Analyses OSW

CENTRE FOR EASTERN STUDIES 2.09.2015 www.osw.waw.pl

Ukraine is divided over constitutional reform

Tadeusz A. Olszański

On 31 August, the *Verkhovna Rada* (Ukrainian parliament) passed a bill amending the constitution concerning local government reform (decentralisation) on its first reading. The bill was supported by 265 deputies from the two main coalition parties: the Petro Poroshenko Bloc and the People's Front, and from three opposition groupings. The bill was opposed by the three smaller coalition members: the Radical Party of Oleh Lyashko, *Batkivshchyna* and the greater part of the Self-Reliance party. The debate, which took place in the atmosphere of a scandalous brawl, was accompanied by a protest rally in front of the parliament building. Critics of the proposed reform claim that it will allow the introduction of autonomy to the Donbas, and accuse President Poroshenko of betraying the national interests. After the vote, an attempt to storm the parliament building was made; as a result three soldiers from the National Guard were killed and more than 130 people, mainly members of law enforcement agencies, were injured.

The proposed amendments to the constitution provide for a fundamental reform of the political system, by introducing a new, three-tier organisation of the local government and by strongly cutting back on the state administration's competences regarding local communities. If these changes are implemented, the Ukrainian state will be modernised, further important reforms will become possible and the local background will be taken into account to a greater extent in this strongly internally diversified country. A qualified majority of 300 votes is required for the constitutional amendments to be passed on a second reading. Since it is impossible to reach this majority at present, the second reading is planned for December or early January. Before this, the parliament is expected to pass the necessary executive acts, including those concerning local government. However, there is no guarantee that the necessary number of votes will be achieved, especially as that this bill has provoked the most serious crisis within the government coalition since its creation.

Kyiv has presented the constitutional amendments as its fulfilment of the provisions of the Minsk Agreement. However, the possibility to enable a "special manner of operation for the local governments in some counties of Donetsk and Luhansk oblasts" envisaged in the bill – while formally being a step towards the implementation of the undertakings made in Minsk – is too general, and fails to meet the detailed provisions of the agreement. Furthermore, contrary to the critics' fears and Moscow's demands, the constitutional amendments do not provide for Donetsk's autonomy (which, by the way, is not among the requirements set under Minsk-2).

The bill's key outlines

The constitutional amendments envisage a thorough reform of the state, through the introduction of a three-tier local government structure and a significant enhancement of local government's competences, in particular introducing executive bodies at the local councils which will take over most of the competences of the existing local state administrations. Prefects, the new representatives of the central administration in the *raion*s (counties) and *oblast*s (districts) will mainly be responsible for supervision and coordination. The President will have the right to suspend those councils which have passed resolutions adversely affecting Ukraine's territorial integrity. The present ineffective individual communes will be replaced with strong collective municipalities, similar to those operating in Poland. The reform is planned to be carried out successively over a timeframe of two years (the executive committees are to be established and the prefects nominated only in the first quarter of 2018).

The bill (for more details, see the Appendix) is constructed well and, if implemented, will lead to creating a real system of local government in Ukraine, also equipping the central government with the necessary instruments to control the situation in the regions. However, it will only be possible to fully evaluate the prepared solutions once the acts concerning the local governments, the prefects, the amendment of the tax and budget codes, the education system act, etc. have been passed, since these are the legislative acts which will provide the detailed solutions and determine the real competences and possibilities to act of the central and local governments. One may doubt whether it is right to set such a long timeframe (two years) for implementing this reform, yet an attempt to introduce such serious changes within a few months would very likely have provoked chaos.

The amendments in the light of the Minsk Agreement

Section 11 of the Minsk Agreement of 12 February states that Ukraine should amend its constitution by the end of 2015, introducing the decentralisation of the state, including "special status for some counties in Donetsk and Luhansk oblasts in consultation with representatives of these counties", and also pass an act regulating this special status. However, Ukraine claims that only members of local governments elected after Kyiv has regained sovereign authority over this territory (i.e. after the liquidation of the self-proclaimed republics and the disarmament of their armed forces) can be recognised as representatives of this region, and has categorically refused to negotiate with representatives of the so-called Donetsk and Luhansk People's Republics (DPR and LPR). This stance has been confirmed by the Ukrainian parliament, which in March 2015 recognised these territories as 'temporarily occupied'.

The regulations introducing the draft constitutional amendments (article 18) include a provision stating that "the special manner of operation of some counties in Donetsk and Luhansk oblasts shall be regulated under a separate act", which has provoked sweeping criticism from some of the coalition members and public opinion. Kyiv claims that the act 'on the special status of local government in some parts of Donetsk and Luhansk oblasts', which was passed on 16 September 2014 but has never come into force, is the legal act mentioned in this regulation, and that it is not planning to take up any legislative work to this effect.

