

Referendum: the long and winding road

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It has arrived... Today hardly anybody in Ukraine and beyond doubts that the national referendum, scheduled for April 16, 2000, will actually take place whatever the weather. If opponents of the referendum idea had some hopes that the Constitutional Court would judge against the event, those hopes vanished on March 29, when the Constitutional Court issued a verdict recognizing the President's decree on holding the referendum as constitutional though withdrawing the most controversial issues.

Specifically, the Constitutional Court approved four out of six issues proposed for the referendum: (1) on reducing the scope of parliamentary immunity, (2) on establishing a bicameral legislature, (3) on giving the President the right to dissolve the parliament that is unable to form the parliamentary majority within one month or approve a state budget within three months, and (4) on reducing the number of MPs from 450 to 300. The first question - on no-confidence to the 14th parliament and subsequent amendment to the constitution that would have enabled the President to dissolve the parliament should the latter be denied public trust at a national referendum, and the sixth question - on adopting the constitution at a national referendum - were deemed unconstitutional. The Constitutional Court judged the referendum results to be binding for relevant branches of state power, but specified no time limits as to when the implementation process should begin, hence, having provided a mechanism of putting off inconvenient results on specific issues till some indefinite later.

This national referendum is the second one in Ukraine's recent history. The first one was held on December 1, 1991. Then, the independence of Ukraine was supported by over 90% of 83.7% of eligible voters who came to the polling stations. The second, April 2000 referendum was intended to secure public support on six critical political and legal questions, including no-confidence in the 14th parliament, making amendments to Article 80 of the Constitution to cut down deputy immunity, making amendments to Article 90 of the Constitution to enable the President to terminate the parliament's powers if it failed to present a permanently active parliamentary majority, making substantial changes to the parliament itself and adopting a national constitution at an all-Ukrainian referendum.

In fact, some representatives of Ukraine's political class have counted possible benefits of holding a referendum on some particular issues for a rather long period of time. Last year - the year of the presidential elections - began for a part of the Ukrainian political community with the referendum idea. In January 1999 President Leonid Kuchma spoke about a possibility to initiate a referendum on abolishing the parliamentary immunity. If the parliament does not agree to bringing some deputies to trial, I will have to announce a referendum on abolishing the parliamentary immunity, he said (Uriadovyi Kurrier, 12 January 1999). In practice the effort was to abolish part 3 of Article 80 of the Constitution of Ukraine. The President explained his intention by claiming that he would not be able to act otherwise, for the people had no more trust in the legitimacy of the current legislation as they saw a number of MPs using their seats in the parliament only as a cover. The President's words were not just uttered for nothing: according to some MPs and the leadership of the parliament at that time, in early 1999 there was a well-organized effort to secure demand for holding a test of public volition. At that time the Communists also claimed they were prepared to initiate a referendum on abolishing the presidency in Ukraine and restoring a purely parliamentary form of government.

In the year of the presidential elections neither the intentions of the presidential administration nor the left-wingers' ideas to hold a referendum were implemented, but the environment was prepared for initiating the event in the subsequent months. In July 1999 Leonid Kuchma publicly stated that Ukraine's key problem is the disabled system of power, and proposed several ways of addressing that problem. One of the suggestions was to hold a referendum that would update the country's constitution, the President argued (Izvestia, 9 July 1999). At about the same time the Vidrodzhennya Rehioniv parliamentary group, gathered and informally led by Oleksandr Volkov, returned to discussing feasibility of establishing a bicameral legislature in Ukraine (Segodnya, 15 July 1999). As the polling day drew near, the ghost of the referendum became more clearly visible.

The issue of the referendum moved to the front line of the Ukrainian political debate in the natural form of a people's initiative after the second round of the presidential elections that had brought the victory to Leonid Kuchma. On December 7, 1999, a meeting of citizens of Zhytomyr approved a decision to request the Central Election Commission of Ukraine (CEC) to register an initiative group that would gather signatures in support of the national referendum. The meeting was attended by 254

representatives of Volodymyr Shcherban's Liberal Party of Ukraine and Oleksandr Volkov's Democratic Union, as well as a number NGOs and movements. The questions, proposed for the referendum, were designed to secure public approval for denying public trust to the 14th parliament and giving the president the right to dissolve it, abolishing the parliamentary immunity, transforming the Verkhovna Rada into a bicameral parliament in which one of the chambers would represent regional interests, adopting the Constitution at a national referendum and giving the president the right to dissolve the parliament that is unable to form the majority within one month and approve a state budget within three months. The meeting in Zhytomyr identified members of the 26-strong initiative group that would be directly involved in preparing the referendum.

