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CONSTITUTION MAKING IN UKRAINE: REFOCUSING THE DEBATE

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Among the triggers and demands of Ukraine's 2013–2014 Euromaidan antigovernment protests were fundamental concerns that go to the heart of the country's constitutional architecture. Yet, the two main dimensions of constitutional reform pursued since 2014—judicial reform and decentralization—remain incomplete, and the bigger issue of the separation of powers has all but disappeared from the political agenda. These questions are the linchpin of Ukraine's democratic consolidation, economic reform trajectory, and long-term political stability. As the Ukrainian parliament is unlikely to find unity on these issues anytime soon, the European Union (EU) should refocus the discussion on the separation of powers and work toward decoupling the Minsk process to restore peace in war-torn eastern Ukraine from constitutional reforms.

WHAT'S AT STAKE?

Ad hoc constitution making at the height of political crises or at the whim of Ukraine's presidents has been a repeat feature of the country's post-Soviet transition. Ukraine's 1996 constitution and subsequent constitutional amendments were ambiguous with regard to the separation of powers they prescribed. These ambiguities underpinned power struggles between presidents and prime ministers, left loopholes for presidential attempts at extending their powers, and embedded the informal power of oligarchs. Ukraine's constitutions have thus been an obstacle to political and economic reforms, fostered instability, and fed into cycles of pre-term elections and mass protest.

During the Euromaidan demonstrations, the need for far-reaching constitutional reforms was widely acknowledged both in Ukraine and by external actors. Since then, the call for comprehensive constitutional reforms has been quickly narrowed down to two issues: decentralization and judicial reform. Both are important, and some progress has been made in these areas. The bigger issue, however, of how powers are divided between the executive (and within the executive branch), the legislature, and the judiciary has been sidelined.

As of early 2016, Ukraine faces the challenge of engaging simultaneously in a war, internationally moderated conflict resolution, a constitutional reform effort, and a wider process of political and economic reforms. This simultaneity requires policymakers inside and outside Ukraine to think big.

The EU needs to play a larger part in the debates about constitutional reform, not by imposing a certain model on Ukraine, but by fostering a wider public discussion. The

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stakes are higher than many policymakers in Brussels may realize. Without a clear division of powers, all of Ukraine's political and economic reforms will remain precarious. Ukraine's lack of state capacity vis-à-vis oligarchic interests and the country's exposure to Russia's leverage are among the consequences of an ambiguous constitutional setup. A credible EU stance on democracy promotion in Ukraine and on European security more generally should link the current emphasis on the adoption of reform legislation and capacity building at the local level to these broader issues.

CONSTITUTION MAKING SO FAR

The 1996 Ukrainian constitution and constitutional amendments enacted in 2004 and 2010 located Ukraine's political system in a hybrid space between a presidential and a parliamentary setup. Over time, power has fluctuated in one or the other direction. There is no single template for how exactly power is to be divided between the different branches of government. EU member states exhibit a whole range of options, including semipresidential and semiparliamentary systems. Comparative experience shows that mixed systems as such are not less democratic or prone to instability, provided the powers are clearly delineated and adhered to. In Ukraine, the 1996 constitution and the 2004 and 2010 amendments have all failed to achieve this clarity and commitment.

Against the backdrop of a vague constitution, former Ukrainian president Leonid Kuchma managed to extend his powers. His authoritarian drift was eventually stopped by the Orange Revolution in 2004.

The constitutional amendments of that year, adopted by law as part of a political compromise at the height of the revolution, aimed to limit presidential powers. Under the 2004 constitution, the president no longer had the right to nominate the prime minister (this task was given to a formal majority coalition in the parliament), nominated only the foreign and defense ministers, and could not dismiss individual cabinet members. However, the president retained the right to initiate a procedure of no confidence in the cabinet and the right of legislative initiative. The

circumstances in which the constitution was adopted were hardly ideal, and subsequent inconsistent decisions by the Constitutional Court of Ukraine on the constitutionality of the 2004 law confused rather than clarified matters.

