

Ukraine's Transitional Challenges

THE TRAPS AND PITFALLS IN THE WAKE OF THE MAIDAN PROTESTS

Comment

Comments and Opinions

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After almost 3 months of partly violent protests under extremely harsh conditions and crimes committed by government forces and protesters in and outside Kiev, a heterogeneous coalition of opposition parties and the government under president Viktor Yanukovych have started serious negotiations about a solution of the conflict. At this stage, it is difficult to assess, whether these negotiations will lead to a political transition and regime change, or merely to another stalemate, which may be ended by a violent solution (like the imposition of a state of emergency), or – this is an option, too – to a reshuffle of leaders in the government, which gives the parliamentary opposition more influence on the legislation, but brings disappointment to the far-reaching ambitions of the protesters on the Maidan and the occupied government buildings. According to media reports, the main objective of the latter seems to be the dissmissal of Viktor Yanukovych as president.

This however, would be a strong symbolic closure of the protests, but instead of solving the country's most important problems, it would only create another one: how to create quickly a feasible transitional government, which can prepare the country for new elections? As other transitions, from Latin America in the 1980s, to Central and East European countries during the 1990s and Arab Spring countries, most recently have shown, transition outcomes depend to a large extent on factors that are are beyond the power of those who negotiate it. This does not mean that transition negotiations are predetermined and that the conflict parties do not have any space for manoeuvre. Unfortunately, they can make errors that lead to outcomes which none of them anticipated or intended to achieve. In order to avoid them, certain challenges have to be confronted, and both sides need to be aware of specific dilemmas, which usually only arise during transition and negotiated regime change.

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The Hostage Dilemma and the Challenges of Transitional Justice

During every transitional negotiation, the opposition faces a dilemma, which is known from game theory as 'the hostage dilemma'. It describes the need of the opposition, to offer the ancien regime's leaders guarantee of their personal security which will also be valid after the transition process. Without such guarantee, the old leadership has more incentives to fight until the bitter end than to negotiate a peaceful transition and to step down. Paradoxically, the hostage dilemma is first and foremost a dilemma for the opposition, because the offer must come from its leaders, who also need to convince their own followers about the need to make such a concession. In earlier transitions, the hostage dilemma was solved in many different ways. In South Africa, the Truth and Reconciliation Commission and its amnesty committee, and the crucial role which white South African played in the economy and the security sector altogether delivered credible guarantee, that regime change would exclude retaliation and large scale retribution by the incumbent government. In Latin American transitions, right wing dictators usually were granted formal and blanket amnesties or, as in the case of General Augusto Pinochet, were given personal immunity. Only when a ruler was overthrown, the hostage dilemma

did not occur at all, as was the case in Serbia with Slobodan Milosevic, with Hosni Mubarak in Egipt or with Muhammar Al Gadafi in Libya. In Poland, like in most other CEE transition countries, the hostage dilemma was never legally solved, but the post-transition political system was structured in a way that made retribution against the former *nomenklatura* almost impossible.

One may doubt, whether we can already talk about transition or regime change in Ukraine. What started with the Maidan protests may also end in just another change of government, during which the leading figures behind the curtain of formally democratic institutions reshuffle their positions and redistribute resources. The so called Orange Revolution' was such an example: popular outrage and short-term mobilisation of pro-Western and pluralist citizens led to a new balance of power between Ukraine's oligarchs, after which their supporters in the official institutions (the Verkhovna Rada, the government and the presidency) adopted the consitution to this new balance and returned to business as usual. But even if the post-Maidan process is not about transition to another political order, the need to solve the hostage dilemma may apply anyway. Paradoxically, this is mainly due to Yanukovych's violations of the unwritten succession rules of Ukrainian governments, after the country

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declared independence in 1991. Presidential campaigns in the Ukraine were often accompanied by small scale violence between supporters of competing candidates, but until the Yanukovych campaign against Viktor Yushchenko, former adversaries were left untouched by the winner and the main competitors never targeted each other. Even president Leonid Kuchma never put on trial for his role in the kidnapping and murder of journalist Georgiy Gongadze. The Yanukovych - Yushchenko campaign's innovation consisted in the attempt to poison the adversary. The Yanukovych-Tymoshenko campaign brought another novelty - the loser was imprisoned by the winner. If someone in Ukraine has currently every reason to fear retribution after a political transition, it is Viktor Yanukovych. This is why security garantees for him are so indispensable, if the transition is to remain more or less peaceful. But at the same time, they are very difficult to promote to the public, which, understandably, wants the main culprit to be punished.1

