

**Political Institutions and Public Policies: The Effect of Institutional Choices on
Legislative Decision-Making Practices in Ukraine and Russia**
Policy Paper

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This paper consists of the two parts. The first one, which is based on extensive research on the usage of presidential decrees in Russia and Ukraine, summarizes those threats that the specific patterns of decree usage cause for the process of democratic consolidation and for the efforts to increase government administrative efficiency. It offers some general recommendations that can help the think tank community and non-government organizations (NGOs) dealing with the issues of democracy and governance to counteract the negative tendencies in presidential decree making. These societal actors can affect the transparency, accountability and efficiency of the executive by exposing the different forms of presidential power abuses, advocating good governance practices, and building a broad societal coalition in partnership with political parties and professional associations against closeness, secrecy, and wide-spread patronage and clientelism in the executive branch of government.

Since most problems and solutions are common to both countries, this paper focuses on the conceptual issues and recommendations applicable to both countries. At the same time, the comparative approach adopted both in the research project and this policy paper highlights the differences between countries and their individual strengths and weaknesses. It also illuminates the varying seriousness and urgency of particular problems arising in the context of individual countries and the countries' varying capacity to address these problems.

In the second part of this paper, following the general organization of the research project, the focus shifts from the executive to the legislative branch of government. The discussion centers on the factors that lower the effectiveness and productivity of post-Soviet parliaments and contribute to presidential dominance over the legislative process. Relying on the research paper's analysis of legislative procedures and output, I identify the major problems both in the internal organization of parliaments and in their relations with the executive. I outline the strategies derived from the research and from theoretical political science literature that could allow for the "rationalization" of the internal parliamentary organization and ensure more constructive and cooperative relations between parliaments and cabinets. This part of the policy paper should be of special

interest to think tank experts and deputies on parliamentary committees dealing with the organization of the work of parliament.

Part I. Presidential decrees and transparent and effective governance

Transparency of presidential decree making

The absence of specific rules regulating the use of unpublished decrees provides grounds for serious concern about the transparency and accountability of post-communist executives. As several research initiatives indicate, presidents in both Russia and Ukraine regularly issue a number of unpublished decrees (Parrish 1998; Protsyk 2003) In recent years these numbers have increased significantly. I estimate that President Putin issued on average close to 750 unpublished decrees annually between 2000 and 2002.

It should be of special concern that the share of unpublished decrees when compared to overall decree output increased in both countries over time. The increase was especially dramatic in Russia where the share of unpublished decrees in the overall presidential decree output grew from 13 % in 1992 to 42 % in 2002 (Protsyk 2003: Appendix II). While the existence of unpublished decrees is justified by the need to protect matters of state secret, which is the practice of almost all executives around the world, the sheer numbers of these decrees in Russia casts doubts on the claim that unpublished decrees deal exclusively with narrowly defined matters of state secret. Even the relatively infrequent use of the secret decrees in Ukraine does not provide any guarantees that they are used to deal with matters of state secret. As the recent journalistic discovery of the content of one of the secret decrees in Ukraine suggests (Protsyk 2003: 8), the matters that these decrees cover might fall far beyond the boundaries of what can be legitimately defined as a state secret

Non-transparent and unaccountable use of decree powers can be limited if the following actions are implemented:

- More specific legal constraints are imposed on the presidential ability to issue unpublished decrees. Laws on information and statutes regulating collection

and publication of official documents have to be amended to define more precisely the boundaries for the use of unpublished decrees. The legal norms that could be interpreted as the rules for classifying decrees as “not for publication” remain vaguely defined in both countries. Concerted efforts from legislators are needed to implement such amendments;

- A change in the procedures for classifying and counting presidential decrees in the Russian Federation would be especially beneficial for understanding the extent of presidential reliance on secret decrees. The government information databases should specify the number, date of issue, and ‘not for publication’ status of these decrees. This type of information is available in the Ukrainian legal databases. At present, the Russian official sources do not contain any information on this sort.
- Public awareness of the frequency with presidents use their power to issue secret decrees should be raised. Journal articles and think tank publications can help to inform policy makers, societal activists, and journalists about the issue. While information on specific decrees occasionally appears in the press, after the content of these decrees becomes public, there is very little awareness in politically active parts of society of the magnitude of unpublished presidential decree making.

