

### *Summary*

This paper details the short-comings and difficulties of the Ukrainian electoral system. In 2004, the Ukraine faced a critical constitutional challenge when the pro-West candidate Viktor Yushenko and the pro-Russian candidate Viktor Yanukovich both tied for the presidency. Allegations of voter fraud and intimidation escalated to the poisoning of Yushenko. This paper argues that constitutional challenges are not the fault of post-Cold War history, but rather the instability wrought by an inadequate electoral system.

First, the hybrid system fails to delineate the powers of the president and that of the prime minister. The failures of government from 2006 and onward evince the growing dominance of the East-West cleavage in Ukrainian politics. When both branches of government are divided by both sides, deadlock ensues. Second, the electoral laws prevent the formation of an effective party system since it does not encourage coalition-building. The plethora of minority parties have given rise to governmental failures as the Rada (parliament) consistently fails to gain the necessary votes to pass laws.

### *Introduction*

The Ukraine is the second largest country in Europe (second to only Russia), rich in natural resources, and strategically located between the east and west divisions of Europe. Named the 'bread basket' of Europe and rich in natural resources, the Ukraine has the potential to become one of the wealthiest countries in Europe. Economic development, however, requires strong institutions that support the entrepreneurial spirit. The most basic of such institutions is a stable government. Although scholars disagree as to whether a totalitarian or democratic regime is most favorable for the beginnings of economic development, the consensus is that a

government must first provide order and ensure specific rights. The former merely describes an environment free of chaos. The latter primarily refers to contract enforcement, by which business deals can be formalized into contracts, recognized, and be enforced by the government. Without such a protection, business would not flourish for fears of government expropriation of property, invalidation of contracts, etc.

Since gaining independence in 1991, however, the Ukraine has chosen the path of democratically-led development. Ukraine has been blessed in the fact that both independence and transition from Soviet dominance were both peacefully achieved. Independence was declared following the collapse of the Soviet Union in 1991. The transition to a sustainable democracy, however, has been more difficult. Two major handicaps come to mind: First is Ukraine's volatile history of foreign conquests and occupation, which has severely retarded the formation of a Ukrainian nation. In particular, democratic Ukraine struggles with the creation of freestanding identity, separate from its long experience as a subordinate to Russia, and separate from the coercive influences of the West. Second is Ukraine's flawed and ambiguous institutional design, which fails to successfully divide and define executive powers of the president and prime minister. Both are further confounded by a weak party system and a lack of nationalism. Ukraine has modified its electoral structure three major times since independence; each version has resulted in governmental gridlock.

#### *Cleavage Structure and Institutional Design*

The first attempt in 1994 created a semi-presidential system with a unicameral legislature and independent Constitutional Court. The 450-seat Verkhovna Rada (parliament) was elected through a closed-list proportional system with the entire country as the electoral

district. The result was a multi-party system whose purpose was to represent as many people as possible. However, because Ukraine was a new democracy, countless new parties rushed into the electoral process, seeking to establish their democratic credentials.<sup>i</sup> The 1994 electoral laws dictated that one deputy was elected from each constituency, and a run-off was held if no candidate gained an absolute majority in the first round. Like in the French system, the two-round majority was meant to provide smaller parties with more participation while still being able to manufacture a majority or a cohesive coalition by encouraging parties to ally in the final round.

This proved disastrous as too many parties emerged, each divided according to territorial, ethnic, and economic cleavages, most of which were reinforcing. According to Birch, the best preserved cleavages are Ukrainian-Russian, rural-urban, and religion. Historically and geographically, Ukraine is divided into two distinct regions: the west and east. Eastern Ukraine was long part of the Russian Empire, but Western Ukraine was only annexed to the Soviet Union after WWII. Unlike Eastern Ukraine, Western Ukraine enjoyed a history of enfranchisement under the short-lived Western Ukrainian National Republic in 1918 and during the inter-war period.<sup>ii</sup> Once annexed to the Soviet Union, however, Soviet nationality policy in Ukraine included a lengthy and brutal effort to eliminate the Ukrainian nationalist movement, and the deportation of the entire Crimean Tatar population to Central Asia.<sup>iii</sup> In the 1970s and early 1980s a number of national rights activists in Ukraine were sentenced to lengthy terms of imprisonment for peacefully defending the rights of their language and culture.<sup>iv</sup>

