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Liberal Democracy vs. Autocracy: the Case of Ukraine

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Liberal Democracy vs. Autocracy: the Case of Ukraine

Abstract: The object of this paper is to determine what kind of state is being built in Ukraine: a liberal-democratic or an authoritarian one. This article gives a brief overview of the concepts of the 'rule of law', 'liberal democracy', and 'hybrid regimes'. It shows general trends in the status and development of democracy in East-Central Europe and identifies the main risks for democracy development in Ukraine. The paper closely examines the public administration and the judicial system of Ukraine, the work of its Central Election Commission (CEC), and the functioning of mass media and social media. The article shows that the powers of the presidential office have been expanded since 2016 while at the same time undermining democratic institutions established in the aftermath of the Euromaidan revolution.

Keywords: rule of law, liberal democracy, autocracy, hybrid regime, democratic recession, Ukraine

Introduction

In his recent book *Political Order and Political Decay*¹, Francis Fukuyama acknowledged that some countries in transit from communism to capitalism have not proceeded to democracy. He argues that some of these countries have even made U-turns and returned to autocracy. Democratic institutions, as Fukuyama shows, do not only evolve but also may fall into decay, even in consolidated democracies.²

1 F. Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy*, First edition, New York: Farrar, Straus and Giroux, 2014.

2 Consolidated democracy is a political regime in which democracy as a complex system of institutions, rules, and patterned incentives and disincentives has become, in a phrase, 'the only

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1. The Rule of Law and Liberal Democracy

There is no single and generally accepted definition of the term 'rule of law'. Political science and political philosophy have a long tradition of thought on the rule of law, starting with John Locke, who endorsed the key elements of constitutionalist rule of law (separated and limited powers and reserved rights)³, and the development of liberal thinking on political systems. Herein, I refer to Guillermo O'Donnell's definition. As he explains, the rule of law means that all citizens are equal before the law, and that the laws themselves are clear, publicly known, universal, stable, non-retroactive, and fairly and consistently applied to all citizens by an independent judiciary.⁴

The rule of law is a basic component of consolidated democracy. According to L. Diamond and L. Morlino, a 'good' democracy (by which they mean a liberal democracy) must have 'a strong, vigorous, diffuse, and self-sustaining rule of law'. They identify 10 essential elements of

game in town'. J. J. Linz and A. C. Stepan, 'Toward Consolidated Democracies', *Journal of Democracy*, vol. 7, no. 2, April 1996, p. 15.

3 Cf. M. P. Zuckert, 'Hobbes, Locke, and the Problem of the Rule of Law', in: I. Shapiro (ed.), *The Rule of Law*, New York, London: New York University Press, 1994.

4 L. Diamond and L. Morlino, 'Introduction', in: L. Diamond and L. Morlino (eds), *Assessing the Quality of Democracy*, Baltimore: The Johns Hopkins University Press, 2005, p. xiv.

‘good’ democracy anchored on the rule of law: 1. There is equality before the law with no one above it; 2. The legal state is supreme throughout the country and no local oligarchs or local political bosses can take the law into their own hands; 3. The political, administrative, and judicial branches of the state are relatively free of corruption and unlawful activity is detected and punished; 4. The state bureaucracy enforces the law professionally, efficiently, and universally, and assumes responsibility in the event of an error; 5. The police force is professional, well-trained, and respectful of citizens’ rights and freedoms, including rights of due process; 6. Citizens have equal and unhindered access to the courts to defend against possible injuries by other citizens or state institutions; 7. Criminal, civil, and administrative legal cases are heard and resolved expeditiously; 8. The judiciary is neutral and independent from political influence; 9. Judicial decisions are respected and enforced by state institutions and agencies; and 10. The constitution is the supreme law of the land and it is interpreted and defined by a constitutional court.⁵

In G. O’Donnell’s opinion, ‘the rule of law is among the essential pillars upon which any high-quality democracy rests [...] Without a vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk.’ He believes that only under the rule of law ‘will the various agencies of electoral, societal, and horizontal accountability function effectively, without obstruction and intimidation from powerful state actors.’⁶ Thomas Carothers, in turn, writes about a ‘profound’ relationship between the rule of law and liberal democracy, stating that ‘the rule of law makes possible individual rights, which are at the core of democracy.’⁷ Without the rule of law, he asserts, ‘major economic institutions such as corporations, banks, and labour unions would not function’, and the government’s multifaceted involvement ‘in the economy—regulatory mechanisms, tax system, customs structures, monetary policy, and the like—would be unfair, inefficient, and opaque.’⁸

5 Ibid., p. XIV-XV.

6 G. O’Donnell, ‘Why the Rule of Law Matters’, in: L. Diamond and L. Morlino (eds), *Assessing the Quality of Democracy*, p. 3.

7 T. Carothers, ‘The Rule-of-Law Revival’, in: T. Carothers (ed.), *Promoting the Rule of Law: In Search of Knowledge*, Washington, D. C.: Carnegie Endowment for International Peace, 2006, p. 4.

