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The Rule of Law in Contemporary Ukraine

Widespread Elite Failure Puts Reforms at Risk

Susan Stewart

Ukraine's Euromaidan protest movement, which brought about the fall of President Yanukovich in 2014, has led to a comprehensive process of reforms. However, this process is being hampered and delayed by a large number of internal and external hurdles. There are particularly significant obstacles to establishing a state governed by the rule of law. Preserving areas in which a legal vacuum exists is in the interests of influential political and economic actors because such areas contribute to their personal enrichment and help maintain their power. It is therefore important to examine the progress that has been made and the hurdles that have been encountered in establishing the rule of law. Such an analysis can help German and European actors to take well-founded decisions on how to support Ukraine's moves towards rule-of-law structures more effectively than they have in the past.

When Ukraine finds itself the focus of western attention, this tends to be mainly because of the ongoing fighting in the east of the country, or the efforts to end that violence on the basis of the Minsk accords and stabilise the situation in the Donbas. Less notice is taken of the fact that Ukraine has initiated an ambitious process of reforms, the results of which are likely to have an even more decisive impact on the country's future than developments in its eastern regions.

On the one hand, Ukraine has gone further down the path of reforms than at any other point in its history since the collapse of the USSR. This is due to the strong pressure exerted on the political elite by Ukrainian (civil) society, and to

the support given the reforms by external actors such as the EU and the International Monetary Fund (IMF). Reform-oriented members of the Ukrainian elite – those for whom the top priority is the common good – also play a significant role in this process. On the other hand, there are substantial hurdles involved in passing and implementing the reforms. To date, genuine systemic change towards a law-governed state has not been achieved. First, because the war in the Donbas with all its consequences – especially the large numbers of internally displaced persons – monopolises many financial and political resources that could otherwise benefit the reform efforts. Second, these efforts are suffering from the inadequate experience and unsystematic approach of

both Ukraine's elite and its administration. Third, established interest groups and corrupt networks in the bureaucracy and in parts of the political and economic elite still play an influential role. Fourth, alongside the war, Russia is using a great number of levers to forestall the process of reforms and thus the successful integration of Ukraine into western structures.

Precisely because there are multiple forces that impact both positively and negatively on the Ukrainian process of reforms, the latter's outcome remains unclear. It is important to explore the favourable factors as well as the obstacles standing in the way of the reforms, so as to determine how much potential there is for more effective external support that raises the chances of a positive outcome. The alternative is a Ukraine that remains unstable in the long run, thwarting the goals of the revised European Neighbourhood Policy and aggravating the current refugee crisis in Europe through additional migrant flows.

Measuring Rule-of-law Reforms

The amount of progress that has been made so far differs across reform sectors. Macro-economic reforms have seen the most favourable development. These were not only particularly urgent due to the need to prevent state default, but were also actively supported by external actors. The IMF has made its financial assistance explicitly conditional, setting specific benchmarks that must be met if Ukraine wishes to continue receiving that assistance. Payment of the tranche scheduled for late 2015 has been delayed because there was no acceptable budget for 2016. This shows that the IMF is sticking to its terms of reference. The fact that the relevant ministries in Kyiv are run by people who were socialised outside of the Ukrainian system also seems to be having a positive impact. Finance Minister Natalie Jaresko was raised in the US and has worked for the State Department and as an investment banker, Minister for Economy and Trade Aivaras Abromavicius as a fund

manager in Lithuania. (The latter submitted his resignation in early February 2016, but it has not yet been accepted by parliament.) Both not only have good contacts among relevant external actors, they can also suggest new models of governance and are not trapped in existing networks.

There are no such conditions in place in the rule-of-law area. Whilst the economic reforms launched by the Ukrainian leadership have generally met with praise and are showing the first tender shoots of success, there is good reason to criticise the speed and application of the rule-of-law reforms. These reforms pertain to many spheres, since they concern not only the justice system but also institutions for combating corruption, as well as many measures for increasing transparency in politics and the economy. It is therefore appropriate to judge the progress made so far against a broad understanding of the rule of law, rather than one limited to specific reform sectors.

