

# A NEW CONSTITUTION FOR UKRAINE? <sup>1</sup>

## EXECUTIVE SUMMARY

Following the Revolution of Dignity of 2014, Ukraine's Constitution was amended twice. Some planned changes were not adopted. In the course of the 2019 presidential elections and with the upcoming early parliamentary elections in July 2019, more radical proposals have been made by several political players: the most radical of which entails developing an entirely new Constitution. Most importantly, a representative of Ukraine's new president to the Ukrainian parliament declared the plans of President Zelenskyy and his political party, which according to the polls currently enjoys 50% of popular support, to renew the work of the Constitutional Commission. They plan to task it with preparing either a totally new Constitution or make changes to the current one.<sup>2</sup> Such proposals need to be taken seriously and invite discussion both on their substantive and procedural elements.

Substantive arguments in favour of a "clean slate" solution for the constitutional reform in Ukraine would include fixing the legitimacy of Ukraine's constitutional order following the unfortunate story of the 2004 constitutional amendments, their cancellation by the Constitutional Court in 2010 (now officially investigated as a coup-d'état), and the return to the essence of the 2004 text by the Parliament's resolution following the Maidan events in 2014. Other arguments include adjusting the Constitution to address the reality of the armed conflict and simply improving the Constitution by including a more efficient government structure that takes into account new development in human rights and so forth. The arguments against an entirely new Constitution carry more weight.

They centre around the values of constitutional stability, the dangers of weakening the already fragile national consensus, the potential to develop the Constitution through the jurisprudence of the Constitutional Court as well as, more generally, the fact that many changes could be introduced without meddling with the Constitution's text.

Furthermore, the currently discussed constitutional changes – such as decentralisation, human rights and even new governmental system – could be adopted as constitutional amendments at one stage or another and falls in line with the procedure foreseen in the Constitution upon public and expert consultations. There is no real added value in adopting them as a new constitution. Partial amendments will not be any worse in fulfilling the purposes and solving the problems than a totally new constitution.

The need for a new constitution would appear to be a political rather than a legal question. Political energies could be better spent in effecting the urgent reform challenges Ukraine faces than in a new constitutional process. There can be no magic solution that would ensure a sustainable development of democratic institutions simply by re-writing the Fundamental Law.

## INTRODUCTION

On 21 February 2019, Ukraine's Constitution was amended once again with the entry into force of Law 2680-VIII after its adoption by the Verkhovna Rada of Ukraine (the "**Parliament**") on

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<sup>1</sup> This DRI Briefing Paper has been prepared by the DRI legal team in Ukraine.

<sup>2</sup> "The representative of Zelenskyy in the Rada: The Constitution will be amended", (in Ukrainian) <<https://www.pravda.com.ua/news/2019/06/12/7217908/>> (accessed 12.06.2019).

7 February.<sup>3</sup> The amendment had been sponsored by President<sup>4</sup> and constitutionally enshrined Ukraine's strategic orientation towards the European Union and NATO.<sup>5</sup> At time of writing, this is the latest amendment since the 2016 reform of the judiciary.<sup>6</sup>

In addition, there is another fairly advanced process of changing the text of the Constitution to abolish immunity from prosecution for Members of the Parliament. In June 2018, the two competing drafts (one by President<sup>7</sup> and one by 158 MPs)<sup>8</sup> were met with no objections from the CCU<sup>9</sup>. Further, the docket of the Ukrainian Parliament includes several other post-Maidan motions to amend the Constitution that are concerned with such diverse topics as decentralisation of state functions,<sup>10</sup> changing the Soviet-style names of certain regions<sup>11</sup> and strengthening the status of farmers.<sup>12</sup>

However, several important political players in the ongoing parliamentary elections campaign, including, most notably, a team of the new President Volodymyr Zelenskyy<sup>13</sup> Yulia Tymoshenko<sup>14</sup> and Arsen Avakov<sup>15</sup>, appear to support a total rewriting Ukraine's Fundamental Law. Such proposals invite a serious discussion, among other matters, on the possibility of a "clean slate" Constitution, i.e. of adopting an absolutely new text rather than tinkering with the current one.

This briefing paper starts with an overview of the procedure required by the existing Constitution to amend it, and then proceeds to analyse pros and cons for adopting a completely new Fundamental Law for Ukraine.

