

Article

The Diversity of Actors in Reform Backsliding and Its Containment in the Ukrainian Hybrid Regime

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Abstract

Numerous studies on democratic backsliding mostly focus on the state executive as a driving force. In contrast, the analysis presented here highlights the role of vested interests as the main actors behind backsliding processes in hybrid regimes. In a focused case study of anti-corruption reforms in Ukraine, this contribution analyses the initiation of backsliding by these actors through their influence on nominally independent branches of power as well as the subtle takeover of the legislative repair process that followed. The case study is based on original semi-structured expert interviews and document analysis. The main argument is that the distinct role played by the state executive also substantially changes the interaction between the actors involved. For the case of Ukraine, the study shows that the leverage of Western organisations in conjunction with the expertise and swift reaction of Ukrainian civil society organisations constitute a necessary precondition for the containment of backsliding attempts.

Keywords

backsliding; civil society; democracy promotion; European Union; hybrid regimes; International Monetary Fund; Ukraine; vested interests; Western donors

Issue

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1. Introduction

Much of the scholarship on backsliding—defined here as a relative power expansion of systemic insiders vis-à-vis outsiders through the violation of democratic principles—sees the executive branch, or sometimes more generally the incumbent or simply ruler, as the leading force behind this process (Cassani & Tomini, 2020; Dresden & Howard, 2016; Haggard & Kaufman, 2021; Hale, 2015).

However, this exclusive angle runs the risk of omitting backsliding attempts initiated by and for the sake of vested interests (VIs) outside the formal political arena. Recent publications have highlighted the relative neglect of this angle in the backsliding literature despite its theoretical relevance (Jee et al., 2022). And although missing yet a generally accepted and applicable theory, note-

worthy studies on backsliding consider “that a coalitional approach is worth taking very seriously, perhaps centrally” (Waldner & Lust, 2018, p. 108). VIs are “people and groups [that]...receive...material benefits...[which] are being directly provided to them by the institution [they have a VI in]” (Moe, 2015, p. 289). They are crucial for understanding the dynamics of hybrid regimes, particularly those characterised by “state capture” (Hellman et al., 2003). In such a polity, policymaking is significantly shaped by “individuals [that] spend resources trying to influence the state to create the rents they want” (Khan, 2000, p. 74).

Ukraine is usually seen as a good example of a state capture case (Balmaceda, 2007). There, VIs continue to block a transition towards a fully democratic regime, whilst their role in the dynamics of hybrid regimes remains more ambiguous as they have reportedly

switched political camps, hence coalitions, depending on their expected benefits (Hale, 2005; Pleines, 2019; Way, 2021). Despite this, the scholarship on Ukraine focused predominantly on democratisation processes, through which it investigated the failure to progress towards a fully democratic state (Králiková, 2022), or explained specific cases where reforms have succeeded on a smaller scale (Nizhnikau, 2020). The literature on backsliding focused on monocausal explanations, such as the influence and quality of civil society alone (Knott, 2018). However, a strand has emerged in the scholarship that sees the interplay between international and domestic actors promoting democratic transformation as crucial in explaining outcomes (Nitsova et al., 2018; Samokhvalov & Strelkov, 2021). Yet, whilst providing a multicausal approach, these studies currently focus on the democratisation drive alone.

Accounting for these shortcomings, this article empirically investigates a major anti-corruption backsliding attempt in Ukraine from the perspective of VI groups. It does so from the understanding that “today’s trends in backsliding are rational reactions to international incentives as well as domestic history” (Bermeo, 2016, p. 15). It, therefore, seeks to explain the actors, the timing, and the instruments of backsliding initiation by Ukrainian VIs, the subtle capture attempt by nominally reformist forces during the repair process, as well as the containment by networks of democracy promotion. This article not only contributes to the literature on Ukraine but to the broader academic discourse on backsliding, highlighting the thus far relatively neglected role of diverse VIs outside of the formal political arena and flexible coalitions as crucial factors in this process.

To proceed with the argument, this study elaborates on the domestic and international characteristics of the Ukrainian case. The role of VIs, the collusion of politics and economics, and networks of democracy promotion in hybrid regimes in general and Ukraine specifically will be presented with a special reference to the existing (backsliding) literature and its gaps. Subsequently, the methodological and case selection approach will be explained. Section 4 presents the empirical assessment of the case. In the end, the results are summarised and connected to the broader academic discourse.

2. Theoretical Framework

2.1. *The Case of Ukraine: A Plurality of Vested Interests as Actors of Democratic Erosion*

VIs are an integral part of political processes in all polities (Moe, 2015). From an analytical perspective, these actors have been described as “key forces for stability” (Moe, 2015, p. 279) due to their resistance to policy changes threatening their benefits. One such fundamental change would be a democratic transformation of a hybrid regime, hence opening and levelling the institutional playing field in the political economy. In the event

of a push towards democratisation, different VI groups might join forces, hence establishing coalitions of different sorts, to preserve the system “on the basis of the common plundering of their own state” (Balmaceda, 2007, p. 141).

Ukraine is characterised by a nominal democratisation path, as visible by the signature of the Association Agreement (Wolczuk, 2018), and a factually strong presence of various VI groups. These VIs are grouped around different, relatively fluid political economy coalitions that are a central feature of the system (Way, 2021). The continuous influence of these groups is usually put forward to explain the failure to achieve a democratisation breakthrough (European Court of Auditors, 2021). In the Ukrainian context, these VIs are known as “oligarchs,” individuals holding both substantial economic and political power. The collusion of economics and politics is a general feature of non-democratic regimes (Kupatadze, 2015), but in the case of state capture, it is the former yielding more control over the latter than the other way around. Through it, the stability of an incumbent depends on the support of such a group or groups (Baez-Camargo & Ledeneva, 2017).

