

THE ROLE OF POLITICAL ACTORS IN INSTITUTIONAL EVOLUTION DURING CONSTITUTION MAKING: THE CASE OF UKRAINE

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Submitted to
Central European University
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In partial fulfilment of the requirements for the degree of Master of Arts

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Budapest, Hungary

2007

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Abstract

The goal of this thesis is to determine whether the constellation of political actors has an impact on distribution of powers through constitution making between legislative and executive branches. More precisely, it analyses an idea found in the specialised literature that the consensus-based constitutional arrangements tend to be more stable than the conflict-based ones. Because the theoretical framework for the analysis of constitution-making requires deep contextual knowledge, I chose the case-study research design. Since the research is carried out within the democratisation in the post-Soviet European space, I chose the representative case-study of Ukraine and applied qualitative methods (discourse analysis, content-analysis, and expert-analysis). The findings show that the constitutional arrangements adopted under the condition of conflict between the main political actors are subject for further revision.

Introduction

*A society which lacks the separation of powers has no constitution at all
(French Declaration of the Rights of Man and of the Citizen of 1789, Article 16)*

Modern social science developed a number of theories which attempt to explain different paths of democratisation chosen by the Eastern and Central European (ECE) states on their way to democracy and liberalism. The most known among them are the modernisation theory (Adam Przeworki, Firmo Limongi) and europeanisation (Peter Mair). Despite the difference in their theoretical foundation, however, all these theories agree on one focal point – the importance of the political actors in the process of democratization. Therefore, the constellations of political actors are often chosen as an explanatory variable for an important constituent of the transition process, namely the establishment of institutional arrangements as to the separation of powers by means of the constitution making.

Constitutional choice of institutional arrangements is one of the most important explanatory variables for democratisation in the transition literature. This approach is adopted by some of the authors who address the issues of transition to democracy in their works, as well as by the authors who analyze the strengths and weaknesses of the parliamentary, presidential, and semipresidential forms of government (Linz (1994), Lijphart (1992), Stepan and Skatch, Taras (2003), Elster, Offe, Preuss (1998)).

For the ex-republics of the European part of the former Soviet Union (FSU), drafting and adoption of the new constitutions was among the fundamental tasks for the transition period due to a number of reasons. As it follows from the typology of constitutional functions developed by Murphy (1993), at least three reasons must be mentioned. First, the separation of powers principle (formally present in the old Soviet constitution) had to be adjusted to the needs of the independent state. Second, the adoption of the new constitution would symbolise the break with the past (for the part of political actors at least) and usually expression of

Western credentials. Third, newly adopted constitutions contained chapters with an extensive list of fundamental rights. In addition, the constitution-making process served as a foundation of the new states in all post-Soviet societies (Wolczuk 2001). Moreover, even if the constitution making was a formal one and did not result in optimal institutional design or a subsequent democratic consolidation, it still remains an important and necessary step. It is in the process of formulating text, adopting or amending the constitution that the political actors developed the institutional design and procedural rules of for the democracy to be built.

One of the reasons for choosing this topic for the research was the puzzling trajectory in which some post-Soviet European states¹ have designed different institutional arrangements for legislative-executive relations in the process of constitution making. Moreover, the dynamics of these arrangements varies greatly among these countries: in some of them, the form of government was changed through the constitutional reforms (like in Moldova and Ukraine), whereas in the others it has been stable (like in the Baltic States and Belarus). This had led, however, to convergent institutional settings for legislative-executive relations, a parliamentary regime (except for Belarus). The divergent dynamic forming institutional arrangement through constitutional process is particularly puzzling because all states inherited from the Soviet Union the same institutional model of formally parliamentary council-based form of government which can be found in the Soviet Constitution of 1936 (Kul'chyts'kyi 1997).

The research question, therefore, is formulated in the following manner: How did preferences and constraints of political actors influence the initial set-up and later reforms, if any, of institutional design as to the relations between the legislative and executive branches of power? By answering this question, the research aims at contributing to the explanation for variation in constitutional frameworks among the post-communist regimes.

¹ Comprising the three WNIS (Western Newly Independent States): Belarus, Moldova, and Ukraine, term coined by Lynch (2003: 50) and the three Baltic States.

The analysis of constitution making process, namely the role of political actors in the evolution of formal institutional arrangements concerning legislative-executive relations, will focus on Ukraine. The main goal of the research is to show how the institutional development was influenced by the political actors through constitutional reforms according to the following criteria: their preferences, expectations, and constraints, related to the institutional choice. Throughout the thesis, the focus is on the legislative-executive relations, because the establishment of a functioning distribution of powers between major branches of government, namely executive and legislative, is one of the crucial factors for consolidation of democracy (Zielonka 1994).

The thesis is comprised of introduction, three chapters, conclusion and the list of references. Chapter 1 represents the theoretical and methodological framework. Its first subsection covers the definition, conceptualisation and operationalisation of the independent and dependent variables of the research carried out within the studies of post-communist transition, democratization, and democratic consolidation. The second subsection of the first chapter explains methodology and cases used for the research. The second chapter analyses the elaboration of the Constitution of Ukraine of 1996 from actor-centred approach. The third chapter traces drafting and adoption of the amendments to the Constitution of 2004 within the same theoretical perspective. The conclusion summarises the main findings of the research.

Chapter 1: Theoretical and methodological framework

1.1. Main concepts

1.1.1. Actors and institutional design

Contextually, this thesis is situated within the field of democratisation studies, since the institutional design is generally acknowledged as being crucial for democratic transition and consolidation. It is hypothesised that democratisation² is possible only under existence of institutions that give some institutional guarantees to major political forces for their interests under democratic competition (Przeworski 1988). There is even an assumption within institutionalism that democratic constitution is neutral to the interests of political actors, in line with general emphasis on relative autonomy of political institutions (March and Olsen 1984).

From the actor-centered institutionalism point of view, institutions are created by political actors who have their own particular interests and aim to embody them in some form of the institutional structure. Particularly, the constitutions and institutional design are assumed to be results of political and normative conflicts between the political actors, because in the process of institutional choice they examine complex network of norms, institutions, and organisations, to strategically use opportunities over their competitors in the transition due to this network (Merkel 1996).

Special attention is paid to the influence of political actors along with institutions on the consolidation of democracy (Schmitter 1993). In his analysis of the consolidation of democracy, Schmitter claims that provision of a set of institutions embodying contingent consensus among politicians is a challenge for democratic consolidators; consolidation of democracy itself is a problem for political actors and a constrain on their actions. The role of political actors during transition from autocracy to democracy has several distinctive features

² Defined by Przeworski as ‘a discrete step of devolution of power from the authoritarian power apparatus to institutions that permit an uncertain interplay of forces’ (1988: 79).

if it is to be compared with the stable democracy. First, there is an increase in the number and variety of participants who create new rules. Secondly, they have more autonomy as to accepting or declining proposed rules and practices. Thirdly, in the process of the democratisation, actors undergo behavioural changes from ‘political causality’ of their actions when making institutional choices to ‘bounded rationality’³ when starting implementing them (Schmitter 1993: 5-6). The above analysis suggests, therefore, that it is important to analyse the constellations of political actors if one is to find a plausible explanation of the institutional evolution and its outcomes in a particular state. Among the variety of institutional choices deemed essential for the democratic consolidation, the core ones – on the executive-legislative relations, the party electoral system, the territorial division of power, and (optionally) human rights - are usually made during the process of drafting and ratifying the constitution, which, in turn, serves as a set of ‘meta-rules’ for the democracy.

From the analytical perspective, the process of democratic consolidation can be divided into three consequent phases: structural consolidation (constitution making and establishment of political institutions), representative consolidation (of parties and interest groups that are intermediary structures), and an attitudinal consolidation (support of citizens, or vital civil society) (Merkel 1996). The following chapters of this thesis analyse the processes of constitution making and reforming at the first stage of structural consolidation, since it is a basis for further success or failure in consolidation of democracy.

The importance of political actors as a determining factor for the institutional design is particularly important for study of post-communist transitions. While European states are generally characterised as adherents to the parliamentary model (Shugart 1997), where the institutional structures play a crucial role in mediation of the actors’ behaviour and determination of policy outcomes, the post-communist societies represent the contrast in this

³ The notions of ‘political causality’ and ‘bounded rationality’, used to define the behaviour of political actors, reflect correspondingly ‘abnormal’ uncertainty of previous regime and ‘normal’ one of a democracy; it is assumed that although uncertainty is inherent to all polities, it is bounded (Schmitter 1993: 11).

matter: weak institutions are heavily influenced by the choices of political actors who design institutions and redistribute powers while pursuing own strategic interests (Wolczuk 2001a). In this regard, one of the important aspects of post-communism is the constant struggle for exercising the control over the executive branch, which results in different institutional arrangements. On this dimension, there is a plausible divergence between the post-Soviet European states: since dissolution of the Soviet Union, the Baltic States have become parliamentary republics, Moldova and Ukraine made their shift from legislative power from presidential to parliamentary republic only recently (largely due to constitutional amendments of 2004 and 2006), whereas Belarus has strengthened the Presidential regime.

It can be summarized that there is a strong interconnection between the political actors and institutions during the transition. The elite consensus on the distribution of powers between political institutions is a crucial factor for consolidation of democracy in transition states (Linz and Stepan 1996). This consensus must be embodied in the drafting and approval of constitution, which is necessary condition for any successful democratisation (Schmitter 1993). Particularly it is expected that since separation of power is institutionalized, democratic consolidation has been achieved, and changes to the legislative-executive design are rather marginal than foundational (Schmitter 1993; Pigenko et al. 2002). If the consensus is missing, given the establishment of a new institutional framework by means of constitution making, the political conflict is more likely to be focused on power struggle than on policies (Nordberg 1998). Therefore, the role of political actors in process of designing institutions is crucial for study of democratic transition and consolidation.

1.1.2. Constitution making, Constitutional Design, and Constitutionalism

The term *constitution* originates from Latin word *constitutio* – to create, establish – and can be traced back to the times of the Roman Empire, where it was used to define the acts of the Emperor. In modern constitutional theory, two principle meanings of the notion can be

found. The first one is classical narrow definition of a constitution. It corresponds to the definition of ‘code of norms which aspire to regulate the allocation of power, functions, and duties among the various agencies and officers of government and to define the relationships between these and the public’ made by Finer et al. (1995). The second meaning is broader and refers to ‘the whole system of government of a country’, including rules with formal status (constitution, laws and formal decrees) and extra-legal ones (customs and conventions); both kinds of rules create framework within which governance by political actors’ takes place (Wheare 1966). In this thesis, the first meaning of ‘constitution’ is used to analyse the distribution of powers between legislative and executive branches. However, the main focus is made not on the constitution as a ‘product’ of constitution building, but on the ‘process’, the means by which the constitution is drafted and adopted, as defined by Schmitter (1997).

In the process of *constitution making*, three main constituents may be separated: time-frame, the framers, and the way of adoption of the constitution. In this thesis, focus is made on the framers who are simultaneously key political actors (Zielonka 2001).

In the states undergoing post-communist transition and/or democratic consolidation, especially in post-Soviet European states, the constitution making is often criticised for being highly politicized and using constitutional framework for realisation of drafters’ interests (Holmes 1993). Besides constellation of political actors, who are central to this paper, tradition of legal culture and respect towards formal constitutional norms is also important (Wolczuk 2001). However, for the sake of completeness of argumentation, it is necessary to mention that there are two opposite points of view on politicisation of the constitution making. One is that ‘legislators should not renegotiate the rules of the game while they are playing the game’ (Elster 1998); the second interprets it as an unavoidable and normal phenomenon under regime change, which is possible ‘only through a political process dominated by actors who know how to speak to ordinary citizens’ (Holmes 1993: 22). Since

in both negative and positive evaluations of the politicized constitutional processes the role of political actors is central, it is the object of analysis in this paper. In addition to this argument, the justification of the focus on political actors' role in establishment of separation of powers through constitution making is due to their generally crucial role in building the liberal democracy from the top to bottom, since civil society alone (especially weak one in post-communist states), is incapable of achieving this goal (Holmes 1993).

The perspective of *political actors* as independent variable is chosen for the thesis due to above-stated argumentation and is applied in accordance with analytical framework for the constitution making developed by Elster and supported by other scholars. According to Zielonka (2001), in addition to normative aspirations of constitution making, it is their preferences, constraints, expectations and acceptance of outcomes which influence the separation of powers in final product of constitution-building process. He explains it the following way: making constitutional choices, including fundamental one on separation of powers, constitution-makers still are motivated by their short- and long-term political interests: 'They have supporters to reward, enemies to stimulate, principles to defend, and prejudices to express' (Zielonka 2001: 42). Therefore, political actors influence the normative rationales behind the constitutional draft so that final product can differ from it. This explanation of importance to consider not only normative aspirations, but practical interests of political actors as well for studying democratization, was stated by a number of scholars earlier. Democracy is not a result of a compromise on substantive issues only; it is a necessary condition that relevant political forces institutionally provide guarantees for their interests in the course of democratic competition (Przeworski 1988). This justifies analysis of political actors' influence on constitutional choices and subsequent reforms, carried out in the current study.

