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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE CONCEPT PAPER
ON THE ESTABLISHMENT AND FUNCTIONING
OF A CONSTITUTIONAL ASSEMBLY
OF UKRAINE**

on the basis of comments by

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I. Introduction

1. By letter dated 18 February 2011, Mr Serhiy Holovaty, the Chair of the Ukrainian Commission for Strengthening Democracy and the Rule of Law, asked the Venice Commission to give an opinion on the Concept paper for the establishment and functioning of the constitutional assembly in Ukraine (CDL-REF(2011) 012, hereinafter: "the Concept Paper"), prepared and adopted by this Commission.

2. The Ukrainian Commission for Strengthening Democracy and the Rule of Law was established by the Presidential Decree on "*Discretion of the Commission on Strengthening of Democracy and Promotion of the Rule of Law*", of 9 December 2010. In accordance with its Statute, appended to this Decree, the Commission is charged, *inter alia*, with the "*preparation of proposals regarding attaining of compliance of the Constitution of Ukraine with the European standards and values, based on the recommendations of the European Commission for Democracy through Law (the Venice Commission)*" (paragraph 3.c).

3. On 13 January, during the first meeting of the Ukrainian Commission for Strengthening Democracy and the Rule of Law, president Yanukovich requested the Commission to elaborate a model of the Constitutional Assembly. The Concept Paper under consideration was prepared and adopted further to this request.

4. The Venice Commission invited Messrs F. Sejersted, E. Tanchev and K. Tuori to act as rapporteurs.

5. *The present Opinion, based on the rapporteurs' comments, was adopted by the Venice Commission at its Plenary session (Venice,)*.

II. General observations

6. In its recent Opinion on the Constitutional situation in Ukraine¹, the Venice Commission underlined that "*a change of the political system of a country based on a ruling of a constitutional court does not enjoy the legitimacy which only the regular constitutional procedure for constitutional amendment, and preceding open and inclusive public debate can bring*". The Commission referred to its 2005 Opinion on the amendments to the Constitution of Ukraine² where it had stressed that "*taking the time necessary for finding a real consensus among all political forces and the civil society on a well-balanced and coherent constitutional reform would secure legitimacy of the new Constitution and the political system in Ukraine*". It also considered that it is "*clear that the current constitutional framework based on a ruling of the Constitutional Court does not enjoy sufficient legitimacy, which only the regular constitutional procedure for constitutional amendments in the Verkhovna Rada can ensure*"³.

7. Furthermore, the Commission estimated that "*recent political and constitutional crisis in Ukraine once again revealed how urgently a true and comprehensive constitutional reform is needed in that country*". It recalled that it "*has called for such a reform several times already, and has underlined the need to secure the legitimacy of any constitutional reform in Ukraine*", which "*can only be achieved if constitutional amendments are made after extensive, open and free public discussions involving the opposition and civil society, and in strict accordance with*

¹ See CDL-AD(2010)044

² See CDL-AD(2005)015, para. 37.

³ See CDL-AD(2010)044, para. 65.

the constitutional provisions on amendment through decisions of the Verkhovna Rada by a qualified majority". The Venice Commission strongly encouraged "*the Ukrainian authorities to engage in a process of constitutional change that is based on the regular constitutional procedure for constitutional amendments and on the democratic participation of all actors of society concerned*" (para 73).

8. The European constitutional tradition shows the variety of ways in which broad constitutional reform may be introduced. There is no single best model that fits all situations. What functions well in one country may not necessarily work for another. In the Venice Commission's opinion, the most important factor is not the procedural arrangement as such, but whether the constitutional reform process is conducted in a democratic and transparent manner, in good faith, with the necessary wisdom, expertise, and in such a way as to ensure the broadest political and public legitimacy.

9. The concept of a "constitutional assembly" (or "convention")⁴ is normally used to describe assemblies that are created specifically for the purpose of preparing either a new constitution or broad constitutional reform. The drafting or revising of a constitution through a constituent assembly, notably when it is directly-elected, can be considered as an act of popular sovereignty. This stands in contrast to the most widely used alternative model in democratic countries, which is a constitutional reform prepared by state parliament itself. Depending on the national situation, a constitutional assembly may be able to attain broader political consensus on basic issues than parliament, and may also enjoy a higher level of public support and legitimacy.

10. Comparative constitutional law shows that special constitutional assemblies have mostly been used in two types of historical circumstances. First, when established in the aftermath of a significant break from the past such as a revolution, civil war or major disruption of this kind. Second, in the establishment of federations or confederations where a group of independent or separate states or former colonies have come together in a new union.

