

CONSTITUTIONAL REFORMS IN UKRAINE: AN UPDATE ON RECENT DEVELOPMENTS AND DEBATES¹

EXECUTIVE SUMMARY

Constitutional reform is the cornerstone of changing Ukraine's political-legal framework. The process of change has gained traction with the establishment of the Constitutional Commission (CC), a mixed political-expert body of 55 members instituted by President Poroshenko in March 2015. The Commission will develop and make constitutional reform proposals to the President who may decide to submit them to a vote in Parliament. While he is free to change these drafts, he is not expected to do so, as it would undermine the authority of the Commission.

The Commission currently comprises three working groups: on decentralisation, judiciary reforms and human rights. The working group on decentralisation, headed by the Speaker of Parliament Volodymyr Groysman, is already at a well-advanced stage and expected to present a package of draft amendments to the Commission's plenary soon. Decentralisation reforms have particular urgency in view of scheduled local elections in October and the commitments under the Minsk II agreement. There was a risk that the process in this working group would be slowed down by a debate on presidential powers versus those of the government and parliament. Controversies on this derailed the reforms after the Orange revolution are not likely to be easily resolved, given that President and Prime Minister are far from commanding the 2/3 majority in parliament needed for constitutional reforms. However, it now looks that these questions will not be tackled by the proposed reforms. The other two

working groups are expected to develop and propose a draft text to the Commission's plenary in the course of June.

DRI is represented in the Commission as an observer. This report is mainly based on participation and observations taken in the Commission's plenaries and working group meetings. While the proposed changes can only be evaluated in detail once they are agreed, it appears until now that in all three working groups there is a tendency to bring these constitutional chapters in line with long-standing recommendations, in particular those of the Council of Europe's Venice Commission (the Council of Europe is represented in the Commission by several observers). If this tendency is sustained and drafts that reflect European obligations are adopted by parliament, a major reform milestone will be achieved.

There are some concerns about the process: While the pressure for reform is immense, there is a risk that a "salami-style" reform (amending parts of the Constitution sequentially, depending on which draft is ready first) creates incoherence between the reformed constitutional chapters. Notably, the Commission has no deadlines. It could start working on more issues beyond the three current ones if it so decides. Another concern is the lack of public consultation and outreach work. While the Commission includes civil society representatives and international observers, who contribute to information-sharing, there have been no systematic efforts to consult the interested public or disseminate information in a systematic way. While the current reform rush clearly makes broad proper public consultation a difficult proposition, more public information is necessary ahead of a possible parliamentary vote.

¹ This briefing paper was written by Andriy Kozlov and Michael Meyer-Resende of Democracy Reporting International.

1. BACKGROUND

On 3 March 2015, President Poroshenko issued a decree² establishing the CC as a special auxiliary body and approved its regulations. The Commission's role can only be advisory as according to the Constitution the right of initiative for constitutional amendments rests with the President or 150 MPs. However, the composition of the Commission will lend considerable authority to its decisions, especially if they are taken by unanimity or large majorities.

Another presidential decree of 31 March³ approved the proposed list of members of the Commission, including Volodymyr Groysman, the Speaker of Parliament as the Chairman, and two prominent legal scholars as the Deputy Chairmen: Prof. Volodymyr Butkevych, a retired ECHR Judge, and Prof. Viktor Musiyaka. Oleksiy Filatov, Deputy Head of the Presidential Administration, was appointed Secretary of the Commission. Beyond these four, another 51 members were included. They represent all the fractions present in Parliament as well as leading law schools and think tanks from across the country, including Donetsk and Luhansk as well as the Autonomous Republic of Crimea.⁴ Some representatives are linked to civil society organisations. Three ex-presidents can also be found among the members.

In addition, 13 persons serve as expert observers, proposed by international organisations, such as the Council of Europe, the EU, the OSCE and Democracy Reporting International. These expert observers can participate in all sessions and take the floor, but they cannot vote.