While cleavages are often reinforced, they are by no means crippling for the

government. In fact, Ukraine's treatment of its minorities has been encouraging. Unlike many other former Soviet republics, inter-ethnic stability has been maintained.<sup>v</sup> This is due to the fact that ethnic tensions have not yet become open conflict. Instead, disagreements over policy have more to do with defining the Ukrainian national identity – that is, what is it to be Ukrainian. National discussion on language rights and the need to protect the ethnic identity are clear indications of the peoples' struggle to reconcile the idea of an overarching national identity with familiar ethnic identities.

However, the problem with the 1994 electoral rules is not due to cleavages, but with the rules themselves. First, candidates were not required to affiliate with a party.<sup>vi</sup> The result was a large number of independents and a total of fourteen parties, making coalition-building more difficult and weakening identifiability and accountability. Second, candidates were required to win at least 50 percent of votes.<sup>vii</sup> This rule was meant to limit the number of parties in parliament. The result was, however, decreased representation for minorities. Third, first-past-the-post majoritarian rule is supposed to exaggerate election results to manufacture majorities. Seats that theoretically should have gone to candidates with less than 50 percent were then given to larger and better organized parties. Yet with Ukraine, there were no clear majorities because the effective number of parties was too high, and party strength too low.

The 1994 electoral rules failed to take into account Ukraine's democratic immaturity. The failure for parties to strike alliances is due to their inexperience with politics. Prior to independence, most ethnic Ukrainians were barred from holding high offices in favor of the ethnic Russians.<sup>viii</sup> More obvious is that Soviet rule did not encourage democratic exercise. Majoritarian rule requires that parties have widespread appeal, but when coupled with

ethnically- and geographically-centered parties, the result is too many factions and a weakened government.

In 1998, amended electoral rules divided the Rada into two halves (semi-proportional system): 225 MPs were elected by majority voting as earlier, another 225 MPs was elected proportionally from national party lists, with a 4 percent threshold for representation. The amendments appeared to work in the 2002 parliamentary elections as coalitions formed, marking an end to the fractured results of 1994. In the end, only eight party blocs achieved the 4 percent threshold. The United Nations hailed the 2002 parliamentary election as a success because the Yushchenko-led Our Ukraine's victory “marked the first post-independence victory for the democratic opposition.”<sup>ix</sup> The modified electoral rules favored Our Ukraine because it was able to win in single-mandate districts when it could not in proportional regulations. The opposite was true for the Communists.<sup>x</sup> By offering the electorate the opportunity to vote for the candidate, Communist advantage in both experience and party strength are both tempered. On the other hand, the use of single-mandate constituencies gave a seat to 95 independent candidates; 7 seats to candidates of Parties under the 4% threshold, and 123 others to candidates belonging to the 6 parties with more than 4%.<sup>xi</sup> In other words, these single-mandate constituencies clearly increased the degree of parliamentary fragmentation, making it more difficult to form a majority.

In March 2006, the Rada was elected entirely using proportional representation with a 5 percent threshold. This was a clear effort to reduce political fragmentation, although at a relatively high cost in terms of “useless” votes as almost 20% of the votes did not serve to elect a member of parliament.<sup>xii</sup> A PR system, however, encourages minority participation, thus

making single-party majorities hard to achieve. Parties must bargain and create unified platforms, thus making governance more difficult. Government stability therefore depends on the strength of coalitions.

### *President*

Since Ukraine is a young democracy, its parties are weak but very much divided. Ukraine's multi-party system is divided into two camps: the pro-Western and the pro-Russian. This is because while ethnic cleavages are not pressing, economic cleavages have the potential to be otherwise. The conflict is very much over scarce resources. Jobs are few and competition is high given the high education level of the average Ukrainian. The economic cleavage has manifested itself into a West-Russo division in which the Ukrainian population disagrees as to which regional alliance would be the most beneficial for the economy: join the EU and institute necessary economic and political reforms, or fall back on Russia.

