by the Constitution and the laws of Ukraine" allows for the allocation of powers to prefects by ordinary laws. The provision creates some legal uncertainty and could lead to a weakening of a constitutionally guaranteed local self-government through ordinary legislation.

A further risk in the current set-up is the lack of a defined tenure length and grounds for the dismissal of prefects in the Constitution. This could make them too dependent on the President and the Cabinet of Ministers to whom they report. In addition the double reporting line could become a source of conflicts.

The constitutional amendments also do not specify whether the President has discretion to refuse to appoint a prefect

¹⁷ See transitional provisions of the Constitution of Ukraine in the proposed edition of the draft law.

only. So, the existence of the above circumstances is subject to the President's discretion only. Respective amendments to Art. 49-50 of the Law on the Constitutional Court could be a possible way out, provided that the Constitutional Court en banc (not just one of its panels) would decide whether to open the proceedings and establish there exist the relevant circumstances¹⁹.

In order to give better protection to the local councils counterbalancing of powers of the central government may be considered by enabling local self-government bodies to apply to the Constitutional Court against the laws they consider violating the constitutional rights of the local self-government (possibly with certain procedural filters). However, there is no sign of such a balance in favour of the local self-government.

Once again, in cases related to the actions by a governmental agency upon submission of another agency (such as calling of the extraordinary elections by the Verkhovna Rada upon the submission by the President), it remains unclear whether taking an effective action upon such a submission is an obligation or a discretion of the relevant body. There were hundreds of cases under the Yanukovych's government when local elections (including those in Kyiv) were never scheduled by parliament though they had to be.

interests of the territorial communities of the relevant district and oblast. The distribution of self-government powers of the communes, districts, oblasts will be determined by the law based on the principle of subsidiarity.	Art. 143 (4)
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A positive development is the proposal to secure the right of the local-self-government for land titles and a portion of the national taxes in the Constitution instead of ordinary laws. The draft also provides for the executive and local budgetary powers to be transferred to the local level, as well as self-government powers' distribution through its three levels based on the principles of subsidiarity and allocation of adequate resources. This means that only communes can decide which powers they wish to delegate to the upper level of the self-government (and not to the central executive as it used to be).

The principle of "subsidiarity" mentioned above is not clearly defined in the draft. Though such a definition can be provided by law it would be better to grant it the highest legal protection by including it directly into the Constitution. The Polish decentralisation reform is seen as a good example by many Ukrainian reformers; the principle of subsidiarity is mentioned in the preamble of the Polish constitution and there are relevant provisions where its legal essence is stipulated with a direct effect.²⁰

Added assets and powers. Distribution of powers at local level	
The material and financial basis of local self-government will include <u>the land and a portion of national taxes.</u>	Art. 142 (1)
Budget and the majority of executive powers (in particular, on joint communal property management) shall be handed over to the local self-government authorities and their executive.	Art. 140 (4-8)
The executive bodies of local communes are established (chaired by the heads of communes), executive committees of district and oblast councils (district and oblast councils elect their heads and form the composition upon submission of the latter).	Art. 141 (10)
Financial resources should be adequate for the scope of powers of the local self-government. This implies that the allocation of financial resources is directly dependent on the scope of the local authority's powers and should change proportionately if such powers are changed.	Art. 142 (3-4)
District, oblast councils, their executive committees represent and implement joint	Art. 140 (7) and

Elections and acquisition of new powers	
The <u>tenure of the elected local self-government bodies</u> shall be decreased from 5 to 4 years.	Art. 141 (5)
The powers of the Verkhovna Rada <u>shall no longer include scheduling of regular local elections</u> – they will be held on the last Sunday of the fourth year of the tenure of the local self-government bodies elected at the previous regular elections directly on the basis of the Constitution.	Art. 85 (1) para 30
The <u>deadline for holding regular local elections</u> is established (120 or 180 days from dissolution as applicable)	Art. 141 (8)
After the local elections in October 2015 the <u>next regular local elections will be held in October 2017</u> . The local self-government bodies elected on these elections will gain new powers if the Verkhovna Rada creates the appropriate	Para 3 of Final and Transitional Provisions

19 In the current wording of Art. 50 only the panel ruling on refusal to open the proceedings shall be reviewed by the Constitutional Court during its session; the opening of the proceedings shall be decided by one of its three panels.