The framework of the World Justice Project (WJP) lends itself to such an evaluation. This non-governmental organisation based in Washington, D.C. uses a Rule of Law Index to estimate and compare the progress made in establishing the rule of law in over 100 countries. For this purpose, the WJP conceptualises the essence of the rule of law in four principles:

- 1) The government, including civil servants and plenipotentiaries, as well as individual persons and private establishments are held accountable under the law.
- 2) Laws are clear, publicly known, lasting, just, and applied without distinction, and protect fundamental rights, including the right to security of the person and safety of property.
- 3) The process for passing, applying and enforcing laws is transparent, just and efficient.
- 4) Laws are enforced promptly by competent, morally irreproachable and independent plenipotentiaries or neutral persons, who are sufficient in number, have the required resources at their dis-

posal and reflect the characteristics of the society they serve.

By engaging with these principles with reference to present-day Ukraine, it is possible systematically to judge the level of rule of law in the country and point out the most serious shortcomings. The reasons behind these shortcomings can then be sought and solutions suggested for remedying them.

Accountability

The World Bank's Public Accountability Mechanisms Initiative lists four parameters for ensuring sufficient levels of accountability of public actors: disclosure of income and asset declarations; a reasonable approach to dealing with conflicts of interest; freedom of information; and resolving questions of immunity.

In early 2015, the Law on Preventing Corruption came into effect in Ukraine. It tightened the reporting requirements on income and assets for high-ranking politicians, government officials and their close relatives, as well as the conditions for verification and publication of their declarations. The OECD considers that its recommendations to date for this sector have been fully implemented by the new rules. However, the success of this reform depends on how the National Agency for Corruption Prevention (NACP) handles it – this agency is responsible for checking income and asset declarations. Unlike the Anti-Corruption Bureau, which began work in October 2015, the NACP's activities are to be coordinated by the government.

Although the Agency was created in March 2015, its top posts have still not all been filled. Members of the supposedly independent selection committee, as well as candidates for high office in the agency, failed to disclose their connections to Prime Minister Arseniy Yatsenyuk, causing a scandal. In addition, a system that electronically registers the assets of high-ranking actors for verification by the NACP is scheduled to be introduced a year later than originally

planned. This was mandated by an inconspicuous paragraph inserted into the Budget Law of 25 December 2015 at the last minute. The system is now to be activated on 1 January 2017, at the earliest.

As the example of allocating the NACP posts indicates, conflicts of interest are a highly relevant topic for Ukraine. The anti-corruption law is intended to regulate the way such conflicts are dealt with. Here, too, the NACP has the final say. However, success depends not only on the agency but also on the ability and readiness of superiors to recognise and address potential conflicts of interest in their colleagues. There is a lack of sensitivity for this issue, as the example of the Deputy Minister for Energy Ihor Didenko demonstrates. In his view, co-owning a company with the Ukrainian oligarchs Ihor Kolomoyskyi and Hennadiy Boholyubov does not constitute a conflict of interest – although both of his business partners possess substantial interests in the energy sector and have received preferential treatment from Didenko in the past, when he held other state posts. Up till now, such conflicts of interest have been common practice in the country's political system without being penalised or even acknowledged as such. It is therefore necessary to raise awareness of the problem, both inside Ukraine and with relevant external actors.

Progress had already been made concerning freedom of information during Viktor Yanukovich's presidency (2010–2014). Following a campaign by local and international NGOs, a law came into effect in 2011 that provides a broad definition of the concept of "public information" and stipulates that relevant data should be published even without an individual request. The main purpose is to inform the public about the authorities' activities and decisions. In March 2014, important changes to the law were passed. They extend the range of the information to be published and are intended to promote the implementation of said law. However, it is precisely this implementation that leaves much to be desired. Experts have therefore been calling for the creation of

a monitoring body with sufficient competences to enforce implementation.

Finally, accountability also covers issues of immunity. To make good on a campaign promise, President Poroshenko presented a draft law that would abolish parliamentary immunity in general. While the draft was declared constitutional by the Constitutional Court in June 2015, many experts as well as the Council of Europe's Venice Commission have spoken out against the planned law. It is certainly the case that, for many of those wishing to escape prosecution, parliamentary immunity is an incentive to stand for election. This is especially true for corruption cases. However, at the same time there is a risk, in a still unconsolidated democracy with a poorly functioning division of powers, that unwelcome members of parliament who are not protected by immunity will become a target for the executive, especially where the latter can exert substantial influence on the judiciary. Whether for these or other reasons, members of parliament have yet to pass the law in question. In practice, therefore, it continues to be the case that members of the Rada (the Ukrainian Parliament) are only stripped of their immunity if there seems to be clear evidence of criminal offences. This occurred recently in the case of Mykola Martynenko: the Prime Minister's political ally stands accused of corruption, and the Anti-Corruption Bureau is investigating. However, a new general set of rules to regulate questions of immunity is currently not on the agenda.

