Judicial Reform after the Euromaidan:
Ukraine's Rule-of-Law Breakthrough that Wasn't

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I. Introduction

If a country ever seemed ready for a rule-of-law breakthrough, it was Ukraine in 2014. The massive Euromaidan protests demonstrated Ukraine's high and sustained level of demand for law, which has been deemed crucial to the development of a well-functioning judiciary (Hendley, 1999; Pistor, 2002; Berkowitz, Pistor, and Richard, 2003). During the Revolution of Dignity which eventually toppled President Yanukovych, the median protestor rallied for the rule of law, rather than for European integration, Ukrainian nationalism, or the partisan opposition (Onuch, 2014; Popova and Shevel, 2014). Demand for law continues to be high as majorities of Ukrainians report that judicial reform should be the government's top priority and civil society has spawned several organizations devoted exclusively to monitoring the process.

Since 2014, Ukraine has built up the institutional or *de jure* independence of the judiciary, considered by many to be a prerequisite for *de facto* independent courts and the rule of law (Larkins, 1996; Burbank, 19998; Russell and O'Brien, 2001, etc.). The new Ukrainian government turned its attention immediately to judicial reform and barely a few weeks after the revolution, Ukraine's judges received a stronger self-government mandate—the rank-and-file judges on each court could elect their chair in a secret ballot (Popova, 2014). Over the next four years, almost a dozen new laws have brought the institutional setup of the Ukrainian judiciary closer in line with international best practices (Szostek, 2017).

More broadly, Ukraine has vigorous political competition, which many believe fosters the emergence of independent courts (Ramseyer, 1994; Ginsburg, 2002; Stephenson, 2003; Epperly, 2013, etc.). President Poroshenko has had to change his Prime Minister, reshuffle his government, and compromise with opponents in parliament. Challenges have come from all sides—from the official opposition, the aptly-named Opposition Bloc, from Poroshenko's one-time allies in parliament, and even from ambitious executive appointees. Case in point, in May 2015, former Georgian president Saakashvili obtained Ukrainian citizenship to become the governor of Odessa and the face of the Poroshenko

Administration's radical reforms. By 2017, the two fell out, Saakashvili was fired, founded a new opposition movement, organized anti-government protests and was stripped of his citizenship.

And, finally, Ukraine has been strongly exposed to the main external catalysts of successful rule-of-law reforms: foreign investor pressure and European conditionality (Schimmelfennig and Sedelmaier, Vachudova, 2005; Bechev and Noutcheva, 2008). The EU and the IMF have closely monitored judicial reform, offered several carrots (loans and visa-free travel), and threatened to withhold them (again loans) when they perceived the Ukrainian government to be wavering in its commitment to judicial reform and the rule of law (Popova, 2017).

Unfortunately, despite the full checklist of auspicious factors for independent courts, the promise of the Revolution of Dignity to provide the rule of law is dissipating. The judiciary has dragged its feet on holding anyone accountable for the massive corruption and abuses of power of the Yanukovych administration revealed during the protests. The high profile restructuring of the judiciary has yielded few visible signs of change in implementation. Both within Ukraine and among its international partners, concern is rising that the courts are as dependent and corrupt as before.

Our analysis takes stock of the dizzying array of legislative and institutional changes that the Poroshenko administration has enacted since taking power in 2014. We highlight the remarkable breadth of these changes, as well as their startling lack of impact on judicial norms and practices. Despite appearance of a radical break with the past, the evidence does not suggest deep or abiding changes in the way Ukraine's judicial system operates. Rather, Ukraine's ambitious reform agenda seems to have generated very little in the way of substantive change.

On a conceptual level, we point out that reform is a complex and multilayered phenomenon. It can take many forms, and its impact on judicial independence and the rule of law is far from certain. Reform is not merely a destination but a *process of transformation*, about which we understand surprisingly little. In the literature, there is a lot of discussion about factors that trigger or impede the initiation of reforms—whether it is domestic political competition, or a certain institutional setup of the judiciary, or international system pressures on domestic politics. But how does the process unfold from there? Independent judiciaries and the rule of law do not appear *de novo* or in a vacuum—they have to replace politically subservient courts and the arbitrary use of law for political purposes. Yet, we are surprisingly oblivious to the mechanics of the metamorphosis. Can we teach old dogs new tricks—i.e. do dependent judges become independent under the right circumstances? Or is it necessary to replace old, dependent judges with new, independent ones? Who needs to do the purging—politicians, civil society or the judiciary itself? How should the purge happen—through formal measures in one fell scoop, or gradually, through changes in the informal norms that govern the behavior of the judiciary?

We use Ukraine's post-2014 judicial reform experience to grapple with some of these theoretical questions. We argue that politician-initiated legislative and institutional reforms tend to fall short (at least in the short- and medium-term) if there is shallow elite commitment to the rule of law. Civil society pressure cannot overcome obstructionism, and indeed can be counterproductive in the long run, unless it goes hand in hand with reforms that are driven, embraced and implemented by an internal constituency within the judiciary. While it is too soon to tell where the reform process in Ukraine will end, it appears that reforms have actually increased political pressure on judges and decreased the prospects for genuine democratic change—quite the opposite of reformers' purported goals.

II. The Meaning of Judicial Reform: A Conceptual Framework

Surprisingly, most of the scholarship dealing with judicial reform takes the concept for granted, and rarely bothers to define it. The concept is often implicitly understood as a set of institutional changes—whether that refers to small modifications, such as switching from partisan to non-partisan judicial elections (Hall 2001) or changing judicial tenure rules (Finkel 2008), or major institutional restructuring, such as the adoption of judicial self-governance through the judicial council model (Magalhaes 1999). Other studies on judicial reform define it in terms of outcomes—usually, normatively desirable judicial features, such as independence or efficiency (Botero et al. 2003). In such cases, the literature tends to assume that judicial reform's impact on outcomes such as independence, power and efficiency can either be positive or none. When the effects are positive, reform is deemed successful. When no positive effects accrue and the status quo persists, reform is judged as a failure.

This underdeveloped conceptualization of judicial reform misses a lot. First, reform can be consequential without any institutional restructuring of the judiciary. Often, changes in the informal norms that structure the relationship between the judiciary and other branches are the most transformative for the functioning of the judiciary. Second, judicial reform can *reduce* the independence, power and efficiency of the courts, either as an unintended consequence or as a deliberate strategy. When political actors attempt to limit the independence or power of the judiciary through institutional restructuring or changes in informal norms, they are also pursuing judicial reform. Sometimes they sell reform as an attempt to increase efficiency, when the surreptitious goal is to curtail power and independence. Alternatively, they openly argue that judges are unaccountable and overly activist and hence the judiciary needs to be reformed to better serve the common interest.

Put differently, judicial reform is a multidimensional phenomenon that varies considerably in its content, form, and function. Judicial reform may affect one, multiple, or all levels of the judiciary and the institutions that govern it; it may include legislative, institutional, and/or informal norm changes; and it may alter the internal functioning of judicial institutions, the judiciary's relationship with the other

branches of government, and/or the popular legitimacy of the courts. Moreover, the effects of reform measures can vary considerably. Reforms may embolden the courts, or limit their power and independence; they may generate deep and enduring changes, or have little lasting impact on the *de facto* function or independence of the courts.