When the Latin American dictatorships and the communist regimes of Central and East European countries underwent transition, popular calls for large scale punishment of perpetrators were usually tempered from outside. The overwhelming consensus among donor countries, the international community and even international Human Rights organisations inclined

transitional governments to grant amnesty in the name of reconciliation, unity and stability.² Otherwise, the argument went, the supporters of ousted dictators would take revenge and threaten the success of transition. When human rights were invoked, donors and human rightscampaigners usually pointed to the rights of the accused in post-transition trials. Today, there is a new consensus, which calls upon transitional governments to punish perpetrators in the name of the human rights which they violated. Once there is a clear perspective for regime change in Ukraine, the new rulers will be confronted with such calls to investigate and punish all past human rights abuses and to compensate as many victims as possible. Punishment for perpetrators of human rights abuses can serve as a means to delegitimate the institutional and ideological legacy of the ancien regime and to promote the rule of law. But the main dilemma in transition is usually not whether to do so or to apply amnesty, because this is hardly ever the deliberate choice of the new government. Instead, it is the outcome of the struggle between the forces of the new and the old regime and the new balance of power that emerges from transition. The choice that a transitional government does have is different: it can trade truth for punishment. This is an issue, which needs more explanation than the hostage dilemma.

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Truth Versus Punishment

The **current** mainstream in human rights favours the claims of victims over any other competing claim. According to it, victims have the right to be given a voice, the right to be compensated for their suffering, the right to have their suffering acknowledged by society and the right to justice, which is mostly understood as the right, to see their persecutors punished. But there is a tension between these rights. The victim-centred approach to transition neglects for example the fact that perpetrators usually know much more about past crimes and atrocities than their victims. They are very unlikely to reveal this knowledge as long as they are threatened with criminal prosecution. The South African TRC solved this dilemma by granting perpetrators conditional amnesty if they revealed all their knowledge about any crimes they were involved in and if those crimes were political rather than purely criminal. Perpetrators were not even required to express remorse, but they were expected to deliver evidence against others, who had not yet admitted their wrongdoings.3 This created dynamics, which were impossible to control for perpetrator networks and prevented ingroup solidarity within those networks. In order to prevent others from incriminating them, perpetrators had to come forward first in order to obtain the benefits of conditional amnesty.

The facts about apartheid, revealed in public by those, who had committed crimes, strongly contributed to the delegitimatisation of the system first and foremost among those, who had been beneficiaries and supporters of Apartheid. This made negationism much more difficult as if the crimes had only been exposed by victims and researchers. But this came with a price tag: until today, perpetrators and victims may meet in the street and the victims are not even allowed to blame their torturers in public.

This is the dilemma that every transitional government in Ukraine will face, too: if it wants to find out what happened to opposition activists who disappeared, were tortured or murdered by snipers, if it wants the perpetrators to expose the crimes of the ancien regime under Yanukovych, it will have to grant conditional amnesty to mid- and low-level perpetrators. If it wants to punish them, it can resort to criminal trials (if the judges are loyal to the new political order), but then perpetrators will have every possible incentive to conceal the truth. Compared to most Latin American and African transitions, the Ukrainian Maidan revolution was relatively low of casualties and could probably be investigated by a special court alone. But relying on a Truth Commission could make sense if the aim is not only to elucidate the events between November 2013 and today, but also human rights abuses and

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extralegal killings by state organs in the past, for example the Gongadze affair4, the poisoning of Yushchenko or the murders of recalcitrant journalists and political campaigners. The latter approach will only be feasible though, if the intended result of the current negotiations is – from the opposition's point of view – a political earthquake which abolishes abolishes the postcommunist order that ruled ruled Ukraine for the last two decades and if this new order institutes a liberal democratic representative democracy with functional institutions. It does not make sense (and will most likely become a farce) if the objective is only to replace the Yanukovych entourage by other politicians and to leave the current political system untouched.