The system in Ukraine can be described as “neopatrimonialism” (Nizhnikau, 2020). It is a result of both Soviet legacies, most notably “patrimonial communism,” as well as deliberate choices by politicians during the post-Soviet transformation period (Hale, 2005, p. 149). In Soviet times, this system was characterised by “low levels of bureaucratic professionalism...high levels of corruption and nepotism, few opportunities for contestation, little to no economic freedom, high degree of restrictiveness and isolationism, and no access to the West” (Dimitrova-Grajzl & Simon, 2010, p. 210). Although the system nominally changed, it was still argued that “the whole class of political elites, though plural and competitive, are profoundly cut off from the citizenry...[and] corrupt, self-interested, and ineffective” (Carothers, 2002, p. 10). An important feature of VI groups and coalitions in the Ukrainian system, which contrasts with countries like Russia and the Soviet period, is “pluralism by default” (Way, 2021). It is rooted in the regional divisions of the country. Through it, different VI groups could appeal to their respective constituencies, but rarely to the constituencies of their rivals, through which they possessed a secured power base that led to a relative balance of powers (Nasuti, 2016).

Taking regional divisions and post-Soviet legacies together, the transformation path has brought about a system in which a high degree of competition among interest groups is complemented by a relatively closed system and a weak executive (Balmaceda, 2013). This competition also takes place in the formal playing field, as parliamentary loyalties in Ukraine are usually divided into different informal loyalties to oligarchs (European Court of Auditors, 2021). As such, parties have been described as “loose affiliations...which are subject to change when the interests of the oligarch leading it

change” (Cleary, 2016, p. 12), whilst elections are characterised as a “part of a broader game” (Balmaceda, 2013, p. 11). This “game” is amplified by media control (“media capture”) that most of these oligarchs possess, skewing the electoral playing field further (Knott, 2018).

However, just as VIs create (temporary) coalitions to prevent a throughout democratisation in a state capture regime, they also prevent the monopolisation of power of a winning side. This setting is largely attributed to the relative balance caused by regional divisions (Way, 2021) and is seen as a “panacea against autocratic backsliding” (Pikulik, 2019, p. 493). It contributes to Ukraine’s continuity as a hybrid regime, although with changing degrees of openness, which can be framed as *regime dynamics* (Hale, 2015, p. 486). Backsliding stands in this respect for negative changes within the *existing framework of a hybrid regime*, that is, the regression of previous democratisation progress.

Therefore, contrary to theorisations of autocratic backsliding that are a sign of a relative strengthening of the executive (Dresden & Howard, 2016; Hale, 2015), reform backsliding in state capture regimes can be initiated by VIs in times of a weakening state executive. This is in alignment with the general insight that “backsliding reflects incentive structures” (Bermeo, 2016, p. 17). In the Ukrainian case, for instance, political crises between temporarily aligned actors of nominally reformist forces have been used by agents hostile to reforms. This was the case under the reform-oriented President Yushchenko, who had to align with the pro-Russian Yanukovich and appoint him as prime minister in 2006 due to a deteriorating coalition with the grouping of Tymoshenko, an oligarch herself. In supporting the President, the latter in turn managed to halt reforms as well as stop corruption investigations on the oligarch Renat Akhmetov, a close ally of Yanukovich (Nasuti, 2016).

2.2. The Interplay Between Western Donors and Local Civil Society Organisations as a Counterweight

The previous case also showcases the flexibility among VIs regarding coalitions and their fluidity. Another example is Petro Poroshenko, oligarch turned politician, who served, among others, as minister of economy under Yanukovich in 2012, when Ukraine experienced arguably the most severe case of backsliding in its post-Soviet history (Kudelia, 2014). Despite this, he became the face of the imminent post-Yanukovich time as the country’s first elected president after Euromaidan. He was responsible for Ukraine’s remarkable, although limited, short-term democratisation push. This can be explained by the outstanding importance of domestic and international constraints imposed on the ruling class in hybrid regimes (Dresden & Howard, 2016).

External pressure is described as a central constraint in the literature (Hale, 2015). In the Ukrainian context, the signature of the Association Agreement, the corresponding import of an entire legislative framework, and

the associated conditionalities are key examples of the interplay between pressure and incentives exercised by external actors. However, the influence that third parties may exercise in promoting democratisation, or preventing backsliding, is hereby conditional on economic and/or financial constraints that the government faces (Andrews, 2013). That is because the decision to implement conditional reforms or not underlies a cost-benefit analysis. This explains why the track record of reforms in Ukraine was particularly strong in the direct aftermath of the Euromaidan, as war and potential financial collapse threatened the state and increased its reliance on Western funds (Bertelsmann Stiftung, 2022). In addition, it has been argued that the influence of one actor can additionally be constrained by the presence of another actor that serves as a counterweight, putting forward what is known as “rival conditionality” (Ademmer, 2016). Such an actor, like Russia in the Ukrainian case, who focuses much more on geopolitical demands than good governance conditionality, served for a long time as an alternative pole for (financial) support for some of the VI groups. This highlights the important role of Ukraine in the geopolitical contestation between the EU/West and Russia.

This also explains differences among VI groups. Some of them, particularly those in the executive, might be dependent on Western aid to keep the country financially afloat, public grievances at bay, and thus their formal position secure. From this perspective, they are then forced to initiate, at least formally, democratisation reforms. However, there are continuous attempts to undermine these reforms either in the process or ex-post as they hit the very benefits of VI groups, particularly when they concern far-reaching anti-corruption measures.

This leads to a crucial limitation of foreign, Western actors in preventing backsliding in hybrid regimes: the ambiguity of many decisions and their interactions with aspects such as sovereignty, particularly those carried out by VI-controlled state institutions, like courts (Bermeo, 2016). In conjunction with quick and subtle decision-making processes, this increases the importance of civil society actors. Civil society bears the potential to limit backsliding tendencies by providing information, advocacy, and mobilisation of the masses (Palyvoda et al., 2018). They complement international donors as they understand the local context and possess the necessary in-depth information on developments to which they can react quickly. Yet, civil society in Ukraine “has generally been classed as apathetic, weak, and ineffectual [through which it] tend[s] to be reactive to issues and events” (Cleary, 2016, p. 7). In particular, Ukrainian civil society organisations (CSOs) “weaknesses include organisation of activities aimed at influencing political decisions and support of the public interest in a specific issue” (Palyvoda et al., 2018, p. 11). The corresponding “low degrees of civil society organisation” (Harasymiw, 2019, p. 289) and distance from society (Lutsevych, 2016) are also said to be consequences of Soviet legacies. This

way, civil society in Ukraine has not been considered in the academic literature as a factor bringing about far-fledged democratisation (Worschech, 2017).