While the presidential decree had a general scope, the CC decided to focus on three main topics: human rights, justice and decentralisation. They are being discussed in three dedicated working groups. Each member can in principle participate in every working group. Currently 17 opted for human rights, 28 for the judiciary reform and 35 for decentralisation. (Even though some of them registered for two or even three working groups, the attendance in practice is low). The CC Chairman suggested that the CC may add more subject areas for the debate and decision later on. The above presidential decrees do not indicate the period for which the CC was established and leave open the possibility for more subjects to be addressed by the Commission over time.

2. PROGRESS

The Commission has made significant progress in the decentralisation working group. An integral draft is already under consideration. It builds upon the already existing drafts. Decentralisation is one of the key political interests in view of the respective commitments under the

Minsk II Agreement⁵ and the local elections scheduled for autumn. It is expected that these elections will take place for already reformed local institutions.

The judiciary and human rights working groups, which started drafting from scratch, are unlikely to complete a draft as fast as the decentralisation working group. That said, all working groups are aiming to submit drafts at the plenary sessions of the CC as soon as possible. The high speed of the process has made it difficult for the public to follow the process or to engage in systematic consultations.

To date, the Commission has held two plenary meetings. The third plenary has been postponed until later in June. The most likely reason is the necessity to adjust decentralisation constitutional amendments with the local election bills registered with the Verkhovna Rada at the end of May and thus, to hold respective working group meetings afterwards but prior to the CC plenary.

In terms of the substance of reforms, several members across working groups advocate the concept of 'organic laws' to be directly introduced by the Constitution while amending the majority requirements for certain laws, for example for a law on judicial system or in the area of human rights. The thinking is that by requiring a 3/5 (270 MPs) parliamentary majority for adopting organic laws, key legislation would be better insulated against political objectives of the majority of the day.

2.1. DECENTRALISATION

The working group under the chairmanship of Volodymyr Groysman, the Speaker of Parliament, has so far met three times. Initially two drafts were discussed. The first one was the text of the Presidential bill that was already submitted to Parliament in June last year but then withdrawn in November. The second draft was promoted by the group of experts affiliated with Yuri Hanushchak from the civic initiative "The Reanimation Package of Reforms". Both drafts provided for decentralisation of state power and more rights for local self-government but the key difference between the two proposals was that the Presidential draft addressed, among others, the issues of central state powers, such as the President's right to dismiss the General Prosecutor. The Presidential draft also suggested that local officials, whose principal duty would be to monitor the observance of the Constitution and laws at the local level should be appointed by the President (and to be called "presidential" representatives according to the draft) while the proposal by Mr. Hanushchak reserved the power of appointment for the government.

Later on, a selected number of working group members and some other experts were invited to discuss ways to combine the two drafts in a series of closed meetings. This practice raised concerns about the openness and inclusiveness of the process, but it brought a positive

² See the Decree of 3 March 2015 No. 119/2015, available in Ukrainian at: <http://www.president.gov.ua/documents/19018.html>.

³ See the Decree of 31 March 2015 No. 190/2015, available in Ukrainian at: <http://www.president.gov.ua/documents/19212.html>.

⁴ Three members of the CC work for universities from the Donbas area: from Donetsk, Luhansk and Mairupol respectively. The first two universities have been relocated.

⁵ The Minsk II agreement indicates the following commitment: "Conducting 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 regions, 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 regions in accordance with the measures specified in Note [1], until the end of 2015."

result in a single concept. Drafts based on the concept deal exclusively with de-centralisation issues, thereby removing the contentious issues of distribution of power and the system of checks and balances from the agenda.

