

## КОНСЕНСУС ЕЛІТ ЯК УМОВА КОНСТИТУЦІЄТВОРЕННЯ В УКРАЇНІ

© Мандзій Л., 2015

У статті автор розглядає консенсус еліт як умову процесу конституційного творення в Україні. Виділяє чотири періоди конститутієтворення в Україні й докладно аналізує умови прийняття Конституції та внесення змін до Основного Закону в кожному періоді зокрема.

*Ключові слова:* Конституція, консенсус еліти, парламент, Президент.

Lyubomyra Mandziy

### ELITE CONSENSUS AS A CONDITION FOR CONSTITUTIONAL PROCESS IN UKRAINE

In the article, the author examines elite consensus as a condition for the process of Constitution creation in Ukraine. Four periods of the constitutional process in Ukraine are distinguished. The conditions of admission of the Constitution and Amendments to the Basic Law are analyzed in detail for each period in particular.

*Key words:* the Constitution, elite consensus, parliament, president.

One of the most important moments of modern state's existence is the preparation and adoption of the Basic Law, the Constitution, which determines the nature of government, social order, rights, freedoms and duties of citizens. As rightly pointed by Viktor Yushchenko, "The Constitution is a system of beliefs, thinking and vision of the Ukrainian nation, its identity and understanding of its own state" [9]. Adoption of the Constitution of Ukraine in 1996 was an important step in the formation of Ukrainian statehood. The Basic Law stipulates principles of state policy aimed primarily at ensuring democratic rights and freedoms of citizens of Ukraine. Despite the fact that the Constitution has been defined by the European community as one of the most advanced, many problems emerged in the process of its implementation.

Today there are many studies of Ukrainian scientists-constitutionalists, which tackle the issues of essence of the Constitution. Significant contribution to the coverage of this topic was made by V. Kampo, W. Pohorilko, P. Rabinovych, P. Stetsyuk, V. Shapoval, Y. Shemshuchenko and others. It should be noted that the problem of reform or adoption of a new Constitution is still relevant.

The article aims at studying the elite consensus within different periods of the constitutional process in Ukraine.

Consensus is a universal principle of democracy, which allows solving and preventing contradictions and conflicts, removing tension in society, achieving agreement on contentious issues. Consensus (from the Latin. "consensus" – agreement, harmony) means the "existence of unity in the views of two or more entities on key aspects of the social order, manifested in the unity of action" and "method, a form of collective decision-making, which requires agreement" [6]. There are two basic principles of consensus: 1) support of the decisions by majority involved in its achieving; 2) absence of direct objections to the decision by at least one of the participants in the negotiations. Thus, consensus is not unanimity, but absence of direct objection in recognizing neutral point of view. Consensus proposes to seek win-win solutions which are acceptable to all. According to O. Balatska, "appropriate usage of consensus technology by the elite facilitates both *polyarchy* of the very power, balancing of interests within the elite and the establishment of an agreement between the state and civil society" [1].

In political science, there are three levels of consensus:

- base or core (at the level of society);
- procedural or constitutional (sets the "rules of the game");
- "present" (at the level of policy implementation).

In world practice, there are several ways of adopting constitutions. The most common are the following: by the highest representative body of power; by the body specially created for adoption of the Constitution, for example, the Constitutional Assembly, the Constituent Assembly; directly by people in a referendum. Adoption of the Constitution in Ukraine was made by the Verkhovna Rada of Ukraine – the highest representative body of the state.

The process of Constitution creation in Ukraine can be divided into several periods:

- 1991-1996 - Independence of Ukraine, drafting the Constitution and its adoption in 1996;
- 1996-2004 - Implementation of the Constitution of Ukraine 1996;
- 2004/2005-2010 - amending the Constitution of Ukraine, the decision of the Constitutional Court;
- 2010 - present – need for the constitutional reform, searching legitimate ways for the system updates of the Constitution.

Each of these periods has its own features and characteristics.