To better reflect this complicated reality, we outline three dimensions of judicial reform—what we refer to as scope, mode, and impact—to highlight the variety of possible configurations and outcomes subsumed by the concept. In the process, we identify some of the key oversights and mistaken assumptions that obscure our understanding of what judicial reform is and how it happens.

Scope

The concept of *scope* refers to the range of actions associated with the reform process. Reform can be limited in scope, focusing on only a single issue, institution, or rung of the judicial hierarchy. For example, a change to the rules governing the appointment process for new judges is a reform with limited scope. Other limited-scope reforms might target only the lower courts, only appellate courts, or only the Constitutional Court and its jurisdiction. In contrast, a comprehensive reform program with broad scope would affect many levels of the judicial hierarchy and institutions of judicial governance—including judicial councils, judicial appointments commissions, and/or judicial administration bodies.

One of the common misconceptions among both advocates and opponents of reform, as well as the public at large, is that scope is positively correlated with impact. We assume that the bigger or more wide-ranging a reform program, the more potential impact it has. Reformers often conflate scope with impact as a "sales tactic" to give the appearance of dramatic change, because it is easier to convince people that change is afoot when they can see widespread and highly visible reforms. But appearances can be deceiving. Reforms can tinker with lots of unimportant things (broad scope) to create the appearance of reform with very little impact. Conversely, a change to one seemingly minor rule, e.g. the retirement age of Supreme Court justices (limited scope), can have a potentially huge impact on the composition of the court and the political independence of the judiciary.

Mode

The *mode* of reform refers to the type of changes or initiatives associated with the reform process. Mode can be legislative, institutional or normative. Judicial reform is most commonly enacted through legislative amendment. Reforms often involve changes to existing legislation that outlines the structure of the judiciary, judicial careers and budgeting, judicial self-governance, and the formal relationship between the judiciary and other institutions. Legislative changes can also alter the codes that courts work with, influencing the jurisdiction of the courts or their level of discretion. Another common mode of

judicial reform is institutional restructuring. This can include creating new courts, closing down existing courts, creating or reorganizing institutions of judicial self-governance, or introducing new institutions in other branches of government with oversight powers over the judiciary. All institutional restructuring involves adopting new legislation or amending existing legislation (and sometimes the constitution), but not all legislative amendments rise to the level of institutional restructuring. A third mode of judicial reform involves normative change. This type of reform attempts to influence the informal norms that govern the behavior of actors within the judiciary, or between the judiciary and other branches of government. This can include attempts to violate or alter existing norms, or introduce new informal norms.

As might be expected, the most visible and readily achievable modes of reform, i.e. legislative and institutional, are also the most common. Normative change is the slowest and most difficult kind of reform because it requires not only altering legal or institutional rules, but changing the way that judicial actors think and behave. It is also arguably the most consequential and enduring of the three. However, the modes of reform do not follow a clear hierarchy, nor are they mutually exclusive. Legislative and institutional reform packages often include normative objectives, whether explicit or implicit. Likewise, reformers interested in normative change frequently rely on legislative or institutional reforms to achieve their goals. The key point is that where reformers place the emphasis can affect outcomes. Reforms that focus exclusively on legislative or institutional changes without concern for normative change can easily fall short, producing no discernable change in the *de facto* functioning of the courts, or backfire due to a misunderstanding of existing norms.

Impact

The third dimension of judicial reform is its *impact*, or the degree of change in the functioning of the judiciary. Reform impact can be difficult to measure, and it may lag behind the other dimensions of reform. But without this dimension, judicial reform is not interesting or consequential in and of itself. Among the range of possible impacts are turnover in court personnel, changes in judicial behavior and the functional independence of the courts, and/or changes in the perceived power and independence of the courts.

Significant turnover in personnel is among the most visible signs of reform impact. Court packing reforms, lustration reforms, closure of existing courts or founding of new courts, changing procedures for disciplining judges—all can have the effect of removing old judges and/or recruiting news ones. This turnover can produce deep change when newcomers bring new norms and values that remake the institution from within. However, turnover can also be a sign of only superficial change; the faces on the courts may be new, but the way in which the institution behaves can remain fundamentally the same.

Another potentially measurable indicator of reform impact is the way in which judges decide cases. If reform measures are effective, we may find evidence of courts breaking with established patterns of political subservience and asserting their functional independence from powerful elites. This could include deciding cases against the interests of powerful political and economic actors, or rejecting politically motivated cases intended to punish or intimidate the political rivals of incumbents.

Finally, changes in judicial behavior can eventually lead to changes in the perceived power and independence of the judiciary—either by judges themselves, or by the public. These changes in perception may affect the level of public trust and legitimacy of the judiciary, ultimately improving the ability of the courts to serve as a guarantor of democratic rights and freedoms.

How Change Happens

The literature on judicial reform says very little explicitly about the mechanics of institutional transformation. However, much of the research assumes an implicit theory of change, which goes something like this: The reform process begins with political leaders, who—compelled by some combination of public demand for change, domestic political competition, and/or international pressure—realize that judicial reform is necessary, and ultimately in their best interest. These leaders then enact a set of reforms that change the incentive structures facing judicial actors and alter the power dynamics between judicial institutions and other interested parties. In successful cases, these changes trigger a kind of spontaneous rebirth of the judiciary. Judges, now rid of political pressure and the corrosive influence of corrupt officials, are finally able to realize their independence and fulfill their professional obligations to uphold the rule of law. Court cases are now judged on their legal merits, rather than the interests of powerful political and economic actors. And the judiciary gradually begins to assert its rightful power and independence, both functionally and in the public imagination.

The problem is that the reform process is rarely, if ever, so clear-cut. In practice, the motives of political reformers are mixed, and sometimes explicitly anti-democratic. Public cries for accountability and civil society activism can help facilitate change, but they can also increase the vulnerability and politicization of the courts. Judges supposedly liberated by the reform process may in fact be uninterested or unprepared to claim their newfound independence—or rightfully skeptical about the true motives of reformers and the risks for judges who break ranks and challenge existing hierarchies and behavioral norms. In short, the process of change is likely to be messier and less linear than we may imagine, because transitioning judicial systems are full of actors imbedded in, and conditioned by, a complex political and institutional environment that shapes the way they understand that process.

In the following analysis, we describe how the Ukrainian example exposes the blind spots in our theoretical understanding of the judicial reform process. A country seemingly poised for a rule-of-law

breakthrough, Ukraine has instead witnessed a flurry of reform activity and political fanfare, accompanied by precious little functional change in the judicial sector. Specifically, despite the appearance of favorable conditions, we contend that Ukraine's highly contentious political environment and history of deeply politicized courts have fostered shallow elite commitment to the rule of law and a weak internal constituency for reform within the judicial sector. Though nearly absent from the scholarship on judicial reform, we argue that these factors have played a decisive role in Ukraine, undermining the transformative potential of legal and institutional reform measures, and scuttling the possibility of *de jure* independence and the rule of law.