8 Ibid., p. 5.

Fukuyama perceives modern liberal democracy as a combination of three sets of institutions. The first is a state that ‘concentrates and uses power to defend the nation from foreign and domestic threats’, as well as enforces the law and delivers basic services to citizens.⁹ The second is the rule of law; ideally it should be a system of transparent laws that obligate not just ordinary citizens but the most powerful political actors in the society. And the third are the institutions of democratic accountability, such as free and fair periodic multiparty elections.¹⁰ The state concentrates and uses power to enforce its will while the law and accountability mechanisms constrain the exercise of power. Fukuyama believes that ‘the success of a liberal democracy depends on achieving a balance between strong state power and the checks and balances constituted by the legal and electoral systems.’¹¹

2. Democratic Recession

Since the mid-1970s, and especially after the fall of the Berlin Wall in 1989 and the collapse of the Soviet Union in 1991, the world observed a substantial growth in the number of democratic states. Recently, however, this process has slowed. According to Freedom House’s *Freedom in the World 2018* report, freedom, democracy, and human rights have been declining throughout the world during the last 12 years. Over this time, 113 countries have seen a net decline and only 62 have experienced a net improvement. In 2017 alone, 71 countries suffered a net decline in political rights and civil liberties, with only 35 registering gains (see Table 1). Basic tenets such as free and fair elections, the rights of minorities, freedom of the press, and the rule of law all saw attacks around the world.¹²

9 F. Fukuyama, ‘The Rise of Populist Nationalism’, in: *2018 Davos Edition: “The Future of Politics”*, [Zurich]: Credit Suisse Research Institute, [2018], p. 8-9.

10 Ibid., p. 9.

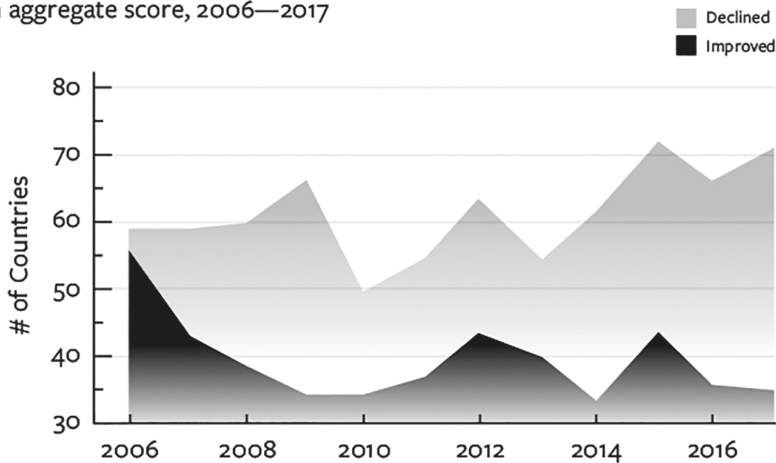
11 Idem, ‘The Historical Pattern of Political Development in East Asia’, in: L. Diamond and M. F. Plattner, Yun-han Chu (eds), *Democracy in East Asia. A new Century*, Baltimore: The Johns Hopkins University Press, 2013, p. 4.

12 Freedom House, ‘Freedom in the World 2018: Democracy in Crisis’, <https://freedomhouse.org/report/freedom-world/freedom-world-2018> [2018-06-18].

Table 1. Decline in Global Freedom

Twelve Years of Decline

Number of countries that declined and improved in aggregate score, 2006—2017



www.freedomintheworld.org

Source: Freedom House, 'Freedom in the World 2018: Democracy in Crisis'.

It is worth mentioning here the concept of democratic waves popularised by Samuel Huntington in 1991. The notion 'wave of democratisation' depicts a number of transitions 'from nondemocratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period'.¹³ The 'first wave' of democratisation started in the 1820s and lasted until 1926; the 'second wave' took place from 1943 to 1962. Both waves, he argued, culminated in 'reverse waves.' As a consequence 'democratic systems were replaced in many cases by historically new forms of authoritarian rule'.¹⁴ The 'third wave' of global democratisation began in the mid-1970s and extended to the former communist states in Eastern Europe. At the same time, Huntington

¹³ S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, London: University of Oklahoma Press, 1991, p. 15.

¹⁴ Idem, 'Democracy's Third Wave', *Journal of Democracy*, vol. 2, no. 2, Spring 1991, p. 18.

warned about the possibility of a new 'reverse wave' if the new authoritarian states show the viability of a nondemocratic form of rule and if the world sees 'the United States as a fading power beset by political stagnation, economic inefficiency, and social chaos'.¹⁵

In 1974, when the 'third wave' of democratisation started, about 30 percent of independent states in the world met the criteria of electoral democracy.¹⁶ That is to say, there were only 46 democracies. Around 2006, the growth of freedom and democracy in the world was suspended. Since then, the net number of electoral democracies has stagnated. That number fluctuated between 114 and 119 (that is, about 60 percent of the world's states). The number of both electoral and liberal democracies began to decline after 2006 and then flattened out.¹⁷ According to the latest Transformation Index (BTI) carried out by the German think tank Bertelsmann Stiftung, the quality of democracy, market economy, and governance reached in 2018 its lowest level in 12 years.¹⁸ Among the factors that contributed to this reverse wave were the global financial crisis that began in 2007-2008, the wars in Iraq and Afghanistan, the economic success of authoritarian China, as well as general dissatisfaction with regime performance in new democratic states.¹⁹

It is important to emphasize that the transition from communism in Europe and the former Soviet Union has only sometimes led to democracy. According to Michael McFaul, the vast majority of new post-communist states were 'various shades of dictatorships or unconsolidated transitional regimes'.²⁰ Therefore, even though regime changes in this region occurred at the same time as other third-wave

¹⁵ Ibid., p. 15-16.

