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Neither War Nor Peace, But Disband the CCU!

The People’s Deputies Are Advised to Ignore
the Upcoming Decision of the Court and Get
Rid of the Constitutional Umpire

Politicians may amuse themselves however they please, but do not touch the Fundamental Law. After all, it is not as hard to rectify what is wrong as it is to avoid excessive noise when doing it. Agreeing that the constitution was changed in 2004 with procedural violations, the people’s deputies are now furiously discussing ways to go back to the past. The “regionals” [Party of Regions members] are advising us not to make a tragedy of this. The opposition is calling on the guarantor and the Constitutional Court to reject the automatic restoration of the 1996 Constitution.

Five minutes to Kuchma

The press service of the Constitutional Court of Ukraine (CCU) has reported that the Court has reached a decision in the case of the constitutionality of the 2004 constitutional reform, and that it will be made public on October 1. But people’s deputy Roman Zvarych had assured us as early as Thursday that the court had declared the “quadruple two” law unconstitutional, although he did not know the substance of the decision, or its reasoning and consequences.

If the CCU justices had a sense of humor, they would have chosen a different date for the second birthdate of the 1996 edition of the Fundamental Law—October

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Translated by Robert J. Valliere.

7. Or they would have recalled that the coronation of the Galician-Volyn prince Daniilo Romanovich took place on that date in the eighteenth century, or taken into account a more recent event—the approval of the last constitution of the Soviet Union.

We will discuss what the CCU justices actually say in the next issue. But in view of the fact that during the public hearings at the Court’s session, no arguments were heard in favor of Law No. 2222-IV, there are very few options available to the CCU. As is noted in the media, the only distinction between these options is whether the court automatically restores the legal force of the 1996 constitution. Although this will have no significance in the redistribution of official powers; making use of a document to which changes were made improperly would be absurd.

The opposition, offended by the inexorable strengthening of presidential power, is trying to tilt public opinion in the direction of defending the rights of the Verkhovna Rada. The speeches can be reduced to the thesis “It does not matter to us if there were violations or not. But giving dictatorial powers to the current president is anti-state!”

It is noteworthy that the same petition [to declare the 2004 constitutional reform unconstitutional] was filed with the CCU by 102 Yulia Tymoshenko Bloc (BYuT) members of the Rada in March 2007—not to strengthen her opponent at the time, Viktor Yushchenko, of course. On the contrary, at the time, they were talking about a “plot” among the outgoing authorities and a gross disregard for the Fundamental Law in carrying out the 2004 constitutional reform.

Today the first deputy chairman of the Batkivshchina Party, Aleksandr Turchinov, is accusing the “white-and-blues”^{*} of a desire to “codify the dictator status of President Viktor Yanukovich.” “That is precisely why they are trying, outside the constitution, outside of existing legislation, and outside of common sense, to repeal the constitutional reform, which the Party of Regions itself instigated in 2004,” said A. Turchinov, although his signature, as it should, came second after Yulia Tymoshenko’s on the 2007 constitutional petition to strike down the 2004 constitutional reform. And in December 2004, Law No. 2222-IV got just one vote of support from the BYuT faction, still small at the time. The former lawmaker did not specify in which of those years “common sense” prevailed.

Violators of the constitution, unite!

A certain selectiveness of memory, unfortunately, can be observed among other defenders of constitutional reform as well. For example, in 2006 the “Not So!” electoral bloc, whose party list was headed by the first president, Leonid Kravchuk, was trying to get into parliament. One of the authors of draft No. 4180 [the amended draft that became Law No. 2222], Stepan Gavrysh, was also on top of that list. The

^{*}The Batkivshchina Party belongs to the Bloc of Yulia Tymoshenko. “White-and-blues” is the nickname for the members of Yanukovych’s Party of Regions.—Ed.

disposition of forces has changed in four years, but Leonid Makarovich [Kravchuk] still defends the product of his former associates to this day.

