

Ukraine

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***Abstract:** This chapter discusses constitutional developments in Ukraine, a country that since its independence in 1991 has struggled with crucial constitutional questions, notably on how to balance the offices of the president, prime minister and chairman of parliament. A mixed system with a focus on presidential powers was put in place in 1996, but this did not significantly stabilize institutional relationships. The results so far have been three rounds of constitutional turns (the fourth is in the making). The original 1996 document was amended in 2004 and parliament was given more powers, which resulted in power struggles between president, parliament, and deputies from the ruling party and the political opposition. In 2010, President Viktor Yanukovič forced a return to the constitution of 1996 in order to receive more powers. Moreover, he was driving the country towards an authoritarian regime and towards Russia – a development that was stopped by public protests in winter 2014/2015. One result of the protests was a return to the 2004 parliamentary version of the Ukrainian Constitution. Due to the subsequent Russian aggression against Ukraine, the second attempt with the 2004 constitution has resulted in the most cooperative governing between president, prime minister and party heads since Ukraine’s independence. Nevertheless, the mixed system enshrined in the document continues to have serious shortcomings, which is one of the reasons why constitutional discussions have not ceased in Ukraine.*

Keywords: Ukraine, constitution, constitution-making, constitutional developments, presidential system, president-parliamentary system, mixed system

1. Introduction

“We need either a presidential form of government, similar to that in the US... or it should be a parliamentary republic. But not a parliamentary-presidential system or a presidential-parliamentary republic – those have turned out to be far too complicated for us” (Gazeta.ua 2008, translation N.G.). This statement of former Ukrainian President Leonid Kravčuk arrives at the core of constitutional politics after 1991. Constitution-making has largely focused on the question of whether or not the president should have more powers than the country’s parliament, resulting in mixed systems that reflected the personal power ambitions of individual politicians.

Parliamentarian forces have been considerably strong since the country's independence in summer 1991, and state presidents have not been able to consolidate purely presidential systems, even if they have repeatedly tried to do so. The 1996 constitution and the road to it largely reflect the attempts of President Leonid Kučma (in office 1994–2005) to enforce a political system with a strong president, to which end he tried to expand presidential powers. As a result of fading political and public support in late 2000, he propagated a stronger parliament. In 2004, the Ukrainian people had enough of manipulative politics and the election fraud following the 2004 presidential elections, and reacted with the 'Orange Revolution'. In addition, oppositional politicians and actors from civil society prevented the consolidation of an authoritarian presidential system fostered by President Janukovič (2010-2014); he was ousted as a result of the 'Euromaidan' protests in winter 2013/2014, and the country was pushed back to a premier-presidential system that had already quite unsuccessfully set the framework for the country's political system between 2006 and 2010.

Questions concerning the constitutional setting of the country have not concentrated on democracy or autocracy in the first place, but rather on the details of the powers of the country's president, prime minister and parliament.¹ The most important problem concerning constitutional politics is the misuse of the constitution by the country's highest representatives to secure their power, including popular referenda and instrumentalization of the constitutional court.

This chapter will first outline the constitution-making efforts that led to the 1996 Constitution of Ukraine, and then focus on the three major amendments of the constitution that have been made so far. The chapter will not discuss the probable amendments to the constitution as a result of Russia's war against Ukraine since February 2014.²

2. The road to the 1996 constitution

The institutional situation of Ukraine had been rather chaotic since its independence, and in the first period of transition only one institutional decision was clear: the Ukrainian people would

¹ For this reason the chapter will not cover theories such as the transition paradigm or categorize the Ukrainian democratic system. See for example Kubicek (1994, 2001), Kuzio (1997, 2005, 2010) or Riabchuk (2012) for works on the nature of Ukraine's democracy.

² The chapter will also not discuss other Russian efforts to influence Ukrainian constitutional politics since the country's independence and their political implications, for instance the question why a special status was granted for Crimea, or the issue of blackmailing/corruption when it came to constitutional issues. As for external western influence on constitutional developments, the chapter will exclusively consider the Venice Commission.

directly elect the president. Apart from that, the three most important institutional actors, the president, the prime minister and the parliament, had different conceptions of the nature of the future constitution. This slowed down the negotiation process considerably.

The differences of opinion particularly concerned the position of the Ukrainian President. The presidency was introduced after independence in 1991 and was later codified in the 1996 constitution. At that time, the president was the head of state, chief executive, and directed the government. Wolczuk (2001, 115) wrote that “in 1992, the presidential sphere of authority remained profoundly unsettled”. The office of the prime minister was placed within an institutional vacuum, too. An institutionalized political party landscape did not exist beyond a pro-Russian Communist Party. Neither the presidents nor the prime ministers had functioning parties that supported their constitution-making efforts in the first years of independence.

