

CONSTITUTIONAL TRADITIONS OF UKRAINE: FROM PYLYP ORLYK CONSTITUTION TO MODERN CONSTITUTIONAL REFORM

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Colleagues,

I am greatly honoured to be invited to the solemn session and to have the opportunity on behalf of the judges of the Constitutional Court of Ukraine to extend our heartily congratulations on the occasion of the 22nd anniversary of the Constitution of the Republic of Lithuania!

I am also grateful to you for the opportunity to address such respectable audience for the first time during our cooperation with the Constitutional Court of the Republic of Lithuania.

It is a well-known fact that Constitution of the Republic of Lithuania was adopted at the national referendum on October 25, 1992.

This historic legal act of the Lithuanian people, who had created the State of Lithuania many centuries ago, confirmed its sovereignty and the right to live in an independent, democratic and legal country.

This became a logical result of years of struggle of the Lithuanians for their freedom and independence, the right to national identity, native language and customs, the right to live freely and work in the land of their ancestors.

In this regard, I would like to note that the constitutional processes of the Republic of Lithuania and Ukraine have much in common, and not only because our peoples once lived in one powerful state – Grand Duchy of Lithuania.

The similarity of the constitutional processes in Ukraine, as well as in Lithuania, lies in the fact that the commitment of our peoples to the ideas of constitutionalism has had a long tradition.

The origin of the Ukrainian constitutionalism is rooted in the custom laws of the grain-growers of Tripillian culture and their descendants – the Slavic tribes of Antes and Wends. Later, these laws were unified in historical writing memo – “*Ruska Pravda*” by Yaroslav the Wise.

Considerable impact on the domestic legal system was made by the provisions of the Lithuanian Statutes. They became the basis not only for the ancient Cossack's “liberties”, but, in

various editions, they once were a fundamental source of rights throughout major Ukrainian territories.

Yet a special place among the origins of the domestic constitutional law takes “Pylyp Orlyk Constitution”, a document which, according to a famous Ukrainian historian Oleksandr Ohloblin, is “a manifest of political will of the Ukrainian nation before the whole world and memorable cultural monument of Ukrainian state and political opinion”.

A few words about the author of this historical document.

Supporter and close companion of Hetman of Ukraine Ivan Mazepa, Pylyp Orlyk was born in 1672 in Vilenschyna in Czech-Lithuanian noble family. His father, Stepan, a Polish army officer, a catholic, had long served in the Polish-Lithuanian army and was killed in the battle against the Turks near Khotyn a year after Pylyp’s birth. His mother Iryna Malachowska came from Orthodox Lithuanian-Belarusian noble family of the coat of arms “Hrymala”.

Young Pylyp received proper training and good education. In particular, he studied at Kyiv-Mohyla Academy which at that time was one of the most prestigious educational institutions in Eastern Europe. Noble, well-educated young man with a command of five foreign languages and a diplomatic talent made a quick career in the office of Hetman of Ukraine Ivan Mazepa and obtained the position of Secretary General, i.e. he became the second-ranking official of the Zaporizhian army.

After the defeat of Charles XII and Mazepa in Poltava battle of June 28, 1709, together with their entourage, family and army remained, they were forced to seek asylum in Turkey. The same year Hetman Ivan Mazepa died and was buried in a foreign land.

Zaporozhians, chiefs of staff and Cossacks, at the Rada (Council), which took place near the town of Bendery on April 5, 1710, elected Pylyp Orlyk as a new Hetman. The most active follower of Mazepa's ideas, he dedicated his entire life to creating Western European coalition that would help liberate Ukraine. Unfortunately, his plans were not destined to be realised. All Orlyk's efforts to liberate Ukraine failed.

With dreams and ideas of homeland and free independent Ukraine, Pylyp Orlyk died in exile on May 24, 1742 in Iasi in Moldova.

Along with the election of Pylyp Orlyk as a new Hetman, the Cossack's Rada adopted “Legal Pacts and Constitutions on the Rights and Liberties of the Zaporozhian Army”, better known as “Pylyp Orlyk Constitution”.

The Constitution consisted of a preamble and 16 Chapters, and established the basis of the Ukrainian state – a system of government, territorial structure, military system, social and economic issues, state religion, etc.

The preamble to the document states that Christianity was not first adopted by the Grand Duke Volodymyr Sviatoslavovych but by “ancient brave Cossack people”. In this way, it is the nation who lived on these lands, that was given priority in the establishment of the Rus (Kyiv) state on certain political and ideological grounds. The said provision formed the basis of the idea of political independence of the Ukrainian people and their right to their own state.

In particular, Ukraine was defined as a republic with elected authorities, the state power in which was executed according to the principle of its division into legislative (General Rada), executive (led by Hetman) and judicial (General Court).

