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5. Reforming centralism and supervision in Armenia and Ukraine

William Partlett

In 2015, both Armenia and Ukraine initiated major structural changes to their constitutions. In Armenia, reforms were adopted in December 2015 that converted its presidentially dominated system to a parliamentary system. In Ukraine, the most important constitutional reforms—which have not been formally adopted at the time of writing—focused on decentralizing the country's constitutional system (Ash 2016).

The Council of Europe's Venice Commission—officially known as the European Commission for Democracy through Law—has described both sets of constitutional reforms as moving Armenia and Ukraine closer to Western standards of constitutionalism. This chapter seeks to understand the constitutional histories of these two countries to determine how well these changes—both pending and actual—signify a break with the past and a step towards Western constitutionalism. It argues that, despite some halting first steps, these reforms do not yet demonstrate a decisive move towards Western constitutionalism. This conclusion yields some important broader conclusions about formal constitutional change.

Eurasian constitutionalism: centralism and supervision for development

Fully understanding constitutional reform in Armenia and Ukraine requires a deeper look at their constitutional context. Both countries are part of a distinct region referred to here as 'Eurasia'. This region comprises 15 countries that were formerly part of the Russian Empire and the Soviet Union. Their combined population exceeds 300 million people. Prior to the 1990s, formal written constitutions in Eurasia were heavily influenced by the West and therefore featured many of the formal institutions of Western constitutional design. Yet Eurasian discourse envisions constitutions as top-down documents for centralizing and enabling state power in order to achieve specific developmental goals, while Western approaches envision constitutions as

popular documents dividing and limiting government to protect individual rights and avoid tyranny. Eurasian constitutional designers have justified this rejection of Western-style limited constitutional government on the basis that enabling a strong and centralized state is the only way to overcome persistent poverty and territorial insecurity. This discourse has two important consequences for Eurasian constitutional design.

First, formal Eurasian constitution-making has generally been a top-down process that organizes Western institutions in a way that centralizes political power in one sovereign body or individual (Wortman 2011). During Tsarist times, courts and legislative bodies were always subordinated to the tsar; article 1 of Russia's Fundamental Law held that the power of the Tsar was 'unrestrained' (Oda 1999: 385). During Soviet times, the constitution created a constitutional system of legislative supremacy in order to facilitate the rapid and efficient implementation of communist party policy (Partlett 2012).

Second, Eurasian constitutionalism has consistently rejected independent judicial power and has instead given institutions such as prosecutors or legislatures pseudo-judicial powers of supervision (nadzor). This tradition of supervision comes from the sovereign's need to control implementation by the vast governmental apparatus (Raeff 1983: 203). In fact, since Peter the Great, excessive centralism has led to localism and state weakness; supervisory powers have emerged as a method of overcoming this weakness and ensuring top-down, vertical state power.

After the fall of the Soviet Union, Estonia, Latvia and Lithuania adopted new constitutions that overcame these legacies. For the other 12 countries emerging from the Soviet Union, however, these legacies of constitutional centralism and supervision have persisted. For them, the post-communist period was one of economic collapse and state fragmentation. Hyperinflation and unemployment led to a massive economic depression (Reddaway and Glinski 2001). These countries also frequently faced violent separatist movements that posed serious threats to their own territorial integrity.

Amid this turmoil, constitutional designers rejected Western concepts of checks and balances and judicial independence as inadequate to the urgent tasks of rebuilding the economy and securing the territorial integrity of the state. Formal constitutional design across the region was once again aimed at centralizing and concentrating—rather than dividing—state power in order to overcome these challenges (Partlett 2012). New post-communist constitutions therefore afforded vast formal power to presidents—placing them above the system of separated executive, legislative and judicial power, and giving them the authority to coordinate the three branches of government.

This form of centralized presidential power drew on the tradition of viewing a single sovereign as necessary to ensure the unity and territorial integrity of the state. For instance, one of the creators of the 1993 Russian Constitution, Sergei Shakhrai, later commented that it was a myth that the Constitution was drawn from any Western constitutional models, except for perhaps the idea that the Russian president was conceived as the 'Russian equivalent of the British Queen' (Leonova 2012).

At the same time, in order to deal with state collapse, constitutional designers also gave non-judicial institutions supervisory powers to both interfere with and wield judicial power, which has seriously undermined the independence and finality of judicial decisions. For instance, prosecutors across the region retained the power not just to prosecute crime but also to supervise legality. Furthermore, a central core of court leadership (forming what is called the presidium) possesses supervisory power to reopen cases that have been affirmed on appeal. The European Court of Human Rights has held that this judicial supervision undermines the right to a fair trial (Pomeranz 2009). Abuse of prosecutorial supervision was clearly on show when prosecutors were able to use their supervisory review powers to reopen a final decision moving a renowned oligarch's criminal trial to Moscow (Pomeranz 2009).

