

THE UKRAINIAN CONSTITUTION IN THE ERA OF DRASTIC POLITICAL CHANGES

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1.

This study is an attempt of a *Russian researcher* to have a look at the current *constitutional development of Ukraine* through a prism of similar experience of Russia and pressing tasks facing the national constitutional law. In 2013 the Russian Constitution celebrated its 20th anniversary. This was an occasion for experts and political figures yet again to weigh merits and demerits of the Constitution of the country, and to offer ways to improve the constitutional text and its implementation. There are quite a few Russian scientists advocating not just to change certain articles of the Constitution, but also to adopt its new revision.¹

To the moment when this work was being written only three amendments had been made to the Russian Constitution, namely: i) *terms of office of the President and the lower chamber of the Parliament* – the State Duma, were extended;² ii) *responsibility of the Government to submit its annual performance reports* to the State Duma was introduced;³ iii) *the Supreme Arbitration Court was abolished and a procedure for appointing prosecutors* was slightly changed.⁴ Thus, only the latest changes of the Constitution had a nature of the constitutional reform and were related to merger of the Supreme Arbitration Court with the Supreme Court of the Russian Federation. To our opinion other amendments were not so essential.⁵

2.

Taking a look at the constitutional history of Ukraine after collapse of the USSR, undoubtedly there are many common features with the Russian experience. Despite all said by opponents of closeness between Russia and Ukraine, the both countries have much in common in their political, economic and legislative development. The two neighbouring countries have very similar Constitutions, statutory framework as well as overall legal regulation and practice. However, unlike Russia, Ukraine lived through more frequent and drastic constitutional reforms accomplished not only by passing amendment acts to the Constitution.

Until 1991 the Ukrainian SSR was a member state of the USSR. On July 16, 1990 the *Verkhovna Rada* of Ukraine (Ukrainian parliament) promulgated a *Declaration of national sovereignty of Ukraine*.⁶ The Declaration emphasized a necessity to elaborate and adopt a new Constitution and laws of the country on its basis. The Declaration was one of the largest and most detailed documents of the kind among similar documents of the CIS (Commonwealth of Independent States) members. On August 24, 1991 *Act of Independence of Ukraine* was passed, and on December 1, that year it was endorsed by an all-Ukrainian referendum.⁷

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¹ See, for instance, opinion of *Avakjan S. A.*, senior dept. assistant of Lomonosov Moscow State University, associate law professor. *Проекты законов о поправках к Конституции Российской Федерации* [Bill drafts on amendments to the Russian Federation Constitution]. Constitutional and municipal law, 2013, No. 2. p. 20-25.

² The Russian Federation law on amendment to the Constitution dated December 30, 2008 No. 6-ФКЗ «*On changes of terms of office of the Russian Federation President and the State Duma*». Collected laws of the Russian Federation, 05.01.2009, N 1, art. 1, <http://www.rg.ru/2008/12/31/konstitucia-popravki-dok.html> (time of download: 25 May 2014).

³ The Russian Federation law on amendment to the Constitution dated December 30, 2008 No. 7-ФКЗ «*On controlling powers of the State Duma in regard to the Russian Federation Governments*». Collected laws of the Russian Federation, 05.01.2009, N 1, art. 2, <http://www.rg.ru/2008/12/31/duma-pravit-dok.html> (time of download: 25 May 2015).

⁴ The Russian Federation law on amendment to the Constitution dated February 5, 2014 No. 2-ФКЗ «*On the Russian Federation Supreme Court and the Russian Federation prosecution office*». Collected laws of the Russian Federation, 10.02.2014, N 6, art. 548. <http://www.rg.ru/2014/02/07/popravka-dok.html> (time of download: 25 May 2014).

⁵ At different times several changes had been done to Art. 65 of the Constitution which lists names of the Russian Federation subjects. Such changes are made in a simplified order.

⁶ Декларация про державний суверенітет України (Відомості Верховної Ради УРСР (БВР), 1990, N 31, ст.429). Official site of the Verkhovna Rada of Ukraine: <http://zakon1.rada.gov.ua/laws/show/55-12> (time of download: 25 May 2014).