Furthermore, Kyiv has pointed out that it is impossible to conduct local elections in the so-called DPR and LPR, and given the fact that the other party has failed to implement the key provisions of the Minsk Agreement (including a complete ceasefire), the implementation of its further provisions is pointless. Representatives of the separatist 'republics' and Moscow have rejected this stance.

Supporters and opponents of the reform

The parliamentary debate of 31 August revealed the scale of resistance by the Ukrainian political class to the local government reform . No-one dares to openly oppose decentralisation itself, since this was one of the key issues on the agenda of the Revolution of Dignity, so its opponents have resorted to substitute argumentation, branding the reform 'national treason' (according to them, decentralisation will sanction the independence of the self-proclaimed republics in the Donbas). Yulia Tymoshenko made the most radical step in this context; she unexpectedly refused to back the bill, claiming from the parliamentary podium that the amendments had been arranged with the Kremlin. Another argument is the alleged superficiality of decentralisation; as representatives of the Self-Reliance Party see it, the introduction of the prefects will annul the changes, reinforcing Kyiv's power over the regions.

The introduction of the local government system in the broad meaning of the term was backed in parliament by centrist groupings and opposition parties linked to the centre and east of the country. On the one hand, the Petro Poroshenko Bloc and the People's Front, the 'double-headed' government party, understands the need to both end the outdated (post-Soviet) centralism which fails to meet contemporary needs and replace the completely ineffective single rural councils (*silrada*s) with collective communes that will have significant demographic, economic and financial potential. On the other hand, the bill was backed by the Opposition Bloc (made up of former members of the Party of Regions), Revival (a new party linked to Ihor Kolomoyskyi) and People's Will (the party of the recently deceased oligarch Ihor Yeremeyev) – groupings which may count on strong positions in local governments and are thus interested in strengthening them (this is also the motivation of many politicians from the government party).

The reform has been opposed by populists and the political right (Radical Party of Oleh Lyashko, *Batkivshchyna* and the Self-Reliance Party, who are members of the ruling coalition, and Svoboda, which is outside parliament). Their resistance above all is due to the fact that the Ukrainian national movement has traditionally identified a strong state with a centralised state and the view that the state should promote Ukrainian national values (above all the language) in the regions and communities which have in their opinion been Russified; and this would be irreconcilable with giving extensive powers to local communities. Some activists from this camp are genuinely convinced that vesting local government with more powers will pose a threat to Ukraine's territorial integrity.

Given this context, the stance adopted by Self-Reliance, the party linked to the mayor of Lviv Andriy Sadovyi, who is interested in strengthening the position of local communities, is quite mind-boggling. It appears that this party really wants the role of prefects to be maximally weakened, if not abolished altogether, since this would strengthen the position of the *oblast* capital cities (especially local metropolises such as Lviv) as against *oblast* administration.

The political consequences of the vote on the amendments

President Poroshenko postponed the second (final) reading until December, primarily with the intention of removing this issue from the agenda of the campaign preceding the local elections (scheduled for 25 October), and to give time to convince some of the present opponents of decentralisation to change their minds. However, it will be extremely difficult to collect the required 300 votes in a parliament which is in fact formed by around 390 deputies (422 deputies were elected instead of 450 in 2015, and numerous vacancies have appeared since the election, while the ordinary and the qualified majorities are calculated as a proportion of the constitutional composition of the parliament, and always number 226 and 300 votes respectively). Most probably, Poroshenko and the government hope that they will be able to convince some of their opponents to take their side during the discussion on the executive acts. It cannot be ruled out that, in order to gain additional votes before the second reading, the government may remove the regulation providing future special status to local governments in some areas of Donetsk and Luhansk oblasts, under the pretext that the so-called separatists have failed to meet their part of the undertakings made in Minsk.

The fact that some members of the government coalition voted against the bill has made its future uncertain. On 1 September, Lyashko's Radical Party announced that they would go into opposition, and Self-Reliance expelled five of its deputies (of 31 in total) who had backed the constitutional amendments. However, the government coalition has maintained its parliamentary majority. Although President Poroshenko announced in his subsequent television address that the break-up of the coalition is out of the question, the crisis inside it is becoming increasingly evident. Furthermore, an additional vote was held where presidential or governmental proposals were accepted thanks to support from the opposition, while part of the coalition members voted against them, which proves that the president has two coalitions at his disposal inparliament: the official and the 'alternative' one, which offers him room for manoeuvre.

