

Chapter Three

Corruption, Rule of Law, and Ukraine

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This chapter is simultaneously addressed to two audiences: a Western one and a Ukrainian one. During my tenure in Ukraine, I often found that although many Ukrainians had learned and adopted terminology familiar in the West, they either had little understanding of what those terms and concepts meant or understood them in a way that was substantially different from the way in which they are understood in the West. In order to facilitate fruitful dialogue in the future, it is important to bridge those two conceptual worlds through conceptual elucidation. But even in the West, key notions such as rule of law are used far more frequently as platitudes than as clearly defined and understood concepts. Thus to advance discourse about corruption, rule of law and how high levels of the former and low levels of the latter relate to Ukraine, this chapter begins by offering a comprehensive conceptual framework for rule of law and corruption. It also introduces a distinction between episodic and systemic corruption, and it addresses Ukraine's post-Soviet "virtuality" problem. The chapter then discusses the current state of affairs in Ukraine as exemplified by the 2011 prosecutions of Yulia Tymoshenko and other former high government officials and discusses the Marxist-Leninist causes/sources of this state of affairs. It concludes with some suggestions and recommendations for reform in Ukraine and with some thoughts about an "Open Ukraine."

I begin with two propositions that are non-controversial.¹ First, as reflected in all recent surveys, it is undeniable that there are high lev-

¹ The views expressed in this paper are not necessarily those of either the U.S. Department of Justice or the U.S. Government but are simply those of the author.

els of corruption in Ukraine.² Second, high levels of corruption can and do infect a country's politics and significantly impede its economic development.³

Expanding upon these propositions further, let us ask why Ukrainians should care about whether there is a high level of corruption in Ukraine. The answer is that it is in their interest to care for several reasons. Most importantly, high levels of corruption can and do degrade the entire system of governance within a country, and they undermine the possibility of real, instead of make-believe, democracy. Second, high levels of corruption significantly distort a country's economy because, at a minimum, they create a large degree of uncertainty and allow for large-scale theft of money, property and other public assets. At a maximum, they can suffocate an entire economy through monopolization, confiscation and other practices.

But why should countries outside of Ukraine care about levels of corruption in Ukraine? Again, there are multiple reasons. First, there is the contagion problem. It is difficult to quarantine corruption within a given country. Because we live in an increasingly globalized economy and interconnected world, corruption in one country can easily spill over to its neighbors. For example, if contraband—whether consisting of drugs, weapons or humans trafficked illegally—needs to cross a border, customs or transport officials on both sides of the border will likely need to be corrupted.

Second, high levels of corruption can lead to a partially failed state, with all of the attendant headaches that such states can cause the international community. Third, the international community has spent

² See, e.g., the set of 61 surveys of corruption in Ukraine conducted in 2008–2009 by MSI for the Promoting Active Citizen Engagement in Combating Corruption in Ukraine Project. The surveys and accompanying analyses included national surveys, surveys by individual oblasts and surveys by sectors (e.g., corruption in the judicial system, in education, in connection with real estate transactions etc.). These surveys are available from Dr. Lyubov Palyvoda at palyvoda@ccc.kiev.ua. See the Freedom House evaluation of corruption at <http://www.freedomhouse.org/images/File/nit/2011/NIT-2011-Ukraine.pdf>; and the Transparency International survey of perceived corruption for 2010 at http://www.Transparency.org/policy_research/surveys_indices/cpi/2010/results.

³ See the chapters in this volume by F. Stephen Larrabee and Serhiy Kudelia.

millions on helping countries such as Ukraine try to reduce corruption, improve their systems of governance and promote economic development. Presumably the international community has an ongoing interest in seeing returns on its investment for humanitarian, political and economic reasons.

What Is Corruption?

To speak constructively about corruption in a country such as Ukraine, that is, to say something more than that there is much corruption there and to bemoan that state of affairs, we need to do some prefatory work by establishing a key distinction about manifestations of corruption and also by explaining the relationships between corruption and rule of law. The working definition of corruption I propose is: corruption is an act or omission committed by a public servant who unlawfully and/or wrongfully uses his/her position to obtain some undeserved benefit for him/herself or his/her allies, contrary to duty and the rights of others. Before proceeding, let me explain what is meant by a public servant, a concept that I found to be foreign to some people in Ukraine. A “public servant” is anyone who works for the state; it is, thus, anyone whose salary is paid by the state. This includes the president, ministers, judges, policemen, custom agents and many others.

The most common forms of corruption are bribe-taking and exploiting conflicts of interest. By conflict of interest I mean a situation in which a public servant makes a decision, whether regarding hiring of personnel, procurement of goods or services for a government entity, or making a judicial or ministerial decision that is influenced by the financial, familial or partisan political interests of the individual public servant making that decision. Thus, to cite but a few examples, a judge who rules in favor of his political party in order to advance that party’s interests or a minister who sells government property at a discount to his brother-in-law or the police official who buys computers for his police force from his wife’s computer company are all guilty of a conflict of interest.

Systemic Corruption and Episodic Corruption

Corruption appears in all countries, and news of its occurrence can be found circulating around the world. This sometimes prompts people in countries such as Ukraine to say, “what’s the big deal about corruption in Ukraine? Every country has corruption.”