However, the CEC refused to register the initiative group, referring to the lack of forms that would be used for writing registration documents, and standard forms to be used for making identification cards for representatives of the initiative group. According to the Law on the All-Ukrainian and Local Referenda (1991), the forms were supposed to be approved by the Presidium of the Verkhovna Rada, but the Presidium was abolished after the adoption of the 1996 Constitution. Yet, at the end of December 1999 the Pechersky borough court of Kyiv abolished the CEC's decision as illegitimate and judged that the Central Election Commission had to register the Zhytomyr initiative group for organizing the national referendum. Therefore, the CEC began to implement the court's judgment, while at the end of December 1999, shortly before the parliament had to vote to approve the President's nominee for the position of the Prime Minister of Ukraine, President Leonid Kuchma announced the referendum would go ahead regardless of whether his candidate for Prime Minister would be approved or not (Den, 21 December 1999). The prospect of having an early parliamentary election following the referendum outcome in 2000 became increasingly realistic. Yet, the situation developed in such a dynamic and multi-faceted way that nobody risked making final conclusions before the verdict of the Constitutional Court was issued.

At the very beginning of January 2000, remarkably rich in political events, the Central Election Commission registered as many as 218 initiative groups that were authorized to collect signatures of supporters of the referendum. It was argued that after a relatively short period of time the initiative groups gathered signatures of as many as 3.5 million politically active citizens. Meanwhile, the parliament was waiting for the judgment of the Supreme Court, to which about 50 MPs appealed for cancellation of the Pechersky borough court's judgment that had opened the way to registration of the initiative groups. On January 12, 2000, their expectations ended with the announcement that Chief Justice Vitaly Boiko had left the judgment of the Pechersky borough court in force.

Further developments resembled a game of virtual volley-ball in which the ball moved fast between the two sides of the political playground. Shortly after the people's initiative from Zhytomyr the parliament approved, by 309 votes, the Law On Temporary Moratorium on Holding National and Local Referenda . The adoption of the law was officially motivated by the poor social and economic situation of the state and the lack of adequate legal framework for organizing referenda. Commenting on the new law, President Kuchma's press secretary Oleksandr Martynenko announced that the decision on moratorium is a clear example of how the deputies' self-saving instinct works (Segodnya, January 13, 2000).

Subsequently, the new law was vetoed by the President, and the MPs failed to override it.

In his turn, President Kuchma returned the new bill On the Order of Financing Expenditures of the State Budget of Ukraine in 2000 before the Law of Ukraine On the State Budget of Ukraine for 2000 , unsigned but equipped with his comments and proposals, for the review, arguing that implementation of some norms of the bill would make it impossible to hold referenda, including the national referendum in process of preparation following the public initiative. On January 14, MPs failed to override the president's veto on the bill.

Ukrainian left-wingers also resumed their efforts to use people's initiatives for holding another national referendum on the agenda of the previous year. The issues, proposed for a referendum by left-wingers, focused on abolishing the presidency in Ukraine. Yet, the CEC was in no hurry to consider the application for registration of an initiative group that would allow the Communist party to start collecting signatures in support of a national referendum.

The situation continued to develop rapidly. On January 15, 2000, the President issued the decree On Announcing the National Referendum after the People's Initiative . I fulfilled the will of the people, stated the President arguing that we will have the same success as we have now unless an able form of power was created. According to the President, the key task of the referendum was to create a parliament that would be able to provide an adequate legal enforcement of the pursuit of reform in Ukraine. Yet, Kuchma added, holding the referendum did not mean that the parliament would be automatically dissolved (Uriadovyi Kurrier, 19 January 2000)

Commenting on the decree, the presidential chief of staff Volodymyr Lytvyn announced that the President sought to learn the attitude of the whole society to the questions proposed for the referendum

. He stressed that the President views the referendum as a method of keeping the deputies' corps alert so that the deputies could be fully focused on solving the tasks to be solved by law-makers. (Ukraina Moloda, 18 January 2000).