2.1 The 1995 constitutional agreement (Dohovor) and subsequent draft constitutions

The various constitutional drafts reflected the volatile political situation after the declaration of independence of the country on 24 August 1991. In summer 1991, the parliament approved the first concept for a new constitution, the second draft dates from June 1992, the third from January 1993, the fourth from May 1993, and then another one was presented in July 1993.³

The Venice Commission, the Council of Europe’s advisory board on constitutional matters, had issued various assessments of the January 1993 draft. The remarks made clear that this could only be the first step on a very long and rugged road towards a new constitution. One reviewer, for example, was not fully convinced that the authors had understood the nature of representative democracy, in an otherwise positive assessment.⁴

In his critique on the July draft, Futey (1994) concluded that the concept of checks of balances had been taken to an extreme: In this draft entire branches of government could dismiss each other. For instance, it was anticipated that both the president and the parliament would be granted the power to call for a nation-wide referendum to dismiss either the parliament or the president. The parliament had the right to dismiss the prime minister, and even the whole government. As such, the drafters seemed “uncertain as to whether they [were] establishing a parliamentary republic or a presidential one” (Futey 1994, 648). The fact that the political forces

³ See the Draft Constitution of Ukraine, May 27, 1993; including a substantial comment on the May 1993 version – the fourth draft (Draft Constitution 1994).

⁴ “Plusieurs articles donnent à penser que les rédacteurs n’adhèrent pas entièrement aux principes de la démocratie représentative” (Venice Commission 1993).

in the country – in striving to get the most out of the constitution for themselves – did not decide on either a parliamentary or a presidential republic would turn into the main problem of Ukrainian constitution-making.

In 1994, there were two important domestic political events: the parliamentary elections brought a strong leftist faction headed by the Communist Party of Ukraine (*Komunistyčna Partija Ukrajiny* – KPU) in June, and Leonid Kučma was elected president in July with over 52% of the votes (Erlanger 1994; Birch 1995). The left political forces were united in their desire to stop their adversary Leonid Kučma and to impede a presidential system. Kučma, in turn, was determined to gain as many presidential competences as possible.⁵ The result of this stand-off was that President Kučma presented a decree termed “Constitutional Law on Power and Self-Government” in December 1994. It was approved by parliament on May 18, 1995 with a simple majority, as Kučma had threatened to put it to a popular referendum (which would probably have approved it) (The Moscow Times 1995).⁶ The law became part of the June constitutional agreement (1995), which functioned as a transitory constitution called *Dohovir*, and had a limited duration of twelve months (Constitutional Agreement 1995).⁷

Kučma had reached his main goal of increasing presidential powers: He now could appoint the prime minister and all cabinet ministers without the consent of parliament, and could issue decrees on economic reform. However, he was not entitled to impeach the parliament and parliament could not impeach the president (Wolczuk 2001, 191f.). This first battle between the deputies (in particular leftist political parties) and the president was clearly won by the president. Leftist political actors obstructing Leonid Kučma and national-democratic forces favoring a parliamentary system were right in their assessment that the June 1995 constitutional agreement was paving the way for a political system dominated by the president. The result were endless struggles between the president, the presidential party and other parties in parliament, in particular the Communists (ibid.).

⁵ In autumn 1994, a state constitutional commission had replaced the former parliamentarian one. Leonid Kučma and Oleksandr Moroz, the new speaker of the parliament, co-chaired the body. Moroz also blocked attempts from Kučma to concentrate power in the future president’s hands.

⁶ See Protsyk (2005, 27f.) on Kučma’s use of decrees and their relevance for the constitution-making process and for more on Kučma’s presidency, see also Wilson (1997, 69f.).

⁷ See Wolczuk (2001, 196f.) on the contradictory norms of the *Dohovir*, the various commissions and their drafts, and the debates the latter provoked.