Presidential decrees and the politicization of the bureaucracy

Top-level bureaucratic appointments in Russia and Ukraine are highly politicized due to the fact that these appointments are made with presidential decrees. Presidential use of decree powers to appoint high level bureaucrats undermines the principle of meritocracy of the civil service and contributes to the growth of patronage and clientelistic practices inside the executive. It also creates an environment in which political expediencies and the needs of the incumbent president, rather than long term objectives of governance, receive priority.

Presidents in Russia and Ukraine make hundreds of appointments each year. As the research results show, the presidents make appointments not only to what has become perceived as political positions – cabinet ministers, heads of central government agencies, presidential representatives in the regions. They also appoint first deputy ministers, deputy ministers, deputy heads of central government agencies and exercise a major say in making many other appointments that belong to the realm of civil service appointments.

The appointments to deputy ministerial positions are especially illustrative. The politicization of deputy ministerial positions is extreme in Ukraine. While the presidents in Russia reserved the right to appoint deputy ministers only in several key ministries, such as interior and foreign affairs, the president in Ukraine appoints deputy ministers across the whole spectrum of cabinet ministries. President Kuchma, for example, issued an average of 200 cabinet appointment-related decrees per year during the 1995-97 period (Protsyk 2003:20). A larger share of these decrees dealt with the appointment of deputy ministers.

Combating the high level of bureaucratic politicization requires the following actions:

- The rules for top bureaucratic appointments need to be altered through the introduction of amendments to the laws on the civil service, ministerial and central government agencies' statutes, and other legal documents of lower order. Neither the Russian nor Ukrainian constitutional clauses specify rules regarding deputy ministerial appointments or rules regarding other types of bureaucratic appointments. The legitimacy of these appointments is primarily a matter of established political practices and not a product of constitutional norms. The presidents fought various procedural and administrative battles to gain control over these types of appointments and their control of these specific appointment powers can be challenged through the introduction of amendments in the above mentioned laws and statutes.

- The independence of the cabinet of ministers as the main center of executive decision making has to be enforced. Such independence would allow a greater autonomy to cabinet civil service agencies and departments that are responsible for non-political bureaucratic staffing and recruitment. As some of the current literature on Russia suggests, the cabinet's control over the executive is routinely violated by the presidents (Luchin and Mazurov 2000: 120-121). In Ukraine, the Law on Cabinet of Ministers, the draft of which was initially introduced in 1997, has not yet been passed due to the fact that the president repeatedly vetoed the successive draft laws which originated in the parliament. This evidence indicates the existence of a high level of contestation over the issue of cabinet independence. Thus, the legal and political efforts to safeguard such independence should be on the top of government restructuring agendas discussed in both countries.

Presidential decrees and 'pork-barrel' politics

Similar to the presidents of many Latin American countries, the Russian and Ukrainian presidents use their decree powers to provide particularistic benefits to specific constituencies. As one major study indicated, over 25 percent of all presidential decrees in Russia for the 1991-98 period provided particularized benefits for regional, sectoral, or other special interests (Mishler et al 2001: 9). Although the share of decrees serving the special interests in the total decree output of the Ukrainian presidents was smaller, the use of decree powers for these purposes was widespread in Ukraine as well.