While the referendum issue took shape and attracted increasing number of backers and opponents, the non-left part of the Verkhovna Rada was going through the process of formation of the parliamentary majority, for, as Oleksandr Volkov put it, no majority - no parliament .

Hence, on January 16 the found out about its referendum initiative. Possible negative consequences of the referendum were promptly estimated by the Ukrainian MPs, and on the next day the parliament embarked on the complicated internal processes designed to create a consolidated parliamentary majority. After a short while the left-wingers, demoralized by the failure in the recent presidential elections, were removed from a number of key positions in the parliament's leadership. New Speaker, First Vice Speaker and Vice Speaker, as well as heads of parliamentary committees were elected. In order to distance themselves from the 14th parliament, the object of the most critical first question of the forthcoming referendum, the majority MPs formally changed the number of the parliament for the 3rd Verkhovna Rada (from 1990). Commenting on the fact of formation of the parliamentary majority, Leonid Kuchma told representatives of the new majority that if the Verkhovna Rada performed effectively he would propose changing the first question of the referendum from do you distrust the parliament to do you trust the parliament (Molod Ukrainy, 3 February 2000).

In general opinion, the referendum resembled either an axe or a Damocles' sword hanging over the Ukrainian parliament. The popular Damoclean comparison in the context of the referendum was picked up by the President's permanent representative in the parliament Roman Bezsmertnyi. Take it that the President is trying to bring some changes to the Constitution in order to hold a sword over the parliament, but, unfortunately, one cannot simply do without that today. It's enough to remember how we adopted the Constitutional Agreement, the Constitution, how [we] approve the budgets. If there is no such sword and certain responsibility, the parliament will not be able to give birth to the necessary decisions,.. he argued (Den, 5 February 2000).

The new majority tried to comfort itself with the idea voiced by new Speaker Ivan Pliushch: if the Verkhovna Rada demonstrates constructive performance, there may be a new initiative, designed to cancel the referendum (Holos Ukrainy, 9 February 2000). Yet, the majority failed to convince the President that it could be a good alternative to holding the referendum. In mid-March 2000, Leonid Kuchma was quoted as saying that after the formation of the majority in the Verkhovna Rada the need for the referendum did not disappear, but, on the contrary, increased. The reason for his view was that the majority functioned, among other things, because of the pending threat of the forthcoming referendum. But if the referendum was abolished by the Constitutional Court, the President argued, there was a threat that the majority would collapse (Holos Ukrainy, 14 March 2000).

Naturally, the Constitutional Court was also involved in the referendum game, as the point of final judgment and hopes of the numerous opponents of the referendum. On January 20, 2000, the Constitutional Court received the petition of over 100 MPs demanding that the President's decree on the referendum be abolished as non-constitutional. The initiative was supported by the left and some right-wingers. For instance, the view of former Attorney General of Ukraine, now member of the Hromada Victor Shyshkin, that the referendum was unconstitutional and illegitimate was supported by a representative of the Ukrainian People's Rukh Vitaly Shevchenko, who argued that our party and faction believe that holding such events and in such a way is an unconstitutional and illegitimate business . Hence, on February 29, 2000, the Constitutional Court began the hearing on the constitutional appeals submitted by 103 and 108 MPs demanding to verify the compliance of the President's decree On Announcing the National Referendum after the People's Initiative with the Constitution of Ukraine. Given the importance of the case and the appeals of the members of the parliament as subjects of the right to make constitutional appeals, as well as the ongoing preparations for the national referendum, and referring to Article 57 of the Law of Ukraine On the Constitutional Court of Ukraine and paragraph 24 of its Regulations, the Constitutional Court launched an urgent hearing, legally limited in terms to one month (Vechirniy Kyiv, 29 February 2000).