In November 1995, the president presented a document that resembled the June 1995 agreement.⁸ It was approved on March 11, 1996 by the parliamentary constitutional committee after a seven-hour meeting and in a turbulent atmosphere.⁹ As expected, left-wing political forces would not agree with the draft; Communists even refused to debate it in parliament. However, Myhailo Syrota, the head of a newly formed extraordinary commission, presented another draft in May 1996 which passed in the first reading of parliament despite the over 5,700 comments he had received from deputies (Kolomayets 1996b; Wolczuk 1988, 132f.). Leonid Kučma had first supported Syrota, but on June 27, 1996 had suddenly issued a decree that a referendum on the March 1996 draft would be held in September.¹⁰ This gave the constitution-making process and parliamentarians the necessary stimulus, as Kučma's draft could have passed in that referendum.

2.2 Finally: the 1996 Constitution

The constitutional night of June 27-28, 1996 was a historical event for Ukraine: Parliamentarians came together for a day-long, overnight session in which ad-hoc committees worked on certain articles, and voted 10 to 20 times. The most important point had been that left-wing forces and Communists agreed to adopt Ukraine's national flag, state symbol and anthem in exchange for giving Crimea the status of an autonomous republic with its own constitution (Kolomayets 1996c) (Wolczuk 2001, 202f.).¹¹ Finally, on the morning of June 28, 315 out of 450 members of parliament – thus a qualified majority – passed the new constitution (The Ukrainian Weekly 1996). It established a semi-presidential or president-parliamentary system.

The document sought to balance the rights of the state president and the national parliament, but the text still reflected Leonid Kučma's attempts at getting the political system under the control of a strong state president. The mistrust between the actors involved was best reflected in the direct election of both the president and the parliament; there was no final decision yet on

⁸ The constitutional commission, which in the meantime had delegated the process to a smaller working group of ten experts, failed to present a substantively different document in November 1995, as there was no consensus on how to redraft the 1995 Constitutional Agreement.

⁹ Moroz abstained from voting (Kolomayets 1996a).

¹⁰ See Wolczuk (2001, 205f.) in detail on the constitution-making process in 1995 and 1996.

¹¹ Ukraine had been eager to pass the document before the final round of the 1996 Russian elections to clearly underline the country's sovereignty and that Crimea was a part of Ukraine. Still, Russia occupied Crimea from February 27, 2014 onward and incorporated it in retrospect into the Russian Federation on March 18, 2014 after a referendum. The Venice Commission declared it being not in line with the Ukrainian Constitution (Venice Commission 2014).

whether the president or the prime minister would lead the country. The institutional struggles prevented a clear division of powers between the legislative, executive and judicial branches.¹² In practice, the president was elected directly by the people, and executive power was shared between president and parliament. Art. 106 stipulated 31 different presidential competences. This included that the president was the head of state, but not the head of government. The president appointed the prime minister with the consent of parliament and dismissed him, but he did not have the right to dissolve parliament. Additionally, the president appointed the defense and foreign ministers, and was allowed to veto laws (Ukraine 1996). In an environment of informal politics, bargains and corrupted parliamentarians, the power-sharing provisions provided a facade of mutual control. Practice demonstrated that the confirmation of the prime minister in parliament was a mere formality.¹³ In reality, the constitution had granted the president independence from parliament and control of the government through the prime minister.

3. Constitutional Politics in the new constitutional order

3.1 How to (unsuccessfully) amend the constitution? The 2000 referendum and the 2003 draft law

The fact that a new constitution was now in place did not mean that the president cut back on his power ambitions, nor did state institutions improve their work. In June 1999 (Leonid Kučma was to be re-elected president in October 1999)¹⁴, the left-wing dominated parliament had failed to consider about 700 draft laws on social and economic issues the president had submitted, out of which 50 had dealt with the practical implementation of constitutional statutes. This prompted Kučma to stage an attack on “parliamentary passivity” (Woronowycz 1999), and present problems of law-making as closely related to the nature of the 1996 constitution (Åslund 2009, 131; Chaban and Vernygora 2010, 233).¹⁵

In doing so, Kučma directly meant to lay the groundwork for extending his powers via a constitutional change. Art. 156 stated that amendments have to be passed by a two-thirds

¹² The Venice Commission subsequently criticized a separation of powers was not “consistently maintained throughout the text” (Venice Commission 1996); see also Futey (1996, 31f.) and Kuzio (1999, 28).

¹³ A rare example took place in 1999 when Prime Minister Valeriy Pustovoitenko was not re-confirmed (three votes missing). Moreover, the president dismissed prime ministers unilaterally up until the 2004 reform – Pavlo Lazarenko in July 1997, Viktor Juščenko in May 2001, and Anatolij Kinah in November 2002.

¹⁴ The 1999 presidential elections brought 56% for Kučma and 38% for the Communist candidate Symonenko in the final run-off. See also Birch, Wilson (1999) on the 1998 parliamentary elections in which the Communist Party (KPU) came out strongest with more than 25%.