This division materialized in the 2004 presidential elections when incumbent Prime Minister Viktor Yanukovich, a convicted felon connected with economic oligarchs and Moscow, ran against Yushchenko, leader of the pro-West Our Ukraine party. For the most part, elections are free, but not necessarily fair. International institutions such as the OSCE cite frequent irregularities such as intimidation of independent media, harassment of candidates and their supporters, and illegal campaigning by state officials. In the 2004 case, election results did not match exit polls. Further investigation revealed intimidation and fraud.<sup>xiii</sup> In what became known as the “Orange Revolution” millions marched in to protest fraud in the second-round vote. Eventually, the Constitutional Court struck down the second-round results and ordered a rerun on December 26.

Despite Yushchenko's eventual victory, his government failed to stay together. While the Orange alliance (led by Our Ukraine) is in itself a majority coalition, it failed to block the Rada (by simple majority) from choosing the rival Yanukovich as prime minister. This circumstance is neither unfamiliar, nor dysfunctional. In fact, the French semi-presidential system oftentimes breeds cohabitation. Ukraine is an entirely different case because a young and very weak party system breeds two effects: First, an underdeveloped party system with many fractured parties prohibits the Rada from cohesively and efficiently fulfilling its role as the agenda-setter and undermines its ability to check presidential authority. Second, cabinets are unstable and very short-lived. The latter makes governance particularly difficult because the last constitutional amendment made the cabinet separate from the president, and answers directly to the parliament.<sup>xiv</sup> An unstable Rada will be reflected in the cabinet, thus making the president's job much more difficult. In Yushchenko's case, it led him to appoint deputy officials in other bodies of the executive to substitute for his inability to choose his own cabinet.<sup>xv</sup>

When parliament is unable to set the agenda due to the absence of a stable majority, it often leads to what is called 'imperial presidentialism.' If political deadlock is parliamentary culture, then chances are that the president would be tempted to take matters into his own hands. First, is the president's tendency is to stretch executive authority by planting loyal subordinates in other parts of the government since he has no control over the appointment of cabinet officials. Second, since parliament suffers from collective action problems, gaining the necessary votes for no-confidence to end the political deadlock is much more difficult than an executive decision to dissolve parliament. In the case of the Ukraine, one of the sole powers the president has over the Rada is the ability to dissolve parliament. Ukraine's (latest)

constitution specifically grants the president the ability to dissolve parliament if the Verkhovna Rada fails to form a majority within 30 days after its first sitting, or a new cabinet within 60 days after the dismissal or resignation of the previous one; or if it fails to gather for a sitting within 30 days during an ongoing parliamentary session (Article IX of Constitution).<sup>xvi</sup>

On April 2, 2007 President Yushchenko dissolved parliament after months of political standstill with his rival Prime Minister Yanukovich, whose cabinet supports closer Russian relations and has blocked many of Yushchenko's economic reforms. Since the Constitutional Court is equally split, no decision has been made as to whether the act was constitutional.

This political deadlock is due to an imperfect marriage between a weak party system and the semi-presidential system in which both the Rada and president have the authority to dismiss parliament, and neither has a monopoly on executive authority. Therefore, when government is divided, political deadlock is highly likely. This system is unlike any other semi-presidential system. France, for instance, grants the president control over his own cabinet. The Ukrainian semi-presidential system stresses symmetrical powers between the prime minister and president because when past versions gave the president more power over the parliament, the results were particularly bad. Symmetrical authority is an outgrowth of dual legitimacy, which is exasperated by a political culture that stresses the supremacy of the legislature. This is an outgrowth of its Soviet past, where political representation through the executive was impossible but possible through the legislature (despite single-party rule). The Rada therefore considers itself the all-powerful delegates of the people, superseding any restrictions or constraints.<sup>xvii</sup> In practice, this means that presidential veto is trumped by parliamentary dominance. Since the constitutional reforms

adopted during the Orange Revolution were hurried, it is unclear who does what and how conflicts are to be resolved. Thus, in the above cases, both Yushchenko and Yanukovich can legitimately claim to have authority, but the constitution does not specify who has the final authority.<sup>xviii</sup>

