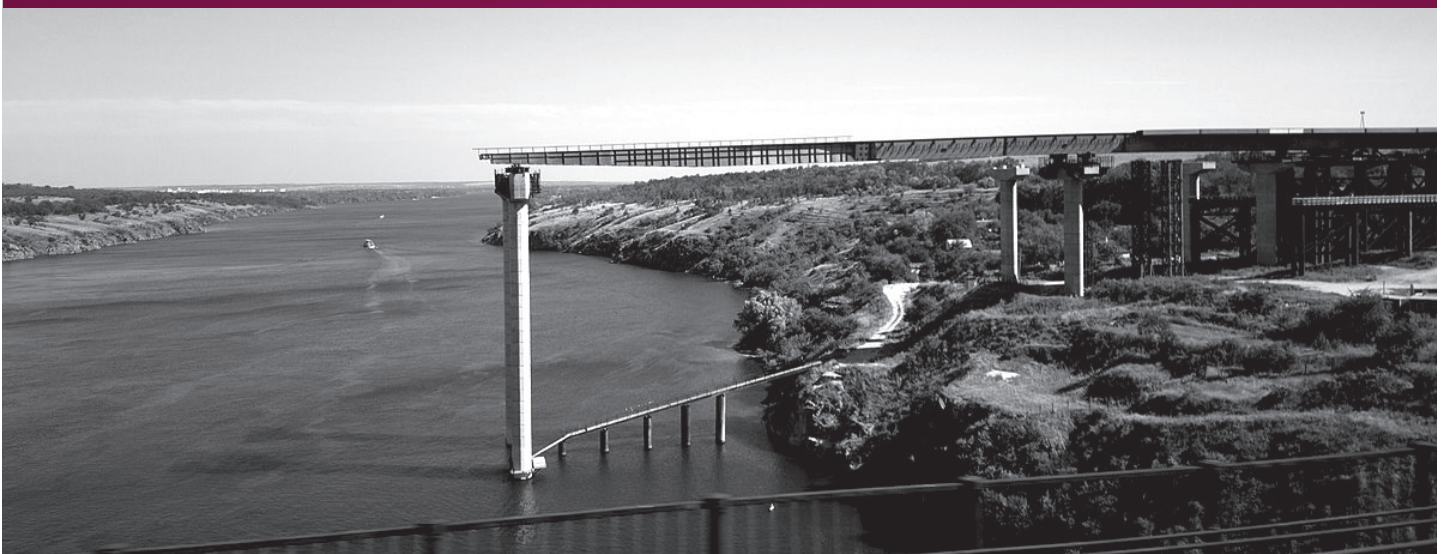# UKRAINE'S STALLED TRANSFORMATION

A CONCERNING CONTEXT FOR THE 2019 PRESIDENTIAL AND PARLIAMENTARY ELECTIONS

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UKRAINE'S STALLED TRANSFORMATION

A CONCERNING CONTEXT FOR THE 2019 PRESIDENTIAL AND PARLIAMENTARY ELECTIONS

- Despite the momentum for fundamental change that emerged in Ukraine after the Euromaidan revolution of 2014, the incumbent elites were able to safeguard many traditional mechanisms for extending their stay in power and effectively impeded the systemic transformation.

- After the presidential and parliamentary elections of 2019, Ukraine will face an increased risk of populism and radicalization of the political agenda on the one hand, and apathy and disengagement among the population on the other.

- In these circumstances, the West should be ready to increase its involvement in Ukraine, but also to step up conditionality in order to influence the behaviour of protectors of the old system, interacting more with the pro-reform constituency in Ukraine.

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INTRODUCTION

Ukraine's 2014 revolution was driven by a demand for comprehensive change. Five years on, however, none of the main candidates running in the presidential elections of 2019 could pretend to adequately represent the new, post-revolutionary Ukraine. Two of the top three were veteran politicians, the president in office and one of Ukraine's richest people, Petro Poroshenko, and the two-time prime minister and current leader of the opposition Bat'kivshchina ('Motherland') party, Yulia Tymoshenko. Both started their political careers as collaborators of President Leonid Kuchma at the end of the 1990s, both switched allegiances and alliances several times and, in general, both are products of the old political system, based on clan competition and patronage networks. Their political longevity is telling and is a phenomenon that cannot be explained by personal qualities alone.

The third candidate was showman and producer Vladimir Zelenskiy, a no less paradoxical figure. Perceived by his supporters as a 'new face' and an anti-establishment candidate, he previously had well-known connections with several oligarchic media empires and, at the time of campaigning, could not and did not conceal his links with the most notorious business mogul, Ihor Kolomoiskiy, himself a symbol of Ukraine's unreformed past.