## 1. THE PROCEDURE FOR RENEWING UKRAINE'S CONSTITUTION

The procedure for amending Ukraine's Constitution is governed by a separate Chapter of the Constitution—Chapter XIII ("Amendments to the Constitution of Ukraine"), comprising Articles 154–159. The main feature here is that there are two procedural tracks for amending various parts of the Constitution. The "simple track" must be followed in amending any constitutional provisions except those contained in "protected" parts of the Constitution—Chapters I ("General Principles"), III ("Elections, Referendum") and the same Chapter XIII, for which there is the "strict track".

The "simple track" provides for three steps:

- The submission of a draft amendment bill by the President or by no less than 150 MPs;
- The preliminary assent by a simple majority of the parliament (at least 226 MPs); and
- The subsequent confirmation by no less than 300 MPs during the subsequent regular session of the parliament.

The "strict track," which has never been used or even seriously attempted, includes:

- The submission of a draft amendment to the Parliament by the President or by no less than 300 MPs;
- The adoption of the draft by the same majority; and

<sup>3</sup> As required by the Constitution (see below), this was the second vote. The bill passed the minimal threshold of 300 positive votes out of 450 MPs: it was supported by 334 MPs, with 35 votes against and 16 MPs not participating (see [http://w1.c1.rada.gov.ua/pls/radan\\_gs09/ns\\_golos?g\\_id=21858](http://w1.c1.rada.gov.ua/pls/radan_gs09/ns_golos?g_id=21858)), accessed 30.05.2019).

<sup>4</sup> Verkhovna Rada of Ukraine, *draft Law on Amending the Constitution of Ukraine (regarding the State's strategic course towards Ukraine's obtaining full membership in the European Union and the North-Atlantic Treaty Organisation)*, 3 September 2018, No. 9037 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=64531](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64531) (accessed 30.05.2019).

<sup>5</sup> Verkhovna Rada of Ukraine, the Law of Ukraine "On amending the Constitution of Ukraine (regarding the State's Strategic Course towards Obtaining Full Membership of Ukraine in the European Union and the North Atlantic Treaty Organisation)" of 7 February 2017, No. 2680-VIII (in Ukrainian) <https://zakon.rada.gov.ua/laws/show/2680-19> (accessed 30.05.2019).

<sup>6</sup> Verkhovna Rada of Ukraine, the Law of Ukraine "On amending the Constitution of Ukraine (regarding the judicial system)" of 2 June 2016, No. 1401-VIII (in Ukrainian) <http://zakon.rada.gov.ua/laws/show/1401-19> (accessed 30.05.2019).

<sup>7</sup> Verkhovna Rada of Ukraine, *Draft Law on Amending Article 80 of the Constitution of Ukraine (as to the Immunity of the People's Deputies of Ukraine)* dated 17 October 2017, No. 7203 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=7203&skl=9](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=7203&skl=9) (accessed 30.05.2019).

<sup>8</sup> Verkhovna Rada of Ukraine, *Draft Law on Amending Article 80 of the Constitution of Ukraine (in the Part Concerned with the Abolition of the Immunity of the People's Deputies of Ukraine)* dated 19 July 2017, No. 6773 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=6773&skl=9](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=6773&skl=9) (accessed 30.05.2019).

<sup>9</sup> Constitutional Court of Ukraine, Opinion No. 1-в/2018 of 6 June 2018 (in Ukrainian) <http://zakon.rada.gov.ua/laws/show/v001v710-18> (accessed 30.05.2019); Constitutional Court of Ukraine, Opinion No. 2-в/2018 of 19 June 2018 (in Ukrainian) <http://zakon.rada.gov.ua/laws/show/v002v710-18> (accessed 30.05.2019).

<sup>10</sup> Verkhovna Rada of Ukraine, *Draft Law on Amending the Constitution of Ukraine (on Decentralising State Power)* dated 1 July 2015, No. 2217 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=55812](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55812). See also Andriy Kozlov, "From Central Control to Local Responsibility: Decentralisation in Ukraine," DRI Briefing Paper 59, November 2015 [https://democracy-reporting.org/wp-content/uploads/2016/03/briefing\\_paper\\_from\\_central\\_control\\_to\\_local\\_responsibility\\_decentralisation\\_in\\_ukraine\\_en.pdf](https://democracy-reporting.org/wp-content/uploads/2016/03/briefing_paper_from_central_control_to_local_responsibility_decentralisation_in_ukraine_en.pdf) (all accessed 30.05.2019).