III. Ukraine's Post-Maidan Judicial Reforms

By all accounts, the wide-ranging scope of the post-Maidan reform agenda is one of its most notable features. The Poroshenko administration has enacted sweeping and comprehensive changes throughout the judicial sector. Every level of the court hierarchy and all institutions of judicial self-governance have undergone some form of restructuring over the last 3 years. A host of new institutions have been created, with still more in the works. In legislative and institutional terms, the Ukrainian judiciary has undergone a tectonic shift. Yet, as we discuss, the impacts of these changes are much less clear.

Legislative Changes

Since March 2014, the Rada has passed at least eight major new pieces of legislation, including a set of Constitutional amendments, aimed at shaping the judiciary. The first of these laws was adopted on April 8, 2014, barely 6 weeks after Viktor Yanukovych fled the country. The *Law On Restoring Trust in the Judiciary*, widely known as the *judicial lustration* law, introduced sweeping changes. The law had two cornerstones: 1) the automatic dismissal of all judicial leadership cadre—court chairs and deputy chairs, the members of the High Qualification Commission of Judges (HQCJ), and the members of the High Council of Justice (HCJ); and 2) the formation of an *ad hoc* commission to investigate complaints against judges who allegedly violated defendants' rights during Euromaidan, and decide whether to recommend some judges for dismissal for judicial oath violations by the HCJ (for more on the law, see Popova, "Ukraine's Legal Problems," *Foreign Affairs,* April 15, 2014).

In February 2015, the pro-Poroshenko parliamentary majority adopted another judicial reform law—*On Guaranteeing the Right to a Fair Court*—drafted and submitted by the Presidential Administration. The law restored the jurisdiction of the Supreme Court, which had been severely curtailed by Yanukovych's 2010-11 judicial reform. The law also introduced qualification categories for judges,

which was a step back, rather than forward for institutional independence, as the assignment of categories could be a tool for rewarding loyal judges and punishing disloyal ones.

In the summer of 2016, judicial reform continued through the adoption of a set of constitutional amendments and amendments to the main piece of legislation stipulating the structure of the judiciary—the *Law on the Judicial System and the Status of Judges*. The June 2 constitutional amendments fully reversed Yanukovych's judicial reform by folding the high specialized courts created under his tenure back into the Supreme Court. In a major break with Ukraine's post-Soviet practice, the constitutional amendments took away the President's power to create and close courts and transferred it to the Rada. In return, the President received the power to immediately appoint all judges to life terms, while the Rada was taken out of the judicial appointment process. Through amendments to ordinary legislation, judges' functional immunity from prosecution was reduced and the list of transgressions that called for disciplinary action against them by the judicial self-government organs became longer. Finally, new legislation introduced a new institution—private judicial act enforcers.

In January 2017, a new law reconstituted the High Council of Justice (Vysha Rada Yustitsii) into the High Council for the Administration of Justice (Vysha Rada Pravosuddya). In July 2017, a new law on the Constitutional Court introduced many changes. In October 2017, in a legislative initiative unprecedented in its scope in Ukraine's post-Soviet history, three of the main codes (the Commercial Procedural Code, the Civil Procedural Code, and the Administrative Code) were rewritten. The pro-presidential majority that voted through the revision of the codes in parliament has billed it as a reformist step towards a better legislative basis for a more efficient and "more European" judiciary. However, working with new legislation can also adversely shape judges' behavior. As judges work to learn the intricacies of the new provisions, they may be more insecure in their decisions and more vulnerable to "guidance" by judicial superiors in individual cases. And most recently, in June 2018, the Rada adopted a compromise law on the creation of an Anti-Corruption Court. Another law further regulating the function of the court is in the works.

Institutional Changes

The post-Maidan period has seen an explosion of institutional creation within and around the judiciary. The Supreme Court, Constitutional Court, and High Council for the Administration of Justice have been reconstituted with different membership, jurisdiction, rules of standing, and institutional setup. Moreover, the majority of the changes are in line with what are perceived to be best practices in the institutional setup of the judiciary—strong judicial self-government, powerful high courts with broad jurisdiction, and institutional insulation.

The reconstituted and renamed High Council for the Administration of Justice (HCAJ) is stronger than its predecessor as a judicial self-government organ, which supervises the work of judges and courts. HCAJ members now take leave from their regular jobs as judges, prosecutors or lawyers and work full-time, rather than part-time as before. This change is supposed to reduce the need for them to rely on the work of staff, whose behavior is less transparent and accountable. The judicial corps now has a controlling share of representatives on the new institution (11/21; 10 appointed by the Congress of Judges + the Chair of the Supreme Court serving ex officio), while the President and the Rada could appoint only 2 members each. This step formally greatly increases the insulation of this judicial institution from the political branches. The remaining 6 members of the HCAJ are appointed by the professional associations of lawyers, prosecutors, and legal academics. Finally, the new institution has full power over judicial careers and the courts' budgets, which further contributes to the structural insulation of the judiciary from the political branches—judges would not have to beg politicians for money to assure proper financing of the courts.

Major institutional reforms reached the Constitutional Court as well. The Ukrainian Constitutional Court can now be accessed through the constitutional complaint option that exists in many European countries: any Ukrainian citizen could challenge the constitutionality of a given law as a way of appealing a final court decision. The new Constitutional Court has 18 justices, appointed through 3 quotas (presidential, parliamentary, Council of Judges) and following formal competitions. Justices will serve only one 9-year term, but after leaving the Court would be entitled to a lifetime salary, equal to 50% of their salary on the bench. The goal of the post-tenure salary is to foster independent behavior on the bench by reducing the need for justices to issue quid pro quo decisions as an investment in their post-tenure livelihood.

A new Public Integrity Council (PIC) was launched in the fall of 2016 alongside the High Qualification Commission for Judges (HQCJ) to vet candidates for judicial office. The PIC has 20 members who had to show that they have pursued an anti-corruption agenda within civil society for at least 2 years prior to their appointment to the council (i.e. since at least fall 2014). The purported goal of this institution is to increase the transparency and accountability of the judicial cadre renewal process by involving civil society.

A High Anti-Corruption Court and an Anti-Corruption chamber within the Criminal Cassation chamber of the new Supreme Court are currently in the works. After almost two years of wrangling and under significant pressure by the IMF and the EU, the Rada adopted a law on the High Anti-Corruption Court in June 2018. The court will have 35 judges hearing only political corruption cases and its decisions could be appealed in the dedicated chamber at the Supreme Court. The judges on the new court will be appointed by public competition run by an *ad hoc* Commission within the HQCJ. The members of the *ad*

hoc Commission will be appointed through quotas by the President, the Rada, the Minister of Justice, and the international community. The points of contention that slowed down the adoption of the law were the make-up and role of international community's quota. Predictably, the international organizations demanded greater autonomy and power for the experts they would appoint, while the presidential administration resisted. In the end, a compromise was reached. The law gives meaningful veto power to the international experts—a candidate could not be appointed to the court unless she had the support of more than half of the international experts. The presidential administration managed to push through the provision that Ukrainian citizens could serve as international experts, if they were backed by the international community. Many see Ukrainian citizens as potentially more vulnerable to pressure by the Ukrainian political establishment. In January 2019, the HQCJ and the international experts are vetting candidates.

