

UKRAINE'S POLITICAL REFORMS: ONE YEAR ON FROM EUROMAIDAN

EXECUTIVE SUMMARY

Ukrainian reformers and Ukraine's European partners, such as the Council of Europe's Venice Commission, have demanded for a long time that significant, widespread political reforms be adopted to break a corrupt and largely inefficient political economy. The Venice Commission alone has published 73 detailed opinions on Ukraine since 1995. The Euromaidan revolution and its aftermath have opened a new window of opportunity to mark this break from the past.

The jury is out on whether the opportunity will be seized. Some significant reform laws have been adopted, such as the reform of the Soviet-era prokuratura, but the future of essential signature reforms remains unclear with various documents – President Poroshenko's 2020 programme, the coalition agreement, the new government's 'action programme' – painting a fuzzy picture of priorities and plans. Indeed the most operational document, the government's action programme, is the least explicit about essential political reforms.

Constitutional reforms should be the highest priority now, to use the 'constitutional moment' of a new era and recast the overall political-legal arrangements as long as the parliamentary majority allows garnering the necessary 2/3 majority. An inclusive but swift constitutional reform process would also provide an understandable narrative to the wider public that may otherwise quickly get lost in the technicalities of legal reforms. The contents of necessary constitutional reforms are well known and uncontroversial among Ukrainian reformers and European bodies. They focus on such issues as the political system, the independence of the judiciary, the prosecutor's office and decentralisation. Strangely, constitutional reforms seem to be dropping steadily on the priority list of policymakers. Avoiding constitutional reforms now risks putting all other reforms into question in the future,

when they could be found to be inconsistent with an unreformed constitution.

On election reforms the focus of reformers is mostly on changes to the electoral system, abolishing the majoritarian components of elections, which are considered to be the main culprits of electoral corruption in the past. However, every electoral system has pros and cons and reformers should not leave fixes to the legal framework out of sight that are not related to the electoral system, such as the composition of election commission, the fragmentation of laws and campaign finance regulation which all contributed to poor electoral conduct in the past. There is particular pressure to reform the system of local elections, which are to be held in autumn 2015.

The question of local elections is linked to complex decentralisation reforms that are aimed at simplifying the country's territorial structure and lessening the strong centralisation of the current system, which not only alienates the local levels from the state but also allows formidable political corruption at the central level. The key aims of decentralisation are a simplification of the structure and more local and regional autonomy in policymaking and resource allocation as well as stronger public participation and representation at those levels. In short, decentralisation should bring the revolution back to the people across the country. Comprehensive decentralisation is not thinkable without amending the constitution as well.

The reform of the judiciary is another required signature reform. The content of such reforms has long been clarified by Ukrainian reformers and the Venice Commission alike, aiming in particular at stronger mechanisms for the independence of judges and depoliticisation of high-level judicial appointments. Again, such reforms not only require an overhaul of ordinary laws, but of the constitution as well. The same is true for

further changes to the role and appointment mechanisms to the prosecutor's office.

1. INTRODUCTION

2014 was a transformative year for Ukraine: President Yanukovich fled the country on 21 February, Russia occupied Crimea in March and is involved in the violence in Eastern Ukraine, Petro Poroshenko was elected President with a majority in all regions on 25 May¹. On 25 September, he presented a reform programme called 'Agenda 2020'. The 26 October parliamentary elections brought significant support for five parties that run platforms of reforms: The People's Front of Prime Minister Yatsenyuk (22,14% of votes in the proportional component), the Poroshenko Bloc (21,81% proportional), Samopomich (10,97% proportional), the Radical Party of Oleh Lyashko (7,44% proportional) and Batkivshchyna (5,68% proportional).² The two leading parties did not exist a year ago. On 21 November, a coalition agreement was signed by the five out of six parties in the new parliament to lay out their reform plans. This document takes a commitment to implement all major reforms demanded by the Euromaidan and expected by the European partners of Ukraine regarding targeted political transformation, with references, *inter alia*, to constitutional, electoral, judicial and local reforms, although some are highlighted in the form of a detailed action plan, while others are only mentioned in passing. On 9 December, Prime Minister Yatsenyuk presented the 'Government Action Programme for 2015-2016' that was approved by the Verkhovna Rada two days after.

Contrary to ambitious plans back in spring 2014 no comprehensive political reforms were adopted in the period until October. A draft by President Poroshenko for constitutional reforms was not consulted and did not make headway in parliament. It received a mixed review from the Council of Europe's Venice Commission. Since then constitutional reforms seem to have dropped on the list of priorities. They are not explicitly mentioned in any of the key documents for reforms, such as Poroshenko's 'agenda 2020', the coalition agreement³ and Yatsenyuk's government action programme for 2015-2016.