<sup>11</sup> Verkhovna Rada of Ukraine, *Draft Law on Amending Article 133 of the Constitution of Ukraine (in order to Rename the Dnipropetrovsk Region)* dated 27 April 2018, No. 8329 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=63949](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63949);

Verkhovna Rada of Ukraine, *Draft Law on Amending Article 133 of the Constitution of Ukraine (in order to Rename the Kirovograd Region)* dated 18 May 2018, No. 8380 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=64029](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64029);

Verkhovna Rada of Ukraine, *Draft Law on Amending Article 133 of the Constitution of Ukraine (in order to Rename the Dnipropetrovsk Region)* dated 21 November 2018, No. 9310 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=64967](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64967) (all three accessed 30.05.2019).

<sup>12</sup> Verkhovna Rada of Ukraine, *Draft Law on Amending Article 41 of the Constitution of Ukraine concerning the Implementation of Ukrainian Citizens to Land, Retaining Ownership in Agricultural Land with Citizens of Ukraine and the Sustainable Development of Agricultural Areas on the Foundation of Farms* dated 24 March 2017, No. 6236 (in Ukrainian) [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=61420](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61420) (accessed 30.05.2019). This one also passed the CCU: Constitutional Court of Ukraine, Opinion No. 4-в/2018 of 23 November 2018 (in Ukrainian) [https://www.ccu.gov.ua/sites/default/files/docs/4\\_v\\_2018.pdf](https://www.ccu.gov.ua/sites/default/files/docs/4_v_2018.pdf) (accessed 30.05.2019).

<sup>13</sup> "The representative of Zelenskyy in the Rada: The Constitution will be amended", (in Ukraineian) <https://www.pravda.com.ua/news/2019/06/12/7217908/> (accessed 12.06.2019).

<sup>14</sup> For example, "A new Constitution will give power to the people" <https://www.tymoshenko.ua/en/news-en/a-new-constitution-will-give-power-to-the-people/> (accessed 30.05.2019).

<sup>15</sup> "Avakov: People's Front has drafted a new Constitution" (in Ukrainian) <https://tsn.ua/politika/narodniy-front-pidgotuvav-proekt-novoyi-konstituciyi-avakov-1042385.html> (accessed 30.05.2019).

- The confirmation by a national referendum declared by the President.

A motion for any provision within the “protected” Chapters may only be attempted once during a parliamentary term.

Further, there are common requirements for either track:

- Amendments to abolish or restrict human rights and freedoms, to terminate Ukraine’s independence or violate its territorial integrity are forbidden;
- The Constitution cannot be amended in situations of martial law or national emergency;
- A failed amendment cannot be resubmitted earlier than a year after the respective negative decision by the Parliament;
- The Parliament cannot amend the same provisions of the Constitution more than once during a convocation;
- The Parliament cannot adopt an amendment unless there is a positive opinion by the Constitutional Court of Ukraine confirming its correspondence to the above requirements.

The exact relations between the two tracks is not totally clear. The assumption seems to be that the “strict track” overtakes the “simple” one: i.e. should the Constitution be amended by a single motion covering both the “protected” and “unprotected” Chapters, the “strict track” should be followed for the entire motion. However, this assumption has never been tested in practice. The most problematic question seems to arise as to whether the referendum required by the “strict track” should comprise the entire motion or only the changes to the “protected” parts of the Constitution.

This rigidity of the amendment procedure (especially its “strict track”) has been the main reason why various politicians have been toying with the “clean slate solution” — that is adopted (most likely) by referendum — in order to bypass the procedural difficulties and the permanent inability to reach the necessary level of support within the parliament.

The constitutionality of the “clean slate solution” is dubious. The regime of former President Viktor Yanukovich came closest to it by enacting the Law on the Nation-Wide Referendum in 2012.<sup>16</sup> The Law explicitly provided for the possibility of amending the Constitution through popularly-initiated referendums, including

complete overhauls of the fundamental document. The CCU found this Law unconstitutional in early 2018, mentioning inter alia that there was no constitutional way to exclude the parliament from the equation.<sup>17</sup>

It should also be mentioned, that the CCU was less clear in the past. A judgment in 2005 interpreted Article 5(2–3) of the Constitution<sup>18</sup> in a way that “the people has the right to adopt the new Constitution of Ukraine”.<sup>19</sup> The Court did not dwell on the this.

