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TO WIN THE WAR IS NOT THE SAME AS TO ‘WIN THE PEACE’: THE COMING CONSTITUTIONAL MOMENT IN UKRAINE¹

WYGRAĆ WOJNĘ TO NIE ZNACZY WYGRAĆ POKÓJ:
NADCHODZĄCY MOMENT KONSTITUCYJNY W UKRAINIE

Russia’s continuing aggression against Ukraine is exceptional both in terms of its scale and its global implications. A peaceful and prosperous future for Ukraine, neighbouring states and indeed the entire continent, depends upon two interrelated factors. The first is Ukraine’s ability to win, with Western support, the war initiated against it by the Russian Federation under Putin. This would bring about a new global opening, ending the Moscow-Beijing anti-Western axis in world politics. The second factor is Ukraine’s ability to take advantage of the constitutional moment that will present itself as attention shifts from the military effort toward the process of state reconstruction. Presenting the situation of Ukraine in regional, historical, and global context, we draw attention to specific challenges and choices that state elites will face post-war. We explain the internal and external implications of these choices to show why Ukraine should seize its upcoming constitutional moment. Drawing on both political theory and real world examples of constitutional revolutions, we explain the factors involved in the effective exploitation of the constitutional moment. We suggest that, channelled to constructive purposes, the demands and aspirations of Ukrainian citizens may help propel the political and economic reforms needed to secure social trust and a stable future. We conclude that multi-level political and civic engagement in a new constitutional process will be indispensable for reconstructing the institutional foundations for peace, democratic governance and the rule of law in post-conflict Ukraine.

Keywords: constitutional moment; Russia and Ukraine; constitutional process; war and its global implications; post-conflict state reconstruction; political leadership; coordination of the constitutional moment; political leadership; civic mobilization; delayed constitutional moment; suppressed constitutional movement; constitutional revolution

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Agresja Rosji na Ukrainę jest wyjątkowa pod względem skali, jak i potencjalnych skutków globalnych. Od wyniku wojny z Rosją zależy nie tylko przyszłość Ukrainy i państw sąsiadujących, ale będzie ona miała konsekwencje globalne. W artykule omówione są dwa współzależne czynniki. Pierwszym jest zdolność Ukrainy do wygrania, przy wsparciu Zachodu, w wojnie wszczętej przeciwko niej przez Federację Rosyjską. Drugim jest zdolność Ukrainy do wykorzystania momentu konstytucyjnego. Przedstawiając sytuację Ukrainy w wymiarze regionalnym i kontekście historycznym i globalnym, zwracamy uwagę na konkretne wyzwania i wybory, przed którymi staną elity państwowe po wojnie. Wyjaśniamy wewnętrzne i zewnętrzne implikacje tych wyborów, by pokazać implikacje wykorzystania przez Ukrainę momentu konstytucyjnego. Czerpiąc z teorii politycznej i historycznych przykładów rewolucji konstytucyjnych, wyjaśniamy czynniki, jakie wpływają na efektywne wykorzystanie momentu konstytucyjnego. Sugerujemy, że właściwie ukierunkowane żądania i aspiracje obywateli Ukrainy mogą napędzić konieczne reformy polityczne i gospodarcze niezbędne do zapewnienia zaufania społecznego i stabilności. Konstatujemy, że wielopoziomowe zaangażowanie polityczne i obywatelskie w nowy proces konstytucyjny będzie niezbędne dla odbudowy instytucjonalnych podstaw pokoju, demokracji i praworządności w powojennej Ukrainie.

Słowa kluczowe: moment konstytucyjny; Ukraina; proces konstytucyjny; wojna i jej globalne implikacje; powojenna odbudowa państwa; przywództwo; centralizacja zarządzania momentem konstytucyjnym; społeczeństwo obywatelskie; mobilizacja poparcia; utracony moment konstytucyjny

I. UKRAINE'S IMPORTANCE AMONG THE FORMER SOVIET REPUBLICS AND THE REGIONAL AND GLOBAL IMPLICATIONS OF THE WAR

From its beginnings in 1991 the Ukrainian transition from communism to a liberal-constitutional regime encountered many difficulties. Ukraine had been particularly affected by communist rule; its administration, armed forces and security services were heavily infiltrated and subject to Moscow's influence.²

Moscow's official propaganda used every opportunity to present Ukraine as a failed state, though in terms of the Corruption Perception Index (CPI) indicators, published annually by Transparency International, and the Quality of Governance measures of the World Bank, the position of Russia has usually been inferior to that of Ukraine. The effective resistance to the Russian invasion suggests that the society of Ukraine is in better shape than had been expected.

