

UKRAINE

THE PROMISE AND THE RISK OF CONSTITUTIONAL REFORMS

EXECUTIVE SUMMARY

After the revolutionary events in February, Ukraine's parliament restored the 2004 version of the 1996 constitution, which weakens the role of the president and enhances the powers of parliament. There is widespread agreement among pro-democracy forces, however, that more constitutional reforms are needed. The Council of Europe's Venice Commission has regularly recommended changes to Ukraine's constitution ever since it was adopted in 1996.

The Venice Commission's recommendations would provide guarantees for democratic governance, in particular: a workable balance of power between state institutions; reform of the Soviet-era prokuratura (prosecutors' office) and the judiciary; and the introduction of a personal mandate for members of parliament, rather than mandates being controlled by parties. The Verkhovna Rada (parliament) has established an *ad-hoc* committee to draft constitutional changes for a first reading before presidential elections on 25 May, which would then be adopted in a second reading during the next parliamentary term in autumn.

The reform process presents a chance for the long-demanded changes to the constitution, but there are risks that it will not succeed. The to-be elected president might try to undermine changes that would weaken the presidency. Furthermore, the public might reject reforms if they are carried out in a backroom fashion. Given the difficulty of this transition in the context of Russian threats, the momentum for reform could peter out and the necessary two-thirds majority might not be reached.

To address these challenges, the reform should be speedy, aiming for conclusion this year. While speed is not ideal in

terms of generating public understanding and acceptance of reforms, these constitutional reforms have been intensively debated in Ukraine ever since 1996. The political class, civil society and legal experts know what needs to be done.

The challenge will be to convince a restive public that quick reforms do not present another backroom deal, but that they fulfil the country's democratic aspirations. For this reason it is imperative that the Rada conduct regular and genuine consultations with civil society and the wider public and that it has a proactive communication strategy. Ukraine's international partners should continue to support the process and insist that reforms be in line with recommendations by the Council of Europe.

1. BACKGROUND

The question of reforming Ukraine's 1996 constitution has been at the centre of many major political crises in Ukraine. After the Orange Revolution in 2004, the constitution was significantly revised, in particular to shift power from the president to parliament. In a controversial decision in 2010, the Constitutional Court overturned the 2004 amendments, restoring strong presidential powers. On 22 February 2014, the Rada reinstated the 2004 amendments. Yet, the Council of Europe's Venice Commission found the 2004 version of the constitution problematic in some aspects. Ukrainian policymakers now state their intention to address these shortcomings.

2. KEY CONSTITUTIONAL REFORMS

The upcoming constitutional process is about essential elements of a democracy, which have been raised by the Venice

Commission since 1996.¹ They remain an issue in the version of the constitution, namely:

- **System of government, and the balance and separation of powers:** The 1996 constitution created a semi-presidential system with a parliament, a government headed by a prime minister and a directly elected president with a powerful role. While initially the balance of power worked reasonably well and parliament provided a counterweight to the president, later *de facto* powers shifted strongly to the president, giving the system an authoritarian character. One of the demands of the Orange Revolution was increased powers to parliament, which were instituted in the constitutional amendments.

Formation of the government was now based on a parliamentary majority, with the president's role reduced to formal approval. The Venice Commission's opinion on the 2004 version of the constitution welcomed these changes but recommended further reforms to avoid overlapping competencies and blurred lines of accountability between the president and the cabinet.

The implementation of the 2004 version of the constitution was disastrous: President Viktor Yushchenko and Prime Minister Yulia Tymoshenko, former allies in the Orange Revolution, were embroiled in bitter power disputes, discrediting the Revolution and resulting in public disillusionment. The role of the president in the 2004 version has been described as too weak to lead but strong enough to spoil.

The Venice Commission recommended in particular that the establishment of a parliamentary majority should be less formalistic. The Commission found that more stability could be achieved by establishing a German-style "constructive non-confidence vote" whereby parliament could only vote no confidence in a government if a sufficient majority also exists for electing new prime minister. The Commission further recommended that the entire cabinet be nominated by the prime minister, including the ministers of interior and foreign affairs. Under the 2004 version of the constitution, these two are named by the president, leading to unclear lines of responsibility of the two ministers.

- **Reform of the *prokuratura* (prosecutor's office):** The *prokuratura* is a Soviet-era institution with far wider powers than prosecutors enjoy in most democracies. Most notably, in the 2004 version of the constitution, the *prokuratura* is charged with the "supervision of the observance of human and citizen's rights and freedoms and the fulfilment of laws by bodies of executive power and by bodies of self-government" (Article 121 paragraph 5). The *prokuratura* thereby overshadows the administration of justice by courts. The *prokuratura* is seen as a powerful political tool, as well as an entry point for corruption. The Venice Commission recommended that the supervisory power of the *prokuratura* be greatly reduced while the role of the Authorised Human Rights Representative of Ukraine be strengthened.

- **Reform of the Judiciary:** The Venice Commission recommended that the appointment and dismissal of certain high officials and constitutional-court judges not be decided by absolute majorities, but rather by qualified majorities (such as two-third) in the Rada, in order to avoid partisan appointments. The Commission also made detailed recommendations on the mandate of the Supreme Court², on the appointment procedures and disciplinary

measures for judges.³

- **The nature of parliamentary mandates:** According to the 2004 version of the constitution, deputies of the Rada lose their seat if they leave the parliamentary faction of the party on whose ticket they were elected (often referred to as "imperative mandate" as opposed to a personal mandate). Given the weakness of political parties in Ukraine and wide-spread corruption (many deputies stand accused of changing sides based on bribes), there is a strong lobby in Ukraine for continued party control of mandates. The Venice Commission has however recommended this change since 1996, highlighting that deputies represent people rather than parties. Reforms in this area may need to be accompanied by changes of electoral and political party legislation.

