Eine kurze Geschichte des ukrainischen Verfassungsrechts

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On 21 February 2014, the parliament voted in favor of a law that reinstates into force several provisions of the 2004 Constitution of Ukraine, along with a few other changes (unfortunately, there is no English version of the new Constitution available yet; the one in force until February 2014 can be accessed here). 386 members of the parliament voted in favor. While the changes might not be perfect, they restore the balance of powers between the parliament and the president.

In my view, over the past years, Ukraine was *de jure* within the legal frames of the Constitution of 2004, and *de facto* illegally changed the Constitution that was operating by a 2010 decision of the Ukrainian Constitutional Court. The decision contradicts Ukrainian constitutional law and illustrates how Yanukovich sought to gather all power in his hands (along with his other acts, such as the "dictatorship laws" of 16 January 2014). Here is, step by step, how we ended up with the Constitution of 2010 and why it was actually invalid.

The Ukrainian Constitution before 2004

The Constitution of the USSR (Ukrainian Soviet Socialistic Republic) was adopted on 20th of April 1978 and went through substantial changes between 1989 and 1996. In 1992, after the Soviet Union collapsed, Art. 68 of the Constitution was amended to state that Ukraine is an independent state and the emblem of the USSR was removed, as were all provisions mentioning the Soviet Union later that year. In 1995, former Ukrainian president Leonid Kuchma and the speaker of the parliament Aleksandr Moroz signed a Constitutional agreement, which was in force until the adoption of the new Constitution of 1996.

The Constitution of an independent Ukraine was adopted in 1996 by the parliament. It replaced the previous Constitutional agreement and the Constitution of 1978. The Venice Commission strictly recommended introducing a constitutional reform in order to avoid a constitutional crisis and to organize a referendum, which would allow the people to choose the form and order of the state. Both lawmakers as well as specialists on constitutional law criticized the text of the Constitution, as it led to various legal collisions.

In 2000, president Leonid Kuchma initiated an All-Ukrainian referendum on the following points: a) introducing the two chambers of the parliament; b) granting the president a right to dissolve the parliament when it is not able to form a coalition within a period of three months or is not able to adopt the budget; c) reducing the number of the members of parliament from 450 to 300; d) depriving the members of parliament of their immunity. These measures weakened the role of the parliament vis-à-vis the president.

The 2004 Constitutional reform

During the Orange Revolution, Kuchma called upon the parliament to pass Law No. 2222- IV, the so-called "Constitutional reform" of 2004, and stated that he would otherwise refuse to hold reelections. The reform weakened and limited the powers of the president. By that time, the Supreme Court of Ukraine, at the request of Viktor Yushchenko, had already issued a decision asserting that the election results could not be determined due to mass falsifications. The law introducing the Constitutional reform was approved by majority (402 ayes – in favor voted the Party of Regions, Yanukovich's political force, Kuchma, and their allies, the Communist party of Ukraine; the opposition, the "Block of Yulia Tymoshenko", as well as Ms. Tymoshenko and Mr. Yushchenko personally, voted against Law No. 2222.) It is now difficult to say why Tymoshenko and Yushchenko opposed the constitu-

tional changes of 2004: whether it was just a typical behavior of the opposition to criticize and oppose every act and initiative of their opponent, the president; or a strategically reasoned decision in light of Yushchenko's real possibility to become president – why limit their own power? (I should note though, that Yushchenko, after he became president, formed the National Constitutional Council in 2007, which was tasked with preparing a concept for systematic Constitutional reform. However, his initiative was not successful.)

The Constitutional reform provided for a transition to a parliamentary republic. The prime minister was to be elected by the parliament upon a proposal from the president. The parliament (the coalition of deputies' fractions in collaboration with the prime minister) was in charge of forming the government – the Cabinet of Ministers (except for the minister of foreign affairs, the head of the security services of Ukraine and the minister of defense – these positions were proposed by the president and reported to him). The legislative term was extended from 4 to 5 years.

The Constitution of 2010

Between 2006 and 2009, the leaders of the Party of Regions and Yanukovich himself repeatedly expressed public support for the Constitutional reform. However, in 2010, as it was no longer for their benefit, their position dramatically changed to the opposite. A group of 252 parliamentarians, mostly from the Party of Regions, filed a request to the Constitutional Court (CC), seeking to reverse the Constitutional reform of 2004. Their main argument was that the rules of procedure had been violated when Law No.2222 was adopted (prior to voting, certain provisions were reformulated without seeking an opinion of the CC, as foreseen by the rules of procedure). By its decision of 30 September 2012, the Constitutional Court overturned Law No. 2222, and thus reinstated the pre-2004 Constitution. Ukraine became a presidential republic once again: the president had the power to appoint the heads of local administrations; it was in his power to dissolve the parliament if no plenary meeting was convened during thirty days of a regular session; he proposed the candidate for the post of the General Prosecutor, to be elected by parliament, but had at the same time the power to dismiss the General Prosecutor without the parliament's approval. All the ministers were appointed by and reported to the president.