20 For example, see Art. 164 (3) of the Polish Constitution of 7 April 1997 which says that "the commune shall perform all tasks of local government not reserved to other units of local government" and article 166 (1) that reads as follows: "public duties aimed at satisfying the needs of a self-governing community shall be performed by units of local government as their direct responsibility"; available in English at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

The reform will be fully implemented only after the new local elections in October 2017. The current local self-government elected in October-November 2015 will be for two years only if the bill is adopted. Newly established communes may get new constitutional powers before October 2017 if they hold new elections. After 2017 elections, the district and oblast self-government will acquire new powers as well. The new system will finally start in full in March 2018 when executive committees should be created on the district and oblast level and prefects introduced.

3. THE STATUS OF 'OCCUPIED AREAS' IN THE EAST

The controversial language on the "occupied areas" is found in proposed section 18 of the Transitional Provisions of the Constitution: 'Specific arrangements for the exercise of local self-government in certain rayons of Donetsk and Luhansk oblasts shall be set forth in a separate law' (hereinafter referred to as Section 18).

It can be argued that Section 18 is not fundamentally new, given that the current constitution includes the possibility to take historical special factors into account (such as history, economy, geography) in the territorial structure of the country (Article 132 of the current Constitution). The newly proposed Article 132 upholds this idea. Section 18 could be understood as one specific expression of it.

One often mentioned concern of Section 18 is that a hypothetical future Ukrainian government and parliament could extend the 'specific arrangement' of Section 18 to the rest of the Luhansk and Donetsk oblasts. However, the idea of 'specific arrangements' relates to the local self-government only, not to the powers of the state.

Section 18 could be seen as implementing UN Security Council Resolution 2202 of 17 February 2015 which endorsed the "Package of Measures for the Implementation of the Minsk Agreements" and called on all parties to fully implement it. This Resolution is binding on all the UN Members according to the UN Charter.

Section 18 cannot be read in isolation. One should consider other relevant provisions of the current Constitution, the suggested constitutional amendments as well as the Law on special procedures for the local self-government in certain districts of Donetsk and Luhansk oblasts together with the supporting resolutions of the Verkhovna Rada.

Section 18 applies to "certain districts of Donetsk and Luhansk oblasts". The definition of this area can be found in the resolution of the Verkhovna Rada of 17 March 2015 whereupon "rayons, their parts, cities, villages and settlements between the Ukrainian state frontier, Azov Sea and the line between settlements/their respective geographic coordinates" are considered as "certain districts" of Donetsk and Luhansk

oblast.²¹ Exactly these territories were declared by the Verkhovna Rada as "temporarily occupied".²²

Furthermore, Section 18 refers to a "separate law" to regulate specific arrangements for the exercise of local self-government without clarifying if this "separate law" means the law on the special procedure for the local self-government in certain districts of Donetsk and Luhansk oblasts currently in force or any other future law based on Minsk II requirements and constitutional amendments.

Pursuant to Art. 10 of the present law on the special procedure for the local self-government in certain districts of Donetsk and Luhansk oblasts of 16 September 2014 as amended on 17 March 2015,²³ it fully enters into force only after extraordinary elections with a number of serious preconditions including withdrawal of outlawed military formations and securing transparent election process under the Ukrainian law, as well as for unrestricted national and OSCE monitoring – currently the fulfilment of these conditions looks unlikely. Also, the draft law on amending the Constitution of Ukraine as to decentralisation of power provides for ordinary elections while extraordinary (for various reasons) can be called for by parliament exclusively (see proposed Art. 85 (1) para 30).

Opponents of the decentralisation bill have argued that it would implement aspects of the Minsk II that they do not agree with, such as exemption from criminal liability for the armed groups, a role for local self-government bodies in the appointment of judicial personnel and a role for local militia. This is not the case. The bill does not deal with any of these three aspects in any manner. They would have to be established in another law.

Furthermore, the introduction of Section 18 does not mean that specific arrangements for the given areas can contradict other articles of the Constitution. All the institutional safeguards including the role of prefects (to suspend unconstitutional or illegal acts of local self-government and to implement state programs – including those of regional development and renovation), of the President (to suspend the powers of local self-government in case of breach of the Constitution posing a threat to sovereignty, territorial integrity and national security) and of the parliament (to call for extraordinary elections in case the Constitutional Court finds an act of local self-government unconstitutional upon presidential application) will remain fully in force. Provided there is no armed conflict and foreign military presence which is the precondition for any special arrangements these safeguards will be sufficient to maintain the constitutional order. At the same time, more attention should be given to

21 See Resolution of the Verkhovna Rada No. 252-VIII of 17 March 2015, available in Ukrainian at <http://zakon4.rada.gov.ua/laws/show/252-19>.