¹⁶ Electoral democracy is a system in which citizens, through universal suffrage, can choose and replace their leaders in regular, free, fair, and meaningful elections. L. Diamond, 'Facing Up to the Democratic Recession', *Journal of Democracy*, vol. 26, no. 1, January 2015, p. 141.

¹⁷ Ibid., p. 141-142.

¹⁸ R. Schwarz, 'Democracy under Pressure: Polarization and Repression Are Increasing Worldwide', *Bertelsmann Stiftung*, 22 March 2018, <https://www.bertelsmann-stiftung.de/en/topics/aktuelle-meldungen/2018/maerz/democracy-under-pressure-polarization-and-repression-are-increasing-worldwide/> [2018-06-25].

¹⁹ J. Möller and S.-E. Skaaning, 'The Third Wave: Inside the Numbers', *Journal of Democracy*, vol. 24, no. 4, October 2013, p. 97.

²⁰ M. McFaul, 'The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Postcommunist World', *World Politics*, vol. 54, no. 2, 2002, p. 212.

transitions, McFaul offered to capture the post-communist experience with a different theory—the fourth wave of *regime change*, one that led to democracy and dictatorship.²¹

This trend of ‘hybridisation’ of political regimes urged scholars to treat them as a separate type of political regime. Investigating their characteristic features, scholars divided themselves into three groups. The first one took hybrid regimes as defective democracy²², the second viewed them as incomplete, a separate subtype of authoritarianism²³, and the third one characterised them as a separate type of regime. Each of these groups has made some progress in explaining what is happening in this ‘grey zone’, but there is still no consensus on either the features or the number of hybrid regimes. Most scholars agree that the characteristic feature of a hybrid regime in a narrow sense is competitive elections. Among other features, they distinguish different elements of authoritarianism, but until now there is no final agreement about the quantity of the elements.²⁴

An increasing number of analysts claim that there is a global slide towards authoritarianism. The growing signs of a democratic recession are spreading to the core of the world’s liberal democracies: Europe and the United States.²⁵ The threat posed by the UK Independence Party induced Prime Minister David Cameron to call the referendum concerning Brexit and contributed to the shift of his Conservative party to the right. After being elected president, Donald Trump withdrew the US from the Trans-Pacific Partnership and the Paris Accords on Climate Change, criticized NAFTA, and imposed punitive tariffs on China, Canada, Mexico, the EU, and other countries. The other stages of the democratic recession were the doubling of support for Marine

²¹ Ibid., p. 212–244.

²² See: W. Merkel, ‘Embedded and Defective Democracies’, *Democratization*, vol. 11, no. 5, 2004, p. 33–58.

²³ See: A. Schedler, ‘The Menu of Manipulation’, *Journal of Democracy*, vol. 13, no. 2, April 2002, p. 36–50; idem (ed.), *Electoral Authoritarianism: the Dynamics of Unfree Competition*, Boulder, Colo: Lynne Rienner, 2006; S. Levitsky and L. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War*, Cambridge: Cambridge University Press, 2010.

²⁴ Ю. В. Мацієвський [Y. V. Matsiievskiy], *У пастці гібридності: зигзаги трансформацій політичного режиму в Україні (1991–2014)* [In the trap of hybridity: zigzags of the transformations of the political regime in Ukraine (1991–2014)], Чернівці [Chernivtsi]: Книги – XXI, 2016, p. 13.

²⁵ L. Diamond, *Defending Liberal Democracy from the Slide Toward Authoritarianism*. Keynote Speech to the European Democracy Conference 2017 Bratislava, November 21, 2017, p. 1, http://www.kas.de/wf/doc/kas_24479-1442-1-30.pdf?171130131056 [2018-08-30].

Le Pen's Front National in France; the founding and the electoral victory of the anti-establishment Five Star Movement in Italy; the entrance of the far-right Alternative for Germany to the Bundestag in September 2017; moves by traditional right-leaning parties toward the policies of the far-right in order to preserve victories in the March 2017 Dutch and October 2017 Austrian parliamentary elections.²⁶

Thus, one could observe the regression within the democratic world itself. New governments that set out clearly nationalist agendas were formed in Hungary in 2011 and Poland in 2015. Both Hungary and Poland had shifted early from communism to democracy; both were considered as having succeeded in the consolidation of their democratic systems during the 1990s. Other states in the region, including the Czech Republic and Romania, seem prompted to follow. In his speech in 2014, Hungarian Prime Minister Viktor Orban, defined his position on liberalism: 'A democracy is not necessarily liberal. Just because something is not liberal, it still can be a democracy [...] we have to abandon liberal methods and principles of organizing a society, as well as the liberal way to look at the world.'²⁷ According to political scientist Ivan Krastev, in the West, where the will of the people remains the main source of political legitimacy, Orban's model of illiberal democracy may well become an alternative to liberalism in the coming decades.²⁸ L. Diamond expressed a similar opinion during his speech at the European Democracy Conference 2017 in Bratislava. He emphasized that 'there are reasons to be concerned about other post-communist EU democracies, along with the growth in support

26 W. A. Galston, 'The populist challenge to liberal democracy', *Brookings*, 17 April 2018, <https://www.brookings.edu/research/the-populist-challenge-to-liberal-democracy/> [2018-06-25]; F. Fukuyama, 'The Rise of Populist Nationalism', p. 7-8; P. Brown and J. Horowitz, 'Trump announces tariffs on \$50 billion worth of Chinese goods', *CNNMoney*, 15 June 2018, <http://money.cnn.com/2018/06/14/news/economy/trump-china-tariffs/index.html> [2018-06-25]; L. Bayly, 'U.S. hits E.U., Canada and Mexico with steel, aluminum tariffs, sparking trade war', *NBC News*, 31 May 2018, <https://www.nbcnews.com/business/economy/u-s-hits-e-u-canada-mexico-steel-aluminum-tariffs-n878881> [2018-06-25].

