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The Constitutional Process in Ukraine

Issues in Play

Summary

- Ukraine's weak rule of law and widespread corruption and nepotism, combined with growing concerns over a shift toward authoritarianism under President Victor Yanukovich, were among the key factors that triggered the Maidan protests.
- Many political conflicts and failures of governance in Ukraine are rooted in the weakness of the political and judicial system, including shifts in constitutional powers, over-centralization of administrative structures and a lack of judicial independence.
- The interim government should promote an inclusive, participatory and transparent constitutional process. Such a process could help de-escalate the current conflict and build confidence in the central government and its willingness to integrate all constituencies into Ukraine's political system.

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Introduction

The Geneva agreement of April 17, 2014, provides a roadmap to de-escalate tension in Ukraine and a commitment by the parties to work toward resolution through broad national dialogue and constitutional reform with outreach to all of Ukraine's regions and political constituencies. On May 14, the interim government organized a first roundtable on Ukraine's future, with several Ukrainian politicians and German diplomat Wolfgang Ischinger meeting in Kyiv. The Organization for Security and Co-operation in Europe (OSCE) has offered to help promote the national dialogue in the coming weeks. In addition, the interim government in April announced a constitutional process intended to lead to amendments to the constitution. A special committee in the parliament is preparing amendments that are to be discussed in the next weeks.

This Peace Brief argues that a constitutional process could make a significant contribution to restoring peace in Ukraine, despite continuing incidents of violence, and to normalizing relations between the central government and the regions. The national dialogue can help to initiate a broad discussion on Ukraine's future, but it does not replace a comprehensive constitutional process. This process should consider key shortcomings in Ukraine's political system that have contributed to the conflict, including frequent shifts in constitutional powers between the president and the parliament, over-centralization in administrative structures and a lack of judicial independence. A solid constitutional process is likely to take more time than the interim government has scheduled for it.

The Need for a Compromise on a Lasting Constitution

As a political contract between the governing and the governed, an amended constitution or even a new version should create a legal framework that will be respected by all parties and endure political crises, irrespective of who holds power in the future. Since 2004, the political system has changed twice between a system in which the president holds extensive powers and a system in which the president and prime minister must cooperate with each other. These changes have led to persistent constitutional and political instability.

After the “Orange Revolution,” constitutional amendments in 2004 transformed the political system from “presidentialism” to “semi-presidentialism.” The period between 2005 and 2010 was characterized by ceaseless rivalry between political parties, especially power struggles between then-President Victor Yushchenko (2005-2010) and then-Prime Minister Yulia Tymoshenko (2005, 2007-2010). After Yanukovich won the presidential election in 2010, he pressured the constitutional court to rule the amendments of 2004 unconstitutional. That move returned significant powers to the president, allowing him to dismiss the government without parliamentary approval and nominate candidates for the office of the prime minister. He also gained authority over the judiciary. After the ousting of Yanukovich in February 2014, the parliament passed a law reinstating the constitutional version of December 2004, restricting presidential powers once again.

Those who held power changed the constitutional “rules of the game” based on their political preferences. While tolerance for opposing political positions will not evolve overnight, a new constitution could set an institutional framework that helps the political culture to mature. A successful constitutional process would yield a compromise on a constitution that reflects a lasting societal consensus. The constitution should ensure the fair representation of all constituencies as well as a balanced separation of powers among the executive, the legislature and the judiciary.

The Need for Decentralization

Another key issue in the constitutional debate will be the administrative structure of the country. According to its constitution, Ukraine is a unitary state in which public policies are implemented in a top-down approach. Through decentralization, greater powers on taxation, spending and the election of governors could be assigned to the regions and districts.