In the first period of Constitution creation, the following features have to be defined. On November 1, 1990, the first meeting of the Commission on the new Constitution was held. It was chaired by the-then Chairman of the Verkhovna Rada Leonid Kravchuk. It was emphasized that the new basic law at the constitutional level must fix the main provisions of the Declaration of State Sovereignty of Ukraine. On June 8, 1995, the Constitutional Treaty was concluded between the Verkhovna Rada of Ukraine and the President of Ukraine "On the principles of organization and functioning of the state and local authorities for the period before the adoption of the new Constitution of Ukraine". Within the year, active hard work of members of the Constitutional Commission was carried on concerning generalization of all alternatives and submission of an agreed draft of the Constitution of Ukraine. In early March, 1996, Co-Chairpersons of the Constitutional Commission signed the completed draft of the document and included the issue of its discussion to the agenda of the Parliament. As noted by A. Kolodiy, "the constitutional process, which lasted in Ukraine from 1990 to 1996, contains all the features of the political struggle that the Ukrainian society had to further deal with: overextension in time, need to counter the destructive habits of Communists, using leverages of presidential power" [4].

In the first reading, MPs significantly changed the draft of the Constitution. The lack of support of the second reading can be attributed to the lack of consensus concerning a number of important provisions between parliamentary factions and groups (on the status of the Ukrainian language, state symbols, the Crimea, property). Left-wing parties completely refused to support the draft Constitution. Preparation and adoption of the Basic Law was accompanied by heated debates and discussions not only in the Parliament. Confrontation aggravated between the President Kuchma and his team, aimed at dismissing the Chairman of the Verkhovna Rada of Ukraine Oleksandr Moroz, and the Parliament, especially the Socialists who stated the need to "begin the constitutional way to elimination of the institution of the presidency". In this situation, the President of Ukraine Leonid Kuchma appoints the referendum on the Constitution of Ukraine in September 1996. This could lead to the dismissal of the Parliament. Realizing the situation, most MPs returned to the issue of the Constitution. On the "constitutional night" (June 27-28, 1996) for nearly 14 hours MPs roll-call voted for each article of the Constitution. On June 28, 1996, the Parliament passed the first in the Ukrainian history Constitution of the independent state of Ukraine, which ultimately strengthened the legal foundations of our country, its sovereignty and territorial integrity.

The adoption of democratic decisions, namely the Constitution of Ukraine, can be seen as an act of conscious political elite consensus. According to O. Balatska, "Through consensus, the Constitution of Ukraine was adopted in 1996, although during the constitutional process numerous compromises took and still take place" [1]. The threat of dismissal of the Parliament, the possibility of approving the Basic Law by the people during all-Ukrainian referendum, awareness of the need to pass this document – these were the impetus for compromise and consensus of the political elite concerning the Constitution adoption.

The features of the second period were the implementation of provisions of the Constitution through the adoption of appropriate regulations. Strengthening contradictions between the Verkhovna Rada of Ukraine and the President of Ukraine became noticeable in 2000. The society has spread the idea of a constitutional referendum.

One of the first attempts of the ruling elite to revise main provisions of the Basic Law was to hold the nationwide referendum in April, 2000, on establishing a bicameral parliament, reducing the number of MPs to 300, abolishing parliamentary immunity, and providing additional opportunities for the President to dismiss the Parliament. Although all the questions were positively supported by voters, the specific way of referendum, including its manipulative nature, questioned the results. This was followed by the decision of the Constitutional Court, according to which the results of the referendum should be implemented in compliance with the relevant parliamentary procedures. The above-mentioned bill had lack of support in the Parliament.

During 2001-2004, many projects of the constitutional reform in Ukraine appeared. Projects multiplied, but the process of amending the Constitution were delayed in time because none of the political actors did not want to give up power. In August, 2002, the President of Ukraine Leonid Kuchma launched a nationwide political debate on the need in the constitutional reform in the country. It was about limiting the authorities of the President and the transition to a parliamentary-presidential republic. Subsequently, these initiatives were not effective. In 2004, the Parliament considered two bills amending the Constitution, but

there was no political will of the majority to adopt those amendments. The issue of amendments to the Constitution was a key pillar of the presidential campaign in 2004.

To solve the political crisis 2004, the Parliament adopted in December the Law of Ukraine "On Amendments to the Constitution of Ukraine" [3]. According to the amendments, Ukraine transferred to a parliamentary-presidential country. The Parliament gained rights to form a government which, in fact, became independent from the president. Undoubtedly, this decision cannot be considered as a full constitutional reform.

In December, 2004, amendments to the Constitution of Ukraine again became possible as a result of a compromise between supporters of Yushchenko and Yanukovich and consensus of the political elite in the form of adopting a package of constitutional amendments. After political deprivation for the post of President, MPs of the Party of Regions, who were supporters of a parliamentary-presidential republic, initiated and voted for this law violating of the constitutional procedure. As a result, the imbalance of powers and responsibilities of public authorities and destabilization of the political situation in the future occurred.