Armenia and Ukraine—which suffered from both separatism and economic collapse—typified this path. They both adopted constitutions in the mid-1990s with powerful presidents who stood above the three branches of government.[1] These countries were never semi-presidential in the Western sense; instead, they had constitutional systems that were organized under centralized and concentrated presidential power. Second, both countries have a wide array of powerful supervisory institutions that fuse executive, legislative and judicial power: both gave prosecutors the power to supervise investigation and legality (Constitution of the Republic of Armenia 1995, article 103; Constitution of Ukraine 1996, article 121).[1]

Whither Eurasian constitutionalism?

In 2015, both Armenia and Ukraine initiated significant constitutional reform. The Venice Commission commented that Armenia's changes were moving it towards a 'rationalised parliamentary regime' (Venice Commission 2015a: 12). An early report on Ukraine's reforms was similarly positive (Venice Commission 2015b). These positive assessments were echoed at the Venice Commission's 2015 plenary session. The commission's report on Armenia stated that the creation of a parliamentary system in Armenia 'corresponded to the international standards of democracy' (*Armenian Weekly* 2015). Its

report on Ukraine stated that constitutional decentralization was compatible with the European Charter of Local Self-Government and 'deserve[s] support' (Venice Commission 2015c: 7).

This review will examine these claims in light of both countries' Eurasian constitutional legacy. After their failure to converge with Western models in the early post-communist period, do these changes now reflect a significant shift towards the key values underlying Western constitutionalism, including the rule of law and checks and balances? Or do they continue the tradition of adopting the forms and institutions of Western constitutionalism but for different purposes? The answer to this question has important implications for understanding the ongoing development of Eurasian constitutionalism.

Armenia

Armenia completed its two-year process of constitutional reform with the approval of major constitutional changes in a December 2015 referendum. Armenia's reforms were not initiated by a popular revolution or mass perceptions of political corruption. Instead, constitutional change in Armenia was primarily a top-down attempt to change the super-presidential system to a parliamentary system.

Process

Armenia's process solicited very little domestic popular participation. Instead, it followed the Eurasian tradition of a top-down process of presidentially led constitution-making. In September 2013, Armenian President Serzh Sargsyan appointed a nine-person Constitutional Commission without consulting with Parliament or any other body. The commission was headed by the president of the Constitutional Court and largely included pro-Sargsyan loyalists (Galyan 2015). The only participative aspect of the process was the engagement of the commission with a key international body: the Venice Commission. In fact, a key member of the Constitutional Commission, the president of the Constitutional Court, Gagik Harutyunyan, is also a member of the Venice Commission. These ties led to significant collaboration throughout the process, from the announcement of the reforms until the final proposed changes.

The process of constitutional drafting had a strong impact on the outcome. The lack of popular involvement in the reforms has fuelled criticism that the reforms did not seek to introduce a Western-style system of limited parliamentary government, but rather to change the rules of the game to allow the president and his party to remain in power. This perception

motivated significant protests before the December 2015 referendum. In fact, the only real public participation in Armenian constitutional change arrayed itself in opposition to the reforms (Radio Free Europe 2015).Furthermore, Armenia's experience provides an example of the possibilities and perils of international involvement in constitution-making. On the one hand, the Venice Commission was successful in helping to shape the direction of the reforms. Many of the requested changes were made, reinforcing the conclusion that international bodies are increasingly playing an important role in constitution-making. On the other hand, however, this involvement did not allay the opposition's concerns that the reforms were designed to help the president and his party retain power. This provides further evidence that international participation might have the unintended effect of enabling top-down and non-participatory constitution-making.

Substance

The reforms fundamentally converted Armenia from a presidential to a parliamentary system of government. Initially, the commission did not clearly state this direction. In the first significant announcement about the reform in May 2014, the presidentially appointed Commission on Constitutional Reforms announced a series of vaguely worded goals related to reforming the constitution to establish 'effective mechanisms of real appreciation of human rights and freedoms' and 'a working system of checks and balances' (Roudik 2014). As details of the reforms emerged, however, their true direction became clear. A concept paper released in 2014 criticized Armenia's current system for giving the president 'unbalanced' powers and therefore helping to contribute to the excessive 'personification' of state power (Venice Commission 2014a: 15).