In another judgment in 2008, touching upon the same constitutional provisions, the CCU acknowledged the possibility of adopting a completely new Constitution through a popularly-initiated referendum.<sup>20</sup> Although both of them were somewhat evasive, the decisions of 2005 and 2008 were quite positive as to a “clean slate” revision. Therefore, the decision of 2018 marked a U-turn in the position of the CCU, which was not unprecedented.<sup>21</sup>

However, the CCU’s decision of 2018 does not necessarily exclude a total rewriting of the Constitution; a brand-new text is still possible, provided that its adoption is in line with the current relevant provisions.

## 2. PROS AND CONS OF A COMPLETELY NEW CONSTITUTION

Historically and politically the “clean slate” solution went hand in hand with the idea of adopting a new constitution by popular referendum without the involvement of the parliament, which was often seen by the executive power as a hindrance. Likewise, the “strict track” was often seen by interested political actors as too complicated. In view of this, such designs tended to be treated with suspicion and accusations of attempts to usurp state power, and for a good reason:<sup>22</sup> in fact, in such post-Soviet countries as Belarus<sup>23</sup> and Kazakhstan,<sup>24</sup> referendums served as tools to consolidate and perpetuate the powers of ruling presidents.

<sup>16</sup> Verkhovna Rada of Ukraine, the Law of Ukraine “On the Nation-Wide Referendum” of 6 November 2012, No. 5475-VI (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/5475-17>>. See also: Ruslana Vovk, “Legal Framework for National Referendums in Ukraine,” DRI Briefing Paper 83, May 2017 <[https://democracy-reporting.org/wp-content/uploads/2017/05/DRI-UA-BP-83\\_National-Referendum.pdf](https://democracy-reporting.org/wp-content/uploads/2017/05/DRI-UA-BP-83_National-Referendum.pdf)> (all accessed 30.05.2019).

<sup>17</sup> Constitutional Court of Ukraine, Judgment No. 4-пн/2018 of 26 April 2018 (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/v004p710-18>> (accessed 30.05.2019).

<sup>18</sup> “The people are the bearers of sovereignty and the only source of power in Ukraine. The people exercise power directly and through bodies of state power and bodies of local self-government.

The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials.”

<sup>19</sup> Constitutional Court of Ukraine, Judgment No. 6-пн/2005 of 5 October 2005 in the case on the People’s exercise of power (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/v006p710-05>> (accessed 30.05.2019).

<sup>20</sup> Constitutional Court of Ukraine, Judgment No. 6-пн/2008 of 16 April 2008 in the case on adopting the Constitution and laws of Ukraine at a referendum (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/v006p710-08>> (accessed 30.05.2019).

<sup>21</sup> “Taking stock: first steps of the renewed Constitutional Court of Ukraine,” DRI Legal News, Issue 5, 14 August 2018 <<https://democracy-reporting.org/taking-stock-first-steps-of-the-renewed-constitutional-court-of-ukraine/>> (accessed 30.05.2019).

<sup>22</sup> Olena Yakhno, “Will the Constitution be Amended without Members of the Parliament?” 7 July 2010, 00:00 (in Ukrainian) <<https://day.kyiv.ua/uk/article/podrobici/konstituciyu-zminyaty-bez-deputativ>> (accessed 30.05.2019).

<sup>23</sup> Belarusian Helsinki Committee, “Referendum 96 (Opinion of the Opposition): numbers, judgments, law,” 1996 (in Russian) <<http://lukashenkorg.narod.ru/1996.htm>>; Wikipedia.org, “2004 Belarusian Referendum” <[https://en.wikipedia.org/wiki/2004\\_Belarusian\\_referendum](https://en.wikipedia.org/wiki/2004_Belarusian_referendum)> (accessed 30.05.2019).

<sup>24</sup> Wikipedia.org, “1995 Kazakh presidential term referendum” <[https://en.wikipedia.org/wiki/2004\\_Belarusian\\_referendum](https://en.wikipedia.org/wiki/2004_Belarusian_referendum)> (accessed 30.05.2019).