The emerging drafts eliminate the current 'vertical' of local state administrations and transfer most of the powers in local matters to the local self-government of the basic level (city, town, village, settlement) under the principle of subsidiarity. A combination of several basic level units constitutes a community and several communities constitute a county (povit). The concept of regions (called "oblasts" and may be renamed into "volost", a more traditional Ukrainian word) as well as Kyiv and Sevastopol subdivisions, remains relevant, together with the counties, to implement common regional projects under various administrative agreements. Local self-government authorities comprise representative (councils) and executive bodies presided by mayors (called heads of communities). The peculiarities of the self-government in Kyiv and Sevastopol as cities with a special status are to be provided by law, rather than in the Constitution.

An important novelty is that local elections are to be scheduled on the basis of legal provisions rather than by a Parliament's decision. Under former President Yanukovich in more than 200 communities, including the city of Kyiv, elections were not held.

The central state will be represented by state governors (prefekty) at county and oblast levels. They will be appointed and dismissed from office by the President upon the nomination of the Government (a compromise formula). The governors will monitor the conformity of local self-government acts to the Constitution and laws of Ukraine. Their authority will include the right to suspend those acts and submit cases to the [administrative] court, coordinate local subdivisions of the central executive and, in the state of emergency or martial law, govern and organise the activities at county and oblast levels.

The President will be vested with the power to cancel, upon submission of the state governor, the authority of local self-government before its tenure expires in case it goes beyond its powers determined by the Constitution and other laws. In such circumstances, an interim plenipotentiary will be appointed who will lead the self-government executive and new elections held no later than within 90 days. This clause caused the most vivid discussion on how to reserve an effective tool for the President against usurpation by local self-government, as it happened in Eastern Ukraine, while conversely to avoid abuse of presidential power to usurp local powers for political ends. This risk and possible remedies (such as involving courts) are still being debated by the group

Another much-debated issue is that state governors can be dismissed from office without reasons being listed in the Constitution. This may open the door for arbitrary dismissal of governors for political reasons, while their role is that of a civil servant.

Transitional provisions are also being debated on issues such as the terms of current self-government, adjustment to the new structure, state governors' appointment and terms of new elections where new communities arise and to the power of the President to cancel the authority of the present local self-government.

After open discussions on 12-13 May several members of the group have held consultations behind closed doors. This may be an attempt

to align the decentralisation issues with the recent draft laws on local elections that emerged in the Rada at the end of May. It is hoped that a 'semi-final' draft will be widely and thoroughly discussed before its final approval by both the working group and the CC as a whole.

2.2. JUSTICE

This working group led by Oleksiy Filatov, a Deputy Head of the Presidential Administration, has held five meetings. By now a draft has been proposed by a group of experts led by Serhiy Holovaty, also believed to be associated with the Reanimation Package of Reforms. The draft provides for a parallel structure of general and administrative courts with the Supreme Court and High Administrative Court as their respective apices. It makes the High Council of Justice the only authority dealing with all the matters related to the judiciary. It also incorporates the service of the public prosecutor into the judicial system and appears to provide guarantees of judiciary independence consistent with the Venice Commission's recommendations. There are also drafts proposed by other members and the Supreme Court of Ukraine. The working group decided not to take any draft as a starting point, but to decide conceptually on all the consolidated key points and controversial issues and then proceed with drafting. Given the time pressure and that there is only one week dedicated to drafting in the working group schedule, such an approach may imply that there is another 'blanket draft' being prepared.

Due to vivid discussions, the group is one meeting behind the schedule in its agenda. It has already discussed the contents and structure of Title 'Justice', requirements for judges, procedures for the appointment and dismissal of judges and guarantees to them, judicial functional immunity, an issue of the authority responsible for selection of judges and overview of their activities. Some of those issues were resolved and some left for further discussion or consideration of the CC. Financing courts and judicial self-government are still under discussion and such matters as the system of judiciary, jurisdiction, bar, office of the public prosecutor, enforcement of decisions, clauses related to the Constitutional Court of Ukraine and transitional provisions are still to be tackled by the group. The draft is expected to be presented in June.