The main pieces of reforms adopted through 2014 included the law on the prosecutor's office, a raft of anti-corruption laws, a lustration law and a new public procurement law. The

lustration law has been particularly controversial and was commented critically by the Venice Commission⁴. In all other areas significant legal reforms have yet to be adopted, not to talk about implementation.

With local elections due in autumn 2015, there is a particular pressure on decentralisation and electoral reforms, which in turn require constitutional reforms.

2. CONSTITUTIONAL REFORMS

The constitutional reforms are the most important of all political reforms for several reasons. This is first of all a matter of momentum: The reform-minded parties have 305 seats in the Rada and three members of the Rada's presidency⁵. Constitutional amendments require approval by a 2/3 majority (Article 155 of the constitution), i.e. 300 of the 450 seats in the Rada.⁶ However, as Ukraine's past and transitions elsewhere show, the strong public and party support for reforms could erode fast. The coming months appear to be Ukraine's *constitutional moment*, offering a rare chance to change the country's fundamental set-up in line with its commitments *vis-à-vis* the Council of Europe.

The constitution is also an essential document to *establish a constitutional, rule of law based culture*. In public the constitution is often perceived to be more of a political than a legal document. It was changed as a part of a political package deal legitimising the outcome of the 2004 Orange Revolution in 2004 (in particular, making it possible to conduct the 'third round' of the presidential elections). In 2010 the Constitutional Court declared the 2004 changes unconstitutional on procedural grounds. The judgment, reached after Yanukovich won the 2010 elections, was seen as blatantly political and criticised by the Council of Europe's Venice Commission⁷. In February 2014, after Yanukovich's departure, the constitution was changed back to the 2004 version amid legal controversy.

The upcoming constitutional process should mark a break with this tradition. While the constitutional process should be swift, to maintain momentum, it should be open and inclusive. While ultimately it is the Rada that has to approve the constitution, in the drafting process civil society and the

1 The results of the presidential elections in the regions can be found on the official webpage of the Central Election Commission of Ukraine: <http://www.cvk.gov.ua/pls/vp2014/wp001>.

2 This leaves the Opposition Bloc (9,43% proportional), a parliament faction mostly formed of former members of Yanukovich's Party of Regions, as the only official opposition in the new parliament, though a number of representatives of the former regime who got elected as independent candidates, are also expected to be in opposition. This said, the parliamentary coalition of pro-reform parties, if consistent in preserving the alliance, is expected to secure an overwhelming majority.

3 The coalition agreement was signed by the following parties: Poroshenko Bloc, People's Front, Samopomich, the Radical Party of Oleh Lyashko and Batkivshchyna.

4 Interim Opinion on the Law „On Government Cleansing“ („Lustration Law“) of Ukraine, 16 December 2014, No.788/2014, available at <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29044-e>.

5 The speaker and the two vice-speakers belonged to the coalition fractions but formally lost their party affiliation, according to the Parliament's Rules of Procedure.

6 Currently 27 seats of parliament are vacant. Thus *de facto* currently 300 seats represent more than 2/3 of the actual members of parliament. It seems clear however that the constitution requires a 2/3 majority of the 'constitutional composition' of 450 seats (article 76 constitution). The 27 vacant seats include: 12 members that could not be elected in the single member districts of Crimea, due to the Russian occupation and inability to hold elections in nine districts of Donetsk and six districts of Luhansk due to the war in the East.

7 Opinion on the Constitutional Situation in Ukraine, 20 December 2010, No. 599/2010, available at

<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29044-e>.

interested public should be consulted in a transparent and accountable manner. In the past the balance between presidential and prime-ministerial powers have been a major sticking point of constitutional reforms. Given the current power balance, in particular the composition of the coalition in the Rada, there is a chance that a more lasting, functional balance of power is achieved. The demise of the Orange Revolution due to power struggles between then President Yushchenko and Prime Minister Timoshenko serves as warning on how to squander a constitutional moment.

