

Political laboratory

It's time to move on from 15 years of constant constitutional instability

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OUTGOING PRESIDENT LEONID KUCHMA SIGNS CHANGES INTO THE UKRAINIAN CONSTITUTION ON DECEMBER 8 DURING THE 2004 ORANGE REVOLUTION FOLLOWING NEGOTIATIONS TO BREAK THE POLITICAL DEADLOCK BETWEEN THE BLUE AND ORANGE CAMPS. WITH HUNDREDS OF THOUSANDS OF PROTESTORS ON THE STREETS OF KYIV A CONSTITUTIONAL COMPROMISE WAS EVENTUALLY REACHED, BUT IT HAS CREATED RIVAL POWER BASES WHICH HAVE DESTABILISED UKRAINIAN POLITICS EVER SINCE. NEW CONSTITUTIONAL CHANGES ARE CURRENTLY BEING CONSIDERED BY BOTH PRESIDENT AND PARLIAMENT





Nothing is ever as it seems in Ukraine's Byzantine political world. The December 8, 2004 parliamentary vote on a package of bills agreed at EU-brokered negotiations during the Orange Revolution included a provision for constitutional reforms to be introduced in 2006. Viktor Yushchenko agreed to the reforms in exchange for his election on December 26, 2004. The only parliamentary faction to vote against the package was the Yulia Tymoshenko bloc (BYUT).

Political experiments continue

Today, nearly four years on, positions among the political elite have shifted significantly. Mr. Yushchenko seeks to return to a presidential system while Mrs. Tymoshenko announced her intention during a mid-April speech to the Parliamentary Assembly of the Council of Europe (PACE) that she favoured reforming Ukraine's constitution further towards a full parliamentary system modelled on that of Germany.

In a later interview on the ICTV channel she warned that the first reading of a new constitutional bill would take place prior to the summer parliamentary recess, "Because no country can develop steadily, strategically, and become stronger in the world geo-political space, if there is a chaos of government."

Mrs. Tymoshenko's complaint that the 2006 constitution had brought "chaos" was based on her criticism of mixed presidential-parliamentary systems that inevitably lead to "dual power." In Mrs. Tymoshenko's view, it is better to have pure presidential or parliamentary systems rather than the hybrid versions that have been chosen by Ukraine.

In choosing which is better suited for Ukraine, Mrs. Tymoshenko argued: "I believe that the parliamentary form of government will at last introduce order - it will be similar to that in Germany. There will be a Chancellor and an order. At the same time, I stress once again, the President will remain and the all-Ukrainian election of the President will remain."

Pure parliamentary systems can include presidents elected by parliament or presidents elected in national elections. The key question is that of the extent to which any new system would leave the president or chancellor with limited executive power over the government.

Ukraine's perennial constitutional instability

Only two of Ukraine's seventeen years of independence have been free from attempts to reform the constitution: these years were 1999 and 2005. Constitutional instability has inevitably led to political instability and splits among the elite on the strategic priorities for Ukraine, both domestically and externally.

In 1991-1996 Ukraine sought to adopt a constitution to replace its Soviet-era Ukrainian constitution that had itself already been amended on numerous occasions. In June, 1996, Ukraine was the last of the fifteen former Soviet republics to introduce a new constitution. This however only came about after a marathon all-night session of parliament following a threat issued by President Leonid Kuchma to hold a constitutional referendum that would bypass the body altogether.

Putting the issue to referendum

Twelve years on Mr. Yushchenko and his Minister of Justice are again

threatening to hold a referendum if their version of constitutional reforms is not adopted. As in 1996, the threat of a referendum may spur parliament into action but ultimately it seems likely that parliament will prevail and a referendum will not be held. Holding a referendum would open up a Pandora's Box of other questions that the Party of Regions could add to the ballot. The last thing the President wants is an additional referendum question on NATO that undermines the potential for Ukraine to receive a Membership Action Plan (MAP) next year. Mr. Yushchenko is also plagued by low public support meaning that he would run the risk of losing any referendum held today.

Following the adoption of Ukraine's semi-presidential constitution it took another two years before Crimea adopted a constitution that was in legally compliant with Ukraine's basic law. Crimea had been developing a constitution even longer than Ukraine, working on its document since 1992, but until 1995 the drafts adopted by the peninsula had were too separatist in nature to receive multilateral acceptance.

A year of constitutional peace in 1999 was followed by Mr. Kuchma seeking to use Ukraine's first non-leftist parliamentary majority to reform the 1996 constitution towards his preferred super-powered presidential system. Four referendum questions in April 2000 received suspiciously many votes that were not internationally recognised.