As to the structure of the Title, the novelty is that clauses on the office of the public prosecutor will be included into the Title 'Justice'. The principal requirements for judges will be determined by the Constitution. The minimum age requirement will be raised from 25 to 30 years and the minimum number of years of professional legal practice from 3 to 5 or 7 years.⁶

Judges will be appointed by the President upon nomination by the High Council of Justice, thus effectively excluding Parliament from the procedure. The Presidential role is designed to be ceremonial, thus making the process non-political. It is also suggested to remove the current five-year probation period and to appoint judges for life

⁶ The working group has split here. As the five-year proposal received 10 votes while 7 members voted for a seven-year background it was decided to return to the discussion at some final stage of concept elaboration or to submit the issue to the CC plenary for final resolution. The head of the working group proposed the same approach for any issue where there is no unanimity and the gap in votes is not decisive.

immediately. The debate over the role of President in transferring and dismissing judges split the group.⁷

The working group has agreed to differentiate between dismissal (a voluntary act of the respective authority based on specific circumstances) and termination of judge's office (following pre-determined facts, such as death, reaching the age of 65, etc.). In the remaining list of grounds for dismissal, the vague concept of the 'breach of oath' would be substituted by 'disciplinary offense inconsistent with the status of a judge'. The reasons and criteria for disciplinary responsibility of judges will be specified by the law exclusively.

The limited functional immunity and indemnity concept will be introduced for the judges instead of current unlimited immunity that can be lifted by Parliament only, thus being politically motivated. Under the proposed clause, a judge can be detained or taken into custody upon consent of the High Council of Justice except for the cases when he was arrested while committing a crime or immediately after. Judges will enjoy indemnity from liability for delivering a decision, except if these constitute a crime or disciplinary offense.

The working group has been split on whether the High Council of Justice should take over all the authority related to the judicial corps, including competitive selection of judges, their professional training and assessment, financial and organisational support to the judiciary and disciplinary procedures. It was decided preliminarily⁸ that these matters will be vested with other authorities that are still to be determined. The matter will be discussed again or transferred to the CC for a final decision.

There is general consensus that only the High Council of Justice will be regulated by the Constitution, while other authorities and establishments such as the High Qualification and Disciplinary Judicial Committee or State Judicial Administration (if decided so) will be governed by the law.

The High Council of Justice will be composed of 19 members (one member less than the current composition)⁹ with the majority of judges or retired judges elected by judges as recommended by the Venice Commission in its numerous reports. Ten of these will include 9 judges or retired judges elected by judges and the Chief Judge of the Supreme Court ex officio (Supreme Court judges elect one of their colleagues as Chief Judge). The majority of members is thus being elected by their peers. The other nine members will be elected by the bar (2 members), legal scholars (2 members), public prosecutors (2 members) and the President (3 members selected by open competition). The Minister of Justice and Prosecutor General would no longer be ex officio members of the High Council. The members will be elected for the four-year term and cannot be directly reelected. They can however be elected again for a four-year term later, thus contributing to a more dynamic

turnover of people and ideas within this body. The quorum of the High Council of Justice will consist of 15 members, of which judges together with retired judges will constitute a majority (8 members).

The High Council of Justice will be considered a representative body of the judiciary while judicial self-government will be taken over by other bodies.

The powers of the High Council will comprise at least the following

- 1) proposing candidates for the appointment as judges by the President;
- 2) resolving on the issues of transfer and dismissal of judges and making proposals on these matters (depending on further decisions by the working group and/or the CC (see footnote 6);
- 3) resolving on issues of termination of office of judges;
- 4) granting consent on detention and taking judges into custody;
- 5) considering appeals on the decisions related to disciplinary responsibility of judges / resolving on the matters of disciplinary responsibility;¹⁰
- 6) resolving on the issues of temporary dismissal of judges;
- 7) performing other authorities stipulated by the Constitution and laws of Ukraine.¹¹

The authority of the High Council of Justice vis-à-vis the public prosecutors is yet to be decided.