The coalition agreement of November 2014 contains little indication of the main directions of constitutional reforms, but commits to an open, transparent and inclusive process that should lead to drafting of constitutional amendments in line with the recommendations of the Venice Commission.⁸ These recommendations are well known to the politicians and the society as constitutional changes and have been debated in the country since 1996. The Venice Commission has over time delivered several opinions and recommendations related to constitutional reforms.⁹

While striking of an optimal balance between the political branches of the government is among the most important, but also the most sensitive and politicised issues, other long-standing recommendations are in place which should help the country to strengthen its democratic institutions. These include abolition of the constitutional provision according to which members of parliament lose their mandate if they fail to stay in the parliamentary faction of the party on whose ticket they were elected (imperative mandate), as well as elimination of blanket restrictions on the right to stand in parliamentary elections for those who had prior criminal record. After all, the constitutional reform is to pave way for most of the key political reforms which are among the priorities for the new government, including: establishing a functional balance and separation of powers, reforms to establish the independence of the judiciary, the reform of the prosecutor's office and decentralisation.¹⁰

3. ELECTORAL REFORMS

Electoral reforms figure high on the list of demands for reforms. It is worth recalling that the 2004 Orange Revolution was triggered by protests against election fraud.

As far as **parliamentary elections** are concerned the public debate has centred on the electoral system. The mixed proportional-majoritarian system for parliamentary elections is widely rejected. Its majoritarian component (single mandates) is associated with fraud and manipulation. The single-mandate

elections have been seen as the Achilles heel of elections, as local political and business elites, supported by authorities in Kyiv, extensively engaged in vote-buying and abuse of administrative resource to advance loyal candidates. The dissatisfaction of protest groups with the majoritarian system increased when former members of Yanukovich's Party of Regions passed to the parliament as independent candidates in single-mandate districts in the October 2014 elections.

The reform of the electoral system and specifically elimination of majoritarian elections is one of the key demands of the Euromaidan movement. The November 2014 coalition agreement commits to replace the existing mixed system for parliamentary elections with a pure proportional system with open party lists. The government's action programme is silent on the issue. A proportional system appears to be seen by many as a panacea to all electoral problems. However, every electoral system has pros and cons. For example, abolishing single member districts could be in tension with decentralisation, depriving the electorate of a possibility of local representation. Any decision in this regard should be conscious of its drawbacks.

The electoral system is not stipulated by the constitution, it is only a matter of the electoral law. Legislative initiatives to replace the mixed proportional-majoritarian electoral system with the one based on open list proportional contests have been brought earlier this year, but no such initiative obtained the vote of the outgoing parliament despite considerable support by the Maidan movements and the new ruling elites. Some amendments to the election legislation were made prior to presidential elections of May, but these did not affect the electoral system and were mostly technical in nature¹¹.

Furthermore, it should not be overlooked that many shortcomings in Ukrainian elections (parliamentary, but presidential and local elections as well) result from a **problematic legal framework** unrelated to the question of the electoral system. Many Ukrainian experts as well as the Venice Commission and OSCE/ODIHR pointed at many problems in this regard, such as: a fragmented legal framework (no uniform election law); limitations to stand as a candidate in elections; lack of political pluralism in lower-level election commissions; only weak mechanisms on campaign financing and unclear rules on invalidating elections. Fixing such 'technical' shortcomings to reduce electoral corruption should not be controversial and could be addressed speedily.

At this stage of the transition, the **local elections** will quickly become the focus of attention, given that they should take place in autumn 2015. They are widely seen by the reformists as the last step in voting remnants of the Yanukovich era out of office. Again, as for parliamentary elections, a focus is on electoral system change towards an open-list proportional

8 See p 9 of the coalition agreement available in Ukrainian at: http://solydamist.org/wp-content/uploads/2014/11/the_coalition_agreement_1.pdf.

9 See DRI's Briefing Paper 46: *The Promise and the Risk of Constitutional Reforms*, available at http://democracy-reporting.org/files/dri_briefing_paper_46_constitutional_reforms_ukraine.pdf.

10 See DRI's Briefing Paper 46: *The Promise and the Risk of Constitutional Reforms*.

11 Several changes were made in election laws in March-May 2014, mostly to make the presidential elections feasible and to pass some technical amendments (e.g. facilitate the simultaneous conduct of early presidential elections and parliamentary by-elections, enable military in the anti-terrorist operation to vote, etc).

system. The coalition agreement promises to improve the system of local elections in the first half of 2015, including, *inter alia*, by replacing majoritarian elections at the upper levels of local self-government with proportional ones. The government's action programme does not touch upon the issue. Preparing and implementing those changes before the election dates would be challenging. As is the case for parliamentary elections, attention should be given to fix the legal framework removing various shortcomings that favor electoral corruption.