## WHAT COULD BE ACHIEVED BY ADOPTING A NEW CONSTITUTION FOR UKRAINE?

Here are a few goals that might potentially be achieved if a new Ukrainian Constitution were to be adopted.

**Mending the legitimacy of Ukraine's constitutional order.** The text that is currently lying at the foundation of the Ukrainian State has had a bumpy history. Initially, it was adopted in 1996 by the Parliament following a long and volatile constitutional process. In 2005, the Constitution was changed by the Law adopted on 8 December 2004 ("**Law 2222-IV**") that enshrined political compromise. Made during the heat of the Orange Revolution, this Law is likely responsible for securing the peaceful resolution of the situation created by the flawed presidential elections of 2004.<sup>25</sup> The main direction of the 2004 constitutional reform was the reduction of presidential powers and institutionalisation of political parties as formal elements of power. Ultimately, the newly elected President Viktor Yushchenko had less power than his predecessors.

Neither Yushchenko' nor his successor Viktor Yanukovich were satisfied with the post-2004 constitutional arrangement. In 2010, soon after his ascent to the office, the latter and his Party of the Regions managed to overthrow the 2004 reform and regain the pre-2004 presidential powers through a CCU ruling that found the law of 2004 to be unconstitutional due to procedural deficiencies.<sup>26</sup> Subsequently, the 2010 judgment was widely condemned as a "silent coup d'état":<sup>27</sup> a view that prevailed after the 2014 revolution and resulted in the prosecution of Yanukovich, the former Minister of Justice Oleksandr Lavrynovych and some other persons accused of the usurpation of state power in 2010.<sup>28</sup> However, the formal aspect of restoring the text as reformed in 2004 has been a legal challenge. According to the Constitution, judgments by the CCU are final and subject to no review. The Constitution is silent on the proper course when such a judgment is deemed blatantly wrong. Immediately after the flight of President Yanukovich, the Parliament set about restoring the "uncorrupted edition" of the Constitution: that as amended by the Law 2222-IV and a couple of other amending laws of 2011 and 2013. It did so through two instruments. On 21 February 2014 the Parliament adopted the Law of Ukraine "*On the Restoration of Certain*

*Provisions of the Constitution of Ukraine*".<sup>29</sup> On the next day, the Parliament adopted a Resolution<sup>30</sup> to the same effect—to serve as the legal basis for the restored Constitution until the Law of 21 February entered into force, which happened on 2 March. Of course, the "restorative law" was adopted through the ordinary legislative procedure rather than the complicated one for constitutional amendments. All in all, currently the Ukrainian State is living under the Constitution initially adopted by the Parliament without any popular participation in 1996, questionably reformed in 2004, even more questionably reverted to its original form in 2010, lawfully amended in 2011 and 2013, then restored to its reformed pre-2010 edition while simultaneously incorporating the mentioned post-2010 amendments, and (finally) partially amended again in 2016 and (most recently) 2019.

Some feel that this tortuous constitutional history warrants adopting a completely new constitution. The opposite argument could also be made: the constitutional history reflects Ukraine's political complexities that cannot be wished away by writing a new text. Indeed, one could argue that the current constitution has proven a degree of resilience that underpins its legitimacy.

Then, the alleged legitimacy deficit of the current Constitution might be argued in a different way: it may be alleged that the "constitutional process" in Ukraine has always been a play of the elites, with the general public and civil society being at best spectators and at worst gullible puppets. After all, the initial adoption of the Constitution of independent Ukraine (just like of the preceding Soviet Constitution) was effected by the parliament without any general approval or even much public engagement, while the decisions of the only referendum ever held on constitutional matters have never been implemented.<sup>31</sup> But the story is — as always — somewhat more complicated than that. In fact, the parliamentary adoption of the current Constitution's initial version took place under President's pressure who declared a nation-wide referendum regarding the text developed within a

<sup>25</sup> Verkhovna Rada of Ukraine, the Law of Ukraine "*On Amending the Constitution of Ukraine*" of 8 December 2004, No. 2222-IV (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/2222-15>> (accessed 30.05.2019)

<sup>26</sup> Constitutional Court of Ukraine, Judgment No. 20-пн/2010 of 30 September 2010 in the case concerning the compliance with the procedure in amending the Constitution of Ukraine (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/v020p710-10>> (accessed 30.05.2019). The Court found that the draft it had approved as part of the formal amending procedure slightly differed from the final text enacting constitutional amendments and referred to this as to the ground to nullify the whole piece of constitutional legislation. Interestingly, a similar attempt to nullify the reform for the same procedural shortcomings was frustrated by the CCU in 2008 for some minute technical reasons as well as for the curious observation that with entering into force the amending law had actually become an integral part of the Constitution itself, probably implying that the Court lacked the capacity to assess the constitutionality of the Constitution (See: Constitutional Court of Ukraine, Order No. 6-y/2008 of 5 February 2008 (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/va06u710-08>> (accessed 30.05.2019)).