True, the position of the first president today coincides most often with the opinion of the leader of the BYuT and her comrades-in-arms. The latter long ago found out whom to blame for all the problems in the country: it is not those who make the mistakes who are to blame, but those who point them out. So they have chosen the CCU justices for the role of the little guy who gets blamed.

So it is not surprising that L. Kravchuk, on the air on the television channel TRK Ukraine, extolled this very topic last week, stating that “the CCU, starting in 2004, has been turned into a political ‘mortar and pestle’ or political boutique where you can order up any decision.” On a high note of “profound indignation,” he proposed bringing the opposition and president together in the Verkhovna Rada and making a gesture of reconciliation—“send all the justices of the CCU into retirement”—probably with the wording “for impeding democracy” or “for a positivist bias,” as the jurist Roman Zvarych once suggested. And then, devise new rules for the appointment of members of the sole body of constitutional jurisdiction who, most likely, will be required to deliver only the “correct” decisions.

The author of the idea does not trouble himself with how to effect these desires, which require changes to the Fundamental Law and preliminary approval of the CCU (and there will not be one!) accordingly. Because a political peace is more important than a constitutional war. The main thing is that the powers of parliament, frozen because of the deactivation of the CCU, will effectively be preserved until the next presidential election, when other aspirants to the position of head of state will get the chance to fight for “dictator’s status.”

Demanding is not so easy

As our weekly predicted, the leaders of the two factions that make up the governing coalition with the Party of Regions are moving in concert with the opposition’s demands. With almost entirely understandable motives: the need for their services will effectively recede the day after the CCU decision is announced, because the people’s deputies will be able to decide for themselves whether to support the “president’s course.” The Verkhovna Rada chairman Vladimir Litvin, the head of one of the factions, thus came out in favor of resolving the unconstitutionality of constitutional reform through the direct involvement of parliament. That is, the CCU, “which obviously has grounds to assert that the Verkhovna Rada violated procedure [for amending the constitution],” should order the Rada “to bring everything into conformity [with constitution], guided by Section XIII of the constitution and the 1998 CCU decision.” This, in the speaker’s opinion, would facilitate “a cessation of the inflaming of passions in Ukraine, and would allow the president to demand that the Verkhovna Rada react in a corresponding manner.” True, Vladimir Mikhaylovich did not say a word about the fact that after the [constitutional] referendum of 2000, parliament very calmly shelved the will of

the people manifested in the results of the referendum, and has also not carried out some CCU recommendations for several years.

The leader of the Communists, the second coalition partner, Petitioner Simonenko, does not want to live under the old Fundamental Law either. At the same time, he warns that the Communist Party of Ukraine (CPU) faction “will not vote for a return to the constitution of Kuchma’s times.” The ideological obstacles are obvious here, as the Communists are insisting on the idea of electing the head of state regardless of the people’s opinion—by the vote in the Verkhovna Rada.

So the union on this matter among the Communists, BYuT, and opposition portion of the NUNS [Our Ukraine–People’s Self-Defense Bloc] guarantees that the CCU recommendations will not be carried out by this parliament. So the talk of observing the law by the people’s deputies is nothing more than a trap for the Party of Regions. On the other hand, supporters of the president will hardly consent to participate in a repeat adoption of Law No. 2222-IV under proper procedure, which would be dragged out at least until February of next year anyway.

Tangled up in two versions

The scenario of a “coalition in opposition” is a modification of an idea that was also made public by L. Kravchuk a few months ago. He called upon the people’s deputies “not to take notice” of the CCU decision, and to live under the system of the 2004 constitutional reform going forward. Leonid Makarovich did not explain how this accords with the provisions of the constitution regarding the binding nature of decisions of the court. On one hand, he warned that declaring the “quadruple two” law unconstitutional “would call into question the legitimacy of all power in the country.” After all, as he put it, the question of what to do with the legislation that was adopted and personnel decisions that were made in accordance with the existing constitution would remain unresolved.