11. There are different types of extra parliamentary and non-executive power constitution making mechanisms. For example, during 18th and 19th centuries, some of the nation state constitutions, such as 1787 US federal constitution, were prepared and adopted by the constitutional conventions with superior constituent authority, which started constitution drafting *ex nihilo* and with time limits as the only limitation of their powers. With the creation of a new constitution, these bodies have ceased to exist and have left their place to the regular bodies of state power. The 20th century constituent assemblies, such as the IVth and the Vth French Republic, were limited in their power not only by the temporal frame, but also by an informal pre-constitutional consensus on certain unamendable principles such as republicanism or the unitary character of the political system, *rechtsstaat* or rule of law principle, and fundamental human rights.

12. Another form of body is a constitutional committee or commission (e.g. Feugler Commission in Switzerland). These have usually consisted of public figures or experts appointed to study constitutional matters, to draft a new constitution or amendments to an existing constitution.

13. As noted in the Concept Paper under consideration, a basic distinction between different constitutional assemblies is the way in which their members are selected and their mandate.

14. Directly-elected constitutional assemblies have, in practice, been relatively rare compared to the indirectly-elected assemblies. The most recent examples of directly-elected assemblies include Iceland and Nepal. Also, following the recent events in Tunisia, the Tunisian Interim

⁴ In the existing literature on this matter, the terms « constituent assembly», "constitutional assembly", and "constitutional convention" are often used loosely and interchangeably. While there may be some differences between them, these will not be addressed in the present opinion.

President announced that a constituent assembly charged with developing a new post-revolt constitution will be elected in July.

15. As to their mandate, a constitutional assembly may be used to deal with all or only one or more stages leading to constitutional change (e.g. formulating proposals, public discussions, negotiating the draft constitution/constitutional amendments, ratification of a new constitution/constitutional amendment).

16. A few state constitutions expressly provide for a constitutional assembly as one of the possible procedures for constitutional amendment⁵. The Ukrainian Constitution currently in force (in its 1996 version) does not specifically provide for this possibility.

17. In practice, constitutional assemblies have often been established to draft a wholly new constitution after a revolutionary change of some kind or in some cases, where a serious deterioration in the operation of an existing constitution had required the drafting of a new and more effective constitutional structure. Indeed, it has been argued that a special “assembly” or “convention” may have certain procedural advantages over a parliament when it comes to preparing basic constitutional reform.⁶ In particular, such an assembly would be more likely to embody the process value of free and unconstrained deliberation, and to give weight to reason over vested interests. If a constitutional assembly is organised in the right way it may come closer to the ideal formulated by political theory of writing constitutions behind a so-called “veil of ignorance”, in full knowledge of society’s needs, but without taking into account personal interests.

18. In the light of the Venice Commission’s calls for a comprehensive constitutional reform and considering the current political situation in Ukraine, the initiative of the President of Ukraine and the Ukrainian Commission for Strengthening Democracy and the Rule of Law to convene a specialised constitutional assembly to launch a process of constitutional reform - rather than entrusting it solely to Parliament or president - is to be welcomed. It seems also appropriate that the assembly will only have a consultative character since the Ukrainian Constitution gives the decision-making role in this area to Parliament. Thus there will be no break in constitutional continuity.

19. The Venice Commission notes a recently signed Presidential Decree whereby the President of Ukraine expresses his supports for the initiative taken by the former president Leonid Kravchuk to establish a “Scientific Expert Group on Constitutional Assembly Preparation”.

20. In this regard, the Commission wishes to express its concern that the establishment and functioning of two different bodies working in parallel on the same issue may render the constitutional reform process more difficult and controversial as well as less coherent and inclusive than it should be. Furthermore, the blueprint for a Constitutional Assembly that has been presented by the Commission for Strengthening Democracy and the Rule of Law in its Concept Paper of 16 February 2011 already provides a good model, which should serve as the starting point for further elaboration on how to make a good constitutional reform process.

⁵ Thus for example, the US Constitution. Bulgarian and Russian Constitutions require the convening of a special body for the purpose of amending certain constitutional provisions or adopting an entirely new constitution.

⁶ Cf. Jon Elster “Legislatures as Constituent Assemblies”, in Bauman and Kahana “The Least Examined Branch. The Role of Legislatures in the Constitutional State”, Cambridge University Press 2006 pp. 181-197, who compares “constituent legislatures” with “conventions”, and gives many examples of both, as well as arguments as to why the latter model may have procedural advantages. The two best-known constitutional conventions were those in Philadelphia in 1787 and Bonn in 1949. A more recent and less successful constitutional convention was that convened by the European Union in 2001-2003.

III. Specific observations on the proposed constitutional assembly in Ukraine

A. Mandate

21. According to the Concept Paper, “ *the 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.*” (part III, point 11).