27 C. Tóth, 'Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014', *The Budapest Beacon*, 29 July 2014, <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/> [2018-06-10].

28 I. Krastev, 'Eastern Europe's Illiberal Revolution. The Long Road to Democratic Decline', *Foreign Affairs*, May/June 2018 Issue, <https://www.foreignaffairs.com/articles/hungary/2018-04-16/eastern-europes-illiberal-revolution> [2018-09-09].

for various kinds of populist and illiberal parties and movements even in Western Europe.²⁹

3. Ukraine in Reports by the European Commission and Freedom House

Independent watchdog organisation Freedom House in its report noted that in 2017, democracy was in crisis in many countries of the world.³⁰ Ukraine was identified as a 'partially free' country in which the level of democratic freedoms continues to deteriorate. It continues to recover from the crisis of 2014, the loss of Crimea, and the military conflict in the Donbas area. As specified by Freedom House's *Freedom in the World 2018* report, Ukraine is considered a 'partly free' state, with a score of 62 out of 100. Its freedom rating is 3 (7 is the worst score), with civil liberties at 3, and political rights at 3.³¹

It is worth mentioning here that after the political revolution that occurred in Ukraine in 2014, President Petro Poroshenko and his governments have implemented reforms aimed at stabilising government finances, consolidating the banking sector, enacting transparent procedures for government procurement, as well as raising energy tariffs. A number of important reforms were launched in the spheres of the judiciary, public administration, decentralisation, electricity market, energy efficiency, environmental protection, as well as reforms on healthcare, pensions, and education. Several important institutions were reformed or established over the past four years, among them the police, the Supreme Court, and new anticorruption agencies.³² The European Commission recognizes that civil society plays a pivotal role in the reform progress (particularly, in the areas of anti-corruption and the judiciary), counterbalancing strong vested interests represented in parliament and among institutions and authorities. At the same time,

29 L. Diamond, *Defending Liberal Democracy*, p. 1.

30 Freedom House, 'Freedom in the World 2018: Democracy in Crisis'.

31 Freedom House, 'Freedom in the World 2018: Ukraine Profile', <https://freedomhouse.org/report/freedom-world/2018/ukraine> [2018-06-05].

32 'Association Implementation Report on Ukraine. Joint Staff Working Document', *European Commission, High Representative of the Union for Foreign Affairs and Policy*, Brussels, 14.11.2017, p. 2, https://eeas.europa.eu/sites/eeas/files/association_implementation_report_on_ukraine.pdf [2018-08-31].

the European Commission pays attention to the fact that some civil society actors have denounced the increased pressure on their activity, which undermined their work and credibility.³³

However, despite the progress made by Ukraine in its reform process, the country still has major structural problems. Up to now, Ukraine suffers from the effects of oligarchic monopolies, an overregulated economy, a challenging business environment, corruption, and weak rule of law.³⁴ That is why EU leaders especially stress the need for more effective steps to combat corruption and for continued efforts to reform the judiciary and prosecution to strengthen the rule of law.³⁵

The report *Nations in Transit 2018*, issued by Freedom House, says that for the first time in the past three years the situation with freedom and democracy in Ukraine has worsened. Ukraine's Democracy Score declined from 4.61 in 2017 to 4.64 in 2018 (see Table 2). That is why Freedom House classifies Ukraine as a 'partly free' state with a 'hybrid regime', where freedom is interlaced with authoritarianism.³⁶ The report says that the window for fundamental reforms may not have closed, but it has narrowed considerably against a background of political resistance to anticorruption reforms and a series of attacks on the civil society and media. Therefore Ukraine, as well as Moldova, Georgia, Armenia³⁷, and Kyrgyzstan, is moving in a negative direction and may turn into an authoritarian state.³⁸ The Ukrainian government, in turn, justifies the restrictions in the areas of civil society and independent media by the need to counter Russia's military aggression and anti-Ukraine propaganda. Thus, after the political revolution of 2014, Ukraine did not become a fully fledged democracy or an example of successful reform.

33 Ibid., p. 4.

34 B. Jarábik and T. de Waal, 'Ukraine Reform Monitor: March 2018', *Carnegie Endowment for International Peace*, 27 March 2018, <https://carnegieendowment.org/2018/03/27/ukraine-reform-monitor-march-2018-pub-75909> [2018-08-27].

35 European Council, 'Joint statement following the 20th EU-Ukraine Summit Brussels', 9 July 2018, <https://www.consilium.europa.eu/media/36086/joint-statement-eu-ua-summit-2018.pdf> [2018-08-31].

36 Y. Yesmukhanova, 'Nations in Transit 2018: Ukraine Country Profile', *Freedom House*, <https://freedomhouse.org/report/nations-transit/2018/ukraine> [2018-06-05].

37 After the April 2018 coup, Armenia embarked on the path of democratic transformation.

38 N. Schenkan, 'Nations in Transit 2018: Confronting Illiberalism', in: *Nations in Transit 2018*, [Washington]: Freedom House, [2018], p. 4.

