

Timm Beichelt
Europa-Universität Viadrina
Große Scharnstr. 59
15230 Frankfurt/Oder
Germany
Tel. +49 – 335 – 5534 2537
beichelt@euv-frankfurt-o.de

Rostyslav Pavlenko
National University Kyiv-Mohyla Academy
School of Policy Analysis
Voloska str. 8/5, 04070 Kyiv
Ukraine
Tel. +38 – 066 – 7346 952
rostpav@yahoo.com

Presidential Election and Constitutional Reform

Version: February 19, 2005

1. Introduction

Ukraine, similarly to other European CIS states, even after the Orange Revolution of December 2004, belongs to the "gray zone" between democracy and authoritarianism.¹ Neither regime type is fully consolidated. On the one hand, the abuse of power and corruption are wide-spread, the power system is centralized, checks and balances are often ineffective, human rights are sometimes infringed, the media are biased, and – obviously to be seen in the recent presidential election – the will of the people in elections is not respected by all parts of the political elite. On the other hand, the constitutional framework is officially based on the checks and balances principle, the political system is pluralistic, the opposition is quite active and shows considerable successes during elections, some media provide independent information, civil society is viable and actively developing (Haran/Pavlenko 2004). And, even though after a long and worrisome struggle in November and December 2004, a change in power is possible even with regard to the highest office in the country, the presidency.

These last features speak against classifying the system as an outright autocracy. Unfair as the first rounds of the presidential election were called by the OSCE observers, the campaign even at that stage remained competitive and the outcome of the election resulted in power change. At the time of finishing this article it must remain open if this change will in the mid-term be accepted by all major players.² The citizens proved

¹ The authors would like to thank Tania Astashkina and Nadiya Russ from European University Viadrina in Frankfurt(Oder) for their support in assembling material and reviewing an earlier version of this text.

² The time covered by this text ends on January 31, 2005. Although the mass protests of the "Orange Revolution" have forced the incumbents to agree to repeat the second round of the elections under improved legislation and tight international supervision, and reform-oriented candidate Viktor Yushchenko was elected president, the political conflict is still ongoing. One indicator is that the losing side (former Prime Minister Viktor Yanukovich) refused to recognize its defeat. Moreover, the compromise between the incumbents and the opposition itself implied changing the Constitution – shifting control over the executive from the President to the Premier. The changes are to take effect in late 2005, before the parliamentary elections. Only after the latter take place, it will be clear what political force gets the parlia-

ready to protect their rights, from checking their names on voter lists to protesting electoral forgery. This demonstrates the potential demand for democracy in society, the existence of the basis on which the democratic values can develop.

In short, the Ukrainian legal and political system bears the seeds of both democracy and authoritarianism. The presidential election of 2004 can be seen as an important milestone, which marks the choice that Ukrainian establishment and society had to make between these alternatives. On first sight, with the inauguration of the new president Viktor Yushchenko on January 23, 2005, the "democratic camp" won the power struggle. However, as the examples of the Federal Republic of Yugoslavia and Georgia show, the winning of a presidential contest by "democratic forces" does not automatically mean an immediate and/or thorough transformation to full fledged liberal democracy.

Therefore, the frame of reference used for the Ukrainian regime is neither that of a consolidated democracy (Dahl 1989) nor that of an autocracy (Linz 1989), but the more recently developed concept of a "defective democracy" (Merkel et al. 2003). In the text, the constitutional and legal framework of Ukraine will be tested for the ability to provide important safeguards against power abuse and unfair play. The Ukrainian constitutional system will be looked at in the light of a specific characteristic, the concentration of considerable powers in the hands of one president. We formulate the hypothesis that it is this feature which adds decisively to "the winner takes all" mood within all political camps. Given the unpopularity of the authorities within Ukrainian society, the incumbents in the 2004 campaign had to wage an uphill battle. Unlike in most other CIS countries, their main task was not to further consolidate their power, but to safeguard against the risk of losing all of it. In our view, this led to the unprecedented tense campaign, which ex-President Kuchma called "the dirtiest ever" already when the worst parts had not become a reality yet.³ Needless to say, the ten-day delay of the results announcement after the first round of elections as well as the failure to follow up on fraud accusations after the second were also major indicators of a dirty election – although it is not completely clear if that was exactly the point Kuchma was referring to.

