

Would Ukraine Breach its own Constitution if it Dropped its NATO Bid?

VB verfassungsblog.de/would-ukraine-breach-its-own-constitution-if-it-dropped-its-nato-bid/



Viktoriia Lapa



Justin Frosini

18 Februar 2022

Among the many issues discussed in the context of the current Russian threat of aggression against Ukraine, Ukraine's NATO aspirations and Russian opposition to it joining this organization is prominent.¹⁾ Some may think that dropping these aspirations might help avoiding a disastrous war.²⁾ This, however, is no longer just a matter of political will but of constitutional law: Since 2019, the prospect of joining NATO is enshrined in the Ukrainian Constitution, so one could argue that withdrawing the request for membership of NATO would be unconstitutional. Indeed this blogpost argues that the Euro-Atlantic provisions in the Ukrainian Constitution are not merely symbolic, but they actually legally bind the Ukrainian government with regard to its foreign policy.

The amendment to the Constitution in order to strengthen Ukraine's commitment to European Union membership and Euro-Atlantic integration took place during the term of former President Petro Poroshenko, who put this at the centre of his presidential campaign. The Constitutional Court of Ukraine greenlighted the amendments in its Opinion of 22 November 2018 with 6 Separate Opinions of the Judges who claimed that the Opinion of the Constitutional Court should have been more precise on its motivation rather than just formally checking compliance with procedural requirements. Amendments to the Ukrainian Constitution require at least 2/3 votes (300 deputies) of the constitutional composition of the Parliament (450 deputies). While there were of course opposing views among the deputies during the adoption of these amendments, the Ukrainian Parliament, on 7th February 2019 finally adopted the changes to the Constitution with 335 (out of 450) votes in favour.

The Ukrainian Parliament amended the preamble and several articles of the Constitution concerning the competences of some of its main governmental bodies:

- In the preamble after the words 'civil harmony on the land of Ukraine' the following passage was added: 'and reaffirming the European identity of the Ukrainian people and the **irreversibility** of the European and Euro-Atlantic course of Ukraine';

- Paragraph 5 of the first part of Article 85 (the competences of the Parliament of Ukraine) is now worded as follows: ‘determination of the principles of domestic and foreign policy, **implementation of the state’s strategic course towards full membership of Ukraine in the European Union and the North Atlantic Treaty Organization**’;
- Article 102 (the President of Ukraine) now has a third section that states the following: ‘The President of Ukraine is **the guarantor of the implementation of the state’s strategic course towards full membership of Ukraine in the European Union and the North Atlantic Treaty Organization**’
- Article 116 (the Cabinet of Ministers of Ukraine) was amended so as to add item 11 which states the following: ‘ensures the implementation of the strategic course of the state for **the acquisition of full membership of Ukraine in the European Union and in the North Atlantic Treaty Organization**’.

Some scholars consider these amendments to be redundant and lacking any legal value claiming that existing Ukrainian legislation already aims at pursuing Euro-Atlantic integration on the basis, inter alia, of the Law ‘On National Security’. At the time, they argued that, in actual fact, such amendments merely had a political aim and were a part of an electoral strategy given the fact that they were brought into force just before the end of the term of former President Poroshenko. While this might be true, from a legal standpoint one cannot ignore the fact that “constitutionalizing” Euro-Atlantic integration could have legal consequences as well.

First of all, it is obvious that the reference to Euro-Atlantic integration in connection to the exercise of the functions of governmental bodies provides less flexibility to future governments in terms of policy making. For example, Art. 9 of the Constitution of Ukraine says that entering into international agreements that are contrary to the Constitution is allowed only upon amending the Constitution of Ukraine accordingly. Indeed, if the Ukrainian President – who has the right to sign, suspend and terminate certain agreements on behalf of the peoples of Ukraine – decided, through a decree, to scupper the Agreement by which Ukraine established cooperation with NATO back in 1997⁵⁾ then forty-five Members (or more) of the Parliament of Ukraine, the Supreme Court, or the Commissioner of the Verkhovna Rada for Human Rights could lodge a claim in front of the Constitutional Court disputing the constitutionality of such a Presidential decree.⁶⁾ The same would be applicable to the actions of the Parliament of Ukraine – if it were to adopt any law that would go contrary to the Euro-Atlantic aspirations of Ukraine. In fact, such a law could be challenged as unconstitutional before the Constitutional Court of Ukraine by the President of Ukraine, the Supreme Court or the Commissioner of the Verkhovna Rada for Human Rights.

In its hypothetical Decision on unconstitutionality of the above-mentioned decrees or laws the Constitutional Court of Ukraine would almost certainly refer to Article 19 of the Constitution of Ukraine, which stated that ‘all state and local self-government and their

officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine.'