### *Recommendations*

The most obvious problem for Ukraine is the current hybrid system, in which presidential and prime ministerial powers are not clearly defined. Shugart and Carey argue that in order for functional hybrid system, there must be a clear division of presidential and prime ministerial responsibilities that are respected by both sides.<sup>xix</sup> Not only is this true in practice in Ukraine in recent years, but also institutionally, the constitution does not provide these clear boundaries of power. This is especially dangerous given the possibility of cohabitation, in which the president and prime minister may come from opposing political parties. The current Ukrainian semi-presidential system stresses symmetrical powers between the prime minister and president. Symmetrical authority is an outgrowth of dual legitimacy where both parliament and the executive, having popular mandates, each consider themselves the representative of the people.<sup>xx</sup> This tendency is exasperated by a political culture that stresses the supremacy of the legislature. The Rada therefore considers itself the all-powerful delegate of the people, superseding restrictions or constraints imposed by other state institutions. In practice, this means that presidential veto is trumped by parliamentary dominance. Thus both the president and prime can legitimately claim to have authority, but the constitution does not specify who has the final authority.

While the constitution originally named the president as the head of government,

reforms instituted after the 2006 parliamentary elections have given more power to the prime minister but failed to completely delineate presidential and parliamentary powers. The consequence is political gridlock, as both president and prime minister battle for executive authority. On April 2, 2007 President Yushchenko dissolved parliament after months of political standstill with his rival Prime Minister Yanukovich, whose cabinet supported closer Russian relations and had blocked many of Yushchenko's economic reforms. Since the Constitutional Court was and still is equally split, no decision has been made as to whether the act was constitutional. This display of Ukraine's political deadlock is due to an example of the imperfect marriage between a weak party system and the semi-presidential system in which both the Rada and president have the authority to dismiss parliament, and neither has a monopoly on executive authority.

The hybrid system cannot be sustained as a viable option for the Ukraine given its weak and fractured party system. Given the intense geographic division in parliament, the current hybrid system cannot function without meeting political deadlock; one faction will always control the presidency while the other will control the prime ministerialship. This is especially dangerous for a country in transition. On the other hand, a pure presidential system would require that Ukraine become more majoritarian, something the Ukraine does not favor given that in 1994 it scrapped its more majoritarian electoral laws in favor of pure PR.<sup>xxi</sup>

Pure presidentialism would also be problematic in that majoritarianism and dual democratic legitimacies are even more exaggerated.<sup>xxii</sup> Presidentialism is more majoritarian given that only one person can win the presidency. This winner-take-all aspect would negate minority representation in the executive. For the Ukraine, this is especially dangerous because

it has intensified West-East divisions, with the 2006 presidential elections being a case in point. Dual legitimacy would stem from the fact that both the executive and legislature are popularly elected. Given the elevated status parliament enjoys in Ukrainian culture and history, competing legitimacies would not work for such a country.

What is then proposed for the Ukraine is a parliamentary system. By circumventing the problems of dual legitimacy in presidentialism and in its current hybrid system, a parliamentary system offers Ukraine a chance at an effective government which would be free of the gridlock that continues to threaten it currently. Divisions of power between president and prime minister would be eliminated as there will only be one prime minister. In addition, where presidentialism encourages conflict between the separated powers, a parliamentary system encourages coalition building and cooperation within the unified body of the legislature. The executive branch does not generally conflict with the legislative branch in this system given that the prime minister and his cabinet would come directly from the ranks of the legislature and derive their authority from the consent of that body. The risk of governmental gridlock is therefore reduced in a parliamentary system.

It is important to note, however, that a parliamentary system as described above will only function if electoral laws were amended as well. Given that Ukraine primarily suffers from an over-zealous and fractured party system, the reforms should therefore focus on amending the electoral rules. Currently, the Rada houses five major parties, two of which are actually loosely connected and highly divided coalitions of even smaller parties. Together, these two coalitions – the Our Ukraine and Yuliya Tymoshenko Blocs – control 228 seats out of 425. Their inability to ensure the loyalty and discipline of party members therefore renders

government formation very difficult. Consequently, the ability of the people to rightly identify themselves with a political party is severely hampered. Consequently, Ukrainian citizens have a very low level of political party identification.<sup>xxiii</sup>

This lack of identifiability undermines popular confidence in the system which serves to further weaken the democratic values of Ukraine's institutions. Given that the Ukraine uses a parliamentary system, weak and unstable political parties also make for weak and unstable coalitions in government. Should the effective number of parties be decreased, then government formation may prove easier to achieve and thereby provide Ukraine with a more stable and effective government.