The reforms create a parliamentary republic in which the president is reduced to a ceremonial role in comparison with the prime minister (Venice Commission 2015d). In particular, the new constitution shifts key power—particularly over the direction of policy and the military—from the president to the prime minister. The prime minister now leads the Security Council (article 152), controls the armed forces (article 154) and determines 'general guidelines of policy' (article 152). In addition, the president can only issue a decree if it is 'co-signed' by the prime minister (article 138). The Constitution concentrates power in Parliament and goes to great lengths to formally codify electoral rules to ensure that one party has a 'stable parliamentary majority' (article 89(3)). Perhaps most notably, the new rules mandate a run-off election between the two leading parties if a stable parliamentary majority is not reached. These rules draw heavily from the Italian system, which seeks

to ensure large and stable majorities for the top vote-getting party (Venice Commission 2015a: 14).

On the one hand, these reforms potentially roll back the legacies of Eurasian constitutionalism. In particular, the introduction of a parliamentary system might help encourage the growth of parties—a key component of checks and balances in Western-style democracy. The Venice Commission has largely viewed the changes as filling this role, describing the reforms as 'a further important step forward in the transition of Armenia towards democracy' (*EurActive* 2015).

On the other hand, this new system, particularly with its constitutional mandate for a stable parliamentary majority, undermines a key check on a sovereign leader's power: term limits. Term limits have proven to be the most important limitation on super-presidential power across Eurasia. In Russia, President Vladimir Putin stepped down from the presidency in order to respect a constitutional term limit; although he returned to power four years later, this represents the first time that a healthy and powerful leader in the region has voluntarily given up (at least formal) power. Elsewhere, presidents have been forced to absorb the reputational costs of amending constitutions to remove or extend term limits. For instance, Kazakhstan faced fierce criticism by international bodies for changing its Constitution to allow Nazarbaev to be president for life (Freedom House 2008).

The adoption of a parliamentary system, by contrast, removes term limits while still allowing Armenia to appear to be moving towards Western-style constitutionalism. In fact, many commentators have argued that these changes are designed to allow President Sargsyan to avoid stepping down from power in April 2018 when his second term ends. Pointing to the elitist and presidentially dictated process, they argue that this reform was only about adopting the formal outlines of European standards, and that it never represented a commitment to true checks and balances. One commentator has argued that this system could be 'harmful' to democracy because it would lead to 'the entrenchment of a single party and individual' (Galyan 2015).

These criticisms echo prior experience in constitutional practice elsewhere in Eurasia. Moldova's move from super-presidentialism to parliamentarism in 2000 has created a stronger sovereign leader than in the former super-presidential system (Roper 2008: 124). Indeed, leaders in parliamentary systems who have a comfortable majority face very few checks and balances, particularly when courts are weak. In March 2016, the Constitutional Court struck down the parliamentary system and returned Moldova to a popularly elected presidential system in response to popular protests (Calus 2016).

President Sargsyan has used the language of Eurasian constitutionalism to encourage Armenians to vote for the reforms. In particular, he described how a parliamentary system will increase the effectiveness of the state and fulfil developmental goals, stating that '[t]he changes will make cooperation between different branches of government more effective' and also that they will 'facilitate economic development' (*EurActive* 2015).

Thus, although these reforms formally adopt a parliamentary system, they do not signal a clear break with the regional tradition to use constitutions to consolidate state power. Codifying electoral rules that ensure majority-party rule has the potential to further centralize power in one individual—and do very little to break away from the past. Finally, Armenia's reforms do nothing to change its tradition of supervision. Despite the wholesale changes to presidential power, article 175 of the Constitution still gives the prosecutor broad powers to 'supervise' legality by overseeing 'the enforcement of sentences and other coercive measures' as well as allowing broad power to appeal cases, even those to which he or she is not a party.

Ukraine

Ukraine has a long history of excessive centralism. During the Tsarist and Soviet periods, it was ruled by a system that concentrated significant power in the imperial centre (i.e. St. Petersburg and Moscow, respectively). Since 1991, power has been centralized in Kiev. The central government exercised its power through a centrally appointed and vertically integrated system of executive 'state administration' under the control of the president, which relied on centrally allocated resources. This executive power vertical made the regions dependent on the central government for resources and policy priorities; political accountability flowed from the central administrative apparatus rather than from the local electorate.