Nevertheless, its reactivity is a crucial mechanism to signal backsliding attempts and possibly prevent them when working in conjunction with Western actors. As a result, a new strand has emerged that departs from monocausal explanations and focuses on the impact that the interaction between international partners and civil society in fostering or defending change has. It proposes a model where CSOs are responsible for the elaboration and monitoring of reforms and international organisations for the crucial leverage to push for them (Nitsova et al., 2018). It can therefore be expected that in cases where CSOs alarm Western donors of backsliding attempts and rigorously track the repair process, those partners *can* use their leverage to skew the incentive structure of key policymakers towards backsliding aversion. When working alone, either the political leverage (situation of CSO activity without Western leverage) or the reactivity to subtle capture attempts by possessing local knowledge would be missing (situation of Western leverage without CSO activity).

3. Methodology

The foregone analysis has highlighted the importance of VIs as central actors in the backsliding process. Also, the interplay of Western donors and CSOs as constraining factors became visible. This study takes a neglected yet important look at a backsliding attempt from the VI perspective to explain the causal mechanisms for backsliding in state capture regimes and therefore contribute to the ongoing debate.

3.1. Case Selection

The case selected for this study is based on the iMore index, compiled by VOX Ukraine, which tracks and scores

all legislative and judicial decisions in Ukraine on a 5 (*best*) to -5 (*worst*) scale. It, therefore, gives a comprehensive in-depth overview of the political dynamics in the country regardless of the formal branch of power involved. This is important to omit the executive bias and consider other captured branches of power. Hence, this approach to case selection reduces the risk of selection bias. Figure 1 shows all 442 assessed acts in Ukraine since the inauguration of President Zelensky until the Russian invasion.

The selected case, marked in red, refers to Decision 13-r/2020 of the Constitutional Court of Ukraine (CCU) from October 27, 2020. There, crucial provisions of Ukraine’s Law 1700-VII on the Prevention of Corruption were deemed unconstitutional as they supposedly infringed “judicial independence” (CCU, 2020c, p. 3). In particular, the transparency of the asset declaration system and liability for false declarations were hit by the ruling. In effect, obliged people could publish false declarations without the threat of sanctions, which was seen as a severe hit on the anti-corruption infrastructure in Ukraine.

3.2. Analytical and Data Collection Approach

Given the magnitude of this decision and the multiple actors involved, this study sought to explain both the timing and instruments of backsliding efforts applied by different VI groups as well as the relatively successful fight-back by democratic players. Hereby, and in contrast to other studies, a two-level assessment of VIs was made to distinguish the methods and context between those VIs that are out of reach of Western leverage and those where this pressure is an inherent feature, all with the overarching goal of formulating and proving causal mechanisms in the proposed framework.

It relied on official documents issued by respective actors, secondary sources such as analyses of the civil society sector, and in-depth, semi-structured interviews.

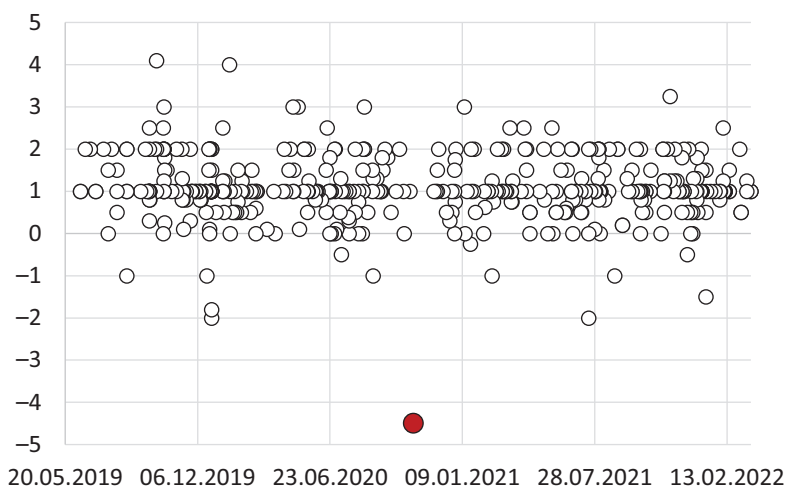


Figure 1. iMore ratings from the beginning of V. Zelensky’s term. Note: Each dot represents one assessed normative act. Source: Author’s work based on (VOX Ukraine, n.d.).

These interviews were conducted with 12 representatives of the civil society sector in Ukraine, current and former Western policy advisors in Kyiv and Brussels, as well as representatives close to the government. The data collection started from November 2021 onwards and was interrupted by the Russian invasion of Ukraine. All interviews were conducted in English through online communication platforms with the previous explicit consent of the respective interviewees. The explicit consent also applies to the de-anonymisation of presented data, such as quotes, which were otherwise anonymised. The collected material, of which each interview lasted between 45 to 90 minutes, was transcribed and analysed in MAXQDA. There, inductive and deductive coding patterns were applied that differentiated between the strategies and approaches of VIs to conduct backsliding and the dynamics between as well as reactions of CSOs and Western partners. These dynamics were considered in both, the overall context of Ukraine and for this case study to get an inside view of the background processes of that time.

4. Analytical Part

4.1. First Backsliding Attempt: The Entire Dismantling of Institutions Led by Anti-Western Actors

The prelude to Decision 13-r/2020 were Rulings Nos. 9-r/2020 and 11-r/2020 from August 28 and September 16 respectively (CCU, 2020a, 2020b). In both, the CCU ruled that certain provisions of the establishment of the National Anticorruption Bureau (NABU) were unconstitutional. On the ground of the “independence of the law enforcement body,” the appointment procedure was to be transferred away from the president to the government and parliament-controlled cabinet of ministers (CoM; CCU, 2020b, p. 1). Through all three decisions together, the central pillars of the anti-corruption infrastructure were effectively ruled unconstitutional and basically all, albeit modest, anti-corruption progress was eliminated (Venice Commission, 2020). That is because the National Agency on Corruption Prevention (NACP) relied on the asset-declaration system and NABU, the investigative body, was in turn dependent on the workings of the NACP. The establishment of all its pieces, NABU, NACP, and the asset declaration system, as well as their subsequent independence, were key demands of Western partners, like the EU and the International Monetary Fund (IMF), and usually referred to as the biggest reform success stories (IMF, 2021d, p. 81).