Table 2. Nations in Transit Ratings and Average Scores: Ukraine

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
National Democratic Governance	5.00	5.00	5.50	5.75	5.75	6.00	6.00	5.75	5.75	5.75
Electoral Process	3.50	3.50	3.50	3.75	4.00	4.00	3.50	3.50	3.50	3.50
Civil Society	2.75	2.75	2.75	2.75	2.75	2.50	2.25	2.25	2.50	2.75
Independent Media	3.50	3.50	3.75	4.00	4.00	4.25	4.00	4.00	4.00	4.25
Local Democratic Governance	5.25	5.25	5.50	5.50	5.50	5.50	5.50	5.25	5.00	4.75
Judicial Framework and Independence	5.00	5.00	5.50	6.00	6.00	6.00	6.00	6.00	5.75	5.75
Corruption	5.75	5.75	5.75	6.00	6.00	6.25	6.00	6.00	5.75	5.75
Democracy Score	4.39	4.39	4.61	4.82	4.86	4.93	4.75	4.68	4.61	4.64

The ratings are based on a scale of 1 to 7, with 1 representing the highest level of democratic progress and 7 being the lowest.
Source: Y. Yesmukhanova, op. cit.

4. The Public Administration and Judicial System

● All these processes take place against the background of the gradual strengthening of the power of President Petro Poroshenko and his inner circle. Although according to the constitution Ukraine is a parliamentary-presidential republic and, consequently, the influence of the Verkhovna Rada on the internal and foreign policy of the state should be dominant, in reality the president is more powerful in the country.³⁹ During his four years in power (since June 2014), Poroshenko has succeeded in creating a *de facto* presidential system. His financial-political group controls most Ukrainian institutions: power structures, the executive, legislative, and judicial branches of power, the CEC, and media.

³⁹ The Constitution of Ukraine was adopted in 1996 and introduced a presidential-parliamentary form of government. In 2004, the form of government was changed to parliamentary-presidential. In 2010, the decision of the Constitutional Court was applied, according to which the court, in excess of its powers, reinstated the 1996 constitution. In 2014, the constitution was renewed with the 2004 wording. It is important to emphasize that all three changes occurred in an unconstitutional way.

In accordance with the constitution, the president controls the security service, the army, diplomacy, and the Office of the Public Prosecutor. Poroshenko resorted to appointing loyal people to positions in these institutions, often regardless of their qualifications or experience. An example of this is Yuriy Lutsenko, who was appointed to the position of General Prosecutor in May 2016 despite having no background in law. Lawmakers had earlier passed a law removing the need for the nominees to hold a law degree and reducing the required legal experience, and then voted for Lutsenko's candidacy.⁴⁰ It is worth mentioning that in other premier-presidential countries, the Prosecutor General is usually appointed by parliament (Croatia), selected by other agencies (Romania) or the functions are performed by the Minister of Justice (Austria).⁴¹

It is not unusual when laws in Ukraine are signed that contradict constitutional norms, and in particular restrict the constitutional rights of citizens. Among these cases are amendments to the law 'On Elections of People's Deputies' (from 17 November 2011), which were passed on 16 February 2016. New provisions of the law allowed party leaders to change voting lists by eliminating deputy candidates from these lists after elections have been held. On 21 December 2017, the Constitutional Court of Ukraine declared these amendments unconstitutional, owing to the fact that they contradict electoral rights established by the constitution, in particular articles 5, 8, 15, 38, 71, 79-81, 84.⁴²

The judicial system in Ukraine cannot be considered an independent branch of government, largely due to the highly volatile political

40 P. Polityuk, 'Ukraine appoints Poroshenko ally with no legal experience as top prosecutor', *REUTERS*, 12 May 2016, <https://www.reuters.com/article/us-ukraine-parliament-prosecutor/ukraine-appoints-poroshenko-ally-with-no-legal-experience-as-top-prosecutor-idUSKCN0Y311A> [2018-08-28].

41 R. Averchuk, 'Presidential Power in Ukraine: A Comparative Analysis', *VoxUkraine*, 8 July 2016, <https://voxukraine.org/en/presidential-power-in-ukraine-comparative-perspective-en/> [2018-06-13].

42 Конституційний Суд України [Constitutional Court of Ukraine], Рішення Конституційного Суду України від 21 грудня 2017 року № 3-п/2017 [Decision of the Constitutional Court of Ukraine from December 21, 2017 No. 3-p/2017], http://ccu.gov.ua/sites/default/files/docs/3-p_2017_o.pdf [2018-08-28].

situation and the lack of a tradition of the rule of law.⁴³ First attempts to lustrate corrupt judges, carried out shortly after the revolution, have failed. Moreover, the appointment of new judges resulted in the judiciary becoming even more loyal to the ruling financial-political groups, which protected it from civil-society pressure.⁴⁴ According to a Gallup opinion poll, by the end of 2013, the level of trust in the Ukrainian judicial system was one of the lowest in the world, amounting to 16 percent.⁴⁵ In 2016, this index fell to 11%. This is the lowest figure for the entire period of Ukraine's independence and indicates that Ukrainians do not trust the implemented reforms.⁴⁶

The implementation of the judicial reform, initiated by the president, started in June 2016. It included the introduction of a series of amendments to the constitution, new laws 'On the Judiciary and the Status of Judges' and 'On the High Council of Justice'. It should be noted that over the past eight years one could observe a notable trend: both presidents Viktor Yanukovych (2010-2014) and Petro Poroshenko immediately after being elected reformed the courts. Thus, in 2010 and 2016, a law called 'On the Judiciary and the Status of Judges' were adopted.