Having established the theoretical significance of political actors and their constellations for the research, it is necessary to define and operationalise the notion appropriately. There are varying definitions of an ‘actor’ in the specialised literature. In this thesis the notion ‘political actors’ is used following after scholars of separation of powers Wise and Pigenko (1998) to refer to presidency, legislature⁴ (the main parties in parliament and their leaders), and executive (prime-minister), as the key participants of the constitutional process who influence executive-legislative relations. On the basis of such definition, analytical distinction can be made between two groups of actors: individual (presidency and prime-ministership) and collective (parliament) (Wolczuk 2001).

For the purposes of this study, the *separation of powers*, namely executive-legislative relations, is chosen as a dependent variable because it is one of the fundamental choices which constitution makers face and it is crucial to the prospects of further democratic consolidation (Lijphart 1992). There is a general consensus in the literature on this issue. For instance, Shugart (1993) emphasises that legislative-executive relations are central to any democratic constitution. Zielonka points out that ‘Constitutions that fail to establish clear rules of the institutional game and the unequivocal separation of powers will not contribute to democratic consolidation’ (2001: 46). To explain the specific redistribution of powers between the legislature and the executive in two case-countries, the link from political actors through constitution making to the separation of powers is made in the thesis.

The main hypothesis of the thesis is that one of the explanatory variables for institutional arrangements for executive-legislative relations in post-Soviet European states is constituted by preferences and constraints of political actors. To test this hypothesis, I first define and order preferences and constraints of political actors (evaluation of the independent variable); second - analyse how the power is constitutionally distributed among executive and

⁴ ‘Ukraine is one of the only countries in the CIS where parliament remains a strong force in politics’ (Clover 1998).

legislative branches (evaluation of the dependent variable); and third, analyse the causal link between consensus/disaccord among political actors and the subsequent constitutional reforms on the executive-legislative relations according to following criteria: identification of constraints, ordering of preferences, and mechanism of realization of preferences. To answer the research question of the thesis, I aim to find out and explain a pattern of how institutional evolution of legislative-executive relations depends on the political actors' preferences and constraints as independent variable. Namely, I expect that consensus-oriented constellation of political actors leads to stable executive-legislative relations whereas non-consensus (conflicting) one leads to the constitutional reforms in this area.

In the literature, this hypothesis is to some extent supported by Przeworski's argument that 'agreements about institutions are... possible, even if the political forces involved have conflicted interests and visions' (1988: 70), because they are interested in the opportunities for realization of interests, which can be shaped only through institutions, and not in an open conflict. Therefore, the compromise is substantive being shaped within the existing institutional framework, and simultaneously instrumental in providing realisation of the sides' interests.

One of the possible problems for conducting research is that the actual functioning of political actors, particularly presidents and parliaments, does not necessarily correspond with the constitutionalised distribution of powers (Zielonka 2001). According to Article 160 of the Constitution of Ukraine of 1996, it came in force immediately after its adoption; however, in fact as late as in 1997 a number of laws anticipated in it and necessary for its proper functioning were still not adopted (Linetskyi 1997). Therefore, the thesis analyses only the distribution of powers envisioned by the political actors during the constitution making and not its real implementation.

The notion of *constitutional design* is used to refer to a set of governing institutions, namely the President, cabinet, and parliament, and the interrelations between them, the modes and levels of centralization, and the electoral system (Morlino 2001). In this thesis, the first constituent of separation of powers in the above definition, namely executive-legislative relationship, is analysed in the process of adoption and reforming of the constitutions.

1.2. Methodology and case selection

My analysis of how institutional arrangements for executive-legislative relations are formed during the constitution making process is situated within theoretical frameworks of new institutionalism and rational choice. New institutionalist framework is relevant because political institutions provide the frame for policy-making (including constitution making in the case of subsequent constitutional revisions) and establish the ‘rules of the game’ for the political actors. However, political institutions themselves do not determine the result of political bargaining among the actors (Hall and Taylor 1996). That is why the analysis of political actors’ preferences and constraints will be carried out based on functionalistic assumptions of rational choice model that actors’ attitudes are means-end instrumental and that outcomes of their actions are intended; the institutional origins and changes (e.g. constitutional reforms) can be explained through their functional outcomes for their creators (Landman 2000; Riker 1990).

However, although rational choice model provides an opportunity to analyse how strategic interaction between different political actors defines policy choices and outcomes – executive-legislative relations in this paper - its basic assumptions are perhaps too narrow. In reality, constitutional designers can only have short-term horizons (preferences/constraints) and can not anticipate institutional outcomes which probably will differ from their expectations, in which case constitutional reforms are needed. Therefore, in addition to rational choice theory, the actor-centered institutionalism (ACI) was developed by Mayntz

and Scharpf (1997) to explain the institutional evolution of executive-legislative relations. This framework combines game-theoretic modelling, actor constellation, mode of interaction and institutional setting. *Constellation of political actors* describes the players of the game, their strategy choices, the expected outcomes, and the preferences over these outcomes; *institutional setting* means institutions understood as the rules of the game (Scharpf 1997: 44).

To adjust the outlined above theoretical frameworks to the aim of this research, notions developed by the ACI will be applied following the analytical framework for constitution making, suggested by Jon Elster, which is applicable to Eastern Europe (1996). It is based on the hypothesis that institutional interests explain the actions of constitution-makers. It includes next analytical stages: first, identification of constraints for the constitution-makers. Second, ordering of available options, or preferences, of constitutional choice, for which information on their goals and motivations is needed. The latter include reason (impartial), passion (emotional), or interest (either personal or institutional). Third, the mechanisms of realization of these preferences: rational argumentation, bargaining (credible threats and promises), and voting. Elster argues that it is interests (e.g., institutional ones) that make impartiality impossible, especially if institution participates in the constitution making process while being subjected to its outcomes; then, it will aim at enhancing own weight in the balance of powers.

The study is conducted on the micro-level of political actors as well as on the meso-level of political institutions.

The methodology employs the following qualitative methods. First, the discourse analysis of publicly accessible information sources on the constitutional reform in Ukraine. Second, the content-analysis of political actors' speeches, declarations, and interviews in press (official parliament and government press, as well as party-press to define preferences of party-affiliated actors). Third, the expert-analysis of secondary sources and surveys.

Fourth, the descriptive-inductive method of analysis of the change of institutional frameworks aimed at their contextual explanation (Rhodes 1995).

The research itself is a case study of Ukraine during the period from 16 June 1990, when the Declaration of Sovereignty was adopted, to 8 December 2004, when through the amendments to the 1996 Constitution Ukraine became a parliamentary republic. The main justification for choosing Ukraine as a case-study is an intense constitutional process it has undergone since dissolution of the Soviet Union, which has lead to the change of institutional design from the semipresidential towards the parliamentary model. Moreover, particularly in Ukraine a number of parliamentary and general political crises since 1991 has been caused by constitutional unsettlement of mutual relations between executive, legislature and Parliament and by lack of main political actors' ability to settle them strategically and not situationally. Finally, the Ukrainian political actors were constitution makers themselves, having refuted the idea of creation a constitutional assembly (Wolczuk 1998). Puzzling about the case-study is first, the delay in adoption of the basic law (in 1996, the last among the post-Soviet states), which is difficult to bring to an agreement with an urgent need for it, and second, the change of a regime towards parliamentary republic in 2004 given semi-presidentialism initially stated by the Constitution of 1996. Probably this puzzle can be explained by analysis of constellation of political actors and their interaction during constitution making process.

Generally, post-European Soviet states represent three categories of forms of government: the Parliamentary (the Baltic States, Moldova after the constitutional reform of 2000), the semipresidential (Ukraine before the constitutional reform of 2004) and presidential (Belarus) (Nyzhnyk 2003). Ukraine represents one of the extreme paths of

constitution making characteristic for the post-Soviet European states⁵, characterised by unceasing conflict between political actors over redistribution of powers between the Parliament, president, and government under conditions of lack of base for working out stable consensus (the second case in the region is Moldova). The other pattern is stable character of legislative-executive relations due to underlying agreement between political actors on the balance of power, characteristic for the Baltic states and Belarus (see table 1). Since in the second group of states there was no significant disagreement between political actors on the balance of power between legislative and executive branches, their constitutions have not gone through principal reforms; this is opposite to cases of Ukraine and Moldova. Therefore, the post-Soviet European states altogether represent plausible divergence of political actors' preferences and constraints, causing different legislative-executive relations stated in constitutions.

Table 1. *Institutional (executive over legislature) evolution in post-Soviet European states.*

Initial Division of Power	Current Division of Powers		
		<i>Parliamentary</i>	<i>Presidential</i>
	<i>Parliamentary</i>	Latvia Lithuania Estonia	-
	<i>Semi-presidential</i>	Moldova Ukraine	-
	<i>Presidential</i>		Belarus

The thesis argues that difference in pattern of adoption of constitution and in path of its evolution can be explained by analytical framework for constitution making developed by Jon Elster and analysing constellation of political actors, their institutional and personal preferences and constraints, and mechanism of realization of preferences. Since the different

⁵ Therefore this analysis can be helpful for study of post-Soviet origin and subsequent reforms (in any) in other countries of the region. However, the study is qualitative and in each case the peculiarity of constellation of political actors must be taken into account.

paths of constitutional reforms for legislative-executive relations in post-Soviet constitutions to a great extent result from divergent constellations of political actors, the contextual study is the most valuable. Therefore, for the sake of profoundness of analysis, this thesis focuses on a one-case study only.

During the period of independence, Ukraine has adopted new constitution establishing new institutional arrangements for legislative-executive relations and has already undergone fundamental changes of distribution of powers between the branches. The basic constraints for all political actors, which would be relevant for the analysis of any other post-Soviet European state, are legacies of membership in the Soviet, particularly institutional arrangements (unity of councils' power), and relations with the Russian Federation.

Chapter 2. A new Constitution for Ukraine (1990-1996)

From the theoretical perspective used in the thesis it is very important to understand whether political actors are characterised by consensus or conflict when institutionalising executive-legislative interrelations during constitutional making and reforming. For this, it is important to analyse their background and establishment, preferences and constraints in the constellations of political actors, mechanisms of realization of their preferences, and the outcomes of their actions.

2.1. Constellation of political actors

2.1.1. Background and establishment

The principal question concerning the origin of political actors in Ukraine as independent from former power centre, Moscow, is ‘why did Ukraine’s elites adopt the pro-independence platform?’ (Dyczok 2000: 27). One of the well-grounded answers is the re-orientation of a leading part of the local (republican) communist elite (Wolczuk 2001b). Another assumption is that the decision on independence was a result of a political compromise between the pragmatic part of the *nomenklatura*⁶ and a national-democratic movement; the latter aimed at both democratisation and creation of independent state. This compromise allowed both political forces to receive an overwhelming (90% of the votes) support for the independence in the all-Ukrainian referendum held on the 1st December 1991 (Wydra 2001). However, having decided on establishing an independent state, political actors have not rejected the Soviet model of institutional arrangement when working out the constitutional framework for it (Wolczuk 2001b).

The origin of political actors who have put institutional evolution into effect through constitutional process should be traced back to declaration of *perestroika* in the Soviet Union

⁶ The removal of Volodymyr Shcherbyts’kyi, the first secretary of the CPU from 1972, in early 1990 led to division in hitherto monolithic communist elite into anti- and pro-perestroika factions (Motyl and Krawchenko 1997); the latter are referred to as national communists, throughout the thesis.

(Zaitsev 1997). The institutional changes were started by amendments to the Constitution of Ukrainian SSR as early as on 27 October 1989⁷ and the Declaration of Sovereignty; however, they stayed very insignificant in the period from 1991 to 1993⁸.

At the end of the 1980s, there were two principal types of political actors, who reached a fragile political consensus to gain independence, but pursuing different aims. The first was *nomenklatura*, or later the ‘national communists’, who aimed to obtain the power in the new state. The second was the opposition, or nationalists (*Rukh*), who were interested in the independence itself (Handrich 2002).

However, analysing constraints, and mechanisms of realisation of preferences of political actors at active phase of constitution making (1994-1996), it is important to take into consideration two main actors: on the one side, collective - parliament⁹, including the Left, the centrist, and national-democrat blocs; on the other, individual - presidency (Wolczuk 2001b). Later, during the phase of constitution amending (1999-2004), a third individual actor – Prime Minister, head of the Government - is considered. Finally, my analysis will include references to the Constitutional Court, an institution that can play a role of the mediator in institutional conflicts between legislative and executive powers.

Presidency was introduced by the Law *On founding of the post of the President of Ukrainian SSR* on 5 July 1991¹⁰ with the aim to make the institutional framework, consisting of the legislative Supreme Council and the executive Council of Ministers and designed for the republic within the Soviet ‘federation’, appropriate for the needs of the independent state (Wolczuk 2001b). According to this Law, a president elected through direct elections (first to be held on 1 December 1991) would have the Right to propose candidacy of Prime Minister

⁷ Adoption of the Law ‘On Amendments to the Constitution of Ukrainian SSR’ about system of councils with the Supreme Council at the top (Orzikh 2003).

⁸ ‘institutional preservation rather than institutional engineering’ (Wolczuk 2001b: 243).

⁹ The analysis of preferences of collective actors, Parliament in this thesis, is complicated because of internal splits (Wolczuk 2001) and collective action problems (Protsyk 2003). That is why, for the aim of the thesis, only the prevalent position of the factions in the Parliament is considered.