Yes, it’s true that every country has corruption. But there is a fundamental difference between those countries in which corruption is systemic, and those in which it is merely episodic. Countries in which corruption is merely episodic demonstrate the following characteristics. When corruption occurs, the victims, or the witnesses to, that corruption have someone or some institution to which to report it, and they can do so with a reasonable expectation that, in most instances, that corruption will be investigated, stopped and its perpetrators punished. In such societies, the broadly and sincerely held belief is that corruption is not normal or acceptable behavior, and this belief is reflected in the laws, institutional arrangements and mechanisms adopted both to prevent corruption and to punish it when it is uncovered.

In countries in which corruption is systemic, its occurrence is widespread. There are no effective means of challenging it, that is to say, there are no institutions with the will and the authority to properly investigate and to punish those who engaged in corrupt acts. There are also no mechanisms in place to prevent corruption. And, the general societal assumption is that corruption is more or less normal, that it’s just the way things are in the world.

A moment’s reflection will probably persuade one that episodic and systemic corruption are polar opposites on an imaginary scale on which all countries can be placed. And there often are differences within a country as to location on the episodic/systemic corruption scale. For example, a country in which corruption can fairly be said to be episodic may nonetheless have a region or a city in which corruption is systemic.

When people speak about combating corruption, what they probably mean is that they want to help reduce a country’s systemic corruption to merely episodic corruption. One more introductory point that needs to be made is that, thanks to the inventiveness of human ingenu-

ity, combating corruption can itself be corrupted. This occurs when, for example, a government pursues its own partisan agenda of persecuting its opponents under the guise of supposedly combating corruption.

Corruption, Rule of Law, Economics and Culture

There are several relationships between corruption and rule of law, and they are very important. But before turning to that subject, it would be fruitful to note the importance of economic and cultural factors in any successful campaign to control corruption.

Public servants need to receive adequate salaries and benefits such as pensions in order to avoid the situation in which the authority or responsibility with which the public servant is charged is out of balance with that person's salary, benefits and working conditions. A policeman, customs official or judge who is paid a completely inadequate salary will be much more inclined to ignore his/her conscience and to sell his/her authority for a bribe or to engage in conflicts of interest to his/her benefit than is one who is adequately paid. This is so because if a public servant is adequately paid and can expect an adequate pension, that person is less likely to want to risk losing it all by engaging in corruption. As a practical matter, post-Soviet countries often have far too many public servants, and one of the first steps they need to take is to reduce those numbers in order to be able to pay adequate salaries to the smaller number of public servants.

With respect to cultural factors, what a society considers "normal" or "acceptable" behavior will have a profound influence upon what members of that society do or refuse to do, and this of course also applies to public servants. If bribe taking by judges is considered commonplace or inevitable, then it is much more likely that a new judge will have fewer reservations about taking his/her first bribe. If, on the other hand, bribe taking is considered by a society to be a shameful betrayal of public trust and of the oath of office that the judge swore upon becoming a judge, then it is much, much less likely that a new judge would even think about taking a bribe.

In addition to the impact of social norms upon the behavior of individual public servants, institutional pride and "esprit de corps" are also

very important factors in the level of professionalism demonstrated by any particular category of public servant. Professional pride and professional integrity can be created and maintained by good leaders who demonstrate professional dedication to their particular institution, care about its reputation and care about the well being of the rank and file of that institution. Such leadership is perhaps most visible in the military of some countries, but it can also be created in any other institution, whether the police, the prosecution service or the health ministry.

Corruption and Rule of Law

In addition to societal attitudes about the unacceptability of corruption as well as institutional professionalism and *esprit de corps* being very important contributing factors to controlling corruption, a functional legal system is another very important factor. By a functional legal system I do not merely mean a system that has judges, police, prosecutors, lawyers and jails, but I mean a legal system characterized by rule of law, because, unfortunately, there are various legal systems with judges, police, prosecutors, lawyers and jails that are dysfunctional. To paraphrase a statement once made by the president of the Russian Republic, dysfunctional legal systems are those characterized by legal nihilism.

What Is Rule of Law and Why Is It Critically Important?

To start with the second question first, rule of law is critically important to the overall well being of any complex, modern society and it is very difficult to control corruption without it. Rule of law may be analogized to the spinal structure of a complex, modern society. If it develops straight and strong, then that society's economic, political and legal systems are likely to develop in a normal fashion. By normal fashion here I mean a market economy with proper regulation; a genuinely democratic political system; and a legal system that is committed to discovering facts, not inventing them, that provides balance between the rights of the accused and the authority of the government, and whose overall goal is justice, however imperfectly that may sometimes be achieved.

If the rule of law is weak, that is akin to a human skeletal structure being bent, deformed or stunted in its development; when that occurs, the entire body will be deformed. So it is with a society's economic and political structures. Without rule of law, a country is likely to be plagued by power hierarchicalism and/or the law of the jungle; by legal and/or political arbitrariness and, thus, economic unpredictability; and by social atomization and alienation from a society viewed as unfair and "other." By power hierarchicalism I mean a state of affairs in which the oligarch or dictator or commissar decides what right, benefit or punishment should be meted out to whom, and does so not on the basis of some neutral principles but on the basis of what is to that person's advantage or to the advantage of the group or system of which that person is a part.