Russians also claim that Belarusians and Ukrainians are merely ethnic groups within the Russian nation, and that their languages are peasant dialects.³ Yet these are very different societies with their own cultural traditions. Their separation since 1991 has not been easy and has never been accepted by Moscow. Soon after the demise of the USSR, Moscow's diplomacy invented the term 'near abroad' to denote the fifteen former 'republics' that supposedly should be included within Russia's 'sphere of influence'. Moscow kept interfer-

² Hurak, D'Anieri (2022).

³ Kravchenko (2022).

ing, in an open or tacit way, to subvert their efforts to create viable political and economic systems. Ukraine, due to its strategic position on the Black Sea, has been a particular target of such activities. Sherman Garnett correctly saw the role of Ukraine as the 'keystone in the arch': once it is free from the Russian yoke, other pieces of the imperial project fall apart.

While failing to provide legitimacy to the acts of the Russian Federation, the Russian motives for aggression are historical and geostrategic. In 2014, by attacking Ukraine and occupying important parts of its territory, Moscow violated its international obligations under the Budapest Memorandum (1994) and the UN Charter. In the past, the global community has on several occasions come to terms with unlawful acts/international crimes committed by UN member states. In 2008, when Russia invaded and incorporated parts of Georgia, the reactions of the international community were mild, to say the least.

Russian aggression against Ukraine is exceptional not only in terms of its scale, unknown in Europe since World War II, but also because of its global implications. In view of Moscow's increasingly close collaboration with Beijing, and the criticism voiced by the rulers of both states against the present, allegedly "unjust", world order, what is at stake is the mode of global cooperation. From the Western perspective, Ukraine's war in defence of its territorial integrity aligns with the principles of international law and is part of an effort to preserve the rules-based international order in the face of an authoritarian/totalitarian challenge.⁵ This effort also implies American leadership in the world economy and politics. However, from Moscow's and Beijing's perspective the stake in the war is the stability of their domestic political regimes. Here the interests of the declining world power, Russia, and the ascending world power, China, converge – in both cases the internal stability of their regimes depends on the suppression of individual freedoms.⁶

Ukraine's particular importance among the former Soviet republics derives from Russia's claims to have its historical and cultural roots in the medieval Kievan state. Yet, since the Mongol invasion in the first part of the thirteenth century up until the partitions of the Polish-Lithuanian Commonwealth in the seventeenth century, the three nations had lived under very different political regimes and been subject to very different cultural conditionings. The forms of government acceptable to Russians are not palatable to Ukrainians, as shown by the Orange Revolution in 2004 and the Euromaidan events in 2014; neither do they suit Belarusians, as demonstrated by the mass demonstrations that followed the rigged 2020 elections. Moscow's rulers must have feared the impact the rebellions may have on the internal situation in Russia itself.

More importantly, these events demonstrate the will of these societies to adopt Western patterns of political and economic existence by joining NATO and the European Union, and this means separation from Russia. Ukraine

⁴ Garnett (1997).

⁵ We believe that the norms of international law need to be recognized and upheld as an essential core of the rules-based international order. For a discussion of problematic attempts to invoke the latter in place of the former, see Dugard (2023).

⁶ On this topic see, Kamiński, Kamiński (2017).

has advanced further on this road. Its consecutive governments have not only adopted membership in these organizations as their priority, but in 2018 the unified Orthodox Church of Ukraine accepted the ecclesiastical jurisdiction of the Ecumenical Patriarchate of Constantinople, thereby cutting its direct ties to the Moscow Patriarchate.⁷

Reconstruction of the empire within the Soviet borders, and possibly the recovery of the former Soviet 'sphere of interests' was Moscow's latent objective since the moment of the demise of the 'federation'. After Vladimir Putin took over, this objection became a publicly proclaimed priority. Putin's change of political orientation involved, internally, the suppression of civil liberties, and the adoption of an ideology of Russian, as opposed to Western, Eurasian civilization.⁸ Externally, it involved the emergence of an anti-American alliance with the People's Republic of China.