Ukraine's foreign policy was to be based on good neighbourhood and mutually beneficial cooperation with other countries, and Chapter II of the Constitution in its original text formulated the principle of sovereignty of Ukraine and inviolability of its borders:

I am quoting the original: “Every state arises and exists due to the inviolability of its borders. Thus, may the territory of our Fatherland, Little Rus, remain within its borders as established by agreements with the Polish Republic, the illustrious Ottoman Porte and Moscovy”.

Particular attention was paid to the fight against corruption and embezzlement of public property, social protection of the wounded and families of the Cossacks fallen, the state was also obliged to take care of its citizens who found themselves imprisoned abroad.

A characteristic feature of the Constitution was that it was elaborated with full confidence in a quick return to homeland, where it would be legally valid for the entire territory of Ukraine. Therefore, at the moment of its conclusion it seemed the entire reality, though the author of the Constitution had failed to achieve the desired.

Thus, Pylyp Orlyk Constitution became an important pillar in the further development of Ukrainian statehood idea, a kind of symbol of the struggle for the creation of an independent Ukrainian state.

Not accidentally after reading the provisions of the Legal Pact, a famous French philosopher Voltaire said: “Ukraine has always sought freedom”.

In the mid-nineteenth century in Ukraine there shaped a doctrine of equality of nations, individual liberty, limitation of the state power by the Constitution and the law. In a historical aspect it is regarded not only as a direction of philosophical and political thought, but also as opposition to the policy of oppression of all sorts of manifestations of Ukrainian national idea, carried out by the Russian Empire.

The said doctrine was based on political values that had been asserted their position in practice in Europe at that time, as well as on creatively reconsidered experience of government

of the past generations of the Ukrainians. It showed the beginning of a new stage of the process of national revival of the Ukrainian people.

One of the key roles in the assertion and development of national constitutional traditions was played by an intellectual society known as “Cyril and Methodius Brotherhood”. Its founders and active participants were, in particular, Taras Shevchenko, Mykola Kostomarov, Panteleimon Kulish, Mykola Hulak, Heorhii Andruzkyi and many other representatives of Ukrainian intelligentsia.

Their political ideals were constitutional statehood, republican form of government, federalism with wide local autonomy, abolition of serfdom, free labour, citizens' democratic rights and freedoms. These ideals were embodied not only in the philosophical, political and artistic works, but also in the constitutional drafts as documents of political and legal significance. The most famous of them is the draft by Heorhii Andruzkyi “Outlines of the Constitution of the Republic” of 1850.

The above-mentioned draft caused a real shock to the powers. In particular, it envisaged the establishment of a Slavic state (confederation), which was to unite seven states that should be divided into regions, regions – into districts, districts – into communities. State power in the Confederation was to be carried out on the basis of division of legislative, executive and judicial functions of state bodies.

From the author's point of view, the supreme legislative body of the state was Legislative Assembly, the executive one was the State Council and the judicial one was Conscientious Court.

As historians noted, Slavic confederation, according to Heorhii Andruzkyi, could include, in particular, Ukrainian, Belarusian, Lithuanian and other nations. Yet there was no place for Russia in this Confederation.

It is logical to connect the beginning of the real constitutional process in Ukraine with the destruction of Russian Empire as a sole state, with separation from it of certain nations with historical territories of their settling.

In Ukraine, along with the fall of the autocratic power there were several attempts to set up a nation state. There have appeared as independent state formations: Ukrainian People's Republic, West Ukrainian People's Republic, the Hetmanate and the Directorate.

Accordingly, under each of them acts of the constitutional significance, designed to stipulate forms of organisation of the Ukrainian state (universals, statutes, constitutions, etc.) were elaborated.

Of course, these acts varied in the details of construction of the state mechanism, yet all of them proceeded from the same principles, namely:

- firstly, Ukraine is a sovereign and independent state with the republican form of government;
- secondly, all power in the state belongs to the people of Ukraine, which is realised, in particular, through democratically elected representative body;
- thirdly, the sole state power shall be implemented by legislative, executive and judicial authorities;
- and finally, fourthly, local self-government is implemented in Ukraine, and rights and freedoms of its citizens are enshrined in the constitution.

These acts, together with draft constitutions of Mykhailo Draghomanov, Mykola Mikhnovskyi, Stanislav Dnistrianskyi and other national constitutionalists of those times are considered to be a part of treasure of the national constitutional thought.

Ukrainian constitutionalism of the Soviet period can hardly be considered as an independent legal phenomenon, since from almost the very beginning it found itself under quite hard centralised ideological control.

The Soviet power, exercised at the Ukrainian territory, aimed to obtain relevant legal basis for it and operate legally. Therefore, the first constitution of the Soviet period appeared in the Ukraine quite early – in 1918 as the antithesis to all previous draft constitutions.