What is the Venice Commission?

The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice - is the Council of Europe's advisory body on constitutional matters.

The role of the Venice Commission is to *provide legal advice* to its member states to help bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. The Commission has 59 member states, including the 47 Council of Europe member states.

¹ All references to Venice Commission recommendations in this chapter relate to the Commission's 2005 opinion on the Amendments to the Constitution of Ukraine, 8.Dec.2004, N. 339/2005, which can be downloaded here: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)015-e)

³ For a detailed appraisal of judicial reforms see also: Policy Brief by the Centre for Political and Legal Reforms, 11 March 2014, which can be downloaded here: <http://www.en.pravo.org.ua/index.php/148-public-administration/559-judicial-reform-in-ukraine-challenges-and-recommendations>

- **Decentralisation:** Decentralisation has not been a key theme of the Venice Commission's opinions. Politically speaking decentralisation is the elephant in the room. Despite its size and heterogeneous make-up, Ukraine is a rather centralised state. There appears to be agreement that more powers should be handed to the governorate or local levels. Many policymakers have however been wary of anything that could move the country towards federalism, which they fear could be a prelude to secession.

These fears have become more urgent in the context of Russia's occupation of Crimea, coupled with Russian demands that Ukraine should become a federation.⁴ The Russian intervention has effectively contaminated the debate and will make it difficult to have a reasoned discussion on decentralisation in the short term. While the current constitutional reforms could be used to make some progress on decentralisation, in the longer term Ukraine would benefit from a more far-reaching discussion about the allocation of power and resources in the country; such a debate is unlikely to be constructive now.

3. THE CURRENT CONSTITUTIONAL REFORM PROCESS

After the Maidan revolution in February 2014, the alliances in the Rada shifted significantly. Most deputies now support the wide-ranging democratic reforms demanded by the Maidan groups, NGOs and the wider public. As mentioned, on 22 February the Rada reinstated the 2004 version of the constitution. On 4 March the Rada established an *ad-hoc* committee for constitutional reform, which should propose amendments before April 15. The committee is composed of representatives of the major parties.⁵ According to Article 155 (on constitutional amendment) of the constitution, the second reading needs to take place in the "next regular session", which would be in autumn.

The foreseen timetable is politically significant: It is based on the idea that before the presidential elections the shape of amendments, notably the reduced role of the future president, should be defined. The period between the first and the second reading could be used for public consultation and debate on the proposed amendments. This moment offers the chance to make the reforms long recommended by the Venice Commission.

⁴ Foreign Minister Lavrov in a speech to parliament on 21 March: "A more specific thing, which is included in our propositions, is our conviction that the federalisation of Ukraine should be the goal of the constitutional reform. To make statesmanship of this country sustainable, the results of the constitutional reform should be approved by all regions. The results should be put to a nation-wide referendum", http://www.mid.ru/brp_4.nsf/0/1EB0F5937A80B6B444257CA500519090

⁵ The resolution was published on the Rada's website: <http://rada.gov.ua/en/news/News/News/88951.html>

4. WHAT COULD GO WRONG?

There are a number of risks to the process:

- The constitutional court must verify the constitutionality of proposed changes, even if only on a narrow basis of criteria (conformity with articles 157, 158; see article 159). The court has been highly politicised and might act as a veto player.
- After election, the new president might be inclined to undermine the reform process in order to fend off a reduction in his or her powers.
- A lack of public consultation by the parliamentary *ad hoc* committee could undermine the credibility of the reforms. The process could be perceived as traditional political horse-trading as opposed to genuine, inclusive reform. Civil-society groups are already expressing concerns.
- Spoilers aiming at undermining the reform process could portray the constitutional changes as illegitimate tampering with the constitution by a new parliamentary majority bent on enhancing its powers.
- The Rada may fail to generate the required 2/3 majorities in the second reading.

5. CONCLUSION: HOW TO MAKE IT WORK

The Venice Commission at various times has recommended reforms to the 1996 constitution, and its subsequent amendments, which would bring the constitution in line with Ukraine's obligations as a member of the Council of Europe. Ukraine's international partners should continue to highlight these as key reforms. Ukrainian civil society and expert communities should likewise advocate for these changes to avoid mixed messages on the reform agenda. Clearly expressed public and international expectations in the constitutional-reform process would make it more difficult for potential spoilers to undermine the process. Ukrainian media and civil society should demand presidential candidates to express their opinion on these changes.

There should also be agreement on the need for speedy reforms. While ordinarily a longer process may strengthen public consultations, in this case the momentum for reform could be lost soon. Constitutional reforms have been intensively debated in Ukraine since 1996. The reforms recommended by the Venice Commission are well-known, understood by the political class, civil society and legal experts and in line with the country's democratic aspirations.

To make sure the wider public understands and accepts such changes as a way of democratising Ukraine, the *ad hoc* committee should open its deliberations and consult with interested groups and the wider public in a systematic manner. Civil

society and the media should broadcast these debates and considerations beyond Kiev. International partners have signalled that they would support such a process. Public outreach would help to neutralise framing by spoilers. A fast, open and inclusive constitutional reform process would help binding those political energies clamouring for reforms, such as the Maidan groups. A clarification of constitutional powers should also help Ukraine to achieve a workable political system to deal with the numerous challenges of a democratic transition during an economic crisis in the context of the Russian threat against Ukraine.

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