Overall, two trends can be identified in the area of accountability. First, the pattern that already existed prior to the Euromaidan still applies: the legal texts are largely acceptable, but implementation is flawed. Second, a majority of the elite is not prepared to introduce transparent procedures or relinquish existing privileges.

How Legislation is Handled

The second and third principles set out by the World Justice Project concern the way that legislation is tackled in the broadest

sense. They address the content of laws as well as their preparation, passage and implementation – the latter being particularly problematic in Ukraine.

Ukrainian laws are published and can be publicly accessed on the Parliament's website. On the whole, the statements contained therein are clear and intelligible. However, contradictions and vague wordings also occur – shortcomings that tend to derive from two sources. First, many Rada members and staff lack professionalism in harmonising legal texts. Second, individual members of parliament, or small groups of them, deliberately keep wordings imprecise so as to enable different readings of the laws and thus secure their own interests or those of their respective patrons.

As a rule, the durability of laws is a given. There are, however, at least two exceptions. First, certain types of law are regularly rewritten. This primarily concerns electoral legislation, which is traditionally altered shortly before each election in favour of the ruling elite. As a result, there is no continuity in the electoral or party system, and the electoral code that has been repeatedly demanded by the OSCE to establish a basic foundation for holding elections has not materialised. This trend persisted during the local elections in October 2015. The relevant law had only been passed in July of that year, without substantial debate either in parliament or in the wider society. "Open lists", which were meant to offer citizens more freedom to choose individual candidates, were announced but not in fact introduced. Access to elections was made more difficult for independent candidates. The many internally displaced persons, meanwhile, were not given an opportunity to go to the ballot box. Additionally, for security reasons no elections at all were held in a number of districts, although the criteria behind that decision remained opaque. These last two factors presumably played into the hands of the ruling coalition because they are likely to have reduced the voter potential of the successor parties to Yanukovich's former Party of Regions.

Second, there are laws that are amended frequently to satisfy special interests. An example that illustrates the differences between the Yanukovich period and today is the law on public procurement. Under Yanukovich, the law in question was hollowed out by a series of changes, which for instance made it legal in certain cases to have calls for tenders with only one applicant. After a new law on public procurement was passed in April 2014, a wave of modification proposals began. However, these have largely been blocked. In addition, an electronic system for awarding contracts, called ProZorro, has been gradually introduced. After a pilot phase, a law was passed in December 2015 to extend the system to all areas of public procurement. In other words, this sector provides an example of a procedural improvement, even though it remains vulnerable to corruption, primarily because of the huge sums of money involved.

The question of whether the contents of Ukrainian laws are just is not easy to answer. The fact that a large number of laws are fast-tracked is, if anything, an argument against: this method makes it more difficult to check whether draft laws have been influenced by special interests. Moreover, without any debate in parliament or society at large, it is hardly possible to broach the issue of different concepts of justice or to find a compromise between them. Finally, the highly problematic Ukrainian justice system (see below) is hardly in a position to deliver objective verdicts, even when it is not being used to delay or complicate the implementation of laws. The latter seems to be the case for the so-called lustration law, which is intended to regulate the dismissal of civil servants on political grounds. For an entire year now, this law has been in the hands of the Constitutional Court, many of whose judges would themselves be affected by the lustration process. According to international evaluations, the law does have questionable aspects and should be reworked. The delays by the Constitutional Court (and by the

Rada, which has not yet voted on changes that have already been promised) impede the necessary confrontation with the country's past and the urgent renewal of its elite.

The justness of certain key laws undergoes examination by an international group of lawyers and other legal experts from the Venice Commission. This is an important procedure, which often leads to meaningful changes in legislation. However, key Commission recommendations are often ignored, or else Ukraine fails to wait for the Commission's final report. Instead, the Rada revises and passes the law in question after only a preliminary assessment by the Commission, picking up mainly on smaller points made by the experts. The latter approach enables the ruling elite to claim that international opinions have been taken into account, without sacrificing its own interests to considerations of justice.