¹⁰ After presidential elections held in June 1991 in the RSFSR, in which Boris Yel’tsin won (Tolstov 1997). The Constitution of 1978 was supplemented with the Article 12-1 ‘President of Ukrainian SSR’ (Orzikh 2003).

for appointment or his dismissal, as well as number of ministers in key spheres (on defense, national security, internal affairs, finance, justice and head of KGB of Ukrainian SSR), but not to dissolve the Parliament or to veto legislation; the Presidential veto on the legislation could be overcome by simple majority (Orzikh 2003). The conflict over the proper institutional design of presidency was the main driving force behind both constitution making (1996) and amending (2004) (Wolczuk 1998).

When analysing *the Parliament* as a collective actor, it is important to differentiate between the Left, the centre and the Right factions, because they have definite preferences over constitutional distribution of powers between the branches, as well as to consider those of the *Head of the Parliament*¹¹.

The Left bloc (Communist Party of Ukraine (CPU), Socialist and Peasant Parties of Ukraine (SPU-SelPU)) has been in favour of the Parliamentary form of government. It has been one of the Parliamentary factions with the strongest ideological preferences for parliamentary republic, for the abolishment of institution of presidency and for formation of a government by the largest party in the Parliament (Jeffries 2002), opposed to the Centre-Right's and the President's preferences for conservation of strong presidential powers, first introduced by the Constitutional agreement of 1995. Such an institutional preference was caused by ideological communist vision of socialist direction of state's development, which was aimed at the establishment of power of councils and was incompatible with the institution of presidency (Bilyts'kyi and Pogrebyns'kyi 1997). The Left bloc's insistence on its own ideological stance and derived institutional preferences is the reason why it has not compromised with hypothetical allies (centrist groups). The second reason for favouring

¹¹ According to the Constitution of 1978, this post was needed only for presiding over a parliamentary sitting; nominal leader of the republic and the second official person after First secretary of the Central Committee of CPU was the Head of the Presidium of the Parliament. The situation changed after amendments to the Constitution on 13 June 1991 functions of the Presidium, headed since then by the Head of the Parliament. Until the introduction of the institution of presidency (for less than a year) Head of the Parliament was a head of the state; from then on, he has kept significant powers, among them preparation of the issues for consideration by the Parliament and proposal of candidacy for the post of Head of the Constitutional Court (Gorlov 2005).

parliamentary model is to be found in institutional provisions of this model: a principal institutional preference of the Left has been to retain power within councils with a unicameral parliament at the top - national level, and to prevent actual 'usurpation of power' by the President under 'the separation of powers' proposed in the 1992, 1995 and 1996 constitutional Drafts (Wolczuk 2001). The third reason for pro-parliamentarism preference is a pragmatic one: in electoral competition, the Communists are more likely to dominate in a parliament than to nominate a competitive candidate at the Presidential elections. An important constraint on the mechanism of realisation of their preferences has been the level of electoral support: since the Parliamentary elections in 1991, the Left has never collected more than 40% of the popular vote and cannot form a constitutional majority to adopt or to amend the Constitution (Protsyk 2003); moreover, their popularity has dramatically decreased in 2002 elections in comparison to those in 1994 and 1998 (as the table 3 shows).

In terms of Elster's analytical framework, the continuation of council-system and opposition to national state has been at the top of their preference-ordering. The mechanisms of realisation of their preferences applied by the Left has been voting or not registering for voting to prevent a quorum, based on the numerical superiority in the Parliament and subsequent opportunity to block disagreeable alternatives by rivals (Wolczuk 2001). Nevertheless, the Left - to a considerable degree owing to communist 'hard-liners'' radical opposition against both Centre-Right and President – could have realised their set of preferences not through adoption of the new Constitution, but through amendments to it, which have become possible due to changes in preferences of President and parts of two other political forces in 2004.

For *the national-democrats, or Right bloc* (Ukrainian Republican Party, Democratic Party of Ukraine, *Rukh* factions, Reform and Order Party) the state-building and symbolic tasks of the Constitution have been crucial ideological preferences. Institutional preference

has aimed at the abolishment of the system of councils, and this stance on separation of powers eliminated any opportunity for compromise with the Left and made the presidency an ally. Therefore, the Right has traditionally supported the strong presidency as a guarantee for state independence and national consolidation (Wolczuk 2001). Undoubtedly, the ideological preferences for state-building and nation consolidation have dominated above distribution of powers between legislature and executive in the Right's preference ordering. Ultimately, having in fact backed President in the constitution making process, the minority of national-democrats has reached at least their ideological preferences, contrary to the communist majority, although it has failed to prevent constitutional reform towards parliamentary republic of 2004.

The largest constraint has been the same as above: since the Parliamentary elections in 1991, the Right has never collected more than 25% of the popular vote and have not been able to initiate adoption of or amendments to the Constitution on its own. Even after the most successful (since 1991) for them elections to the Parliament in 2002, national-democrats split on the issue of constitutional reform for strengthening presidency: one part argued that it would lead to authoritarianism, another part reasoned that it would be effective given fragmented party system. However, the Right would have postponed the constitutional reform on the time subsequent to the Presidential elections of 2004 in which their leader, former Prime Minister Victor Yushchenko, had been expected to win (Protsyk 2003).

The last political force considered in this thesis, *the Centre bloc* (Social-democratic Party of Ukraine (SDPU), Liberal party of Ukraine (LPU), *Yednist'*, *Centre*, *Derzhavnist'*¹², *Independents*, *Social market Choice*, *New Ukraine*) has been united not by ideological preferences, as the previous two, but rather by ideological neutrality and the need for reforms. The 'centrists' preferences for the model of legislative-executive relations have included

¹² The two factions united into *Constitutional Centre* in September 1996 (Bilytslyi and Pogrebyns'kyi 1997).

empowerment of parliament (unicameral) and government along with limitation on the presidency. Since the Left and the Right have had the opposite preferences for constitutional reform, the position of the Centre has been crucial for maintaining or changing the institutional status quo. Nevertheless, since the centrists have aimed at a new parliamentary system, different from former of ‘councils’ one, they could not have come to any compromise with the Left on the institutional preferences (like the national-democrats could not on both ideological and institutional); neither could they have sided with the President (as the national-democrats have). Having no defined hierarchical ordering of preferences, they have functioned as a field for compromise between the President and the national-democrats on the one hand, and the Left on the other, who have played a zero-sum game (Wolczuk 2001). Still, during all three parliamentary terms since 1991, together with majority of independent deputies, the centrists have inclined to opportunistically support President on the issue of constitutional reform because of clientelistic reasons, for the Presidential rewards (including patronage appointments, preferential access to governmental administrative resources, and legal and economic favours for businesses) (Protsyk 2003).

2.1.2. Preferences and constraints of political actors

According to the Constitution of 1996, there are two political actors who can change the institutional status quo: the President and the Parliament. Their preferences were crucial in explaining the distribution of powers between the branches during the adoption and amending of the Constitution. It is important to mention that despite different preferences for distribution of powers among the branches, since 1994 the only broad consensus for political actors (except for the communists) was the necessity to adopt the new Constitution as soon as possible (Wolczuk 2001b).

Presidency.

Both Ukrainian presidents, Kravchuk and Kuchma, have had generally similar preferences for strengthening the powers of the President and the executive vertical, although their mechanisms for realisation the preferences have differed. The first President's preferences¹³ were those of limited presidency and strengthening of the executive branch (Tolstov 1997), justified by the state-building and nation-building aims. There is a disagreement in the literature as to the extent that the institutional resources at the disposal of the first President were defined by Constitution of 1978, since they were not clearly separated from those of parliament (Lytvyn 1997). However, since his aim to consolidate Ukraine as an independent state was commonly shared by most political forces, except for the Left, Kravchuk enjoyed support of majority of the Parliament and received additional privileges of law-making with aim of political and economic reforms (Tolstov 1997). Still, they were temporary and generally he never possessed enough bargaining power to realise his preference for strong presidency (Wolczuk 2001). After his defeat in 1994, he said 'May God save the person who will get the power. Even if he is angel, he will turn to devil... There must be a President, *Verkhovna Rada*, government, constitution and independent court' (*Holos Ukrainy*, 15 October 1994).

The second President's preferences followed those of his predecessor but were aimed at purely institutional and not ideological goals. The empirical evidence of the first and the first half of the second terms of his presidency, particularly President's behaviour at crucial stages of the constitution making (Constitutional agreement of 1995, Constitution of 1996, and Referendum of 2000) (Protsyk 2003) confirms the fourth theoretical implication of Shugart's hypothesis (see Chapter 1) that if the President is involved in the constitution making process, he will promote a strong presidency.

¹³ Until 1990, Kravchuk was representative of nomenklatura (he took a position of secretar on ideological issues at the Central Committee of the CPU); afterwards he changed his orientation from communist to national communist (Bilyts'kyi and Pogrebyns'kyi 1997).

After signing the Constitutional agreement of 1995 which provided for strong presidential powers, the President's aim was to transfer them into the new Constitution. A powerful instrument for achieving this goal was a presidential right to request a referendum on constitution (formally, this was only possible after agreement of its text with parliament, but this provision was violated in 1996). Another important lever was the composition of the Constitutional Commission since October 1994, which was no longer a parliamentary, but consisted of representatives of all three branches of power – political actors with very differing preferences for constitutional outcomes and particularly distribution of powers between the branches (Harasymiw 1993). However, due to his control over judiciary, the President obtained the support of a majority of commission members. Thus, after March 1996 when the draft was passed to the Parliament, informal instruments of influence on the MPs like 'intensive behind-the-scenes lobbying, negotiating, promises and deals' were applied by the President who created the 'fifth column' for promotion of his interests in the Parliament (Wolczuk 2001: 207).

However, a change in Kuchma's preferences for constitutional reform – from presidential to premier-presidential republic - took place in the second half of the second term, in 2002. This can be explained first, by the victory of Yushchenko's party, supported by hostile to Kuchma political forces, at the upcoming presidential elections in 2004; therefore, the new preferences for the transition of power and weakening the President's position (presumed to be uncontrollable after 2004) surfaced. These preferences could have been implemented only through the constitutional reform by shifting from semipresidentialism to parliamentarism. A second cause was the influence of the European Union, integration into which was proclaimed by Kuchma as a strategic state aim for Ukraine as early as in 1994 (Molchanov 2004) and for which constitutional reform in the direction of parliamentary republic would be more appropriate. However, from these two explanations the first is

acknowledged as the more plausible by most of scholars (Protsyk 2003). It shows the importance of taking into consideration not only institutional environment, but constraints and preferences (in the given case, passions and interests have dominated over impartial reasons) of the political actors in the redistribution of powers between the branches by the means of constitutional reform.

Parliament (*Verkhovna Rada of Ukraine*)¹⁴

As already indicated (see page 16), it is difficult to single out a preference over the distribution power for the collective body. Generally, there are several factors accountable for MPs' preferences for separation of powers: ideology, consensus on prior agreement, and institutional learning (Pigenko et al 2002). According to the analysis of voting behaviour during 1994-1998 and 1998-2002 terms in the Parliament, clientelistic patterns of voting (including preferences for maintaining or changing the constitutional status quo) dominate over ideological and learning-based ones (Protsyk and Wilson 2003). On the one hand, this shows why one part of the Parliament (usually the Right and the Centre) supports the President, who enjoys control over the Government (except for the Prime Minister) on crucial issues, such as the distribution of powers. Therefore, it would be inappropriate to explain the MPs' preferences over distribution of powers by the institutional self-preservation model only (Protsyk 2003). On the other hand, the Parliament consistently demonstrated its anti-Presidential position at all crucial moments of constitution making: Constitutional agreement of 1995, Constitution of 1996, and Referendum of 2000; in the period from the first Draft of the Constitution (1 July 1992) to the Law 'On the Amendments to the Constitution of Ukraine' (8 December 2004), legislature's powers increased while presidential decreased.

Government (*The Cabinet of Ministers of Ukraine*), headed by the Prime Minister, has no right of initiating the amendments to the constitution, but Prime Minister's position as a

¹⁴ Supreme Council (Soviet in Russian) of Ukraine.

head of the executive branch (since 1996) is particularly important in the analysis of constellation of political actors along with the President or the Parliament. There is no single preference possible to trace back throughout constitution making in Ukraine. The Prime Minister predominantly took the pro-presidential stance, but there were antipodal cases (Marchuk's opposition to Kuchma's initiative on referendum in 2000, see Chapter 3).