22. The proposed constitutional assembly in Ukraine appears to be a preparatory constitutional assembly, which will draft a reform package, to be presented to the President, with the proposal that it should then be submitted to the *Verkhovna Rada* (parliament) for adoption according to the existing amendment procedures, as laid down in Section XIII of the current state constitution (point 12 of the Concept Paper). This guarantee for the respect of the existing constitutional amendment procedure is strongly commanded. The Commission has already stressed in past opinions on the constitutional reform in Ukraine the importance of respecting the existing amendment procedure provided for in the constitution.⁷ Also, in its general “Report on Constitutional Amendment” of December 2009, the Commission underlined that “*as a general principle any major constitutional change should preferably be done according to the prescribed formal amendment procedures*”, so as to ensure constitutional continuity, stability and predictability.⁸

23. While the Concept Paper specifies that the constitutional assembly should be a “consultative-advisory body” to the president, in practice its role may not be confined solely to consultation and advice. It will also have the task of actually drafting a new constitutional reform package, which it will then vote upon (described as a “preliminary approval”, point 12 of the Concept Paper), and submit this to the President with a suggestion concerning its submittal to *Verkhovna Rada*. The proposed constitutional assembly will not be a formal agent of constituent power, as it will still be up to the president to make the final decision as to whether or not to submit the draft constitution/constitutional amendments prepared by the assembly to *Verkhovna Rada*.

24. Another important role of the assembly will be to secure the participation in the drafting process of all the relevant political forces and (other) organizations of civil society, as well as instigate public debates on the substance of the reform. In line with such a function, the assembly is expected to organise “*discussion of various initiatives and drafts submitted by political parties, civil society organizations, or by individual drafters*” (point 12 of the Concept Paper).

25. In order to be successful, such an assembly should have a high degree of independence and autonomy. Composed and conducted in the right way, the assembly might then function as a more or less representative sounding board of society at large. Past experience with regard to constituent assemblies indicates that one of the factors of success is the degree of political and societal consensus as to the acceptable constitutional options within which the assembly operates.

⁷ Cf. for example, CDL-AD(2008)015.

⁸ Cf. CDL-AD(2010)001 paragraph 22. See also paragraph 189, where the Venice Commission warns against circumventing the prescribed requirements for constitutional change by instead putting the issue directly to the electorate in a popular referendum.

B. Composition

26. The composition of the assembly sketched in the Concept Paper seems to allow for a wide representation of political forces and (other) civil society actors, as well as constitutional experts (point 13 of the Concept Paper). However, the way in which its members are selected raises some concern.

27. While according to the experience in other countries the members of constituent assemblies were selected either by direct elections or indirectly by parliament, the Concept Paper seems to propose that the assembly members be appointed by the Ukrainian president (point 11 of the Concept Paper). Alternatively, giving this role to parliament – preferably with a qualified majority requirement – would ensure political compromise and broad representation. Should the present model be kept, the Commission recommends taking great care when appointing members, in order to guarantee the necessary level of legitimacy. This may be ensured by selecting members that enjoy broad confidence and authority across the political spectrum in the country.

28. On the other hand, having in mind the present political realities in Ukraine, the role of the president in the selection of the members of the constitutional assembly may reflect the existence of a serious commitment to a coherent constitutional reform and could be instrumental in rallying politicians, and mobilizing consensus and support for the reform process. It should not however, lead to a disproportionate influence of the President on the operations of the assembly and the substance of the reform.

29. The Commission also notes the large size of the Assembly - up to 100 members, which might obstruct its efficient functioning. Among these 100 members, 30 % should be politicians, 40 % academic experts (law, political science and etc.) and 15 % representatives of civil society. It is not stated who the last 15 % would be. This should be clarified.

C. Operating procedures

30. As mentioned above, the assembly will be a deliberative forum, which would debate proposals and drafts put before it. It would include a *“specialized Experts’ Team consisting of up to 10 members, who 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 the Constitutional Assembly.”* (point 13.b of the Concept Paper).

31. The Concept Paper is unclear however, as to the way in which the members of the Expert’s Team are to be selected: would the ten experts themselves be members of the assembly? Would they have a chairperson, and would he or she also be the chairperson of the assembly?

32. The Concept paper does not indicate whether the assembly should have a presidium or other kind of steering committee of the assembly. In the Venice Commission’s opinion, it may be useful to also specify, in the Concept Paper, whether the assembly would have the power to appoint special “thematic” committees, drafting committees or harmonisation committees to work on specific issues or to iron out differences and inconsistencies between recommendations of thematic committees. Finally, it should also be mentioned whether it will have a secretariat, and its nature and calibre – professional or merely administrative.

33. In this regard, the Commission wishes to underline the need to ensure that the relationship between the assembly itself, its possible committees and the people actually writing the drafts be

such so as to ensure the quality, efficiency and mutual confidence, as well as a free and constructive exchange of ideas.