Regime Change or Change of Government

It is the Very character of the Ukrainian political system, which makes the doubts about a real transition so obvious. Independent Ukraine has often been compared to Russia and Belarus, because in both countries we witness an authoritarian government ruling under conditions of a so-called hybrid regime and the activity of so-called oligarchs — wealthy businessmen, who made a fortune during the breakdown of the Soviet system and managed to privatise state assets and hijack state institutions for their

private benefit. All this does exist in Ukraine, too, but the relationship between key actors is different. After Yeltsin, the Kremlin has managed – just like Alexander Lukashenko in Minsk - to centralise power and make the oligarchs dependendent upon the state. Today, who controls the presidency and the government also controls the distribution of resources between the state budget and private business, and even the distribution of resources between oligarchs. In Russia and Belarus political power can destitute and marginalise even the wealthiest businessman, as the incarceration of Khodorkovsky and trials against businesspeople in Minsk have shown. In Ukraine, it is the other way round: a flexible web of oligarchs, who engage in changing coalitions and whose wealth and power is based on regional centres, controls economy, finances and a large number of fellow travellers in the state administration, including own 'clubs' among members of the Verkhovna Rada. This de facto transforms the Rada, but also other crucial state organs like the Constitutional Court, the central ministries and the Central Bank into façade institutions. The real decisions are taken behind the curtain, in phone calls and secret meetings between members of the political-entrepreneurial establishment, and then metarmorphose into Rada's resolutions, government regulations or new laws. It is no secret, that the current negotiations between the three opposition leaders and the Yanukovych entourage

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started, because Serhij Tihipko and Rinat Akhmetov opposed the hardliners' attempt to impose the state of emergency by withdrawing 'their' partisans from the Party of Regions' Rada club.⁵ Altogether this was almost a hundred

Rada members.

There is no organised and institutionalised opposition to this façade-system of power in Ukraine. Opposition parties also apply the rules of this oligarch-game. Batkivshtshyna, the party of Yulia Tymoshenko and Arseniy Yatsenyuk depend on the sponsorship of Tymoshenko's empire of enterprises, which cashes in on gas transit from Russia. Svaboda, the nationalist right wing party with strong roots in the western part of the country, is controlled by a chocolate tycoon, Piotr Poroshenko, whereas Udar, Vitali Klitschko outfit, is regarded as the political representation of Dmytro Firtash, another gas tycoon. Yanukovych's official pillar, the eastern based Party of Regions seems to belong to several principals. This web of power overlaps with several others that control access to media, to the army, the security sector, the judiciary and the tax administration. The intransparency of those webs allows their rulers to monopolise whole sectors of the economy and the state administration, which increases the social cost for consumers and taxpayers, and at the same time, optimises profits and minimises entrepreneurial risk for the oligarchs.

Power is strongly decentralised in Ukraine (as it always was, throughout history, except for the relatively short Stalinist period), which makes the system extremely stable and immune against shocks. Political earthquakes like the Orange Revolution only cause changes in the façade, but leave the structure behind it untouched. Elections do not decide about the distribution of power, they are the result of power shifts behind the curtains. In other words: Viktor Yushchenko did not disappear from the political scene because he lost elections, but he lost his political leverage because his business cartel - linked to finance and banking - was no longer able to sustain a strong political representation after the 2009 crises, which led to the meltdown of the banking sector and the exodus of foreign capital from the financial sector. If exposed to external shocks - like popular unrest, economic decline or changes in the world economy – the system readjusts: some oligarchs become more powerful, others lose influence. But such shocks hardly ever threaten the pillars of the system. This makes any kind of real transition to a liberal market-oriented democracy a much bigger challenge than in countries, where the party system reflects the result of elections and not the outcome of power struggles behind the curtain. How should oligarch-sponsored opposition parties and oligarch-sponsored government parties engage in negotiations aiming

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procedures.

at getting rid of their oligarchs? How can they reform more than just the façade-institutions? Here, we touch upon another paradox: in Ukraine democracy does not foster democrats, and democrats have hardly any chance, to democratise the country through democratic