Hence, the victory of Ukraine would imply a death sentence for Putin's regime. Moreover, it may well bring an end to the Moscow-Beijing anti-Western axis in world politics, and the beginning of a new global opening. In the long run the successful defence of Ukraine's sovereignty and its transition to a liberal-constitutional regime would have a beneficial impact on global political and economic stability. On the other hand, it could bring the risk of a geostrategic power vacuum in Russia, and a multitude of related problems.⁹ In short, Ukraine's victory in the war would open the way to a peaceful resolution of some of the world's most difficult problems, but would also create new ones. Ukraine's defeat would considerably weaken the position of the United States in the world, and could have catastrophic consequences for Europe as a whole.

II. THE CONSEQUENCES OF RUSSIA'S CHOICES

During the decade of the 1990s, the Russian political elite faced a dilemma it was unable to resolve: either to build a liberal democratic system based on the market economy or to concentrate on imperial restoration.¹⁰ The first choice would bring Russia closer to Europe and the United States, also putting the Russian economy on a firm footing. On the other hand, the imperial option implied the adoption of an anti-Western strategy. Vladimir Putin's suc-

⁷ See on this topic, Hurak, Kobuta (2021).

⁸ Balatska (2022).

⁹ According to Andrei Kolesnikov (2023): 63, 'although Putinism may be finite, its advanced state of development and its deep roots in anti-Western thought suggest that it may take more than the outcome of war for Putin's hold over Russian society to break.' Yet, the survival of 'Putinism' would further advance the degradation of Russian elites and society. One way or another, its probable outcome would be the disintegration of the state and a power vacuum, with all the imaginable risks involved.

¹⁰ For a perceptive analysis of the implications of this choice for Moscow's internal and external policies, see Zbigniew Brzezinski (1997). For a detailed and multi-level analysis of the genesis of the Russian aggression against Ukraine of 24 February 2022, see Regina-Zacharski (2023).

cession to Boris Yeltsin, and the victory of the nationalist coalition – which included the army, former KGB operatives, and members of the criminal underworld – brought with it the choice of the second option. From that moment on, the legitimacy of the Russian political regime was founded on its success in forcefully subduing the former republics of the USSR to Moscow's dictate, and Ukraine was to be the jewel in the crown. In following this path, Putin needed to neutralize the most important European players, namely Germany and France, and obtain the benevolent support of Beijing. In the case of the aggression against Ukraine in 2022, only the last hope materialized.

Last but not least, from the Western European perspective, it is a moral imperative to assist a fellow nation that strives to create for itself a civilized mode of life based on the rule of law,¹¹ a democratic government, and territorial integrity. Moreover, a stable and prosperous Ukraine would stimulate economic growth in Europe, and open new geo-economic avenues to the Caucasus and Asia that would generate new political and economic opportunities for the whole continent. It would also deprive China of an important ally in its war against the rule-based world order. Finally, when one considers the possible outcomes of a Russian victory, then the choice is clear: such a victory would incite other authoritarian regimes to follow suit, and the obvious first step in this direction would be China's invasion of Taiwan; it would also result in the re-emergence of the Russian failed state, now dominating over Ukraine and Belarus, kept together with terror, unavoidably spreading material misery and cultural degradation. However, the problem of Europe is not the deficit of power in Brussels, but the deficit of leadership at the national levels.

III. FROM MILITARY FINANCING TO REFORM OF THE POLITICAL AND ECONOMIC REGIME

Ukraine has been able to withstand Russian aggression, not only owing it to its own military valour, but also due to the continuing Western financial and material support that amounts to approximately 100 billion US dollars. Contributing governments must justify such efforts to their taxpayers in terms of effectiveness. This raises the topic of corruption. Moscow's propaganda notwithstanding, Ukraine does not fare well on this account, and some of the worst suspicions have materialized. Thus, there are strong external and internal pressures on the Ukrainian government to eliminate corruption in the state administration and the army. The government has no better option but to comply or at least to fake compliance. Meanwhile, the political and eco-

¹¹ On the task of strengthening the rule of law and transitional justice in the wake of conflict, see: UNSC (2005), *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, 23 August 2004. Consider also the Moscow Document of the CSCE (1991: 29), stating that, 'the development of societies based on pluralistic democracy and the rule of law are prerequisites for a lasting order of peace, security, justice and co-operation in Europe'.

conomic life of the country is geared at all levels of its organizations to the war effort: starting from individuals, through the economy focused on satisfying the insatiable needs of the army, up to the level of the central government. Yet, when peace comes, a dramatic reversal of political and economic priorities will be unavoidable, and the army will lose its crucial political importance. Then, other tasks will become a priority, including the reform of the political and economic regime.