Already long before the elections themselves, one of the possible ways to overcome the instability of the system was seen in reformulating the constitution and establishing another type of government. All political forces (including those behind the newly elected president) declared the intent to reform the system into a parliamentary one. The first necessary step was done as a part of an elite compromise – the constitution was amended. Yet, the amendments are only to take effect in some time. The mode of the fulfillment of reform – the appearance or absence of the broad consensus of main political forces, the free or forced support from the parliamentary factions, the time and manner of enactment of the adopted amendments to the constitution – will be the next milestone showing Ukraine's development to democracy. Once the elections of 2004 are over, there next step on the way of democratic transformation is already in sight.

The aim of the given text is not to establish a full scenario for the further democratic development in Ukraine. Rather, we want to show that the implementation of the planned constitutional reform would allow the Ukrainian political system to get rid of

mentary majority, form the government, and will finally determine the course of the country's transition. Therefore, the text should be read as an analysis centered around the elections, not around the general developments afterwards.

³ Kuchma bude praciuvaty vid dzvinka do dzvinka, *Ukrainska pravda*, 22 September 2004: <<http://www2.pravda.com.ua/archive/2004/september/22/news/19.shtml>>

one of its strongest impediments to consolidation: the strong position of the president, which turns every presidential election into a gamble for all political power in Ukraine. On the basis of the defective democracy model, we want to show that constitutional reform should strengthen horizontal checks and balances in the system, which would lead to a distribution of power among several institutions instead of only one. Consequently, the next presidential election would lose some of its significance for the political fate of Ukraine as a whole, and the incentives of various political actors to push the results in their direction could be considerably diminished.

2. Theoretic approach: defective democracy

In the early 1990s, Samuel Huntington saw two consecutive changes in a state's leadership as a sufficient criterion for the establishment of democracy (Huntington 1991). That mark proved to be all too simple. However, in general the transition scholars of the time were convinced that the striving for democratization was accomplished once elections and control of the government would be accomplished.

The hypothesis had some value in the case of most of the Central European states, where formerly oppositional forces won the first elections after the breakdown of the *ancien régime* and where thorough restructuring had begun right with the first post-socialist government in office. In Ukraine, Russia, and other CIS states, however, it soon became clear that even the best scenario would not lead to full-scale democracy; they drifted into a "gray zone" between democracy and autocracy (Bendel/Croissant/Rüb 2001). These countries did not have some of the crucial advantages in democracy building at their disposal: a) the area does not know democracy from former historic periods (Offe 1998), b) the problems in the economic sphere were so big that they threatened the legitimacy of any elected leader, c) bureaucrats and members of the old elite were keen to enrich themselves rather than their countries (Hellman 1998); moreover, as there was no immediate parliamentary election, it were the old elite and bureaucracy that dominated the decision-making (large-scale elite change did not occur), d) the institutional choices were made in favor of centralized presidential republics, which concentrated power in the hands of heads of states and their entourage, thus creating a substitute for the Communist party committees in decision-making, rather than introducing checks and balances (Shugart 1993), and e) the external pressure from the European Union or other international organizations was rather weak because EU membership was not a short-term prospect anyway. From that line of transition theory, it is hardly a surprise that most analyses do not see Ukraine as a clear democracy today (Karatnycky 2004).

The theoretical debates did not only address the issue of the necessary prerequisites of democracy, though. Another development was the conceptualization of democracy as something that went much beyond free and fair elections. Of course, scholars had long before argued that the limited model of reference did not meet the complexity of democracy. Democracy exists in a variety of models (Held 1996; Schmidt 2000); elections are nothing but a necessary condition. Still, it took some time before this knowledge was included into the mainstream of transition studies. One major breakthrough occurred with a book by Juan Linz and Alfred Stepan written in 1996 (Linz/Stepan 1996) where the authors argued that without a stable territorial surrounding and a democracy-sympathetic bureaucracy, any democracy is bound to face serious problems. In the German scientific community, it was Wolfgang Merkel who used an even more stringent formula when insisting on the "state of law" or the "constitutional state"