The main provisions of the judicial reform passed in 2016:

1. A three-level judicial system, which operated until 2010: local courts, courts of appeal, and the Supreme Court of Ukraine; to investigate some categories of cases, the law provides higher specialised courts (see Table 3).
2. The new High Council of Justice consisting of 21 members was established. It appoints all judges in Ukraine on a competitive basis. Thus, the competence to appoint and to remove judges was trans-

43 Jarábik and Waal, op. cit.; *Bertelsmann Stiftung, BTI 2018 Country Report – Ukraine*, Gütersloh: Bertelsmann Stiftung, 2018, p. 11.

44 M. Minakov, 'Reconstructing the power vertical: the authoritarian threat in Ukraine', *oDR: Russia and Beyond*, 29 June 2017, <https://www.opendemocracy.net/od-russia/mikhail-minakov/reconstructing-power-vertical-authoritarian-threat-in-ukraine> [2018-08-30].

45 S. Rochelle and J. Loschky, 'Confidence in Judicial Systems Varies Worldwide', *Gallup*, 22 October 2014, <https://news.gallup.com/poll/178757/confidence-judicial-systems-varies-worldwide.aspx> [2018-08-30].

46 ГО "Публічний аудит" [Public Organisation "Public auditing"], 'Реформа судової системи в Україні від Президента' [The reform of the judicial system in Ukraine from the President], *Публічний аудит* [Public auditing], <http://publicaudit.com.ua/reports-on-audit/reforma-sudovoyi-systemy-v-ukrayini-vid-prezydenta/> [2018-06-13].

ferred from the Verkhovna Rada to the High Council of Justice. At the moment, 10 members of the High Council are elected by the Congress of Judges of Ukraine (which are *de facto* appointed by the president) while the remaining 10 are nominated by the president, the Verkhovna Rada, the Congress of Advocates, the Conference of Prosecutors, the Congress of Representatives of Higher Education and Research Institutions in the Field of Law (each of them have two appointees); the president of the Supreme Court of Ukraine is an *ex officio* member of the High Council of Justice. Consequently, the president has 12 representatives on the High Council of Justice while parliament has only two.

3. Regrading all judges: a candidate must be a citizen of Ukraine who is at least 30 years old and not older than 65, has command of the state language, a degree in law, and a record of at least five years of professional work in the field of law (for the Supreme Court—10 years).
4. All judges are obliged to submit two income declarations (their own and family members').
5. A judge may not be detained or arrested without the consent of the High Council of Justice (formerly, this function was carried out by the Verkhovna Rada).⁴⁷

More than 1,200 judges appointed prior to the constitutional amendments have decided to resign and parliament approved almost 1,000 of these resignations in September 2016.⁴⁸ Theoretically, the reform of the judiciary could make Ukrainian courts more independent and capable of guaranteeing a fair legal trial. However, during the transitional phase, which will last through 2019, it has resulted in greater dependence of the judiciary on the president, who oversees the rotation of judges, appointment of members of the judiciary self-governance bodies, and creation of a new Supreme Court.⁴⁹ Conse-

⁴⁷ Ibid.; see also: 'On the Judiciary and Status of Judges' Law of Ukraine no. 1402-VIII from 2.06.2016, High Qualification Commission of Judges of Ukraine, https://vkksu.gov.ua/userfiles/doc/Law_on_Judiciary_and_Status_of_Judges_16%2007%202016_ENG.pdf [2018-06-19].

⁴⁸ C. Giardullo, 'Four Years After: The "Long March" of Justice-Sector Reforms in Ukraine', *IAI Papers*, no. 1 (January), 2018, p. 10.

⁴⁹ B. Jarábik and M. Minakov, 'The Consolidation of Power in Ukraine: What It Means for the West', *Carnegie Endowment for International Peace*, 19 September 2016, <http://carnegieendowment.org/2016/09/19/consolidation-of-power-in-ukraine-what-it-means-for-west-pub-64623> [2018-08-30].

Table 3. Judicial System of Ukraine

2010	2016-2017
The court system is comprised of:	
1. Local courts;	1. Local courts;
2. Courts of appeal;	2. Courts of appeal;
3. Higher specialised courts;	3. Supreme Court of Ukraine.
4. Supreme Court of Ukraine.	Higher specialised courts operate to investigate certain categories of cases.
Appointment of judges	
President and Parliament	President
Control over judges	
High Council of Justice	High Council of Justice
Consent to arrest	
Parliament	High Council of Justice

Source: ГО 'Публічний аудит' [PO 'Public auditing'], op. cit.

quently, despite the continued implementation of justice reforms, the perceived level of judicial independence in the country remains very low. According to the WEF *Global Competitive Report 2017-2018*, Ukraine is 129th among 137 countries in terms of the level of judicial independence.⁵⁰

5. The Central Election Commission of Ukraine

The CEC is another important institution in Ukraine. Its current composition was approved in 2007 and the vast majority of its members were subject to rotation in 2013 and 2014. However, the Verkhovna Rada changed the law on the CEC to properly hold presidential and parliamentary elections in 2014. These changes included a provision that the commission of a CEC member would be terminated not after the end of the seven-year term but after the appointment of the new CEC. Later on, the ruling circles began to use the CEC to avoid early elections. As a result, the authority of 13 of the 15 members of