2.3. HUMAN RIGHTS

This working group, headed by the former judge of the European Court of Human Rights, Prof. Volodymyr Butkevych, has so far held 12 meetings. This is the only group that holds meetings that are completely open to the public. They take place in the building of Kyiv-Mohyla Academy with unrestricted access. The group has a busy schedule, with meetings held almost every day.

During the preliminary discussions, the group identified the main problems to be tackled by the future reform. Lack of direct effect of the rules in the present Title 'The Rights, Freedoms and Duties of a Human and Citizen' of the Constitution was named as the main problem caused by numerous references to laws necessary for application of the rights along with a lot of restrictions that are unnecessary in the democratic society. Another problem is that some concepts of rights are formulated in a way that makes it impossible to guarantee them either judicially or by any other means.

Understanding that the speed of the process is vital, the group members agreed on the following approach: the chairman has gathered all the proposals at the end of April, the group agreed that Title II should be redrafted and, having identified the structure of the new Title proceeded with immediate drafting. It was agreed to change the name of the proposed draft Title to 'Human Rights' in order to avoid any difference between rights and freedoms that was sometimes misused by

7 The opinion to exclude the President from transfer and dismissal procedures prevailed after the vote with 10 against 8 members which constitute an 'indecisive majority' as follows from the above footnote. However, the decision is not final and the role of the President in the process will become more clear in the course of further discussions and voting.

8 7 members voted for the High Council of Justice as a single authority.

9 There were also proposals for 20 and 25 members with the same 'judicial majority' but the 19-member proposal was upheld with 15 votes against 4.

10 Though no voting was held in this regard there was obviously no consensus within the working group. The matter will be considered again or submitted to the CC for a final decision.

11 There is a discussion within a group whether the list of powers should be pre-emptive. It was noted that if some additional powers can be provided by the laws these laws should be organic and voted with 3/5 majority of the Parliament (270 MPs).

Ukrainian courts. The structure of the Title is based on the Charter of Fundamental Rights of the European Union and all the rights are to be formulated in a way to have human dignity at their core. The Charter brings together human rights in six subsections, such as dignity, freedoms, equality, solidarity, citizens' rights and justice. The clauses are being formulated in accordance with the Charter and European Convention on the Protection of Human Rights and Fundamental Freedoms.

The working group has drafted 18 articles covering subsections dedicated to dignity (human dignity, right to life, right to the integrity and prohibition of torture, prohibition of slavery and forced labour), freedoms (right to liberty and security, to respect for private and family life, right to marry, freedom of thought, conscience and religion, freedom of expression as well as freedom of the arts and sciences, freedom of assembly and association, right to education, right to property, right to choose an occupation and engage in work, and right to asylum as well as protection in the event of removal, expulsion or extradition) and equality (principle of non-discrimination, equality between men and women, rights of the child). The group started drafting solidarity-related rights with the right to social protection. The remainder of the solidarity subsection as well citizens' rights and justice are still outstanding.

So far the following positive innovation can be noted:

- 1) significant decrease in references to ordinary laws in a way that unduly limits human rights;
- 2) the death penalty would be explicitly prohibited;
- 3) the right to physical and mental integrity would be guaranteed;
- 4) not only forced labour, but slavery would also be prohibited;
- 5) those arrested or detained should be notified of the grounds of the arrest or detention as well as of the charges against them immediately;
- 6) the term of judicial approval for taking a person into custody decreased from 72 to 48 hours, otherwise a person should be released immediately;
- 7) the freedom of expression in literature, art, sciences is unrestricted, thus censorship is effectively eliminated;
- 8) the right of assembly and association (except for political parties) is guaranteed to everyone, not only citizens;
- 9) the law on expropriation is proposed to be upheld by qualified majority of 2/3 (300) or at least 3/5 (270) votes in Parliament;
- 10) the non-discrimination clause is opened up;
- 11) citizens who belong to indigenous people or national minorities would be guaranteed the right to learn their languages or to learn in their language: respective state and communal educational establishments will be listed and protected by a respective law.