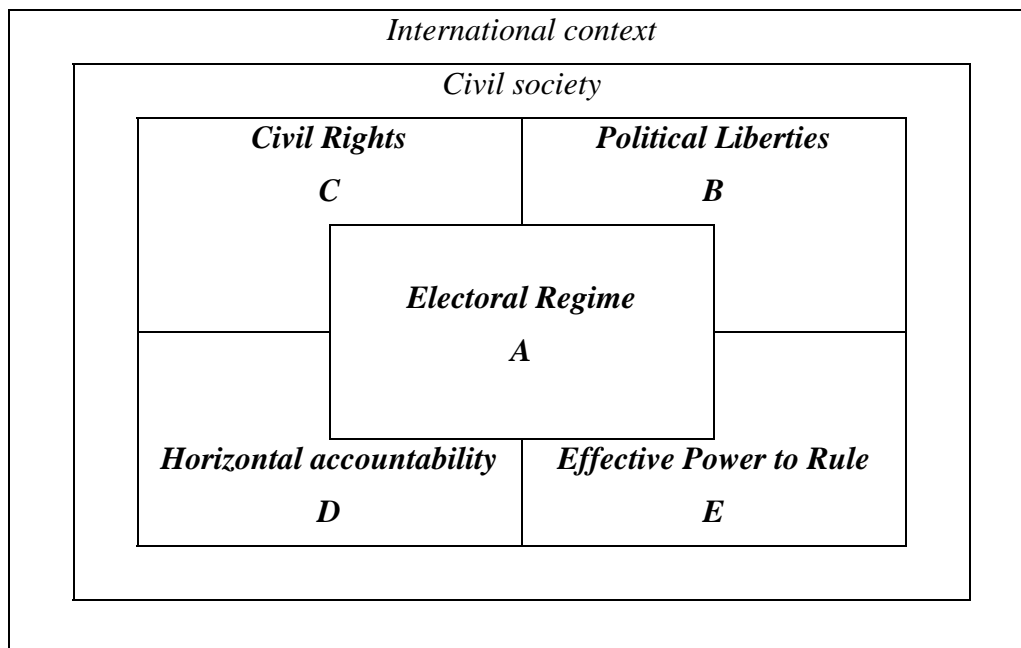
(Rechtsstaat) as the major thing of a new democracy that is really functioning (Merkel 1999a; Merkel 1999b).

The main tool by Wolfgang Merkel and some colleagues to identify the differences between full and minimal democracies is the concept of "embedded democracy"; it will be employed throughout this text. In a strategy similar to that of Robert Dahl (Dahl 1989) in relating ideas of democracy to its existing institutions, he identified three dimensions of democracy:

1. the vertical dimension of power legitimation and power control
2. the (horizontal) dimension of the liberal constitutional state, and
3. the dimension of agenda control.

From there, he developed five partial regimes of democracy, all of which need to function in order to identify a liberal democracy (see figure 1): (a) the electoral regime and (b) the public space belong to the vertical dimension, (c) political rights and (d) horizontal checks and balances belong to the horizontal dimension, and (e) the actual transfer of power to those elected constitutes the dimension of agenda control. The concept is called embedded democracy because the five partial regimes are interlinked. In order for a democracy to function, all partial regimes need to function simultaneously. If one or several partial regimes do not function, Merkel talks of a "defective democracy".

Figure 1: The concept of embedded democracy



Source: Merkel (2004: 29 with some modifications)

When taking another look at figure 1, two additional spheres surrounding the political regime can be elaborated.⁴ One consists of the international context, the other of civil society. The logic behind the introduction of these two spheres is as follows.

- a) The five partial regimes indeed refer to the *political* regime, which means that the interaction of politics and society are not covered. However, the way a political regime functions depends to a large extent on the political culture of society. For example, it took about twenty years until the West German population developed a more or less democratic political culture, whereas in the first years after the formal introduction of democracy the commitment to democracy was not very intense (Conradt 1980). Therefore, the spheres of political liberty (partial regime B) and horizontal accountability (partial regime D) have arguably been underdeveloped and defective in the first years of West German democracy. Only when the West Germans constituted a "civic culture" (Almond/Verba 1963), were the partial regimes able to function adequately. Therefore, the sphere of civil society surrounds the partial regimes; democracy is "embedded".
- b) Society and the political regime are only able to develop into a democracy if and when the preconditions of the existence of the state itself are clear. Utilizing transitology slang, Wolfgang Merkel calls this precondition "stateness". For the case of Ukraine, it may be clearer to talk of the international context instead (again, see figure 1). In addition to the aspects of stateness, the very foundations of a state may be in danger if external powers undertake efforts to pull that state into one or the other direction. Therefore, the international context is a further sphere which needs to be taken into consideration when judging the functioning of democracy.