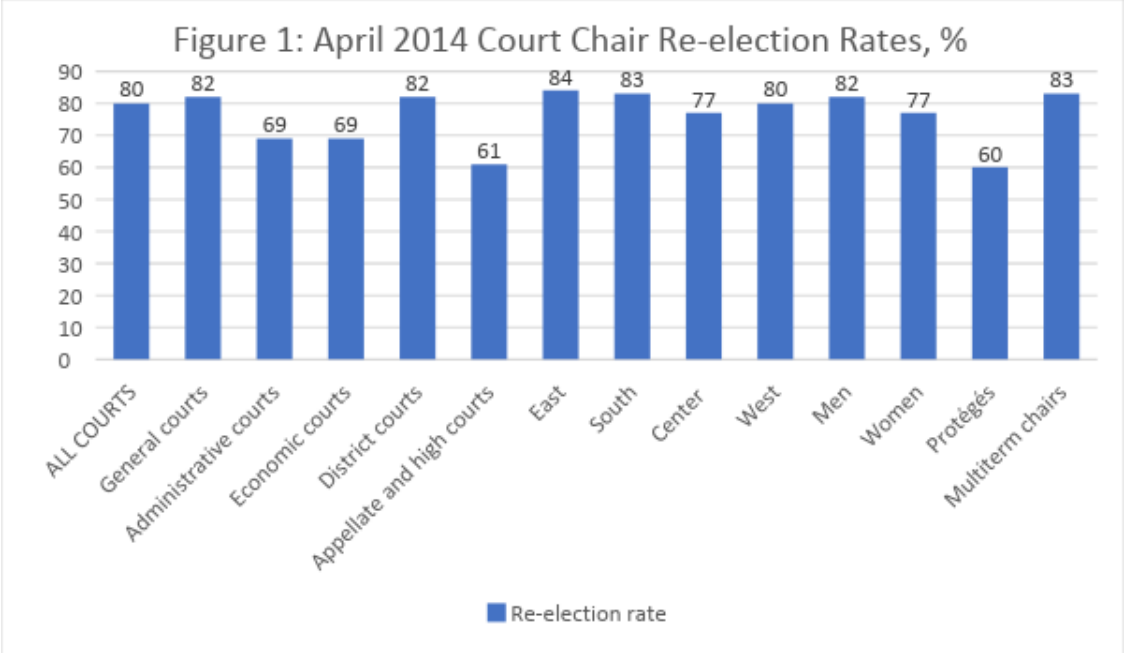
Within the executive, the Poroshenko administration has an active point man for the judiciary, a former lawyer (and thus relative outsider to the judiciary), Aleksei Filatov. In 2014, Filatov formed a Council for Judicial Reform Issues and invited key administrative leaders within the judiciary (i.e. high-level judges and court chairs) to participate in regular consultations. The Council for Judicial Reform at the PA has drafted the judicial reform bills submitted by the PA to parliament.

Finally, a slew of new institutions tasked with tackling corruption have been formed outside of the judiciary. Arguably, their creation also amounts to judicial reform. They redraw the playing field for corruption prosecution—currently a central mandate of the judiciary; a mandate it has so far failed to fulfill. Thus, the activities of the new anti-corruption institutions are likely to affect the functioning of the judiciary. The National Anti-Corruption Bureau of Ukraine (NABU) appeared first in March 2015. It is an autonomous institution, whose director is selected and appointed by the President, but cannot be easily removed by him. NABU can investigate high-level political corruption, but cannot prosecute it. In September, 2015, a new Special Anti-Corruption Prosecution (SAP) was created through a decree of the Prosecutor General in September 2015. SAP can oversee the legality of NABU's investigations and would eventually prosecute NABU's cases in court. Within the executive, a National Agency for Corruption Prevention (NAZK) was launched in August 2016. This organ's mandate focuses on the formation of government policy on fighting corruption.

Normative and Behavioral Changes

So far, the informal norms that have shaped judicial behavior in post-Soviet Ukraine seem to be surviving the sweeping and comprehensive structural judicial reform adopted over the last 3 years. First, deference to court chairs seems to be alive and well, especially at the lower courts. Analysis of the April 2014 court chair elections (Popova, forthcoming) shows that the judicial rank-and-file did not use the

direct election to bring about major change in the courts. On the contrary, leadership continuity and retention were the norm across the judicial hierarchy and across the country's regions. Overall, over 80% of court chairs retained their positions. Figure 1 shows retention rates across types of courts, levels of courts, region, and chair characteristics. Multivariate regression analysis shows that Yanukovych proteges (i.e. judges parachuted by Yanukovych as chairs of courts where they had not served before) were significantly more likely on average to lose their positions in the April 2014 elections. However, even their re-election rate was 60%, which seems quite high, given that their political sponsor had fled the country. The result is consistent with a strong norm of deference by rank-and-file judges to their administrative leaders. There was no strong regional dimension to the chair elections—judges in Western and Central Ukraine were roughly as likely to re-elect their Yanukovych-era chairs as were judges in Eastern and Southern Ukraine[1]. This is a somewhat surprising finding as Western and Central Ukraine purportedly experienced significant civil society mobilization around rule-of-law issues and were the focus of "trash can lustration" actions and other attempts to interfere in the judicial election process. The lack of regional variation thus suggests that the hierarchical deference norm in the judiciary is quite strong and holds across regions and cross-cuts traditional East-West Ukrainian ideological and political cleavages.



[1] Perhaps, judges in the Central region had a slightly lower re-election rate—one model specification showed this result.

Another informal norm that is still standing after Euromaidan's political earthquake is executive dominance over judicial governance through the appointment of "pro-presidential" members of the judicial self-governing institutions. The judicial lustration law initially triggered a confrontation between Yanukovych-era judicial elites, who wanted to avoid being purged, and members of the incoming political elite who aspired to take their positions. This confrontation tied up the two institutions of judicial self-government, the HQCJ and the HCJ, for the rest of 2014. Despite the lustration law providing for the immediate disbanding of the HQCJ, the HQCJ continued operating with its Yanukovych-era membership for months, as members tied up the process by challenging their dismissal in the courts. The High Council of Justice (HCJ), also became a battlefield as Yanukovych-era judicial playmaker, Sergei Kivalov, attempted to safeguard his control within the judiciary (Popova, 2014). The stalemate at the HQCJ was broken by early 2015. The new chair had no previous experience as a judge but had been active in a lawyers' association that gravitated to the Poroshenko administration. In an introductory interview he was upfront both about his close ties to the Presidential Administration and regular judges' resentment that an outsider had been appointed to lead one of the judiciary's most powerful institutions[2]. By the spring of 2015, the HCJ was functioning and the majority of its newly-elected members were loyal to the Presidential Administration, whether due to long-standing ties to Poroshenko or having more recently pledged their allegiance. The organ was chaired by an appointee from the presidential quota—Igor Benedisyuk[3]. The reconstituted judicial self-government organ, the HCAJ, though formally much more insulated from the executive, informally represents the continuation of the executive dominance norm as it is chaired by the same Poroshenko appointee—Igor Benedisyuk.