Several important political events occurred in Ukraine in 2015. After the revolution in Maidan Square in 2014 that led to the removal of President Viktor Yanukovich from power, a number of ambitious political reform projects were undertaken against the background of violent conflict in eastern Ukraine (Ginsburg and Zulueta-Fülscher 2015). Formal constitutional changes to the relationship between central and regional institutions were at the forefront of this political change. These reforms were adopted by the Ukrainian legislature in a first reading, but have not yet been adopted by the required amount in later readings (Carnegie Endowment for International Peace 2016). Demands for decentralization came from two opposite sources. First, the Maidan protestors saw constitutional decentralization as a way to end the cronyism and corruption in Ukrainian politics that stemmed

from excessive centralism (USAID 2014: 3). Underlying many of these demands was a sense that constitutional change was a form of post-colonial rejection of former Russian domination. The second source of demands for decentralization was the new Russia-backed leadership in eastern Ukraine, which wanted to preserve its linguistic and cultural ties with Russia. These demands were codified in point 11 of the 2015 Minsk Agreement, which called for 'constitutional reform' where the 'key element' is 'decentralization'.

Process

Two key elements have characterized the process of constitutional change. First, despite the popular demands for constitutional decentralization, the Ukrainian Government has followed the Eurasian tradition of limiting public involvement in the constitutional drafting and ratification process. The draft provisions were formulated by a Constitutional Commission appointed by the Ukrainian president, Petro Poroshenko. The commission included prominent legal experts and politicians, but no representatives of the rebel-controlled east. Furthermore, the process did not include any referendum on the changes; instead, the reforms required passage in a series of readings by escalating majorities in the legislature. Second, the process was also characterized by strong international influence—wielded primarily through the Venice Commission, which worked closely with the Ukrainian Commission and successfully achieved a number of changes to the text after a series of reports on the deficiencies of the draft amendments.

This process had important impacts on the reforms. First, the failure to include any participation from eastern Ukraine greatly reduced the chances that the reforms would satisfy that region's demands for decentralization. Moreover, the lack of popular input also likely contributed to major demonstrations outside the Ukrainian legislature after it passed the constitutional reforms in its first reading. Perceiving (incorrectly) that the reforms went too far in accommodating the demands of the eastern Ukrainians, demonstrators led a protest that ultimately led to three deaths. Moreover, this lack of public involvement—and the ongoing suspicion that it created—is also likely a factor in continuing problems with legislative ratification of the reforms.

Furthermore, the Venice Commission's active involvement is an important example of a growing trend in the process of constitution-making: influential intervention by non-domestic actors. The Ukrainian example shows how influential this kind of intervention can be: the Constitutional Commission complied with nearly all of the requests for changes made by the Venice Commission. Yet the legislature's failure to ultimately pass the reforms suggests this cooperation cannot replace broad-based buy-in from the populace.

Substance of the reforms

The text of the proposed reforms made significant changes to the relationship between the centre and the periphery in Ukraine. Perhaps the most far-reaching proposed change is that elected representatives at the *hromada* (community), *rayon* (district) and *oblast* (regional) levels of government now control executive power in the regions (articles 140–41). At the lowest (i.e. *hromada*) level of government, Ukrainians will separately elect their executives and legislators. At the district and regional levels, Ukrainians will elect legislators who will then choose their executive. Given their ability to control executive bodies of power, local governments can now carry out their preferred policies. As the Venice Commission stated in its report, this 'shift toward local self-governance deserves to be commended' (Venice Commission 2015b: 4).

These formal constitutional changes, however, are not enough to erase the legacy of centralism. First, additional changes are needed at the statutory level. The reforms afford localities control over land and taxation, but also specify that 'the state' will ensure the 'adequacy of financial resources' and the 'scope of powers of local self-government'. Kiev therefore needs to pass additional laws to ensure that this central control will not keep the regions fiscally dependent on the centre.

Second, important questions remain around the Ukrainian Government's—and particularly the president's—continued supervisory powers over local government. The reforms give the president (head of state) and Council of Ministers (head of the executive branch) the power to interfere in the internal actions of regional governments. In particular, they allow the president to temporarily suspend the heads of local regions and local councils (and to appoint a replacement) if they violate the constitution or threaten Ukraine's territorial integrity, national security or state sovereignty (articles 106 and 144).