The task of the next sections is to use this model with the Ukrainian case in order to discuss different aspects: a) the status of democracy in today's Ukraine with a special glance at the presidential election of the year 2004, b) the role of institutions, and of institution-building in particular, in the democratization process of Ukraine, and c) the possible influence of external actors on the democratization process.

3 Elements of Defective Democracy in Ukraine

3.1 *The background*⁵

When looking at the state of democracy in Ukraine, a look back to the Soviet Union is in order. Liberalization started with Mikhail Gorbachev's perestroika and glasnost. The reasons for their conceptualization and implementation in the late 1980s were manifold. Besides the economic crisis of the Soviet system and the sclerotic symptoms of the political regime, the growing independence of subnational regions played an important role in accelerating the decline of the Soviet Union (Carrère d'Encausse 1978). Whereas the Soviet system had been able to manage interethnic conflict rather well, the political elites of the fifteen Soviet republics pushed for independence from the centre in Mos-

⁴ Since Merkel et al. (2003).

⁵ Some parts of this subchapter go back to Beichelt (2004).

cow soon after Gorbachev had announced his plans for restructuring almost all layers of the USSR.

Consequently, initiatives for liberalization of the Soviet Union came, to a large extent, from the republics, where local party leaders tried to emancipate the republic leaderships from Moscow rule. A landmark in this process was the election to the Congress of People's Deputies, which took place in March 1989. In many republics, oppositional forces did not only run against the autocratic elements of the USSR, but also against Russian hegemony within the state. In several republics, a considerable number of party officials were unexpectedly rejected on these grounds (White/Rose/McAllister 1997). The next steps were elections for parliaments on the level of the republics. The astonishing defeats of the Communist Party in Lithuania and, to a lesser extent, in the two other Baltic republics, were undoubtedly seen as the first steps in the direction of democracy. In the other European USSR republics, as well as in the Caucasus, the high competition of these elections bore strong elements of liberalization. In contrast to this, there was much less competition in Central Asia, which at that time had already led to well-founded assumptions about the differing paths of transition within the USSR (Löhr/Kohler 1991).

During the 1990s, four different subregions evolved in the territory of the former Soviet Union:

- The Baltic States, which had regained independence after the August 1991 revolt, quickly took steps towards integration into Western European structures. The liberalization and democratization of the political regime were followed by the process of consolidation.
- In Central Asia, the conditions for forming political identities as foundations for national states were scarce from the very beginning of liberalization. The borders of the republics in the 1920s had only partly been drawn according to existing ethnic, linguistic, or cultural borders (Götz/Halbach 1996). Because of the absence of alternative legitimate institutions, traditional leaders from the formerly Communist clans were strongly favored in (re)gaining power.
- In the Caucasus, clannish structures succeeded as well. In contrast to Central Asia, nationalism became a major element of clan organization in the post-Soviet period. The regimes of this subregion today combine nationalist and sultanist elements.
- The four European countries of the CIS – Belarus, Moldova, Russia, and Ukraine – were seen for a long time as special cases of the Central European transition to democracy and liberal market economy. Whereas Belarus needs to be classified as an autocracy, the other three countries including Ukraine belong to the “gray zone” mentioned above.

Within these regimes, elements of democracy and autocracy vary to a considerable extent. Azerbaijan, Belarus, Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan can clearly be rated as autocratic regimes. Although both parliamentary and presidential elections exist in all of these countries, the “electoral regime”, with its elements of inclusiveness, fair competition, and effectiveness of the vote does not function in democratic terms. This judgment is shared by Freedom House, which lists none of the states as one of the world's 121 electoral democracies in 2003 (see table 1).⁶

⁶ See <<http://www.freedomhouse.org/research/freeworld/2003/democracies.pdf>>, November 20, 2003.