Since the constitutions provide the presidents with a great deal of discretion in decree making it is difficult to expect that the president will be immune from lobbying efforts on the part of interest groups. Radical change can only occur with a general societal change in attitudes towards favoritism in politics. Such a change can only be gradual and will depend on the concerted efforts of a broad societal coalition that would include NGOs, educators, professional associations, and the media. So far societies in both countries remain highly accepting of clientelistic practices, patronage, and

favoritism. Nevertheless, some institutional constraints can be introduced to combat excessive clientelism and favoritism:

- Strengthening the political role of cabinet in the executive decision-making, a measure already discussed above, would be beneficial in this respect. Cabinet leadership in executive matters implies collective decision-making, which is likely to be more immune to particularistic demands than presidential decision-making has proved to be so far. Having a political rather than technocratic cabinet is critical in this respect: if ideologically coherent and disciplined political parties form the cabinet, the latter is likely to cater to the needs of broadly defined national constituencies rather than to sectoral or regional special interests. Politically strong cabinets, in their turn, are the products of ideologically rather than clientelistically structured party systems, which are something that think tanks and politically active NGOs should aspire to help to build.
- Introducing the effective regulation of lobbying practices. Regulation of lobbying practices remains largely inexistent. While there is a widespread understanding of the need to regulate lobbying activity there have been very few steps made so far to implement the effective rules and norms. In Ukraine, for example, a number of draft bills on lobbying were discussed in policy making circles, yet no draft bill made it to a law. When sufficient legislative support for the advocated measures cannot be obtained, think tanks and advocacy NGOs have to rely on alternative strategies for gaining political support. These strategies may include an advertisement of the advocated measures through seminars and roundtables; TV and newspaper interviews, publication of the individual voting records on the proposed bills, etc.

Constitutionality of presidential decrees

Countries' constitutions, which were designed to a large extent, especially in the Russian case, by the presidents themselves, impose very few limits on the presidential ability to issue decrees. In both constitutions, one very general restriction on presidential decree making is imposed by the clause that requires that presidential decrees do not contradict existing laws. The exclusive prerogative of parliament to legislate in certain policy areas imposes another type of restriction. In both countries numerous critiques coming from the political sphere, academia, and the legal profession argue that the scope and matter of presidential decrees often violates even these very general restrictions.

The legality or constitutionality of presidential decrees, as with the legality of other types of official acts, can be a matter of interpretation. Such interpretation is required since neither the constitution nor laws can possibly outline rules specific enough to determine the exact limits of presidential power and the presidential right to issue decrees concerning particular policy issues that arise in the course of his incumbency. Who makes interpretations regarding the legality of the presidential acts and the limits of the presidential authority becomes critical.

Even more critical is to seize those rare opportunities when constitutional contracts become open for renegotiations and the possibility arises to redefine the powers of key institutional actors and the overall system of checks and balances. As most constitutional scholars and political scientists agree, the existing constitutions in Russia and Ukraine privilege the presidents at the expense of other branches of government, creating an unbalanced constitutional system that is difficult to amend.

- Exposing the records of constitutional courts on the matters of legality of presidential decrees. The record of constitutional courts is very telling. For example, the Constitutional Court of the Russian Federation, did not undertake even a single review of the constitutionality of any of presidential decrees whose legality was challenged before the court (Luchin and Mazurov 2002). The courts' refusal in both countries to consider the matter of the legality of presidential decrees indicates the unwillingness of court judges to deal with highly sensitive political issues. The court's dependence on the president should subside over time due to the fact that judges' office term far

exceeds the office term of incumbent presidents. In the meantime, the various efforts to publicize the courts' records and to expose their lack of willingness to address the highly important matter of distinguishing between the powers of the president and the powers of other institutional actors may encourage a greater degree of independence on the part of the constitutional court judges.

- Seizing the window of opportunity for constitutional reform in Ukraine. Unlike in Russia, the issue of constitutional reform is on the top of the political agenda in Ukraine today. While the opening of the constitutional contract for renegotiation is due to many factors, this opening provides an opportunity to design a more balanced constitutional system. The goals of achieving a more democratic and more effective government will be served well if constitutional amendments include provisions that limit presidential decree authority, concentrate executive powers in the hands of cabinet, and strengthen the role of parliament in forming the cabinet. Limiting presidential decree authority implies curtailing not only presidential power to issue decrees on policy related matters but also reducing the presidential appointment powers. These constitutional reform measures should be combined with the efforts to achieve organizational consolidation and the ideological rather than clientelistic structuration of party system, another key ingredient of a good government (Protsyk 2001).