4.1.1. Actors, Instruments, and Goals

Dissenting voices in the CCU saw the rulings explicitly as a way to increase the exposure of NABU to VIs present in the legislative branch (Verkhovna Rada of Ukraine, 2020). Together with the increased formal protection from the asset declaration system, it meant the cap-

ture of anti-corruption institutions by VIs. Unsurprisingly, they happened following official appeals by 47–51 parliamentarians (CCU, 2020a, 2020b, 2020c) for each ruling from the Verkhovna Rada of Ukraine, of whom almost all belonged to the pro-Russian party Opposition Platform—For Life. It is heavily influenced by Viktor Medvedchuk, an oligarch with close ties to the Kremlin (Vorobiov, 2020). Besides targeting institutions that were potentially dangerous for VIs, these actions were also linked to raising attention on the side of Western policy advisers. In this way, they hoped to diminish Kyiv’s relations with the West, as they would put in question further tranches of the \$5 billion standing agreement that Ukraine signed in June 2020 with the IMF and associated aid from the EU on which the country relied (Bertelsmann Stiftung, 2022).

Moreover, Russian links and own interests were also visible in the CCU itself. Three of the ruling judges, including its head, who bought real estate in occupied Crimea in 2018 and who was appointed by Yanukovich, Oleksandr Tupytskyi, were notified of the incompleteness of their asset declarations before making the ruling, which was seen as a general conflict of interests on this case (Venice Commission, 2020). Simultaneously, there were even unofficial price tags for judges’ votes during the decision-making process in this case (anonymous interview with Western policy advisor). One policy advisor noted the effect of this ruling and the role of the CCU:

It is basically back to zero...The constitutional court is a very powerful instrument that VIs have in their hands as the constitutional court is obviously not independent...How the decision was taken is a clear indicator that this court acts upon order and not based on rule of law and that’s also one of the reasons why this reform backsliding happened. (Anonymous interview with Western policy advisor, November 2021)

This shows how VIs used their informal influence channels to formally dismantle much of the institutional infrastructure that could endanger them, including the top judges of the court itself. Moreover, this case demonstrates how this influence might come from outside of government-controlled groups, hence another piece of evidence against executive bias.

4.1.2. Timing of the Attack

In a December poll, the CCU ruling was seen by Ukrainians as the third most important political event of 2020, right after the local elections and Covid-19 (Razumkov Center, 2020), hence those issues will have given the context and timing for the attack. These rulings were issued when domestic and international attention was directed towards the second wave of Covid-19. Moreover, just two days before Ruling 13-r/2020, local elections in Ukraine took place, which brought massive losses to the president’s Sluga Naroda (SN) party

(Bertelsmann Stiftung, 2022). It happened at a time when Zelensky's public support was decreasing and the parliamentary fraction highly fragmented: For example, already in March 2020, SN failed to gather a majority in 70% of parliamentary votes and a major cabinet reshuffle took place (Bertelsmann Stiftung, 2022). This is not least due to increased conflicts within the ruling party, divided along the lines of different VI groups (Wilson, 2021). Hence, these are clear indicators of an increasingly pressured executive and fragmented legislative branch.

4.1.3. Reaction by Networks of Democracy Promotion

The ruling generated significant salience, and, in its direct aftermath, the EU and the G7 Ambassador Group all published special statements, raising alarm on this issue, and calling for a resolution (European External Action Service, 2020c). The EU publicly linked further financial aid to the reversal of the setback of this decision and saw it as potentially justifying a temporary suspension of the visa-free regime (European External Action Service, 2020c). Simultaneously, protests erupted in Kyiv against the ruling and more than 50 influential CSOs called all involved CCU judges to resign (Transparency International Ukraine, 2020a). Moreover, the Venice Commission became active, issuing an extensive analysis questioning the CCU decision from a legal perspective (Venice Commission, 2020).

It is important to note that this backsliding attempt was conducted by pro-Russian actors. These representatives are generally out of reach of Western policy leverage and their political goals differ substantially from West-leaning VI groups in Ukraine. As such, the head of the National Bank of Ukraine and President Zelensky were both univocally alarmed that a failure to reverse this obvious case of backsliding would lead to a suspension of financial aid from its international partners, something the country was in dire need of at that time (bne IntelliNews, 2020). Additionally, the finance minister estimated that the decision had already cost the country \$2 billion in its immediate aftermath, not least as it became clear that Ukraine would not receive another IMF trench in 2020 (Leshchenko, 2020).

It is worth noting, however, that the IMF did not issue any official statement concerning the situation. Nevertheless, in its 2021 loan extension report, it highlighted that "adverse constitutional court rulings challenged the anti-corruption framework in fundamental ways that required restoring its effectiveness *before the review could proceed*" (IMF, 2021d, p. 1). Yet, the issuance of tranches by the IMF is dependent on successful reviews. This also applies to the EU whose aid in this context is explicitly tied to official backing of Ukraine by the IMF. It seems logical that this line was communicated during non-public meetings. For instance, when the head of the National Bank of Ukraine visited Washington and spoke to IMF representatives on multiple occasions during that period (bne IntelliNews, 2020).

4.2. Second Backsliding Attempt: Subtly Capturing the Fightback Process by Actors Under Western Leverage

The first backsliding push was led exclusively by VIs connected to the judiciary and legislative branches that were out of reach of direct Western leverage. In contrast, the "repair" process was also subject to backsliding attempts, but with different methods. In this respect, it has been noted that: "They [VIs] try to put in some loopholes in the necessary legislation to still profit. So, they do a lot to undermine Western efforts in Ukraine but trying to do it discreetly...not to endanger themselves" (interview with Tetiana Shevchuk, Anticorruption Action Centre, December 2021).