This does not augur well for the parliamentary elections, scheduled for autumn 2019, which, due to the fact that Ukraine constitutionally has a semi-presidential political system,[1] will be even more important for the future of the country than the presidential race.

This Briefing Paper, while not casting doubt on the success stories, primarily takes stock of the changes that have not happened in Ukraine or have not brought the results hoped for in 2014. We argue that the transformation of political institutions was halted

and oligarchs preserved their assets and power, while the transition towards a rule-of-law state was undermined. The analysis aims to shed light on how and why the old system turned out to be so resilient, but is also presented to underline the need for further efforts. Staying within the confines of the 'glass-half-full-half-empty' debate does not suffice. One has to acknowledge that the cycle of muddling through followed by a new push for reforms is not the only potential scenario for Ukraine. Much riskier options should also be considered.

THE MISSION AND THE COALITION

The events of 2014, known as Euromaidan because they were triggered by then President Viktor Yanukovich's refusal to sign the Association Agreement with the EU, are also referred to as the Revolution of Dignity. This is a very telling name. People not only protested against the ever-increasing authoritarianism of Yanukovich, they demanded a comprehensive transformation of Ukraine's political, economic and legal system.

What is notable is that since independence Ukraine had remained a country in which people could indeed decide in elections who would govern them (for example, only one out of Ukraine's four presidents during 1991–2014 was re-elected for a second term), but they could not influence the behaviour of the ruling groupings between elections. That behaviour was predatory, rent-seeking and exercised through manual rule as opposed to institutions – even though a formal democratic facade veiled informal mechanisms. Clientelism and corruption were rampant, while oligarchic powerhouses thrived. Different clans competed for control over state institutions and resources; they wanted to replace each other at the top, but were not willing to challenge the rules of the game as such.

The political divide between Ukraine's eastern and western regions (which, importantly, should not be absolutized or simplified) was instrumentalized by respective ruling groupings to mobilize people against opposing candidates and political forces, but not the system as a whole. The Revolution of Dignity was a

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1   According to the constitution, the president of Ukraine is the head of state and commander-in-chief. His main powers lie in the area of national security and defence as well as foreign policy. The government, which is in charge of economic issues and internal affairs, is appointed by parliament. Ministers of defence and foreign affairs are proposed by the president, but have to be confirmed in parliament.

revolt against all that, and for greater participation by the people, as well as control over their elites.

There were three reasons in particular why hopes were high that the demands could be met this time. The first was the national consolidation around the reform agenda and in defence of the country in view of Russia's annexation of Crimea and the conflict in Donbas. Pro-Russia parties, starting with Yanukovich's Party of the Regions, simply collapsed. As a result, a five-party 'European Ukraine' coalition obtained a constitutional majority in parliament in the elections of October 2014 and proclaimed an ambitious reform programme. A faction of the presidential party, the 'Petro Poroshenko Bloc', was the biggest in the coalition, promising good cooperation between the executive power and the legislature.

Second, unlike in 2005, when after the Orange Revolution the protesters simply left the scene and let their victorious leaders act as they pleased, this time civil society not only gained access to bureaucracy and information, but also built certain oversight mechanisms. For instance, Prozorro (a name resembling the Ukrainian word for 'transparent'), originally a volunteer project to improve the public procurement system, simply replaced the state procurement agency in 2015. Several dozen investigative ex-journalists, volunteers and Maidan activists joined the new parliament and formed the informal 'Eurooptimists' group, while the cabinets formed in 2014–15 included representatives of civil society and business.

Third, and logically in a time of armed conflict with Russia and an economic crisis, the role of Western donors increased considerably, and they were to a large extent in a position to make their support conditional upon reform progress. The IMF, US and EU often set domestic reform agendas and pushed forward their implementation. The EU–Ukraine Association Agreement and Visa Liberalization Action Plan contained legislative and regulative roadmaps. Advisory missions provided guidance for state agencies. External pressure drove several of Ukraine's landmark successes, such as the reform of Ukraine's gas champion Naftogaz, the clean-up of the country's banking system, and the introduction of electronic declarations of assets.

POLITICAL TRANSFORMATIONS

The political reforms were the most urgent and challenging task. The monopoly on political power in Ukraine enjoyed by a few political and oligarchic groups needed to be broken up and replaced by a system based on institutions, a clear separation of powers and competences, as well as individual accountability. Unfortunately, these goals have not been accomplished for the most part, although certain steps in the right direction have been taken. The key deficiencies are outlined below.

