

Ukraine

Precarious Post-electoral Reversals

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Summary

Since Ukraine's 2010 presidential elections, the governing coalition has annulled the 2004 constitutional amendment enacted after the Orange Revolution. President Victor Yanukovich took up the question in June 2010, and on September 30, 2010, the Constitutional Court repealed the 2004 amendment. Ukraine has now returned de facto to the 1996 Constitution. This policy brief outlines the political changes in Ukraine in 2010. It argues that these changes were partially a product of the transition of power between presidents Yushchenko and Yanukovich, and partially born out of the multiple deadlocks between president and parliament from 2007 to 2009. Presidential powers have been reinforced, however, and the changes to the regional electoral law have served to construct a political arena that makes it difficult for the political forces of the opposition to compete against the majority coalition.

Ukraine's Shades of Democracy

As of 2010, Ukraine may be seen as something between an electoral democracy and an electoral authoritarian system. This is a shift from the earlier course. After the constitutional amendment of 2004, many predicted that Ukraine follow the trajectory of an electoral democracy, which rests on the following criteria: a) that rules are recognizable and that they structure political behavior and political choice; b) that there is continuity in institutional arrangements and electoral arrangements; c) that regular elections are held in accordance with a fixed electoral scheme. The result of the 2010 presidential elections has had a fundamental impact on the institutional designs that preceded the elections, however. Institutional arrangements have been changed, and the former members of the Orange coalition have tried, in vain, to act within the framework of the political reforms from 2004, to halt motions based on the simple majority of the new Azarov

government coalition, and to appeal for popular support. Captured by the postponed regional elections, however, the appeal for popular support from the part of the opposition has fallen to the ground. Ukraine may now be closer to what Andreas Schedler¹ has identified as 'electoral authoritarianism'—an art of manipulation directed towards altering the arena of competition. The test case is always the space allowed for the opposition, and the distinct set of manipulative practices that run across weakly institutionalized policy fields in between elections. Unlike purely authoritarian regimes, electoral authoritarianism is about 'access to power' through popular elections. Electoral authoritarian regimes allow for 'authoritarian manipulation, in which ruling parties seek to control the substantive outcomes of electoral competition, and the game of institutional reform' (2006, p.12). Elements of this have been visible in 2010.

Pre- and Post Electoral Ukraine 2010

In his seminal work, Paul D'Anieri² lists four major causes of electoral authoritarianism in Ukraine: societal fragmentation, institutional design, power politics, and the non-revolutionary path of change. To a certain extent, institutional designs reflect the dynamics of other causes, such as social fragmentation, where D'Anieri sees the divisions of Ukrainian society as a major obstacle for an effective democracy, and hence also a driver for empowering the presidency. Often illiberal democratic erosion is a result, as under Kutchma from 1999 and towards 2002. This policy brief focuses on the institutional design (strong presidency, electoral law and rules of parliament). I ar-

- 1 Andreas Schedler (ed.), *Electoral Authoritarianism: The Dynamics of Unfree Competition*, Lynne Rienner Publishers: London and New York, 2006.
- 2 Paul D'Anieri, *Understanding Ukrainian Politics: Power, Politics, and Institutional Design*, M.E. Sharpe, Armonk, NY, 2007.

gue that the way towards amending the 2004 constitutional amendment has involved three factors. First, the ruling coalition amended the Rada regulations, second the electoral law (local elections) and third, the Constitution. Together, these changes have introduced a new dynamics in Ukrainian politics, and indeed one fraught with the heritage of stronger presidential rule. Moreover, the manner in which these reforms have been nested together indicates that the political playing field for the opposition forces has been narrowed substantially. The process has involved installing a new majority government, revamping the Constitutional Court, and finally the coalesced process of amending the Constitution and the regional electoral law.

