



Strasbourg, 3 March 2011

Opinion no. 618 / 2011

CDL-REF(2011)012
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

CONCEPT PAPER

FOR THE ESTABLISHMENT AND FUNCTIONING

OF A CONSTITUTIONAL ASSEMBLY

OF UKRAINE

I. Introduction

1. On 13 January 2011, at the First Plenary Meeting of the Commission for Strengthening Democracy and the Rule of Law, the President of Ukraine stated that the current agenda nowadays includes the issue of a “systemic constitutional reform”, the need for which was mentioned in several documents of European Institutions: Parliamentary Assembly of Council of Europe, European Commission for Democracy through Law (Venice Commission) and European Parliament.
2. Assessing the 2004 Constitutional Reform as “regrettable experience of non-systemic and non-transparent work on changes to the Fundamental Law”, the Leader of the State indicated that this issue had to be solved “in a systemic manner”, “on the basis of effective Ukrainian Laws” and “with involvement of general public” at the present new stage of development of the society and State. He expressed his conviction that the “new constitutional process would be built on the grounds of openness, publicity and legitimacy”.
3. The goal of the “new constitutional process” is viewed as “generation of a balanced system of European-kind representative democracy, strengthening of parliamentarism, construction of an efficient vertical chain of executive power and creation of effective mechanisms of direct democracy”.
4. To achieve the established objectives and goals, the idea of “creation of Constitutional Assembly as an effective advisory tool, which would allow for reconciliation of positions of experts in constitutional law and politics, politicians and the public” was proposed.
5. The President of Ukraine proposed to the members of the Ukrainian Commission for Strengthening of Democracy and the Rule of Law to start developing the concept paper for creation of the “model of Constitutional Assembly”.
6. In response to the State Leader’s proposal, the Ukrainian Commission for Strengthening Democracy and the Rule of Law, at its Second Plenary Meeting on 16 February 2011, reviewed the draft “Concept Paper for Establishing and Functioning of Constitutional Assembly” (reporter Professor M. Koziubra) and approved its text as presented below.

II. World’s Experience

7. The world’s constitutional practice demonstrates different models of constitutional assemblies (congresses, councils, etc.). They differ by both method of their establishment and their competence. With respect to this, they divide into sovereign and non-sovereign assemblies and those with non-limited or limited competence.
8. The first type is a sovereign constitutional assembly. As a rule, sovereign constitutional assemblies are established to approve new constitutions. Mostly, such assemblies are elected bodies of constituent power, which not only work out but also adopt the constitution, which, in turn, may be subject to further approval by a referendum.

9. The second type is a non-sovereign constitutional assembly. By their nature, non-sovereign constitutional assemblies are advisory bodies, which develop and approve draft new constitution or draft systemic amendments to the current constitution, while the final decision with this regard is made by a respectively empowered authority (as a rule, the Parliament) with the possibility to have this decision approved by the referendum.

III. Constitutional Assembly in Ukraine

10. In consideration of rulings of the Constitutional Court of Ukraine, which established that the Constitution of Ukraine of 1996 is “by its legal nature an act of constituent power, which belongs to the people”¹, that they were the people who “authorized the Verkhovna Rada to adopt it”², and that in this case “the constituent power was exercised by the Parliament”³, the model of Constitutional Assembly pertaining to the second type of constitutional assemblies (congresses, councils, etc.) seems to logically and legally fit Ukraine’s current stage of development.
11. By *its nature and legal status*, Constitutional Assembly in Ukraine is a consultative-advisory body to the President of Ukraine, established by the Ukrainian President’s initiative and on the basis of the respective Presidential Decree with the purpose to prepare proposals with regard to a systemized renewal of the effective Constitution.
12. *The assignment* for Constitutional Assembly will be to ensure preparation and preliminary approval of a draft law on systemic amendments to the Constitution of Ukraine as of 1996 (option: systemic renewal of Constitution of Ukraine as of 1996). Within the framework of such assignment, Constitutional Assembly organizes discussion of various initiatives and drafts submitted by political parties, civil society organizations, or by individual drafters. The draft law, which has been subject to further development and final approval, is then submitted to the President of Ukraine with suggestion concerning its submittal to Verkhovna Rada of Ukraine by the procedure of legislative initiative contemplated by Section XIII of the Constitution of Ukraine.
13. *Structurally*, the Constitutional Assembly is composed of two parts:
 - a) The *Constitutional Assembly* as such, composed of up to 100 members, who are highly qualified experts in constitutional law and other fields of law, political scientists, representatives of political parties and other civil society institutions (public associations, human rights organizations, etc.). Constitutional Assembly could be reasonably composed in the following proportions: the number of politicians should not exceed 30% and should approximately correspond in equal proportions to the parliamentary majority and opposition; not more than 40% of lawyers, political scientists, representatives of other fields of social sciences, while representatives of civil society institutions should make up to 15%. Such quotas of representation in Constitutional Assembly would make sure that:

¹ Judgment as of 3 October 1997 (Case No. 18/183-97).

² Judgment as of 11 July 1997 (Case No. 1/1909-97).

³ Judgment as of 30 October 1997 (Case No. 18/183-97).

- Excessive political loading of the new stage of the constitutional process would be avoided, which was not the case when politicians were prevailing in the previous process;
- Discussions would be steered within a professional framework, which would ensure legal rather than political nature of the content of the proposed amendments;
- For the purposes of wording of certain proposed amendments, knowledge and experience coming from political and other, not only juridical, branches of knowledge would be utilized;
- Representatives of civil society institutions would be actively involved in development of the proposed amendments, first of all, in the domains of guaranteeing human rights and fundamental freedoms.

Constitutional Assembly in its full composition would have its meetings (sessions) at least once in three months.

б) A specialized *Experts' Team* consisting of up to 10 members, which are exclusively the most recognized scholars of constitutional science (except for 1 or 2 political scientists, whose research interests and experience are close to the constitutional law). The members of the Experts' Team shall not belong to any political parties. The Experts' team would prepare proposals concerning conceptual grounds of the proposed amendments and word out the texts of provisions subject to review by Constitutional Assembly.

The experts' team would work on permanent basis and have their meetings at least once a month.

14. The Constitutional Assembly would be headed by its Chair, who does not hold any position with the public authorities. The Chair will convoke plenary meetings (sessions) of the Assembly.
15. The Constitutional Assembly operates on the grounds of openness, publicity and legitimacy.
16. Preparatory activities for establishment of the Constitutional Assembly are entrusted to the Organizational Committee (composed of 5 to 7 persons) to be created by a Decree (Order) of the President of Ukraine.
17. The Constitutional Assembly and its Experts' Team perform the work entrusted to them in close cooperation with the European Commission for Democracy through Law (Venice Commission).