⁷ Постанова Верховної Ради Української РСР Про проголошення незалежності України (Відомості Верховної Ради України (БВР), 1991, N 38, ст.502). Official site of the Verkhovna Rada of Ukraine: <http://zakon1.rada.gov.ua/laws/show/1427-12> (time of download: 25 May 2014).



Drafting of a new Constitution of Ukraine took six years, more than in other former Soviet republics. From 1990 to 1996 composition of special constitutional commissions was changed several times. The situation was aggravated by a conflict of legislative power and the President (this position was introduced among other changes to the Constitution of 1978). This problem was resolved by signing the so-called Constitutional agreement between the Parliament and the President (*"About main initiatives of organization and operation of the state power and local self-government in Ukraine for the period before adoption of the new Ukrainian Constitution"*) on June 8, 1995.⁸

This catalysed the constitutional process, and on 28 June 1996 after long discussions and revisions the Verkhovna Rada of Ukraine approved a new Constitution of the state.⁹ It entered into force on the day of its approval (Art. 160 of the Constitution). The old Constitution of 1978 and the Constitutional agreement ceased to have effect. Laws and other statutory acts passed before the enactment of the Constitution were declared valid insofar as they were not in conflict with it (Clause 1 of Transitional provisions).

3.

The Ukrainian Constitution of 1996 like other post-socialist constitutions was aimed at creating a democratic state and market economy of a modern kind, and at overcoming consequences of the totalitarian statesmanship. It proclaimed Ukraine to be a sovereign, independent, democratic, social and law-based state. An individual, his life and health, honour and dignity, inviolability and safety were deemed to be of the highest social value. According to the Constitution people were carriers of sovereignty and the sole source of power. The Constitution secured the following principles: rule of law, separation of powers, political, economic and ideological diversity. Local self-governments had been established and their competences had been guaranteed. Ratified international treaties were considered a part of the national legislation. It is worth mentioning that universally accepted democratic values were enshrined.

The mode of amendments to the 1996 Ukrainian Constitution is combined, i.e. the different sections are changed under different procedures. Accidentally or intentionally, a similar mode is applied to the Russian Constitution, though the order of its modification is stricter and more complex (Art. 134-136).¹⁰ To amend "usual" sections of the Ukrainian Constitution it is required to use the so-called *simple double voting*, when the majority of deputies of the Verkhovna Rada in two successive regular sessions shall vote for the amendments (Art. 155). Changes to the "protected" sections such as Section 1 "*Main provisions*", Section III "*Elections. Referendum*" and Section XIII "*Introducing amendments to the Constitution of Ukraine*" must be approved not only by the Parliament but also by the nation in the all-Ukrainian referendum (Art. 156).

It turns out that the Verkhovna Rada of Ukraine is a mandatory participant of any constitutional reform, alongside with the Constitutional Court which draws a *conclusion* that a bill draft about an amendment does not envisage to abolish or limit rights and freedoms of man and citizen and to exterminate independence and territorial integrity of Ukraine (Art. 157-158). As for the role of the President in the above process he has the right to initiate constitutional changes (applicable to any section of the Constitution), and also has powers to set a referendum over an amendment of the Constitution, but only after it has been approved by the Verkhovna Rada.

Adoption of the 1996 Ukrainian Constitution was a stabilizing factor in the political life of the country. Unfortunately a confrontation within the ruling elite almost nullified its positive potential. Ukrainian experts say that nearly twenty years of the state construction bear witness that all presidents of the country made repeated attempts to expand power of the head of the state at the cost of weakening relevant functions of the Parliament and the Government. Virtually every year (except for 1999 and 2005) they

⁸ Конституційний Договір між Верховною Радою України та Президентом України про основні засади організації та функціонування державної влади і місцевого самоврядування в Україні на період до прийняття нової Конституції України (Відомості Верховної Ради (ВВР) 1995, N 18, ст.133). Official site of the Verkhovna Rada of Ukraine: <http://static.rada.gov.ua/NEWSAJT/site/const/dohovir.html> (time of download: 25 May 2014).