<sup>27</sup> Oleksii Sydorчук, "Mending Mistakes or a Constitutional Coup?" *Ukrainska Pravda*, 5 October 2010, 12:42 (in Ukrainian) <<https://www.pravda.com.ua/articles/2010/10/5/5445124/>> (accessed 30.05.2019). The narrative of the "silent coup of 2010" is not shared by all experts — see e.g. Vsevolod Rechyt'sky, "Can One Trust Constitutional Judges?" *The Ukrainian Helsinki Human Rights Union*, 8 March 2017 (in Ukrainian) <<https://helsinki.org.ua/chy-mozhna-doviryaty-konstytutsijnym-suddyam-v-rechyt'skyj/>> (accessed 30.05.2019).

<sup>28</sup> Radio Freedom, "A Criminal Investigation is Being Conducted against Yanukovich in connection with the Amendment of the Constitution in 2010—the SBU," 9 April 2015, 15:35 (in Ukrainian) <<https://www.radiosvoboda.org/a/news/26947031.html>>; Yana Polyanska, "Yanukovich's 'Constitutional Coup': A New Case of the Prosecutor General's Office of Ukraine," *Radio Freedom*, 7 September 2017, 20:30 (in Ukrainian) <<https://ua.krymr.com/a/28720581.html>>; DT.ua, "Lavrynovych Has Reduced His Part in the Constitutional Coup of 2010 to a Technical Function," 6 September 2017, 12:03 (in Ukrainian) <[https://dt.ua/POLITICS/lavrinovich-zviv-svoyu-uchast-u-konstituciynomu-perevoroti-2010-roku-do-tehnichnoyi-funkcii-253237\\_.html](https://dt.ua/POLITICS/lavrinovich-zviv-svoyu-uchast-u-konstituciynomu-perevoroti-2010-roku-do-tehnichnoyi-funkcii-253237_.html)> (accessed 30.05.2019)

<sup>29</sup> Verkhovna Rada of Ukraine, the Law of Ukraine "*On the Restoration of Certain Provisions of the Constitution of Ukraine*" of 21 February 2014, No. 742-VII (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/742-18>> (accessed 30.05.2019).

<sup>30</sup> Verkhovna Rada of Ukraine, the Resolution "*On the Text of the Constitution of Ukraine in the Edition as of 28 June 1996 with Amendments and Supplements Introduced by Laws of Ukraine No. 2222-IV of 8 December 2004, No. 2952-VI of 1 February 2011, No. 586-VII of 19 September 2013*" of 22 February 2014, No. 750-VII (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/750-18/ed20140302>> (accessed 30.05.2019).

<sup>31</sup> Wikipedia, "2000 Ukrainian constitutional referendum" <[https://en.wikipedia.org/wiki/2000\\_Ukrainian\\_constitutional\\_referendum](https://en.wikipedia.org/wiki/2000_Ukrainian_constitutional_referendum)> (accessed 30.05.2019).

President-controlled commission:<sup>32</sup> something the parliament regarded (not without a reason) as a standard post-Soviet way to the usurpation of power by the president.<sup>33</sup> Therefore, in historical terms, by evading the President-initiated popular referendum in 1996, Ukraine might well have avoided the authoritarian concentration of power with the president.