Ukraine started to cooperate with NATO in 1997 by entering into a Charter of a Distinctive Partnership with NATO. Later, Ukraine requested to join NATO at the Bucharest summit in 2008. Paragraph 23 of the Bucharest Summit Declaration reads as follows: 'NATO welcomes Ukraine's and Georgia's Euro-Atlantic aspirations for membership in NATO. We agreed today that these countries will become members of NATO.' That said, 12 years later, in June 2020 Ukraine was recognized only as an Enhanced Opportunities Partner by NATO, which allows for greater cooperation '...between Allies and partners that have made significant contributions to NATO-led operations and missions'. The same status is given to Australia, Finland, Georgia, Jordan and Sweden. Yet, it is quite obvious that while Ukraine has Russian troops in the Donbass region, its NATO membership does not appear to be a viable option. This is why the current crisis between Ukraine and Russia goes beyond NATO and has to be understood in a broader historical and geopolitical context. However, leaving aside the prospects of Ukraine joining NATO in the near future, as illustrated above there is no doubt that the reference to NATO in the Constitution has legal value and any reversal of North-Atlantic integration would imply amending the Ukrainian Constitution. Moreover, any such step would probably lead to a strong backlash from Ukrainian society and politicians, given that according to a recent survey, 54% of Ukrainians would vote for joining NATO in a referendum.

As of now, Ukraine is bound by its Constitution and stepping back from its NATO aspirations does not seem to be a real prospect. That said Ukraine may be coming close to a fork in the road where it may be forced (by Russia or even its Western allies) to choose between fully upholding the Constitution (as amended in 2019) and protecting the territorial integrity of the State. One can only hope that the diplomatic efforts of the last few days will prove to be successful thus overcoming what would be a lose-lose situation for Ukraine and its people.

References

- [↑]1 Some scholars believe that Ukrainian membership of NATO is not the real reason behind Russia's recent deployment of troops close to the Ukrainian border. The mere reference to the Ukrainian bid to join NATO sparked a heated discussion a few days ago. For example, the former Secretary-General of NATO, Jaap de Hoop Scheffer, in an interview to the Financial Times, mentioned that Putin just 'wants his empire back'. For more extensive analysis on NATO's flashpoint in Russia-Ukraine crisis here.

↑2 In particular, responding to a question on BBC radio as to whether Ukraine would consider reverting its NATO membership request if this could avoid a Russian invasion, the Ukrainian Ambassador to the United Kingdom, Vadym Prystaiko stated: “*We might, especially being threatened like that, blackmailed by that, and pushed to it*”... These words led many newspapers to publish headlines such as “*Ukraine could drop NATO bid to avoid war*”. There was also outcry among Ukrainian politicians and, indeed, the spokesperson of the Ministry of Foreign Affairs of Ukraine was forced to declare that ‘...*the ambassador’s words were taken out of context*’ and ‘*the prospect of joining NATO remains enshrined in the constitution*’.

↑3 Ukraine is not the only country that has inserted EU and NATO aspirations in its Constitution. For example, Georgia, Montenegro and Kosovo have done so as well.

↑4 For a more extensive analysis of amendments to the preamble see Justin Frosini & Viktoriia Lapa, *NATO’S Aspirations in the Constitutional Preamble of Ukraine: Distorting Historical Roots of the Constitution or Reflecting Societal Changes?*, IACL-IADC Blog (30 June 2020).

↑5 For example, the Charter on a Distinctive Partnership of Ukraine between Ukraine and North-Atlantic Treaty Organization was entered into by the President of Ukraine in 1997 and could be terminated or suspended by the President of Ukraine as well. The entry, suspension and termination of international treaties by Ukraine is regulated by the Law of Ukraine ‘On International Treaties’ dated 29 June 2004. It has to be mentioned that according to Article 9 of the above-mentioned law entry into treaties on collective security should be ratified by the Parliament of Ukraine

↑6 Article 52 of the Law of Ukraine ‘On the Constitutional Court of Ukraine’ mentions the Verkhovna Rada of the Autonomous Republic of Crimea as one of the subjects of the constitutional petition as well.

References

LICENSED UNDER CC BY SA

SUGGESTED CITATION Lapa, Viktoriia; Frosini, Justin: *Would Ukraine Breach its own Constitution if it Dropped its NATO Bid?*, *VerfBlog*, 2022/2/18,

<https://verfassungsblog.de/would-ukraine-breach-its-own-constitution-if-it-dropped-its-nato-bid/>, DOI: 10.17176/20220219-001043-0.

Explore posts related to this:

Other posts about this region:

Ukraine

LICENSED UNDER CC BY SA