⁹ Конституція України (Відомості Верховної Ради України; ВВР), 1996, № 30, ст. 141). Official site of the Verkhovna Rada of Ukraine: <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> (time of download: 25 May 2014).

¹⁰ "The Constitution of the Russian Federation" (approved by a nationwide vote on 12 December 1993) (considering the amendments introduced by the Russian Federation laws on amendments to the Constitution dated 30 December 2008 N 6-ФКЗ, 30.12.2008 N 7-ФКЗ, 05.02.2014 N 2-ФКЗ). <http://www.constitution.ru/> (time of download: 25 May 2014).

strived to pass a bill on amendments of the Ukrainian Constitution through the Verkhovna Rada or a referendum.¹¹

Significant changes to the Ukrainian Constitution were made during the so-called 'Orange revolution' at the end of 2004 when negotiations between main political powers of the country resulted in a decision to hold a third round of presidential elections and at the same time to limit powers of the president, specifically those related to forming a Government. On December 8, 2004 the Verkhovna Rada passed *Law No. 2222 About amendments of the Ukrainian Constitution* which strengthened the parliamentary element in the mixed form of government of this state.¹²

In the initial revision of the Ukrainian Constitution a pattern for forming a Government almost replicated the Russian pattern, i.e. the president appointed a prime minister with consent of the parliament majority and he appointed other members of the Government upon recommendation of the prime minister (Art. 114 of the 1996 Ukrainian Constitution). So, the role of the parliament was minor. According to the constitutional amendments of 2004 a *coalition of deputy factions* is formed in the Verkhovna Rada as a result of elections and on the basis of aligned political positions. The faction includes majority of people's deputies out of the constitutional composition of the Verkhovna Rada. This coalition of deputy factions has the right to recommend not only a prime minister but also other members of the Cabinet of ministers (Art. 83). Moreover, correlation of forces in this procedure has changed: now the Verkhovna Rada appoints a prime minister upon recommendation of the president and it appoints other members of the Government upon recommendation of the prime minister (Art. 114). The parliamentary element was further enhanced by a constitutional prohibition for deputies to exit from or not to join a faction of the political party which elected them to the Rada (Art. 81). In reality however the 2004 amendments caused more imbalances in the existing relations between highest government authorities and did not bring a complete solution to the problem of a strong presidential power.

4.

The next major change of the Ukrainian Constitution was the *Ruling of the Constitutional Court on 30 September 2010*, when the Court decreed to deem the 2004 amendments to be non-compliant with the Constitution (this happened even after numerous use and interpretation of certain constitutional provisions by the Court itself) and to reinstate the previous revision of the Constitution.¹³ The Court reasoned that these amendments were passed with violation of the procedure because not all amendments were scrutinized by the Constitutional Court. Even if we set aside the political vector such a step made by a body of constitutional control had an ambiguous character. Firstly, the Ukrainian Constitution implies that the Constitutional Court has no right to reinstate previous revisions of the Constitution. Secondly, it appeared that non-constitutional provisions had been in force for long six years in the country.

A turn of events final to this date but not final in the history of the Ukrainian Constitution happened in February 2014 when the Verkhovna Rada voted for reinstatement of the 2004 Ukrainian Constitution on the ground that in 2010 it was annulled by a ruling of the Constitutional Court, not followed by voting in the Parliament as stipulated by the Constitution.¹⁴ Thus, currently Ukraine has a mixed government with a 'strong' president and a 'strong' parliament which no doubt will lead to yet another constitutional reform in the nearest future.

As a matter of law, the overthrow of Ukraine's President *Victor Yanukovich* was also controversial. The Ukrainian Constitution provides only four reasons for a pre-term termination of powers of a head of the state: voluntary resignation (which shall be held in person at the meeting of the Verkhovna Rada);

¹¹ See: Babenko V.N. *Политические партии и конституционные реформы в Украине (1991-2011)* [Political parties and constitutional reforms in Ukraine (1991-2011)]. Parties and electorate in Central and Eastern Europe (2000 – 2010): Collected scientific works/ РАН. ИНИОН. М., 2012. p.153.