Both this Constitution and especially other constitutions, created in the Soviet Ukraine, by their content were quite far from their European analogues – primarily because of their official orientation towards one-party political system, excessive nationalisation of almost all spheres of public life, fundamental objection of the institute of private property and so on.

The adoption by the Verkhovna Rada of the Ukrainian SSR of the Declaration on State Sovereignty of Ukraine on July 16, 1990 may be considered to be the beginning of the most recent constitutional reforms in Ukraine. This act proclaimed the state sovereignty of Ukraine; supremacy, independence, integrity and indivisibility of the authority of the Republic within its territory; independence and equality of Ukraine in foreign relations.

Later the constitutional process went tensely, in conditions of politically unstable situation in society and constant confrontation between the president and parliament. In June 1995 as a compromise measure between the Verkhovna Rada of Ukraine and the President of Ukraine the Constitutional Treaty was concluded.

According to this agreement the President of Ukraine was recognised as the Head of State and the Head of the executive power, and the Verkhovna Rada of Ukraine – the sole body of legislative power. It has also declared the exercise of state power on the basis of its division into legislative, executive and judicial.

On June 28, 1996 the Verkhovna Rada of Ukraine adopted the Fundamental Law of our state – the Constitution of Ukraine, which entered into force on the same day. Since that time this date is a state holiday in Ukraine.

It is clear that the new Constitution of Ukraine had not solved on the spot the whole range of difficult issues faced by Ukraine as a transitive state. Yet, it is worth noting that in terms of a model of the state mechanism, laid down in it, as well as in technical and juridical terms, it was recognised (in particular, by the Venice Commission) as a perfect document that took its distinguished place among the constitutions of European countries.

At the same time, the Constitution of 1996, said a well-known constitutionalist Volodymyr Shapoval, was developed as “the fundamental law of the state, not of the civil society”. While the constitution is considered to be a legal act of civil society rather than that of the state, i.e. an act which is an irreplaceable and effective restriction for the state (including democratic) power.

Besides, as a representative of the Congress of Local and Regional Authorities of the Council of Europe Michelle Gegen correctly noticed, “According to the monitoring results conducted by the Regional Assembly of the Council of Europe about five years ago, it was concluded that Ukraine remains a centralised state. Perhaps this trend may be accounted for personal ambitions of officials, fear of liability or apprehensions that bodies of local self-government would limit the influence of the central government”.

These and other political circumstances led to the idea of amending separate provisions of the Constitution of Ukraine, with the purpose, in particular, to make the manifestation of the excessive concentration of power in one hands impossible.

As a result on December 8, 2004 the Parliament adopted the law on introducing amendments to the Constitution of Ukraine. According to this law, the Verkhovna Rada of Ukraine acquired real power to form the Government and the powers of the President of Ukraine influencing the executive power were limited respectively, i.e. a parliamentary-presidential form of government was introduced.

However, in practice, amendments to the Constitution of Ukraine in 2004 not only denied the formation of the constitutional principles of civil society, but also did not solve certain contradictions, originally entrenched in the Constitution of Ukraine.

Thus, while commenting the constitutional order in Ukraine, Roger Myerson, professor of the University of Chicago and a Nobel laureate, said that “a model, in which the head of the state has rather weak influence on the national government and a wide control over local authorities, simply splits Ukrainian society and provides foundations for insoluble conflict”.

Furthermore, during consideration and adoption of this law the constitutional procedure was violated, and on this basis the Constitutional Court of Ukraine, by its Decision of September 30, 2010, declared it to be unconstitutional. In consequence, according to Article 152 of the Constitution of Ukraine the mentioned Law lost its validity, and the effect of the Constitution of Ukraine of 1996 was renewed.

In spring 2010 presidential elections in Ukraine took place, which were won by Viktor Yanukovich by a small margin from the nearest rival. Majority of politicians assess his actions as the President of Ukraine as such that have led to major social, economic and foreign policy failures of Ukraine during the period of independence of Ukraine. This has provoked protests in the society.

Special dissatisfaction among the diverse population of Ukraine was caused by the refusal of the President of Ukraine Viktor Yanukovich to sign the European Union Association Agreement during the summit held Vilnius last November.

The government responded inadequately, having brutally dispersed peaceful protesters in the capital's Maidan Nezalezhnosti (Independence Square), and later applied firearms that resulted in numerous human victims. As a result, the President and his entourage fled from Ukraine to Russian Federation.

The tragic events at the beginning of 2014 have also influenced on the constitutional process in our state.

On February 21, 2014 the Verkhovna Rada of Ukraine by its constitutional majority of 386 votes adopted the law on renewal of certain provisions of the Constitution of Ukraine in the wording of December 8, 2004.

However, the causes of conflict between the central and local governments, alerted by Professor Myerson, remained to be unresolved. Speculating on these very causes, some political forces with financial, military and political support of Russian Federation, continue to split the Ukrainian society.