Rule of law is also important for controlling corruption because without rule of law, it is very difficult to be able to formally enforce laws and rules intended to control corruption. Even in countries in which society expects its public servants to be honest and where the professional integrity of public servants is high, there still are public servants who are corrupt because of greed or lack of conscience. It is, therefore, necessary that every country have an effective enforcement system to investigate, prosecute and punish those public servants who have betrayed their public trust. A legal system with a low level of rule of law will not be capable of any effective enforcement.

What Are the Constituent Elements of Rule of Law?

I propose the following working definition of rule of law: it is a set of legal mechanisms and institutions that collectively produce what most citizens most of the time consider to be results that are just, in the sense of fair, and reasonable. Thus in a rule of law culture, citizens assume and expect that the legal system will provide justice. By contrast, in a culture in which rule of law is mostly absent, what can also be called a culture of legal nihilism, citizens assume and expect that the legal system has little to do with justice and is instead an instrument employed with few, if any, constraints by the more powerful in order to obtain further advantage by bureaucratic force.

In a complex, modern society, rule of law is maintained by and is the product of the *interaction* between a set of societal attitudes and expectations on the one hand, and the infrastructure of the rule of law on the other. By societal attitudes and expectations I mean, first, an understanding and appreciation on the part of society at large of the critical importance of rule of law as well as a commitment to its core principles. By core principles I mean a strong sense that the legal system must be *just*, which at a minimum means that every man/woman is equal before the law (as captured by the aphorism that “no man is above the law”); that the law should be applied *consistently*, rather than arbitrarily; and that those who apply the law must do so *impartially* (as captured by the aphorism that those who administer the law must play *by* the rules, not *with* the rules).

Second, by societal attitudes and expectations I also mean that there needs to be an *understanding* on the part of political, legal and journalistic elites of the infrastructure needed for rule of law as well as a *commitment* to its defense and preservation.

So, again, rule of law is the product of the *interaction* between, on the one hand, societal attitudes and the expectations of the kind I have just outlined, and the so-called infrastructure of rule of law on the other. What makes up this infrastructure? Two kinds of things: the technical components of rule of law and the institutional arrangements involved in implementing rule of law. By technical components I mean an appropriate constitution, laws and rules. By an appropriate constitution I mean one that can be and is taken seriously—one that, for example, does not contain multiple promises that everyone knows the government cannot possibly keep but *does* contain a clear statement of those that it can and must keep. By an appropriate constitution I also mean a constitution that accomplishes at least three key tasks. First, it needs to set out the separation of powers among branches of government as well as to clearly designate and circumscribe those powers. Second, it needs to identify an individual’s rights vis-à-vis the state. And third, it needs to provide for its own orderly amendment.

A second technical component of the infrastructure of rule of law consists of laws that are adopted after notice and public debate, and that reflect the will of the majority without violating the constitutional

rights of those in the minority. The third type of technical component of the infrastructure of rule of law consists of what those in the Anglo-American legal world call *due process rules*. These fundamental procedural rules require three things whenever the government intends to take any action against or affecting an individual, his rights or his property. First, the individual must receive adequate advance notice of the judicial or governmental action against him. Second, the individual must be provided a hearing before an *impartial tribunal* that will rule on the validity of the governmental action. Third, the individual and his counsel must be provided with a full and adequate opportunity to be heard at such a hearing.

But rule of law will not exist no matter how good the constitution, laws and rules may be if there is not an appropriate human element to implement them, and by appropriate human element I mean institutions such as a judicial system, a prosecution service, the police, an independent and active bar, and an independent legal academy. Most important among these is a judiciary that consists of judges who are professionally competent, independent, impartial and minimally corruptible. Rule of law also requires prosecutors and police who are professionally competent and minimally corruptible. Lastly, it also requires an independent bar and legal academy whose members are committed to the constitution, its primacy and to the defense of rule of law, and whose leadership is willing to defend rule of law publicly when it is being undermined.

Rule of Law in Ukraine and Selective Justice

The conviction and sentencing of former Prime Minister Yulia Tymoshenko on October 11, 2011, generated a firestorm of criticism. The European Union issued a stinging rebuke to Ukraine that same day by High Representative of the Union for Foreign Affairs and Security Policy Catherine Ashton.⁴ The White House, the U.S. Congressional Helsinki Commission and a plethora of editorial pages in European and US media expressed similar criticisms. The Ukrainian

⁴ “Declaration by the High Representative Catherine Ashton on behalf of the European Union on the verdict in the case of Ms. Yulia Tymoshenko,” press release 364 at <http://www.consilium.europa.eu/Newsroom>.

American Bar Association aptly summarized the basis for the criticism as follows:

The prosecution alleged the former Prime Minister had abused her authority in causing the state run energy company NAK Naftogaz to conclude an agreement with Russia for the supply of natural gas, an agreement which now is claimed to be financially disadvantageous for Ukraine. The agreement was executed openly and publicly debated at the time, and no fraud or collusion was ever alleged even during the Tymoshenko trial. The former Prime Minister's actions, therefore, constituted a political act involving another sovereign state. If the former Prime Minister exceeded her authority, the Ukrainian judicial system or Verkhovna Rada (Parliament) of Ukraine could have, and can still, act to void and repudiate the agreement. However, *ultra vires* acts, untainted by fraud, cannot be sustained as being criminal under any interpretation or view of the rule of law in any democratic society.⁵