34. As to the working methods, the Experts' Team would "*work on the permanent basis and would meet at least once a month*" (point 13b) while the assembly would meet "*at least once in three months*" (point 13a). This seems insufficient; Three months is a long time in a constitutional reform process. By comparison, the Convention that prepared a constitutional document for the EU in 2001-2003 met in plenary sessions on average once or twice a month⁹. If the proposed time-frame is to be kept, it should be required that the sessions last for several days. Alternatively, the assembly could be required to meet more often. At any rate, the Concept Paper could also usefully specify the duration of the constitutional assembly.

35. As for the Experts' Team, given that it is envisaged as a body working on a permanent basis, it should meet on a more regular basis.

36. Besides the Experts' Team, the Concept Paper also provides for the "Organisational Committee", composed of five to seven persons, "*to be created by a Decree of the President of Ukraine*" with the task to undertake the "*preparatory activities for the establishment of the Assembly*" (point 16). Again, the Concept Paper does not give any details about the selection of the members of the "Organisational committee", its nature and exact functions.

37. Another question left opened by the Concept Paper is the decision-making procedure within the assembly. Should there be a requirement for unanimity or general consensus? Should there be a set of voting rules? If votes are to be taken, on what basis?

38. The Concept Paper limits itself to state that "*discussions would be steered within a professional framework, which would ensure legal rather than political nature of the content of the proposed amendments*". The Venice Commission supports the intention of the drafters to conduct discussions within the assembly in a professional manner, respecting the fact that good constitution-making involves a high degree of professional expertise. At the same time, one should not pretend that the basic choices made in a constitutional amendment process are not of course of a "political" nature – and must be so.

39. Finally, it is to be appreciated that the Concept Paper urges the Constitutional Assembly and its Experts' Team to "*perform the work entrusted to them in close cooperation with the European Commission for Democracy through Law (Venice Commission)*" (point 17 of the Concept Paper).

IV. Conclusion

40. There are various situations that have led governments and political actors to establish constitutional assemblies or conventions or their equivalents as a way of preparing a new constitution or totally revising an existing one. One of them has been the existence of serious difficulties in the operation of an existing constitution. The comparative experiences in other countries suggest that the use of special bodies such as constitutional assemblies or conventions, holds a strong potential for providing a more open and participatory process of constitutional reform and thus stronger legitimacy of the new constitution.

41. Considering the recent constitutional history of Ukraine, the initiative of the president and the Ukrainian Commission for Strengthening Democracy and the Rule of Law to convene a specialised constitutional assembly to launch a process of constitutional reform - rather than entrusting it solely to Parliament or president - is to be welcomed.

⁹ See <http://european-convention.eu.int/bienvenue.asp?lang=EN>

42. The Venice Commission commends the proposal to mandate the constitutional assembly in Ukraine to prepare the constitutional reform package and to secure the participation in the drafting process of all relevant actors of society, while guaranteeing the respect for the regular constitutional procedure for the adoption of constitutional amendments.

43. The Commission considers it to be of the utmost importance for such an assembly to have a high degree of independence and autonomy. The crucial role of the president in the selection of the assembly's members should not lead to his disproportionate influence on the operations of the assembly and the substance of the constitutional reform.

44. The Venice Commission also encourages the Ukrainian Commission for Strengthening Democracy and the Rule of Law to further reflect on the structure and the operating procedures of the assembly. Most constitutional assemblies and conventions in other countries have resorted to a committee system of one kind or another to achieve their ends.

45. Apart from the mandate, composition and operating procedures, some contextual factors are also important to the success of the constitutional assembly's work. Of particular significance could be the nature and degree of public consensus about basic constitutional objectives.

46. The recent constitutional history of Ukraine is marked by the political confrontation and competition between various groups within society. The Venice Commission has repeatedly stated that only a real consensus among all political forces and civil society on a well-balanced and coherent constitutional reform would secure the legitimacy of the new Constitution and the political system in Ukraine. The Commission therefore strongly encourages the Ukrainian authorities to ensure that there is only *one* special body working on the constitutional reform process. This would provide a potential for a coherent and inclusive reform process and lessen the risk of political confrontation.

47. As for the substantial side of the envisaged constitutional reform process, the Venice Commission reiterates its recommendation that a constitutional reform should result in an "effective strengthening of the stability, independence and efficiency of state institutions through a clear division of competencies and effective checks and balances" and "should also introduce additional mechanisms and procedures of parliamentary control over the actions and intentions of the executive". In addition, it "should also include changes in the provisions on the judiciary aiming at "laying down a solid foundation for a modern and efficient judiciary in full compliance with European standards"¹⁰.

48. The Venice Commission remains ready to assist the Ukrainian authorities in the constitutional reform process.

¹⁰ See CDL-AD(2010)044, para. 74.