From this perspective follows the particular importance of the interplay between CSOs and international organisations, as one CSO representative said:

They want to trick the reforms and what they are doing is much easier for us to foresee: What might be the traps [that] they will put in the way of the reforms? The international community [on the other hand] has [the] political capital and leverage to advocate for the reforms. (Interview with Olena Holushka, Anticorruption Action Center, January 22)

This stems from the fact that the actors of the second backsliding push relied to various degrees on Western donors. For one, their political ratings were tied to the financial survival of the state as they were governing in different positions, but also for the sole sake of showcasing good relations with the West. As one representative noted concerning the incumbent:

Zelensky didn't want to rely on the IMF, etc. But after some years, he understood that you should be in this club, you should work with IMF, you should meet the club to get more cheap money, to get handshakes, otherwise, you will be in the club of some strange people. (Interview with anonymous government source, January 2022)

4.2.1. National Agency on Corruption Prevention Repair and Constitutional Crisis Case

In response to the crisis, President Zelensky proposed Draft Law 4288 to the parliament which foresaw, along with the cancellation of the CCU Decision 13-r/2020, the dissolution of the entire judge composition of the CCU; a rejection of this law, he insisted, would also endanger Ukraine's commitments to its Western partners (Zinets & Polityuk, 2020). Although the dissolution of the CCU composition would have been unconstitutional in itself, Zelensky's actions in this context were supported by 57% of the population (Leshchenko, 2020). However, the president failed with his proposal and withdrew the draft law knowing he would not gather the necessary majority in the Rada and faced severe international criticism for it,

most notably on the grounds that the unreformed nomination procedure would have given Zelensky significant power over the court.

Despite that, the president first suspended Tupytskyi, whilst he later cancelled the Yanukovich decrees on his appointment on the grounds of national security, which was in itself seen as unconstitutional, raised concerns by CSOs, and was later overruled by the supreme court (Transparency International Ukraine, 2021b). Yet, the prosecutor general simultaneously issued charges against Tupytskyi for alleged corruption and institutional controversies erupted. This, however, might not be seen as a direct case of backsliding as per definition, since a politically dependent judge, who arguably made unconstitutional rulings, was replaced with another arguably dependent judge in a constitutionally questionable manner. Hence, the degree of openness remained on the same, troublesome level. Moreover, as the US put Tupytskyi on their Magnitsky Act sanction list “for significant corrupt acts to include the acceptance of a monetary bribe while serving in the Ukrainian judiciary,” they referred to him as “former chairman” of the CCU (Blinken, 2021). This shows a lack of intervention, or quiet tolerance, on behalf of Western donors in this case *despite concerns from Ukrainian CSOs*.

Besides Zelensky’s draft law on the dissolution of the entire judge squad, the “compromise” from Rada Speaker Dmytro Razumkov also failed to be enacted. It foresaw the re-institution of the previous anti-corruption infrastructure but treated false declarations as a *criminal offence and not a crime* (Transparency International Ukraine, 2020d). It would render the anti-corruption institutions toothless, through which CSOs called it “dangerous” and “not a punishment [but] a way to increase corruption” (Transparency International Ukraine, 2020d). During a high-level meeting with Ukrainian PM Shmygal, EU High Commissioner for Foreign Affairs Borrell and EU Commissioner for Neighbourhood and Enlargement Várhelyi argued that the “law...has several deficiencies and does not produce the necessary deterrent and corruption prevention effect” (European External Action Service, 2020b). Despite having passed the Rada, it was eventually vetoed by President Zelensky, as required by the civil society and Western partners. Hence, once Western donors intervened together with CSOs, the law was effectively stopped. As this example shows, VIs might use the repair process to *change details of laws* in the legislative process that might seem minor but actually render institutions ineffective. These details might be so minor that they remain under the radar of Western donors.

Importantly, at this stage, there were many competing draft laws in the parliament, even within a single party, such as SN (Transparency International Ukraine, 2020c). One of them was Draft Law 4301-a, from Oleksandr Dubynskyi. It foresaw the complete exclusion of judges from the law on corruption, hence also from the asset declaration obligation. Dubynskyi was not only

considered a close ally of the oligarch Kholomoisky, but closely related to Tupytskyi, as the head of the CCU is officially residing in a mansion owned by businessman Serhiy Levchenko, whom himself ran for an SN mandate during the local elections with the explicit backing of Dubynsky (Sorokin, 2020). This additionally demonstrates the different connections and informal alliances across branches of power and party lines. It also highlights the attempt by VIs to make use of internal divisions in the parliament during times of a weakened executive to push for different draft laws that would suit their interests. Knowing of these divisions, they might use their own informal leverage to push for amendments and exclusion in laws during the “repair process.”

Finally, however, all draft laws foreseeing a softening of the previous asset declaration system failed to pass the necessary legislative process. The proposals endorsed by many CSOs managed to get through (Transparency International Ukraine, 2020b). The original asset declaration system with criminal liability and other provisions on the functioning of the NACP was therefore reinstalled in December 2020 by passing Law No. 4470 and Law No. 4471, respectively. Shortly after, the EU announced the disbursement of €600 million in financial aid to Ukraine as part of an emergency package (European External Action Service, 2020a). Although the Memorandum of Understanding was already ratified in mid-September 2020, the dispersion was only allowed to happen after Ukraine continued its engagement, for which the reversal of the NACP setback was crucial. Subsequently, in a press briefing in January 2021, the IMF confirmed that it had resumed its virtual mission to Ukraine in December 2020 and therefore proceeded with the review (IMF, 2021b).

4.2.2. National Anticorruption Bureau Case

However, although the NACP case was resolved, a broad parliamentary front worked on amending the law on NABU, officially under the banner of making it align with the constitution. In February 2021, the parliament pushed for Draft Law 5070 right after an unsuccessful negotiation round with the IMF. It would provide the CoM with unprecedented powers over this agency to select and remove its head as well as create uncertainty over the legality of the existing leadership. Hence, this would have brought opportunities for VIs to take over this agency. As one former EU advisor in Kyiv noted, the interaction with CSOs to prevent such a scenario was paramount:

There were many different attempts to undermine NABU. There was a law by which the parliament would select the chairman of NABU. So, if this law goes undetected, they might quickly adopt it and then it’s too late. Once a law has been adopted it is hard to intervene again...So, in these cases, they [the CSOs] would say that there is a law in

the pipeline. Please intervene to have it stopped. (Interview with Henrik Larsen, former EU advisor to Kyiv, November 2021).