But, the high profile conviction and sentencing of Tymoshenko should not obscure the even more profound and systemic problems with the Ukrainian legal system. Many of these problems were highlighted in an important report issued on August 12, 2011, prior to the Tymoshenko verdict and sentencing, by the Danish Helsinki Committee for Human Rights. The report is titled "Legal Monitoring in Ukraine II"⁶ (hereafter "Legal Monitoring"). The specific subject of Legal Monitoring is the 2011 prosecutions of Tymoshenko and three other prominent members of the former Ukrainian government; namely, the former Minister of Interior Yuriy Lutsenko, the former First Deputy Minister of Justice Yevhen Koyniychuk and the former Deputy Minister of Defense Valeriy Ivashchenko. It is authored by a man who in addition to possessing extensive international experience

⁵ "Statement of the Ukrainian American Bar Association on the Trial and Sentencing of Julia Tymoshenko," October 11, 2011, at <http://www.uaba.org>; "*ultra vires* acts" means acts that are beyond the scope of authority.

⁶ The Danish Helsinki Committee for Human Rights, "Legal Monitoring in Ukraine II," available in English and Ukrainian at www.helsinki-komiteen.dk.

has also served as a Danish public prosecutor, as a chief of police and as deputy chief of the Danish Security Service. It is an outstanding report in the thoroughness and impartiality of its analysis.

More importantly for our purposes, Legal Monitoring is a scathing indictment of Ukraine's legal system from the perspective of what constitutes a civilized legal system in the 21st Century, regardless whether one is comparing Ukraine's legal system to a civil law or common law system.⁷ Twenty years after Ukraine became independent, one finds that one after another of the procedures and practices employed today by the criminal justice system are patently unfair and, in some instances, extraordinarily so.

To cite but some of the examples discussed in Legal Monitoring, the young judge in the Tymoshenko case will in 3 years come before the Higher Council of Justice that will decide whether or not to reappoint him. Three prominent members of that Council are the Chief Prosecutor and two of his deputies, representing the same office that is prosecuting Tymoshenko before that same young judge. This is an obviously unacceptable conflict of interest to the detriment of the defendant.⁸ Furthermore, incredibly—as this violates every precept of judicial independence—the Ukrainian Prosecutor General exercises a control function with respect to the judiciary. Thus, for example, in the last year the prosecution initiated 600 disciplinary cases against judges that resulted in 38 judges being dismissed, only a few of which cases had anything to do with criminality; in other words, only a few had anything to do with corruption.

⁷ The term “civil law” system refers to any legal system that is a descendant of Roman, Justinian and later Napoleonic law; this is the system that can be found in various forms in continental Europe and South America. The common law system arose in England and is the system found today in England, the U.S., Canada and other present or former members of the British Commonwealth.

⁸ Although the Council of Europe's Venice Commission emphasized that it was beyond its competence to take a position on the verdict in the Tymoshenko case, on October 15, 2010, the Commission criticized the appointment of the judge charged with hearing the Tymoshenko case on the grounds that as a temporary or probationary judge, i.e., as one whose reappointment was to be reviewed in 3 years, his independence could be questioned. “Venetsians'ka komisiya: spravu Tymoshenko ne mozhna bulo viddavati Kireyevu,” *Ukrayinska Pravda*, October 15, 2011.

The Lutsenko defense was not allowed to copy the case files containing thousands of pages of documents and was only given short periods of time within which to look at those documents. That is unacceptable in a rule of law system. It is also fundamentally unfair that under Ukrainian law the defense cannot appeal to a judge in order to force the prosecution to treat the defense fairly in such instances. Similarly, defense counsel for Tymoshenko was only given several days within which to prepare for trial in a case involving tens of volumes of documents. That is also unheard of in a rule of law system.

It is also unheard of in a rule of law system for a government to file criminal charges against high-ranking members of a former government where the gist of the allegations is that the defendants made political or economic decisions with which the current government disagrees. The same applies to questioning Tymoshenko on 42 separate occasions by the prosecutor's investigator; or jailing these defendants, none of whom is alleged to have committed a violent crime nor has a criminal record; or delaying medical care for Ivashchenko while in jail; or handcuffing defendants Lutsenko, Ivashchenko, and Korniychuk and keeping them in a cage in court, and so on.

The Genesis of the State of Rule of Law in Ukraine and the Marxist-Leninist Destruction of Legal Justice

Because today's legal system in Ukraine is in most respects a continuation of the Soviet legal system, it is impossible to understand some of the bizarre legal practices and procedures going on in contemporary Ukraine without some familiarity with Soviet history and the Marxist theory that influenced its development. According to Marxist-Leninist theory, law as it existed in, for example, the West was part of the so-called "superstructure" of society. As such, so the theory went, law reflected and served the interests of the capitalist class rather than representing any general human ideal of justice or human rights. The law was, therefore, nothing more than a supposed instrument of the state in waging class war against the workers.

As recounted by the historian Richard Pipes, one of the first things that Lenin and the Communists did in December 1917 was to issue a "Decree on Courts" that did away with almost the entire then-existing

legal system.⁹ It did so by dissolving almost all of the courts and by doing away with the Procuracy, the legal profession and the justices of the peace. In its place Lenin's regime established Peoples' Courts as a substitute for local courts. The Peoples' Courts were intended to deal with crimes of citizens against citizens. More importantly, it also created so-called Revolutionary Tribunals to deal with people accused of "counter-revolutionary" crimes as well as speculation, looting and embezzlement.