¹⁵ Åslund (2009, 129) provides details on the desolate economic situation, especially in the context of the 1998 Russian financial crisis.

majority of parliament, and then approved in an All-Ukrainian referendum. Leonid Kučma decided to leave the parliament out of the decision and directly ask the people instead; he used his right to initiate a national referendum through a presidential decree.¹⁶ He proposed six questions. The constitutional court rejected the two most controversial ones: the question on the adoption of the constitution directly by popular vote and the one on the dismissal of parliament by an All-Ukrainian referendum.¹⁷ In April 2000, the Ukrainian citizens were thus asked to answer four questions: Whether to create a second chamber of parliament; whether to cancel the immunity of parliamentarians; whether to reduce their number from 450 to 300, and; whether the president should have the right to dissolve parliament under certain conditions. All questions were supported by around 80% of the participating voters (Venice Commission 2000a). However, there was no prospect of a two-thirds majority in parliament that would have been needed for the results' legalization. Thus, this attempt to extend the power of the president through a change of the constitution was prevented.

Afterwards, things turned against Kučma: In the course of 2000, he became unpopular, mainly on the grounds of his alleged involvement in the murder of the journalist Heorhiy Gongadze. The scandal resulted in protests calling for Kučma's resignation and the victory of the national-democratic party "Our Ukraine" (*Narodnij Sojuz "Naša Ukrajina"*) in the 2002 parliamentary elections with over 23% of the votes.¹⁸

In June 2003, Kučma saw that he or any candidate of his was likely to lose the upcoming 2004 presidential elections and that he had better chances in co-opting corrupted parliamentarians within the setting of a premier-presidential system. Thus, he presented a constitutional amendment draft stating that decisions adopted by national referenda would not need approval

¹⁶ See Article 106.6 of the 1996 Ukrainian Constitution: "The President of Ukraine shall: [...] appoint the All-Ukrainian referendum regarding amendments to the Constitution of Ukraine in accordance with Article 156 of this Constitution, and proclaim the All-Ukrainian referendum initiated through the popular initiative." And Article 156: "A draft law on making amendments to Title I General Principles, Title III Elections, Referendum, and Title XIII Making Amendments to the Constitution of Ukraine, shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine, or by not less than two-thirds of the constitutional membership of the Verkhovna Rada of Ukraine, provided that it is adopted by at least two-thirds of the constitutional members of the Verkhovna Rada of Ukraine, be approved by an All-Ukrainian referendum called by the President of Ukraine [...]" (Ukraine 1996). The outdated 1991 referendum law had been adapted slightly to the requirements of the 1996 Constitution.

¹⁷ The court in general deemed his undertaking not in line with the Ukrainian Constitution (Constitutional Court of Ukraine 2000).

¹⁸ The presidential alliance "For a United Ukraine" (*Za Jedynu Ukrajinu*) only came third, after the second-placed Communist Party with 20%. On the elections and their consequences, see Kuzio (2003) or Birch (2003).

from the parliament to become law and all seats in the lower chamber would be elected from party lists (at that time, half came from party lists and half from single-seat constituencies). Moreover, the prime minister and most government ministers would be appointed by parliament, and not by the president. Finally, the president would not have been allowed to dissolve parliament under certain circumstances (among others, if it failed to approve the state budget, which has been a problem in Ukrainian politics). The president of the Socialist Party (*Socialistyczna Partija Ukrainy – SPU*), Moroz, was skeptical, while Chairman of Parliament Lytvyn welcomed the initiative (Makhnonos 2003). In April 2004, the draft constitution received 294 votes, six votes short of the two-thirds majority required to amend the constitution (Wilson 1997, 79f.).

In this period, the constitutional court played a crucial role, although it could not solve the problems inherent to the 1996 constitution. In principle, the court had been established as an independent and powerful institution as it was the only institution to interpret the constitutional document, to decide on the unconstitutionality of laws, and to deliver a solution in institutional conflicts.¹⁹ The court was meant as an arbiter between president and parliament, but this also implied that it had to handle the most controversial issues – namely power struggles between President Kučma and the parliament, and later on Kučma’s aim to salvage his political power. In a controversial ruling, the constitutional court allowed him to run for president a third time in December 2003, but Kučma did not run (BBC 2003). Wolczuk (2001, 260) had noted that “[...] the Court found itself in a highly precarious and vulnerable position [...]. Despite the frequent invalidation of, at least some provisions of, legal acts, the Court often strove to limit the impact of its rulings by carefully seeking out the middle ground”. She also found that this strategy failed as the president became more and more aggressive and got the court to take his side (ibid., 331f.). Brown and Wise (2004, 160) later argued that the court “has been relatively balanced in its decision-making”. In particular, the 2000 referendum on the extension of presidential powers got the constitutional court into trouble. The legislative base for the referendum was provided, as the old 1991 referendum law had remained in force, but it was unclear whether the president would be able to initiate such a referendum and whether the popular vote would be binding.²⁰