As has already been implied, the speed at which many laws are whipped through Parliament is a substantial problem. Frequently, pressure from the President or from foreign actors is behind such fast-tracking. Examples include the budget law, as well as laws on decentralisation and tax reforms. According to a study by the Open Society Foundation, about 60 per cent of all laws adopted since the current Rada was elected in October 2014 were passed using abbreviated procedures. This puts an end to any possibility of a meaningful debate or the necessary fine-tuning of paragraphs.

The greatest hurdles to applying and enforcing laws are still to be found in the administrative system. The state apparatus operates in hopelessly outmoded ways and continues to be largely rooted in Soviet patterns. After substantial delays, the Law on the Civil Service was adopted in December 2015, and is intended to initiate administrative reforms. Further delays in its implementation should, however, be expected. In addition, secondary documents such as regulations, which make it possible to implement laws, often do not materialise at all or only inadequately. This is a further indication of insufficient professionalism –

or of the implementation of undesired laws being deliberately sabotaged, depending on the circumstances.

Finally, a chronic problem is the fact that legislative acts concerning aspects of the rule of law do not stipulate adequate sanctions to deter actors from corrupt behaviour. Inversely, certain people can – if it is politically desirable – be punished with disproportionate severity for smaller violations, because the relevant laws provide too much leeway. This is now changing to some extent, for instance in anti-monopoly or labour legislation. However, the lack of positive incentives continues to be problematic. As a rule, civil servants are woefully underpaid; the temptation is correspondingly great to engage in bribery or other corrupt practices.

As this overview has shown, the main problems with the way legislation is handled lie partly with the substance, but mostly with the procedures. Procedural problems exist starting with the debates on draft laws and continuing through all phases including the implementation of adopted legal norms. There is a striking lack of professionalism, and the influence of powerful actors interested in poorly regulated legal areas ensures that important laws intended to promote rule-of-law processes are blocked, delayed or not effectively implemented. At the same time, Parliament lacks a culture of debate and compromise, which further encourages irregularities. All of this indicates extensive continuity among the political and administrative elite: it has little genuine commitment to reform and only agrees to changes when external actors or reform-oriented forces inside Ukraine exert correspondingly strong pressure.

Reforming the Justice System

A major problem with the justice system is the persistent lack of independence among judges, some of whom are de jure subordinate to the executive, while even more are de facto subordinate. However, in September 2015 the Constitutional Commission

appointed by Poroshenko in March of that year approved a draft law that should protect the independence of the judiciary much better than has been the case so far. First, it would abolish the trial period for judges (currently five years) so that appointed judges would no longer be dependent on being confirmed by Parliament. Second, the role of the President in appointing judges would be limited. Third, the Supreme Judicial Council (SJC), which selects judges, would be less dependent on the President and Parliament than hitherto. The latter would each be allowed to nominate two members of the Council, with the remaining 17 members being appointed by professional bodies. Judges would not be completely unassailable, since they could still be transferred by the President or recalled even for minor misconduct by the SJC using disciplinary proceedings. Nevertheless, the law is potentially a milestone on the road to an independent judiciary in Ukraine.

In December 2015, Parliament voted to submit the law to the Constitutional Court, which declared it to be constitutional on 22 January 2016. (Since the law amounts to a change to the constitution, the Court must approve the draft law before it can be adopted with a two-thirds majority by Parliament. A simple majority suffices for the referral to the Court.) However, there seems to be some resistance on Prime Minister Yatsenyuk's part, since he has suggested an alternative: dismissing all judges and replacing them with new ones. The draft law, by contrast, merely provides for a review of the existing judges. The Prime Minister's party, People's Front, currently refuses to support the law and may insist on a referendum on any possible changes to the constitution. This is liable to prevent the required two-thirds majority from being attained and thus further delay the reform of the justice system.

A second crucial topic is the slow progress being made in reforming the Ukrainian Prosecutor General's Office (GPU). In October 2014, a law on this issue was in fact adopted, but it only came into effect in

April 2015 and is being implemented very reluctantly. The powers of the Prosecutor General, which had been extensive, were limited, and the institution is to be more closely embedded in the justice system in the future. In addition, new prosecutors have been appointed locally. By mid-December 2015, Prosecutor General Viktor Shokin had appointed 154 local GPU representatives, albeit using a partly non-transparent application procedure which prevented outsiders from being hired.