With respect to the interaction between CSOs and international donors, one Ukrainian representative noted further:

[The exchange is] very regular. There are different groups dealing with the rule of law, donors, or anti-corruption institutions. There are even groups for each specific anti-corruption institution or for the Ministry of Justice....There can be weekly, monthly, or quarterly meetings. But quite often, they are in *constant contact*. (Interview with Iryna Fedets, Institute for Economic Research and Policy Consulting Kyiv, November 2021)

Right after the draft law was published, Justice Minister Malyuska admitted that it was “not agreed with the IMF...and we will pass the law only after obtaining approval from the IMF” (Concorde Capital, 2021). Such a law, in any case, would go against the basic provisions in the standing agreement that highlight the “independence and effectiveness of Ukraine’s anti-corruption infrastructure [as] the requirement under the current IMF support programme on the status of which discussions continue” (IMF, 2021c). CSOs repeatedly and publicly warned against, and therefore also during these “constant contacts,” passing Law 5070 (Transparency International Ukraine, 2021a). It was eventually dropped, and Draft Law 5459 was introduced, which guaranteed the legality of the existing leadership of NABU, hence leaving no possibility to remove its staff sooner. However, it foresaw the selection procedure for the new head to be conducted by a president-led body and the CoM. Although seen as a step forward, this dependence on the executive and the incumbent was still widely criticised by CSOs (Transparency International Ukraine, 2021a).

The final law in this respect was Law No. 5459–1, which passed the Rada on 19 October 2021. It legally strengthened the agency and transferred the selection procedure from the president to a committee consisting of three delegates from the CoM and three experts *selected by Ukraine’s international partners*, giving the latter real influence over this agency to safeguard its independence. This law was endorsed by CSOs, whilst the EU *explicitly urged Ukraine to pass it earlier*, and the IMF later praised this decision (“EU calls on Rada to adopt bill on NABU status,” 2021). Just one day before passing the law, the IMF announced that it had reached a staff-level agreement with Ukraine, which will have been an important precondition for it (IMF, 2021a).

5. Conclusion

Besides historical legacies, the domestic and foreign incentive structure in Ukraine is a result of its geopoliti-

cal role, regional divisions, and political decisions. That is, despite some historical commonalities, it differs noticeably from autocratic post-Soviet countries like Russia. Rather, parallels of this system have been drawn by different authors regarding, e.g., Kenya (Hale, 2015; Way, 2021). This work, therefore, paves the way for further comparative inquiries on backsliding. In accordance with theoretical studies, it highlights the importance of the coalitional approach and the relative power balance of actors to understand backsliding. It proposes a causal mechanism in which due to the relatively high degree of competition, the attempts to backslide can be conducted by different actors not falling under the system of checks and balances of both formal politics and Western leverage. They nevertheless yield significant control over parts of the state and might initiate backsliding in times when divisions within the ruling coalition and/or a weakening of the executive appear. This stands in contrast to the usual angle of the executive as the backsliding actor observed in much of the literature and underlines the relevance of this alternative focus.

Actors in this ruling coalition who can formally fight back backsliding attempts, such as the executive or other branches of the state, are also partly controlled by VIs but dependent on Western support. As such, they might be forced to fight back due to constraints stemming from international dependencies and their corresponding incentive structure. However, in the process, they might seize the opportunity and build provisions to increase their own relative power. These alterations are so fine that they might easily end up under the radar of Western donors when operating alone. At this stage, groups that initiated backsliding in the very beginning might also seek to build in concessions as seen in the “compromise” draft laws, highlighting the cross-party coalition building and influence of VIs.

It is then the task of CSOs, quickly navigating in and possessing profound knowledge of the local context to signal such attempts to international donors which effectively use their financial and political leverage to prevent using institutional eruptions for the benefit of these VIs. In accordance with theoretical elaborations, where international donors abstain from doing so or even factually accept the situation, such as in the controversial case of laying off the head of the CCU, CSOs alone are too weak to break through with their postulates. This article highlights through this the deficiencies of the state of democracy and the subsequent distance of the citizenry in a state capture regime, whereas a coalition of Western actors and local CSOs, which does not have a democratic mandate by the Ukrainian people, is necessary to safeguard institutional independence and good governance reforms against coalitions of actors that are nominally obliged to it by their popular mandate.

However, it also shows the potential for long-term alterations. Just as the influence of the EU and CSOs together might be enough to prevent backsliding, but falling short of facilitating a democratic breakthrough

today, there is room for optimism in the current context: In the case of many CEE countries, the “prospect of [EU] membership has been both credible and attractive enough that the EU might even be considered a potential ‘external base’ for alternative power pyramids in patronalistic countries” (Hale, 2015, p. 458). As the Russian vector, on which most of the anti-reformist forces relied, is effectively dead due to the Russian invasion, the leverage of the EU is growing relatively stronger. Although it is too early to predict what post-war Ukraine will look like, a serious commitment to the membership perspective by the EU might alter the incentive structure irreversibly and potentially lead to a break-up of these dynamic anti-reform coalitions and therefore pave the way for a democratic breakthrough, as seen in other places in Europe and the world.

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Conflict of Interests

The author declares no conflict of interests.