4. JUDICIAL REFORMS

President Poroshenko highlighted judicial reforms as a cornerstone of his 'Agenda for Reform 2020'. In the coalition agreement the parties committed to wide-spread reforms of the judicial sector on the level of laws and constitution. Judicial reforms are long demanded by Ukrainian reformers and many international actors. The Venice Commission alone published seven opinions on this theme. The key recommendations have been the same ever since Ukraine joined the Council of Europe: Reducing political influence in the appointment and removal of judges, appointment of constitutional judges by qualified (sometimes also called supermajority, meaning more than a 50% + 1 absolute majority), rather than absolute majority in the parliament. It also found the function of the parliament to appoint other, non-constitutional judges to be inappropriate and welcomed the suggestions to assign the power of appointing ordinary judges, for a life term, to the president, upon the binding motion of the High Council of Judges. It also recommended strengthening the powers of the Supreme Court and empowering it with a function to ensure uniform application of law. Ultimately, the Commission had noted that the constitutional reform would be an appropriate occasion for rethinking the four-tier structure of the judiciary in a view to see whether the transition to a three-tier system is desirable. This would entail changes in Article 125 of the constitution.¹²

First measures affecting the judiciary taken by post-Maidan parliament earlier this year were not institutional in nature, but rather revolutionary and somewhat superficial. In February, the parliament passed laws to enhance its role in appointing judges and subsequently replaced several judges on higher courts, including five judges of the Constitutional Court. Further, in April, the parliament passed a law on "Restoring Trust in Judiciary", more commonly referred to as the law on lustration of judges. The law provided for decomposition of the High Council of Judges and ordered replacement of heads and the deputy heads of all courts, as well as called for lustration of all judges adjudicating politically sensitive cases in the context of public protests.

¹² Joint Opinion on the Law on the Judicial System and the Legal Status of Judges of Ukraine, 18 October 2010, No. 588/2010, available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282010%29026-e>.

Despite strong public support, these measures put the judiciary under strong pressure.¹³ The new parliament should make steps from retributive actions towards well-designed institutional changes. The coalition agreement provides for a list of first measures to be taken in the sphere of judicial reforms with the aim of simplifying the system on the constitutional level and ensuring impartial qualified judicial procedures.

5. REFORMS OF THE PROSECUTOR'S OFFICE

In a positive development, the long-awaited law on prosecutor's office was adopted by the parliament on 14 October.¹⁴ Until now, the prosecutor's office was a continuation of the Soviet prokuratura with much wider powers than those enjoyed by its western counterparts. Most significantly, the prosecutor's office was empowered with the so-called function of 'general supervision' which granted it with far-reaching powers in checking on implementation of laws by any individual or entity, including executive and local self-government bodies.¹⁵ This system not only rode roughshod over the separation of powers, it was also credited with opening the door to wide-spread corruption. Elimination of the function of 'general supervision' was one, albeit not the only important change brought by the new law. The law also removed the prosecutor's function to issue arrest warrants and in general, considerably reduced its investigative functions, transferring these functions to a newly established body, the State Bureau of Investigation. It also provided for a completely new concept for competitive recruitment of prosecutors, their self-governance and discipline, as well as the code of ethics.

In its most recent opinion on draft constitutional amendments of President Poroshenko, the Venice Commission welcomed the intention of Ukrainian authorities to reform the prosecutor's office and, more specifically, to eliminate the function of general supervision. The Commission, however, outlined a need for additional improvements, which would enhance independence of the prosecution service from political bodies. The recommendation, which would also necessitate constitutional amendments, called for removal of the power of the parliament to vote no confidence in the prosecutor general and warned against granting similar powers to the president as a way to balance the parliament's influence on this body. In addition, the Venice Commission recommended that to bring the institution closer to the standards of the Council of Europe, the prosecutor general should be appointed for a single term, either for a long

¹³ The OSCE/ODIHR Final Report on Early Presidential Elections of 2014 refers to hesitation of judges to adjudicate certain cases for fear of repercussions, following the "lustration" laws and specific incidents (see p. 24): available at <http://www.osce.org/odihr/elections/ukraine/120549?download=true>.

¹⁴ The law was passed in the first reading in November 2013 as a condition to signing the Association Agreement with the EU.

¹⁵ See DRI's Briefing Paper 46: *The Promise and the Risk of Constitutional Reforms*, p. 2, supra note 1.

period of time or until retirement, rather than for an indefinite time but contingent on the political mandate by either the president or the parliament. In addition, the grounds for dismissal of the prosecutor general should be specified in the constitution or a law, to strengthen the independence of this body from the political branches of the government.

6. DECENTRALISATION

There is a general consensus among the new political establishment, as well as the civil society on the necessity of decentralisation. The Ukrainian discourse on decentralisation mainly implies delegation of powers from the central government to the local authorities and strengthening of self-government in the regions and local communities. Ukraine's territory includes 24 regions (oblasts), in addition to the Autonomous Republic of Crimea. The cities of Kyiv and Sevastopol have a special constitutional status. The second tier of the complex, asymmetric Soviet-type territorial division includes some 490 districts or rayons, as well as cities of oblast subordination, and the third tier consists of small cities and villages. Currently, oblasts and rayons have elected legislatures but are governed by executives directly appointed by central government. Only in cities of oblast subordination and in smallest communities of the third tier local executive bodies (mayors) are elected.