The blurring of the constitutional powers of the president and the cabinet played into the breakdown of relations between former president Viktor Yushchenko and prime minister Yulia Tymoshenko in the aftermath of the Orange Revolution. Following his election as president in 2010, Viktor Yanukovych oversaw further reform, effectively reinstating the 1996 constitution, which defined a semipresidential system with formal and informal loopholes for presidential influence. In December 2010, the constitutional court declared the 2004 amendments unconstitutional, arguing that the law had been passed without the court's mandatory preliminary opinion. The 1996 constitution stipulated that the court undertake a preliminary review before the adoption of a law on constitutional amendments. This review was primarily meant to check for violations of the constitutional principles on human rights and territorial integrity. These provisions are still in place despite the constitutional court's questionable practice of reviewing amendments already adopted by the parliament.

By 2013, the balance had once again tilted toward a powerful and unaccountable presidency. The Euromaidan protests were triggered by Yanukovych's last-minute refusal in November of that year to sign the EU-Ukraine Association Agreement, a framework for political and economic cooperation. But the deeper causes of the widespread societal discontent about a corrupt regime were tied up with Ukraine's constitutional makeup. In the aftermath of the Euromaidan demonstrations and Yanukovych's ouster, the Ukrainian parliament reinstated the 2004 constitution in February 2014—once again in a highly charged political context.

THE CURRENT STATE OF AFFAIRS

Ukraine's current constitutional reform process has three main pillars: judicial reforms, decentralization, and the separation of powers. The first two are on the agenda of Ukrainian

policymakers, and external actors continue to provide incentives, financial support, and legal advice to maintain the momentum behind the ongoing process of drafting and adopting the related laws and constitutional amendments and preparing for their implementation. For example, the EU has offered visa liberalization for Ukrainians traveling to EU member states and launched a new program aimed at capacity building at the local level, and the Council of Europe has provided legal advice.

Ukraine has made some progress on judicial reforms, including with regard to the appointment and oversight of judges. The EU can set targets for the adoption of laws in the area of judicial reforms and cross-reference the evaluations by the Council of Europe's Venice Commission of specific aspects of these laws, but ultimately, the EU does not control the small print. The Venice Commission's detailed opinions of specific constitutional reform proposals can facilitate the redrafting of constitutional amendments, but domestic politicians can easily present a positive assessment of particular provisions by the Venice Commission as an external legitimation of a much wider reform package or amend the vetted drafts before the parliament votes on the final version.

With regard to decentralization, a legal basis has been created for local taxes and budgetary powers as well as for the voluntary amalgamation of local government units. Capacity building at the level of local government, as envisaged by the EU's new program in this field, is the type of technical assistance the EU does well. Here, the problem lies elsewhere: the EU is likely to reinforce the growing gap between the implementation of the laws on local government and the pending constitutional reform on decentralization.

As for the third constitutional reform issue—the separation of powers—the picture is a lot bleaker. A Constitutional Commission, made up of constitutional law experts, members of parliament, and civil society activists, was set up to satisfy the demands for far-reaching reforms emanating from the Euromaidan demonstrations, but the commission was not given an opportunity to discuss, generate, or evaluate broader constitutional reform ideas.

Even the constitutional court, an institution with a checkered history, has played only a formalistic role in the constitutional reform process led by the presidential administration. The compromised legitimacy of the court was illustrated most recently in January 2016, when it approved a series of amendments to reforms of the judiciary without further comments, only for several constitutional court judges to then criticize the provisions in public.

The parliament's role in the constitutional reform process has also been limited. Party structures remain weak and are dominated by individuals and oligarchic interests. While the ruling coalition was still intact before two parties pulled out in early 2016, a majority of parliamentarians routinely approved presidential initiatives, at least at the first reading. One exception to this rule was the need for President Petro Poroshenko to restore parliamentary oversight of the Prosecutor General's Office, a provision that the presidential administration had removed from the draft law after the Venice Commission had reviewed it. Presidential initiatives have tinkered with the process of the selection of judges envisaged in the judicial reform package.

Poroshenko's de facto powers today are similar to those of Yanukovych, partly due to the unpopularity of Arseniy Yatsenyuk, who became prime minister in 2014, and the lack of an organized opposition. Following Yatsenyuk's announcement on April 10 of his resignation and revelations about Poroshenko's offshore holding company, opposition to the president may become more apparent, but it is likely to form on an ad hoc basis.

RECOMMENDATIONS FOR THE EU

Widening the Constitutional Reform Agenda
The EU should signal more clearly that Ukraine's constitutional reform agenda must go beyond current proposals for decentralization and judicial reform. Rather than prioritizing stability by backing the current officeholders, external actors like the EU need to reintroduce the separation of powers into the debates on constitutional reform. Learning from the experience with anticorruption and judicial reforms, the EU can play a useful role in anchoring an issue in the

political debate. Every mention by the EU of constitutional reforms should from now on be accompanied by a reference to the unresolved balance of power at the heart of Ukraine's political system.