¹⁹ The 18 judges were appointed for 9 years (equal shares by president, parliament and the High Council of Judges) without the right of reappointment; the appointment came into effect only after oath of the potential judge in parliament (Venice Commission 2011). On an assessment of the court see also Wolczuk (2002).

²⁰ In October 2000, the Venice Commission stated that a referendum cannot alter the Constitution (Venice Commission 2000b).

3.2 How to (successfully) amend the constitution? The December 2004 Law No. 2222-IV

Kučma had failed to amend the 1996 constitution in order to secure his power twice, the first of which had been a popular referendum, the second a vote in parliament. The third attempt to secure his power was made through a direct intervention. The presidential elections of November 21, 2004 were manipulated in order to allow his ally Viktor Janukovič to win over the oppositional candidate Viktor Juščenko. However, the people took to the streets and in the middle of public demonstrations, which turned into mass protests against Kučma (later called the Orange Revolution), the constitutional court on December 4, 2004 ordered a third round of presidential elections through which Viktor Juščenko was about to be elected president

The expectations surrounding an oppositional President – Viktor Juščenko – had convinced a wide range of elites that the 1996 constitution should be amended in order to weaken his power – and the new president showed little resistance. This resulted in a third attempt to amend the 1996 constitution: On December 8, 2004, the Chairman of Parliament Volodymyr Lytvyn managed to push through a constitutional amendment establishing a premier-presidential republic (Olearchyk 2004). 402 deputies approved the constitutional change as law No. 2222-IV, which was submitted as bill No. 4180, quasi-identical to the failed April 2004 bill No. 4105. The amended articles (Art. 76, 78, 81-83, 85, 87, 89, 90, 93, 98, 112-115) turned Ukraine into a premier-presidential republic (Law of Ukraine 2004, Bandera 2004, Venice Commission 2004). Viktor Juščenko was elected president on December 26, 2004 with 52% of the votes (Chivers 2004), but the competences of the president had been reduced.

3.2.1 Towards a parliamentary political system?

The constitutional amendment took effect on January 1, 2006, and replaced one mixed system by another. The only state institution that had reached a certain stage of institutionalization was that of the president – at the expense of all other formalized state institutions. The Venice Commission stated: “In practice [...] the 1996 Constitution resulted in a concentration of powers in the hands of the President and in a constant legislative-executive confrontation” (Venice Commission 2010).

Parliament gained power from the amendment, as it would name the prime minister and the government, and would have the right to dismiss the prime minister and individual ministers. The formation of the government was to be undertaken after parliamentary and no longer after

presidential elections. Members of parliament would lose their mandate if they left their party or faction. The legislative period of the Ukrainian parliament was extended from four to five years, and elections were to be based on proportional representation by party lists. Within one month after the elections, the parliament had to form a parliamentary majority in order to choose a government. If it failed to do so, it could be dissolved by the president. The parliamentary chairman – and no longer the prime minister – would take over the official duties of the president in the event that he was unable to perform his duties. This would become important in February 2014, after Janukovič left Ukraine for Russia. Nevertheless, the president still appointed the ministers of defense and foreign affairs, the prosecutor-general, and the head of the security service. He also had the right to propose candidates for the position of prime minister, even though he lost the power to appoint and dismiss the prime minister, and therefore the president remained a powerful institution with important legislative and appointment competences. He also continued to chair the National Security and Defense Council (NSDC), whose decisions were binding for executive organs. The presidency continued to have the right to appoint regional governors, who otherwise reported to the government.²¹

These amendments weakened the formerly strong presidency to some extent, but did not create a viable parliamentary system. It more closely resembled a political compromise between parliament and president than a real transfer of power to parliament (d’Anieri 2007, 19; Mussuri 2006). The Venice Commission was not convinced that there was a “balanced and functional system of government”, and it saw the danger of “unnecessary political conflicts” (Venice Commission 2010). Those fears materialized as Prime Minister Julija Tymošenko took office in January 2005 and almost immediately entered a conflictual relationship with the country’s president, which resulted in her dismissal in September 2005. D’Anieri (2007, 19) underlined in 2007 that there “is some reason to believe that the shift of power toward the parliament will replace the problems of Kučma’s reign with a new, but equally dangerous set. The new institutions may be prone to stalemate, which is hazardous in new democracies.” The immediate outcome of the new institutional setting was an ongoing power struggle between the president and the parliamentary majority (of the Party of Regions (*Partija rehioniv* – PR), the Communist Party (KPU), and the Socialist Party (SPU) formed after the 2006 parliamentary elections).