The Ukrainian Paradox – How Democratic Procedures Prevent Democratisation

Oligarch networks can easily manipulate election outcomes, either by using the state administration to forge election results, or by reversing the distribution of mandates in parliament by 'purchasing' votes. But this is only one side of the problem. The other one consists in the deeply enrooted clientelism of voters in the Ukrainian East and South.6 In those parts of the country, the preponderance of the Party of Regions is almost total. This dominance is reeinforced by the strong clientelism of voters in the Donbas and an electoral system which distributes half of the mandates in the Rada to the winners of majoritarian one-seat constituencies. The other half comes - like in Russia - from centrally approved party lists. During the 2012 elections, the Party of Regions won 186 mandates (out of a total of 450), of which 114 came from majoritarian constituencies. Under conditions of strong media control,

clientelist voters and the demographic dominance of the Donbas region over other regions, the outcome of any future transitional election is highly predictable: the Donbas oligarchy around Rinet Akhmetov and his allies will keep a blocking (if not a dominant) position in any transitional parliament and most likely also decide about the future president. It is true that the Maidan protests also spread to some eastern regions and that the opposition parties' ability to mobilise supporters was much higher than Yanukovych's capacity to get his followers on their feet. But in future elections, the number of votes will be more important than the ability to mobilise dedicated supporters. The opposition could be able to overcome these obstacles, if it had enough access to popular media (mostly television) in the eastern parts of the country. It could then create the (false) impression that the majority of Ukrainians are with the opposition and not with the government, which in turn would make opportunistic voting behaviour by clientilist voters beneficial for the opposition.7 But the media system of the eastern oblasti is very different from the one dominating in other parts of the country, and it is strongly influenced by Russian television, which is very popular among Russian speaking, orthodox Ukrainians. Enclaves of pro-Western, oppositional citizens, who were beeing mobilised during the Maidan protests, hardly ever tried

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to appeal to the population majority of their regions and often used symbols that were more likely to repel the wider population than to win it over for the opposition.

If one takes into account all these obstacles to a smooth political transition, it becomes obvious why the current negotiations are more likely to lead to a change of the government and to personal, rather than structural, changes in the political system. The Majdan protests were impressive and demonstrated a high level of oppositional mobilisation, but neither the high level mobilisation, nor the rifts in the ruling establishment should obfuscate the fact that the opposition is definitely the weaker part at the negotiation table. After more than two months of incredibly intense and massive mobilisation, it has only managed to push the other side to the status quo ante of early January - to withdraw most (not all) of the socalled 'dictatorial laws', which imposed grim sanctions on any kind of protest. The opposition has not yet managed to get its supporters out of jail and there is no perspective, how the government could be coerced into signing the EU agreement, which triggered the outburst. It is also obvious, that no opposition in the world would be able to uphold the current level of mobilisation until the next elections, no matter whether they take place in advance or according to the schedule. Besides that,

there is also one factor which has been almost invisible so far – the Army. As Arab Spring cases show, the Army leadership is most likely to stabilise the situation and at the same time to shelter discretely the *ancien regime* and the existing structures of the security sector. But in Ukraine, the Army leadership is also under strong Russian influence and dominated by oligarchs and cartels linked to the armaments industry in Dnepropetrovsk. It's role is therefore more likely to weaken the opposition's case than to support it.9

A New Institutional Architecture

Transitional negotiations can lead to outcomes that none of the conflict parties ever intended to achieve. This can turn counterproductive – when the conflict escalates into civil war, but it can also create unexpectedly positive outcomes, like the 1989 elections in Poland. If – against all oligarch odds – something similar happens in Ukraine, which traps and pitfalls should then be avoided in order to create optimal outcomes? And which solutions would make a real transition to market economy and democracy more likely than others?

The basic problems of Ukraine are the dominance of corrupt networks that hijack the state and marginalise voters' influence on political

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outcomes and the absence of the rule of law. There are political systems, which further corruption and there are institutional solutions, which do not eradicate, but impede corruption. In general, presidential systems are more prone to facilitate corruption on the highest level than parliamentary systems. There are several reasons for that: first, decentralised decision making with a high number of potential veto players makes the success of external interference more costly and its potential results less predictable. An oligarch will be ready to pay for a specific bill only if he can be sure, that he gets exactly the bill he needs. If he cannot control all the instances of the legislative process, his cost rises and the likelihood of success is lower. Second, parliamentary systems contain more insitutional checks and balances than strong presidential ones. Parliamentary systems facilitate mutual control between state organs, and that in turn makes it more likely that corruption gets investigated and punished. Third, parliamentary systems support frequent alternations of government, which makes them less stable than presidential ones. But this renders the outcomes of legislative processes also less predictable and more costly for external spoilers, especially, when the duty terms of crucial organs do not overlap. No wealthy businessman will try to buy a bill, corrupting Lower House members, when the legislative process for the

bill lasts three years, and the bill has to be approved by the Upper House, whose composition will change every two years. In such a case, the businessman does not even know, whom to bribe, when the legislative process starts.