Arbitrariness was a central feature of proceedings before these Tribunals insofar as they were charged with determining penalties while being, "guided by the circumstances of the case and the dictates of revolutionary conscience."¹⁰ As Pipes describes it, since *how* "the circumstances of the case" were to be determined and *what* constituted "revolutionary conscience" were left unexplained, the Tribunals operated as kangaroo courts and sentenced people to death or other punishment on the basis of the appearance of guilt. By 1920, procedural "bourgeois" holdovers such as the questioning of witnesses or the confrontation of defendant and plaintiff were discarded as overly burdensome and, the Tribunals' "judges" were selected by the Bolsheviks. The result was courts without laws to guide them, and a situation in which people were punished for crimes without the crimes having been given even semi-precise definition.

The system of "justice" was thus subjugated by Lenin to be wholly subservient to politics. And since there were no legally objective conceptions of right or wrong, or of guilt or innocence, there remained "only subjectively determined political expediency."¹¹ As the "law" was applied without the benefit of any formal legal guidelines, it ended up being interpreted very loosely, "as a political device serving the interests of the regime, whatever these happened to be at any given time."¹² As Pipes correctly described it, this was a world of legalized lawlessness.

⁹ Richard Pipes, *Legalized Lawlessness: Soviet Revolutionary Justice* (London: Institute for European Defence & Strategic Studies, 1986).

¹⁰Pipes, op. cit., p. 9, quoting the January 1, 1918, instruction to such Tribunals issued by the Commissariat of Justice.

¹¹Pipes, op. cit., p. 13.

¹²Pipes, op. cit., p. 14.

Once Lenin hijacked the legal system for the purpose of having it assist a totalitarian government control its population, there were no limits to how what passed for the “law” could be perverted. That is why the Soviet system staged show trials that more resembled the theatre of the absurd rather than any genuine legal proceeding, and that is why under Soviet leader Josef Stalin this system provided for fake legal proceedings that gave mass murder a make believe justification. The fake legal proceedings to which I am referring involved the so-called “troikas” of which the Soviet government made extensive use in the 1930’s.

As recently described by the historian Timothy Snyder in his book *Bloodlands*,¹³ the troikas were legal commissions used to implement state terror and mass murder. They consisted of a decision-making team of three persons: one member was the regional chief of the NKVD, one was the regional Communist Party chief, and one was the regional prosecutor. Prosecutors were ordered to ignore legal procedures. Confessions were elicited by torture. The three members of the troika would usually meet at night with investigating officers. They would hear a very brief report accompanied by a sentencing recommendation: either execution or the Gulag. The troikas handled hundreds of cases at a time *at the pace of sixty per hour*.

Why the Soviet government went to the trouble of organizing these farcical legal proceedings instead of simply killing the people it was going to kill or send to the Gulag anyway is an interesting question, but not one relevant to our discussion. The issues that *are* both relevant and important to our discussion are *that* such troikas were created and widely used and that prosecutors participated in them, as these facts exemplify the perversions in which the legal system was implicated.

During my anti-corruption work with the Ukrainian Parliament in 2009, I was told on one notable occasion that a major piece of anti-corruption legislation was not adopted because a prominent legal authority who had spent most of his life as a leader of the Soviet legal academy had declared that this legislation was inconsistent with “Ukrainian legal traditions.” A Ukrainian colleague once told me that

¹³Timothy Snyder, *Bloodlands* (New York: Basic Books, 2010).

upon hearing such declarations he could not decide whether to laugh or to cry. But in some sense the prominent Ukrainian legal academic who made that statement was right. Given that the Ukrainian legal system is the direct descendent of the Soviet legal system, then it would *indeed* be inconsistent with that system to allow for anyone to try and make those in power accountable to the law or the people.

As is apparent from the Danish Report on Legal Monitoring, what has remained unchanged from Soviet times¹⁴ is, first, the government's manipulation of the criminal justice system through its influence over the prosecution.¹⁵ Secondly, its domination of the criminal justice system through, and by, the prosecution so that there is no impartial and independent arbiter standing between the prosecution and the defendant, a role that is performed in all rule of law systems by an independent judiciary. In rule of law systems, the prosecution is therefore accountable, as regards compliance with rules of fair procedure, to an independent judiciary. And furthermore, for example, in rule of law systems of the common law type, the prosecution's entire case is accountable to a jury of citizens that is held to be the "judges of the facts" and, thus, the ultimate judges of a defendant's guilt or innocence.

The continuities between what goes on in the legal world in Ukraine today and what Lenin and Bolsheviks initially wrought cannot be ignored. The law continues to be viewed as an instrument of partisan governmental power. That which is construed to be "illegal" is whatever the government in power finds to be politically expedient. And the various procedural safeguards that are at the heart of a rule of law legal system are absent or ignored. This state of affairs prompts the following conclusion. It is questionable whether a legal system

¹⁴Surprisingly, even Ukrainians with a democratic bent seem unaware that their legal system suffers the fatal flaw of being the direct descendant of the Soviet legal system. As I learned from conversations with individuals from all different political camps, the self-conception of Ukrainian lawyers regardless of their political or ideological inclinations is that the Ukrainian legal system is a "Roman" system, i.e., a civil law system, and that the *system* does not need to be changed. There seems to be little awareness that although the Soviet system had the appearance of a civil law system, it was fundamentally different from both civil and common law systems for the reasons described above.