"Telephone law," a related informal norm of executive interference in judicial decision-making, also seems unaffected by the institutional reconfiguration of the judiciary. "Telephone law" involves unsolicited calls in which politicians or their representatives urge judges or their superiors to resolve a concrete case in a concrete way (Ledeneva 2008; Hendley 2009; Popova 2012a). In September 2017, two famous pranksters demonstrated that judges find it eminently credible that a representative of Poroshenko would call them and give them instructions about how to adjudicate a case. In one call (posted on YouTube here) the prankster calls a judge hearing one of Saakashvili's cases in a district court in Lviv posing as Rada deputy Granovsky, asks concrete questions about evidence in the case, emphasizes that Poroshenko is following the case, and urges the judge to consider the case very seriously. The judge proclaims his gratitude to the President for having given him life tenure and assures Poroshenko's

[2] http://www.vkksu.gov.ua/ua/about/zmi-pro-komisiu/sudi-poluchaut-shans-sdelat-reshitelnyy-shag-k-evropeyskoy-tsivilizatsii-kozyakov/

[3] In a Ukrainska Pravda journalist's words: *"Адже більшість із них не можна віднести до політично незаангажованих правників із незаплямованою репутацією."*
http://www.pravda.com.ua/articles/2015/04/21/7065414/

purported representative that the law would be applied in the correct fashion. In another call, the chair of another district court in Lviv, where another of Saakashvili's cases and a case against David Sakvarelidze are heard, gives "Granovsky" important details about the movement of the cases, lays out her planned course of action in the case, and then asks "as far as I understand, [this] is what we are supposed to be doing. Do I understand correctly?" And if the pranksters are, in a way, trying to prove with a "field experiment" that telephone law is alive and well, there are also reports from judges about real such conversations. In 2015, Kyiv Appellate Court chair Anton Chernushenko became a whistleblower about "telephone law". He alleged that he had met PA's point person for the judiciary, Aleksei Filatov at the PA shortly after Poroshenko's inauguration. At the meeting, Poroshenko allegedly personally explained that Filatov and Chernushenko should collaborate in the future, and that if Filatov called to seek clarifications about cases, Chernushenko should interpret Filatov's opinions as the president's positions[4]. Chernushenko alleged that after he refused to collaborate closely with the presidential administration, he became the target of a corruption investigation by the procuracy and the secret services. The judge was accused of manipulating the supposedly random assignment of court cases and personally distributing politically sensitive cases. A raid of his office also found some cash. After the accusations, Judge Chernushenko fled the country.

One post-Maidan change is that judges are increasingly subject to credible pressure and interference by civil society activists. While it may be too early to call this an emerging informal norm, dealing with disruptions and threats by activists is becoming a common occupational hazard for Ukrainian judges. The mobilization of civic groups for court "monitoring" started as early as the April 2014 court chair elections campaign. At the time, civil society groups wanted to make sure that rank-and-file judges voted freely and their votes were counted accurately. Other actions sought to punish judges who, activists believed, had violated citizens' civil and human rights during Euromaidan, but remained on the bench. These "trashcan lustration" actions ended up with some judges being forced into resigning, publicly humiliated or hurt. More recently, HCAJ chair, Igor' Benedisyuk, had activists camped outside his residence for weeks and threatening him with retribution. These incidents likely further undermine judges' self-perception of independence and efficacy. Instead of serving to counterbalance pressure and interference from political incumbents (which is purportedly one of the activists' primary goals), they underscore the point that judges in Ukraine are not free to decide cases in line with their bona fide interpretation of the law, but need to weigh competing sources of pressure[5].

[4] https://www.pravda.com.ua/rus/news/2015/08/28/7079283/

[5] A potentially more promising informal norm change is that post-Maidan judges seem more willing to put their names forth in public competitions, rather than wait to be nominated by their superiors. We are working to collect evidence from recent public competitions for the new Supreme Court and for the vacancy on the Constitutional Court, which will be filled by the Council of Judges shortly.

Reform Impact

It may be appealing to assess the sweeping reforms' impact by checking turnover numbers and assuming that the greater the turnover, the deeper the impact. Overall figures reported by the judicial self-government organ show that a total of 2470 judges, or 28% of all Ukrainian judges, have resigned their positions between 2014 and late 2017.[6] Most of these spots have not been filled, so many district courts around the country are struggling to handle their caseload. The retention elections for court chairs mandated immediately after Maidan's victory and carried out in April 2014, removed about a fifth of chairs at all levels (Popova, forthcoming). At the highest echelons of the judiciary turnover is higher. In the reconstituted Supreme Court, 50 to 70% of appointed judges have not served on the previous versions of the country's highest court (Table 1).

Table 1: Candidates for Appointment to the New Supreme Court

Nominee's current position	Civil chamber	Administrative chamber	Criminal chamber	Commercial chamber
Supreme Court judge	1 (3%)	2 (7%)	0	1 (3%)
Specialized High Court judge	14 (47%)	8 (27%)	9 (30%)	11 (37%)
Appellate court judge	6 (20%)	8 (27%)	10 (33%)	2 (7%)
Lower court judge	0	4 (13%)	3 (10%)	3 (10%)
Lawyer	2 (7%)	0	1 (3%)	6 (20%)
Academic	3 (10%)	5 (17%)	3 (10%)	5 (17%)
Former judge	0	1 (3%)	2 (7%)	2 (7%)
Nominees rejected by High Council for Administration of Justice	4 (13%)	2 (7%)	2 (7%)	1 (3%)

As the table demonstrates, in each chamber (except the Criminal Chamber) the biggest proportion of nominees are judges who already served on the previous incarnations of the Supreme Court. In the Civil Cassation chamber these judges make up 50%, in the Administrative Cassation chamber they constitute 34%, and in the Commercial Cassation chamber they make up 40% of the nominees. If we add the judges who have served on appellate courts (the judicial hierarchy rung right below the Supreme

[6] https://www.segodnya.ua/ukraine/v-ukraine-nachali-sud-nad-sudyami-1139441.html

Court), all four cassation chambers are dominated by experienced judges—70% on the Civil chamber, 61% on the Administrative chamber, 63% on the Criminal chamber, and 47% on the Commercial chamber.

Nevertheless, the assumption that greater turnover means deeper reform impact is misguided. At the lowest levels of the judiciary we simply do not know who resigned and who decided to remain in their positions. One possibility is that most of the 2500 judges who left the judiciary had been thoroughly corrupt and/or politically engaged with the Yanukovych regime. They feared that their corruption and/or politicized decisions would be exposed through the reform measures and they would face disciplining, dismissal, or even criminal charges. They resigned to save face and avoid punishment. If that is the case, the comprehensive reforms have had deep impact. However, the sluggish and ineffectual work of the *ad hoc* Commission tasked with investigating judicial corruption and abuses of office during Maidan suggests that Yanukovych loyalists and corrupt judges had little to worry about. The commission received complaints against 351 judges, but less than one tenth (31 or 9%) were fired in 2016, and only 3 in 2017. The window for pursuing these cases has now closed.

