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The Political Context of the Amendments to the Constitution of Ukraine

Keywords: Constitution of Ukraine, political context, political crisis, protest, political opposition

Słowa kluczowe: Konstytucja Ukrainy, uwarunkowania polityczne, kryzys polityczny, protest, opozycja polityczna

Abstract

The purpose of this article is to determine the political conditions of the amendments introduced to the Constitution of Ukraine regarding the modification of the form of rule: 1) to establish the motives of political subjects that aimed at introducing amendments to the Ukrainian Constitution; 2) to grasp the specific political situation in which the modification of the form of rule in Ukraine took place. The following thesis has been examined: 1) that it were the presidents Leonid Kuchma (1994–2005) and Viktor Yanukovich (2010–2014) who had particular aspirations to modify the semi-presidential form of rule introduced in 1996 in Ukraine; 2) that introducing amendments to the Constitution of Ukraine regarding the modification of the form of rule was the result of a political compromise made between the government and the opposition during the socio-political protest in 2004 (the so-called Orange Revolution) and the mass anti-government protest in 2014 (Euromaidan).

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Streszczenie**Uwarunkowania polityczne zmian Konstytucji Ukrainy**

Celem artykułu jest określenie uwarunkowań politycznych dokonywania zmian Konstytucji Ukrainy w zakresie modyfikacji formy rządów: 1) ustalenie motywów podmiotów politycznych dążących do wprowadzenia zmian do Konstytucji Ukrainy; 2) ujęcie specyfiki sytuacji politycznej, w której modyfikowano formę sprawowania rządów na Ukrainie. Sformułowane zostały następujące założenia: 1) szczególne aspiracje w zakresie modyfikacji półprezydenckiej formy rządów wprowadzonej na Ukrainie w 1996 r. wykazywali prezydenci Leonid Kuczma (1994–2005) oraz Wiktor Janukowycz (2010–2014); 2) wprowadzenie zmian do Konstytucji Ukrainy w zakresie modyfikacji formy rządów było efektem kompromisu politycznego zawartego pomiędzy władzą a opozycją podczas protestów społeczno-politycznych w 2004 r. (tzw. *pomarańczowa rewolucja*) oraz w trakcie masowych antyrządowych protestów w 2014 r. (Euromajdan).

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I. Introduction

The Constitution of Ukraine, passed by the Verkhovna Rada of Ukraine on 28 June 1996, introduced a semi-presidential system, in its president-parliamentary version, with a strong position of the head of the state. The president gained complete control over the executive government. With the consent of the Verkhovna Rada expressed in a simple majority of votes, the president would appoint the prime minister, and independently dismiss him from the office (Art. 106, point 9, of the Constitution)². The deposition of the prime minister was tantamount to the resignation of the government (Art. 115 of chapter 6 of the Constitution)³. Upon the motion of the prime minister, the president would also appoint and dismiss the members of the Ukrainian cabinet of ministers, the administration of the central organs of the executive, and leaders of the territorial state administration (Art. 106, point 10, of the Constitution)⁴.

² Конституція України, Київ 1996, p. 37.

³ Ibidem, p. 42.

⁴ Ibidem, p. 37.

From the moment the Constitution was ratified, various political powers attempted to fully or partially amend it. The main source of the political conflict was the governing system – the competence division and relationships in the president – government – parliament triangle. The strained political debates concerned the issues of the government appointment and control. A question was raised, who should have a decisive role in this respect – the president or the parliament. Another point that was difficult to reconcile was the issue of the influence on the executive between the president and the prime minister.

The objective of this article is to determine the political conditions of the amendments introduced so far to the Constitution of Ukraine regarding the modification of the form of rule. Therefore, the following thesis is proposed: a modification of the semi-presidential system in Ukraine became one of the methods to resolve the political crisis. According to Palle Svensson, a political crisis is a combination of factors that may lead to a breakdown of a political system or changes of a fundamental character⁵. The following research methods have been applied: institutional method, genetically-historical method, and systematic method.

II. Between the Parliament – Presidential and President – Parliamentary Republic

In 2000, President Leonid Kuchma attempted and failed to introduce, through a referendum, a presidential system in Ukraine (as the parliament did not accept the referendum results that had been favorable for the president). In 2001–2004, out of Kuchma’s initiative, six novelization drafts of the Constitution were proposed to increase the competence of the parliament at the expense of the president’s competences. According to political experts, in this way Kuchma tried to retain his power – after his second term as the President, he could, for instance, take the of-

⁵ P. Svensson, *Stability, Crisis and Breakdown: Some Notes on the Concept of Crisis in Political Analysis*, “Scandinavian Political Studies” 1986, No. 9, https://tidsskrift.dk/index.php/scandinavian_political_studies/article/view/12931/24659 (13.07.2020).

fice of the prime minister⁶, whose position at the time would have been strengthened.