The boundaries of powers within the executive have remained blurred, by design probably more than by default. The best evidence of this concerns the electoral promises made by many presidential candidates during the 2019 campaign in the areas of economics (for example, to lower the energy tariffs) and law enforcement, in which Ukraine's president has no competence as this is the prerogative of the government, according to the constitution. Yet this is a natural result of the concentration of actual powers in the office of President Poroshenko during his term in office. Poroshenko is a master of governing through cadres, and he was gradually able to secure the appointment of his close loyalists to the positions of prime minister, prosecutor general, and head of the Central Bank, among others, although formally he has no control over these appointments.

Also very telling with regard to the Ukrainian system is an informal body around the president called the 'Strategic Nine', in existence since 2015. It meets regularly and frequently and, according to media accounts, takes decisions which are later formalized by the cabinet of ministers or the Security and Defence Council.[2]

The parliament, the Verkhovna Rada, is weak vis-à-vis the executive and vulnerable to pressure and manipulations. The body is fragmented and includes six party factions, two groups of members elected in single-mandate districts, and a large number of independent unaffiliated deputies. Parties have loose control over members of their factions and the latter can disobey party decisions on how to vote without facing the risk of losing the mandate. In practice, this means that the executive is usually able to put together an ad hoc majority when needed.

Furthermore, since the change of cabinet ministers in 2016, after which it has been supported by only two factions, it has remained unclear as to whether

2   Https://ru.hromadske.ua/posts/portret-epokhy-kak-poroshenko-upravli-aet-stranoi; https://www.pravda.com.ua/articles/2018/11/7/7197450/.

a formal parliamentary majority exists at all. Importantly, according to the law, such a majority must be formed by members of party factions and made public, and the absence of a no-confidence vote as such is not enough for the cabinet to continue to govern. Yet a list of majority members has not been made available. Still, no motion was tabled on this issue – presumably because the dissolution of parliament and early elections would not be in the interests of either the government or the opposition.

Changing this pattern will be difficult without electoral reform. However, this reform is definitely not going to take place before the 2019 parliamentary elections at least. The draft law, under consideration since 2015, proposing the introduction of a proportional open-list system and abandoning single-mandate districts, to lower the electoral threshold for parties from five to four percent and to streamline election procedures for presidential, parliamentary and local elections alike, passed the first reading in December 2017 by a mere one-vote margin. Four thousand amendments have since been proposed and it has not reached a second reading, however.

This will further delay the transition towards a modern and transparent party system, reflecting the ideological preferences of different groups of the population. Significantly, attempts to establish new political forces with a pronounced pro-reform profile produced few results. Many parties are currently likely to remain 'projects', serving the interests of individual people or groups, created specifically for a given election and either remaining dormant or disappearing altogether afterwards. Despite the law on political funding, adopted in 2015, which established state financial support for political parties and introduced rules on budget transparency, parties still need access to oligarchic resources in order to function.

From a comparative perspective, the decentralization reform deserves a positive mention. It initiated important changes in the territorial-administrative division of Ukraine and centre-periphery relations. As a fifth of the country's population voluntarily united in new amalgamated communes (hromadas), regional and local authorities were allocated more resources and responsibilities.

However, even in this field much remains to be done to get rid of overlapping functions and to clarify the legal status of the new units. Suffice it to say that the Soviet law from 1981 on territorial-administrative division is still in force, whereas consideration of

constitutional amendments that would finally define the place of the new hromadas in the system of governance, and delineate responsibilities and resources between hromadas, towns, districts and president-appointed regional governors, has been continuously suspended since August 2015.

RENTS AND DE-OLIGARCHIZATION

Ukraine made significant progress towards reaching macroeconomic stabilization, improving state finances and streamlining taxation. However, approximately 3,000 state-owned enterprises, which comprise 15% of GDP, public ownership of land and oligarch monopolies in the economy still generate rents, invested in politics. Governmental figures, who were openly at odds with the system, left the cabinet for various reasons one after another. The last to go was finance minister Oleksander Danyliuk, dismissed in June 2018.