IV. THE CHALLENGES OF POST-CONFLICT CRISIS MANAGEMENT, REDRESS AND INSTITUTIONAL REBUILDING

What are the challenges ahead? There are plenty, and the reconstruction of the urban, industrial and communication infrastructure is only one of them. When peace comes, hundreds of thousands of former military personnel will have to transfer to civilian life, some disabled, others facing mental health and adjustment problems as a result of trauma, still others demoralized and inclined to engage in organized crime, all of them demanding special attention from the political centre. This will require the government to engage in a highly skilful process of crisis management. Furthermore, it is also obvious that the nation that has paid such a high price to defend its freedom in ‘blood, sweat, and tears’, to use William Faulkner’s expression, will expect much more from its public institutions than had previously been the case. In designing any strategy of reconstruction, the government will have to take into account society and its civic support. War crimes and other serious violations of human rights – including the torture of detainees in occupied territories and the forced displacement of Ukrainian children to Russia – will need to be documented and victims’ rights will need to be addressed through transitional justice mechanisms oriented to truth, justice, reparations and guarantees of non-recurrence.¹² Ukraine will need to attract back millions of its refugees who have fled to the West, with their skills, professional experience and financial resources. They will return only if they trust in Ukraine’s future. Thus, the social support that will be indispensable for reconstruction will depend on the credibility of the state, and this involves not only an intellectual but also a moral challenge for the country’s political and intellectual elites.

¹² On the rights to truth, justice and reparation/guarantees of non-recurrence, see: UN (2005a) Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity. See also UN (2005b) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. For a discussion of models of transitional justice, see Krotoszyński (2017). On the *right to know the truth* as an emerging norm of international (human rights) law, see Kowalewska (2019): 56–58.

V. POST-WAR OPTIONS 1 AND 2: POLITICS AS USUAL OR CHANGES FROM ABOVE

Thus, the important question is what happens when the war ends and Ukraine is faced with the choice of its future? Let us consider three options. First Kiev opts for continuation with 'politics as usual', introducing some cosmetic changes here and there. If this happens, then the much prized membership in the EU and NATO may be difficult to achieve. With its current political and economic regime,¹³ Ukraine will have difficulty meeting the *Copenhagen criteria* that define the eligibility of a country for EU membership.¹⁴ Moreover, it will be unable to solve the social problems mentioned above in a way that would satisfy the expectations of the population. This may result in a *delayed constitutional moment*.

To address the tasks mentioned above will require a huge effort from the political leadership and administration, but also stable support from other friendly governments, international financial institutions, and global markets. To transform success in war into success in peace will be a gigantic task that will not only decide the future of Ukraine but – considering its strategic location – will be loaded with continental and global implications.

Another option involves the adoption of changes imposed 'from above' by the European Commission that would eventually lead to EU membership. That strategy would require an obedient adaptation to requests flowing from the EU. To an extent this was the case with Poland and other states in the first post-communist wave of EU enlargement in 2004.¹⁵ From the point of view of the political elite, the attraction of this strategy consists in the 'top-down' implementation of institutional changes. This would allow the political elite to reconcile external requirements with its interest in preserving an important part of the privileges it has acquired over time.¹⁶ For the society at large, this

¹³ Consider here the Opinion of the European Commission of Democracy through Law (Venice Commission) noting 'the danger of the concentration in the hands of a private individual of significant influence over the economic, political and public life of a country without transparency, legitimacy and accountability' (para 30). The Opinion recommends that Ukraine put in place 'a comprehensive system to prevent and fight oligarchic influence through a focused strategy/action plan to address oligarchization, recognising the interconnected nature of the problem' (para 36). See Opinion on the law 'On the Prevention of Threats to National Security Related to the Excessive Influence of Persons with Significant Economic and Political Weight in Public Life (Oligarchs)', Strasbourg, 12 June 2023.