Kuchmagate and constitutional changes

The attempt to move to the aforementioned super-powered presidential system (similar to that which Russia had adopted in autumn 1993) was undermined by the onset of what became known as the Kuchmagate crisis in November 2000. Tape recordings allegedly made illicitly in the president's office appeared to indicate that Mr. Kuchma had ordered violence against missing pro-democracy journalist Georgi Gongadze was unveiled to a stunned parliament. Mr. Gongadze's decapitated body was found earlier that month following his abduction in September. Three low-ranking policemen who abducted Mr. Gongadze and were present at the murder were convicted in March 2008 but many observers agree that the real organisers are either dead or have received immunity. Mr. Kuchma and others implicated on the tape continue to deny the allegations against them.

The Kuchmagate crisis torpedoed Mr. Kuchma's long-standing ambition to transform Ukraine into a super-powered presidential system. However, it was not long before he returned to the constitutional question, but this time from the opposite direction.

Following the 2002 elections, presidential administration head Viktor Medvedchuk initiated constitutional reforms towards a parliamentary system. Although Mr. Kuchma clouded his reforms amid the rhetoric of moving Ukraine towards Europe, in reality the main purpose, which was widely understood inside and outside Ukraine, was to deprive the favourite to win the 2004 elections – Viktor Yushchenko – of the extensive powers invested in the 1996 constitution.

These steps led to two years of instability as the pro-Kuchma parliamentary majority (which wavered between 200 and 230 deputies) sought to entice the left (the Communist and Socialist parties) into supporting the reforms. The left had always backed Ukraine's transformation into a parliamentary republic on ideological grounds as they had never supported the introduction of president in 1991. Predictably, the future Orange coalition (Our Ukraine and BYUT) opposed constitutional reforms.

The attempts at constitutional reform in 2003-2004 failed, just as they had in 2000. Although a slim majority in the first parliamentary session voted in favour of the reforms (when a minimum of 226 votes are required) the vote in the second parliamentary session failed to muster the required constitutional majority of 300 votes.

Revolution and reform

Ukraine's elites returned again to the theme of constitutional reforms during the 2004 Orange Revolution. At the instigation of Mr. Medvedchuk and then-parliamentary speaker Volodymyr Lytvyn, a compromise was reached during the three round-table negotiations sponsored by the EU. In return for Mr. Kuchma and his Kyiv allies dropping their support for Viktor Yanukovich's candidacy, Mr. Yushchenko was to be in effect "guaranteed" election in the re-run second round providing he agreed to the constitutional reforms that he had opposed in 2003 and 2004. Mr. Kuchma is also alleged to have received immunity from prosecution.

The only concession that Yushchenko received was that constitutional reforms would go into effect in January 2006, rather

than immediately after his election. The Ukrainian electorate therefore voted for a president with his powers invested in the 1996 constitution only to find that he lost them again after only one year in office.

In 2005 Ukraine again, as in 1999, had a short interregnum from constitutional instability, although it was not to last long. In 2006-2007 during the Yanukovich "anti-crisis coalition" government, Mr. Yushchenko increasingly called for constitutional reforms to reclaim some of his lost powers. The president eventually created the National Constitutional Council on December 27, 2007, only nine days after Mrs. Tymoshenko's parliamentary confirmation as the new PM.

Parliament v president

A rival parliamentary commission on constitutional reforms is likely to be set up in May. With the support of four of the five parliamentary factions it has a better chance of success than Mr. Yushchenko's council. BYUT and the Party of Regions have a constitutional majority of 331 deputies who could initiate constitutional reforms inside parliament that would bypass the President's Council, from which the Party of Regions has already withdrawn.

The Party of Regions would support constitutional reforms out of fear that Mrs. Tymoshenko could be elected president in January 2010. This fear is little different from their support for constitutional reforms under Mr. Kuchma when they feared a Yushchenko election victory.

The Lytvyn Bloc and Communist Party, with an additional 47 deputies, would support constitutional reforms towards a parliamentary republic on ideological grounds. Even within the Our Ukraine-People's Self Defence faction's 72 deputies, 18 deputies from Interior Minister Yuriy Lutsenko's People's Self Defence group have given their backing to Mrs. Tymoshenko's proposals for constitutional reforms. In 2006 Mr. Lutsenko defected from the Socialist Party, which has always been a strong supporter of a parliamentary republic.

Back to the Future

Ukraine urgently needs to move on from the constitutional instability that has plagued it for 15 of its 17 years of independence. Ukraine's elite took the longest of all Soviet republics to create a post-Soviet constitution and ever since has been trying to reform it.