Why the reversal of 2004 Constitution was invalid

Only once, since the declaration of independence of Ukraine, the parliament executed constitutive power on behalf of the Ukrainian People, when it adopted the Constitution of Ukraine in 1996. Through this Constitution, the parliament limited itself to the status of a legislative organ with no constitutive power. Every Ukrainian constitution since 1996 has vested the parliament with the exclusive authority to introduce amendments to the Constitution of Ukraine (with the exception of Chapter I — "General Principles," Chapter III — "Elections. Referendum," and Chapter XIII — "Introducing Amendments to the Constitution of Ukraine," – these chapters can only be amended by an all-Ukrainian referendum, initiated by the president) through a complicated procedure that requires a two-thirds majority of the parliament. This exclusive right of the parliament to amend the Constitution confirms the impossibility of any other acts of any other governmental bodies with respect to changes of the Constitution.

In its preamble, the Constitution of Ukraine states that the Constitution is the Fundamental *Law* of Ukraine. Art. 150, which regulates the powers of the Constitutional Court, states that the Constitutional Court has the power to interpret the laws (*laws – as opposed to Law with a capital letter "L")* and other acts of the Parliament and to judge on their conformity with the Constitution. However, the CC has no constitutive power, and, therefore, no power to change the provisions of the Constitution.

Consequently, the CC exceeded its power when it chose to reverse Law No. 2222. Instead of ruling on the procedural mistakes in adopting this law, the CC returned to the previous constitution and changed the existing constitutional order. Several separate opinions of the judges disagreed with the majority's decision to nullify the 2004 amendments. In particular, they suggested that the CC should limit itself to

declaring the procedural mistake and send Law No. 2222 to the parliament on a revote.

The decision of the Constitutional Court to overturn the Constitution of 2004 is highly misleading. The Council of Europe's Human Rights Commissioner received several reports alleging that the resignation of four judges in the run-up to the decision occurred as a result of extensive pressure by the executive (for example here). The Venice Commission commented in this respect that: "it also considers highly unusual that far-reaching constitutional amendments, including the change of the political system of the country – from a parliamentary system to a parliamentary presidential one – are declared unconstitutional by a decision of the Constitutional Court after a period of 6 years... As Constitutional Courts are bound by the Constitution and do not stand above it, such decisions raise important questions of democratic legitimacy and the rule of law".

I cannot ignore the curious fact that Ukrainian politicians changed their position from one in favor of a parliamentary republic to opposing it, depending on their current position and interests. They simply changed the fundamental law as was advantageous for their particular situation. In 2000, Leonid Kuchma (at the beginning of his presidency) initiated a referendum that limited the powers of the parliament, shortening the number to 300 deputies and creating two chambers. In 2004, when he was on the brink of resigning, he introduced the Constitutional reform of 2004. When Yanukovich was part of the opposition, he supported limiting presidential powers. Once he became president himself, his position changed to the contrary and he went on to usurp the executive, legislative and judicial powers.

It is not surprising that after several years where the legislative and executive power was concentrated in the hands of one person, the idea of parliamentary republic became popular and was picked up by the Maidan protesters. This idea was not new and was often discussed in public society and in political circles. Whether the Maidan represents the majority of the population remains an open question. In my view, the parliament is the representative of and legitimate organ to speak on behalf of the people.

For now, it seems that the parliamentary order will help to maintain a balance of powers and prevent its concentration in one hands. In order to achieve overall stability (including economical), the constitutional changes are definitely not enough. Constitutional reform is needed, but it requires a professional and careful approach, which will take time.

I am sure that nowadays the public will look closely at every decision of Yanukovich's successor. And those who repeat his double-standards approach are looking at the same fate.On 21 February 2014, the parliament voted in favor of a law that reinstates into force several provisions of the 2004 Constitution of Ukraine, along with a few other changes (unfortunately, there is no English version of the new Constitution available yet; the one in force until February 2014 can be accessed here). 386 members of the parliament voted in favor. While the changes might not be perfect, they restore the balance of powers between the parliament and the president.

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