¹⁵It didn't even occur to Ukraine's Chief current Prosecutor that he should not openly declare, as he has done, that he is a member of President Yanukovich's "team."

that was perverted to the point that, for example, prosecutors participated in pseudo-legal proceedings in which issues of guilt and death sentences were decided within a minute or two that has not yet confronted its past and has not yet cleansed itself of that terrible past can now be expected to know how to create, maintain and fortify the rule of law.¹⁶

“Virtuality,” Reality and the Law

A functional legal system, one characterized by rule of law that seeks justice, is also a legal system that seeks to establish what within a court of law is true and what is false. This search for the truth, not some metaphysical or mathematical truth, but truth in the sense of believable facts, is of course necessary in the quest for justice. Rule of law systems have a candid understanding that there is no infallible process for the establishment of truth in the form of believable facts. But rule of law systems go to great trouble and great lengths to try and succeed at discovering the truth. That is why, for example, common law legal systems have extraordinarily elaborate rules of discovery, evidence, cross examination and trial procedure developed and refined over centuries. That is also why there are courts of appeal that are required to explain in detail in their published written opinions for all to see the justifications for their decisions to affirm or reverse lower court rulings. It is these rules and procedures in the aggregate that help these legal systems arrive at the truth in a large majority of cases and situations.

Unfortunately, by contrast to rule of law systems, there is in Ukraine, as is the case in most post-Soviet countries, a phenomenon I will refer to as the “virtuality” problem. By this I mean the widespread

¹⁶In news items on August 24, 2011 (Ukraine’s Independence Day) it was reported that from jail Tymoshenko stated, among other things, that in five years the *real* criminals will be in jail. Based on the contents of the Danish report, one can certainly understand Tymoshenko’s frustrations with the numerous injustices to which she has been subjected. Nonetheless, it is discouraging that instead of speaking about who is going to put whom in jail, neither she nor anyone else in speaking about the need to fundamentally reform the Ukrainian legal system so that it begins to resemble a rule of law system and so that every citizen of Ukraine can be assured that he or she will not be abused and mistreated by it.

tolerance for making believe, for pretending that something is different from or even the opposite of what it actually is. Soviet legal history, with its political show trials, is filled with virtuality. The Soviets also sought to export this virtuality to the Nuremburg trials when their prosecutors sought to try and prove in court that the twenty-some thousand Polish officers murdered at Katyn and elsewhere were victims of the Nazis, whereas they had actually been murdered by the Soviet NKVD.

More recently in Ukraine, one can encounter the pretense that all prosecutions are independent and merit-based whereas there is good reason to believe that some are commenced at the direction of the government to camouflage a political vendetta. Or, for example, one can find that draft legislation intended to help curb corruption is then revised so as to make the legislation practically useless, and that this is done by none other than those who earnestly proclaim their devotion to combating corruption. As documented back in 2002 by Taras Kuzio, Ukraine's virtual struggle against corruption is a play that has, unfortunately, had a long run.¹⁷

That virtuality is not only tolerated but also accommodated in the Ukrainian legal system, has had catastrophic effects because in everyday affairs, the legal system must be, and in rule of law systems *is*, the last refuge of reality and truth. In connection with this it is noteworthy that historians have recently realized that, for example, in 16th and 17th century England, the process in courts of law for establishing facts and citizens' exposure to that process as jurors or court observers served to educate and sensitize the entire English population to the value and importance of ascertaining facts in everyday affairs.¹⁸ Thus, the procedures and mechanisms created in law to ensure impartiality on the part of the judge and jury to the extent humanly possible and to ensure credibility in the information provided to the judge and jury were subsequently adopted and/or influenced the development of establishing facts in history, science and other human endeavors. These procedures and mechanisms reflected an emphasis on obtaining

¹⁷Taras Kuzio, "Ukraine's Virtual Struggle Against Corruption and Organized Crime," *RFL/RL Crime, Corruption and Terrorism Watch*, September 6, 2002.

¹⁸Barbara J. Shapiro, *A Culture of Fact; England 1550-1720* (Ithaca & London; Cornell, 2000).

and presenting testimony by impartial witnesses with first hand knowledge of the issues being examined and an emphasis on seeking corroborating evidence consisting of relevant documents or additional testimony. For a culture, such as Ukraine, in which virtuality continues to be a curse in public life, what might be thought of as the collateral ramifications of genuine legal reform could not be more welcome.

Although the virtuality problem extends far beyond the legal system,¹⁹ our focus is on corruption and the legal system, so we need at least to understand that virtuality is a major impediment to real, rather than make believe, legal reform and combatting corruption. We also should understand that reformers need to be constantly vigilant against it. For example, the term “reform” has in Ukraine been virtualized and the Ukrainian word “reform” is translated into, and is supposed to have, an identical meaning to its counterpart in English. Every standard definition of “reform” interprets that term to signify a change that involves an improvement to or in something. Yet the term “reform” is routinely appropriated for all kinds of changes, whether by legislation, constitution or otherwise, that involve a change, but change without improvement. One needs, therefore, to avoid being duped by misuse of the term “reform.”

What Needs To Be Done To Reduce Systemic Corruption To Episodic Corruption?