Majority Government

Forming a government has been a persistent problem in Ukraine since 2005. Acknowledging the victory of Victor Yanukovich in the presidential 2010 elections, outgoing president Victor Yushchenko signed a new law allowing for the formation of a majority in the parliament.³ Yushchenko argued that the law should 'help the parliamentary forces leave the political cul-de-sac of forming a majority in parliament'. The interpretation of this amendment was essential in dismissing the Tymoshenko government and in enabling the formation of the Azarov government. On February 24, 2010, the Party of Regions proposed a project for the formation of a new parliamentary majority to the Rada chairman, Vladimir Litvin.⁴ The Party of Regions had also drafted a legal proposal on a vote of no confidence against the government. On March 3, the Rada chairman announced that he had not received a list of the requisite 226 deputies supporting the government coalition, and hence that the coalition formally did not exist. That same day, a vote of no confidence launched by the Party of Regions received 243 votes in the Rada, thereby effectively dismissing the Tymoshenko government.⁵

The February 16th amendment was part and parcel of a transition of power from one president-elect to the other. Still, it re-opened the discussion on the constitutional foundation of power in Ukraine. This was taken a substantial step further on March 4, when the Party of Regions launched a draft law to change the Rada regulation's article 61 to allow also independents to be released from their electoral mandate. The motion was supported by 228 votes in the first reading, three short of the list of signatures that was circulated simultaneously in support of a new government.⁶ At the same time, members of the coalition talked about the formation of a government before March 10. On March 9, the Rada chairman ruled against the opposition to conduct a speedy vote on amending the Rada regulation, ignoring the opposition's call that this ran

contrary to paragraph 6 of the Constitution.⁷ Finally, using majority representation in the Committee on parliamentary ethics, the Party of Regions and support parties could easily control mediating efforts in the Council of Faction leaders.⁸ The opposition considered these mediating efforts absurd, as the Council of Faction leaders was indeed mandated by the factions the majority wanted to declare invalid. Faction leaders could not possibly have any say if the Rada voted to abolish factional coherence under the guise of forming a government coalition. Protests were not taken into account. Installed on March 12, 2010, not by vote, but by a list of signatures, the government had a backing of 235 deputies. The principle of majority was based on the fact that factional coherence was abolished. In the upshot, the opposition was worried about stronger presidential rule, and that the new president was acting against the Constitution.⁹

Reinforced Presidential Rule

The new regulation on forming a majority government was paralleled by moves to strengthen the presidency. On February 28, Yanukovich signed a decree abolishing the presidential secretariat of Yushchenko, and installing a leaner administration led by a peoples' deputy from the Party of Regions, Sergey Levochkin, who was also former vice-chairman of the Rada faction of the Party of Regions.¹⁰ The president himself took the lead in asking factions to form a majority in the Rada immediately after the vote of no confidence against the Tymoshenko government. The Ukrainian daily *Kommersant* remarked that this was actually *against* the Constitution, since the head of state should be controlled by the Rada, and not participate directly in bringing deputies over to his side.¹¹ Moreover, it stood in sharp contrast to the Yushchenko period, where the president had acted as broker in parliamentary stand-offs, as during the government crisis in 2006 when he launched the *Universal Pact*, and not as party to the formation of a majority coalition in the Rada.

Replacements were also made in the Constitutional Court. On March 5, Yanukovich by decree dispatched a former Party of Regions peoples' deputy to the position as deputy head of the presidential administration and the president's representative.¹² New policies were launched. To no avail, the opposition criticized the Constitutional Court's ruling in April on lifting

3 'Viktor Yushchenko poprosil prochshanie', *Kommersant*, 17 February 2010.

4 'Akt sozdaniya', *Kommersant*, 25 February 2010.

5 'Kabinet zakryt', *Kommersant*, 4 March 2010.

6 'Deputyaty podobrali vyrazheniya', *Kommersant*, 5 March 2010.

7 'Rada kazhdomu', *Kommersant*, 10 March 2010.

8 'Oppozitsiya nastai vaet na uvolnenii glavy reglamentogo komiteta Rady', *Kommersant*, 22 April 2010.

9 'Koalitsiya gotovit svoe predstavlenie', *Kommersant*, 11 March 2010.

10 'Prezident formiruet adminresurs', *Kommersant*, 28 February 2010.

11 'Esli budet 226 podpisey, ya ob'yavlyu o nalichii koalitsii', *Kommersant*, 4 March 2010. See also: 'Viktor Yanukovich zapustil protsess', *Kommersant*, 4 March 2010.

