
Ukraine's New Constitution: Devolution of Powers and the Rule of Law

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On 4 November 2015, the Ukraine Forum hosted a roundtable with Yuri Tretyak, executive director of the National Association of Regional Development Agencies of Ukraine, and Nataliia Agafonova, member of the Ukrainian Parliament and head of the Sub-Committee on Constitutional Law. The meeting addressed the text of the new constitution, which was recently approved at its first reading, with Mr Tretyak elaborating on the process of decentralization and Ms Agafonova considering the issue of judicial reform.

Decentralization

Deficiencies of the existing system

Following independence, the country was divided into 11,522 municipalities (*hromadas*), a large majority of which consist of less than 2,000 people. Budgetary shortcomings left 70–80 per cent of *hromadas* entirely dependent on subsidies, creating a culture of rent-seeking behaviour, and causing all but 180 municipalities to be incapable of exercising the local government powers as provided to them by the 7 December 1990 law on local self-government. This has resulted in local governmental duties being performed instead by district (*rayon*) administrators. Accordingly, the general public has tended to look to central government as the chief guarantor of quality of life, with only 5 per cent considering the improvement of living standards to be the responsibility of local authorities.

Administrative-territorial reorganization

The proposed decentralization reforms will create a three-tier administrative-territorial structure consisting of *hromadas*, *rayons* and *oblasts* (regions), each with their own exclusive powers in accordance with the European Charter of local self-governance. Under this system, the three tiers are not subordinated to one another. The constitutional reforms will establish the state functions at district and regional level, with prefects being created by presidential appointment in place of state administration. According to the French model, their role will be to coordinate central authority activities and oversee the legality of local self-government decisions, thereby promoting accountability. Responsibilities at *oblast* level will include culture and regional planning and development, while the *rayon* level functions will involve aspects of healthcare and education. Meanwhile each *hromada* will have jurisdiction over economic development, land management, social care, and housing and transport services amongst others, thereby reassuming responsibility for raising day-to-day living standards.

Though tailored to the situation in Ukraine, the reforms will incorporate lessons from other European states such as Poland, which has 2,500 municipalities. As such, a key element of the process is the amalgamation of municipalities, reducing their number by almost 90 per cent to 1,405. These will then be grouped into 120–150 districts forming 27 regions. Through this initially voluntary process, the new *hromadas* will be organized around an economic growth pole, creating a more efficient and prosperous system at the local level. However, this reduction in the number of municipalities will not entail a reduction in Ukraine's roughly 30,000 settlements, each of which will have an appointed mayor. The amalgamation process will be overseen by the Ministry of Regional Development, with region-wide development plans providing guidelines for amalgamation.

Preliminary results and outlook

Fiscal decentralization has thus far yielded positive results despite the country's ongoing economic problems. Before the reforms began in 2014, 96 per cent of municipalities were in receipt of government subsidies; a figure which has decreased to 75 per cent. Of the *hromadas*, 10 per cent now have a balanced

budget, while 15 per cent are donors of funds. Budgetary reforms have yielded incentives to generate local economic growth. Through the allocation of 60 per cent of locally-generated personal income tax and 100 per cent of land and property tax to municipalities, local budgets are 40 per cent higher this year than in 2014. The newly amalgamated municipalities have also taken over 84 per cent of land management, with the 16 per cent remaining under state control comprising Chernobyl, state nature reserves, forests and rivers amongst others.

If amendments to the constitution are adopted, the new administrative-territorial structure will be fully implemented and the amalgamation of municipalities will become compulsory. This process will require changes to around 500 laws. However, should the constitution not be amended, reforms will still be undertaken, albeit in a less homogenous manner. Changes at district and regional level will not be implemented, but the process of voluntary amalgamation will continue. Over the course of three months 793 municipalities have amalgamated into 159 new *hromadas*. Mr Tretyak noted that the level of uptake has been markedly higher than in other countries, which took up to a decade to reach the same point.

While this indicates enthusiasm for the decentralization process, opposition and obstacles remain. Mr Tretyak acknowledged that many local officials fear losing their jobs, but stated that although there will be a reorganization of roles, the number of posts will not substantially decrease. In order to assuage such fears, communication must be improved. On the question of opposition from the oligarchy, Mr Tretyak emphasized the vital role of civil society in preventing regional feudalism.