Insulated institutions play a crucial role in systems, which are less vulnerable to corruption. The notion 'insulated' means sheltered from day-to-day politics and staffed by well paid specialists, whose duty term is governed by principle of rotation and does not depend on the decision making process of any other state organ alone.10 Examples are Central Banks, Supreme and Constitutional Courts and regulators whose leadership is nominated by several state organs (for example one house of parliament, the president, the government) in several, transparent steps and at different moments in time. In such a case, even when parliament, government and presidency are taken over by the same party, the insulated agency will keep its independence, because all other stakeholders can only exchange a part of the agency's executive.

Building an institutional landscape, which makes high level corruption more difficult than it is today may not create the intended outcomes if the party system itself is not sheltered from business influence. This can be

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achieved throught the creation of a level - playing field for all parties with regard to lobbyism. The more resources parties can expect from the state budget, the less they will be susceptible to oligarch sponsoring. Low thresholds for private sponsoring and rigid transparency rules need to be monitored and abuses sanctioned by an insulated agency. Also, the current voting system, with 50 per cent of the mandates coming from majoritarian constituencies, needs reconsideration. Single-seat majoritarian electoral districts are vulnerable to corruption for two main reasons. They facilitate clientilism on the level of the constituency, where a wealthy sponsor only needs to concentrate resources on one candidate in order to purchase a seat in parliament. They also facilitate the popular Ukrainian scheme of buying' members of parliament in order to cross a regulaminatory threshold". An MP holding a direct mandate from a majoritarian constituency can easily sell his vote and even be disloyal to his party leadership (which cannot prevent him from running again in his constituency) and be reelected anyway, as long as he remains loyal to his sponsors back home. An MP elected from a party list under proportional suffrage is much more restrained in his autonomy to 'sell' his vote, since his chances to run again additionally depend on the party leadership, which may sanction his disloyal behaviour during his parliamentary term.

Security Sector Reform: Dismissals Versus Institutional Reform

A crucial role on the way from a corrupt clientilist system to a liberal democracy which cherishes the rule of law is played by law enforcement, the judiciary and the secret services. The secret services are most likely to be disbanded after transition, since they usually play the ugliest part in protecting the interests of the ancien regime and in persecuting its opponents. However, there is a lesson to be drawn from both European and Arab transitions to democracy which suggests proceeding with care and prudence. This lesson says that secret service agents never disappear. If they are dismissed and banned from the state service, they may constitute a higher risk for a transitional government than if they were kept within the new political order. Disbanded agents tend to find new work in organised crime, private security firms or they may work for hostile governments. Large scale punishment, including prison terms for former agents solve the problem only partly - they strengthen in-group favouritism, solidarity among former agents and the emergence of clandestine networks of former perpetrators and public lobbing organisations, which leave their imprint on the party system. It may therefore be a better solution to reform the institution

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rather than the officers, to shatter existing hierarchies, relocate officers across the country, amend rules and appoint new, untainted officers to higher positions. The same can be applied to the police, where large scale lay-offs often prove detrimental to the legitimacy of transitional governments. They are usually stuck in an almost unsolvable dilemma: the public expects them to punish the police for past abuses, but at the same time, is extremely sensitive to crime and corruption, which quickly become the dominating topics of the unleashed media. Reassuring a crime-sensitive public and shattering the police to pieces are totally contradictory objectives. Once again – institutional reform is the better alter-

Usually, institutional reform is difficult to defend during a transition, when the public wants to see perpetrators punished and justice to be done. But here comes the good news for

native to individual punishment.