The presidential campaign of 2004 saw a deep political crisis. Kuchma, who was stepping down as the head of the state, and the oligarchy that he had created during his rule (1994–2005)⁷, favored Viktor Yanukovych (then the prime minister), a representative of the Donetsk's oligarchy, as his candidate for the president. The ruling camp fabricated the results of the second round of elections (21 November 2004) so that Yanukovych would win. On 3 December 2004, the Supreme Court of Ukraine (SCU) ruled the presidential elections to be a fraud and therefore their results could not be established⁸. SCU also obliged the Central Electoral Committee to repeat the second round of elections⁹. The electoral fraud caused mass political and social unrest, which went down in history as the so-called Orange Revolution (November-December 2004).

The opposition paralyzed the main organs of state power and territorial administration (in western and central oblasts). Police units and local governments started to join the protestors. The so-called round table was organized to resolve the political impasse; it was a form of a dialogue between the government and the opposition, with the participation of a foreign diplomatic mission. A compromise was reached, as a result of which on 8 December 2004 an act was passed that amended the Constitution. In consequence, Ukraine became a parliament-presidential republic. Even though Ukraine preserved its semi-presidential system, the president lost his dominating influence on executive power. According to the amended Constitutional Law, which took effect in 2006, the main role in appointing the government and the prime minister was played by the parliament (the parliamentary majority was constituted based on the results of elections). The

⁶ С. Хоменко, *Епоха Кучми: десять неоднозначних років*, http://www.bbc.com/ukrainian/politics/2013/08/130809_kuchma_epoch_sx (14.07.2020).

⁷ A. Aslund, *How Ukraine Became a Market Economy and Democracy*, Washington 2009, pp. 107–113.

⁸ Рішення Верховного Суду України від 3 грудня 2004 року щодо другого туру виборів Президента України, <https://helsinki.org.ua/articles/rishennya-verhovnoho-sudu-ukrajiny-vid-3-hrudnya-2004-roku-schodo-druhohto-turu-vyboriv-prezydenta-ukrajiny> (13.07.2020).

⁹ Ibidem.

president appointed the minister of defense and the minister of foreign affairs only with the consent of the parliament. Walenty Baluk is right to note that after the amendments to the Constitution, the dualism of the executive power in Ukraine was preserved¹⁰. This became the foundation of the conflict between President Yushchenko and Prime Minister Yulia Tymoshenko in 2007–2010. The dispute that then started about the appointment of the heads of the territorial state administration disturbed the functioning of the whole executive power.

Experts and scholars raised the issue of failure to follow the procedures concerning introducing amendments to the Constitution: lack of necessary motions of the Constitutional Court (according to Art. 157 and 158 of the Constitution of Ukraine, the so-called constitutional control of the amendment bill before its proceeding is required); no debate on the amendment bill in the parliament; proceeding the amendments to the Constitution in one package with other bills, etc.¹¹

In 2010, using the fact that the political opposition was weakened, President Yanukovich took over control over the parliament and the government. The Constitutional Court of Ukraine, loyal to President Yanukovich, on 30 September 2010 issued a decree that annulled the amendments introduced in 2004. The legitimization of the decree, which was its integral part, boiled down to stating that The Ukrainian Law Concerning Amendments to the Constitution of Ukraine of 8 December 2004 No. 2222-IV had been deemed unconstitutional, due to a failure to fulfill the procedures required in its drafting and passing¹². However, the Constitution of Ukraine did not stipulate the procedures for renewing its provisions. Moreover, the law regulating the functioning of the Constitutional Court of Ukraine did not give it the competence to

¹⁰ W. Baluk, *Ukraina*, [in:] *Ustroje polityczne krajów Wspólnoty Niepodległych Państw*, eds. W. Baluk, A. Czajowski, Wrocław 2007, p. 123; *Конституція України. Із змінами, внесеними згідно із законом nr 2222-IV від 8.12.2004*, ВВР, 2005, No. 2, ст. 44, Харків 2006, p. 34.

¹¹ Г. Берченко, *Відновлення дії тексту конституції в аспекті концепції установчої влади*, "Форум права" 2016, No. 4, p. 25.