Local elections are becoming the main issue on the political agenda in Ukraine now, and this is one of the reasons why the debate on 31 August was so emotional and demagogical. The fact that *Batkivshchyna* has changed its stance, having previously cautiously backed the reform, is an effect of its urge to compete on populist terms with the Radical Party, its main rival. The elections to the *oblast* and big city councils will serve as a sort of test of strength: their outcome will decide on the strategy the major parties adopt in the coming months. If the Opposition Bloc (OB) achieves poor results, the government coalition may decide to schedule a snap election in spring 2016 to reconfigure its own camp without the risk of losing power. If the OB garners stronger support, Poroshenko will make efforts to maintain the existing coalition, using revenge by the 'Regionals' as a bogey.

The consequences of the riots in front of the parliament building are a separate issue. They were inspired and led by Lyashko's radicals and *Svoboda* (the president of this party, Oleh Tyahnybok, took part in them personally); people were killed, and one of the perpetrators was a veteran of the Donbas war. This incident proves that Ukraine remains internally unstable (albeit not to an extent that would put the state at the risk of collapse), and has also laid bare the consequences of the state's loss of control over the possession of arms and ammunition (the deaths were a result of the use of a combat grenade by one of the

demonstrators). Whether the initiators and the perpetrators of the riots will be punished, or whether this case will be 'blurred' for political reasons, will have a major impact on the formation of the rule of law in Ukraine.

Appendix

The main provisions of the draft constitutional amendments

The bill containing draft constitutional amendments brought to parliament on 1 July and passed on first reading on 31 August envisages a serious transformation of the territorial division structure on the basic level. The existing rural councils (*silrada*, an individual commune covering one or two villages, often with a population of less than one thousand) will be replaced with a collective commune (*terytorialna hromada*), which along with the county (*raion*) and the district (*oblast*) will form the three-tier local government system. Cities will have commune status; and the statuses of Kyiv and Sevastopol will be determined (as before) under separate acts. The regulations concerning the Autonomous Republic of Crimea remain unchanged. The status of villages forming a commune, which at present have their own councils, and their heads is not regulated under the constitution. It is clear from other sources that an institution of village heads (*silskyy starosta*) is planned to be introduced, most likely as part of the new local government act.

Pursuant to a separate act, rural councils will unite into communes voluntarily (this is one of the reasons why so much time has been reserved for implementing the reforms), a process which is already under way. According to available information, local and district authorities have put pressure on rural and small town authorities in this context. Changes are also planned in the structure of counties; it is known that an expert draft scheme exists establishing the final structure of the communes and counties of Ukraine.

Councils elected in general elections, and council presidents, who will be elected in general elections at the same time as the councils, will operate on all three tiers of the administrative structure. The councils will form executive committees, which will take over most of the competences of the present county and district units of state administration. The councils will be vested with a broad scope of powers, and will become the real organisers of social life in the areas within their jurisdiction.

The present local state administration units will be replaced by prefects (only at the county and district levels), who will be tasked with supervising whether the local government bodies observe the law, coordinating the operation of local structures of the executive authority bodies, and implementing 'state programmes'. Prefects will be nominated and dismissed by the President upon a motion from the Prime Minister; they will have the status of public servants (the present heads of local state administration units are politicalappointees).

Prefects will have the right to suspend resolutions and other decisions of local governments, if these are contrary to the law; the final decision will lie with a competent court.

If a local government unit adopts an act “contrary to the Constitution of Ukraine, posing a threat to its sovereignty, territorial integrity or national security”, the President will have the right to suspend the operation of this unit, and at the same time to contest the said act in the Constitutional Court. The court will consider such a motion according to an urgent procedure. If the act is deemed contrary to the constitution, the President will repeal it, and the *Verkhovna Rada* will, upon the President’s motion, dissolve the relevant local government body and schedule a snap election. The draft does not state clearly whether any act contrary to the constitution can be a valid reason for suspending and then dissolving a local government body, or only one which has the features listed later in the text. Based on other sources, it can be concluded that the latter is the president’s intention (this regulation is intended to counteract separatist tendencies).

The amendments will take effect three months after the publication of the adopted text, i.e. no earlier than March 2016. From that moment, the currently existing basic-level territorial division units will become communes, and the local government bodies elected on 25 October 2015 will be vested with most of the powers (including those concerning the budget) envisaged in the amended basic law (this provision is unclear, and must be made more specific in the executive acts). The existing local state administration bodies will continue their operations, but their competences will be reduced significantly. This transitional system will operate for two years; the process of forming new communes and counties, of passing the required laws envisaged under the amended constitution, and adjusting the various spheres of the state’s operation (such as education and healthcare) to the new situation will have to be completed within this timeframe.

Another local government election will be held on the last Sunday of October 2017 (and this will be a regular, not snap, election). The councils elected will form executive committees and take over the apparatus from the liquidated local state administration bodies. Once the executive committees have been formed, the President will nominate the prefects. This process is expected to end by 1 March 2018.