Table 1: Democracy and Autocracy in CIS States

		Ø 1992-1996	Ø 1997-2002	Freedom House Rating	Regime Type
<i>Central Asia</i>	<i>Kazakhstan</i>	5.3	5.5	Not Free	Autocratic Regime
	<i>Kyrgyz Republic</i>	3.1	5.0	Not Free	Autocratic Regime
	<i>Tajikistan</i>	6.8	6.0	Not Free	Autocratic Regime
	<i>Turkmenistan</i>	6.6	7.0	Not Free	Autocratic Regime
	<i>Uzbekistan</i>	6.7	6.5	Not Free	Autocratic Regime
<i>Caucasus</i>	<i>Armenia</i>	3.8	4.1	Partly Free	Defective Democracy
	<i>Azerbaijan</i>	5.7	6.0	Not Free	Autocratic Regime
	<i>Georgia</i>	4.6	3.7	Partly Free	Defective Democracy
<i>European CIS</i>	<i>Belarus</i>	4.6	6.0	Not Free	Autocratic Regime
	<i>Moldova</i>	4.3	3.1	Partly Free	Defective Democracy
	<i>Russia</i>	3.5	4.4	Partly Free	Defective Democracy
	<i>Ukraine</i>	3.5	3.8	Partly Free	Defective Democracy

Source: Freedom House, <http://www.freedomhouse.org/research/freeworld/FHSCORES.xls> (November 20, 2003).

When relating these findings to the conceptual outline of "embedded democracy", it becomes clear that, in the CIS in general, democracy is endangered at its very heart, the electoral regime. In the cases of the CIS, political participation, civic liberties, and effective government – all elements used to differentiate between different types of defective democracy – have to be analyzed, and indeed with the caveat in mind that the competitive foundation of democracy may be seriously damaged. This also leads us to the conclusion that in comparison to the neighboring CIS states, democratization is rather advanced in Ukraine. This is even more true after the presidential election of 2004: Of all CIS countries, only Georgia and Moldova have seen successful power changes within a partly free regime after 1991. Indeed, other countries like Belarus and Russia have experienced fallbacks into the direction of authoritarian rule whenever an incumbent political camp was in danger of losing an election. Ukraine has fallen back, however, with regard to the neighboring countries to the west where the conditions for democratization and democracy have been much higher.

2.2 The Ukrainian case

Figure 1 presents a model of democracy embedded into a) the international context and b) civil society. With regard to the international context, Ukrainian stateness is endangered by the lack of a single national identity – Ukrainians in the east of the country by and large feel attached to Russian culture, whereas Ukrainians in the West have much stronger feelings of a separate Ukrainian identity (Kuzio/Wilson 1994, Ryabchuk 2003). These competing identities do not only lead to a competition of final visions of Ukrainian foreign and security policy. Ukraine's foreign policy is influenced by two

powers with competing visions of Ukraine's position in Europe – Russia on the one side and Western institutions (NATO/EU) on the other side.

In the case of Russia, it is not always clear if Ukraine's breakaway from the Soviet Union is completely accepted by the elites in Moscow. On the other side, the very heart of the western organizations named consists of the delegation of sovereignty and therefore also of a weakening of the state. Therefore, in the Ukrainian case the external dimension clearly matters (Dergachev 2002/03, also see the texts of Iris Kempe and Irina Solonenko in this volume). Regarding civil society, it is usually argued that the seventy years of communist rule and the lack of a pre-communist democratic experience contribute negatively to the participation and other aspects of democratic life.

The dissolution of the Soviet Union was actively pushed forward from Ukraine. Together with Boris Yeltsin, Leonid Kravchuk, who had been responsible for ideology in the Central Committee of the Communist Party of Ukraine, was one of the most important persons involved in the processes in late 1991. In the elections to the National Supreme Rada in March 1990, the Communist Party had still won about three fourths of the mandates. However, among the persons elected on the Communist list, there were about 130 reformers. In addition to these reformers, the national movement in the form of the Popular Movement for the Independence of Ukraine (Ruch) played a role. It was stronger than in Belarus or Russia, but at the same time did not have the same amount of power as it did in Georgia or in the Baltic States.

The task of keeping the different groups together was achieved by Kravchuk and his program to preserve regime continuity despite the goal of independence from the USSR. He was elected president on the same day the Ukrainian population voted for independence with an overwhelming majority of about 90 percent and ruled within a semi-presidential system (Ott 1999: 15-18). The president in that system was proclaimed the head of the government, but he could appoint and dismiss the prime minister only with the consent of the parliament. Such permission was also required for the appointing of the most important ministers (of defense, of foreign affairs, of finances etc.).