#### *Bicameralism & Threshold*

Current electoral rules exasperate the problem. First, the Rada is unicameral with the district magnitude of 425. While such a system encourages greater representation through proportional representation, it ignores the fact that the major issue dimensions – namely socio-economics – manifests itself in regional divisions. In fact, the largest party in the Rada is the Party of Regions, which controls 176 seats. To win in Ukrainian politics is to focus on the regions. In such a system, national interests are veiled in regional conflicts (namely East versus West).<sup>xxiv</sup>

A bicameral Rada would redirect regional representation to the upper chamber, and thereby provide voters and parties with the opportunity to consider national interests in the lower chamber. Currently, the threshold for the Rada is 3 percent. The first recommendation is to increase the formal threshold to 7 percent. This number is based on the latest parliamentary election results where 5 parties passed the current 3 percent threshold.<sup>xxv</sup> Within the 5 winning

parties, there are two classes. The first consists of the top 3 parties (Party of Regions 32.14%, Yuliya Tymoshenko Bloc 22.29%, and Our Ukraine 13.95%), which easily passed the 3 percent threshold.<sup>xxvi</sup> The second class of parties just barely passed the 3 percent threshold, and consisted of the Socialists and the Communists. Given that the smallest party, the Communist Party (3.66%), is not terribly far removed from the Socialists in terms of ideology, it was assumed that should the threshold be set a 7 percent, the two radical left parties would merge in order to meet the new threshold (combined 8.83%). The effective number of parties would then decrease from five to four, thereby lowering the number of veto players and making government formation easier to achieve.

Moreover, parties will become more cohesive with a 7 percent threshold. Winning blocs such as the Yuliya Tymoshenko Bloc and Our Ukraine are formed with many small parties. These parties are encouraged to cooperate and concede in order to maintain a large enough party to win seats. With a smaller number of parties, and more cohesion within the parties, legislation would be easier to pass, and political deadlock could be more easily avoided. Indeed, 7 percent does not severely limit representation. In fact, all represented parties will remain in parliament.

### *Elections*

Second, it is recommended that seats in the lower house be limited to 300. Efficiency would be increased without effecting representation given that there also exists an upper house. Third, it is recommended that the lower house is elected through closed list-PR so as to strengthen the incentive for politicians to remain loyal to their political parties. A closed-list ballot structure will give the party the power to nominate individual candidates. Without party

(leaders') approval, candidates have cannot gain access to a parliamentary seat. Party leaders will then be able to threaten individuals with the prospect of no nomination should discipline become a problem, and cohesion is then created when are forced to comply with the party platform in order to win the party nomination. In the interest of providing the voting public with critical information, parties will be required to make their lists available to the public prior to the start of the campaign. This would ensure that the public will know exactly what candidates their votes may bring into the Rada should their parties win enough seats.

Representation amongst the 300 seats in the lower house should be based on the proportion of votes cast for each party. The entire country should be treated as the electoral district but a threshold of 7 percent of the national vote is required to gain representation in the lower house. Representatives in the lower house will serve for no more than four years without being subject to a national election.

In contrast, the upper house with its 50 seats divided among 25 regions (*oblasts*), will be elected through a first-past-the-post system. Only one seat per *oblast* would be up for election every 3 years, with the term limit for each candidate set at 6 years. Individuals, rather than political parties, will face election in the upper house, maximizing individual accountability. Accountability is only satisfied if the voter is able to vote retrospectively. In other words, it is only possible if the voter is able to reward or punish a candidate for his actions by voting for or against the candidate.

According to Duverger's law, a plurality system like this will result in two-party competition within each region.<sup>xxvii</sup> While the parties themselves might differ from region to region, the overall result will be more majoritarian because plurality favors larger parties. This

is true for several reasons. First is the fact that plurality rule is 'winner-take-all.' Given that the district magnitude is one, only one candidate can win the seat. The psychological effect of the 'winner-take-all' rule is the tendency for strategic voting. Voters are aware that their votes are wasted if they given them to third parties or very small parties. Second, plurality's implicit threshold is much higher than the 7 percent in the Rada. The largest parties are large because they have more widespread appeal, and therefore enjoy a natural advantage over smaller parties. At the very least, "a high threshold of success would generate consolidation in the party system, as only relatively large parties would be electorally viable."<sup>xxviii</sup> By systematically favoring larger parties, one hopes that the upper house will be more stable and therefore have a moderating and stabilizing influence on the Rada.