What Ukraine needs in order to reduce corruption is heightened societal awareness that corruption is a major impediment to economic development as well as a major impediment to full democratization and European integration. This awareness can be and needs to be spread by multiple social segments such as the business community, the portion of the legal community that services the business community, the media, religious institutions, universities, NGOs and others. But if everyone waits for someone else to do it, then it is not going to

¹⁹To the extent that post-Soviet virtuality has received attention, it has been in the context of political corruption. See, e.g., Andrew Wilson, *Virtual Politics—Faking Democracy in the Post-Soviet World* (New Haven and London: Yale, 2005) and T. Kuzio, “Political Culture and Democracy—Ukraine as an Immobile State,” *East European Politics and Societies*, vol. 25, no. 88 (February 2011), pp. 88-113.

happen. Reform also obviously requires political leadership that is genuinely committed to reducing corruption. In some historical instances, leaders have responded to what a society demands—recall what has just recently happened in India where a hunger strike by an activist and citizens' outrage over corruption forced a reluctant parliament into action; in other instances far-sighted politicians have acted as true leaders by creating reform because they understood its long-term necessity.

In addition to helping the citizenry understand the great economic and political costs of corruption for the purpose of mobilizing public support for combating corruption, individuals and organizations interested in reducing corruption need to mobilize behind specific, concrete initiatives. For example, in 2009 two draft anti-corruption laws were introduced in the Ukrainian Parliament that were the products of two years of intensive work on the part of working groups of Ukrainian officials aided by international and local experts.²⁰ One draft law set out a detailed code of professional ethics for public servants that included specific rules relating to conflicts of interest. The other draft law set out in great detail the rules and design for an effective system of financial declarations by public servants. These two draft laws were evaluated by international experts to be, if they were to be adopted and properly implemented, among the very best in Europe. Such projects, and others like them, need to be actively discussed and debated in the Ukrainian media, in university classrooms, on talk shows and in various other public arenas. This is the only way that support for such reforms can be initiated and mobilized. Civil society must push for its adoption.

Lastly, Ukraine does not exist on an isolated planet far from any other society that has sought to reduce corruption. There is a wealth of international experience on how to reduce corruption, and Ukraine can and should take advantage of such experience. Ukraine can and should learn from the successes and failures of nearby countries, particularly from post-Soviet or post-socialist countries as Georgia, Poland and the three Baltic countries as well as from the successes and

²⁰“Project Zakonu pro pravila profesynoiy etiki na publichni sluzhbi ta zapobihannia konfliktu interesiv (4420-1)” and “Project Zakonu pro zachodi derzhavnoho finansovoho kontroliu publichnoyi sluzhbi (4472).”

failures of Western European and North American countries. But there is valuable experience to be gained from around the world. Albania introduced a model financial disclosure system. And one can learn from the long and difficult experience that Hong Kong and Singapore had in eliminating systemic corruption.

Establishing and Strengthening the Rule of Law

The level of corruption present in a society and the presence or absence of rule of law in that society are very closely connected in several different ways. In a modern, complex society, the absence of rule of law is legal corruption, and, furthermore, weak rule of law makes it very difficult to reduce any kind of corruption and make much sense to speak about corruption without also speaking about rule of law.

Ukraine, as do other post-Soviet states, needs to fundamentally and profoundly transform its legal system if it is to enjoy a rule of law system. As a practical matter, there is probably no other way of doing it than by coming to grips with the legal system's catastrophic Soviet past and the causes of that past. This needs to be done by studying that past from the perspective of analyzing to what extent that which happened was "just," in the sense of having been fair, and to what extent and how legal practices, procedures and institutions betrayed the core value of any rule of law legal system; namely, justice as fairness. Such analysis, combined with a genuine commitment to avoid the mistakes of the past, could then be used to reform the entire legal system, ranging from reform of the Legal Academy to reform of the laws, procedures and mechanisms that are a carryover from when the legal system was used to serve the purposes of a totalitarian government rather than to produce justice. Judges, thus, cannot be "accountable" to prosecutors, as was the case in the Soviet Union and remain the case in Ukraine today. Prosecutors should not be the partisan political arm of the government. Furthermore, anyone who is incapable of acknowledging the perversions of Soviet "legality" is not likely to be someone who is qualified to be a judge or to teach at a law school if Ukraine is to evolve to a state guided by the rule of law.

In common law systems, the rules governing the adversarial system keep everyone in line so that justice is undertaken in the majority of

cases. Most often judges are appointed or elected after gaining many years of experience as prosecutors or defense lawyers. Once someone is charged with a crime, judges act like referees who rule on the fairness of whatever the prosecutor or defense lawyer seeks to do both before trial and during the trial. In civil law systems, magistrate judges who are part of an elite and independent judiciary perform many of the investigatory tasks that a prosecutor undertakes in common law systems, while trial judges play a much more active role in questioning witnesses and evaluating evidence. In such systems, prosecutors play a less important role than they do in common law systems. Justice is accomplished because an elite judiciary is highly professional, independent and impartial. Although this is a very complicated question, given the historical and cultural conditions prevailing in Ukraine, that the adoption of an adversarial system may be the more realistic method of establishing a rule of law legal system because it may not be feasible to expect to create a highly professional, independent and impartial judiciary on whom much of the system would be built from scratch.