After Leonid Kuchma became president in 1995, he attempted to change the balance of power in his favor. The struggle between the president and parliament in Ukraine in the first years of sovereignty gave birth to the system of mixed components. In 1995 the speaker of the parliament (O. Moroz, Socialist Party of Ukraine), under the threat of referendum on the confidence in the parliament, was bound to sign the Constitutional Accord. The Accord prescribed the establishment of the presidential republic (the president unilaterally appointed and dismissed the cabinet and local governors) and was to be in force until the new Constitution was adopted.

In 1996, the new constitution was agreed upon. The presidential administration successfully used the ideological discrepancies between the right-wing political oppositional movement, Rukh, and the Communist Party of Ukraine for a constitution which lent huge powers to the president. The constitution was adopted, like the Constitutional Accord, under the threat of impeachment of the parliament by referendum. In an overview, the constitution contains the following elements:

- The president appoints the prime minister after the endorsement of the Parliament, but can dismiss him at will. It makes the prime minister dependent on the president and makes all the premier's competencies (appointing and dismissing of ministers, forming the structure of the state executive power bodies) de facto dictated by the president.

- Thus, de facto it is the president who forms the government, defines its structure and personal membership. Ministers and heads of other departments, especially enforcement and inspection (such as tax administration), are subordinated, first of all, to the president.
- The government is dismissed with the election of a new president, not a new parliament.
- The president appoints heads of regional and district state administrations (local representatives of the executive, de facto sub-structures of the presidential administration), which supervise the adherence to law on their territory and in fact assume functions of territorial self-governing. They prepare and execute a budget of the territory.
- The president abolishes government acts by his own decision.
- At the same time the president can dismiss the parliament only in an (almost unreal) situation when a plenary session cannot be started in 30 days. Before 2000, there existed a criterion to determine whether to start the session: two thirds of the deputies had to register. After the left presidium of the Verkhovna Rada changed and the first non-left majority was composed in February 2000, the deputies abolished this rule.
- The president also has the right of the legislative initiative and of veto that can be overcome by 2/3 of the votes in parliament.

Along with the new constitution, the president in 1996 received extraordinary powers to conduct economic policies for three years. Altogether, the powers of the Ukrainian president were high from an international perspective (Beichelt 2001: 123-176).

On the other side, president Kuchma was not able to dominate the system with his policies. Like his predecessor, he has been confronted with a fragmented parliament, which at the same time was united in its hostility towards the president. Factions in the parliament have been classified by different categories. Western observers tend to name the existing groups after party families known from Western Europe and name the following groupings: Communists and Socialists, Leftist Centrists and Social Democrats, Centrists, Rightist Centrists, and Nationalists (Lindner 1998b). Domestic analysts, however, tend to classify the party system by power blocs, e.g. the rifts between traditional leftists, centrist-pragmatists (usually found around incumbent presidents), and liberal reformists. The labels vary, but in general there is a tendency not to adopt Western categories (see, e.g. Dergachev 2002). One possibility to draw the rifts according to these lines for the current parliament is presented in table 2. No matter how the factions are named, the volatility was extremely high during the first years of the system. Additionally, the parliamentary election of 1994 had shown that the legitimacy of the system was very weak. Electoral participation was so low that even nine months after the election, 45 seats remained vacant.

Table 2: Factions of Ukrainian Parliament, October 2004

Faction/Group	Votes	Representation
Coalition "Force of the People": "Our Ukraine" Bloc Yu.Tymoshenko Bloc	100 19	Pro-Yushchenko center-right parties and deputies.
Ideological Left: Communists	59	Orthodox part of ex-Communist party of Ukrainian SSR.

Social-Democratic Left: Socialists	20	Party of pragmatic ex-Communists
Pro-Kuchma factions: "Regions of Ukraine"	64	Donetsk businessmen and ex-officials (close to premier V.Yanukovych).
Social Democratic Party (united)	40	Ex-officials and businessmen (close to Kuchma's Administration head, oligarch V.Medvedchuk).
"Labor Ukraine"	30	Businessmen (close to Kuchma's son-in-law, oligarch V.Pinchuk).
"Union"	18	Ex-officials and businessmen (close to oligarchs V.Khmelnycky and V.Pinchuk).
People's Democratic Party+Party of Industrialists and Entrepreneurs	16	Ex-officials (close to ex-premier V.Pustovoitenko) + businessmen (former "red directors", close to ex-premier A.Kinakh).
"United Ukraine"	16	Majoritarian deputies, close to oligarch B.Hubsky.
"Democratic initiatives"	14	Mostly Kharkiv deputies, close to Kuchma and oligarch O.Yaroslavsky. Pro-Kuchma's majority coordinator S.Havrysh belongs to this group.
Independent/Not aligned: Independent	18	Businessmen or ex-officials from different regions.
"Center"	16	
People's Agrarian Party	20	Ex-officials, businessmen from rural regions (close to speaker V.Lytvyn).