Representation in the upper house will be malapportioned or disproportional. In other words, seats will not mirror votes because only one candidate from one party will win the available seat from each region. Even if the runner-up wins a stunning 48% of the votes, he cannot share the seat with the ultimate winner. This will not excessively interfere with voter-representation given that the lower house is proportionally elected. Furthermore, strong political parties will be more inclined to form either single-party majority governments or stable coalitions, a prerequisite for effective government.

#### *Unitary vs. Federalism*

Current political parties and allegiances are divided along regional lines, each reflecting a particular stance on what is best for the socio-economic situation at hand. While many like Arend Lijphart may recommend federalism as a means to balance regional needs with national needs, the truth is that further divisions in the Ukraine may prove disastrous; the Ukraine

should remain a unitary government with power ultimately residing with the central government.

First, given the incompetence and corruption of local governments, a unitary government is the only feasible option for Ukraine. While urban areas of Ukraine have moderately sophisticated political infrastructures, large swathes of Ukraine, mostly the rural areas, remain with little political organization. Local self-government, while guaranteed by Chapter XI of the current Ukrainian Constitution, is still reliant on the State for its jurisdictional power and financial support. The President appoints the heads of local governments at the submission of the Prime Minister according to Article 118. With Ukraine's status as a developing country, its rural areas generally lack the necessary resources to effectively govern. Further, the country is in need of a unitary government because given its weak national identity and social cleavages that run along regional lines, federalism would only exacerbate such problems.

The legislature itself should change from a unicameral to a bicameral system, with both houses being symmetrical in power and popularly elected. The upper house, however, would be malapportioned, with two representatives serving the regional interests of the oblasts. Currently, Ukraine's unicameral legislature is dominated by regional interests. A unicameral system creates a legislature devoid of institutional checks as the majority party or coalition is capable of pushing through legislation quickly without any effective veto players. With the creation of an upper house for concentration upon regional representation, the lower house will then be free to discuss national issues. Furthermore, in the case of turmoil between parliament and the prime minister, the upper house can play a stabilizing role as an effective veto player.

Additionally, the two houses will be incongruent as the lower house will consist of representatives roughly corresponding to the populations they represent. The upper house will be malapportioned, meaning that the distribution of seats will not reflect actual votes. Instead, seats will be equally divided among Ukraine's 25 provinces, or oblasts.<sup>xxix</sup>

The prime minister and his cabinet will be appointed by a vote of investiture consisting of a simple majority vote of confidence in the lower house. The intent of an investiture vote originating from the lower house is so that the executive will embody popular, rather than regional, interests. Conversely the prime minister will only have power to dissolve the lower house, allowing the upper house to assume a stabilizing role in the face of upheaval in the lower house. The prime minister and his cabinet can be forced to resign if they lose their vote of confidence in the lower house. Legislation may originate in either the upper or lower house, excluding legislation of a fiscal nature or dealing with taxation, and both houses must approve the same legislation by simple majority before it is sent to the prime minister for final approval and promulgation.

Members of the upper house will serve for six years with one-third of the upper house facing election every two years. Frequent popular elections of the upper house will ensure that the legislation being passed is in line with the will of the people even when a powerful coalition or party controls the lower house. This system will institute an effective mutual check against the substantial power of the lower house of the legislature. A second benefit of this system will be that regional interests are represented in the national government regardless of the population of those regions, a valid concern for a country where economic and ethnic cleavages fall along regional lines.

*Conclusion*

Ultimately, successful government in Ukraine is predicated on the legitimacy of effective institutions, the ability of political parties to form effective coalitions, and a clear delineation of power between institutions. Should reforms to the executive structure and electoral laws not be adapted, then the consequence may be the failure of democracy. Public support and confidence in democracy has fallen since independence. Indeed, many pedestrian Ukrainians feel that public officials care very little about the people, and view democracy as only a means to a personal end.<sup>xxx</sup> However, it is important to note that Ukraine has not reneged on its attempt to build a stable democracy. If anything, current institutions provide a foundation on which to build.

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