¹⁴ The Copenhagen criteria were adopted at the European Council meeting in 1993. They included stable democratic institutions guaranteeing the rule of law, respect of human rights, and protection of minorities; a functioning, robust market economy able to meet the conditions of competition within EU; the country's ability to adopt the *acquis communautaire* – the body of law that has developed since the process of European integration began. In Ukraine there seems to be an awareness of the problems that accession to the EU will entail (see Tsependa, Hurak 2021).

¹⁵ Bruce Ackerman (1992: 46, 51) was among the first observers who noticed that Poland missed the constitutional moment and erroneously gave priority to economic reform instead of concentrating on changes to the political regime. For a discussion of Poland's constitutional pathway, see also Ackerman (2019).

¹⁶ This is the case of the 'rent-seeking' strategy that is popular among economists.

strategy has one advantage: it would improve the quality of governance and the average standard of living. From the perspective of the common-weal, the top-down strategy is suboptimal, for it requires a passive society. This is the case of a *suppressed constitutional movement*. In the long run it may result in political instabilities and inefficiencies.

VI. POST-WAR OPTION 3: CONSTITUTIONAL REVOLUTION AND CREDIBLE GOVERNANCE

The end of the war will find the Ukrainian state at a crossroads. On the one hand, we have a ‘half-baked’ liberal constitutional regime, with a corrupt administration, a weak judiciary, an influential criminal underground, and a political elite often lacking in vision and integrity. On the other hand, Ukraine’s military leadership and command system has demonstrated a surprising vision and innovativeness. This is accompanied by the will to delegate decisions down the hierarchy, comprised of highly professional corps of junior and commissioned officers. One wonders if the same qualities will manifest themselves when the time comes to meet the challenges of civilian reconstruction.

In view of the scale of material and social problems that Ukraine faces, continuation of the present state of affairs in the political and administrative domain risks producing a national disaster. We assume that Russian aggression has strengthened the patriotic feelings and aspirations of Ukrainian society, and thus fostered civic virtues indispensable for effective reorganization of the political and economic system of the country. This assumption also permits us to expect the emergence of a bottom-up pressure on the state by a broad civic movement for constitutional reforms. This pressure may in the short-run destabilize the political system, but channelled to constructive purposes, it may be a key factor in propelling political and economic reform. The main task of the political leadership would be to gain the trust of the citizenry, and *to lead*.

The third possible strategy, apart from passive continuation and opportunistic adaptation to external constraints, is that of *constitutional revolution* – a profound reorganization of the state, most of all of the relationship between the state and society. Certain steps in this direction have been made with the establishment of local self-governments that have demonstrated their value under conditions of Russian invasion. What is needed, however, is a new opening symbolized by a new Constitution. The term charisma, used by Bruce Ackerman¹⁷ in connection with the idea of the ‘constitutional revolution’, is most appropriate here, for it marks a new agreement between the Ukrainian nation and the Ukrainian state, which turns the state into a *res publica* – an entity accountable to and serving its citizens. It aims to build the bonds of

¹⁷ Ackerman (2019).

trust between the rulers and the ruled. Considering the size of the reforms the modernization of Ukraine will require, only trust in the intentions of those in government will convince the population to endure the level of sacrifice and uncertainty they will impose on the population.

Another determinant of the future prosperity of Ukraine will be the ability of the political and professional leadership of Ukraine to gain the confidence of international stakeholders in its ability to continue building credible political and economic institutions. Rebuilding Ukraine's urban and industrial centres will require huge amounts of capital. The strategic location of the country between Europe, Central Asia and the Caucasus, its well-educated labour force, and abundant natural resources, mean that such involvement of foreign states and international investors may be expected. However, the key factor will be the credibility of its institutional regime, and to obtain it, the quality of governance will have to be considerably improved.