The *constraints* under which all above analysed actors acted to reform an institutional framework generally were either legacies of the past or the external influence. Concerning the post-Soviet legacies, at least two of them have influenced the outset of the new state foremost: the lack of modern experience of statehood (Wise and Brown 1999; Wolczuk 2001b) and the experience of totalitarian Communist rule (Dyczok 2000; Motyl 1993). Because of the latter, there was no historically legitimised template of the Government; therefore the Constitution of 1978 with slight changes was used as the Constitution of the independent Ukraine (Wolczuk 2001b). Due to the former, there was no democratic legal system (*Rechtsbasis*) which made it necessary to create the whole law and legal order anew (Wydra 2001). Moreover, there was no power base for reforming institutional framework: neither former communists nor national democrats had no experience of how to govern the independent state (Motyl 1993). With regard to the external influence, most authors agree that the Russian factor was very important: all participants of the constitutional process realised the need to adopt the new Constitution prior to presidential elections of 1996 in the Russian Federation¹⁵ (Wolczuk 2001a). At the same time, the adoption of the new Constitution was the condition of entry into the Council of Europe; it had to be fulfilled within six months after entry (9 November 1995) and this time constraint served as an incentive in the constitution making process (Wydra 2001). The EU has been an important constraint since the mid-1990s (Molchanov 2004), forcing contemporary Ukrainian elites to accept some rules and

¹⁵ The CPU was the only political force opposed to adoption of new Constitution prior to them in the hope of victory of the Communist candidate Zyuganov and restoration of the communist rule on the post-Soviet space (Wolczuk 2001b).

requirements in exchange for expected rewards and benefits (Riabchuk 2006). Unlike their predecessors (analysed in this paper), they have already realised the inevitability of these changes, although even today are reluctant to implement thorough institutional reforms and to firmly secure the rule of law (Riabchuk 2006), which are new constraint on them.

Analysing the implications of political actors' interaction for the separation of powers in the Ukrainian Constitution, several conclusions can be made. First, the Constitution consolidated the basis for the separation of powers in Ukraine. Second, the dangerous tendency towards strengthening of the presidency that was started during Kuchma's term in office was more or less successfully overcome, and in the end the Parliament received crucial rights to check the President and to demand accountability from the Government. As for the President, another crucial actor in the constitution making process, his powers were generally decreased; not only his preferred option for the assembly – bicameral one – was compromised into a unicameral, but a number of constitutional provisions cut his powers. Therefore, Ukraine has not become a pure presidential republic, contrary to the tendencies of the two years prior to adoption of the Constitution. Third, the newly created separation of powers, however imperfect, was strengthened by the introduction of the Constitutional Court instead of Soviet-type and anti-democratic office of public prosecutor that was in charge of monitoring legality and constitutionality of the Government.

2.2. Elaboration of the drafts of new Constitution

In 26 March 1990 elections to the Parliament of Ukrainian SSR, the democratic opposition participating for the first time won nearly 30% of the new Parliament's seats and formed opposition faction *People's Council*¹⁶, which started to influence the legislature's policy-making (Bilyts'kyi and Pogrebyns'kyi 1997), still controlled by the Communist

¹⁶ Joined by the *Democratic platform within the CPU* (Tolstov 1997).

majority¹⁷. On 16 June 1990, the Ukrainian Parliament almost unanimously (by 355 votes to 4) passed the *Declaration of Sovereignty of Ukraine* on the basis of consensus among the factions¹⁸, initiated by People's Council and supported by the national communists¹⁹. The document was not a legally binding statement of intent and did not aim at the secession of the Ukrainian SSR from the USSR (Kuzio and Wilson 1994), although it stated that the adoption of the new constitution was a necessary condition for signing the new federal Soviet treaty proposed by Mikhail Gorbachev (Wolczuk 1998). The Declaration had a constitutional character since it contained principles of state sovereignty and territorial integrity, people's power and equality of citizens, and the separation of powers: 'state power in the Republic is realised by principle of its separation into legislative, executive, and judicial branches' (*Deklaratsiia* ... 1990). The latter principle became programmatic for all political actors whose interaction over the distribution of powers is analysed in the thesis, but the problem has been in the different interpretation of it (Rechyts'kyi 2004). Moreover, the Declaration was meant to be a watershed from 'socialist legacy' and an opportunity to apply Western concepts of constitutionality (Harasymiw 2002). On the basis of this document the Constitutional Commission was created by Parliament²⁰ on 24 October 1990 for working out the Concept of Constitution; out of 59 members were the MPs, the rest were representatives of the executive branch, judiciary and office of public prosecutor (Tolstov 1997). On 19 June 1991, one out of the seven presented concepts was ratified. It included a separate chapter on the constitutional regime with the separation of power between legislative, executive, and judicial branches and with mechanisms of counterbalances and checks. It foresaw the Presidential republic with posts of the President (being concurrently a head of state and of executive branch) and of vice-president; the unicameral Parliament should be independent from the President:

¹⁷ So-called *Group of 239* due to the voting majority till the Act of Independence of Ukraine on 24 august 1991 (Kuzio and Wilson 1994).

¹⁸ There were 5 different alternatives.

¹⁹ After the same declaration was passed in the Russian Federation (Bilyts'kyi and Pogrebyns'kyi 1997).

²⁰ The Parliament of Ukrainian SSR still.

particularly, it should not be dissolved by him. The 19 June 1991 Concept fixed the victory of the Head of the Parliament Leonid Kravchuk, who was the most probable candidate for presidency, on the issue of a presidency, but the defeat on the issue of a bicameral parliament (Wolczuk 1998). The problematic issues within principle of separation of powers were status of office of public prosecutor (which did not belong to any branch) and notion of ‘socialist choice’ (Yuz’kov 1995).

Like the origin of political actors whose stances influenced the separation of powers in the 1996 Constitution, the constitution making must be traced back to the end of the Soviet era. One of the first compromises on the future Constitution was made on 17 October 1990. This compromise was an important outcome of the confrontation between the communists, then the most numerous party of the Parliament, and the Parliamentary opposition (*Democratic bloc* consisting mostly of *Rukh*). The former decided to make concession to the opposition: ‘to consider signing [new Soviet] union agreement [hotly debated in 1990 in the European USSR republics O. P.] premature before the new Constitution of Ukraine’ (Garan’ 1997: 365). In June 1991 the opposition went further demanding the adoption of new Constitution, resignation of Michail Gorbachev and the formation of a new ‘government of national consent’. This resulted in gridlock between the CPU and the opposition, in which claims of the latter to carry out a ‘round table’ were not supported.

An important milestone in this process became the introduction of the President’s post²¹ as the highest official position in the state and the head of the executive power (Orzikh 2003). The presidency was introduced instead post of the first secretary, whereas the Prime Minister – instead of head of council of ministers (accountable to the Parliament) within the previous Soviet institutional design; the doubling of executive power took place and later on caused a lot of problems in redistribution of powers among the branches (Kolisnyk 2004).

²¹ By the Law ‘On founding of post of President of Ukrainian SSR’ on 5 July 1991, according to which the Constitution of 1978 was supplemented with the Article 12-1 ‘President of Ukrainian SSR’.

Despite presidential republic foreseen by the *19 June 1991 Concept of the Constitution*, through adoption of this law the legislature strengthened its own powers. This has demonstrated, on the one hand, weakness of the Left bloc who could not resist the democratisation and onset of separation of powers. On the other hand, it showed their strength, because: 1) the Presidential competences were balanced by the Parliamentary ones²² (see the subchapter 2.1); 2) the only probable candidate for this position was that of the ruling Communist Party (Kravchuk); and 3) because the Left bloc was abstaining from difficult negotiations on a new constitution, insisting instead on amending the existing Soviet one. It can be argued today, that such resistance to adopt the new constitution severely hindered the democratisation process.

Adopting the law about creation of presidential post, the MPs knew that the candidate was ‘no stranger’, the former communist and the Head of the Parliament. However, soon the executive branch became a rival to the legislative one. In the Constitution of 1978 there was a provision that all state organs are under control of and are accountable to the councils. After introduction of the President’s office, an amendment was made: ‘The President is the Head of the State and is the head of the executive power’ (Lytvyn 1997: 393). This demonstrated a clear contradiction to the above-mentioned provisions and need for adoption of the new constitutional provisions as to the distribution of powers. Constitutional Commission started working on draft of Basic Law in June 1991; the suggestions on human rights, as well as on social, economic, cultural rights, were not contested and were entered into the constitutional text unchanged.

The constellation of political forces dramatically changed in 1991: after a failed coup attempt in Moscow (19-21 August), on 24 August both national-democratic opposition and

²² Although the President was elected directly, whereas then Parliament was still elected half-heartedly democratically only (Wolczuk 2001b).

national communist faction of the CPU²³ united to proclaim the adoption of the *Act of Independence of Ukraine*²⁴ to realise their top priority preferences: the former to build an independent state, and the latter – to retain power in it²⁵ (Bilyts'kyi and Pogrebyns'kyi 1997)). After proclaiming independence, the Parliament initially received the complete power. Previously, within the Soviet institutional framework, the councils acquired the Parliamentary form according to the Soviet Constitution of 1936 (Strashun 1991). That is why in the short run after dissolution of the Soviet Union the continuity of power and institutional arrangements was obvious, as well as the need for urgent reform of them. Under Soviet regulations, the councils, or quasi-‘parliaments’, served as transmission belts of ‘dictatorship’ from the totalitarian communist party to the ‘masses’. Even prior to dissolution of the Soviet Union, during continuing fall of the party monopoly, they started to depend on voters’ will (an example for this is the first free parliamentary elections in the Ukrainian SSR in 1990) and had to be transformed, particularly, the legislative power had to be separated from the executive (Kul'chytskyi 1997). This need became obvious after adoption the law on presidency and decision on all-Ukrainian referendum on independence; since the Concept of 19 June 1990 adopted under Soviet institutional framework could not meet the requirements of the independent state, the most urgent amendments to the effective Constitution were made by constitutional majority after adoption of all laws. Formally the Parliament recognized this urgency by its decision of 22 April 1992 to adopt a new Constitution as soon as possible in the light of changes in the societal relations and status of the state (Tolstov 1997). Meanwhile, on 17 September 1991 the socialist 1978 Constitution of Ukraine, with minor amendments, was recognized to be the Constitution of the independent Ukraine, thus fixing the inheritance

²³ The ‘hard-liners’ of the CPU created the Socialist Party of Ukraine (SPU), opposed to national communist-national democratic alliance (Kuzio and Wilson 1994).

²⁴ With 346 votes for, 1 – against, and 13 abstained (Tolstov 1997).

²⁵ On 30 August 1991, the CPU was banned by the Presidium of the Parliament; on 26 October it was reborn as the SPU led by Oleksandr Moroz (Kuzio and Wilson 1994). After proclamation of independence and political pluralism, in June 1993 the CPU headed by Petro Symonenko was founded (Linyts'kyi and Pogrebyns'kyi 1997).

of the Soviet institutional design. The Parliament was the highest state authority and the Government was the highest executive body, accountable to the Parliament (Wolczuk 1998).

The constellation of political forces, however, changed again after presidential elections held on the same day as the all-Ukrainian referendum on independence (1 December 1991), in which the communist candidate Leonid Kravchuk, who was a Head of the Parliament since 22 July 1990 and a leader of national communists since spring 1991, won with 61.6% of the votes over anti-communist and pro-European candidate Vjacheslav Chornovil, the leader of *Rukh* (23.3%) (Bilyts'kyi and Pogrebyns'kyi 1997). After decline of the USSR became obvious, national communists applied the 'survival' strategy of manipulation of popular nationalism as the only chance to retain the power and to fulfill self-interests; they largely controlled the process of state-building. Despite being opponents during the 1980-s, the national democrats (except for *Rukh* headed by Chornovil) started to support Kravchuk after victory, whereas the centre bloc (*New Ukraine*) stayed distanced from the President (Kuzio and Wilson 1994). The newly elected President gradually extended his powers: through the amendment to the Constitution in February 1992, he was named both the head of the state and of the executive branch and granted the Right to issue decrees with the force of law (Wolczuk 1998).

The legislative-executive relations sharply changed because the principal contradiction as to the distribution of powers emerged between the two crucial political actors, Kravchuk and the Parliament. The debate was bi-dimensional: the first dimension concerned the pros and cons of the separation of powers issue (majority of MPs supported conservation of regulations of Constitution 1978 and rejected strong executive vertical headed by the President); second, between followers and opponents of the conservation of the Soviet system. In other words, debate considered question: what kind of a republic should Ukraine become – presidential or parliamentary?

The first presidential elections are very important because they fixed the development in legislative-executive relations for the next three years: although presidentialism started to become stronger, there was still no proper cabinet system (Kuzio and Wilson 1994). To a large extent this institutional preservation was caused by the fact that the amended constitution of 1978 neither contained clear separation of presidential and parliamentary powers nor delimited the presidential powers from the prime minister ones. The first President used the constitutional uncertainty to increase his powers, particularly to strengthen the executive branch; this was causing permanent confrontation between the President (although he was communist) and parliament (although the majority was communist as well) and finally the pre-term elections of both state branches were agreed on.

Concerning the constellation of political actors, the centrists and national-democrats had to participate in the informal coalition with the *nomenklatura* as a junior partner. In this coalition, both sides had their own interests (represented in a more structured way in the second sub-section). Put very generally, the national-democrats and the centrists wanted to break with the Soviet legacy and to introduce rapid reforms. The communists needed their partners for legitimatising their stance, especially in the central and western parts of the state. However, the positions of the actors were unequal: while the communists dominated in the bodies of legislative and executive power, the national-democrats were policy-makers only in ideological and in international spheres (Riabchuk 2006). Since the collaboration with the communists immediately after independence worsened the image of national-democrats among population, their bargaining power in the ongoing constitutional process was low.

During Kravchuk's term in office, institutionalisation began and relatively consensual institutional framework was in place (Motyl and Krawchenko 1997). However, a *nomenklatura's* (former *Group of 239*) control over power remained an important problem (Haran' 1997), which in the final analysis has blocked any broad reforms, although both

urgent and possible, and has significantly influenced the constitution making process. It was opposed to the Centre-Right (*New Ukraine, Rukh, People's Council*) within the Parliament, whereas the Parliament was opposed to the President on issue of distribution of powers among the branches.