Ukraine's transition: oligarch influence, cartelist and clientelist obstacles to radical change are most likely to drive the negotiators in Kiev into a direction which makes institutional reform the only available avenue of change. It is hard to believe that a weak opposition will be able to win over oligarchs, the military, the security sector and the remainders of the Party of Regions to a programme of large scale retribution against the pillars of their power. It is much more likely, that prudent and slow institutional reform will be the price, which the ruling political-entrepreneurial establishment will be ready to pay in order to avoid more radical measures for which the crowds will call out. But this also means that most of the far-reaching hopes and expectations that have been nurtured on the Maidan barricades during the last months, will, as often is the case in negotiated transitions, be deceived.

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12 Footnotes

- 1 More about these paradoxes of retribution during transition: Klaus Bachmann, Paradoxes of Retribution. What Central European Experiences Tell About. Transitional Justice in Arab Countries. Centre of International Relations Reports and Analyses 6/2011 available at: www.csm.org.pl and Klaus Bachmann, Kirsten Fisher and Robert Steward. 'Risks and Rewards: Lessons from Central and Eastern Europe's Transitional Justice Experiences.' In: Kirsten Fisher and Robert Steward (eds): Transitional Justice and the Arab Spring. Routledge 2014 (upcoming). 112-130.
- Kathryn Sikkink. The Justice Cascade. How Human Rights Prosecutions are changing world politics. New York, London: W.W. Norton & Co. 24-28.
- On the Truth and Reconciliation Commission: Richard A. Wilson. The Politics of Truth and Reconciliation In South Africa. Legitimising the Post-Apartheid State. Cambridge University Press 2001; Antje du Bois-Pedain. Transitional Amnesty in South Africa. Cambridge University Press 2007; Erik Doxtader and Philippe-Joseph Salazar (eds). Truth and Reconciliation in South Africa. The Fundamental Documents. Institute of Justice and Reconciliation. Capetown: New Africa Books 2007.
- 4 Georgiy Gongadze was a Kuchma-critical journalist, who was abducted and killed in 2000. Later on, a former Ukrainian secret service agent, who fled to the West, published a conversation, in which Kuchma is heard ordering the killing of Gongadze. The tape was never admitted in any of the numerous Ukrainian investigations of the Gongadze killing. A number of people were prosecuted and sentenced in connection with Gongadze's death and a former Minister of the Interior was killed a few hours before he could testify about the killing. Gongadze's head, who had been severed by his hijackers, was never found. His descendants were granted asylum in the US.
- 5 Yanukovych's response was to threaten them with the dissolution of the Rada (and, according to some sources, with death). Ukrajinska Pravda, 29.1.2014.
- 6 The division into an eastern and western half is far from being complete and free of contradictions. The Crimea differs in many ways from other eastern parts of the

- country, whereas Transkarpatia (Zakarpatja) is in terms of political mobilisation, support for western' parties and movements and with regard to the Maidan events a strongly eastern' region, where support for Yanukovych was high and votes for Yushchenko and Tymoshenko were scarce in previous elections. Central Ukraine the area around Kiev also differs in many ways from the western and eastern part.
- 7 Such an effect is called 'pluralistic ignorance,' and describes a situation where people base their decisions on a false perception of what the dominant opinion of their reference group is. Since voters tend to vote for the prospective winner rather than for the loser, this effect increases the likelihood of success of political forces that dominate public discourse but do not yet have a majority in elections.
- An example was the use of black-red flags, the anthem of the Ukrainian nationalist movement during World War II, which collaborated with the German occupation and fought against the Soviet partisan resistence, whose traditions are very popular in the Donbas region.
- 9 The ability of the Army to stage a coup d'etat (as for example in Egypt) is weakened by the fact, that the Ukrainian Army still comprises conscript soldiers, whose loyalty is in doubt, especially, when they were conscripted in the western parts of the country. Using the Army to quash protests may quickly lead to civil war and make heavy weapons available to the opposition.
- Often, such leadership of this kind of agencies is appointed by institutions which do not have the right to recall the leadership, after its appointment. One such example is the European Commission, which is appointed by governments and the European Parliament, but commissioners can only be dismissed if the European Court of Justice agrees to it.
- 11 For example the threshold for making a group of members of Parliaments a formal club (giving them certain privileges) or in order to cross a voting threshold.

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