Andrii Bohdan was actually right in stating that Ukraine's is a time-honoured tradition of specialised commissions charged with elaborating constitutional texts. The first one — that actually laid the foundations of Ukraine's current constitutional order — was created by the parliament in November 1994.<sup>34</sup> All the successors of President Kuchma in the office charged their own working parties with drafting constitutional changes, however none has succeeded in gaining much public support nor in seeing its work through.<sup>35</sup> Against this background, the most recent one established by President Poroshenko in 2015<sup>36</sup> fared comparatively well in what concerns transparency and openness to the civil society. However, none of the two successful constitutional amendments since the Revolution of Dignity could be directly credited to the Commission. After an energetic beginning, when the commissioners agreed to start the constitutional overhaul with the human rights part, the work of the Commission ground to a halt during Poroshenko's presidency. Its fate under the new administration is murky. In any case, winning and retaining democratic legitimacy is a real challenge of a historical scale. There are no technical fixes here. Any best-intended headlong attempts conceal serious risks, wherefore cautious conservatism could be regarded as a plausible attitude: it is easier to lose democracy than to improve it.

**Adjustments for a time of war:** The authors of the 1996 Constitution had hardly ever thought of a situation the country is living through at the moment: an armed aggression by a foreign power occupying whole regions of a country, while brazenly denying its military engagement at the same time. Although the Constitution contains provisions related to national security and defence, the military, martial law and similar things, it is essentially a peace-time constitution, and as such it may be seen as hampering many needed policies justified by the emergency. However, it is not clear what necessary policies the current constitution hinders and any adjustment to the situation could be seen as accommodation rather than striving to establish Ukraine as a mature democracy. In particular, any attempts to restrict human rights should be avoided as Ukraine's human rights record rather needs improvement, as evidenced by the case law of the European Court of Human Rights<sup>37</sup>.

**Simply enhancing the Constitution.** There exists a widespread belief among many Ukrainians that the 1996 Constitution was based on the most progressive standards existing in the world. Even if true, the situation has changed since then. The Constitution might have been progressive if compared with its socialist predecessor of 1978,<sup>38</sup> but two decades have passed since. The 1996 text was the product of a difficult (and inherently imperfect) compromise reached between the President and the Parliament. Some tend to read all the subsequent history to signify that the balance of powers enshrined in the Constitution was not optimal. Secondly, the Constitution might require serious changes in its foundational provisions and (especially) those concerned with human rights, in particular to account for the evolution of the European human rights law. Actually, the next big step might consist in making the Constitution more human-oriented rather than power-oriented. This may be countered with the remark that, unlike the realm of technology, the concept of "progressive" in the social and political spheres is less obvious and often comes out as a result of difficult societal processes. The true task would consist in keeping the playground open rather than in finding and fixing all "progressive" solutions. Therefore, a complete rewriting would only be useful if the current Constitution is proven to be too rigid.

## ARGUMENTS AGAINST A COMPLETE OVERHAUL OF THE CONSTITUTION

Arguments against any radical constitutional reforms are also well known and may be summarised as follows.

**Age brings strength and experience.** A decent old rule might be preferred to an exquisite new one because, firstly, the old rule would be better known and therefore more predictable in its application. Secondly, the old rule would be more respected due to its age: it does not need to win legitimacy. So, for Ukraine, the experience of living under an imperfect but stable Constitution might be more valuable than constantly striving for perfection.

**Protection against destructive ideas.** With all its possible drawbacks, Ukraine's current Constitution was drafted to protect the nation from ideas that are widely seen as dangerous, such as federalism, special status of the Russian language, or special status of certain regions and so forth. These ideas are promoted by Russia — in the context of war and occupation, these are widely understood as code words for dismembering the country. The existing text enshrines a certain national consensus and it would be better to build any further developments on this.

<sup>32</sup> LIGA, Ordinance of President of Ukraine No. 467/96 "On holding the nation-wide referendum for the adoption of the new Constitution of Ukraine," dated 26 June 1996 <[https://ips.ligazakon.net/document/view/U467\\_96?an=19](https://ips.ligazakon.net/document/view/U467_96?an=19)> (accessed 30.06.2019).

<sup>33</sup> Dmytro Kryvtsun, "How the Constitution of 1996 was adopted: Why neither the society nor the authorities have learnt to live by the Fundamental Law" (in Ukrainian) <<https://day.kyiv.ua/uk/article/tema-dnya-podrobyci/yak-prymaly-konstytuciyu-1996-roku>>.

<sup>34</sup> Verkhovna Rada of Ukraine, Resolution No. 231/94-VR by the Verkhovna Rada of Ukraine of 10 November 1994 "On the Composition of the Commission for Working on the Draft of the New Constitution of Ukraine (the Constitutional Commission)" (in Ukrainian) <<https://zakon.rada.gov.ua/laws/show/231/94-вр>> (accessed 30.05.2019).