Source: Site of the Ukrainian Parliament (http://gska2.rada.gov.ua:7777/pls/radac_gs09/fr_list).

Obviously, one major reason for the immobility of the system is institutional. The regime is not well prepared for dealing with situations of cohabitation. The key reason for this impasse, however, needs to be seen in the political and ethnic separation of the country. Whereas the eastern side of the country and the Crimean peninsula are mostly inhabited by Russians or Russian speaking Ukrainians, the western parts of the state are culturally Ukrainian. Both groups exhibit strong socio-cultural ruptures regarding the Communist past, the value of the nation, and other questions of identity. Therefore, nation-building is one of the most crucial themes in Ukraine (Kuzio 1998; Wolchik/Zviglyanich 2000).

When analyzing the political development in accordance with the model of embedded democracy, defects have to be identified in every partial regime.

Partial Regime A – Electoral Regime: The electoral regime has been endangered, on the one hand, by the president Kuchma's agenda of keeping Communists and related post-Soviet forces at bay, and, on the other, by different financial-economic clans from different regions of the country. The presidential election of 1999 followed the 1996 Russian example and consequently drew negative commentary from election observers. Parliamentary elections have not been as seriously marred, but still were far from recognition as "free and fair".⁷ The 2004 presidential election did not meet (...) a considerable number of standards for democratic elections", as the OSCE election observation declared.⁸

The defects of the electoral regime are rather clear, but the element of stability needs to be taken into mind as well. When potential turning points come near in the form of presidential elections, it is not only the person in power – the president – that has to fear a loss of influence. Rather, given the strong vertical structure of the governmental system, it is the whole regime that is in danger. Expectations become uncertain, political and economic investments may prove to be misdirected. Where so much is at stake,

⁷ See the according report on <<http://www.osce.org>>.

⁸ See http://www.osce.org/documents/odhr/2004/11/3811_en.pdf.

democratic norms surrounding the electoral process are not internalized to the extent that incumbents are forced to adhere to the imperative of free and fair competition.

Partial Regimes B and C – Political and Civil Rights: The openness of the public sphere is rather limited by political and economic coercion directed against independent newspapers; most major TV stations had been signed onto a pro-Kuchma line before the elections. Violent deaths of journalists are linked to their anti-establishment coverage. Therefore, the freedom of information is limited. Politicians from various opposition camps fell victim to fatal attacks as well. On the other side, the limitations of the public space are not complete. Channel 5 is nation-wide oppositional channel which positions itself as a "channel of honest news", yet is supported by P. Poroshenko, Viktor Yushchenko's ally. There exist independent and opposition printed press outlets (on freedom of the media in Ukraine, see Haran/Pavlenko 2004).

There have been no effective limits on the freedom of access to Internet information sources. Yet, some attempts were made. In 1998-1999, the government tried to establish a law, which would limit the number of providers for Ukrainian Internet sites; the motion failed.⁹ In October 2004, the clients of three government-based Internet providers were banned from opening a site hosting jokes about premier Yanukovich (yet, this ban was overridden later). One of the sites close to the opposition, obkom.net.ua, underwent an attack on its server (yet, it quickly reestablished itself at a different provider).¹⁰ In conclusion, while the right of obtaining "enlightened information" (Dahl 1989) is not systematically disregarded, state actors have not been very active to enhance these rights.

