

RFERL, June 26, 2009

Constitutional Instability In Ukraine Leads To 'Legal Turmoil'

by Taras Kuzio

On June 28, 1996, Ukraine became the last Soviet republic to adopt a post-Soviet constitution, and that day was designated Constitution Day, a national holiday. Two years later, on October 21, 1998, the Crimean Autonomous Republic adopted its own constitution, recognizing the peninsula within Ukraine.

Leonid Kuchma's reelection as president in 1999 gave rise to Ukraine's first non-left parliamentary majority that sought to ditch the country's "semi-presidential" constitution in favor of a full presidential system. The relevant four questions were put to a referendum in April 2000 that was not internationally recognized, and were approved by a suspiciously high percentage of voters.

But Kuchma's plans were undermined by the onset of the Kuchma-gate crisis in November of that year, when tapes made illicitly in his office allegedly proved that he ordered violence against journalist Heorhiy Gongadze, who was kidnapped on September 16 and found decapitated on November 2, 2000.

Ukrainian politicians traditionally approached constitutional, and indeed all other issues, from the standpoint not of national interests, but personal advantage. Following the 2002 parliamentary elections, Kuchma shifted 180 degrees from his constitutional position two years earlier toward support for a parliamentary system. The architect of this strategy, which had two objectives, was presidential chief of staff Viktor Medvedchuk, leader of the Social Democratic Party-united.

Disarming Yushchenko

The first objective was to split the opposition by persuading the left, perennial supporters of parliamentarism, to support the constitutional reforms advocated by pro-presidential centrists. The second was to strip popular opposition presidential candidate Viktor Yushchenko, if he were elected, of the extensive presidential powers enshrined in the 1996 constitution.

The second vote in April 2004 failed after some pro-presidential centrists rebelled in protest at the change earlier that month of the election law from mixed to fully proportional. That change had been a condition of support by the left for the constitutional reforms.

Ironically, the reforms adopted on December 8, 2004, in a parliamentary vote were identical to those rejected eight months earlier. During those eight months, the authorities waged an all-out campaign to prevent Yushchenko being elected with the powers enshrined in the 1996 constitution. The widespread fraud that marred the presidential ballot led to the so-called Orange Revolution, triggered by Europe's largest postwar mass protests, in which one in five Ukrainians participated.

Three European Union-sponsored roundtables resulted in the December 8 compromise agreement that led to a repeat vote on December 26 that Yushchenko won. In return, Yushchenko granted verbal immunity to his defeated rival Kuchma, and Yushchenko's Our Ukraine supported the vote on the constitutional reforms to come into force in 2006. The Yulia Tymoshenko bloc (BYuT) was the only parliamentary force to vote against the constitutional amendments.

Constitutional Questions

After being elected president, Yushchenko complained about, but failed to repeal, the constitutional reforms. First, between September 2005, when the Tymoshenko government was removed, until February 2007, when the Orange alliance was reconstituted, the BYuT and Our Ukraine were at loggerheads and divided. Yushchenko and Our Ukraine did not support the BYuT's call to invoke the October 2005 Constitutional Court ruling that constitutional reforms required a national referendum. The BYuT campaigned for such a referendum in the 2006 and 2007 elections.

Second, Yushchenko did not establish his National Constitutional Council until December 27, 2007, and only presented his reform proposals on March 31, 2009. But by then he had no hope of implementing them as his popularity rating had collapsed to 2 percent and he had no support in parliament. Our Ukraine had voted to rejoin the coalition in December 2008, against his wishes.

The conflict between the president and prime minister continued throughout 2008, and the onset of the global financial crisis in the fall failed to dampen it. During that time, legal and constitutional experts and different political factions all reached the conclusion that the president's daily intervention in economic and energy issues is unconstitutional. (Under the 2006 constitution, the government reports to the parliament, not to the president.)

In an April 2008 speech to the Parliamentary Assembly of the Council of Europe, Tymoshenko announced a dramatic shift within the BYuT towards support for parliamentarism.

Their second conclusion was that without presidential support for the holding of a referendum, the only way the constitution could be changed was through a constitutional majority. But two successive attempts, in September 2008 and May 2009, to form a BYuT-Party of Regions coalition with the aim of pushing through constitutional reforms that would strengthen the parliament both failed, partly due to personal mistrust but also to Party of Regions' demands to have their cake and eat it.

While supporting a president elected by parliament (i.e. full parliamentary system), Party of Regions Chairman Viktor Yanukovich simultaneously sought a "guarantee" of two presidential terms with extensive powers similar to those bestowed on the president in the 2006 constitution. German Chancellor Angela Merkel pointed out to Ukrainians in May that parliamentary presidents are ceremonial.

Halfway To Nowhere

Two further factors are of direct relevance. "Semi" political systems, whether presidential (as in the 1996 constitution) or parliamentary (as in the 2006 constitution), are recipes for instability and conflict. If Ukraine really wants political stability and an escape from constitutional and legal chaos, it should change the constitution either to a full presidential system or towards a full parliamentary system. Prime Minister Tymoshenko acknowledged the inevitability of that choice in the course of a lengthy interview on Channel 5 on June 11. "Semi" systems do not divide powers clearly and are therefore recipes for "chaos," she stressed.

Nearly two decades after the disintegration of the Soviet empire, the 27 postcommunist states are divided into two groups: those in Central-Eastern Europe and the Baltic states have parliamentary systems, and those in Eurasia -- presidential systems. The two exceptions are Ukraine and Moldova, with semi-parliamentary and parliamentary systems, respectively.

Parliamentarism and democratization went hand-in-hand in Central-Eastern Europe and the Baltic states, facilitating their integration into NATO and the EU. Parliamentarism could therefore further integrate Ukraine into Europe.

Ukraine's transition from a semi-presidential to semi-parliamentarian constitution has completely overshadowed Yushchenko's presidency. Personality, ideological, and gender factors have been compounded by constitutionally unclear divisions of powers. U.S. Judge Bohdan Futey noted this month in a Ukrainian legal journal that "these [constitutional] changes interlaced the power of the executive and legislative branches, leaving the country in legal turmoil to this day."

Yushchenko's presidency has been dominated by political crises, governmental instability, elite in-fighting, and constitutional chaos that have combined to undermine the potential generated by the Orange Revolution. With the constitutional question still unresolved as the Yushchenko era nears its end, Ukraine will enter the January 2010 election campaign in the same state of constitutional uncertainty as it did five years ago.

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