22 See Resolution of the Verkhovna Rada No. 254-VIII of 17 March 2015, available in Ukrainian at <http://zakon4.rada.gov.ua/laws/show/254-19>.

23 See the Law in Ukrainian, available at: <http://zakon5.rada.gov.ua/laws/show/1680-18>.

the 'special regime of the economic and investment activity' which may turn into a tax haven and smuggler bay as the experience of 90s and early 2000s shows.

4. WHAT COMES NEXT

Serious tensions within the coalition, with Radical Party's retreat and Samopomich and Batkivschyna's different opinions and all three of them voting against decentralisation draft leave the future of the reform unclear. The vote at the preliminary approval stage gathered 265 "yes" (compared to 288 "yes" votes on 16 July to put the bill on the agenda). With 300 votes required for the adoption according to Article 155 of the Constitution, the trend would have to be reversed. If adopted, it will become law and give a way to constitutional amendments in three months. The reform would have to be implemented by 1 March 2018 at the latest which is the deadline for the local state administrations being discontinued and their powers transferred to (a) rayon and oblast local executive committees, and (b) prefects.

Pursuant to Article 159 of the Constitution, a bill on constitutional amendments shall be considered for final adoption by the parliament upon the conclusion of the Constitutional Court on its conformity with Articles 157 and 158. This is to be done only at the ordinary parliamentary session following the one where the bill was approved preliminarily.

In its decision No. 8-pn/98 of 9 June 1998,²⁴ the Constitutional Court maintained that in case there were changes to the bill after such a Constitutional Court conclusion, the bill would need to be reviewed by the Constitutional Court once again. Therefore, a constitutional amendment bill can be finally adopted by no less than 300 votes only in its integrity to which the Court's conclusion was granted. No changes can be made to this draft. In fact, the minor alterations to bill 2222-IV of 8 December 2004 were used by the Yanukovich's government as a formal pretext to divert to the initial 1996 version of the Constitution in September 2010.

There are two legal scenarios if, for different reasons, the bill does not gather 300 votes:

(i) Provided the second voting on the draft law adopted by simple majority on 31 August 2015 takes place and the draft does not gain 300 votes, the whole constitutional amendment procedure should start anew, including: elaboration of a new draft, new Constitutional Court's review, and two voting procedures in parliament with simple and qualified majority required respectively. Besides, the Verkhovna Rada can start considering changes to the same constitutional provisions

only one year after the second voting on the current draft law (Art. 158 (1) of the Constitution);

(ii) The coalition can decide to amend the current draft text before the second vote. The new agreed text - even with minor alternations - will be considered as a new draft law. It can be submitted to the Verkhovna Rada for consideration immediately; the aforementioned one year pause requirement does not apply. However the new draft will have to be approved by parliament twice: 1) by simple majority, that in the best case scenario would take place within the current third session of the Verkhovna Rada that lasts until 15 January 2016; and 2) by the qualified majority of 300 votes, to take place in the ordinary session following the session with the first approval (Art.155 of the Constitution). It is worth noting that according to Art. 83 (1) of the Constitution ordinary sessions of the Verkhovna Rada start on the first Tuesday of February and September each year. As a result, whereas the current third session of parliament ending on 16 January 2016 can be prolonged by the decision of the Verkhovna Rada, the next, fourth ordinary session has to start on Tuesday, 16 February 2016. Even if the MPs agree on a new draft and 300 votes are secured, the reform can only be passed in 2016.

In case the Verkhovna Rada is dissolved before another vote on the decentralisation, the process would have to restart from the beginning in the next Verkhovna Rada: According to Art. 149 (3) of the Rules and Procedures of the Verkhovna Rada the newly-elected parliament cannot consider a constitutional amendment bill that was preliminarily approved by its predecessors even if there was no vote for final approval.²⁵ The bill will be considered as dismissed with legal consequences provided by Article 158 and described above in detail.

²⁴ See resolution para 2 of the Decision No. 8-pn/98 of the the Constitutional Court of 9 June 1998, available in Ukrainian at: <http://zakon4.rada.gov.ua/laws/show/v008p710-98>.

²⁵ See the Law of Ukraine on the Rules of Procedure of the Verkhovna Rada No. 1861-VI of 10 February 2010, available in Ukrainian at: <http://zakon4.rada.gov.ua/laws/show/1861-17/print1435188400113758>.

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