At the national level, reform-oriented individuals have been appointed as deputies of the Prosecutor General. However, the Prosecutor General himself is a very controversial figure. This was already true for Vitaly Yarema, who held the post from June 2014 to February 2015, and it continued to be the case for his successor Shokin, who worked for the GPU since 1981, with the exception of a few short interruptions. Shokin has been explicitly criticised by representatives of Ukraine's civil society as well as by external actors, such as US Vice-President Joseph Biden or Jan Tombinski, EU Ambassador to Ukraine and Head of the EU Delegation in Kyiv. Viktor Trepak, who until November 2015 was First Deputy Director of the Ukrainian domestic intelligence service (SBU), stated that he had terminated his contract because Shokin was blocking the fight against corruption. Shokin's former deputy, Vitaly Kasko, claimed that Shokin did not approve of lawsuits against former high-ranking GPU staff and had therefore asked Trepak to give notice. (Kasko himself has since resigned in frustration.) The reform of the GPU has therefore stagnated, putting at risk both financial support from abroad and the fulfilment of the Visa Liberalisation Action Plan agreed upon with the EU. Shokin was finally sacrificed after the Rada found the work of the Cabinet of Ministers over the past year inadequate, casting doubt on both Yatsenyuk and Poroshenko (the latter in his capacity as founder of the party with the largest parliamentary faction in the ruling coalition). However, the future trajectory of the GPU is still unclear.

In conclusion, the independence of the Ukrainian judiciary is as questionable as the informal norms of conduct that guide its representatives. While new laws are now tackling these problems, there are substantial obstacles to the reforms, as is indicated by the delays that have arisen and by the dubious personalities who enjoy power and influence in this area. Second-tier civil servants often spend much time and energy on achieving a sustainable reform of the system, but they are not infrequently thwarted at the highest level.

Overcoming Deficits

As this evaluation of the measures taken to introduce the rule of law has shown, large parts of Ukraine's current elite lack the will to bring about substantial change. In addition, many civil servants are corrupt and lack professionalism. Reforms in the rule-of-law area are therefore proceeding very slowly and often remain ineffective. It is thus evident that the main driving force for such reforms must come from outside of the elite – primarily from external actors and Ukrainian civil society.

Since external actors are not in a position to replace problematic political figures, they should place more emphasis on raising the level of professionalism. Training measures, for instance on tackling conflicts of interest, can make a contribution here if they are tailored to the Ukrainian context. To guarantee this, it would make sense to cooperate closely with relevant civil society organisations in the country. Experience has shown that interactive formats, which focus on practical exercises, are more effective than one-sided consultancy situations. It seems advisable to aim for a snowball effect, where committed participants identify other potential interlocutors. This would gradually build up a critical mass of individuals who would be able to assert themselves against a majority attempting to block the reforms. Such measures should not remain limited to the capital city. Ukraine has started to decentralise; this

offers opportunities for training sessions that can increase administrative capacity in the regions and simultaneously strengthen elements of the rule of law. Should the twinning approach be used here – whereby civil servants from EU member states are brought together with corresponding partners from the Ukrainian state apparatus – two things will be important: first, to ensure that those involved have adequate language skills; second, to select civil servants from the EU member states who are familiar with the Ukrainian context.

For elite renewal, performance-based transparent recruiting and hiring procedures are imperative (such as have already been implemented for the newly established police force). It will presumably take some time until such procedures become the rule, especially for high-ranking posts, but the EU and its member states can encourage this process through training, exchange of views, and monitoring.

Finally, conditionality can and should be used in a more targeted and visible manner. Admittedly, this is more difficult with regard to the rule of law than in the sphere of economic reforms. Suitable benchmarks cannot always be clearly defined, and the quality of results depends very much on the attitude of those involved in their implementation. However, there is solid evidence that external pressure has already led to some progress in Ukraine, for instance in creating institutions to fight corruption. The fact that the EU is currently making detailed demands in this area as a precondition for a visa-free regime with Ukraine is a good example of concrete conditionality, without which real progress is unlikely. The goal should be to insist on small but steady steps until a point in the adoption of the rule of law is reached that renders a return to previously entrenched behaviour patterns all but impossible.

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