Certain variations still exist in different draft clauses. The working group intends to come back to every article once the initial drafting is over. After this the draft will be submitted to the CC.

The working group has so far organised one consultation to solicit public input. An open four-hour seminar was attended by 50 people.

The working group is also planning to hold public events, possibly beyond Kyiv to explain proposed amendments to academic circles and the general public.

3. THE WAY AHEAD

It is expected that the decentralisation working group will be the first to complete its work and propose a final draft to the CC very soon. It is possible that the human rights working group will be ready with their draft in June. However, there are challenges ahead. Firstly, a consensus should be reached within each working group on all the clauses or decisions made by the CC, especially in cases of a serious dispute within a working group. Secondly, the CC should agree on the final text. The next plenary is scheduled preliminarily for mid-June where the CC is going to consider draft proposals delivered by the working groups.

4. COMMENTS ON THE PROCESS

In general, the process of reforms raises a number of issues:

- **“Salami”-style approach to reform**

With the Presidential decree not providing for any timelines, each working group will finish their work at a different time. Volodymyr Groysman has already announced that different parts of the reforms may be submitted at different times. Given the pressures for quick decentralisation, it is understandable that he does not want to make the Commission work at the speed of its slowest working group. However, the “Salami”-style process could undermine the coherence of the changes as there will be no overall consolidation of the three areas of reforms. Instead the judiciary and human rights working groups will likely have to adjust their texts to the decentralisation draft to create some coherence. It is also possible that only some constitutional areas will be reformed and that the reform momentum will have petered out when the others are ready. One way to address the tension between quick reforms and a thorough reform may be a commitment to carry out a more deliberate and systematic overall constitutional review in two years to assess how the currently discussed amendments have worked out and to identify additional reform needs.

- **Hybrid composition: legal experts and politicians**

The Commission is composed of a mix of political figures and legal experts. It includes many eminent jurists and experts who are close to civil society, which is positive. The openness towards international observers is likewise positive, adding a level of transparency. In this sense the Commission is a much better initiative than the presidential draft of last year which was elaborated with no consultations. The inclusion of political figures will make it easier to mobilise the parliamentary support that the Commission's drafts will need to muster a 2/3 in the Rada. However, the hybrid composition also has some drawbacks. The Commission is not seen as a neutral, technocratic body. The voting rules, requiring a majority for adopting a draft, also weaken the idea of technical authority. A pure expert commission would not necessarily vote and declare one proposal better to another. Instead an expert commission may even propose two draft versions on a given theme, making sure both are technically sound, leaving it to political deciders to choose either. The set-up of the Ukrainian Commission instead has a political bend. However, the idea of providing alternative draft clauses where there is neither unanimity nor substantial majority is vocal among the CC members while they admit the risk of bringing alternatives to the Parliament which can divide the already unstable constitutional majority of 300 votes.

- **Public Consultations**

The decree establishing the Commission includes several provisions dealing with public consultations, but in the current context of reform rush, the Commission has only done little outreach work. There was no

strong political understanding or will to consider consultations an essential element of the process and consequently almost no means were invested to carry out consultations or information campaigns. The main reform website still contains no information on constitution-making.¹² A dedicated website has been set up only recently: <http://constitution.gov.ua>

Though the CC plenaries as well as its working group meetings are open to the media, there has only been irregular attendance. Only the CC plenaries get some attention but the journalists prefer Volodymyr Groysman's briefings afterwards to attending the discussions. Even the Human Rights working group that completely sticks to the open door principle (without necessity to carry the ID and go through security checks) is rarely attended by the media, even specialised legal ones.

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¹² See <http://www.reforms.in.ua/index.php?pageid=constitution-reform>