A debate surrounding the legal force of legal provisions, which have been adopted to implement the norms of the current Fundamental Law, is indeed possible. After the CCU decision is made public, we will have to revert to the “Transitional Provisions” of the 1996 constitution. And these regulate only acts that had seen the light of day before its adoption. But this is a topic more suited for a dissertation than practical application. Without complicating life for us and for the state with theoretical excursions, one could make use of the rule that acts remain in force until they are repealed either by a lawmaking entity or by the CCU. And there is no chaos of legitimacy if you do not try to get tangled up in the two versions.

Establishing the dates for the upcoming parliamentary and presidential elections is what will be problematic. The Party of Regions MPs will have to take their own dog by the throat, and agree to hold elections on the last Sunday of March 2011. The ban against the retroactivity of acts in time or the determination of the scope of powers at the time a mandate is received will not be operative—an invalid law

engenders neither rights nor obligations, so the people's deputies might as well forget about the five-year term.

If the coalition tries to extend its term (to 2015, according to some rumors), it could be done legitimately only by amending the constitution. And this is where the moment of truth will really come for the CCU, which will be required to issue a preliminary approval of this idea. But there is no need even to allow the thought that the court would consent to such a violation of the Fundamental Law.

We also should not expect a collapse at the pinnacle of state power. On the one hand, the de facto concentration of power in the hands of one party makes standoffs in the "president–Verkhovna Rada–Cabinet of Ministers" triad impossible. On the other hand, there is successful experience in the long-term activity of bodies of power in the absence of fundamental laws. Some issues are still regulated by legal acts from the Soviet era.

When, ultimately, after the CCU decision is made public, it turns out that the parliament will be able to exist without a coalition and the president will be dismissing and appointing members of the government—rank-and-file Ukrainians will feel almost no difference. Because the authorities have a general responsibility to the people, regardless of the number of branches of power and the methods of distributing administrative powers.

***ZiB* poll (conducted by Tat'iana Kalugina)**

What threats does a presidential republic conceal within itself?

The likelihood of Ukraine's return to a presidential republic looks increasingly realistic. Discussions regarding the advantages and shortcomings of plunging into the past are becoming increasingly frequent in political circles. A *ZiB* correspondent clarified what makes a return to a presidential form of rule threatening.

Leonid Kuchma, president of Ukraine in 1994–2005:

I have been and remain an adherent of a parliamentary-presidential model. I fear that an unsuitable person will become president with unlimited powers someday. We have already had an example of this. The constitution should make inherent counterbalances such that no single faction can feel itself untouchable.

Kseniia Liapina, NUNS bloc faction:

A presidential republic would be appropriate in countries with a longer history of democracy (e.g., the United States). But the presidential model is a concentration of power that threatens totalitarianism in Ukraine, against the background of weak democracy that is just forming its own history.

Vladislav Luk'ianov, Party of Regions (PR) faction:

For me, the presidential form of rule is more organized and consolidated. In other words, there is less talk and more action under this form of rule.

Taras Chornovil, independent:

Any form of rule can be a good one in a normal civilized country, if the constitution is respected. There are totally normal countries with a presidential form of rule. We do see a trend: most of the developed European countries are parliamentary republics. However, on Ukrainian soil, any form of rule that concentrates power in single hands automatically becomes threatening.

Leonid Grach, CPU faction:

A period of plundering, banditry, and robbery could ensue in the event of transition to a presidential republic. This threatens a return to Ukraine at the beginning of the 1990s.

Valerii Bondik, PR faction:

I feel that a presidential republic does not conceal any threats whatsoever. You have to read the fundamental work *The Prince* by Niccolo Machiavelli. In my opinion, a presidential republic, at the level of development of Ukrainian democracy, would only facilitate protection of human rights and freedoms. I am for a presidential republic.

Oles' Donii, NUNS bloc faction:

I am convinced that our problem lies not in the form of rule, but in an inability and reluctance to live according to democratic principles. Any authoritarian tendencies that are codified in the form of a presidential republic will be a drag on democratic development to a certain degree. In this context, one can point to a struggle between the democratic European tradition and the authoritarian Russian one. The Russian model is authoritarian power, the absence of democracy from below to above, and, accordingly, the population can only hope for the good will of the dear father tsar. Europe lives differently.