References

- Ademmer, E. (2016). *Russia’s impact on EU policy transfer to the post-Soviet space: The contested neighborhood*. Routledge.
- Andrews, M. (2013). *The limits of institutional reform in development: Changing rules for realistic solutions*. Cambridge University Press.
- Baez-Camargo, C., & Ledeneva, A. (2017). Where does informality stop and corruption begin? Informal governance and the public/private crossover in Mexico, Russia and Tanzania. *Slavonic and East European Review*, 95(1), 49–75.
- Balmaceda, M. M. (2007). *Energy dependency, politics and corruption in the former Soviet Union: Russia’s power, oligarchs’ profits and Ukraine’s missing energy policy, 1995–2006*. Routledge.
- Balmaceda, M. M. (2013). *The politics of energy dependency: Ukraine, Belarus, and Lithuania between domestic oligarchs and Russian pressure*. University of Toronto Press.
- Bermeo, N. (2016). On democratic backsliding. *Journal of Democracy*, 27(1), 5–19.
- Bertelsmann Stiftung. (2022). *Ukraine country report*. BTI Transformation Index. <https://Bertelsmann-project.org/en/reports/country-report/UKR>
- Blinken, A. J. (2021, December 9). *Elevating anti-corruption leadership and promoting accountability for corrupt actors* [Press Release]. U.S. Department of State. <https://www.state.gov/elevating-anti-corruption-leadership-and-promoting-accountability-for-corrupt-actors>
- bne IntelliNews. (2020). *NBU says no IMF tranche for Ukraine this year*. <https://www.intellinews.com/nbu-says-no-imf-tranche-for-ukraine-this-year-196579>
- Carothers, T. (2002). The end of the transition paradigm. *Journal of Democracy*, 13(1), 5–21.
- Cassani, A., & Tomini, L. (2020). Reversing regimes and concepts: From democratisation to autocratisation. *European Political Science*, 19(2), 272–287.
- Cleary, L. (2016). Half measures and incomplete reforms: The breeding ground for a hybrid civil society in Ukraine. *Journal of Southeast European and Black Sea*, 16(1), 7–23.
- Concorde Capital. (2021). *Draft law targets NABU chief, provokes discussions on IMF support*. https://concorde.ua/rs/daily/item_77421
- Constitutional Court of Ukraine. (2020a). *Summary to the Decision of the Grand Chamber of the Constitutional Court of Ukraine No. 9-r/2020 of August 28, 2020*.
- Constitutional Court of Ukraine. (2020b). *Summary to the Decision of the Grand Chamber of the Constitutional Court of Ukraine No. 11-r/2020 of September 16, 2020*.
- Constitutional Court of Ukraine. (2020c). *Summary to the Decision of the Grand Chamber of the Constitutional Court of Ukraine No. 13-r/2020 dated October 27, 2020*.
- Dimitrova-Grajzl, V., & Simon, E. (2010). Political trust and historical legacy: The effect of varieties of socialism. *East European Politics and Societies*, 24(2), 206–228.
- Dresden, J. R., & Howard, M. M. (2016). Authoritarian backsliding and the concentration of political power. *Democratisation*, 23(7), 1122–1143.
- EU calls on Rada to adopt bill on NABU status. (2021, October 19). *Ukrinform*. <https://www.ukrinform.net/rubric-polytics/3334860-eu-calls-on-rada-to-adopt-bill-on-nabu-status.html>
- European Court of Auditors. (2021). *Reducing grand corruption in Ukraine: Several EU initiatives, but still insufficient results* (Special Report No. EN 23/2021). <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=59383>
- European External Action Service. (2020a, December 09). *EU disburses €600 million in macro-financial assistance to Ukraine* [Press Release]. <https://shorturl.at/hotYO>
- European External Action Service. (2020b, December 08). *Ukraine: High Representative/Vice-President Josep Borrell and Commissioner Olivér Várhelyi discuss the implementation of the reform agenda with Prime*

- Minister Shmyhal [Press Release]. https://www.eeas.europa.eu/eeas/ukraine-high-representativevice-president-josep-borrell-and-commissioner-oliv%C3%A9-v%C3%A1rhelyi_en
- European External Action Service. (2020c, November 3). *Ukraine: Statement by the spokesperson on the fight against corruption after the constitutional court decision of 27 October* [Press Release]. https://www.eeas.europa.eu/eeas/ukraine-statement-spokesperson-fight-against-corruption-after-constitutional-court-decision-27_en
- Haggard, S., & Kaufman, R. (2021). The anatomy of democratic backsliding. *Journal of Democracy*, 32(4), 27–41.
- Hale, H. E. (2005). Regime cycles: Democracy, autocracy, and revolution in post-Soviet Eurasia. *World Politics*, 58(1), 133–165.
- Hale, H. E. (2015). *Patronal politics: Eurasian regime dynamics in comparative perspective*. Cambridge University Press.
- Harasymiw, B. (2019). Civil society as an anti-corruption actor in post—Euromaidan Ukraine. *Canadian Slavonic Papers/Revue Canadienne des Slavistes*, 61(3), 288–320.
- Hellman, J. S., Jones, G., & Kaufmann, D. (2003). Seize the state, seize the day: State capture and influence in transition economies. *Journal of Comparative Economics*, 31(4), 751–773.
- International Monetary Fund. (2021a, October 18). *IMF team and Ukraine’s authorities reach staff-level agreement on the first review of the Stand-By Arrangement* [Press Release]. <https://www.imf.org/en/News/Articles/2021/10/18/pr21301-ukraine-imf-team-and-ukraines-authorities-reach-staff-level-agreement-on-first-review-of-sba>
- International Monetary Fund. (2021b, January 14). *Transcript of IMF press briefing* [Press Release]. <https://www.imf.org/en/News/Articles/2021/01/14/tr011421-transcript-of-imf-press-briefing>
- International Monetary Fund. (2021c, March 11). *Transcript of IMF press briefing* [Press Release]. <https://www.imf.org/en/News/Articles/2021/03/11/tr031121-transcript-of-imf-press-briefing>
- International Monetary Fund. (2021d). *Ukraine—First review under the Stand-By Arrangement* (Country Report No. 2021/250). <https://www.imf.org/en/Publications/CR/Issues/2021/11/23/Ukraine-First-Review-Under-the-Stand-By-Arrangement-Requests-for-Extension-and-Rephasing-of-509855>
- Jee, H., Lueders, H., & Myrick, R. (2022). Towards a unified approach to research on democratic backsliding. *Democratization*, 29(4), 754–767.
- Khan, M. (2000). Rent-seeking as a process. In M. Khan & K. S. Jomo (Eds.), *Rents, rent-seeking and economic development* (pp. 70–144). Cambridge University Press.
- Knott, E. (2018). Perpetually “partly free”: Lessons from post-Soviet hybrid regimes on backsliding in Central and Eastern Europe. *East European Politics*, 34(3), 355–376.
- Králiková, M. (2022). Importing EU norms: The case of anti-corruption reform in Ukraine. *Journal of European Integration*, 44(2), 245–260.
- Kudelia, S. (2014). The maidan and beyond: The house that Yanukovich built. *Journal of Democracy*, 25(3), 19–34.
- Kupatadze, A. (2015). Political corruption in Eurasia: Understanding collusion between states, organized crime and business. *Theoretical Criminology*, 19(2), 198–215.
- Leshchenko, S. (2020, November 8). Constitutional court becomes a collective Yanukovich. *KyivPost*. <https://www.kyivpost.com/article/opinion/op-ed/sergii-leshchenko-constitutional-court-becomes-a-collective-yanukovich.html>
- Lutsevych, O. (2016). Civil society versus captured state: A winning strategy for sustainable change. *Development in Practice*, 26(5), 646–656.
- Moe, T. M. (2015). Vested interests and political institutions. *Political Science Quarterly*, 130(2), 277–318.
- Nasuti, P. (2016). Administrative cohesion and anti-corruption reforms in Georgia and Ukraine. *Europe—Asia Studies*, 68(5), 847–867.
- Nitsova, S., Pop-Eleches, G., & Robertson, G. (2018). *Revolution and reform in Ukraine: Evaluating four years of reform*. PONARS Eurasia.
- Nizhnikau, R. (2020). Love the tender: ProZorro and anti-corruption reforms after the Euromaidan revolution. *Problems of Post-Communism*, 69(2), 192–205.
- Palyvoda, L., Kuprii, N., & Bikla, O. (2018). *Status and dynamics of civil society organizations development in Ukraine in 2002–2018: Report on survey findings*. Creative Center Charitable Foundation.
- Pikulik, A. (2019). Belarus, Russia, and Ukraine as post-Soviet rent-seeking regimes. In H. E. Hale (Ed.), *Stubborn structures: Reconceptualizing post-communist regimes* (pp. 489–506). Central European University Press.
- Pleines, H. (2019). The political role of business magnates in competitive authoritarian regimes: A comparative analysis. *Jahrbuch Fur Wirtschaftsgeschichte*, 60(2), 299–334.
- Razumkov Center. (2020). *Ukraina-2020: Nevypravdani ochikuvannya, neochikuvani vyklyky. Pidsumki roku u dzerkali gromadskoi dumki (gruden 2020)* [Ukraine 2020: Unjustified expectations, unexpected challenges. The results of the year in the mirror of public opinion (December 2020)]. <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/ukraina-2020-nevypravdani-ochikuvannia-neochikuvani-vyklyky-pidsumky-roku-u-dzerkali-gromadskoi-dumky-gruden-2020r>
- Samokhvalov, V., & Strelkov, A. (2021). Cross-dimensional network of democracy promotion: Public administration reform in post-Euromaidan Ukraine. *Journal of European Integration*, 43(7), 799–814.