VII. THE NEED FOR UKRAINE TO SEIZE AND EXPLOIT ITS UPCOMING CONSTITUTIONAL MOMENT: INTERNAL AND EXTERNAL IMPLICATIONS

The *constitutional moment* appears when strata with vested interests in preserving the *status quo* fall into disarray, old alliances do not function, and uncertainty about the relative strength of political influence reigns.¹⁸ At the same time, awareness of the systemic crisis spreads within public opinion. This short moment offers a window of opportunity for the revival of civil society, and for publicly minded leaders to come to the fore to revolutionize the organization of the state. The success of the constitutional moment comes when publicly minded society meets with publicly minded leadership in the pursuit of the liberal-constitutional project. To break the resistance of the forces of the *status quo*, the constitutional movement must occasionally resort to extra legal measures. This explains the use by Bruce Ackerman of the term 'constitutional revolution'.¹⁹ If the opportunity for implementing fundamental reforms is wasted, then old forces re-group and come back in a new disguise, and with them old pathologies.

Considering the size of the destruction brought by the war, success in exploiting the constitutional moment is a must for Ukraine. The national resources of the country are by far insufficient to meet the costs involved in reconstruction. Its efforts will have to be supported by international assistance from friendly states, international financial institutions and, last but not least, by world markets. In the long run, with the exception of humanitarian help, this assistance will depend on the credibility of the country's political and economic organization.

¹⁸ For a review of the existing literature on the subject, see Baraggia (2020). For a comparative study of 'founding moments' in constitutionalism, see Albert, Guruswamy, Basnyat (2021).

¹⁹ Ackerman (2019).

Ukraine's proper use of the constitutional moment would also change the character of EU accession negotiations. In the case of a *suppressed* constitutional moment and top-down implementation of reforms, the EU would dictate the conditions. Yet if changes result from a constitutional revolution, Ukraine would become an active partner in the negotiations. Relevant here are pragmatic interests – not emotions. Beside its geopolitical location, Ukraine is rich in natural resources, and possesses a well-educated labour force. Its membership in the European Union would be an important asset to the organization.

In the middle of the war for national survival, should Ukrainians concern themselves with the problems ahead? They should. If they do not, they may 'miss the boat', by not being ready to exploit the emerging opportunities. The Articles of Confederation, which from 1781 until 1789 served as the United States' first constitution, were adopted by the Continental Congress in 1777 – six years before the end of the War of Independence. It is time for Ukraine to prepare itself for the future. First of all, to carry on with the war, Ukraine must start working on improving its institutional capacity.²⁰ Otherwise, it may face difficulties in sustaining the current level of external and internal support for its war effort.

When the war began in 2014, James Sherr, a perspicacious British analyst, remarked that 'Ukraine's weakness is the official state'²¹ and added: 'as long as people believe deeply in change and reform, but look after themselves and their interests, then problems will not be solved. Now, it is particularly urgent because Ukraine is at war, and the internal front, I think, is as important, if not more important, than the external front.'²²

VIII. FACTORS INVOLVED IN THE EFFECTIVE EXPLOITATION OF THE CONSTITUTIONAL MOMENT: FROM POLITICAL THEORY TO EXAMPLES OF CIVIC MOBILIZATION

Let us look briefly, from a general perspective, at the factors involved in the effective exploitation of the constitutional moment. Niccolò Machiavelli in his *Discourses on Livy* addressed this very issue. He emphasized the need for a strong, centralized leadership, and the urgency of the task.

So that republic can be called happy whose lot is to get one man so prudent that he gives It laws ordered so that It can live securely under them without needing to correct them. (Book I, Chapter II)²³

But It is indeed true that they will never order themselves without danger, because enough men never agree to a new law that looks to a new order in a City unless they are shown by

²⁰ For an analysis of the transformation and effectiveness of the institution of the President in Ukraine at the start of the full-scale invasion of the Russian Federation, see Karmazina, Tsependa (2023).

²¹ Sherr (2014): 19.

²² Sherr (2014): 19.

²³ Machiavelli (1996): 10.

a necessity that they need to do it. Since this necessity cannot come without danger, it is an easy thing for the republic to be ruined before it can be led to a perfection of order. (Book I, Chapter XVIII)²⁴

Machiavelli saw the following difficulties involved in a systemic reform. First, a reform can be introduced either 'with one stroke' or 'little by little' (Book I, Chapter XVIII).²⁵ Both approaches have defects, though these are different in each case. In the first case, the reform requires revolutionary methods to break the resistance of forces of the old regime. In the second, gradual change requires time, which offers those with vested interests in the status quo the breathing space needed to regroup and effectively derail the reform efforts, in order to preserve their access to the centre of political power and privilege. Hence, whenever feasible, the 'with one stroke' method is superior to a 'step by step' approach.