It is not accidentally that annexation of the Crimea, the formation of marionette People's republics and other events that have threatened the existence of an independent Ukraine, were held under the slogans of providing greater autonomy to the regions.

Thanks to the heroism and self-sacrifice of real patriots of Ukraine, as well as to the support on the part of the leaderships and the public of democratic countries, Ukraine has managed to stop the destructive processes. But the recent dramatic events show the urgent need to regulate painful problems at the constitutional level.

In this aspect the society lays high hopes on the President of Ukraine Petro Poroshenko who recently submitted a draft law on introducing amendments to the Constitution of Ukraine to the parliament.

In experts' opinion, the preliminary analysis of its provisions gives grounds for the assertion that it is finally suggested to take first steps on the way to the decentralisation of power and the destruction of command and distributive system.

In particular, it is suggested instead of oblasts, districts, cities, settlements etc. to determine as subjects of administrative and territorial division only three subjects, i.e. regions, districts and communities. The proposal to abolish the vertical structure of state administrations of all levels also received favourable comments.

Territorial communities should finally get real possibilities to resolve vital issues of local character, using financial and material resources of the region for this purpose. It is also suggested to liquidate actual dependence of bodies of local self-government on the executive power, to increase their influence on all aspects of the democratic organisation of local life. Thus, reasonable decentralisation of the state power will result in transferring decision-making of all issues of local character to the territorial communities, which should stimulate the citizens' activity and really ensure their right to participate in the administration of state affairs, which is guaranteed by the Constitution of Ukraine.

Constitution is an act of constituent power that belongs solely to the people. Therefore, the Ukrainian people — citizens of Ukraine of all nationalities – should be the main subject of the constitutional process. It is the people who are the bearer of sovereignty and the only source of power in Ukraine according to Article 5 of the Constitution of Ukraine, and the right to determine and change the constitutional order in Ukraine belongs exclusively to the people.

The historical experience also shows that in order to successfully implement the tasks of constitutional process it is not only bodies of state power and of local self-government, but also institutions of civil society which should actively participate in it.

Yet it is not out of place to point out that constitutional process should run exclusively in the manner and pursuant to the requirements set forth by the Constitution of Ukraine, and its results should not raise any doubts of their legitimacy.

One of such requirements stands for the obligatory consideration of draft laws on introducing amendments to the Constitution of Ukraine by the parliament only upon the availability of an opinion of the Constitutional Court of Ukraine on their conformity with the requirements of Articles 157 and 158 of the Constitution of Ukraine.

Specifically, under Article 157 of the Fundamental Law the draft law on introducing amendments to the Constitution of Ukraine cannot foresee the abolition or restriction of human

and citizens' rights and freedoms, or be oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. Also the Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

Article 158 of the Constitution of Ukraine sets forth procedural restrictions aimed at guaranteeing the stability of the constitutional order.

It is worth mentioning that the Constitutional Court of Ukraine during the period of its activities has provided 24 opinions on such issues, including 8 opinions in which the Court recognised that draft laws were non-conforming with the above provisions of the Fundamental Law of Ukraine and hence could not be considered by the parliament in view of their adoption.

Thus, the Constitutional Court of Ukraine along with the Verkhovna Rada of Ukraine and the President of Ukraine is an important participant of the national constitutional process.

At the end, I want to draw some conclusions:

– firstly, the Ukrainian people have always supported the democratic system of its state. The content of historical heritage, related to the domestic constitutional process shows that they were developed in accordance with the principles and human values generally recognised by the democratic community and sometimes even ahead of them;

– secondly, a truly independent and sovereign constitutional Ukrainian state may be possibly built provided decentralisation of power is only implemented, following the example of EU Member States, providing real rights to territorial communities to resolve issues of local significance;

– and finally, thirdly, the main subject of the constitutional process is the people of Ukraine, who exercise its constitutional right to determine the constitutional order of the state.

Dear Colleagues!

As people say, “A friend in need is a friend indeed”.

Big trouble came to long-suffering Ukrainian land.

We have already paid a high price for the right to be masters in our house. But it is too far to the end of attacks of the so-called brotherly state. However I am convinced that we – the Ukrainians – will overcome this difficulty, since we are gaining strength to fight from the support of our real friends.

Therefore, I take this opportunity to express my sincere gratitude to the President of the Republic of Lithuania Her Excellency Ms. Dalia Grybauskaitė, to the leadership of the Seimas and the Government of the Republic of Lithuania and to the people of the Republic of Lithuania for supporting Ukraine in difficult times for the Ukrainian people.

Our nations have already passed the examination of friendship, so let our friendly relations remain for ever, and no more trouble come to our homes.

Dear friends, I wish you happiness, health, peaceful skies and God's blessing in all your good deeds and endeavours, both in work and in personal and family life!

Thank you for your attention!