²¹ See Art. 85 on the extended powers of the Ukrainian parliament, Art. 116 on the competences of the government, and Art. 106 on the competences of the president.

3.2.2 The president, the prime minister, and the constitutional court

Those who had expected the new oppositional politicians to rule differently, were disappointed. In summer 2006, Oleksandr Moroz pushed a resolution, subsequently passed by parliament, that took away the constitutional court's right to revise the legality of the December 2004 constitutional amendments made in the context of the Orange Revolution. In 2007, President Viktor Juščenko fired three judges of the constitutional court, and the court was not able to determine the legality of his decree to dismiss parliament and call early elections (which supposedly had been against the constitution). The second Tymošenko government that came into office in 2007 also used the topic of the constitution in political battles, but refrained from proposing reforms to alter the unsuitable formal institutional framework.²²

Subsequently, State President Juščenko appealed to the constitutional court in order to obtain an interpretation of the provisions on the referendum and the procedure to amend the constitution. Referring to its 2000 and 2005 decisions, the court stated in April 2008 that it was the Ukrainian people who exclusively had to decide on amendments to the constitution in an All-Ukrainian referendum (Constitutional Court of Ukraine 2008b). A referendum had been never held, and speaking in a strictly legal sense, this switch to the premier-presidential system was thus unconstitutional.

The president did not opt for a referendum, but for a national constitutional council in 2008, which was installed to work out a new constitutional text. In the light of Julija Tymošenko's power ambitions, it provided for more rights for the president and a second chamber in parliament, but did not solve the more fundamental issues (Kyiv Post 2009). And there was more trouble coming up: In December 2008, Julija Tymošenko – who had always been quick to change coalitions for the sake of personal power – and Viktor Janukovič presented a document that outlined a parliamentarian system with the election of the president by the parliament.²³ In response, President Juščenko submitted a draft law with constitutional amendments that contained among others a presidential right to veto government decisions on foreign policy, defense, and security matters (Kyiv Post 2009). At this stage, a public debate had evolved that centered on the necessity to introduce a completely new constitution as a prerequisite for political change (Lange and Reismann 2009, 2). However, political elites in general had no interest in

²² See Hesli (2007) and Copsey (2008) for the consequences of the institutional battles.

²³ The coalition and according agreements were called "PriByuT", see Chaban and Vernygora (2010, 236), Kubicek (2009, 324f.), and Izvestija (2008).

solving the issue, as daily politics left no room for fundamental political decisions, and as the matter of the constitution had – up until then – been a suitable political instrument.

3.3 How to (successfully) amend the constitution? Return to the 1996 Document

In 2010, political forces around Kučma and the Party of the Regions got what they had wanted since 2004: Viktor Janukovič won the presidential elections and was appointed president on February 25, 2010.²⁴ The constitutional situation became even worse: The new president started with a serious violation of Art. 83 in order to be able to elect his own prime minister, and get rid of Julija Tymošenko. According to Art. 83, only deputies of parliamentary factions were able to take part in the election of a prime minister. However, the president also allowed individual/independent deputies in the election process in order to avoid having to appoint an oppositional prime minister. This procedure – which can be called a constitutional putsch – was nonetheless approved by the constitutional court in April 2010 (Kyiv Post 2010, Constitutional Court of Ukraine 2010a).²⁵

On October 1, 2010, the constitutional court reinstated the semi-presidential system of government according to the 1996 constitution, and ruled the 2004 amendment unconstitutional. Janukovič had reached his goal of strengthening his position. However, the constitutional court did not cut a fine figure in this game: In February 2008, it had rejected an appeal by 102 deputies who doubted the constitutionality of the 2004 amendment. In July 2010, 252 deputies made a second claim with basically the same content, and the court ruled that the constitutional amendments were unconstitutional (Constitutional Court of Ukraine 2008a, 2010b; Koliuško and Žurba 2010). Futey criticized the fact that this was done without “proper explanation”, but the decision was “doubtlessly legitimate, since the procedures for enacting the political reform were unconstitutional” (The Ukrainian Weekly 2011, 9). Besides, in 2005, the constitutional court had decided that changes in the political system of Ukraine have to be submitted to and approved by a national referendum (Futey 2011).