So as to avoid the impression that problems with the legal system are somehow confined to the way criminal law is practiced, it is worth noting that practices that occur in Ukraine outside the criminal law are likewise unacceptable in a state governed by the rule of law. For example, it is unthinkable in a rule of law state for a squad of masked police special forces with machine guns to barge into a major law firm for purposes of rooting through that law firm's files at will, yet that is something that happened in Ukraine in 2010. It is also unthinkable for judges to be bribed to provide legal cover for patently illegitimate corporate raiding of businesses or "raiderstvo." This is when a criminal gang decides to expel the rightful owners of a business and sends a squad of masked gunmen to evict the rightful owners of that business while using as legal camouflage a court order granting the gunmen control of the business, is based on some fabricated legal basis and obtained from a corrupt judge.

Although, given its Soviet past, the changes that the Ukrainian legal system needs to undergo are systemic, specific concrete changes can and should be implemented immediately. To cite but one example, work on drafts of a new, reformed criminal procedure code has been going on for years with assistance from the European Union and North Americans. It is high time to adopt such a code and thus to help

eliminate some of the worst abuses allowed by the current code that dates back to Soviet times.

Helping Ukraine Help Itself Reform

With regards Western assistance on reform of the rule of law and corruption in Ukraine the most important starting point is straight talk and tough love. Straight talk and tough love are somewhat inhibited by the dictates of diplomacy and by considerations of sovereignty, but an artful exercise of straight talk and tough love can overcome those inhibitions. U.S. Ambassador to Ukraine John F. Tefft gave a good speech at a public roundtable in Kyiv at which he spoke about how an independent judiciary and courts of appeals are central to protecting an individual from the state. As he explained:

This is the essence of democracy and is the exact opposite of the way the judiciary and the legal system is used in authoritarian and totalitarian states where its purpose is to protect the state from individuals. Moreover, on a practical level, an independent judiciary promotes transparency by requiring the state to provide reasons and justification for its actions as it applies the law in particular cases.²¹

It would also be valuable for the West to develop a *long term* strategy to assist Ukraine to fundamentally reform its legal system and reduce systemic corruption. With respect to rule of law, there should be some serious consideration given to examining to what extent historical and cultural factors applicable to Ukraine's experience may resemble those that, for example, existed when the common law system was developed such as distrust of government. It would be also important to think about whether it might not make sense to recommend that Ukraine adopt certain features of the common law with respect to criminal procedure.

²¹Statement of U.S. Ambassador John F. Tefft at the Roundtable on the Role of Supreme Courts in Protecting Human Rights at the National Level, held at the Supreme Court of Ukraine, September 22, 2011; <http://ukraine.usembassy.gov/supreme-courts.html>.

As regards corruption, it is useful to keep in mind that it took Hong Kong and Singapore, the two best examples of countries that eliminated systemic corruption, about 20 years to achieve this objective. So persistence and patience are obviously necessary. It is, however, very noteworthy that Georgia has made significant strides to reduce corruption since the 2003 Rose Revolution.

It would also be useful for there to be coordination among Western countries and institutions in this endeavor. Furthermore, this endeavor should be focused on what is best for Ukraine rather than on what may be best for any given international organization involved in assisting Ukraine to undertake reforms. Finally, individuals from the West engaged in such endeavors must be knowledgeable both about legal systems and recent Ukrainian and Eastern European history. If an individual is unfamiliar with the nature of the Soviet system and the role that the Soviet legal system played within it, that person is unlikely to understand the legal culture in Ukraine or how to assist reforms. That person is unlikely to recognize manifestations of the virtuality problem and that person is unlikely to understand how to avoid overt and covert attempts to sabotage genuine anti-corruption efforts.

Open Societies, Trial and Error

In this chapter I have been critical about various aspects of the Ukrainian legal system and of Ukraine's high levels of corruption. It is, however, important to remind oneself that *all* societies make mistakes as all societies have people who are greedy and/or unprincipled and/or just stupid. But, rule of law develops and improves only *if* a society is capable of recognizing problems and also learning from its mistakes. Thus, English common law with its protections for the individual from the state can be said to have developed as an attempt to provide relief from the abuses of those in power. Much more recently, the U.S. introduced various reforms in the late 1970s in response to abuses of power of then President Richard Nixon carried out as part of the so-called Watergate scandal. For example, we greatly expanded the system of Offices of Inspector General so that every Department and agency has one. The mandate of Offices of Inspector General is to reduce fraud, waste, abuse and corruption in each Department or agency. Another reform the U.S. introduced was to make it illegal for

the U.S. Internal Revenue Service (the Tax Service) to share anyone's tax or financial information with anyone else in government without a written order from a Federal judge. Even Federal prosecutors have to obtain judicial orders before he/she can obtain tax records in connection with a criminal investigation. This requirement was introduced because Nixon's team had ordered the Internal Revenue Service to provide it with tax and financial information relating to those whom they considered to be its political enemies.

Conclusions

In the face of a significant problem, such as Ukraine's high levels of corruption and weak rule of law, there are two possible strategies. One is to adopt the posture of an ostrich; that is, to hide one's head in the sand and to pretend that all is well. The other strategy is to acknowledge the existence of the problem, to confront it and develop policies to solve it. Central to the notion of an "Open Ukraine" is the idea of a society that is open to acknowledging everyday realities which means a society that is capable of realizing and recognizing its shortcomings. This means a society that is willing to view life as a process of trial and error in which we have the capacity to learn from past mistakes in order to create a better present and future. It is in this context that I urge Ukraine and that segment of the international community interested in its evolution to help it become an "Open Ukraine."