The difference between 'politics as usual' and the politics of the 'constitutional moment' consists in a different approach to the state. In the first case, even in the most civilized societies, citizens usually conduct their everyday businesses with a view to their private interests. If the political regime is well regulated, this does not jeopardize the common interest of society. The 'constitutional moment' comes when the common interest is in jeopardy and impacts negatively on the functioning of the whole political and economic order. At this point revolutionary change and 'extraordinary institutional forms' are required. Bruce Ackerman perceptively noted that:

Although constitutional politics is the highest kind of politics, it should be permitted to dominate the nation's life only during rare periods of heightened political consciousness. During the long periods between these constitutional moments, a second form of activity – I shall call it normal politics – prevails. Here, factions try to manipulate the constitutional forms of political life to pursue their own narrow interests. Normal politics must be tolerated in the name of individual liberty; it is, however, democratically *inferior* to the intermittent and irregular politics of *public virtue*²⁶ associated with means of constitutional creation.²⁷

Ackerman elaborated on the idea in his recent publication invoking Max Weber's notion of 'charismatic power'. Let us consider, as an example, two historical constitutional moments: those of the Constitution of United States of America of 1787, and the Constitution of 3 May 1791 of the Polish-Lithuanian Commonwealth – the tradition to which Ukraine is the rightful successor. The two have some common features.

1. Both cases characterized an intense civic mobilization in support of the reordering of the existing political regime. In the United States it had its roots in the victorious War of Independence; in the Commonwealth – in the reform movement that emerged among the urban and landed elites of the Realm to prevent its decay. The indispensable ground for the *politics of public virtue* – the high level of public mobilization, can be sustained for a limited period of

²⁴ Machiavelli (1996): 11.

²⁵ Machiavelli (1996): 55.

²⁶ The latter italics are our own.

²⁷ Ackerman (1993): 163–164.

time. During this period the people of privilege are able to agree to sacrifice some of their fortunes and powers for the sake of the common good. Karl Marx, in his little known study of the Constitution of 3 May 1791, wrote that, 'despite some deficiencies, this Constitution, seen against the background of the Russian-Prussian-Austrian barbarity, appears as the only work of freedom that had originated in Eastern Europe. And it emerged from the privileged class, the nobility. The world knows of no other such act of nobility by the nobility'.²⁸ The politics of public virtue requires a virtuous leadership.²⁹

2. In both cases there was a unified leadership. In America the leadership was provided by the commander-in-chief of the revolutionary army, George Washington; in the Commonwealth, the leader of the reform was none other than the King of Poland and Grand Duke of Lithuania, Stanisław August Poniatowski. These two figures formed the intellectual centre where the act itself and the strategy for building popular support were worked out. As Martin Seymour Lipset³⁰ remarked, Washington himself never openly voiced his opinions; he worked behind the scenes to build consensus among debating parties. King Stanisław August, a highly educated and publicly minded personality, like George Washington, presided over parliamentary debates, but otherwise was not directly involved. Yet, his informal role in preparing and pushing the project through parliament was crucial for its success.

3. In both cases, the way in which the Constitution was passed by the legislature included extra legal elements. The process was only effective because it had strong social support – another requirement for the success of the constitutional moment. The makers of the Constitution were opposed by powerful vested interests. Hence to break their resistance, they did not hesitate to use 'dirty tricks'. Under such circumstances, the reforming party cannot lose touch with the mobilized grassroots. Thus, Ackerman noted, the constitutional moment requires revolutionary means, for – to recall Machiavelli's point – the change of the institutional structures is best implemented if done 'with one stroke'.

The fate of the 3 May Constitution supports Machiavelli's remark that 'it is an easy thing for the republic to be ruined before it can be led to a perfection of order'. The enactment of the Constitution was ultimately followed by the partitions of the Kingdom by its neighbours: the Russian Empire, the Kingdom of Prussia, and the Habsburg Monarchy.³¹ Yet, the memory of the 3 May Constitution survived, mobilizing generation after generation to resist unconstitutional regimes.