A more plausible scenario is that judging in post-Maidan Ukraine is as a high-stress job as it has ever been, and judges are leaving in droves for greener pastures. Many of those who resigned likely feared that the judicial lustration project was both a political purge and a façade fight against judicial corruption. Some feared getting scapegoated and charged criminally for infractions they either did not commit or committed along with most of their colleagues. Others stressed about being attacked and harassed by "court monitoring" vigilantes. Still others wanted to avoid getting saddled with lose-lose cases (for e.g. prosecuting Anti-Maidan activists in an Eastern/Southern court), so they left pre-emptively. If that is the case, the reform may have reinforced the norm of executive dominance over the judiciary and exacerbated judicial corruption and dependence.

At the higher courts, turnover seems to stem mainly from the replacement of Yanukovych loyalists with Poroshenko loyalists, rather than from an influx of reformist elements from the lower rungs of the hierarchy or from outside the judiciary. As Table 1 shows, only about 10% of the new appointees to the Supreme Court were scholars and another 10% were lower court judges.

Alternatively, reform impact is often assessed by looking at the types of decisions that judges deliver. However, there have been few "major" decisions at any level of the judiciary in the post-Maidan era. While some high-profile cases are pending in the courts as the anti-corruption institutions (NABU and SAP) have started to generate some investigations, the courts have so far been stalling. It may be early to claim that impact has been limited as far as landmark decisions go, but so far this is the situation we have.

Perceptions of judicial independence offer another perspective on reform impact. Perhaps as a result of sustained political pressure and a freer media that obsessively covers the courts' every move, the judiciary is now perceived as more politically dependent than ever before. A 2015 survey by the Center for Political and Legal Reforms shows that 80% of respondents think judges are dependent on politicians and/or oligarchs. Another 2015 survey by the same organization shows that less than 10% of judges themselves believe that the Ukrainian judiciary is independent, and even more damningly for the current government, 46% of judges believe that political pressure on judges today is just as strong as under Yanukovych, while 29% of judges believe that political pressure has increased under Poroshenko! In 2017, the perception has not changed much. A USAID survey conducted in Aug-Sep 2017 shows that when asked to assess the current state of the Ukrainian judiciary, respondents most often point to either corruption or political dependence. 58% think that corruption is on the rise and 49% think that new judges are selected through political, rather than meritocratic criteria. Only 16% think that judges are independent from politicians and oligarchs.

In sum, popular trust in the judiciary has plunged below Yanukovych-era levels and ordinary judges feel less independent from politicians than ever. The 2015 Center for Political and Legal Reforms survey shows that only 9% of respondents trust the courts (compared to 40% trust in the President and the Army, and ~30% trust in the Rada and the government). By 2017, trust in the Rada and the government has collapsed to 10%, according to the USAID survey, while courts remain profoundly distrusted—12% trust them and 65% distrust them.

IV. The Breakthrough that Wasn't

Taking stock of Ukraine's reform trajectory, we are confronted with a puzzle: Why have apparently favorable conditions generated so much legal and institutional change, but so little impact? In other words, why has Ukraine's rule-of-law breakthrough failed to live up to its promise? The answer, we argue, requires a closer examination of the internal dynamics of the reform process—in particular, the shallow commitment of political elites to the rule of law, and the absence of a strong reformist constituency within the Ukrainian judiciary. We contend that these factors constitute key variables in the reform process, which are central to understanding the Ukrainian experience, and the experiences of transitioning states more broadly.

Shallow Elite Commitment

Political elites play a vital role in shaping the reform agenda and overseeing its implementation. As veto players in the policy process, they may choose to cede substantial authority to an independent judiciary, or to guard their political power at all costs. Of course, it is rare to find political elites who

openly oppose the idea of a strong and independent judiciary; to do so is to mark oneself as explicitly anti-democratic, an apologist for corruption, and a target for public criticism and scrutiny. Yet, in practice, there is wide variation in the depth of elite commitment to the rule of law. Some ideologically committed elites are willing to invest political capital and scarce resources to further the rule of law, playing the role of "reform makers" who can tip the balance toward deep and lasting reform. Others feign support for the rule of law to keep up appearances, while working behind the scenes to keep the courts weak and politically dependent. Despite public declarations to the contrary, these "reform fakers" would prefer to constrain judicial authority and harness the power of the courts for personal or political gain (Popova 2017).

In Ukraine, the post-Maidan push for judicial reform was not enough to turn old elites into born-again believers in the rule of law. The circumstances simply left politicians with no choice other than to publicly support a reformist agenda, despite their private misgivings. Evidence of this shallow elite commitment can be seen in many of the actions of political elites throughout the reform process. In the Rada, laws proposed by reformist MPs have been watered down by competing drafts from the Presidential administration. As old judges have resigned, the Poroshenko administration has dragged its feet over new judicial appointments that could breathe life into the reform process. In criminal cases involving judges implicated in corruption and abuses of power during the Maidan period, the General Prosecutors appointed by Poroshenko have taken a passive stance that belies real commitment to reform. And despite promising to appoint independent international experts to the panel selecting justices on the new High Anti-Corruption Court, the Poroshenko administration has made repeated moves to undermine this commitment. In sum, political elites have repeatedly blocked the deepest and most transformative reform measures, suggesting an opportunistic and disingenuous posture toward the reform process.

Part of the explanation for this shallow elite commitment can be found in the nature of political competition in Ukraine's highly contentious and unstable regime. Where intense political competition is coupled with deep uncertainty about the stability of the political system, the comparative evidence suggests that political elites are less likely to prefer independent courts (Popova 2010, 2012). Because incumbents cannot be assured of winning the next election—or even that the next election will be held—they are compelled to use any and all tools at their disposal to stay in office, including manipulating the courts to disadvantage, disqualify or intimidate political opponents (Popova, 2010; Trochev 2010). At the same time, well-established patterns of judicial politicization mean that political elites enjoy ready-made tools to control the courts, and reduced concern for public backlash among a populace accustomed to such behavior. The result is a kind of no-holds-barred fight for power and influence in which instrumentalization of the courts constitutes a logical and attractive strategy for maximizing short-term political advantage in an environment of long-term uncertainty (Popova 2012).

In Ukraine, we have seen these dynamics play out over and over—in the highly politicized defamation and electoral registration lawsuits used to silence political rivals and media organizations in the 1990s and early 2000s (Popova 2010, 2012); in the Yanukovych administration's systematic attacks on judicial independence; in the highly politicized prosecutions of political figures like Yulia Tymoshenko and Yurii Lutsenko (Popova 2016a); and in the use of courts as a political weapon against protestors during Euromaidan (Popova 2016b). Ukraine's judiciary has repeatedly been targeted by regime elites as a key political battleground. And with the stakes of political competition only increasing in the post-Euromaidan period, the political environment in Ukraine continues to incentivize elites to politicize the judiciary, rather than to insulate and protect it from influence.