During its work in 1990-1993, the Constitutional Commission headed first by President Kravchuk and then together with new Head of the Parliament Ivan Pliushch (*Vidomosti Verkhovnoi Rady*, 1990) worked out the first *1 July 1992 Draft of the Constitution* which was submitted for a nationwide discussion in December 1992. The Draft foresaw semipresidential regime with the directly elected president as the head of both the state and the executive branch and with two alternatives of organising legislature: uni- and bicameral. It reflected then constellation of political actors: proposing a compromise between parliamentary and presidential forms of government, it embodied preferences of the President²⁶ (Wolczuk 1998). Although evaluated positively as it was aimed at break with the Soviet legacy of unity of power and at democratisation, it was criticised by Western and Ukrainian legal experts for violation of the separation of powers principle (between legislature and judiciary²⁷) and by introduction of strong presidency which given weak party system²⁸ could impede further consolidation of democracy and stability of government (Harasymiw 2002). Nevertheless, it has significantly influenced subsequent drafts and was named 'A draft which became a Constitution' (*Holos Ukrainy*, 14 May 1992). Given the above stated problems, the draft was revised by the renewed staff of Commission towards premier-presidentialism (significantly decreasing presidential powers: the President would be the head of the state and not of the executive branch and increasing governmental ones) which became possible due to ineffective leadership of the President and presented to the Parliament

²⁶ Evaluating the Draft afterwards, Kravchuk said: 'For power to be used well, executive bodies have to be strong and effective; a weak executive could only lead to crisis' (*Holos Ukrainy*, 12 November 1992).

²⁷ The President, the Government, and the Parliament along with the judiciary would be authorised to pass laws and regulations (Harasymiw 2002).

²⁸ 'opting for worst of all possible worlds' (Harasymiw 2002: 52).

on 27 May 1993. The direction of the change became possible due to ongoing decrease of power of the President who gradually focused on representative rather than executive functions ²⁹ and the increase of power of the Head of the Parliament Pliushch whose preferences were for dismantling the Presidential powers in favour of the superiority of the Soviet-type Parliament (Wolczuk 1998).

However, the MPs disagreed on all the fundamental issues; the Left bloc particularly demanded exclusion of the institution of the presidency from the new Constitution as ‘leading to the establishment in Ukraine of a presidential monarchy’ (Harasymiw 2002). After discussion in the Parliament, the second *Draft of 26 October 1993* was submitted for nationwide discussion. It continued tendency of movement from presidentialism towards premier-parliamentarism but violated the principle of the separation of powers in favour of the parliament, to some extent restoring Soviet-type assembly government given multi-party system (Sliusarenko and Tomenko 1997). In the aftermath of deadlock in the Ukrainian government in 1993 and 1994, caused by the confrontation of legislative and executive branches of power³⁰ and resulting in pre-term presidential and parliamentary elections of 1994³¹, the work on the draft of the Constitution was discontinued; the Constitutional Commission liquidated itself in the late 1993. Afterwards, due to the given above fundamental confrontation between Kravchuk and the Parliament, as well as the upcoming pre-term parliamentary (27 March 1994) and presidential (10 July 1994) elections, first in the independent Ukraine, the constitution making stalled completely.

The constitutional process was renewed in its second stage after the completion of early elections in 1994 (as the table 2 shows).

²⁹ In November 1992, the Prime Minister Leonid Kuchma was granted privileges of law-making on economic issues instead of Kravchuk (Wolczuk 1998).

³⁰ Including contradictory to the Constitution privileges to issue decrees, delegated by both President and Parliament to the Government of Prime Minister Kuchma on 18 November 1992, and Kravchuk’s demands for concentration of the plenary executive powers in his hands, rejected by *The Parliament* (Zaitsev 1997).

³¹ Nevertheless, solution of the deadlock by means of early elections in 1994, agreed among *The Parliament* and Kravchuk, can be estimated as indication of growing institutionalisation and of the recognition of priority of balance of power by political actors (Motyl and Krawchenko 1997).

Table 2. *Ukraine: the aftermath of general election of 27 March 1994: party/faction composition of the Parliament in December 1994*³²

Party	Seats in the Supreme Council, Number	%
Communist Party (CPU)	84	18.6
Socialist Party/Peasant Party bloc (SPU-SelPU)	61	13.55
Total Left	145	32.15
<i>Interregional Block of Reform</i>	25	5.55
<i>Yednist'</i>	25	5.55
<i>Centre</i>	36	8
Total Centre	86	19.1
Narodnyi <i>Rukh</i> Ukrayiny (NRU)	27	6
<i>Reform</i>	29	6.44
<i>Derzhavnist'</i>	27	6
Total Right	83	18.44
Independents	89	19.77
Total	403	450

Since the Left bloc (CPU and SPU-SelPU) won the Parliamentary elections with 34% of mandates against 8% taken by the Right bloc (NRU and URP), they appointed their representative Oleksandr Moroz as Head of the Parliament. On 19 July 1994 all the key political actors – newly elected President³³, Prime Minister and Head of the Parliament – published a declaration, or ‘non-aggression pact’ (Zaitsev 1997: 18), to adhere to the Constitution of 1978 and to amend it only under consensus of all sides; theoretically, representatives of executive and legislative branches committed themselves to solve issue of distribution of powers through agreement and not confrontation, although newly elected President Leonid Kuchma emphasised that ‘united executive vertical should be strengthened and headed by the President’ (Kul’chyts’kyi 1997). During the year, the shift in the constellation of the political actors was taking place: the Left opposed the Presidential power preferring the Soviet-type system of councils, while the President demanded more executive

³² Because of the runoffs since July till September; Source: Bilyts’kyi and Pogrebyns’kyi 1997: 62.

³³ Leonid Kuchma, supported by the Left and majority of the Centre in pre-election time, won with 52% of votes against former President, supported by the Right (46%); however, during his first term in office the preferences of political forces for support of president changed and resembled those during Kravchuk’s presidency: the Left opposed the President for his reformatory policy, whereas the Centre-Right, including *Rukh*, supported his preferences for strengthening executive branch (Linyts’kyi and Pogrebyns’kyi 1997).

power for economic reforming. The Centre which initially after the elections seemed to support the most Left to gain numerical superiority later shifted to the President's side (Wolczuk 1998). Therefore, the new Constitutional Commission was created on basis of representation of both legislative and executive branches of power³⁴ on 10 November 1994, headed by Kuchma and Head of the Parliament Moroz.

In December 1994, Kuchma introduced a draft of Constitutional Law³⁵ *On state power and local self-government in Ukraine*³⁶ with suggestions of the separation of power along executive and legislative lines. According to the draft, the Parliament had to transfer part of its powers to the President as foreseen by the Law of 1991 (Lytvyn 1997). In reality, however, the President's draft was built on principles of unity of power central to the Constitution of 1978. Particularly, the presidency would be strengthened, post of Prime Minister would be subordinated to the President, and the Parliament would be generally weakened: the right of legislative initiative would belong to a number of bodies (including courts and office of public prosecutor); judicial function would be shared by legislation and executive (Harasymiw 2002). In fact, the President used his bargaining power to reverse the general tendency to weakening the presidency in previous draft laws produced by the Constitutional Commission.

Meanwhile, on 28 February, the President appointed new loyal acting as a Prime Minister (Marchuk) to increase pressure on the Parliament in the bargaining around Law *On power....* After difficult process of discussion in the Parliament with support only from the Centre (Zaitsev 1997), the draft law was passed by simple majority on 18 May 1995 and would make the President an individual head not only of state but of government as well. However, the draft law contradicted with more than 50 articles of the effective Constitution and could be enforced only by constitutional majority (301 votes) which was impossible given the conflicting preferences of the political forces in the Parliament: the Centre-Right

³⁴ They were 'subjects of legislative initiative' (Wolczuk 1998: 126).

³⁵ 'Constitutional law' itself was category of legislation, newly introduced by the President (Harasymiw 2002).

³⁶ Further referred to as Law *On power...*

sided with the President but could not outvote the Left (*Informatsiino-analitychnyi biuleten'* 1996). Kuchma made an appeal to Ukrainian people stating that 'Coexistence of the President and the Parliament in the valid legal status is impossible' (*Holos Ukrainy*, 31 May 1995) and issued a decree on confidence to himself and the Parliament, which was vetoed by the latter.

Since the very first session of the new Constitutional Commission, a discrepancy between the President's and the Head of the Parliament's preferences has become obvious. Kuchma insisted on adoption and inclusion into the new Constitution provisions of the Law *On power...*, which significantly decreased control of legislature over executive and gave the President legislative functions, arguing that stronger presidency is necessary for effective work of the Parliament. Moroz opposed these changes to the effective Constitution and accused the President in aspiration not to separate powers, but to strengthen presidency at the expense of legislature (Gorlov 2005); Symonenko (the leader of CPU) criticised the draft law for curtailment of the Parliament's powers and increase of influence on the judicial power (*Holos Ukrayiny*, 14 December 1994). Given unsuccessful bargaining, the Head of Constitutional Court and MP Holovatyi suggested to conclude a treaty between the President and the Parliament (*Holos Ukrayiny*, 17 January 1995).

2.3. Constitutional agreement between Parliament and President.

To solve the conflict peacefully, negotiations on Constitutional agreement between the President and the Parliament, which should be in force till adoption of the new constitution, were held. Surprisingly enough, they resulted in the compromise, partially possible due to 'tit-for-tat' strategy: the two provisions most important for both sides were deleted: impeachment of the President by the Parliament and dissolution of the Parliament by the President. In the aftermath of bargaining with domination of threats of referendum from the President's side, who was supported by the Centre-Right (Bilyt'skyi and Pogrebyns'kyi 1997) because they opposed the Left's adherence to the Soviet-type institutional framework (Wolczuk 1998), on

8 June 1995 the Constitutional agreement for a period of one year was concluded between the President and the Parliament (including the Head). In fact, it was enforced Law *On Power...* which acquired status of the temporary, or 'little', Constitution transforming Ukraine into semipresidential republic. Although after parliamentary consideration the presidential powers were significantly restricted in comparison to introduced by the Law 'On power...', the President was given the unilateral right to appoint and dismiss the Prime Minister and the Government (Harasymiw 2002). Legal contradiction between a number of regulations in the Constitutional agreement and in existing Constitution was neglected as inferior (number of the 1978 Constitution were suspected) to compromise between political actors. However, the intensive conflict between the executive and legislature during the adoption of the Constitutional agreement remained and during the one-year term a vast bargaining process was taking place: the Parliament kept legislative functions, but lost power to form and control the Government and therefore was highly motivated to change the balance of powers in the new Constitution (Gorlov 2005); the President did not fulfil his expectations on the strengthening of executive power and continued his course. On 24 August 1995 in his annual speech on the Day of independence of Ukraine he emphasised: 'Strengthening of executive power as a necessary precondition for way out of economic crisis must be accompanied by strengthening of the role of the Parliament as really legislative body...' (*Holos Ukrainy*, 25 August 1995). An important back up for President and constraint on the Parliament was deepening economic crisis, to which the President appealed as a result of inadequate separation of power and a justification for strengthening of executive power (*Holos Ukrainy*, 18 February 1995).

To speed up the constitutional process, on 19 June a new working group of Constitutional Commission consisted mainly of scientists recommended by President was created and prepared a *Draft of Constitution of 15 November 1995* which was approved by a

majority of Constitutional Commission (due to supporters of President) on 23 November. However, the working group of Constitutional Commission (including representatives of both the Parliament (Butkevych) and of the President (Holovaty)) and Head of the Parliament evaluated the project of new Constitution³⁷ as violating principle of separation of powers in favour of the President. Kuchma insisted on consideration of the 23 November 1995 Draft by the Parliament in December already, otherwise threatening to submit it to all-Ukrainian referendum (Zaitsev 1997). However, Moroz answered that the executive power cannot submit the Constitution for referendum and that it still was necessary to redistribute power between legislature and executive properly (*Holos Ukrayiny*, 16 February 1996); the Parliament, although variegated, could not approve the Presidential republic embodied in the draft of the Constitution (Gorlov 2005).

With the aim to come to an agreement with all branches of power about the Draft, the working subcommission consisting of representatives of the President, of the Parliament and of judicial power³⁸ was created. Finally, the agreed draft was published on 24 February 1996. The practically presidential form of government was introduced: since the President, although not named the head of the executive branch, should be empowered to appoint (and dismiss) a Prime Minister and government and to dissolve the bicameral parliament, he would possess both legislative and executive powers and not be checked neither by the Parliament not by judiciary. Moreover, the procedure of impeachment was made very complicated³⁹ (Kudriashov 1996b).

On 11 March, the draft was passed to the Parliament. It envisaged a bicameral legislature and a strong presidency (Wolczuk 1998). Representing the project to the Parliament, Kuchma insisted that traditional parliamentary powers were given to the

³⁷ Which resembled the first Draft of Constitution submitted in 1993 for nationwide discussion significantly.

³⁸ Represented by the Supreme Court of Ukraine and Supreme Arbitration Court.

³⁹ Because the President should appoint half of the judges of the Constitutional Court, submit to the Parliament candidacies for the judges of the Supreme Court, and appoint judges of the courts of general jurisdiction (Kudriashov 1996b).