²⁸ Marx (1971): 152.

²⁹ 'Constituting a system of government as a social experiment requires that the necessary conditions are met and that those who engage in the experiment know what they are doing. As actors behave strategically to gain dominance over others, the validity of the experiment is placed at risk. The method of the experimental sciences requires knowledgeable experimenters concerned with the integrity of the experiment rather than with the rewards to be derived from occupying positions of authority. ... the strategies pursued by "realists" in their quest for dominance can only achieve systems of order constituted by "accident and force".' Ostrom (1997): 215–216.

³⁰ Lipset (1998).

³¹ As a result of the partitions of the Polish-Lithuanian Commonwealth, Poland and Lithuania were eliminated from the map of Europe for 123 years.

IX. THE REGIONAL AND GLOBAL IMPLICATIONS OF THE WAR AND THE PRIORITY OF A RESPONSIVE CONSTITUTIONAL PROCESS ORIENTED TOWARDS STATE RECONSTRUCTION

Russian victory would not only imply Ukraine's defeat, but would also bring back Moscow's direct rule over Belarus and the Caucasian states. However, even if it were successful in its imperial endeavour, Russia would continue to function in world politics as a bankrupt pariah, without hope for external cooperation, except with China, North Korea and Iran. Russia's rule over Ukraine would offer no chance for the restoration of the country's ruined industrial and urban infrastructure. Moreover, it would imply a reign of terror unknown since the time of Stalin. Russia's economy is already in poor condition, and that of Belarus is no better. Thus, the pessimistic scenario would lead to an unimaginable human catastrophe with gloomy implications for the rest of Europe.

From the European perspective, the only plausible solution to the conflict is the withdrawal of Russian forces from the internationally acknowledged borders of Ukraine. This would also bring about the end of Putin's rule in Russia, and possibly the emergence of a power vacuum there. The same fate would likely meet Lukashenko's regime in Belarus. Such a development would be a setback for Beijing's global ambitions and could lead to at least temporary renunciation of the invasion of Taiwan. Yet, if the war drags on, it may incite Beijing to risk an invasion against Taiwan. Time is an important factor in human life and in politics.

From the point of view presented in this paper, once the invading forces are pushed out of the country, the rest will be in the hands of Ukrainians themselves. For reasons stated above, the country can count on full external financial and political support. Yet, the scale of the support will depend on what Ukrainians can do with it.

Thus, the top priority for the Ukrainian political elite should be the reconstruction of the state, for everything else depends on it. Once the war ends, Ukraine will be inundated with suggestions from all sides and exposed to pressures from private interests and 'professional advisors'.³² Its success will depend on the creation of a strong political centre with an effective analytical backend, able to orient its activities to strategic objectives. This centre should have strong support from all levels of political organization. This may be possible only when it is receptive to concerns and ideas coming from below. To be able to concentrate on strategy, the central government must delegate the day-to-day management to lower levels of government, regional and local self-governments included, while maintaining oversight of their activities. All this is the subject matter of the constitutional process.

³² In Poland in the early 1990s, these highly paid and mostly useless 'experts' were teasingly called the 'Marriot brigade' after the name of the hotel where they tended to reside. For an excellent appraisal of the problem, see Wedel (1998): 45–82.

X. CONCLUSION

To conclude: the end result of Russia's war against Ukraine will have global implications. A peaceful and prosperous future for Ukraine, neighbouring states and the entire continent, depends first of all upon Ukraine's ability to win the war initiated against it by the Russian Federation under Putin and, secondly, on its ability to take advantage of the constitutional moment that will present itself as attention turns toward the future. Ukraine will face a new beginning. The engagement of citizens and of local and regional government will be critical in the very practical, pragmatic endeavour of reconstructing strong institutional foundations for the democratic state. The window of opportunity presented by the constitutional moment will be short and lessons from abroad suggest that it may easily be overlooked. Many challenges will need to be addressed simultaneously at both the national and regional levels for social trust and institutional credibility to be rebuilt. Effective and strategic policy making will need to be complemented by mechanisms for ensuring democratic and legal accountability. A responsive, multi-level constitutional process will be indispensable for reconstructing the institutional foundations for effective democratic governance and the rule of law in post-conflict Ukraine.

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