¹² Рішення Конституційного суду України у справі за конституційним поданням 252 народних депутатів України щодо відпо-відності Конституції України (конституційності) Закону України "Про внесення змін до Конституції України" від 8 грудня 2004 року N 2222-IV (справа про додержання процедури внесення змін до Конституції України), <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v020p710-10> (25.06.2020).

amend the Constitution by renewing the provisions that had been annulled¹³. Therefore, the experts from the Centre of Political and Legal Reforms questioned the ruling of the Constitutional Court of 3 September 2010¹⁴. The Venice Commission also questioned the aforementioned ruling¹⁵. Therefore, with the help of the Constitutional Court of Ukraine, Yanukovich brought back the presidential-parliamentary system in Ukraine.

III. Restoration of the Parliamentary – Presidential Republic as a Result of Euromaidan

In 2013–2014, wide anti-government unrest (Euromaidan) took place in Ukraine, caused by the government's suspension of the process of signing the association agreement between Ukraine and the European Union (EU). At the very beginning of the protests, in December 2013 the leaders of opposition parties (Arseniy Yatsenyuk – All-Ukrainian Union “Fatherland”, Oleh Tyahnybok – All-Ukrainian Union “Freedom”, and Vitaly Klitschko – Ukrainian Democratic Alliance for Reform) raised the issue of bringing back the Constitution with amendments to its form of 2004¹⁶. On the other hand, an opinion that the overreaching competences of the head of the state is one of the main reasons for the political crisis dominated in politics at the beginning of January 2014¹⁷. The leaders of the opposition started to spread the idea that returning to the Constitution in its 2004 form, which limited the competences of the president, would help resolve the political crisis. As a result of these efforts, in February 2014 62,5% of the participants of Euromaidan supported the pro-

¹³ Закон України Про Конституційний Суд України, “Відомості Верховної Ради України” 1996, No. 49, par. 272.

¹⁴ *Розвиток публічного права в Україні (довідь за 2009–2010 роки)*, eds. Н. Александрова, І. Коліушко, Київ 2011, p. 124.

¹⁵ *Про конституційну ситуацію в Україні: Висновок Європейської комісії за демократію через право (Венеціанської комісії) від 17 грудня 2010 р.*, http://zakon4.rada.gov.ua/laws/show/994_a36 (1.07.2020).

¹⁶ *Лідери опозиції озвучили ультиматум до уряду*, <https://news.vash.ua/news/polityka/lidery-opozytisyi-ozvuchyly-ulytymatum-vladi> (10.06.2020).

¹⁷ С. Хоменко, *Усі способи повернутися до Конституції-2004*, https://www.bbc.com/ukrainian/politics/2014/01/140130_constitution_2004_sx (1.07.2020).

posal to limit the competences of the head of state by bringing back the 2004 Constitution with amendments, as was indicated by the poll conducted on 2 February 2014 by the Ilk Kucheriv Democratic Initiative Foundation¹⁸. Thus, on 4 February 2014, the parties of the opposition presented a bill to the parliament that returned the Constitution to its 2004 form.

Consequently, the issue of reinstating the Constitution became the foundation of a compromise established on 21 February 2014 between President Yanukovich and the leaders of the three oppositional parties. This compromise was made possible thanks to the mediation of the diplomatic mission of the EU (a representative of the Russian Federation also participated in negotiations). According to the Agreement on the settlement of the political crisis in Ukraine, the version of the Constitution that limited the competences of the head of the state was to take effect within 48 hours from its signing. The Verkhovna Rada was to ratify the law reinstating the 2004 Constitution, while President Yanukovich, as he signed the agreement, committed himself to sign the Constitution. Next, the government was to be appointed. Until September 2014 a constitutional reform was to be undertaken, and early presidential elections were to take place by December 2014¹⁹. On 21 February 2014, the parliament passed the law that reinstated the Constitution in its 2004 form. 386 deputies (the constitutional majority is 300 deputies), including the ruling parties: Party of Regions (140 votes) and the Communist Party (32 votes) voted in favor of the law reinstating some provisions of the Constitution of Ukraine²⁰. However, President Yanukovich did not keep his word, refusing to sign the law passed by the parliament²¹. He escaped to the Russian Federation, which would paralyze the whole functioning of the Ukrainian state with its semi-presidential system and wide competences of the president.

As a result, the Verkhovna Rada decided on a number of political solutions to resolve the political crisis that was slowly leading to a collapse of the

¹⁸ *Від Майдану-табору до Майдану-січі: що змінилося?*, http://www.dif.org.ua/ua/polls/2014_polls/vid-maidanu-taboru-do-maidan.htm (25.06.2020).