12 'Viktor Yanukovich obzovelsya novymi kadrami', *Kommersant*, 5 March 2010.



the immunity of the peoples' deputies but keeping the immunity of the president. Representatives called it a 'political ruling', noting that Yanukovich had been one of the authors of the draft law of 2009 proposing to lift presidential immunity. As the balance of power had shifted, this was no longer needed. Again, this rule strengthened the presidency substantially, and reduced the Rada's role in the power balance.¹³ All taken together, the solid Rada majority, the lifting of factional discipline and the abolishment of immunity created a predicament for joining the pro-presidential team.

Amending the Constitution

Yanukovich set the constitutional debate in motion again at two levels. In March he called in the diplomats of the G-8 and the EU countries to hear their views on the constitutionality of the formation of the Azarov government.¹⁴ The president assured at the meeting that he would ask the Constitutional Court to check the legality of changing the rules for government formation, but did not reflect on how the government had been formed. This unusual 'hearing' indicated that the head of state at least seemed mindful of sounding out the opinions of the international community on domestic policies in Ukraine. On the other hand, if constitutional rule had already been set aside, such a courtesy call to the judiciary would have little significance. Indeed, the Constitutional Court ruled on the issue in the beginning of April, handing down a ruling in direct contradiction with an earlier ruling in 2008. The court said that the formation of the government coalition did not run contrary to the Constitution, while the ruling from 2008 explicitly stated that only factions could take part in a government coalition.¹⁵

In June 2010, Yanukovich openly spoke of the need to reverse the 2004 amendment, arguing that governance was not effective under it. The Rada treated the issue in July parallel to the adoption of a legislative act on the internal gas market of Ukraine. In all, 252 deputies – i.e. the majority coalition – held that the Constitutional Court should rule on the legality of the amendment of December 9, 2004, stating that it had been adopted after a 'breach in procedures'. Again, Ukraine was split. Members of the Party of Regions were adamant that Ukraine should return to presidential rule, and to the Constitution of 1996, while the opposition argued that the amendment had, since being adopted, become part of the 'body' of the Constitution and a part of constitutional governance. In the upshot, the Constitutional Court played an interfering role, with the former chairman of the Court, Sergey Strizhak, declaring to the media that the Constitution had no 'body', only letters. The issue was settled through the Rada chairman in a closed meeting with the heads of the Constitutional

Court and government officials, all from the Party of Regions: no members of the opposition were present.¹⁶ On September 30, the Constitutional Court ruled that the 2004 amendment was invalid.

The Regional Elections

In an electoral democracy, elections are incentives for forces to pool resources. In Ukraine, however, the 2010 regional elections have been a victim of political gamesmanship. Originally set for 2011, regional elections were postponed by a Rada vote on February 16, 2010, pending a new law draft. This was launched in April 2010, and stipulated prolonging the mandate of regional councils (including Crimea), and the chairmen of city councils, from four to five years. The change was to take effect from the regional elections to be held in 2011. However, the draft was interpreted as having retroactive validity for the regional elections of 2006. Representatives who had been elected for four years in 2006 would automatically receive an extra year in office if the bill were passed. This raised new issues, and the ruling coalition postponed a decision on the elections by sending the bill to the Constitutional Court. The court reached a conclusion in June, arguing that the terms of office for future elections should be prolonged, but not with retroactive effect. The Rada went further, adopting a new law on local elections that stipulated holding elections on October 31, 2010.

More important than the date was the fact that the law narrowed the field of competition. First, while favoring the dominant parties from the 2006 and 2007 elections, the law ruled out many new parties that had emerged from the presidential elections, among them Arsenii Yatsenyuk's Front of Change, and Serhiy Tyhyhko's Strong Ukraine. Second, the law broke with earlier practices, stating that all candidates for mayoral positions had to be registered with parties. This amendment undermined the positions of several independent local mayors, with further centralization and less regional power as a result. Third, only formally recognized *parties* could run, not blocs. This latter restriction threw a demolishing spanner in the works for the opposition's largest party bloc, the Yuliya Tymoshenko Bloc. Finally, the delay in adopting the law reduced the time for registration and nomination of candidates from 90 days to 50 days. The shortening of the pre-electoral period made it difficult for the NGO sector to estimate the consequences for the political arena, and to prepare exit polls.¹⁷

13 'Viktor Yanukovich sokhranil immunitet', *Kommersant*, 8 April, 2010.