⁵⁰ K. Schwab (ed.), *The Global Competitiveness Report 2017-2018*, [Geneva]: World Economic Forum, [2017], p. 297.

the CEC is formally terminated.⁵¹ It is worth mentioning that seven members were elected on a quota that included the Party of Regions and the Communist and Socialist parties, which are no longer in the politics of the country.⁵²

The president has already several times submitted lists of new nominees to the Verkhovna Rada, but until now there has been no vote. Foreign institutions have repeatedly drawn attention to this, noting that delays in this matter demonstrate a lack of will to carry out reforms in the field of governance. The main reason for the criticism is the political imbalance in the composition of the candidates.⁵³ The Parliamentary Assembly of the Council of Europe stressed in January 2018 that the composition of Ukraine's CEC should be balanced 'by proportional representation of all parliamentary political factions'.⁵⁴

On 5 July 2018, the Verkhovna Rada failed to renew the CEC. There were no candidates from the Opposition Bloc faction⁵⁵ in the president's list, which included 14 nominees for 13 vacancies. Moreover, the ruling coalition could, at the end, hold up to 10 seats in the CEC.⁵⁶ Thus, the issue of renewal of the CEC still remains unresolved, although the next presidential elections will take place quite soon, on 31 March 2019. Most likely, the Verkhovna Rada will return to this issue in autumn 2018.

51 Jarábik and Minakov, *op. cit.*; М. Мінаков [M. Minakov], 'Між владною вертикаллю та ліберальною демократією. Перспективи розвитку політичного режиму в Україні' [Between power vertical and liberal democracy. The prospects for the development of the political regime in Ukraine], *Агора* [Agora], no. 19-20, 2017, p. 12.

52 Еспресо [Espresso.TV], 'Рада не розглянула призначення нового складу ЦВК' [The Rada did not consider the appointment of the new CEC], 19 April 2018, https://espresso.tv/news/2018/04/19/rada_ne_rozglyanula_pryznachennya_novogo_skladu_cvk [2018-06-11].

53 І. Фаріон [I. Farion], '«Підвішений» Центрвиборчком' [The 'suspended' Central Election Commission], *Високий замок* [High castle], 21 May 2018, <https://wz.lviv.ua/article/371374-opoblok-khoche-bachyty-u-tsvk-fihuranta-chornoi-bukhhalterii-partii-rehioniv> [2018-06-11].

54 Parliamentary Assembly. Council of Europe, 'Resolution 2203 (2018). The progress of the Assembly's monitoring procedure (January-December 2017) and the periodic review of the honouring of obligations by Estonia, Greece, Hungary and Ireland', <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24493&lang=en> [2018-08-30].

55 Opposition Bloc is the successor of the disbanded Party of Regions. Currently, it constitutes the third-biggest faction in the Ukrainian parliament.

56 S. Halling, 'EPDE Policy Alert – Electoral Reform in Ukraine #7', *European Platform for Democratic Elections*, 23 July 2018, <https://www.epde.org/en/news/details/epde-policy-alert-electoral-reform-in-ukraine-7.html> [2018-08-30].

6. Mass Media and Internet

The president's ruling group is also expanding its control over media. Pluralism of media was undoubtedly an important asset of Euromaidan. But since the second half of 2016, one could observe a significant increase in the ruling elites' pressure on media. Ukraine witnessed a series of attacks in 2016 on leading news TV channels, in particular on the Inter channel (widely perceived to be pro-Russia), the 'Vesti' Media Holding, and Hromadske.TV. In general, almost all large TV channels that the more or less tried to criticize the authorities were subjected to pressure in some form, in particular outlets 112, NewsOne, ZIK, and Страна.UA.⁵⁷

The Institute of Mass Media counted 29 registered physical attacks on journalists and 89 cases of interference in journalistic activities in 2017.⁵⁸ However, despite the international pressure, the government still did not make the necessary efforts to investigate the attacks on journalists and media and did not bring the perpetrators to justice. The 2016 high-profile killing of renowned Belarusian liberal journalist Pavel Sheremet remains unsolved, 'raising serious questions about the efficiency and transparency of law enforcement institutions.'⁵⁹ The 2016 attacks on the offices of the Inter channel also have not been fully investigated.⁶⁰

In this context, it is important to mention here the 'murder' and subsequent re-appearance of Russian journalist Arkadiy Babchenko in May 2018. The day after the announced murder, it turned out that it was all a sting operation by Ukraine's Security Service (SBU) to foil a Russian assassination plot. Although Poroshenko praised the 'brilliant operation', many expressed reservation about the tactics used by the SBU. The group Reporters Without Borders condemned the

57 Мінаков [Minakov], op. cit., p. 12; К. Задирака [K. Zadiraka], 'Концентрація влади та згортання демократії: чи готові ми до єдиної України?' [Concentration of power and curtailment of democracy: are we ready for the united Ukraine?], *Commons*, 7 September 2017, <https://commons.com.ua/en/koncentraciya-vladi/> [2018-06-25].

58 М. Поживанов [M. Pozhyvanov], 'Порошенко стає Януковичем: доведено Freedom House' [Poroshenko becomes Yanukovich: proved by Freedom House], *Facenews*, 16 April 2018, <https://www.facenews.ua/columns/2018/320439/> [2018-06-25].