¹² Закон України Про внесення змін до Конституції України (Відомості Верховної Ради України (ВВР), 2005, N 2, ст.44). Official site of the Verkhovna Rada of Ukraine: <http://zakon3.rada.gov.ua/laws/show/2222-15> (time of download: 25 May 2014).

¹³ See: Shcherbanyuk O.V. *Народный суверенитет как приоритет современной конституционно-правовой политики Украины* [National sovereignty as a priority of the modern constitutional and legal policy of Ukraine]. Constitutional and municipal law, 2013 No. 2. p.78.

¹⁴ Закон України Про відновлення дії окремих положень Конституції України (Відомості Верховної Ради (ВВР), 2014 No. 11, ст.143). Official site of the Verkhovna Rada of Ukraine: <http://zakon1.rada.gov.ua/laws/show/742-18/paran2#n2> (time of download: 25 May 2014).

impossibility to perform duties due to health problems; as a result of impeachment (this is a rather complicated and well regulated procedure); or death (Art. 108-111). None of the above mentioned reasons took place. In such conditions it is interesting to note a method used in this political situation. On February 22, 2014 the Verkhovna Rada passed a resolution that “President of Ukraine V.Yanukovich removed himself from implementation of the constitutional powers which poses a threat to governability of the state, territorial integrity and sovereignty of Ukraine, massive violation of rights and freedoms of citizens”.¹⁵ This resolution scheduled early elections of the president.

Taking into account the previous constitutional development of Ukraine, political events in the late 2013 and early 2014 shall be highlighted. Many people call these events either a revolution or a *coup d'état*. It is commonly known that revolutions and *coup d'état* are not legal ways to change power, they are not regulated by the constitutional or legal provisions. On the contrary, revolutionary events violate law, devalue it and above all the constitutional branch of law. On the other hand, it is evident that to normalize the political situation in the country which passed through a *coup d'état* it is required to have a universal regulator of public relations such as law. A new constitutional and other legal provisions shall be created not only by agreement reached within a ruling elite, but they shall rest upon a wide public support, including the ruling forces and the opposition.

Having a look at the existing Ukrainian Constitution, a number of *areas of tension* can be distinguished, i.e. constitutional provisions under a real danger of being violated or which are explicitly violated on the territory of the country.

First of all, we should refer to Art. 8 stipulating that Ukraine recognizes and applies the principle of the rule of law. The Ukrainian Constitution has the highest legal power and its provisions have a direct effect. On the basis thereof, all subjects of legal relations and in particular highest state authorities shall abide by the Constitution, irrespective of any circumstances, even emergencies, like those which took place in the centre of Kiev or Odessa, or in the South-East of the country. Under Art. 68 everybody shall rigorously adhere to the Constitution and laws of Ukraine, and *shall not encroach on human rights and freedoms, honour and dignity of other people*. Under Art. 5 of the Constitution people are carriers of sovereignty and the sole source of power in Ukraine. This section reads as follows: “right to define and change the constitutional form of government belongs solely to people and cannot be usurped by a state, its authorities or officials. Nobody can usurp the state power.” The Ukrainian Constitution does not give the right to the people to resist oppression and to rise in revolt as it is written in the constitutional documents of the USA. But if the massive part of the public is strongly dissatisfied with actions of state authorities as it was witnessed in Kiev back in the late 2013, then the opinion of the people shall not be ignored by the authorities.

5.

Certainly, today the most gruelling issue in Ukraine is the so called ‘*ethnic problem*’. Under Art. 10 of the Constitution “in Ukraine there is free development, use and protection of the Russian and other languages of *ethnic minorities* of Ukraine”. Art. 11 states that “state shall facilitate development of ethnic, cultural, linguistic and religious identity of all indigenous peoples and ethnic minorities of Ukraine”. These provisions imply that the Russian language has no status of the second official language along with the Ukrainian language, despite its wide spread, especially in the South-East of the country. It is called “the language of ethnic minorities”.