14 'Viktoru Yanukovich priznalis' v legitimnost', *Kommersant*, 11 March 2010.

15 'Deputatov ne rassudili', *Kommersant*, 9 April 2010. The only ambassador to protest visibly against this was the Ambassador of the UK.

16 'Narodnye deputaty vykhodyat na otmenu', *Kommersant*, 15 July 2010. Present at the meeting were Andrey Klyuyev, first deputy prime minister and earlier deputy head of the parliamentary fraction of the Party of Regions, and Adam Martyniuk, member of the faction of Ukraine's Communist Party. Martyniuk had been installed as deputy speaker of the Rada by partisan promotion from the ranks of the Party of Regions when Aleksander Lavrinovich was appointed Minister of Justice. According to traditions, this post had been granted the opposition, but this was ignored. 'Kommunisty vzyali ne svoe', *Kommersant*, 12 May 2010.

17 Radio Ukraine, <http://www.nrcu.gov.ua/index.php?id=148&listid=131604>, accessed on 5 November 2010.

Snap changes and new rules have had an effect on the reporting of results. Illustratively, results have appeared earlier in newspapers than on the website of the Central Electoral Commission itself. Indeed, the electoral commission has recently stated that it 'may consider' publishing results at a later date.¹⁸ To be sure, the regional elections were nested in a chain of political controversies and reforms. Still, the criterion of an electoral democracy – to hold regular and transparent elections that also provide real incentives for the contenders – was not heeded. The electoral result itself produced no clear indication as to the political balance in Ukraine. The Party of Regions has won mayoral elections in 10 of a total of 24 oblast centers, with the sharpest contender, Batkivshchina (associated with the Yuliya Tymoshenko Bloc) winning in only two. In Kharkov, the electoral result was disputed, with the Party of Regions barely winning over the Batkivshchina nominee. The rest of the total of 24 major centers was won by a hodgepodge of various parties not represented in the national legislature.¹⁹

Conclusions

The precarious reversals in Ukraine that started in March 2010 and ended in October 2010 may produce new problems. First, the current government enjoys close relations the president, which may effectively strengthen presidential rule. Formally, this is in line with the 1996 Constitution, but Yanukovich was not elected according to this Constitution. The current electoral coalition is also prone to strengthen both presidential rule and a more intrusive administrative bureaucracy. Second, the opposition associated with

reforms, anti-authoritarianism and national values has been weakened both by amendments of the Rada regulations, and changes in the law on regional elections. This may further increase the divisiveness in Ukrainian politics. To be sure, the divisiveness of Ukrainian politics in recent years has led to numerous institutional deadlocks, and the institutional design from 2004 was not clear. Indeed, the EU warned against it in 2004. This said, it was supported by 402 of 450 deputies, and also of the bulk of what is now the Party of Regions. The fact that this amendment has now been rolled back testifies to more than a change of heart: It seems more a case of settling the scores. The earlier power-sharing model of 2004 was (ideally, at least) designed to balance presidential powers against those of the government and the parliament. This power-sharing model has now become a thing of the past.

The government has been seeking legitimacy from the EU for these reversals. For the EU, however, this is less of a matter of technicalities, and more a question of values, as it has been in most EU statements on Ukraine. The latest summit between Ukraine and the EU reflected this, with strong conditionality from the EU that the incentives of visa-free travel and the EU open door policy will remain pending on a strict democratic record of Ukraine towards the parliamentary elections in 2012.²⁰ In this sense, the EU's value card has been rejuvenated and combined with a clear statement from the European Parliament that Ukraine is entitled to become a member only if it qualifies and does not reverse democratic gains. In the further context, Brussels will hold the free-trade agreement carrot and the European Parliament the value stick. That might prove to be a good combination, also in the sense that the EU then remains true to its values.

²⁰ Eurasia Daily Monitor, 1 December 2010.

¹⁸ *Kyiv Post*, 8 November, 2010, at: <http://www.kyivpost.com/news/politics/detail/89186/#ixzz14gUgMd1g>

¹⁹ *Kommersant*, 8 November, 2010, at: <http://www.kommersant.ua/doc.html?docId=1534981>, accessed on 8 November 2010.

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