Further, we contend that diplomatic and economic pressure from powerful actors like the EU has predictably failed to consolidate genuine elite commitment to reform. While the appeal of closer relations with Europe may influence political calculations in neighboring countries like Ukraine (Schimmelfennig and Sedelmeier 2004; Vachudova 2005; Grabbe 2006), there are clear limits to the efficacy of external pressure as a mechanism for fostering deep elite commitment to reform. A longstanding criticism of the EU accession process is that it tends to produce only surface-level lip service to reforms among domestic elites. With its prescriptive focus on top-down legislation and institutional changes, critics argue that the EU incentivizes political leaders to focus on appeasing Brussels, rather than on building consensus and fostering genuine ideological commitment to democracy and the rule of law. As a result, it has created states with the formal trappings of democracy, but populated by elites with an informal aversion to liberal norms (Ágh 2015, 2016; Bugarič 2015).

In recent years, the "de-democratization" of EU member states like Hungary, Romania and Poland offers a stark illustration. In Hungary, Victor Orban's systematic assault on judicial independence and his sustained efforts to centralize political authority have called into question the country's basic commitment to democracy (Ágh 2015, 2016, Scheppele 2018, Halmai 2018). In Romania, Victor Ponta's attempts to undermine the Romanian Constitutional Court during an intra-institutional conflict in 2012 were followed by recent legislative changes aimed at decriminalizing official corruption to shield Romanian politicians from prosecution (Scheppele and Perju 2012; Karasz 2017). In Poland, the so-called Law and Justice Party's efforts to purge and coopt the judiciary have so severely impeded judicial independence that experts warn there is "no longer a separation of law and politics" (Sadurski 2018, Kovács and Scheppele 2018). The EU has since taken the Polish government to task by triggering a procedure to punish Poland for a "clear breach" of Article 2 of the Treaty of the European Union, which guarantees the rule of law, and the European Court of Justice has temporarily suspended Poland's judicial reform law in order to protect the judiciary's independence. These developments raise serious questions

about the commitment of political elites to basic democratic principles—and in turn, about the limits of EU influence—in states where the EU has actively lobbied for reform.

These questions are further compounded by the political and geographic limitations of EU influence in non-candidate states like Ukraine. Given public opposition within the EU to even a watered-down "Association Agreement" with Ukraine,[7] the only realistic option for the foreseeable future is for Ukraine to remain part of the European neighborhood policy (ENP) framework—without the promise of future membership to sway the core political interests of political elites (Flenley 2013). In such a scenario, the EU's already questionable influence on domestic elites is further constrained by the absence of a credible mechanism to advance formal accession negotiations. Thus, despite repeated interventions by the EU and the IMF, external actors lack the leverage in Ukraine to move the needle beyond shallow and irresolute commitments to reform.

Weak Internal Constituency

Another important influence—though one that is frequently absent from academic and policy debates—is the degree to which the reform process is supported by a reformist constituency inside the judiciary. Given the many ways in which the judicial corps can influence outcomes, it is surprising how often judges are left out of conversations about legal and judicial reform. Judges and judicial leaders are a central part of the reform equation because they are essential to the day-to-day implementation of reform policies. A strong reformist movement within the judiciary can press for reforms and empower change agents within the court system to animate the reform process. Conversely, a judicial corps resistant to change—or afraid to challenge the status quo—can torpedo well-intentioned reforms and set in motion a self-fulfilling prophecy of political subservience and judicial corruption. Put simply, if judges are not part of the solution, they may well be part of the problem.

By internal constituency, we mean not just latent pro-reform attitudes among rank-and-file judges, but the proactive engagement and assertion of judicial authority by actors within the judiciary. This may take the form of organized judicial action, particularly through autonomous professional associations that give voice to judges as active participants in the reform process (Beers 2012). Alternatively, it may manifest as a more amorphous "ideational shift" within the judiciary, which changes judicial perceptions about the role of judges in a democratic society, and prompts judges to engage in "high-risk judicial activism" (Hilbink 2012). In either scenario, the key point is that judges have the

[7] Before the current Association Agreement entered into force in September 2017, it was initially blocked by a public referendum in the Netherlands—until the addition of a supplementary clause clarifying that the agreement would not give Ukraine the right to automatic EU membership. (https://www.rferl.org/a/eu-ukraine-association-agreement-formally-approved/28610083.html)

power to shape the development of the judiciary and the judicial reform process in ways that are often overlooked and under-studied.

One possible configuration is a judicial corps with outspoken activist tendencies. The comparative evidence suggests that internal reform movements within the judiciary can be effective advocates of judicial independence and the rule of law, even in the face of political opposition. Such was the case in Hilbink's account of activist judges in late-Franco era Spain, who resisted political subservience and challenged the abuses of the regime by seizing upon "strategic opportunities to 'speak law to power'" (Hilbink 2012, 590). More recently, the judiciary in post-communist Czech Republic provides a subtler but no less important example of judicial activism on behalf of democratic reforms. Despite a dearth of formal institutional protections and a pattern of anemic policy reforms in the judicial sector, the Czech Union of Judges led the charge for reform—vocally advocating for increased political independence, stronger mechanisms of transparency and accountability, and increased professionalization in the Czech judiciary (Beers 2012). In many ways, the strength of the post-communist court system in the Czech case is a direct result of the judiciary's own role in pressing for key reforms.[8]

In other cases, the primary impetus for reform may be located outside the judiciary—in a prosecutor's office, ministry of justice, anti-corruption agency, or civil society group. However, a reformist movement inside the judiciary can still play a vital role, by allying with other change agents to press for reforms, and by grooming key personnel to lead newly reformed judicial institutions once a political opening appears. In Romania, where efforts to reform the judiciary have been protracted and highly contested, the reform process has benefitted substantially from an internal movement organized by mid-ranking judges from a handful of regional courts outside Bucharest. Dissatisfied with the existing leadership in the Romanian judiciary, the group founded an alternative judicial association, the National Union of Romanian Judges (UNJR), in the mid-2000s. Despite their modest ranks and relative obscurity in the early years, UNJR's judicial activists vocally pressed for reforms and served as key allies to change agents outside the judiciary—in the Ministry of Justice, the National Anticorruption Directorate (DNA) and civil society (Beers 2012). By the early 2010s, when the judicial reform process in Romania was nearing a tipping point, several UNJR leaders were promoted to key leadership positions in the Superior Council of Magistracy (CSM) and the National Institute of Magistracy (INM), where they continued to push for a strong reform agenda from inside the judicial hierarchy.