Parliament in the full scope, whereas Moroz (the second Head of Constitutional Commission) said that given conflict of political forces with different interests it was still necessary to seek further compromise not to embody victory of one of them (Gorlov 2005). Both the Left and the Centre-Right in the Parliament clamoured the Draft of 11 March for bicameral legislature and dominance of the presidency (with extended powers compared to the Constitutional agreement) over the legislature; the Left objected specifically the abolition of the council institutional framework. The communist faction went as far as to draft the Constitution of the Ukrainian Soviet Socialist Republic on 18 March, contributing to consolidation of the Centre-Right in the favour of the President (Wolczuk 1998).

To elaborate the project, the Interim special commission was created; in the aftermath of discussion of above stated controversial points by the Parliament, the balance of powers in the draft of 11 March was changed in favour of legislature, and on 28 May new draft in a wording of above mentioned Commission was printed in parliamentary newspaper *Holos Ukrayiny*. Although the President finally agreed to the unicameral parliament, this parliamentary draft turned out to be unacceptable for him, and he reacted with the threat to submit constitutional issue for a referendum, which meant that the Parliament would lose control over its final version (Harasymiw 2002). However, this President's move was opposed by another key political actor - Prime Minister Marchuk - known for his aspiration to coordinate the Government actions with the Parliament (Zaitsev 1997)⁴⁰. On 4 June, the Constitution was adopted at the first reading⁴¹ followed by a number of comments by President and by confrontation between the Left and the Right within Parliament over issues different than distribution of powers (right of ownership for land, status of Crimea and state language and state symbolics). During the second reading (19-28 June 1996), the most powerful group opposing adoption the Constitution was a governmental one, headed by pro-

⁴⁰ Marchuk was dismissed by the President the very next day (Gorlov 2005).

⁴¹ For which a simply constitutional majority is required (Article 155 of Consitution of 1996).

presidential Prime Minister Lazarenko⁴² who organised visiting sitting of the Government⁴³ outside Kyiv⁴⁴ to prevent the Parliament from gathering a constitutional majority (Kudriashov et al. 1996); finally, on 26 June 1996 Kuchma issued the decree on conducting of all-Ukrainian referendum on 25 September 1996 concerning the Draft of 11 March 1996, not one approved at the first reading on 4 June 1996 (Zaitsev 1997). All parliamentary factions, including the most pro-presidential national-democrats, viewed the March draft as inferior to the June one; moreover, the early parliamentary elections after the referendum were likely. Therefore, on 28 June the Constitution was adopted by the constitutional majority in consecutive second (by 325 votes) and third (315 votes) readings.

2.4. Institutional set-up in the Constitution of Ukraine of 1996.

According to the Constitution of 1996, the state power in Ukraine is carried out according to the principle of its separation into legislative (parliamentary), executive (governmental), and judicial branches (Article 6); the presidency does not belong to any of the branches although influences forming and functioning of all of them. The unicameral parliament (*Verkhovna Rada*⁴⁵) is the ‘sole body of legislative power’ (Article 75), the Government (*Cabinet of Ministers*) is ‘the highest body in the system of bodies of executive power’ (Article 113.1), and the President is ‘head of the state’ (Article 102.1).

The directly elected president is granted the Rights to:

a) appoint the Prime Minister (with consent of the Parliament) who chooses the Government – the highest body of executive power – with the President (Articles 106.9 and 106.10);

b) to dismiss the Prime Minister and the ministers unilaterally (Article 106.9, 106.);

⁴² Appointed by the President on 28 May 1996 (Zaitsev 1997).

⁴³ Then, a lot of MPs combined parliamentary mandates with leading posts in the executive bodies; this provision was ruled out by the Constitution of 1996 (Wolczuk 2001b).

⁴⁴ To adopt the draft law of Constitution, two-thirds constitutional majority is necessary during the consecutive session (Article 155 of the Constitution of 1996).

⁴⁵ The Soviet title of the Parliament was not changed due to demands of the Left bloc.

- c) to create and dissolve ministries (Article 106.15);
- d) to dissolve the Parliament if it is unable to convene for thirty days during one plenary session⁴⁶ (Article 106.8);
- e) to veto parliamentary draft legislation (which can be overridden by a two-thirds parliamentary majority (Article 94 and 106.3)) and to revoke decisions of the Government (Article 106.16);
- f) to appoint one third of the Constitutional Court and other central executive bodies, but with consent of the Parliament;
- g) to call national referenda (Article 106.6).

According to transitional provisions, the President receives law-making powers on economic issues (not regulated by the current legislation) for three years⁴⁷. Therefore, despite constitutional status of the presidency ‘above the power’, it has powers of all three branches of power: legislative – to issue decrees for the Government; forms the whole system of executive power with the assistance of parliament and the judicial power with parliamentary consent (Solovjevych 1997).

The directly elected parliament can dismiss the Government in a no-confidence vote but not earlier than one year after approval of its programme (Article 87). *The Parliament* lost some powers provided by the Constitution of 1978, particularly to interpret laws, in favour of the Constitutional Court (Article 147); moreover, presidential draft laws are to be considered extraordinarily (Article 93).

The Government is formed (and Prime Minister appointed) by both president and parliament in accordance to following procedure: president appoints Prime Minister by agreement of more than half of constitutional composition of the Parliament, and then members of The Government proposed by the Prime Minister (Article 114.2,3); the

⁴⁶ This provision could have given the President the right to groundlessly dissolve the Parliament even during the Parliamentary recess which last more than 30 days (Malyshko 1997).

⁴⁷ This period coincided with the remaining time of Kuchma’s term in office.

Government is accountable for the President and under the control of the Parliament (*Konstytutsiia Ukrainy* 1996).

The adoption of the new Constitution in 28 June 1996 became possible in the aftermath of the long bargaining process between the principal political actors: the President, the Parliament (who were constitution-makers, too), and the Government on such a principal issue as the distribution of powers among the branches. As the result of the bargaining process (threats and promises), which was predominant mechanism of realisation of actors' preferences, a presidential-parliamentary form of government, characterised by the dual authority over the Government⁴⁸ was fixed by the Constitution. During constitution making, both main actors – the President Kuchma and the Parliament – have realised their preferences partially only⁴⁹. On the one hand, the President has realised his overwhelming preference for strong presidency, but not to the expected extent because the President obtained control neither over the Government (Prime Minister became the chief executive) nor over the Parliament (he obtained no right to dissolve it). During voting, the national democrats yielded their support for those major levers of presidential power to realise their top priority preference – adoption of the Constitution as guarantee of sovereignty of Ukraine prior to the Presidential elections in the Russian Federation. On 26 June 1996, the President was supported mostly by the Centre (Zaitsev 1997).

On the other hand, the Left bloc in the Parliament has not implemented its preference for purely parliamentary form of government although the equal to presidential powers were given to the Parliament (but aimed to prevent the usurpation of power under Soviet councils system), whereas the Centre-Right bloc supporting the Presidential-parliamentary one has,

⁴⁸ Unilateral right to dismiss the Government

⁴⁹ 'The political prize will be control of the Supreme Council, for power will be unquestionably concentrated there, not in the Communist party's apparatus, as in former times, nor in the President's office as both Kuchma and Kravchuk have recently attempted to do. This result was secured by the ex-Communists' use of their majority in Parliament, thus assuring a carry-over of the Soviet legacy for Ukraine's politics in the post-Communist era' (Harasymiw 2002: 78).

despite disapproving Kuchma's confrontational mode of behaviour in June 2006 (Wolczuk 2001b).

Therefore, the Constitution reflected the temporary configuration of political forces in 1996 only and did not embody the basic consensus in dispute over distribution of powers (Wolczuk 1998). The implemented constitutional design for separation of powers and checks and balances was criticised for indefinite stance of the presidency in the system of state institutions and absence of real power in the Government. The presidency is guarantor of the constitutionalism, however, it is influential on both the Government (although together with the Parliament)⁵⁰ and the Parliament⁵¹, but is not politically or legally accountable (Kolisnyk 2004).

Nevertheless, declaring the new principle of crucial importance, about separation of powers (Article 6) and receiving the highest legal power (its norms are of direct effect), the Constitution has become a necessary precondition for the further democratic and market development (Wydra 2001): 'The Constitution of Ukraine as it has emerged represents a fundamental step away from Communist dictatorship towards democracy' (Harasymiw 2002: 78); the last Soviet Constitution of 1978 which was in force till 1996 was severely supplemented and amended⁵² because of its socialistic and command-administrative conceptual character, which made it inappropriate for aims of state-building. Moreover, the Constitution has implemented its ultimate task – establishment of institutional framework (see

⁵⁰ The rights to: appoint and to resign the Prime Minister ((Article 106.9); to appoint the members of the The Government (Article 106.10); to form, to reorganise, and to dissolve the ministries (Article 106.15); to decrees of the Government (Article 106.16); to issue decrees to determine additional functions of the government (116.10) (*Konstytutsiia Ukrainy* 1996).

⁵¹ The rights to: draft and officially submit draft laws to the Parliament (93.1); to define draft laws as unpostponable to be considered out of turn by the Parliament (96.2); to veto passed laws and to return for repeat consideration by the Parliament (96.4); to demand special sessions of the Parliament with the stipulation of their agenda (Article 83.2); to terminate the authority of the Parliament prior to the expiration of term (Article 90.2); to appeal to the Constitutional Court to decide on issues of constitutionality (conformity with the Constitution of Ukraine) of laws and other legal acts of the Parliament and acts of the Government (Article 150) or to decide on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Parliament for granting agreement on their binding nature (Article 151.1) (*Konstytutsiia Ukrainy* 1996).

⁵² Between 1991 and 1995, over 220 amendments were made to the Constitution of 1978 (Wolczuk 1998).

introduction), or of the ‘basic rules of the game’; however, adopted on the basis of tactical compromise in conflicting environment, it was vulnerable to the changes of balance of power in the constellation of political actors and could not guarantee the adherence to established distribution of powers by the actors.

Chapter 3: Constitutional reform and constitutional amendments (1996-2004)

After the 1996 Constitution was adopted due to the President's threat of the referendum, the constellation of political actors analysed in the previous chapter had changed and the anti-presidential majority started to develop in place of the anti-left one. The transformation of the Centre-Right preferences for the distribution of powers from strong presidency into preferences for parliamentarism became crucial at this point. The reasons for the change in preferences were as follows: first, the achievement of the Centre-Right preference of having a guarantee for state- and nation-building (through adoption of the Constitution of 1996), and second, the increasing power of the former ally – the President, which concealed a danger of authoritarianism (Wolczuk 2001b).

Since the Constitution of 1996 was adopted as a temporary compromise among the conflicting actors, the debates on amending it started between both presidential and parliamentary sides almost immediately. Officially, the process of making amendments to the Constitution in force was initiated by the *State programme of development of legislation of Ukraine till 2002*, developed by affiliated to the Parliament scientific Institute of Legislation and approved on 15 July 1999 by the Resolution of the Parliament. It foresaw presentation of the draft law on amendments to the Constitution to the MPs the same year. Since 1999, the 13 draft laws on amendments to the Constitution were submitted to the Constitutional Court of Ukraine for review⁵³ (Rudyk 2004). Nevertheless, the analysis of further constitutional reform demonstrates that the way decisions on redistribution of powers between the branches

⁵³ According to the Article 159 of the effective Constitution of Ukraine, the Parliament can consider draft bills on amending the Constitution only given conclusion of the Constitutional Court on their correspondence to the Articles 157 ('The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency') and 158 ('The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law. Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution') (*Konstytutsiia Ukrainy* 1996).

were made is better explained from the political actors' perspective than from that of the legal perspective suggested by the scientific institutions.

3.1. Drafting amendments to the 1996 Constitution

The results of the first parliamentary elections, held after the adoption of the Constitution, again witnessed a numerical superiority (but not majority) of leftist wing having 175 seats (as table 1 shows), which together with some independents and *Hromada* party (88 seats) formed an anti-Presidential bloc later on (after a conflict regarding the election of the Head of the Parliament). They opposed the President and the Centre-Right bloc who supported him on the issues of constitutional reform. Soon, however, the pro-presidential factions (NDP, PZU, SDPU(o)) and a party loyal to the President (NRU) have increased their number of seats to 185 due to the support of independents and members of parties which did not pass the elections barrier. As a result, the Parliamentary majority responsible for the formation of the Government was impossible to reach.

Table 3. *Ukraine: the Parliamentary election of 29 March 1998*⁵⁴.

Party	Seats in the Supreme Council, Number	%
Communist Party (CPU)	123	27.11
Socialist Party/Peasant Party bloc (SPU-SelPU)	35	7.56
Progressive Socialists (PSPU)	17	3.56
Total Left	175	38.44
Ukraine's Greens' Party (PZU)	19	4.22
Popular Democratic Party ⁵⁵ (NDP)	31	6.44
<i>Hromada</i>	24	5.11
Social Democrats (United) (SDPU(o))	17	3.78
Total Centre	91	23.32
Narodnyi <i>Rukh</i> Ukrayiny (NPU)	46	10.22
Total Right	46	11.56
<i>Parties and blocs which have not overcome 4% threshold</i>	35	35
Independents	101	25.78
Total	448	100.00

⁵⁴ Source: *Parlament Ukrainy: vybory-98*. Ch. 2. Pp. 628-629.