Moreover, the constitutional reforms also create 'prefects' that represent the president in the localities (article 118). These prefects are classic supervisory institutions in the Eurasian tradition: they are a renamed version of *predstavniky*—regional representatives that helped presidents build top-down presidential power in the 1990s. They are appointed and dismissed by the president, and have the authority to repeal provisions passed by local government (article 144). Prefects are also broadly charged with coordinating the actions of local government and 'supervising' legality. The combination of judicial and executive powers given to these new institutions has therefore been the most controversial aspect of the reforms, as the prefects represent a

mechanism of continued central control as well as a continued lack of respect for the independence of judicial power (Mendus 2015).

President Poroshenko has repeatedly justified this continuing central control as a response to the crisis in Eastern Ukraine. In particular, he has repeatedly clarified that the amendments do not create a federal state, and describes the continued powers of presidential supervision as an important 'vaccination' against separatism. In this way, he has drawn on a long tradition of constitutional centralism and supervision as a way of preserving the territorial integrity of the state.

These statements demonstrate the continuing power of Eurasian approaches to constitutions amid crisis. With Ukraine facing new challenges to its territorial integrity from Russia and Russian-leaning eastern Ukrainians, constitutional designers have drawn on the centralist legacies of Eurasian constitutionalism—presidential supervision. These legacies in turn undermine the ability to achieve real reform that can satisfy either the eastern Ukrainians or the Maidan supporters. The Venice Commission realized this, but was only able to convince the Constitutional Commission to make a last-minute change that subjects the unilateral review power of the president and prefects to the Constitutional Court (article 144). Given the weakness of the Constitutional Court, however, the extent to which this judicial supervision will control these legacies is uncertain at best. Thus, although the proposed reforms will help Ukraine take some tentative first steps towards building a less centralized system, they do not signal a significant break from its Eurasian past, as the Maidan protestors hoped they would.

The Eurasian legacy has also persisted in the failure to change the broad powers of 'supervision' given to the public prosecutor in sections 3 and 4 of article 121 of the Ukrainian Constitution. Legislative attempts to reform the prosecutor's office have also failed, which many argue is a key factor in slowing Ukraine's reformist path (Coynash 2016).

Conclusion

Placing these reforms in their historical context suggests that they have not been as transformative as previously thought. Instead, they have preserved important components of Eurasian constitutionalism such as a top-down process of constitution-making as well as design features such as centralism and supervision. This analysis yields three important lessons.

First, it demonstrates the resilience of historical forms of constitutional design. Ukraine is the clearest example of this. Its constitution-making was driven

primarily by a popular uprising in favour of breaking free of the Eurasian legacy. But in trying to break away, Ukraine has drawn on the same types of approach—particularly excessive presidential centralism and supervision—that it inherited from its Russia-dominated past. It thus demonstrates a key post-colonial irony: in seeking to escape Russian colonial rule, Ukrainian drafters were inevitably shaped by it. In its constitutional design, Ukraine is perpetuating centralism and supervision, and therefore failing to make the necessary structural changes to signify a significant break with the past.

Second, it demonstrates the limits of a best-practices approach to formal constitutional design. Armenia is perhaps the best example. Although a switch from a super-presidential to a parliamentary system seems to be a move towards Western constitutionalism, this is not necessarily the case. In the absence of strong party competition and judicial review, parliamentary government can be less democratic and pluralistic than presidential systems. In particular, a formal parliamentary system of constitutional government can reduce key checks and balances. This finding suggests that formal constitutional rules are only part of the picture, and must be assessed within the broader context of how they interact with the domestic political culture.

Third, and relatedly, these limits on formal design also provide two important lessons for international organizations such as the Venice Commission. First, they should avoid assuming that a certain constitutional design or a best practice—in this case, parliamentary government—is always preferable. Second, international organizations should be aware of the potential effect their participation can have on the *process* of constitutional reform. In both Armenia and Ukraine, the commission's role contributed to the top-down nature of constitution-making: its participation gave the processes in both countries a veil of democratic legitimacy even though they did not engage with key domestic groups. Nor did the commission encourage greater public participation.

Going forward, members of international organizations should play a more active role in encouraging not just substantive changes, but also a more transparent and participatory process. While focusing on the constitution-making process would have been unlikely to solve all the problems in Armenian and Ukrainian constitution-making, it could have helped to combat traditional Eurasian views that formal constitutional rules are simply an elite game in the pursuit of monopolizing power. More generally, this kind of advice could help to limit the chances that international organizations are used to legitimize constitution-making processes that are otherwise top-down and unilateral affairs.

Notes

1 Constitution of the Republic of Armenia 1995, <https://www.constituteproject.org/constitution/Armenia_2005.pdf>; Constitution of Ukraine 1996, <https://www.constituteproject.org/constitution/Ukraine_2004.pdf>.

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