Constitutional reforms in Ukraine require a two-thirds majority in the parliament to become law. The current political situation makes it nearly impossible to pass this threshold. Following the vote on confidence in Yatsenyuk on February 16, which the then prime minister survived, government instability and the prospect of early elections are hovering over Ukraine. Poroshenko had already postponed the crucial second vote on the decentralization package twice before the confidence vote. Now, there is a real danger that constitutional reforms will become sidelined as the elites' struggle for political survival intensifies. This is the moment for the EU to ensure that this does not happen and refocus the debate on the broader underlying issues.

Key to this process will be facilitating public debate about constitutional reforms. The EU should help build momentum for a wider public discussion of these reforms, involving members of parliament, civil society actors, and domestic and international legal experts.

In mid-December 2015, the head of the Delegation of the European Union to Ukraine, Jan Tombiński, publicly stated that Ukraine might need a new constitution rather than constitutional amendments and that a parliamentary republic could be the best option for the country. While he phrased his points carefully, they marked an unusually open intervention in the constitutional reform debate. They opened up the space for a more critical discussion of the reform process to date. Other actors from the EU, the Council of Europe, and the Organization for Security and Cooperation Europe (OSCE) should follow up on this opening.

Similarly, civil society actors have repeatedly called for a constituent assembly and a transparent constitutional reform process. Institutional hubs for coordinating the EU's engagement with Ukraine, such as the European Commission Support Group for Ukraine, should have the mandate and capacity to encourage this process.

The EU should bring together civil society actors with a stake in constitutional issues, parliamentarians, and constitutional law experts to generate a public debate the executive cannot ignore. By doing this, the EU would also usefully widen the range of its Ukrainian interlocutors on reforms.

In September 2014, the EU allocated €10 million ($11 million) for civil society support with a particular emphasis on anticorruption, judicial reform, and constitutional reform. The EU should use some of this money to fund events and forums for societal, political, and legal actors to discuss wider constitutional issues. The two-day public forum entitled "The Future of Ukraine's Constitutional Overhaul" in Kyiv in February 2016 hosted by the nongovernmental organization Democracy Reporting International—in which EU and member-state officials and diplomats took part alongside members of the Constitutional Commission, the presidential administration, the parliament, and civil society organizations—is an example of the kind of events the EU should support.

When it comes to both local and regional governance, the issue is also one of encouraging debate—a modest but essential step. Highlighting the role of both regional and local governance in democratic consolidation is not the same as advocating one particular model of decentralization or paving the way to federalism and Russian influence. In the absence of such public debate, politicians and society at large are projecting unrealistic hopes and fears onto the notion of decentralization, eroding the space for nuance and political agreement. In one extreme consequence of the lack of debate and the resulting uncertainty, clashes erupted outside the parliament during the vote on the first draft of the constitutional package on decentralization in August 2015, and one person was killed.

The accommodation of regional diversity has been a constant in Ukraine's post-Soviet transition. On paper, a compromise was struck between the notion of Ukraine as a unitary state, which was formulated as a founding principle of the 1996 constitution, and the constitutionally enshrined Autonomous Republic of Crimea. Subsequent rounds of constitutional

reform in 2004 and 2010 left the basic idea of a unitary state with a partial exception untouched.

Today, the issue of subnational (regional and local) governance is more acute than ever. Under the term "decentralization," the focus is now on Ukraine's organizational structure, tax base, budgetary powers, and capacity of local government, on the one hand, and on the status of the occupied territories in the eastern Donbas region, on the other. Officially, the status of these territories, which are controlled by Russian-backed separatists, has been decoupled from the constitutional reforms on decentralization: determining this status requires a normal law with a simple majority in the parliament rather than a constitutional amendment approved by a two-thirds majority. Politically, however, the two issues are closely linked. The parliament passed the status law on the territories, which was meant to be in effect for three years and allows for limited self-rule with regard to language provisions and cross-border links, after the first Minsk agreement was reached in September 2014 with the aim of resolving the conflict in eastern Ukraine. After Minsk II was struck in February 2015, Poroshenko amended the status law the following month so it would enter into force only after local elections had taken place in the occupied territories.