- Sorokin, O. (2020, November 6). Constitutional court judges live far beyond their stated means. *Kyiv Post*. <https://www.kyivpost.com/ukraine-politics/constitutional-court-judges-live-far-beyond-their-stated-means.html>
- Transparency International Ukraine. (2020a). *Constitutional court judges must resign*. <https://ti-ukraine.org/en/news/constitutional-court-judges-must-resign>
- Transparency International Ukraine. (2020b). *Draft laws to restore NACP powers: Legal analysis*. <https://ti-ukraine.org/en/news/draft-laws-to-restore-nacp-powers-legal-analysis>
- Transparency International Ukraine. (2020c). *Ways to resolve constitutional crisis proposed by MPs*. <https://ti-ukraine.org/en/news/ways-to-resolve-current-constitutional-crisis-proposed-by-mps>
- Transparency International Ukraine. (2020d). *What makes proposed law on criminal liability for false declarations so dangerous*. <https://ti-ukraine.org/en/blogs/what-makes-proposed-law-on-criminal-liability-for-false-declarations-so-dangerous>
- Transparency International Ukraine. (2021a). *Amendments to the law on NABU: Legal analysis*. <https://ti-ukraine.org/en/news/amendments-to-the-law-on-nabu-legal-analysis>
- Transparency International Ukraine. (2021b). *Big blast of constitutional court proceedings: A year later*. <https://ti-ukraine.org/en/blogs/big-blast-of-constitutional-court-proceedings-a-year-later>
- Venice Commission. (2020). *Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the legislative situation regarding anti-corruption mechanisms, following Decision No. 13-R/2020 of the Constitutional Court of Ukraine/Urgent opinion on the reform of the constitutional court* (Opinion No. 1012/2020). <https://www.venice.coe.int/webforms/documents/?opinion=1012&year=all>
- Verkhovna Rada of Ukraine. (2020). *Okrema dumka suddi Kolisnyka V.P. stosovno Rischennya KSU no. 11-p/2020* [Dissenting opinion of Judge Kolisnyk V. P. concerning the Decision of the CCU No. 11-p/2020]. <https://zakon.rada.gov.ua/laws/show/nb11d710-20#n2>
- Vorobiov, M. (2020). The pro-Russian forces behind Ukraine's constitutional crisis. *Eurasia Daily Monitor*, 17(165). <https://jamestown.org/program/the-pro-russian-forces-behind-ukraines-constitutional-crisis>
- VOX Ukraine. (n.d.). *iMore index* [Data set]. <http://imorevox.org>
- Waldner, D., & Lust, E. (2018). Unwelcome change: Coming to terms with democratic backsliding. *Annual Review of Political Science*, 21(1), 93–113.
- Way, L. A. (2021). The party of power: Authoritarian diaspora and pluralism by default in Ukraine. *Democratization*, 28(3), 484–501.
- Wilson, A. (2021). *Faltering fightback: Zelensky's piecemeal campaign against Ukraine's oligarchs*. European Council on Foreign Relations. <https://ecfr.eu/publication/faltering-fightback-zelenskys-piecemeal-campaign-against-ukraines-oligarchs>
- Wolczuk, K. (2018). Demystifying the association agreements. In M. Emerson, D. Cenusă, T. Kovziridze, & V. Movchan (Eds.), *The struggle for good governance in Ukraine, Georgia and Moldova: The struggle for good governance in Eastern Europe* (Vol. 1, pp. 278–298). Centre for European Policy Studies.
- Worschech, S. (2017). New civic activism in Ukraine: Building society from scratch? *Kyiv-Mohyla Law and Politics Journal*, 2017(3), 23–45.
- Zinets, N., & Polityuk, P. (2020, November 2). Back me or put IMF loans and EU visa-free deal at risk, Ukraine's president warns. *Reuters*. <https://www.reuters.com/article/us-ukraine-politics-imf-idUSKBN27I2JN>

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