The consensus of the political elite was preceded by a long history of conflicts and crises. The foundation for destabilizing the political situation in the country was laid. Such a situation lasted for five years.

The third period in the Constitution creation is associated with the implementation of the decisions of the Verkhovna Rada in 2004 and unreasonable expectations of the society towards completion of the constitutional reform, significant reduction in handling political and economic processes. This resulted in accumulation of negative trends in the country.

In December, 2007, the Decree of the President of Ukraine "On the National Constitutional Council" was declared [8] The Decree launched a public dialogue on the content and improvement of existing provisions of the Constitution of Ukraine. In March, 2009, the President of Ukraine submitted a draft Law of Ukraine "On Amendments to the Constitution of Ukraine" to the Verkhovna Rada of Ukraine. Despite the need in systemic changes to the Constitution and the declaration of support of this initiative by deputies, appropriate decisions were not taken. Election of the President of Ukraine complicated updating of Constitution.

After victory of Viktor Yanukovich on the presidential election in Ukraine, the Constitutional Court decided to abolish the political reform of 2004 and bring into force the Constitution of 1996. Parliamentarians who signed the appeal to the Constitutional Court demanding to grant V. Yanukovich authorities which Kuchma had, claimed that changes of the Constitution in December 2004 were made, in their view, with violations. On September 30, 2010, the Constitutional Court of Ukraine announced the Law of the Constitution of Ukraine "On Amendments to the Constitution of Ukraine" on December 8, 2004, as the one which contradicts the Constitution of Ukraine [7] in connection with breach of its consideration and adoption. It can be said without exaggeration that the decision of the Constitutional Court contained a political component. As R. Martyniuk justly observes, "The Constitutional Court of Ukraine was used once more as a tool to achieve political goals, and the rule of law was sacrificed to political expediency" [5, p. 298].

After the decision of the Constitutional Court, the President accumulates power to greater extent in the "same hands" and is almost solely responsible for the whole executive branch, and respectively, for the situation in the country. He can not transfer it neither to the government nor to the Parliament. The Verkhovna Rada of Ukraine becomes a decorative and ineffective parliament which has little or no power to control activities of the executive branch, though this should be its constitutional duty.

Confrontation President-Government-Parliament turned into a vicious circle. In 2010, it forced to return to the norm which, in terms of transitology, is the best for the effective conduct of further course to democratization, namely, a return to the Constitution 1996 and strengthening of presidential power.

During 2004-2005 and up to 2010, uncompletion of constitutional reforms and the need for them was felt in Ukraine.

Since 2010, the discussions on the need for systemic constitutional reform continued in the society. Ukraine was exhorted by the Parliamentary Assembly of the Council of Europe and the Venice Commission to make such reform. In February 2011, the President established the Constitutional Assembly as an auxiliary and advisory body for the purpose of preparing the bill of amendments to the Constitution of Ukraine. In 2011 and 2013, the Verkhovna Rada of Ukraine introduced some changes to the Constitution of Ukraine.

In February 2014, the Verkhovna Rada of Ukraine adopted the Law "On the recovery of certain provisions of the Constitution of Ukraine" [2]. Since February 22, 2014, provisions of the Constitution of Ukraine on June 28, 1996 have been in force, with amendments and supplements introduced by the laws of Ukraine from December 8, 2004.

On May 20, 2014, the Verkhovna Rada adopted the draft resolution on the Memorandum of Peace and Harmony which secured major changes to the Constitution of Ukraine. The Memorandum stated that the

Parliament would make the immediate constitutional reform based on decentralization of state power, consolidation of Ukraine's status as a parliamentary-presidential republic and the balance of power among all its branches at central and local levels.

The Constitution should be amended to strengthen its legitimacy and to correct imbalances and distortions in its practical application. The political situation still does not give hope that these changes can be easily made and are clearly aimed at improvement. The political elite, both ruling and in opposition, considers changes of the Constitution as a way to approve or increase its power. Amendments to the Constitution have to be the result of consensus, agreements for the sake of public interest and not of a certain party. The Constitution has to be changed not for the political interests of authorities, but for the public needs and perspectives.