Besides, in the light of events of the spring 2014 it must be mentioned that a separate article of the Ukrainian Constitution is dedicated to a status of national Armed forces (Art. 17). Not every constitution has such provisions. For example, the 1993 Russian Constitution has no such norms. Among other things this article envisages that “Armed forces of Ukraine and other military functions cannot be used by anyone to limit rights and freedoms of citizens.” Furthermore, the same article of the Constitution says that on the Ukrainian territory it is prohibited to form and operate any armed organization not specified by the law. Under Art. 37, political parties and public interest organizations cannot have armed functions.

Hence, it is instructive to recall that unlike the Constitution of the United States, which proclaims the right to bear arms as the main constitutional right, there is no such a right in the Ukrainian Constitution.

¹⁵ Постанова Верховної Ради України Про самоусунення Президента України від виконання конституційних повноважень та призначення позачергових виборів Президента України (Відомості Верховної Ради (ВВР), 2014, № 11, ст.158). Official site of the Verkhovna Rada of Ukraine: <http://zakon1.rada.gov.ua/laws/show/757-VII> (time of download: 25 May 2014).

Moreover, Art. 60 of the Ukrainian Constitution runs that “no one is obliged to carry out explicitly criminal commands or orders. Issuance and implementation of an explicitly criminal command or order entails legal liability”.

In sum, this short overview notes that the Constitutions of Ukraine and Russia have one thing in common: they underwent formally only three or four reforms, and this does not come as a surprise because since their adoption very little time has passed. However, if amendments to the Russian Constitution were not so large-scale, the Ukrainian Constitution experienced significant changes, especially in 2004, 2010 and 2014. The common denominator of the constitutional reforms of the both countries is that they exclusively touched upon *a status of government authorities* and “were not aimed at expanding existing freedoms of citizens or changing approaches in the area of economics and development of a civil society”.¹⁶

A certain role was played by the Constitutional Courts, and meanwhile the Russian Court used its power to interpret provisions of the Constitution eleven times (1995-2000), its Ukrainian colleague – sixty seven times (1997-2014, excluding only 2006 when there were no Court interpretations of the Constitution).¹⁷ The Russian Court scrutinized mostly issues pertaining to activity of highest government authorities, legislative process, amendments to the Constitution and territorial arrangement. On the contrary, the Ukrainian Constitutional Court interpreted almost all sections of the Constitution, including a section about a social order and human rights.

6.

Now the both countries are facing the same task of not just choosing and accepting an *ideal* legislation, but making an attempt to implement the *already accepted* proper law constructions, particularly in the sphere of human rights, forms of direct democracy, competitive market economy, and independence of courts. Art. 48 of the Ukrainian Constitution can serve as an example of such a regulation. This article says that “everybody has the right to a sufficient standard of living for him and his family, including enough food, clothes and residence”. There is no question if this provision is good or bad, if it is required or not to forgo such wide social guarantees. In the age of a continuing global economic crisis and an increasingly lower standard of living even in advanced countries, it is pressing for authorities not only to perform institutional adjustments, but also to make an effort to fully implement the existing legislation which equally meets global standards of human rights. People of the post-Soviet countries and their ruling elite must get used to living *in compliance with legal regulations*, and foremost with the Constitution and laws, at the end of the day this will help to unlock the positive potential enshrined in the current legislation.¹⁸

¹⁶ Barabash Y. *Опыт конституционного реформирования в Украине: в поисках европейского идеала* [Experience of constitutional reforming in Ukraine: in search of a European ideal]. Comparative constitutional review, 2014, No. 1 (98). p. 32.

¹⁷ Конституція України (Відомості Верховної Ради України (ВВР), 1996. No. 30, ст. 141) // Official site of the Verkhovna Rada of Ukraine: <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> (time of download: 25 May 2014).

¹⁸ See, Strashun B. Конституция России – среда обитания, требующая рационального использования [Constitution of Russia – habitat requiring a rational use]. Constitutional law. East European Review, 1999, No. 4 (29). p.145.