²⁴ Julija Tymošenko lost tightly with 45.47% against 48.95% for Janukovič, and spoke of serious electoral fraud. On the elections, see for example Herron (2010). Kuzio (2010, 208f.) analyzes the general developments in the first Janukovič period.

²⁵ Art. 59 on the “Rules of Procedure of the Verhovna Rada” had been altered. In its new version (March 9, 2010) it permitted individual deputies to join the deputy factions in order to elect the prime minister. Thus a procedural regulation had been used to invalidate a constitutional provision.

The opposition claimed that a dictatorship was about to be established (Kyiv Post 2010). For the first time, the terms autocracy and dictatorship were connected explicitly to the discourse around the constitution. Indeed, Janukovič's misuse of the constitutional court and the constitution far exceeded any instrumentalization by his predecessors, including Leonid Kučma.

In February 2011, the constitutional changes became effective. A return to the 1996 constitution would have required parliamentary elections in March 2011 (the last Sunday in March four years after the previous election). However, Janukovič forced parliament to approve constitutional amendments that postponed parliamentary elections until October 2012 and presidential elections until March 2015 (Law of Ukraine 2011). The president was again given the right to nominate and dismiss the prime minister without a prior proposal from parliament, to approve ministers, and to appoint the head of the security service – institutions that were subsequently misused to cement his power (The Ukrainian Weekly 2010, 3).

International protest against those anti-democratic developments was not very pronounced. But the Venice Commission considered it “highly unusual” that far-reaching constitutional amendments, including the change of the political system of the country, were declared unconstitutional by a decision of the constitutional court after a period of 6 years. It argued that constitutional courts are bound by the constitution and do not stand above it, and “such decisions raise important questions of democratic legitimacy and the rule of law” (Venice Commission 2010).

In May 2012, President Janukovič installed a 94-member constitutional assembly headed by former President Leonid Kravčuk. Its task was to submit a law proposal by the end of 2013 that would enable certain changes in the current constitution – according to Kravčuk, the changes could encompass up to 30% of the current content. In late 2012, he called the 1996 constitution “half-legitimate”, referring to assessments by the Venice Commission (RFE/RL 2012; Kpnews 2012). Janukovič was embarking on a purely presidential and authoritarian system.

3.4 How to (successfully) amend the constitution? Return to the constitution as amended in 2004

At the end of November 2013, protests erupted against Janukovič's authoritarian style of government, following his refusal to sign the association agreement with the European Union. Hundreds of thousands of protesters assembled on Kyiv's Independence Square demanding the president to resign. He let the security forces forcefully disperse the demonstrators several times, and further reacted with anti-protest laws that would put heavy fines on protesters. On January

16, 2014, these laws were approved by 235 deputies by a show of hands to prevent the political opposition from blocking the voting (Reuters 2014). However, the demonstrations continued and by February 18, 2014, events were overturning in Kyiv: The riot police Berkut and SBU security service forces stormed Kyiv's Independence Square and tried to crack down the protest violently, killing hundreds of protesters in the next few days.²⁶ The protesters refused to leave and the president and his closest collaborators abandoned their offices, most of them also leaving Ukraine in the night of February 21-22, 2014.

On February 21, 2014, parliament had already voted in favor of a return to a premier-presidential system with the approval of 386 deputies (Law of Ukraine 2014; Ukraine 2014).²⁷ On February 22, 2014, parliament ousted the former president from office (with 328 votes), and members of the political opposition took power. Oleksandr Turčynov, the new chairman of parliament, became interim president with 282 votes. According to the terms of the EU peace deal of February 21, 2014, Janukovič had to sign the return to the 2004 constitution, but failed to do so and left the country for Russia. The Ukrainian parliament did not initiate a process of impeachment that was possible both under the 1996 and the 2004 constitutions (Art. 111) if the president committed treason or another crime (Sindelar 2014). A government led by Arseniy Jatsenjuk was formed on February 27, 2014.²⁸