Meanwhile, Ukraine's political developments in general and the issue of the referendum in particular caught attention of international institutions, primarily the Council of Europe. The Verkhovna Rada's delegation met the president of the parliamentary Assembly of the Council of Europe Lord Russel-Johnston at the end of January. According to leader of the Ukrainian delegation Borys Oliynyk, the discussion focused on the issue of the referendum while the issue of the parliamentary crisis in Ukraine was not mentioned at all. According to Oliynyk, Lord Russel-Johnston suggested that the referendum decree should be evaluated by experts of the Venetian Commission (Holos Ukrainy, 28 January 2000). In mid-February 2000, representatives of the Parliamentary Assembly of the Council of Europe visited Ukraine. Commenting on their findings on February 21, leader of the delegation Ms. Hanna Severinsen

announced that the unconstitutional referendum is a step in a wrong direction . According to Ms. Severinsen, the Venetian Commission's conclusion would allow to reach a compromise and there would be no need to hold the referendum particularly as the Verkhovna Rada demonstrated the will for constructive cooperation with the President and the government. If Ukraine failed to abide by European norms and standards, it would exclude itself from the members of the Council of Europe, Ms. Severinsen put straightforwardly. In her words, the first step towards Ukraine's exclusion would be suspending its right to vote in the Parliamentary Assembly (Ukraina Moloda, 22 February 2000). The prospect was a rather gloomy one, as Ukraine could in fact repeat the Belarussian option related to the outcome of the 1996 referendum.

Simultaneously, the representatives of the Parliamentary Assembly announced they appreciated President Kuchma's statement that the final decision regarding the referendum should be made by the Constitutional Court.

Finally, in mid-March Ukrainians were informed about a draft recommendation of the Parliamentary Assembly concerning the referendum in Ukraine. According to the document, the referendum could not be considered legitimate unless the Verkhovna Rada approved a new law that would establish the order of holding a referendum. The Council of Europe also expressed anxiety that the referendum could result in an abrupt disruption of the system of checks and balances that existed between the branches of power that would lead to substantial increase in the role of the President and significant reduction of the role of the parliament. Therefore, the draft document recommended the Committee of Ministers to suspend Ukraine's membership in the Council of Europe if the so-called referendum on reforming the institutes of power was held under the existing circumstances (Holos Ukrainy, 14 March 2000). Hence, Ukraine approached the line beyond its declared pro-European ambitions could face a serious challenge.

In his turn, President Kuchma described the fact that the Parliamentary Assembly's monitoring committee issued its recommendations before the verdict of the Constitutional Court as unethical and incorrect . According to the President, he could quote a number of examples the Council of Europe could have addressed instead of trying to deny the people of Ukraine their right to hold a referendum (Nezavisimost, 14 March 2000). The wording of the President's opinion on the general political situation in Ukraine and prospects for existence of the parliamentary majority was enhanced by the head of the presidential administration Volodymyr Lytvyn who publicly stated that the majority in the Ukrainian parliament would cease to exist immediately if the Constitutional Court of Ukraine yielded to the pressure of international community and approved the judgment dictated by the political circumstances (Ukraina Moloda, 16 March 2000).

The judgment of the Constitutional Court on the President's decree on the referendum was issued on March 29, 2000. So, the referendum will take place whatever the weather , but it is still hard to say what the outcome will be in the context of the questions that were left unanswered after the Constitutional Court's verdict. While all answers were supposed to be given by the voters' choice, it is likely that uncertainty surrounding the future balance of power in this state will not be lifted by the results of the massive national opinion poll that will cost the budget additional UAH 30 million. According to the Constitution, it is the Verkhovna Rada that will have to make the changes, approved by the referendum, to the Fundamental Law, but in order to do that the constitutional majority of at least 300 votes will be needed. Creation of a bicameral parliament also requires lengthy preparatory work, including the drafting and adoption of a new election law.

Meanwhile, the Constitutional Court has done its job. First, the referendum, initially perceived as the day of final judgment , was reduced to a massive but simple public opinion, the results of which, although declared binding, may be compensated by the lack of clear deadlines. Second, while removing the no-confidence issue, the Constitutional Court did not eliminate the hook designed to keep the parliament alert . Third, the Constitutional Court made it possible for representatives of the Ukrainian power establishment not only to talk about the existence of an independent arbiter between the branches of power, but also to hope to save face - again! - in the eyes of international community. Fourth - and the most important achievement of the Constitutional Court - the idea of adopting a new constitution through a national referendum will be dropped - at least for some time, and changes to the constitution will be made legitimately by MPs themselves. If, of course, the necessary majority continues to exist...