Part II. Parliaments: legislative output, rules and procedures

Project findings dealing with parliamentary procedures and output, which were summarized in the research paper, provide strong evidence that the policy-making capacity of post-Soviet parliaments has been steadily increasing. One measure of the legislative output, the number of laws passed by parliament, suggests there is an upward trend in the number of laws that each successive parliament both in Russia and Ukraine adopts.

The overall legislative output numbers, however, indicate the existence of an important difference in the productivity of the parliaments in the two countries. The Ukrainian parliament regularly passed a significantly larger number of laws than the Russian parliament. Although the differences in the numbers lessened during the last two years, more data is needed to see whether there is a convergence trend in these general indicators of legislative productivity.

Two factors which can help to account for these differences in the legislative output in the two countries were discussed in the research paper. The first one is variation in the institutional design of parliaments. While the Russian parliament has a bicameral structure, its Ukrainian counterpart has one chamber. The output differences may render some support to the claims that a bicameral legislature slows law-making by introducing another powerful institutional actor into the legislative process. The other factor discussed was the more assertive position of the first Russian president, Yeltsin, who dominated the policy-making process to a much larger extent than the Ukrainian presidents (Mishler et al: 2001). Facing the dominant president, who also legislated primarily through his decrees, the successive parliaments in Russia might have adopted more subordinate positions than their Ukrainian counterparts.

Since the bulk of detailed research on legislative procedures and output was done primarily for Ukraine, the following discussion of policy recommendations deals with the constraints on the effective functioning of the Ukrainian parliament. Some of the proposed measures, such as recommendations regarding strengthening the cabinet's control over the legislative process, are topical in the Russian context as well.

- Strengthening cabinet's control over the legislative process in parliament. The data presented in the research paper indicates that the Ukrainian cabinet's ability to fulfill its legislative agenda declined during the 1994-2002 period. Each successive cabinet during this period, with one exception, was only able to turn a proportionally smaller number of draft laws initiated by the cabinet into laws. Putting the experience of the Ukrainian cabinets into a comparative perspective shows that the Ukrainian cabinets introduced a smaller number of law drafts and were much less successful than even legislatively weak Italian cabinets.

The cabinet's ability to control the legislative agenda has to be strengthened through the introduction of procedural norms that allow cabinets: 1) to submit their draft laws in a package; 2) to declare a draft law as a matter of confidence vote; and 3) to designate certain draft laws as issues that require priority in legislative consideration. A package vote rule requires parliamentary deputies to vote related bills only in a package specified by the cabinet. A no-confidence provision attached to a vote on a bill submitted by the cabinet means that the vote on a bill is equivalent to no-confidence vote on the cabinet. Prioritizing draft laws submitted to the parliament by the cabinet allows the latter to decide on the order in which draft laws are considered by parliament. All these measures constitute a part of a general strategy on rationalizing the parliamentary organization and have been adopted in various combinations by many Western European parliamentary democracies after World War II.

- Introducing a new set of rules on parliamentary procedures. Parliamentary rules of procedure were introduced in 1994 and although parliament has evolved significantly, – both politically and institutionally – since then, the rules of procedure have not undergone any substantial changes. Unwieldy norms and rules encourage numerous violations of proper procedures, by individual deputies, committees and the parliament leadership. As the research paper showed, the average time for the passage of draft laws in the Ukrainian

legislature has also increased over time. It took longer to consider and vote on a draft law during the 1998-2002 term than during the 1994-1998 term.

A number of proposals to rewrite the rules of procedure are currently circulating in the Ukrainian parliament. Among the most promising proposals is a draft law on a new set of parliamentary rules of procedure introduced by deputy Asadchev in the Autumn of 2002. It attempts to streamline the rules and norms that regulate how draft laws are considered in the committees and on the floor, how amendments are introduced and voted upon, and how time limits are imposed on the passage of bills through the parliament. The adoption of proposed changes has the potential to substantially improve the efficiency of parliamentary procedures.