After these events, the reform of the constitution was back on the political agenda. A parliamentary commission prepared a proposal that would reduce presidential powers to merely symbolic ones and submitted it to the Venice Commission in May 2014 (Venice Commission 2015a). On May 25, 2014, Petro Porošenko was elected president with 54.7% of the votes, and subsequently presented his proposal for constitutional reform.²⁹ On July 3, 2014, parliament decided to formally initiate the next round of constitutional reform and underlined in this context that it strongly resisted the (international) calls for a federalization of the country, which had come as a reaction to the Russian aggression in the Donbas. It was, however, accepted that power should be delegated to local government agencies. In this regard, Porošenko stated that the

²⁶ See The Interpreter (2014a) on February 18, 2014 and The Interpreter (2014b) on February 20, 2014 – the bloodiest day of the protests when snipers atop government buildings in the city center gunned down protesters. For possible Russian involvement see Unian (2014). Investigations on the issue are ongoing.

²⁷ 397 deputies out of 450 had registered. Votes in favor came from 140 deputies from the Party of Region, 89 from Batkivščyna, 40 from UDAR, 32 from the CPU, 35 from Svoboda, and 50 independents (Interfax 2014)

²⁸ Jatsenjuk continued as prime minister after his newly formed party National Front won the parliamentary elections in October 2014.

²⁹ For a critique see Hromadske.tv (2014).

decentralization of state tasks would be a powerful countermeasure against the federalization of the country, and he successfully submitted a proposal for constitutional reform and the decentralization of state competences to parliament (Draft Amendment 2015; Venice Commission 2015b).³⁰

4. Conclusion: The Ukrainian constitutional order a quarter century after 1989

Ukraine's tragedy in its constitution-making process since 1991 is that no constitutional solution has been able to bring the country the necessary constitutional stability. The power ambitions of the respective presidents were too strong and their involvement in the constitution-making process too significant, as they would have allowed for a purely parliamentary system. For most of the time, parliament was able to control the presidential power ambitions. However, whenever parliament took power into its own hands, it proved poorly capable to do so.

The mixed systems that were enacted caused serious practical problems when it came to institutional relationships – before and under the 1996 constitution between the president and parliament (personified through its speaker), and under the 2004 constitution between the president and prime minister, and between deputies from the ruling party and the political opposition.

The mixed constitutional system had the effect that power ambitions of the state presidents, single prime ministers – in particular Prime Minister Julija Tymošenko – and the chairmen of parliament destabilized the whole political system. Accordingly, constitutional changes reflected power constellations and relations between the president, the prime minister, and chairmen of parliament: strong presidents provoked quasi-presidential, and in the long run authoritarian, systems and Prime Minister Julija Tymošenko became de facto president.

After almost 25 years of experience with various forms of mixed systems, it can be said that the mixed systems and power ambitions of Ukraine's presidents did not support the country's development. As Ukraine's society has proven with large-scale protests (the Orange Revolution 2004 and Euromaidan 2013/2014), it does not accept the post-Soviet version of an autocratic system with a dominant president.

After February 2014, Russia opted for continuous military aggression against Ukraine, incorporating Crimea illegally into the Russian Federation, occupying part of the Donbas with its hybrid army, periodically threatening with a continental war. Being in a state of war, Ukraine

³⁰ For more critique see Rafalskyi (2015).

cannot allow itself to embark on constitutional adventures.³¹ Thus, the country has remained trapped in its mixed system with two powerful political offices. Of particular importance in this is that the stability of the political system depended on a factor that has been hard to deliver for Ukraine: A prime minister and a president willing and able to cooperate.

It is clearly in the interest of the Ukrainian nation to change this self-destructive constellation. A probable way out could be the popular election of a constitutional assembly, which has so far never been considered. The most important goal of such an assembly would be to present a constitution that is able to balance individual power ambitions, which in practice should result in the preparation of a document leading towards a parliamentary system.³²

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31 The situation is complicated by the so-called Minsk Agreements in which Ukraine is forced to decentralize power and to enshrine a „special status“ of the Donbas in the constitution (Telegraph 2015).

32 Ukraine as of summer 2015 has largely managed to contain anti-democratic and Russian forces previously present in parliament with large numbers of parliamentarians, notably the Communist Party (KPU), the Social-democratic Party of Ukraine (united) (*Social-demokratyčna Partija Ukrajiny (ob'jednana)* – SDPU(o), the Party of Regions or the Opposition Bloc (*Opozycyjnyj blok*), that sabotaged legislative processes among others. At the same time, the office of the president underlies little democratic control. Those facts speak strongly in favor for a serious try on a parliamentary system. Compare also with the chapters on Moldova and Romania.

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