

THE SEVEN PITFALLS FOR POLITICAL REFORMS IN UKRAINE¹

INTRODUCTION

Since Ukraine's new government has been sworn in on 2 December 2014 the main political reform law adopted by parliament has been the judiciary law.² Other key political reforms on the electoral framework or decentralisation have not been moved forward yet. The process for comprehensive and long demanded constitutional reforms is just beginning.³ On 3 March 2015, President Poroshenko established a commission to elaborate the necessary constitutional reforms. Composed of representatives nominated by the government agencies, political parties, civil society, academia and international organisations, the commission is expected to devise and propose constitutional amendments in an open and inclusive consultation process. Constitutional reforms are needed to anchor most of other key reforms and to safeguard them against a future constitutional challenge, as argued in DRI's December Briefing Paper assessing the political reforms adopted after Euromaidan.⁴

Three months after the formation of the new government, a number of pitfalls in the process for political reforms in Ukraine have become apparent.

PITFALLS

1. EXECUTIVE OVERDRIVE

The presidential administration and the government are in a difficult spot: They are beleaguered by the international community and the Ukrainian public to deliver swiftly on political reforms; at the same time they are asked to carry out an inclusive, democratic reform process. These are potentially contradictory demands, because inclusion and consultations cost time. A balance has to be found between these two demands. So far it appears that reforms have been veering too much towards speed at the expense of transparency. Last year's Presidential plans for constitutional reforms drawn up by the Presidential administration with little consultations, floundered. This year the crucial and highly complex judiciary reforms were pushed through parliament by stealth. MPs received more than 1000 pages of amendments a few hours before the second reading. Reducing the Rada in this manner to a rubberstamp body is at odds with Ukraine's democratic aspirations.

2. LOSING UKRAINE'S REFORMISTS

Executive overdrive risks losing Ukraine's most precious resource: the critical mass of reformists, who are determined to reform the country along European lines. It should serve as a warning that most MPs of "Samopomich" ("Self-help"), a pro-reform party in parliament, did not vote for the judiciary reform law in its second reading. They do not object to reforms – they object to the old practice of the Rada being expected to rubberstamp laws, in this case without even a chance to read them in the most cursory manner. The need for speed is agreed. Ukraine cannot afford a protracted reform

¹ This memo was written by Michael Meyer-Resende of Democracy Reporting International, with contributions from Ruslana Vovk, Mykola Gnatovsky and Andriy Kozlov.

² The law "On Ensuring the Right for Fair Trial" was adopted by the Verkhovna Rada in the second reading on 12 February and signed by President Poroshenko on 25 February.

³ The constitutional amendments suggested by the new Verkhovna Rada so far address the parliamentary immunity and immunity of judges. See DRI's Briefing Paper 53: Reforming parliamentary immunities in Ukraine, available at: <http://democracy-reporting.org/publications/country-reports/ukraine.html>.

⁴ See DRI's Briefing Paper 51: Ukraine's political reforms: One year on from Euromaidan, available at: <http://democracy-reporting.org/publications/country-reports/ukraine.html>.

process - but it is a matter of weeks and months – not of hours.

The point is: Process is as important as substance. MPs need to feel ownership of these reforms and endorse them towards their constituencies and the media. If they do not explain and endorse the reforms, public acceptance will dwindle fast. It should be kept in mind that all reform-minded parties need to be kept on board to muster the required 2/3 majority of MPs for the crucial constitutional changes. Likewise civil society should be involved; it does not have the last word on reforms, which rests with the elected representatives, but civil society's endorsement is equally critical to convince the public that the country is changing.

3. CONCENTRATION OF POWER

The risk of executive overdrive has raised the spectre of a concentration of power by the President. Legal initiatives that are hammered through parliament in a matter of hours remind of bad old habits. Another case in point is the proposed draft constitutional amendment on immunities: It does reflect a public desire to end impunity for criminal interests, which have hidden behind parliamentary immunity; however, there is a risk of increased power by the unreformed judiciary and the executive over parliament. This would be an unfortunate recalibration of the balance of powers in a context where a new, democratically elected parliament is supposed to be a driver of change.⁵

4. MISMANAGEMENT OF EXPECTATIONS

There have been several documents laying out the future reform plans, such as the coalition agreement and the government agenda. As highlighted by DRI before, these documents do not say the same things and the crucial item such as the constitutional reform does not figure high on the agenda.⁶ In absence of a clearer roadmap, the huge expectations for a quick overhaul of the country's political structures are not managed and easily frustrated. More orientation is needed on what the main strands of reforms shall be, their approximate timelines and interlinkages. An open and decisive constitutional reform process, affecting all other key reform areas, would provide an overarching and understandable reform narrative. It should thus be treated as a priority as long as the required parliamentary 2/3 majority is present.

5. A SPLIT EXECUTIVE

President Poroshenko and Prime Minister Yatseniuk represent different parties and partially different outlooks on the war in Donbass and internal issues. A widening gap between the two could undermine the reforms, with the Presidential administration and the government working at cross-purposes. Both sides should keep in mind their shared interest in and responsibility for reforms. Despite different views on the war and the Minsk process, they should not allow them to drive a wedge into the reformist camp, which could ultimately break it, bringing reforms to a standstill. Such an outcome would serve nobody in Ukraine and be a victory for those who want to divide and weaken the country.

6. INTERNATIONAL CACOPHONY

The Ukrainian authorities are flooded with international offers of support for reforms and a plethora of special reform bodies. The willingness to support is positive, but beyond the question of the capacity to absorb all the support, there is a risk of lack of coordination and an international cacophony of advice, with every specialist team promoting different priorities and ideas. The international players, the EU and the international financial institutions in particular, should be clear, unified and focus on the essential when expressing their expectations on political reforms. The framework of international and European law and political commitments provides the basis on which expert bodies have been engaging with the Ukrainian authorities for many years. The most important player here is the Council of Europe's Venice Commission, which has been dealing in-depth with all aspects of Ukraine's political reforms for almost two decades and continues to provide opinions that should serve as the main source of reference for verifying the progress of reforms.

7. THE NARRATIVE OF REFORMS IN TIMES OF WAR

One argument often put forth against reforms is that a country at war should not engage in deep reform and instead concentrate its resources on military efforts. This is a dangerous argument, even more so because it is superficially plausible. It is a wrong argument, because it implies that Ukraine is a well-functioning state. Part of Ukraine's problem is a dysfunctional state. Many citizens did not identify with a state so riddled by corruption. The poor state of the military resulted from corruption and lack of long-standing reforms. Corruption and state capture can only be broken by systematic political reforms that establish checks and balances that come from a real separation of powers and the rule of law. Ukraine is fighting a war on the two fronts: Against the external military aggression and against an entrenched system of state capture by business elites. It cannot prevail in one without prevailing in the other.

⁵ See DRI's Briefing Paper 53: Reforming parliamentary immunities in Ukraine, available at: <http://democracy-reporting.org/publications/country-reports/ukraine.html>.

⁶ See DRI's Briefing Paper 51: Ukraine's political reforms: One year on from Euromaidan, available at: <http://democracy-reporting.org/publications/country-reports/ukraine.html>.

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