The coalition agreement reflects the willingness of the new parliamentary majority to reconstruct local government based on the principle of subsidiary and the standards set by the European Charter of Local Self-Government. The government's action programme however only includes limited steps of strengthening local self-government. The draft constitutional amendments of President Poroshenko, in the meanwhile, had gone as far as to propose removal of state administration at the regional and district levels and delegation of respective executive functions to local self-government bodies. While the Venice Commission welcomed this possibility in its opinion on the draft, the coalition agreement has few if any indications that the idea of fundamental withdrawal of executive leverages of the state from the regions is shared by the coalition.

The decentralisation discourse has meanwhile firmly avoided any talks of federalisation amid fears of separatism. Demands by Russia that Ukraine federalises have all but poisoned this question. Laws on the special status of Crimea ("On ensuring civil rights and freedoms, and the legal regime on the temporarily occupied territory of Ukraine") and Donbass ("On special procedure of local self-government within certain rayons of Donetsk and Lugansk regions") were passed respectively in April and September in the context of trying to find a peaceful solution. The latter contained provisions on special self-government regime for the break-away regions, as well as special terms for language policy and local elections.

The status of the Russian language is a key issue to be addressed by the decentralisation reform. The draft amendments to the constitution proposed by the president suggested to empower local councils, from those in villages up to those in the regions, to provide a special status to the Russian language, as well as any other minority languages

within the boundaries of the respective territorial units. However, the Venice Commission found that this suggestion raises concerns with respect to its compliance with the Council of Europe standards on minority protection, as the right to use a minority language should be provided irrespective of the support of the majority in local representative bodies.

7. ANTI-CORRUPTION MEASURES

On 16 September, the parliament passed the long-debated lustration law that entered into force on 16 October and was seen as a key indication that the new authorities are determined to tackle corruption. The law provides for a screening mechanism for some estimated one million civil servants and political appointees and bars several categories of officials in the Yanukovich regime, as well as former Soviet KGB intelligence from holding office in all three branches of the government, as well as in the prosecutor's office and the military. The list of those who were barred by the law included, by default, all higher ranked officials in the presidential administration and the government, as well as prosecutors of all levels and members of the High Council of Judges, who served during Yanukovich's presidency. The ban also concerned all employees of law enforcement agencies, civil servants and local self-government bodies who have participated in political repressions and restricted freedom of assembly during the former regime and those who had made public statements containing calls for separatism, infliction of national hatred and violation of Ukraine's sovereignty.

On 17 November, the Supreme Court challenged the lustration law in the Constitutional Court, which is expected to deliver a verdict in the coming weeks. Meanwhile, the Venice Commission delivered a critical interim opinion on the new law, pointing out that the criteria for lustration, in particular the concept of guilt, should be reconsidered and the lustration measures should comply with the guarantees of fair trial. In addition, the Commission stressed the necessity for an independent commission to carry out the lustration process, rather than the Ministry of Justice.¹⁶

An anti-corruption package, including a series of other, more narrow-tailored laws, was passed on 14 October. The package included the "Law on Anti-corruption Strategy", the "Law on the System of Specially Authorised Anti-Corruption Bodies" (or the Law on National Anti-Corruption Bureau of Ukraine), the new version of the "Law on Public Procurement" and the "Law on Prevention of Corruption". The adoption of the anti-corruption package followed the demands of the Euromaidan and was a response to the conditionality by international financial institutions and the EU-Ukraine Association Agreement. The package envisages the creation of a designated anti-corruption agency, the National Anti-corruption Bureau of Ukraine, which will be charged with investigating, as well as preventing corruption-related offenses

16 Interim Opinion on the Law „On Government Cleansing“ („Lustration Law“) of Ukraine, 16 December 2014, No. 788/2014.

by high-ranking officials. The new legislation also introduces some new procedures for the screening of public officials and provides for mandatory disclosure requirements and declarations of income by them. The package, in addition, introduces a scrutiny procedure for public procurement, which was traditionally prone to corruption risks.

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This publication has been produced with the assistance of the the Norwegian Ministry of Foreign Affairs. The contents of this publication are the sole responsibility of Democracy Reporting International and Institute of International Relations of Taras Shevchenko National University of Kyiv. They can in no way be taken to reflect the views of the Norwegian Ministry of Foreign Affairs.