The separatist upheavals against the central government—fueled by provocative Russian media reports on Ukraine—are indicative of concern that the new government will not sufficiently respect the interests of ethnic Russian and Russian-speaking citizens in eastern and southern Ukraine. A majority of the population in these regions wants to remain in Ukraine, but apparently prefers greater autonomy from the central government.¹

While the interim government opposes federalization, fearing that it will lead to the separation of some regions from Ukraine, it supports decentralization. Decentralization is the redistribution of functions and decision-making powers to the local level in some policy areas and is based on the assumption that local government can better satisfy certain needs of the population than a centralized administration. Organizations like the European Union consider Ukraine to be one of the most centralized countries in Europe and advocate decentralization.²

Ukraine’s administrative-territorial division consists of (1) 24 regions (*oblast*), the Autonomous Republic of Crimea and Kyiv and Sevastopol as cities with special *oblast* status; (2) 490 districts (*raion*); and (3) about 12,000 villages (*silrada*). The regional and district levels consist of councils with legislative powers and state administrators (usually referred to as governors) with executive powers. While members of the councils are elected by popular vote, the governors are appointed

by Ukraine's president upon proposal by the prime minister. During Yanukovich's presidency, the governors increasingly represented the interests of the ruling Party of Regions.

The governors decide on key financial issues and report directly to the president. They are therefore frequently more responsive to the central government than to the local population. According to the Organization for Economic Co-operation and Development (OECD), service provision by the central government often falls short of local needs.

In addition to the lack of political autonomy, the regional levels depend on the central administration for financial resources. Revenues from local taxes and fees are low, and local budgets most often rely on state subsidies, whose allocation is often not transparent. According to the OECD, decentralization should be preceded by territorial reform, which would allow the merger of smaller municipalities and capacity-building in the regional, district and municipal administrations.

A decentralization reform program was developed between 2007 and 2009 but was never adopted. Under the rule of the Party of Regions, in power since 2010, the central government passed several laws that transferred powers from local councils to the central government. This conferred on the center control over many financial decisions in the regions and districts and the ability to offer greater subsidies to the parts of Ukraine where the Party of Regions has most of its supporters.

The current discussions on decentralization could become a significant way to improve relations between the central government and the regions and a meaningful alternative to address the concerns of ethnic Russians and other minorities in Ukraine. The process could result in the shift of responsibilities from the central government to regions and districts, including greater powers with respect to taxing (e.g., property taxes), spending, strategic planning on economic development and infrastructure projects and the selection of governors who are not directly appointed by Kyiv. Volodymyr Groysman, Ukraine's minister for regional policy, has already proposed a reform in this direction.

The Need for an Independent Judiciary

The constitutional process could also be used to consider means to ensure judicial independence in the future. In order not to endanger the constitutional process, the government should reconsider the recent lustration plans.

Although Ukraine's Constitution grants judicial independence, there is little separation of judicial and political powers in practice. While this was also a problem in the 2004-10 period, the trend was reinforced by legislation in 2010, which gave the presidential administration extensive influence over judicial appointments, provisions for disciplining judges and judicial self-governance. The president controlled the appointments of the members of the High Council of Justice and the High Qualification Commission of Judges who are responsible for the assignment, transfer and dismissal of judges, including court presidents. Since the court presidents have authority over the personnel, administrative and financial aspects of the judiciary, they determine the careers of judges. Such a high degree of presidential control weakened the independence of the courts, leading to self-censorship among judges and politically-motivated judicial processes.

The interim government's reaction to these weaknesses was the replacement of the most prominent officeholders in Ukraine's judiciary and lustration measures. Examples include the parliament's decision to dismiss five constitutional court justices, who had voted to return Ukraine to a presidential system in 2010, and the replacement of the prosecutor general by a politician from the right-wing Svoboda party.

In April 2014, Ukraine's parliament adopted a law mandating that all court chairs and their deputies be elected by their peers in a secret vote. But the law's provisions on lustration—a process to purge officials who have abused power or violated human rights—actually compounds the political arbitrariness that has plagued Ukraine's judiciary in the past.

First, the law dismisses all members of the High Council of Justice and the High Qualification Commission of Judges and basically makes them ineligible for reappointment. Second, the law forms an interim special commission for lustration to investigate all other judges. The commission's 15 members are equally appointed by the Supreme Court of Ukraine, the parliament and the new government's commissioner for anti-corruption policy, a Maidan activist. The lustration commission makes a recommendation to the High Council of Justice, which makes the final decision on whether a judge should be dismissed.