Thus, during the existence of an independent state of Ukraine, the process of Constitution creation has not been over. Within this time, the Verkhovna Rada adopted constitutional changes three times. In addition, there was the decision taken by the Constitutional Court. In all periods of the Constitution creation in Ukraine, the elite consensus was a prerequisite of the Constitution or constitutional amendments. Achieving the consensus by political elite has several features. The main elements of the compromise are achieved in a relatively short period of time, with negotiations often conducted behind the scenes. The decision to reach consensus is made only by reputable and experienced politicians. The search for consensus is facilitated by "the context" – demonstrations, mass meetings, protests.

Taking into account general loss of respect for the current Constitution of the state, nowadays formation of a new model of the Constitution is very obvious and urgent for Ukraine. The constitutional process in Ukraine should be open, public for the society, along with public consultations and discussions, taking into consideration public opinion (not in the form of manipulative referendum). Involving citizens into the development of the Basic Law will form a sense of belonging to the creation of a democratic state, promote the consolidation of the society and increase confidence in the authorities.

All in all, the new Constitution of Ukraine or constitutional changes should be possible only through basic or social consensus. This issue will become the object for our further research.

#### References:

1. Balats'ka O. Instytutsiyni formy mizhelitnoyi vzayemodiyi: politolohichnyy analiz / O. B. Balats'ka. // Politolohichni zapysky. – 2012. – # 6. – Rezhym dostupu: [http://nbuv.gov.ua/j-pdf/Polzap\\_2012\\_6\\_14.pdf](http://nbuv.gov.ua/j-pdf/Polzap_2012_6_14.pdf)
2. Zakon Ukrayiny "Pro vidnovlennya diyi okremykh polozhen' Konstytutsiyi Ukrayiny" vid 21 lyutoho 2014 r. // Sayt Verkhovnoyi Rady Ukrayiny. – [Elektronnyy dokument]. – Rezhym dostupu: <http://zakon2.rada.gov.ua/laws/show/742-18>
3. Zakon Ukrayiny "Pro vnesennya zmin do Konstytutsiyi Ukrayiny" vid 8 hrudnya 2004 r. (# 2222-IV) // Sayt Verkhovnoyi Rady Ukrayiny. – [Elektronnyy dokument]. – Rezhym dostupu: <http://zakon2.rada.gov.ua/laws/show/2222-15>
4. Kolodiy A. U pytannyakh konstytutsionalizmu ya velykyy konservator – Rezhym dostupu: [spa.ukma.kiev.ua/konst/docs/opytuvannja.doc](http://spa.ukma.kiev.ua/konst/docs/opytuvannja.doc)
5. Martynyuk R. Dylema polityky i prava v novitn'omu vitchyznyanomu konstytutsiynomu protsesi / R. Martynyuk // Natsional'nyy universytet "Ostroz'ka akademiya". Naukovi zapysky. (Seriya "Politychni nauky"). – 2010. – Vypusk 4. – S. 290-300.
6. Politolohichnyy entsyklopedychnyy slovnyk / uporyad. V. P. Horbatenko; za red. Yu. S. Shemshuchenka, V. D. Babkina, V. P. Horbatenka. – 2-e vyd., dopov. i pererob. – K. : Henez, 2004. — 736 s.
7. Rishennya Konstytutsiynoho sudu Ukrayiny u spravi za konstytutsiynym podanniam 252 narodnykh deputativ Ukrayiny shchodo vidpovidnosti Konstytutsiyi Ukrayiny (konstytutsiynosti) Zakonu Ukrayiny "Pro vnesennya zmin do Konstytutsiyi Ukrayiny" vid 8 hrudnya 2004 roku # 2222-IV (sprava pro doderzhannya protsedury vnesennya zmin do Konstytutsiyi Ukrayiny) // Sayt Verkhovnoyi Rady Ukrayiny. – [Elektronnyy dokument]. – Rezhym dostupu: <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v020p710-10>
8. Ukaz Prezydenta Ukrayiny "Pro Natsional'nu konstytutsiynu radu" // Sayt Verkhovnoyi Rady Ukrayiny. – [Elektronnyy dokument]. – Rezhym dostupu: <http://zakon1.rada.gov.ua/laws/show/1294/2007>
9. Yushchenko V. Ukrayini potribna Konstytutsiya natsional'noho tvorennya – [Elektronnyy dokument]. – Rezhym dostupu: <http://www.dt.ua/1000/1550/62151/>