- Strengthening the analytical and organizational capacity of the parliamentary committees. The internal organization of committee work and norms regulating such committee activities as consideration of draft laws and organization of committee hearings lacks unifying procedures. Committees also differ substantially in terms of the quality and quantity of expert advice and clerical support they receive (PPD 2000, Whitemore 2003). These deficiencies are reflected in the quality of legislative output produced by the parliament. As the research paper showed, the number of amendments to the laws that have been passed since independence is very large. The fact that laws change much faster than the general pace of societal change would dictate may be a reflection of the poor quality of laws passed.

There is a need to introduce and enforce, at least, minimal degree of standardization of rules and procedures that committees should follow in soliciting outside expert advice for preparing and reviewing the draft laws, organizing committee hearings, and exercising control functions. Committee staff quotas and staff responsibilities have to be adjusted in order to better reflect the workload that individual committees face. Developing norms or rules that would allow to judge individual committees' performance, either in

relative or absolute terms, would be also beneficial for improving the work of committees.

- Educating personnel. There is also a room for improvement of technical expertise on the part of parliamentary and committee staff. While some of the shortcomings in the work of committee staff especially are due to low financial compensation for their work and the resulting inability of committees to attract highly skilled support personnel, staff ability to perform their functions is also undermined by a lack of professional training. The needs for such training have to be assessed with the goal of developing a number of seminars for the heads and main specialists of committee staff. Both specialized seminars dealing with such aspects of committee activity as the organization of parliamentary hearings and informing the public about committee work and seminars designed to acquaint the staff with recent trends in the organization of committee work in developed countries could be offered.

- Improving dialogue with public. Although by its nature the parliament is more open and transparent than many other government institutions, the parliamentary committees lack the input of such societal institutions as think tanks, the academic community, non-government organizations, etc. The other side of this problem is that not only the public in general but even key stakeholders are often uninformed about committee activity. Detailed and comprehensive information on many important aspects of the functioning of committees is often not available from official parliamentary or other sources. Utilizing modern communication technologies for improving such a dialogue has a lot of potential. Launching a website that would create a virtual space for think tanks and the non-governmental community to debate legislative issues is one of the promising proposals in this respect. Bringing together the various non-governmental organizations interested in specific policy issues often constitutes a significant problem. Using internet allows lowering the

cost of non-government stakeholders' participation in the process of making policy decisions. The rapid development of internet-based services in Ukraine in recent years opens new opportunities for non-government cooperation. Kyiv-based Agency for Legislative Initiatives, which in cooperation with several partners advocates such a project, has the capacity to prepare and advertise dates and topics for internet conference sessions and secure agreements with the leading think tanks regarding their analysts' participation in such conferences.

Besides the institutional and procedural moments discussed above, political organization of parliamentary factions has a tremendous effect on the quality and character of legislative output. As it was already discussed in the earlier policy-related research, the configuration of party system is a single most important determinant of the degree of political consolidation/fragmentation in the parliament (Protsyk 2001). A number of steps can help to consolidate party system in Ukraine. Introducing into electoral law changes such as a system of proportional representation instead of a mixed one, and a substantially higher electoral threshold for political parties to enter the parliament, can encourage party mergers and coalition-building. Changing the law on political parties in such a way as to allow budget financing for major political parties would decrease their dependence on special interests and would foster ideological and non-clientelistic structuring of a party system. Adopting the version of a law on cabinet that strengthens the link between cabinet and parliament would make political parties in parliament more responsible and would encourage them to develop policy-making capabilities. Changing rules of parliamentary procedures as well as electoral rules by raising the parliamentary faction recognition threshold and by 'tying' parliamentary seats to parties would discipline individual deputies' behavior in parliament and would strengthen parties' internal cohesion

The parliamentary performance is critically shaped both by institutional/technical factors and political composition of parliament. Building a more consolidated and ideologically structured party system should be a very important goal for all those who

are interested in the means of improving the efficiency of executive and legislative institutions in Ukraine.

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