It will not be surprising if the outcome is a purge of judges who were appointed by or cooperated with the Yanukovich government. The Ukrainian ombudsman has criticized the proposed process as violating the constitution, which forbids delegation of court functions such as self-disciplinary proceedings to other bodies. The Council of Europe and Human Rights Watch also warn that the procedures may set the stage for arbitrary and unlawful purging.

The lustration law casts doubt on the new government's will to end political interference in Ukraine's judicial system. The government should ensure that lustration is pursued in compliance with the fundamental and human rights of the individuals under review, and should also distance itself from the recruitment of judges and other types of interference in judicial self-governance. Current lustration procedures should be limited to cases in which judges' verdicts were in violation of human and fundamental rights in the period from November 2013 to February 2014. If lustration proceeds during the constitutional process, it is likely to become a driver of further conflict.

Strengthening the Constitutional Process

In the current crisis, many citizens, especially in eastern Ukraine, doubt the interim government's ability and will to start a broad national dialogue and a constitutional process that integrate the interests of all constituencies. This sentiment is made more acute as the future president, who will be elected in the scheduled May 25 election or in a run-off election, will in all likelihood be a Western-oriented politician—either Petro Poroshenko or Yulia Tymoshenko. A hasty constitutional process risks deepening the polarization in Ukraine and the perception among citizens in the eastern regions that their interests are marginalized in Kyiv. These tensions could be mitigated through an inclusive and transparent constitutional process with the following attributes:

- Under Ukraine's 2004 constitution, constitutional amendments need to be approved by the parliament. But instead of leaving the process mainly in the hands of the parliament and the government, and using a top-down approach, the drafting process should be broadened to include the participation of all political constituencies and regions. A broad debate could de-escalate the crisis, build confidence that institutions in Kyiv are responsive to all segments of Ukrainian society and provide legitimacy for the new constitutional set-up.
- While the constitutional process should be supported by the Council of Europe's European Commission for Democracy through Law (the "Venice Commission" of experts), it should have local ownership and proceed without interference from the United States, Russia and the EU. All three have signed the Geneva agreement and so should support the outcome of the constitutional process.

ABOUT THIS BRIEF

Dominik Tolksdorf is a Transatlantic Post-doctoral Fellow for International Relations and Security (TAPIR) at the U.S. Institute of Peace. His research focuses on the European Union and politics in Eastern Europe and the Balkans. For this Peace Brief, he conducted interviews in Kyiv, Brussels and Washington. The Geneva agreement of April, signed by representatives of Ukraine, Russia, the European Union and the United States, stipulates a constitutional process and the immediate establishment of a broad national dialogue in Ukraine. This article examines the main issues in the constitutional process and outlines possible procedures.

- To foster a participatory national dialogue, the parliament could consider creating an independent commission that serves as a secretariat of the constitutional process. Staffed with national and international constitutional experts and representatives from the national parliament, local councils and civil society from all parts of Ukraine, the commission could be divided in thematic working groups (e.g., on decentralization or constitutional means to ensure judicial independence). The commission could organize public hearings and public discussions across Ukraine. The OSCE could help organize the events, provide logistical support to the Venice Commission and, if needed, help mediate between interest groups and stakeholders within the commission.
- Based on the public's input, the commission's constitutional experts would write a draft of a new constitution, which would then be submitted to the parliament as well as the Venice Commission for review by October. The public should have access to all comments, along with an analysis and explanation of how they have been reflected in the draft constitution. In close coordination with the Venice Commission, the constitutional committee in the parliament would formulate the final version of the constitution.
- Final approval of the new constitution could be accomplished through a combination of a two-thirds majority decision of the parliament and simple majority approval in a nationwide referendum. Elections to the national parliament and the local governments could be held shortly afterwards.

Notes

1. See Pew Research, 2014. "Despite Concerns about Governance, Ukrainians Want to Remain One Country" at: www.pewglobal.org/2014/05/08/despite-concerns-about-governance-ukrainians-want-to-remain-one-country/.
2. European Commission. "Implementation of the European Neighbourhood Policy in Ukraine Progress in 2013 and recommendations for action," Doc. SWD(2014) 96 final, March 27, 2014, p. 10.



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