⁵⁵ Created from pro-presidential representatives of high nomenklatures (February 1996).

In his pre-election campaign for the 1999 presidential elections, Kuchma, who was the main candidate for the office, expressed his preference for bicameral parliament and creation of parliamentary majority (*Peredvyborna programa L. Kuchmy*: 1999). After his comfortable victory on 14 November 1999, the situation in the Parliament changed. The new centre-right majority formed on 13 January 2000 (259 out of 446 deputies) proclaimed its readiness to support the President and conflicted with the Left minority⁵⁶; however, the President did not trust the situational majority, claiming that it would be stable only due to the threat of the all-Ukrainian referendum: ‘...when I look at the surnames on this list ... yesterday they were my adversaries and today ... will protect Ukraine together with me! I cannot imagine this. Under the slightest fluctuation of situation, they will desert to the other camp. ... That is why referendum must take place and the decision must be taken’ (Mostovaya 2000). Actually, Kuchma was the main political actor to initiate the constitutional revision of the distribution of powers (Wolczuk 2001b). His main argument concerned the necessity to revise the constitutional provisions related to the unaccountability of the state power through redistribution of powers among the branches (Kolisnyk 2004). The President was in a permanent conflict with the Parliament, accusing the latter in its inability to form a majority and constant blockage of the Governmental work (Wolczuk 2001b). According to some scholars, Kuchma’s victory caused increase of presidential power and decline in parliamentarism (Akimova 2000).

Given intensification of conflict between the President and the Parliament as to the control over the Government, which was not resolved until the 1998 parliamentary

⁵⁶ From 21 January till 8 February Ukraine underwent the severest parliamentary crisis because of conflict between majority and minority headed by Oleksandr Tkachenko (SPU); on 1 February Ivan Pliushch was elected as a Head of the Parliament.

elections⁵⁷, and parliamentary crisis in January-February 2000 related to majority formation, Kuchma tried to implement his preference for strengthening the Presidential power again. Only this time he used the voting mechanism: on 16 January 2000, the President issued a decree for all-Ukrainian referendum on the vote of confidence to the Parliament, aimed to amend the Constitution and to be held on 16 April 2000⁵⁸. The President proposed six questions to be answered by citizens at the referendum, two of which – on the vote of confidence to the current Parliament and as to the necessity to adopt the Constitution at the national referendum – were recognized by the Constitutional Court (after the Parliament's appeal to the Court) as unconstitutional (Jeffries 2004). The Presidential decree openly violated the constitutional provision as to the process of amending the Constitution, which demanded the constitutional majority and Parliament's will (Wolczuk 2001b).

According to the results of the referendum, the following President's proposals for constitutional amendments received between 81.68-89.91% of the total number of votes: 1) the President should have the power to dissolve the Parliament⁵⁹; 2) the immunity of deputies should be abolished; 3) the number of seats should be reduced from 450 to 300; 4) the unicameral Parliament should be transformed into bicameral one⁶⁰ (Jeffries 2004; Bandurka and Grechenko 2000). Therefore, should the results of the referendum be introduced, the political power of President would be significantly increased.

⁵⁷ After adoption of the Law 'On the Cabinet of Ministers' by the Parliament, according to which the Prime Minister was appointed and dismissed by the President with consent of the Parliament, in December 1996 Kuchma issued the decree 'On the Cabinet of Ministers' which envisaged subordination to the President of the ministries of defence, internal and foreign affairs, violating the Constitution, and was criticised by the Left, the Centre, and even by the Right (Wolczuk 2001b).

⁵⁸ On the basis of Article 106 of the Constitution (*Konstitutsiia Ukrainy* 1996).

⁵⁹ Under defined conditions: in case it fails to form a parliamentary majority within one month or to pass a proposed by government budget within 3 months.

⁶⁰ Which would consist of oblast' governors, who accordingly of the Constitution of 1996 are appointed by the President; therefore, the President would ensure himself loyalty of higher chamber, consisting of his subordinates.

According to the decision of the Constitutional Court of Ukraine, the results of the referendum embodied people's will and should have been implemented by the Parliament⁶¹. However, there were both external and internal constraints on their implementation. First, the Venice Commission questioned the legal grounds of the referendum at the early stage of implementation of the Constitution and pointed to a potential disbalance of powers between the President and the Parliament (*Den*, 4 April 2000). Second, the results were never implemented because the Left and centre MPs dominating the Parliament were emphatically opposed to redistribution of powers in favour of President. Third, the Parliament's attention was distracted by the so-called 'cassette scandal' related to the case of journalist Georgij Gongadze, which also significantly injured the stance of Kuchma (Jeffries 2004).

Nevertheless, despite the fact the results of the national referendum were never implemented by the Parliament, the President continued his course towards strengthening the Presidential powers by all means. In the aftermath of the referendum the President submitted his draft law on amending the Constitution to the Parliament, while the Parliament itself had worked out an alternative draft law as to the distribution of powers⁶². Ironically enough, both draft laws did not take into account the actual results of the referendum, instead simply referring to people's will. The Presidential draft law was aimed at strengthening his influence on the legislature, which would be bicameral and would create 'constantly acting'⁶³ parliamentary majority; this draft was evaluated as strengthening authoritarian tendencies concerning the distribution of powers (Rechyts'kyi 2004). The Parliamentary draft law (prepared by MPs Moroz and Holovatyi) was aimed at the transformation of the form of

⁶¹ Interference of the Constitutional Court was necessary because although the effective Constitution foresaw the order of adoption of new Constitution by qualified majority (two thirds of MPs in the Parliament), and the Constitutional agreement of 1995 provided for vague 'agreement between the President and *The Parliament*', the President alone submitted the Draft for all-Ukrainian referendum while the Law on referendum of July 1991 was out-of-date and not fully correspondent to the Constitution of 1996 (Kul'chyts'kyi 2004).

⁶² The draft laws were named 'About amending the Constitution of Ukraine as a result of all-Ukrainian referendum by people's initiative' and 'On amendments to the Constitution of Ukraine in the result of all-Ukrainian referendum of 16.04.2000'.

⁶³ Vaguely defined concept which would give the President an additional opportunity for pressure on the Parliament (Rechyts'kyi 2004).

government into the Parliamentary republic through redistribution of powers between the Parliament and the President and change of status of the Government. Both draft laws were reviewed by the Constitutional Court and while the Presidential draft was recognized as the one in compliance with the Constitution, the MP's draft did not pass the constitutional test (Gorlov 2005). Therefore, the Constitutional Court served as a mediator in the institutional stalemate between the two core actors of the constitution amending process and played an important role, although some scholars believe that it had exceeded its authority (Bilynskyj 2000). This case represents the influence of political and legal preferences of Constitutional Court's judges on realization of political actors' preferences (Protsyk 2003). Since no agreement was reached, on 29 May 2000 Kuchma issued the decree on creation of the constitutional commission, which was supposed to define and make decisions on controversial issues (namely bicameral parliament, 'permanently acting parliamentary majority', number and immunity of deputies (Rudyk 2004).

Meanwhile, due to the migration of MP's between the factions, the Left majority of the Parliament began to decrease which led to the dislocation of forces within the legislature. In fact, from May 1998 till September 2000 the number of MPs from left decreased from 175 seats to 132. The second tendency concerned the Centre-right which traditionally supported the President, but after the referendum was forced to split into two opposing factions: the propresidential and the progovernmental. The reason for this tendency was the clash of preferences: the intention of the President to strengthen his power by means of referendum was conflicting with the stance of centre parties representing interests of financial-industrial groups and backing up the Prime Minister who became opposed to the President⁶⁴ (Kul'chyts'kyi 2001). At the same time, the propresidential faction submitted a proposal to the Constitutional Court of Ukraine to allow Kuchma run for his third presidential term and

⁶⁴ The constellation of actors in 2000 with opposition between the President and the Prime Minister resembled one in 1993, when Kuchma as Prime Minister opposed President Kravchuk.

received Court's approval on this matter. Given the low level of Kuchma's popularity among the electorate and the negative reaction from European institutions, Kuchma refused to run for his third re-election⁶⁵ (Rechyts'kyi 2004).

The centrist MPs, having taken into account the decision of the Constitutional Court, on 23 February 2001 submitted a new draft law 'On Amendments to the Constitution of Ukraine' to the Parliament, which particularly extended the powers of the Parliament and the Government, while weakening those of the President. In particular it envisaged: 1) the appointment of Prime Minister and formation of the Government by the Parliament with its accountability to the Parliamentary majority; 2) the Right to initiate the impeachment procedure, 3) and in case of early suspension of power, execution of the Presidential duties by the Head of the Parliament. The grounds for these amendments were to distribute powers between branches more clearly, namely to strengthen interconnection and reciprocal responsibility between the Parliament and the Government, and to transfer some powers of the President to the collective bodies. The reaction of both President and the Government towards this draft law was consonantly negative – it was recognized as 'disbalancing the mechanism of equilibrium of forces envisaged by the effective Constitution'. Although the Constitutional Court approved the draft law as a whole, those amendments did not enter into force and the process of amending the Constitution eventually slowed down.

The next turning-point in the Presidential-parliamentary conflict took place in April 2001, when the Parliament attempted to approve the new Law 'On the Presidency', which would oblige the Head of the State to sign all laws adopted by constitutional majority (more than 300 votes). Although this bill was never approved, it influenced the constellation of forces by weakening the pro-presidential majority in the Parliament and strengthening the anti-presidential forces, which at the time became extremely important, given their differing

⁶⁵ According to the Article 103.3 'One and the same person shall not be the President of Ukraine for more than two consecutive terms'; 53 MPs asked for its official interpretation (Rechyts'kyi 2004).

position of distribution of powers between presidential and parliamentary branches (Jeffires 2004).

When the fifth anniversary of the Ukrainian Constitution was celebrated in June 2001, it was clear that the attempts to amend the Basic Law by both the President and the Parliament had failed.

At this point in time, however, the Parliament became pro-active, partly due to the efforts of the Left who attempted strengthen the Parliamentary power and arguing for the abolishment of the President's office. As argued by some scholars, such tendencies can be explained by the legacies of the Soviet past and the absence of the strong candidate for presidency within the Left (Kul'chyts'kyi 2001). Furthermore, on 19 October 2001, the Parliament finally succeeded in adopting the Law 'On elections of people's deputies' (which was already vetoed by the President four times before). This law strengthened the role of the political parties through the introduction of the proportional electoral system (Clover 1998) and increased the role of the Parliament in the overall bargaining process.

In 2002, during the pre-election campaign, most of the political parties, who later on advanced to the Parliament, emphasized the necessity to shift the distribution of powers between legislature and executive towards higher independence of the former and giving it the authority to form the Cabinet (Tomenko 2002). In the aftermath of the Parliamentary election held on 31 March 2002, the pro-reform opposition coalition prevailed in the Parliament for the first time (although not significantly) and the influence of the Left had sharply decreased (as the table 2 shows). Particularly important was the relatively low rating of the propresidential bloc *For United Ukraine* which reflected the weakening stance of Kuchma himself (Yushchenko 2002).

Table 4. *Ukraine: the general election of 31 March 2002*⁶⁶.

Party	Seats in the Supreme Council, Number	%
Communist Party (CPU)	117	26
Socialist Party (SPU)	24	5.3
Total Left	141	31.3
Socialist Democratic Party (SDPU)	23	5.1
<i>For United Ukraine</i>	159	35.3
Total Centre	182	40.4
<i>Julia Tymoshenko's Bloc</i>	22	4.9
<i>Our Ukraine bloc</i>	66	14.7
Total Right	88	19.6
Independents	39	8.7
Total	450	100.00

Although the opposition *Four* including Yushchenko *Our Ukraine* faction, the *Yulia Tymoshenko* Bloc, the CPU and the SPU faction, failed to create a majority, the pro-presidential majority was also incapable of doing it. As a result, on 16 September 2002 the opposition in the Parliament (*Our Ukraine*) came to an agreement with the pro-presidential factions on the issue of formation of the Parliamentary majority and possible creation of the coalition government (Jeffries 2004).

Despite this fact, the President was able to secure a parliamentary majority which favoured him and on 7 December 2002 it signed an agreement for 'political consolidation' with the Government headed by pro-presidential Prime Minister Viktor Yanukovich (appointed by the President on 16 November). Therefore, with the help of the bargaining mechanism, the President was able to achieve his preference as to the legislature being dominated by the executive branch since the Parliament agreed to support the pro-presidential Government (Jeffries 2004). As the President put it, '... the situation in the country has changed fundamentally. We have formed a triangle made up of the President, the Parliamentary coalition and the Government formed by it' (*Kommersant*, 9 December 2002).

⁶⁶ Source: Riabets' 2002: 117.

On 28 January 2003, leader of the opposition – Yushchenko – declared that a single candidate from the opposition will take part in the Presidential elections of 2004. The President's reaction to this statement consisted in his proposal of the draft law 'On Amendments to the Constitution of Ukraine' (on 6 March 2003) for nationwide discussion in March-May 2003, which was submitted as a renewed draft to the Parliament on 19 June 2003. Later on, Kuchma initiated a new round table with the opposition agreeing not to participate in the upcoming presidential elections in exchange for the introduction of bicameral Parliament and adoption of his version of the political reform through the strengthening of the Parliament to be accomplished by the end of his second presidential term.