Just as the reform process can be strengthened and emboldened by reform advocates in the judiciary, it can also be undermined by a judicial corps that is actively resistant to reform. Court

[8] In one notable example, the Czech Union of Judges went so far as to create its own "Education Commission" in 1999 to provide training programs and classes to Czech judges in the absence of a state-run judicial training school (Beers 2012).

presidents may circumvent official rules and procedures to reward cooperative judges and punish those who rebuff informal influence. Judicial councils may fix exam results or waive disciplinary sanctions for subservient judges linked to political patrons. Judges may dismiss corruption cases against well-connected political elites even in face of compelling evidence. Judicial authorities may even use newly minted powers and protections to actively subvert the reform process and shield corrupt elites from real accountability. The case of Bulgaria provides a clear example of this dynamic. Despite the occasional willingness of some political elites to pursue a substantial slate of reforms, the Bulgarian judiciary has stonewalled efforts to tackle official corruption and promote greater transparency and accountability in the legal sector. Judges have actively colluded with the same powerful politicians and bureaucrats they are meant to be prosecuting and used strong institutional protections to shield the judiciary from public and political pressure to take action against corruption (Popova 2012b). In this way, the Bulgarian example offers a stark picture of the dangers of ignoring the agency of judicial actors and assuming that greater institutional protections for judges will naturally and automatically strengthen the rule of law.

In a less spectacular but more common scenario, the judiciary may play a largely passive role in the reform process—neither actively endorsing nor staunchly opposing reform measures. However, this does not mean that the judiciary's posture toward the reform process is inconsequential. In the absence of a clear reformist constituency, a highly politicized reform process can be damaging to both the function and the reputation of the judiciary, ultimately generating a vicious cycle of low expectations and poor performance. In highly charged debates over judicial reform, judges are frequently painted as willing accomplices in cahoots with corrupt political elites. In this way, the reform process itself can be damaging to public perceptions about judicial institutions and the rule of law. Further, claims about politically subservient courts and judicial corruption are likely to leave rank-and-file judges feeling persecuted and scapegoated. When judges do not have effective advocates representing their interests and defending their reputation—i.e. when there are no credible voices inside the judiciary calling for reforms to protect and exonerate the courts—the reform process can be demoralizing and disempowering to the very actors it is meant to protect and embolden.

In Ukraine, we find a judiciary with a largely passive and complacent internal constituency. Despite the flurry of recent attention to the issue of judicial reform—or perhaps *because* of it—there is no substantial, organized reformist movement within the Ukrainian judiciary itself. As one former administrative court judge put it, the few staunchly reformist judges inside the system are isolated and disorganized, surrounded by a silent majority who feel vulnerable and disempowered.[9] By and large, those who have weathered the Revolution of Dignity and remained in their judicial posts appear focused

[9] Author's interview, April 2015.

on keeping their heads down and avoiding the political maelstrom. In similar fashion, the judiciary's newly empowered self-governing institutions have declined to use their increased autonomy to advocate for a strong reformist agenda. Rather, they have strategically avoided taking a strong stand on politically contentious issues—for example, deferring decisions about judicial reassignments in the Donbas, and allowing complaints of judicial misconduct during the Maidan protests to quietly expire without investigating or punishing the accused judges.

This passive approach to the reform process is, in part, a predictable response to Ukraine's long history of deeply politicized courts. In such a volatile political environment, without clear evidence that new legal and institutional protections will insulate judges from attacks, silence and inertia may well be the most rational course of action. Especially in the absence of a strong and outspoken reformist leadership within the judiciary, rank-and-file judges must carefully weigh the costs of voicing opinions and exercising their independence, for fear that such actions may bring significant personal risks. To paraphrase Persson, Rothstein and Teorell (2012), judicial actors in Ukraine face a collective action problem common to many anticorruption situations: Even if most people in the judiciary believe that anticorruption reforms are necessary and beneficial to society, very few individual judges have a clear personal interest in taking a personal stand against corruption (463-4). Rather, as Friesendorf concludes in a recent analysis of police reform in Ukraine, most rank-and-file officers have far more to lose by raising the ire of superiors and political elites than they have to gain. Thus, it is "rational to not openly support reform" (Friesendorf 2017, 8).

Adding fuel to the fire, the post-Maidan period has been marked by a distinctly antagonistic relationship between civil society actors advocating for reforms, and the policymakers and public servants charged with implementing them. In a recent analysis of anticorruption activism in Ukraine, Zaloznaya, Reisinger and Claypool (2018) describe the tactics of civil society organizations as "aggressive," "non-collaborative" and ultimately "detrimental to anti-corruptionism." Rather than supporting and collaborating with reformist elements within the state bureaucracy, Ukraine's "integrity warriors" have relentlessly criticized the motives and tactics of reformers. As a result, their tactics have delegitimized the reform process, further eroded public trust in formal institutions, and decreased the capacity of the state to implement effective reforms (Zaloznaya et al. 2018). In the judicial sector, where civil society groups have been especially critical, anticorruption crusaders have subjected judges to unusually intense public scrutiny. This adversarial posture has reinforced negative public attitudes about the courts and paradoxically increased political pressure on the judiciary. Rather than encouraging rank-and-file judges to speak out against corruption, it has put them on the defensive.

Conclusion

Despite big promises and apparently favorable conditions, Ukraine's post-Maidan judicial reforms have yielded little substantive change. In the language introduced at the start of this analysis, the ambitious scope of the reform process has dramatically altered the legal and institutional structure of the judiciary, but failed to make a deep and lasting impact on the functional independence of the courts. Rather, the judiciary appears to be entering a downward spiral, wherein judicial leaders subservient to the previous regime are being rebuked and replaced by new judicial leaders subservient to the current regime. If anything, the reform process has reinforced the picture of a politicized and submissive judiciary, both among rank-and-file judges and the general public. It is an arresting demonstration of the limitations of sweeping institutional reforms in the absence of real political will and a genuine base of support within the judiciary.

To make sense of this outcome, judicial reform must be understood not simply as a set of institutional fixes, but as a process that builds upon, and is deeply influenced by, the political and social context in which it takes place. In the highly contested and unpredictable political environment of contemporary Ukraine, regime elites feigned commitment to the principles of transparency and judicial independence while systematically undermining the deepest and most transformative reforms before they could take root. Meanwhile, inside the judiciary, a complacent and browbeaten judicial corps was unprepared and unwilling to take advantage of this historic opening to advocate for meaningful changes in the organization and operation of the courts. It is a story of empty rhetoric, missed opportunities and dashed hopes. It also a logical and sadly predictable narrative, considering the interests and experiences of actors inside the system.

Looking beyond the singular experience of post-Maidan Ukraine, the patterns described here suggest that underspecified, overly simplistic conceptualizations of reform are bound to lead us astray. The Ukrainian example demonstrates why we need to focus not only on the drivers of reform and the ideal structure of judicial institutions, but the internal dynamics of the reform process—i.e. how, and under what circumstances, those reforms are put into practice. Specifically, we need to recognize the ways in which the political and institutional environment shapes the implementation of reforms, with particular attention to elite commitment and the judiciary's internal constituency as key factors that can facilitate or derail the process.

Among the many questions that emerge from this study, perhaps the most pressing is about the environmental factors that facilitate meaningful and enduring change in transitioning states. Under what circumstances do elites in highly contested regimes like Ukraine develop a genuine commitment to the rule of law? What factors give rise to an "ideational shift" (Hilbink 2012) within a judicial system accustomed to politicization and corruption? In short, under what conditions can we expect a critical juncture like the Revolution of Dignity to be perceived as a catalyst for positive change, rather than an

existential threat? The answers to these questions are poorly understood, but it is clear that they lie at the heart of the reform process.

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