While major Yanukovych-era plundering schemes were dismantled,[3] new ones appeared. During the presidential campaign, an outrageous – for a country at war – scandal erupted, involving the main state defence procurement concern Ukroboronprom, and implicating the Deputy Secretary of Ukraine's Security and Defence Council, Oleg Gladkovskiy. Investigative journalism revealed that spare parts for the military, including those smuggled from Russia and sometimes of poor quality, were purchased from intermediary companies and then resold to the state at much higher prices.[4] In the energy sphere, the so-called 'Rotterdam Plus' scheme, currently in its fourth year of operation, has the effect of setting the price for domestically produced coal as well as if it was purchased at the hub in Rotterdam and transported to Ukraine. In its first 2.5 years the scheme generated an estimated profit of 35 bn hryvna (some 1.4 bn USD).[5]

De-oligarchization has never really got off the ground. Oligarchic fortunes were, of course, affected by the war, currency depreciation, and the seizure of their assets in breakaway territories and Crimea, but not by a spearheaded reform effort. The only exception was the above-mentioned Igor Kolomoiskiy,

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3 Http://www.ier.com.ua/files/publications/Policy_papers/IER/2018/Anticorruption_Report_EN.pdf.

4 Https://www.bbc.com/ukrainian/features-47375497.

5 Https://bit.ly/2uRGqfi.

whose Privatbank, a key pillar of Ukraine's banking system, was nationalized. However, in this case one has to take into account that Kolomoiskiy is embroiled in a personal feud with President Poroshenko. Kolomoiskiy litigates with Ukraine's government and his many assets were frozen by the London court. But as of March 2019, his personal fortune was estimated by Forbes to still be worth over 1 bn USD.[6] Rinat Ahmetov, Ukraine's richest man and the key beneficiary of 'Rotterdam Plus', has increased his wealth from 2.3 to 6.1 billion USD since 2016.[7]

Oligarchs continue to play a crucial role in Ukraine's political process not only as presumed funders of political campaigns, but even more so as media owners. Even though the law requires disclosing media ownership, key media are still owned through offshore companies. As of September 2018, the ten biggest national TV channels, which were the main source of information for 75% of the population, were in the hands of four oligarchs: Rinat Akhmetov, Viktor Pinchuk, Igor Kolomoiskiy and Dmytro Firtash.[8] President Poroshenko himself owns one national TV channel.

THE RULE OF LAW AND CORRUPTION

Ukraine was able to pass a number of new acts and undertake other measures aimed at improving the situation with regard to the rule of law and the fight against corruption, not least because this sphere attracted the special attention of Ukraine's Western partners. The law 'On Civil Service' introduced professionalized bureaucracy and new selection mechanisms, and launched the reorganization of ministerial structures. Ten pilot ministries are currently establishing new directorates and procedures such as impact assessment, and hiring new personnel. The police reform established new patrol police, a move that was initially highly acclaimed. The law 'On Prosecution' strengthened the independence of this branch of law enforcement system. In 2016, the Law 'On the Judiciary System and the Status of Judges' created new independent self-governing bodies for disciplining and promoting judges.

A totally new anti-corruption infrastructure with wide responsibilities and significant resources was set up. The National Agency on Corruption Prevention (NACP), the Special Anti-Corruption Prosecutor (SAP) office, and the National Anti-Corruption Bureau (NABU) were put in charge of fighting and preventing corruption. A specialized Anti-Corruption Court is also being created.

Again, however, the results of the changes are yet to be felt, while the proliferation of official bodies has created duplication and inter-agency in-fighting without clearly separating their competences in many cases. For example, Ukraine's Security Service (SBU), a 32,000-strong organization directly subordinated to the president, preserved broad powers of investigation and prosecution in areas ranging from organized crime, counter-terrorism and intelligence to anti-corruption, smuggling and economic crimes. Its reform was postponed until 2018 and, apparently, the legislative work is only just beginning. The State Bureau of Investigation, created in 2015 and assuming some competences of the General Prosecutor's Office, was dysfunctional until the end of 2018, due to a conflict between coalition partners over its political control. Meanwhile, the NACP cannot play its role as intended because it still does not have a system to automatically check millions of annually submitted electronic declarations of assets. Multiple problems were also reported with regard to the judicial reform.[9]

A separate problem concerns the prevalence of the old cadres in law enforcement and the judiciary. Sixty-seven percent of the 337 judges who unlawfully subjected Euromaidan activists to persecution under instructions from Yanukovych's administration have remained in their positions. In the Ministry of Interior (MOI), only 8% of pre-revolutionary personnel failed to pass the re-attestation and were fired, and half of the dismissed were reinstated by the courts.

In 2018 Ukraine occupied 120th position in the Transparency International Corruption Perceptions Index with a rather low score of 32 points on a scale from 0 to 100. This nonetheless showed an improvement of 24 positions and 7 points compared with 2013 and reflected the change in the legal environment. However, in 2019 this rating is likely to worsen after

6   Http://project.liga.net/projects/kolomoyskyi_vibory2019/; https://www.forbes.com/profile/ihor-kolomoyskyy/#5c5a892051dc.