On 1 July 2003, immediately after submission of the Presidential draft law, a group of the opposition MPs submitted an alternative draft law with the same title under the number No. 3207-1⁶⁷. Both the Presidential and the Parliamentary drafts aimed to change the form of the Government from the Presidential-parliamentary to the Parliament-presidential republic (Rudyk 2004). The latter was not approved by the Constitutional Court due to the fact that the MP's attempted to transfer the Right to interpret the laws from the Constitutional Court to the Parliament, which contradicted the constitutional provisions⁶⁸. As for the draft law No. 4105 'On amendments to the Constitution of Ukraine', it was approved by the Constitutional Court of Ukraine, registered in the Parliament by pro-presidential MPs, but never became a law⁶⁹. Although it was aimed to solve the problem of misbalance in the legislative-executive relations, it was designed to give an additional power to the Government within the executive branch only, but would leave it accountable to both the President and the Parliament and under the control of the latter (Kolisnyk 2004). Since it was negatively evaluated by the

⁶⁷ It was registered under number 3207-1. Although both draft laws were published and directed to the Constitutional Court, L. Kuchma in August 2003 recalled his one.

⁶⁸ Because it violated the Article 157 of the Constitution (on the right of citizens for judicial protection) by transferring the right to interpret the laws from the Constitutional Court to the Parliament.

⁶⁹ *Vysnovok Konstytutsijnogo Sudu Ukrayiny* of 10 January No.3b/2003.

Venice Commission⁷⁰ and Parliament Assembly of Council of Europe⁷¹ it created a significant constraint from the side of the European Council affecting both President and parliamentary majority.

Nevertheless, the process of amending the Constitution continued. On 8 April 2004, the Parliament did not vote for amending the Constitution, because draft law No. 4105 was supported only by 294 MPs (less than necessary constitutional majority of 300 MPs). On 23 June 2004 the Parliament preliminarily approved the draft law 'On Amendments to the Constitution of Ukraine' No. 4180; and after its approval by the Constitutional Court⁷², on 8 December 2004 the Parliament adopted a packet consisting of two draft laws:

- 1) *On amendments to the Constitution* No. 4180 (at the final reading, with the corrections examined by the Constitutional Court earlier and with new ones, and No. 3207 in the first reading);
- 2) *On special order of conducting revote on 26 December 2006.*

3.2. Distribution of powers according to the 2004 amendments to the Constitution

According to the 2004 amendments, the Parliament became responsible for the formation of the Government and performing the Parliamentary control over the executive branch. In its relationship with the Government, the Parliament can give a vote of non-confidence to the latter (initiated either by the President or not less than one-third of the MPs), but not more than once during a regular session or within a year after Parliament's approval of the Government's programme of activities. The Parliament can dismiss individual members of the Government, except for the Minister of Defence and Foreign Affairs who can be

⁷⁰ In its Opinion no. 230/2002 published on 15 January 2003, as such that does not bring Ukraine closer to European democratic standards and that introduces backward changes *Opinion on three draft laws proposing amendments to the Constitution of Ukraine*, Opinion no. 230/2002.

⁷¹ Which decreed a resolution No. 1364 (2004) on political crisis in Ukraine, defining the procedure of amending the basic law as non-corresponding to either Article 19 of the effective Constitution or the Standing Orders of Parliament (*Resolution 1364 (2004) on the political crisis in Ukraine*, Doc. 10058).

⁷² On 12 October 2004.

dismissed only if proposed by the President. The Prime Minister's candidacy is proposed to the Parliament by the President, who, in turn, receives this candidacy from the Parliamentary coalition. The Government, along with the MPs and the President, has the legislative initiative in the Parliament.

In the relationship with the President, the Parliament has to immediately consider the draft laws determined as unpostponable by the President. The Parliament can override the President's veto over accepted law by the constitutional majority. As already stated in the previous paragraph, the Parliament and the President have dual powers concerning the Government in terms of appointment of the Prime Minister, Minister of Defence and Minister of Foreign Affairs. However, the President retained the Right to dissolve the Parliament (after formal consultations with its Head) under three conditions⁷³:

- a) if the coalition of deputy factions is not formed during one month;
- b) if the new government is not formed during 60 days after resignation of the previous Government;
- c) if the plenary hearings cannot be started within 30 days of one regular session.

In case of the pre-term elections, the Parliament cannot be dissolved again within one year term. The President can be dismissed on the basis either of the free-will resignation or of the impeachment in case of committal of treason (or other crime), decided on by three-fourth of the constitutional majority of the Parliament on the basis of the Constitutional Court's conclusion on the constitutionality of the procedure and Supreme Court's conclusion about *corpus delicti*. In the case of pre-term dismissal of the President, his duties are performed by the Head of the Parliament until the next President is elected and is sworn into the office (Tymoshchuk and Struts 2006).

⁷³ This decision cannot be made in the six last month of term of both the President and the Parliament.

In the aftermath of amending the Constitution, the following violations were revealed by the *National Commission on consolidation democracy and strengthening the rule of law*. First, the Draft Law ‘On Amendments to the Constitution of Ukraine’ (No. 4180) was adopted by the Parliament without the obligatory initial approval from the Constitutional Court⁷⁴.

Second, the Parliament committed a serious violation during the procedure of amending the Constitution: the bill was voted without special and complicated parliamentary procedure, including qualified majority, and in the package with the other law ‘On special order of conducting revote on 26 December 2006’. Therefore, having approved the Law of Ukraine ‘On Amendments to the Constitution of Ukraine’ of 8 December 2004, the Parliament of Ukraine has violated the procedure of constitutional revision. The timeframe of amending the Constitution – during the second and third rounds of the 2004 presidential elections – is also very important because Yushchenko and his allies were forced to vote for the amendments in exchange for the fair presidential elections bill⁷⁵.

Third, the above amendments to the Constitution also violated the provisions of the articles 112⁷⁶ and 121.5⁷⁷ of the Constitution, by contravening with the fundamental principles of constitutionalism – the separation of powers (Article 6 of the Constitution). Therefore, the law amendments to the Constitution were acknowledged as *actum nullum ab initio* and regarded as inconsistent with the constitutional provisions (*Vysnovok shchodo dotrymannia konstytutsijnoyi procedury... 2005*).

The external evaluation of the amendments was provided by the Venice Commission which stated that the ‘constitutional amendments have to be grounded on consensus among

⁷⁴ There is a conclusion of the Constitutional Court of 12 October 2004 concerning the draft, however, adopted by the VRU on 8 December 2004 Law ‘On Amendments to the Constitution of Ukraine’ No. 2222-IV enclosed a number of new amendments not examined by the Constitutional Court

⁷⁵ Fair presidential elections packet bill included the resolution of Parliament on the new membership of the Central Electoral Committee of Ukraine and the resolution of Parliament as to approval of the third round of presidential elections, as it was decided by the Supreme Court of Ukraine.

⁷⁶ ‘In case of pre-term suspension of authority of President of Ukraine, execution of duties of President of Ukraine for the period of election and entering into office of new President of Ukraine rests on the Head of the the Parliament of Ukraine’.

⁷⁷ Functions of general supervision of state bodies’ keeping laws are returned to Office of Public Prosecutor.

political forces and civil society’ and that ‘the constitutional reforms should not be subjected to short-term political expectations’ (*Opinion on the procedure of amending the Constitution of Ukraine*, No. 305/2004). In general, the amendments to the Constitution were estimated as those which do not achieve the ultimate end of the constitutional reform – the establishment of balanced and functional system of governance; while the distribution of powers between the President, the Parliament and the Government should be further defined and implemented (*Opinion...* No. 339/2005). The PACE passed a Resolution on 5 October 2005 concerning the constitutional amendments of 8 December 2004 as ‘adopted as a part of packet agreement for cessation of political crisis’ and estimating them as non-corresponding to the principles of democracy and rule of law and the European standards (*Resolution 1466 (2005)...*)

These opinions provide an opportunity for the political actors whose preferences were damaged in the aftermath of the constitutional reform, primarily the President of Ukraine (currently Yushchenko), to appeal to the Constitutional Court with petition to recognise the Law on Amendments⁷⁸ unconstitutional. Although this has not been done yet, such an option is available even given that the Law came into force on 1 January 2006 because the Right for an appeal to the Constitutional Court is not limited in time (*Vysnovok shchodo dotrymannia konstytutsijnoyi procedury...* 2005).

In the conclusion it must be stated that despite a general tendency of increase of presidential and executive powers over the legislative one since the introduction of institution of presidency on 1 December 1991, transformation of Ukraine into parliamentary republic became possible foremost due to principal changes in constellation of political actors since 2002. Since the 2004 amendments to the Constitution transformed Ukraine into parliamentary republic⁷⁹, they could be seen as generally positive change for democratic consolidation.

⁷⁸ No. 2222 IV of 8 December 2004.

⁷⁹ However, despite the restrictions on the Presidential power resulting from the 2004 Constitutional amendments, president still has significant amount of power, with principal rights for nomination of the key

Particularly, it is argued that they are ‘designed to structure and clarify Ukraine’s shadow *politicum* and to stimulate the development of a multi-party system’ (Riabchuk 2006: 219). However, such a principal change in legislative-executive relations can be estimated negatively as well⁸⁰. Since the amendments to the Constitution took place under confrontation of political actors, namely the President and pro-presidential majority versus parliamentary minority⁸¹, the predictability and stability of distribution of powers among the branches stay questionable.

ministers of defence and foreign affairs, and effective veto over a law passed by the Parliament (can be reversed by two-thirds of votes) (Riabchuk 2006).

⁸⁰ These different evaluations of changes of constitutional bases are in field of debate on which institutional arrangements – flexible of rigid – are preferable in terms of, which was outlined by Holmes (1993).

⁸¹ As Dobriansky, the U.S. Under Secretary of State for Global Affairs in 2004, put it, ‘there have been attempts to alter Ukraine’s Constitution. While Ukraine’s constitutional arrangements can and should be modified when appropriate, changing the rules under which the country’s leaders operate shortly before an election undermines democracy’ (Dobriansky 2004: 312).

Conclusions

In this thesis I have shown that the constitution making characterised by conflict among the political actors is more likely to lead to redistribution of powers between the branches afterwards. Surely, establishment of executive-legislative relations during constitutional process depends on a lot of factors such as level of political parties' consolidation, socio-political and economic situation, strength of scientific and analytical institutions and NGOs, mass-media freedom⁸², and public opinion. However, the constellation of political actors, their preferences, constraints, their expectations, and real outcomes of their actions are the factors that should be analysed in the first place to understand how the legislative and executive powers are redistributed between the branches, as the case of Ukraine demonstrates.

The main hypothesis seems to be confirmed: although the politicised constitutional process, time-consuming and often placing political interests above law regulations, at least ended up in a compromise on new Constitution, including the basic legislative-executive relations, they have not been durable. The institutional preferences and constraints analysed from the perspective of Elster's theoretical framework for constitution making explain the actions of political actors and their difficulty to compromise. During the constitution making, the principal issue was that of distribution of powers among the President, the Parliament and the Government; issues of local self-government and human rights turned out to be less controversial. Therefore the outcomes of institutional evolution and constitutional stability are explained from political actors' perspective. However, for findings of the research to be generalisable, the comparative study would be required.

Ukraine is a representative case of the decisive role political actors have played in institutional evolution during post-communist transition in Central and Eastern Europe: it is

⁸² By the Decree of the President, vice-Prime Minister Oleksandr Yemets' was appointed responsible for illumination of constitutional process in mass-media (Kudriashov 1996: 11).

their preferences and constraints that have defined the distribution of powers among the branches in the Constitution. The constitution making was influenced by two major conflicts: ideologically, between the Left and Right, and institutionally, between the Parliament and the President. Generally, the Left (with preferences for parliamentarism) was trying to block the passage of the Constitution, whereas the Centre-right and the President (with preferences for strong presidency) were insisting on the constitutional revision. Establishment of the semipresidential form of government⁸³ by the Constitution of 1996 has not lasted for a long, for several reasons. First, the Constitution has not provided a durable balance of powers due to mixed form of government, characterised by overlapping prerogatives of the President and the Parliament over the Government (Shugart and Carey 1992). Second, it was adopted by conflicting political actors in the aftermath of a tactical compromise and not a basic consensus. Therefore in the ongoing political competition between the President and the Parliament the distribution of powers was constantly questioned. Given the increased role of the President in the 1990s in comparison to two other branches of power, the likelihood of amending the Constitution towards establishment of presidential republic was high. However, as a result of changes within the constellation of political actors on the eve of the Presidential elections in 2004, ultimately the parliamentary republic was introduced through fast and questionably legitimate amendments to the Constitution. Despite positive consequences of adoption of the constitution given above, the rules of the game established by the constitution rather fixed than current balance of powers than basic consensus on institutional arrangements. As it was predicted by many analysts and demonstrated by the amendments made in 2004, fundamental disagreements have still not been resolved and acceptance of compromise was only tactical. It is only a matter of time before new bargaining over distribution of powers starts again.

⁸³ Which is characteristic of states in transition in their aspiration to unite the advantages of both presidential and parliamentary republics to overcome the crisis caused by system transformation (Tyhonova 1997).

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Expert estimations:

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