59 Association Implementation Report on Ukraine, p. 4.

60 Human Rights Watch, 'Ukraine. Events of 2017', <https://www.hrw.org/world-report/2018/country-chapters/ukraine> [2018-06-20].

operation as a 'pathetic stunt'.⁶¹ Harlem Désir, the OSCE representative on Freedom of the Media, deplored spreading fake information in Ukraine and stated that the state should provide reliable information.⁶² The supposed 'murder' actually disrupted the Ukrainian information field and undermined the credibility of officials and media, both in the country and abroad.

In addition to media control, one could also observe attempts to limit the population's access to social networks. On 15 May 2017, Poroshenko signed a decree banning major Russian companies and their websites from operating in Ukraine, citing national security. The ban targeted the popular Russian social networks VKontakte, Odnoklassniki and language and accounting software, the websites of many Russian television stations and other media, as well as the search engine Yandex and its many affiliates.⁶³ In total, 14.4 million Ukrainians used VKontakte and Odnoklassniki regularly, and more than a third of on-line searches in the country were conducted through Yandex.⁶⁴

Freedom House Ukraine Project Director Matthew Schaaf said: 'Freedom House and other organisations are concerned about the tendency of the Ukrainian government to block information and block access to resources, to websites and so on, because we think that it will make it more difficult for people to access information, news, (and) to express themselves'.⁶⁵ Schaaf also expressed concerns about how the decision to block certain resources was made, stressing that in a democratic society it is usually made through a court.⁶⁶ Council of Europe Secretary General Thorbjørn Jagland also voiced his concern about the decree to block several major online services and social

61 BBC, 'Arkady Babchenko: Ukraine faked murder of journalist', *News*, 30 May 2018, <https://www.bbc.com/news/world-europe-44307611> [2018-06-25].

62 112.UA, 'OSCE condemns spreading fake information in Ukraine', 30 May 2018, <https://112.international/ukraine-top-news/osce-condemns-spreading-fake-information-in-ukraine-28941.html> [2018-06-20].

63 Human Rights Watch, op. cit.

64 D. Koval, 'Forbidden Likes and Shares – Poroshenko's Ban of Russian Social Networks', *Democracy Reporting International*, 17 August 2017, <https://democracy-reporting.org/forbidden-likes-and-shares-poroshenkos-ban-of-russian-social-networks/> [2018-08-29]; Yesmukhanova, op. cit.

65 Cit. in: Hromadske international, 'Blocking Sites Limits Freedom of Expression in Ukraine – Freedom House', *Politics*, 16 May 2017, <https://en.hromadske.ua/posts/blocking-websites-could-limit-access-to-information-in-ukraine-freedom-house> [2018-06-20].

66 Ibid.

networks on the territory of Ukraine, stressing that this 'goes against our common understanding of freedom of expression and freedom of the media. Moreover, such blanket bans are out of line with the principle of proportionality'.⁶⁷

Conclusion

In recent years, one could observe democratic recession in Europe and North America. Many countries that have seen a consolidation of their democratic systems are now sliding further from democracy and more towards authoritarianism. Terrorist attacks, refugee flows, improper handling of minorities, and economic hardships have also weakened more stable European democracies.

The case of Ukraine shows that hybrid regimes are rather settled, even after revolutions. One could hardly disagree with the opinion of Ukrainian political scientist Yuriy Matsievskiy, who stated that hybridisation, rather than democratisation or resurgence of authoritarianism, is the defining trend of post-revolutionary dynamics in Ukraine. By hybridisation, he means the reproduction and preservation of the subversive influence of informal institutions (such as clientelism, nepotism, corruption) on formal institutions (constitution, laws, legislative acts).⁶⁸ It is obvious that the president of Ukraine gravitates towards autocratic tendencies. Therefore, instead of democratic progress, strengthening of the rule of law and civil society, we observe the rapid concentration of power in the hands of the president and his inner circle. They have great control over the law-enforcement agencies, the legislative, executive, and judicial powers, the CEC and media.

In some ways, the consolidation of power in Ukraine is beneficial for the West. Consolidated power simplifies communication, increases the chances of paying off the state's numerous debts and at the same time keeps the country from plunging into chaos. However, such an autocratic model solves only short-term goals and in the long-term

67 Council of Europe, 'Ukraine: Secretary General Jagland voices concern over blocking social networks and websites', *News*, 17 May 2017, <https://www.coe.int/en/web/secretary-general/-/secretary-general-voices-concern-over-blocking-social-networks-websites-in-ukraine> [2018-08-29].

68 Ю. В. Мациевский [Y. V. Matsievskiy], 'В ловушке гибридности: политический режим в Украине после революции 2014 года', *Polis. Political Studies*, no. 1, 2018, pp. 96-115.

is detrimental to Ukraine because it hampers reform and qualitative transformation, and accordingly, preserves the present condition of the state.

One of the reasons for this situation is the insufficiently mature civil society, which does not have considerable influence on the control of the actions of the legislative, executive, and judicial branches of state power. However, the quality of democracy depends on how the authorities interact with the public. Ukrainian society so far lacks an adequate perception of democratic institutions, and that allows the authorities to consolidate power. Therefore, the only way to continue successful reforms is to strengthen the rule of law and develop the civil society sector in Ukraine. The development of these spheres could subsequently create the basis for building an efficient liberal-democratic state.

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