<sup>35</sup> Vitalii Chervonenko, "Poroshenko's Constitutional Commission: For a Third Go" (in Ukrainian) <[https://www.bbc.com/ukrainian/politics/2015/03/150303\\_constitutional\\_commission\\_vc](https://www.bbc.com/ukrainian/politics/2015/03/150303_constitutional_commission_vc)> (accessed 30.05.2019).

<sup>36</sup> President of Ukraine, Ordinance No. 119/2015 of 3 March 2015 "On the Constitutional Commission" (in Ukrainian) <<https://zakon5.rada.gov.ua/laws/show/119/2015>> (accessed 30.05.2019).

<sup>37</sup> See, for example: Mykola Gnatovskyy, Yulia Ioffe, "Twenty Years of the ECHR in Ukraine" EJIL: Talk!, 18 September 2017 <<https://www.ejiltalk.org/twenty-years-of-the-echr-in-ukraine/>> (accessed 30.05.2019).

<sup>38</sup> Verkhovna Rada of the Ukrainian Soviet Socialist Republic, the Constitution (Fundamental Law) of the Ukrainian Soviet Socialist Republic of 20 April 1978, No. 888-IX (in Ukrainian) <<http://zakon.rada.gov.ua/laws/show/888-09>> (accessed 30.05.2019).

**Constitution as a “living instrument.”** This argument against any drastic constitutional reform rests in the ability of legal regimes to develop in time through changes in the interpretation and understanding rather than constant revisions of the text. The idea of a “living instrument” is much favoured by the European Court of Human Rights<sup>39</sup> and has become very fashionable in other fields of jurisprudence. Just as the European Convention adopted in 1950 has been developed in the jurisprudence of the ECHR to correspond to the understandings and aspirations of the twenty-first century, so may Ukraine’s Constitution be developed in the jurisprudence of the CCU and by other relevant institutions.<sup>40</sup>

However, this can be countered with the questionable track record of the Ukrainian constitutional jurisprudence: after all, the CCU is widely regarded as having been the instrumentality for the usurpation of power by Yanukovich’s regime. It is also criticised for incoherent case-law and low credibility. It would take time for the Court to be prepared to implement the “living instrument” doctrine in a due way, which cannot be expected or advisable in the nearest future.

**International support.** Ukraine relies on significant international support by countries and organisations that have been eager in particular to reduce state corruption in Ukraine, including through changing legislation and establishing new bodies. Many of these actors would be nervous that a new constitution would water down legal mechanisms aimed at curbing corruption. It may not be a good time to introduce such a potential irritant in these relations.

**No case for reform?** The strongest argument against a new constitution may be that no good case for it has been made. What in the current constitution requires such wide-spread change that could best be achieved by drafting a new text? What concrete problems need to be solved at this point, that could not be solved through amendments? And finally, the idea raises a political rather than a legal question: in view of the current challenges, would political energies be well-spent in effecting an entirely new constitutional process?

## CONCLUSION

While in principle there exist procedural possibilities and plausible though weak substantive arguments for adopting an entirely new Constitution for Ukraine, it could be asserted that neither doing it nor refraining from introducing any major amendments could in itself guarantee a robust development of strong democratic institutions in the country. A wide public discussion of competing visions of the constitutional order in the country could certainly be useful for raising public awareness about the strengths and weaknesses of the existing Constitution and its importance for Ukraine’s sustainable democratic development. At the same time, it would be far preferable if such discussions maintain a positive

agenda and do not simply become purely rhetorical arguments in election campaigns.

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<sup>39</sup> George Letsas, “The ECHR as a Living Instrument: Its Meaning and its Legitimacy” 14 March 2012 <<http://dx.doi.org/10.2139/ssrn.2021836>> (30.05.2019).

<sup>40</sup> The doctrine of a “living instrument” as such is not free of problems, as the line between “creative interpretation according to present-day conditions” and sheer arbitrariness and disregard for written rules is not always very clear. Ukrainian courts have not yet mastered the subtle art of changing their attitudes graciously so that “changes of practice” were not regarded as opportunistic U-turns: something that has marred the credibility of the CCU. In any case, there is (or at least there must be a limit) to “creative (re-)interpretation”: there are reforms that will require the change of letters.