¹⁹ *Угода про врегулювання кризи в Україні*, <https://www.pravda.com.ua/articles/2014/02/21/7015533> (7.07.2020).

²⁰ *Рада відновила дію Конституції 2004 року*, http://dt.ua/POLITICS/rada-vidnovila-diyu-konstituciyi-2004-roku-137995_.html (7.07.2020).

²¹ *Заява МЗС України щодо виконання Угоди про врегулювання кризи від 21 лютого*, <https://www.kmu.gov.ua/ua/news/247060719> (7.07.2020).

state. On 22 February 2014, the parliament passed the *Law on the Verkhovna Rada's Responsibility for the Situation in Ukraine*, which was supposed to bring back peace and order in the state²². On the same day, the parliament also passed a law which stated that to preserve constitutional order, the Verkhovna Rada accepted as binding the Constitution of Ukraine of 28 June 1996, with amendments and supplementations, introduced by the Ukrainian laws of 8 December 1996 No. 2222-IV, of 1 February 2011 No. 2952-VI and of 19 September 2013, No. 586-VII²³. In this way, the Verkhovna Rada reinstated the parliamentary-presidential republic in Ukraine. That day the Parliament passed also the *Law on the Resignation of the President of Ukraine from his Constitutional Competences and Calling Early Presidential Elections in Ukraine*²⁴. This was a political decision that was founded on the provisions of the Constitution. The solutions accepted by the Parliament allowed to appoint an acting president and to create a government. Therefore, the Verkhovna Rada resumed controllability of the state, appointing necessary institutions of power. Nevertheless, the constitutionalists' opinions on the conduct of the parliament are divided. Some constitutionalists point out that in February 2014 the Verkhovna Rada did not follow the binding procedure for introducing constitutional amendments²⁵. On the other hand, other experts in constitutional law suggest that in the situation in which the collapse of the state was imminent, there were not enough time or resources to begin the complicated process of introducing amendments to the Constitution of Ukraine in compliance with the required time frameworks and stages²⁶.

²² *Постанова Верховної Ради України Про взяття політичної відповідальності за ситуацію в Україні*, "Відомості Верховної Ради" 2014, No. 11, par. 154.

²³ *Постанова Верховної Ради України Про текст Конституції України в редакції 28 червня 1996 року, із змінами і доповненнями, внесеними законами України від 8 грудня 2004 року № 2222-IV, від 1 лютого 2011 року № 2952-VI, від 19 вересня 2013 року № 586-VII*, "Відомості Верховної Ради" 2014, No. 11, par. 151.

²⁴ *Постанова Верховної Ради України Про самоусунення Президента України від виконання конституційних повноважень та призначення позачергових виборів Президента України*, "Відомості Верховної Ради" 2014, No. 11, par. 158.

²⁵ Г. Берченко, *op.cit.*, p. 31; В. Колісник, *Відновлення дії Конституції України та зміна форми правління як засіб поновлення конституційного ладу*, "Вісник Конституційного Суду України" 2015, No. 4, pp. 104–105.

²⁶ С. Різник, *Про нез'ясоване питання конституційності актів парламенту, прийнятих в умовах Революції Гідності*, "Вісник Конституційного Суду України" 2015,

IV. Conclusions

As a result of the presented analysis, two basic conditions of the political context of the amendments to the Constitution of Ukraine in terms of the modification of the form of rule should be enumerated: 1) the ambition of the head of the state (Kuchma, Yanukovych) to strengthen his position; 2) a political crisis that was caused by mass political and social protest (The Orange Revolution, Euromaidan). The hypothesis that the modification of the semi-presidential system in Ukraine was one of the methods to resolve the political crisis has been fully confirmed. At the same time, the Constitution of Ukraine has become the object of political strife. According to the provisions of the Constitution of Ukraine of 28 June 1996, the cooperation in the triangle of the government – the president – the parliament was to be regulated by a number of legal acts²⁷. However, both the parliament and the president hesitated to normalize these relationships. This led to an instrumental treatment of the Constitution both by the particular persons who filled the office of the president, as well as by those who yielded power during the deep political crisis in Ukraine and their opposition.

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№ 6, р. 62; П. Рудик, *Аспекти правового забезпечення відновлення дії окремих положень Конституції України*, "Віче" 2015, No. 8, <http://veche.kiev.ua/journal/4683> (13.07.2020).

²⁷ Ю. Соловйова, *Ухвалення Конституції України як вияв діалектики інтересів різних політичних сил*, <http://lib.chdu.edu.ua/pdf/naukpraci/politics/2006/54-41-17.pdf> (14.07.2020).

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