7   Https://www.forbes.com/profile/rinat-akhmetov/#2375bd7f24fa.

8   Https://www.kiis.com.ua/?lang=ukr&cat=reports&id=783&; https://www.mom-rsf.org/en/countries/ukraine/.

9   http://pravo.org.ua/en/news/20872598-analytical-report-establishment-of-the-new-supreme-court-key-lessons; https://zn.ua/POLITICS/sredi-pobediteley-konkursa-na-dolzhnosti-v-kassacionnyh-sudah-nash-lis-16-nedobrodetelnyh-311085_.html.

Prime Minister Volodymyr Groysman inspects a bridge building site in Zaporizhya. The bridge in question has been under construction since 2004. *Image: Zaporizhzhya Regional State Administration.*

the Constitutional Court repealed the law on illcit en-richment in March. As a result, 65 criminal cases on this charge, under investigation or already taken to court by SAP, had to be closed. But even before that, the statistics were depressing: in 2018 prosecutors studied 9,155 cases of corruption and directed 3,126 of them to court, but in only 766 cases were defendants convicted.[10] As of January 2019, out of 189 high-level cases sent to court by SAP and NABU, defendants re-ceived real prison sentences in only two cases.[11] This raises questions about either the professionalism of the prosecutors or the integrity of the judges.

The inability of the law-enforcement bodies to pro-tect civil society activists who confront the old system at all levels is a critical problem. Between January and November 2018 alone, more than 50 civil activists in the country were violently attacked. Five of them were murdered, but none of the cases were fully solved.[12] It goes without saying what kind of negative effect this trend may have on societal mobilization.

CONCLUSION

As of March 2019, according to a Gallup World Poll, just 9% of Ukraine residents had confidence in the nation-al government, which was the lowest indicator in the world for the second consecutive year. In 2018, only 12% in Ukraine said they had confidence in the hon-esty of elections, representing a steep decline from the 26% who thought so in 2014.[13] The February 2019 Ra-zumkov Center poll confirmed that 83% of people did not trust the state bureaucracy, 82% the parliament, 78% the courts, 77% political parties, 75% the govern-ment, 71% the president, and 62 to 65% did not trust the country's anti-corruption bodies. The most trusted were volunteers (67%), and the armed forces (62%).[14] Meanwhile, according to yet another poll, 59% wanted radical political change.[15]

This is worrying, and particularly so since Ukraine is going to have a president who is the preferred choice

10   Https://www.gp.gov.ua/ua/prev_combating_corruption.html.

11   Https://nabu.gov.ua/novyny/ponad-50-provadzhen-nabu-i-sap-ne-rozglya-dayutsya-u-sudi.

12   Https://www.currenttime.tv/a/ukrainian-murdered-activists-2018/29583473.html.

13   Https://news.gallup.com/poll/247976/world-low-ukrainians-confident-gov-ernment.aspx.

14   Http://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/riven-do-viry-do-suspilnykh-instytutiv-ta-elektoralni-oriientatsii-gromadian-ukrainy.

15   Https://www.pravda.com.ua/articles/2018/03/19/7175060/.

of a small minority of the population. Compared with 54% of votes cast for Petro Poroshenko in the first round in 2014, the current first-round results of 30% and less than 16%, received by the two candidates who made it to the run-off phase, Zelenskiy and Poroshenko respectively, look unconvincing. This constitutes just 19% and 10% of the whole electorate (voter turnout in the first round was 63%). Moreover, based on the high number of candidates whose sole purpose for running in the presidential race was to improve their starting positions for the parliamentary elections, Ukraine may receive an even more fragmented legislature than before.

Whether the new president and the Verkhovna Rada will be able to chart a course that is good for the country and accepted by the people is an open question. Hopefully, they will. On the other hand, however, the genie of extreme populism, as the 2019 campaign showed, is already out of the bottle, which may lead to political radicalization. This, in turn, can be very dangerous in a country that has tens of thousands of recent front-line soldiers. Equally concerning, but also possible taking into account the level of popular frustration, would be apathy and disengagement.

Ukraine's Western partners should be aware of these risks, but they should be driven by the imperative that Ukraine's reforms should be completed, not aborted. The West should be ready to increase its involvement in Ukraine, but also to step up conditionality. There is a constituency in Ukraine with which the West shares an interest in bringing about a transformation, and it has the clout to influence the behaviour of the protectors of the old system.