In supporting constitutional instability Ukraine's elite has in effect put its personal

interests above those of the nation, a not uncommon pastime for elites unafraid of legal sanction and still remaining above the law. Attempts to reform the constitution in 2000, 2002-2004 and since 2006-2007 have all been at the behest of presidents who have sought to gain strategic advantage over their political rivals.

Having the right constitution is only half the question: of crucial importance is the issue of who is president. Mr. Yushchenko is Ukraine's only president to have served under two constitutions - In his first year in office he served under the 1996 constitution and since 2006 he has served under the revised constitution.

Mr. Yushchenko's leadership has not dramatically differed between the two constitutions. Although vested with enormous power during his first year in office there is no evidence that he used these powers to implement the demands of the Orange Revolution. One of his most radical steps, namely the removal of the Tymoshenko government, turned out to be counter-productive.

Under the 2006 constitution the president continues to hold power, controlling regional governors, the appointment of the defence and foreign ministers, prosecutor-general and National Security and Defence Council secretary. If his party is in power he can also gain control over the Interior and Justice Ministries.

Returning Mr. Yushchenko some of the additional powers he lost in the 1996 constitution will not therefore majestically lead to a radical reform programme by a reinvigorated president. He has controlled the prosecutor-general under both constitutions and yet has kept in place dinosaurs from the Kuchma era (Sviatoslav Piskun) or Donetsk allies of the Party of Regions (Oleksandr Medvedko) rather than use this important office to reform Ukraine's rule of law. Attempts to change the constitution therefore again seem to be merely a product of seeking power for power's sake.

Mrs. Tymoshenko's game plan

In giving her support for a parliamentary republic Mrs. Tymoshenko has effectively fired a warning shot across the President's bow. He can now follow one of two paths: He can continue the confrontational stance and megaphone diplomacy against the government that he and his sidekick Viktor Baloha, head of the presidential secretariat, have been undertaking since the government came into

office five months ago. Or alternatively he can remove Mr. Baloha - a key BYUT demand that has widespread support even inside the Our Ukraine party - and establish a new co-operative relationship with the government.

As BYUT deputy Mykola Tomenko recently warned, the President should either dismiss the government or stop criticising it. This would require that the President halt his attempts at blocking every government policy. It is surprising that Western commentators who used every available means to attack the 2005 Tymoshenko government for its alleged hostility to privatisation are today silent when the government's privatisation programme is blocked by the President.

If the president ignores the words of discontent emanating from Strasbourg he will face consequences that would more resemble those of a kamikaze pilot than a rational head of state. Refusal to remove his highly-influential right-hand man Mr. Baloha and seek better relations with the government could lead to an irrevocable breakdown in the Orange coalition. Mrs. Tymoshenko would go ahead with constitutional reforms inside parliament, thereby bypassing the President altogether. More importantly, without Mrs. Tymoshenko's support Mr. Yushchenko will almost certainly not win a second term as President and find himself ejected from office, destined either for obscurity or infamy as the man who squandered the opportunities of the Orange Revolution.

What does Ukraine need?

The transformation of Ukraine into a full parliamentary system is desirable for five inter-related reasons. First, Ukraine's historic political culture is more suited to parliamentarism just as Russia's culture is more suited to a strong Tsar. Secondly, Ukraine's regional diversity is better represented by parliamentarism. In a presidential system one side always wins, whether eastern Ukraine and Mr. Kuchma in 1994 or western Ukraine and Mr. Yushchenko in 2004, and one side is therefore left disgruntled at being marginalised. Third, presidential elections have always been the source of inter-regional instability, whether in 1994 or in 2004, that have nearly led to the break-up of the country.

Fourth, parliamentarism is popular among Ukraine's business and political elites as it gives them greater freedom. Ukraine's "grown-up elites" do not wish to return to the Kuchma era when the former president manipulated

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and played them off against each other. Fifth, parliamentarism will take Ukraine towards Europe and away from Eurasia. Since the late 1990s the 27 post-communist states have split into two groups, with those in central-eastern Europe adopting parliamentary systems and those in Eurasia presidential systems. Parliamentarism assisted central-eastern Europe in its democratisation and eventual integration into NATO and the EU.

Time to move on

Mrs. Tymoshenko is right to bring the issue of constitutional instability to the forefront of Ukraine's political debate. The 2006 constitution should be reformed once and for all this year and then be quietly buried as an issue. Ukraine's progress in reforms, its battle against corruption, establishment of the rule of law and unity in the face of a resurgent imperial Russia could depend on it. With Ukraine on the brink of a breakthrough in its integration with the West, sustained period of constitutional stability is critical. ●