Poroshenko in particular has been keen to distinguish decentralization from federalization. The concept of federalism is tainted by at least three factors: the collapse of the socialist federations of the Soviet Union, Yugoslavia, and Czechoslovakia; the repeated use of the term "federalism" as a political tool in Ukrainian elections; and, most recently, Russia's demand for federalization as a means to end the war in Ukraine's east.

The regrettable though understandable association of the principle of federalism with state weakness and external influence clouds the discussion about decentralization. In particular, it inhibits a thorough discussion of transparent, accountable, and democratic governance arrangements at the regional (oblast) level. Most of the internal and EU-led external discussion has focused on local government. However, the current decentralization proposals also envisage

regional prefects appointed by the president. Their as yet unclear powers of oversight could easily undermine the newly empowered and amalgamated local governments, but the debate on this issue has been cut short, and the EU should begin to redress this shortsighted approach.

Decoupling the Minsk Process From Constitutional Reforms

Ukraine's constitutional reform efforts are complicated by their link to the Minsk peace process. The Minsk II agreement locked in an underspecified broad constitutional reform in a rigid time sequence that has proved unrealistic. Peace processes are moving targets, and what might be necessary at one stage to keep the conflicting parties on board and committed to a ceasefire has to be adjusted as the conflict evolves. The originally envisaged deadline of December 2015 for the completion of constitutional reforms in Ukraine has to be seen in this light. That deadline provided a concrete reference point and underpinned a certain momentum for both the peace process and the reforms. Now, however, it is time to decouple the Minsk process from the wider constitutional reforms.

The parties to the conflict and the external actors involved in conflict management continue to invoke Minsk II; fulfilling the terms of the accord has morphed into a commitment to the spirit of the agreement rather than to its original timeframe and sequencing. The current focus is twofold: The OSCE is trying to increase the transparency of the process by strengthening its technical capacity to monitor ceasefire violations. At the same time, the Trilateral Contact Group, which brings together Ukraine, Russia, and the OSCE, and its working group on political affairs, in which the separatists are represented, are concentrating on creating the conditions for holding local elections in the occupied territories. So far, there is no agreement on the basic parameters of such elections.

Focusing the Minsk process on a concrete political issue provides incentives for all the parties to the conflict: the Ukrainian government, the Russian government, and local political actors that hope to assert and legitimize their political control through the elections. If Ukrainian parties and independent candidates are able to compete and the process is

relatively free and fair, the elections could insert much-needed political momentum into the current stalemate. Only after the local elections should the parties to the Minsk process revisit the law on the status of the occupied Donbas territories and the process of reestablishing Ukraine's control over its border.

If the Minsk process is to be freed of its link to the broader constitutional reform process in Ukraine, the EU will also have to offer Russia a concrete perspective setting out which conditions would lead the union to lift which parts of the sanctions regime it imposed after Russia's 2014 annexation of Crimea.

CONCLUSION

For domestic political elites rebuilding the ship at sea, it is always difficult to contemplate structural changes that could limit their own powers at the national or subnational level. But Ukraine's current political situation provides the EU with an opportunity to shape crucial policy debates tied to constitutional reforms. Without deeper constitutional reforms than the ones currently on the agenda in Ukraine, the wider reform process will remain piecemeal and prone to political manipulation, state capture, and instability. Ultimately, Ukraine's democratic consolidation and state

capacity depend on a clear separation of powers between the executive, the legislature, and the judiciary (including a clear division of responsibilities between the president and the government) and structures of accountable local and regional governance.

By using its political clout and financial support mechanisms to anchor the issue of the separation of powers in the political reform agenda and by fostering a wider public debate on constitutional reforms, the EU could add substance to Ukraine's overarching reform process. A more visible EU emphasis on constitutional reforms in Ukraine needs to be coordinated with the parties and arbiters of the Minsk peace process to pursue both constitutional reforms and conflict resolution without subordinating one to the other.

Decentralization and constitutional reforms generally are more than means of conflict resolution. The involvement of external brokers in Ukraine's peace and reform attempts should not reduce constitutional reforms to a quick fix or a patchwork approach that could sow the seeds of future political instability. Once the current window of extraordinary politics closes in Ukraine, the possibility of constitutional reforms becomes more remote again. Ukraine has to start tackling these issues now, not later.

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