Mr Tretyak identified the 'Donbass problem' as a considerable obstacle to the adoption of decentralization reforms. According to a clause of the Minsk II agreement, the region's special status must be reflected in the Ukrainian constitution. However, Donbass is currently not accorded any such position, and the proposed changes to the constitution exclude provisions on the special status of territories. Instead special governing procedures are identified. If the constitutional reforms are adopted, the possibility of amalgamation also exists.

Judicial reforms

The need for reform

The judicial reforms include measures to ensure the independence and depoliticization of the judiciary, while also optimizing the competence and professional standards of the court system. In order to promote access to justice specialized courts will continue to operate, while administrative courts will receive constitutional recognition. The aim remains to simplify the court system to include only the local, appeal and supreme courts. The concept of a constitutional complaint, to be lodged after the exhaustion of domestic remedies, will be instituted for the first time, creating a further mechanism for the protection of human rights. The implementation of sustainable reforms will create the ground for future legislative changes. According to Ms Agafonova, without these amendments, which have the approval of the Venice Commission, the efficiency of other reforms is doubtful.

Independence of the judicial system

The judicial reforms will separate the court system and the executive branch, thereby creating a judicial system independent of political forces. The enforcement of decisions, which is currently within the remit of the Ministry of Justice, will become the responsibility of the courts, while the prosecutor's office will also become independent of the government. It will lose its power to exercise general control of legality,

but will remain tasked with public prosecution, supervision of pre-trial investigation and representing the interests of the state in court. Meanwhile the reforms will also guarantee the independence of the bar, consolidating its role in the enforcement of the right to legal aid and defence from prosecution.

Appointment and dismissal of judges

The draft of the new constitution proposes changes to the process of appointment and removal of judges, with the intention of fighting corruption and increasing professionalism and independence. To this end, the pluralistic High Council of Justice will assume overall responsibility for the careers of judges. The president will be bound by the Council's submissions on the appointment of judges. Bodies including the Judicial Administration and High Qualification Commission will assist in the task of strengthening professional requirements for judicial candidates. Selection procedures will be carried out on a competitive basis, with prospective judges required to be no younger than 30 with at least five years' professional experience. Once appointed, judges will have permanent tenure unless subject to dismissal proceedings. In conjunction with this, they will receive only functional immunity.

The grounds for dismissal of judges will include the inability to exercise powers due to health reasons; violation of incompatibility requirements; commission of a serious disciplinary offence; refusal to be removed from one court to another; and violation of the obligation to justify the origins of property. The requirement for judges to declare the origins of their assets was recommended by the Venice Commission as a means of fighting corruption. However, what constitutes property has yet to be specified, with Ms Agafonova stating that judges should declare both their own and their relatives' assets.

The initially planned lustration law mandating the removal of all sitting judges was rejected by the Venice Commission on the ground that it would result in the total collapse of the judicial system. Instead, conformity of existing judges with the new requirements will be assessed, including through a requalification test. Ms Agafonova noted that without substantial reforms of the judicial system the lustration law would have failed anyway, as it provided only for replacing individuals. The Ministry of Justice, which was initially pro-lustration, has also altered its view on the issue. Nonetheless, the question of judicial reforms remains subject to politicization, with lustration being favoured by some opposition politicians, as well as members of the People's Front.

Capacity for reform

The timing of the constitutional reforms before the local elections was deemed to be poor, with hustings resembling a parliamentary campaign due to an emphasis on populist ideas instead of local issues. Post-elections, the speakers hope the level of opposition to the reforms will fall. From a governmental perspective, steps have been taken to ensure transparency, including public discussion and the establishment of a consultative body comprising experts and civil society representatives. Reform offices have also been created with the support of USAID to assist in the decentralization process.

Once approved, the successful implementation of reforms is vital, with the EU assisting in capacity-building in this regard. The speakers acknowledged the amount of external assistance, both financial and technical, provided to Ukraine. The latter was deemed to be more important at this stage, given the lack of a national development plan or sectoral strategy. Without coordination by the government, grants and loans are currently allocated to individual projects without a broader strategy for economic development.