Further, activists from civil society have been arrested when voicing their opposition on security matters. The constitutional state is limited due to corruption and lack of neutrality. In short, the regimes bear elements of illiberalism, although probably to a lesser extent than in Russia. Altogether, it can be argued that political rights are not systematically violated. However, reports on inefficiency on the part of the state administration and the judiciary frequently lead to problematic situations. Former deputy Prime Minister Julia Tymoshenko was arrested on questionable grounds, and the prosecutor-general harassed one of the judges who had later ordered her release.¹¹

Partial Regime D – Horizontal accountability: Horizontal checks and balances are weak as well. After the constitution, the president nominates not only the government and subordinates some of the most important ministries (e.g. defense, foreign affairs) himself. Additionally, he appoints the heads of the regional and local administrations. Still, during the first year of the existence of the new basic law, president Kuchma violated the constitution no less than 200 times (Lindner 1998a: 21). This has to do with the paradoxical situation that the president on the one hand enjoys (too) much power when being able to appoint figures, but on the other hand does not have the capacity to actually decree his decisions. Decisions need to be made by parliament, and Ukraine so far has been characterized by parliaments which, because of political fragmentation and polarization, refrained from exerting their potential influence.

⁹ Business, no. 18 (277), 11 May 1998.

¹⁰ See: Chyvokunia Viktor Site anekdotov pro Yanukovycha zablokovanyj. Avtor situ... vdyachnyj Yanukovychu za reklamu, Ukrainska Pravda, <<http://www.pravda.com.ua/archive/2004/october/12/5.shtml>>; Ot "Obkoma": u nashogo providera s minuty na minutu zaberut nash server, <<http://w1.obkom.net.ua/news/2004-10-29/1211.shtml>>.

¹¹ The information of this paragraph is from <<http://www.freedomhouse.org/research/freeworld/2003/countryratings/>>, 25 November 2003.

The weakness of the system of checks and balances at least partly needs to be explained with the strategy of president Kuchma to use formal and informal leverages for influencing the establishment. He managed to create a system of power suitable for him which did exactly go along with the constitutional structure. Within the "party of power", different clans (political-economic, or rather, business-administrative groups) competed within the economic, political and public sphere. Kuchma used the divisions between those groups in a *divide et impera* game, in which the main players were kept close enough to remain interested in the game (not willing to quit, to change the rules or the "arbiter") – and simultaneously far enough not to outweigh seriously other players (and be able to question the need for an arbiter).

After being reelected in 1999 in an election that was criticized as being unfair, Kuchma's administration tried to change the Constitution with the aim of broadening its influence on the parliament. On the base of the old (1991) and imperfect law he held a referendum "on peoples' initiative" (Ukrainian and foreign observers reported numerous violations). In the referendum, over 80% of citizens (as the presidential administration claims) "supported" the necessity of formation of the "permanently acting majority" in Parliament, the right of the president to dismiss parliament if it lacks a majority, the constriction of deputy immunity, and the introduction of a bicameral parliament.

The idea of forming the "permanently acting majority", of course, came on the background of the traditional weaknesses of Ukrainian parliamentarism: the weak party system and the peculiarities of electoral legislation (225 deputies are being elected by the general all national party list with a 4% threshold and another 225 in majority districts where it is very easy to employ "administrative resources" or subordination). Given the differences in strength of the big power blocs throughout the country, that was one of the reasons why none of the political forces has been able to get a majority of votes on its own or in union with like-minded allies in parliamentary elections. Therefore, the idea of the presidential administration was to artificially create such a majority from outside, and to keep it under control by the threat of dismissal of parliament if the majority crumbles.¹²

However, the Constitutional Court prohibited introducing the changes into the constitution directly by referendum. It obligated the authors of this action to follow the due parliamentary procedure of changing the constitution (support of changes by the simple majority – then the verdict of the Constitutional Court that changes do not limit the human rights and they were introduced without the violations of the procedure – finally, support of changes on the next session by the 2/3 voices of deputies).¹³

As a result, the referendum changes were supported only by the pro-presidential majority, and the implementation of the referendum results failed. The idea to change the Constitution re-appeared two years later – and the political context demanded that the direction of those changes be the opposite: the narrowing of president's competencies. The proposals of this initiative will be discussed below.

¹² This logic has been widespread in the pro-Kuchma camp since about 1999 (see Kordoun/Pavlenko 2000). As the 2004 elections approached, the orientation on the artificial creation and extra-parliamentary control of the majority became increasingly visible. The officials of the Kuchma camp used to refer to members of parliament as "button pressers" for bills and programs developed by the administration (see Pogorelova 2004).

¹³ For more on this case, see a Freedom House report: <<http://www.freedomhouse.org/research/nitransit/2001/index.htm>>.

In more general terms, these events show that the usefulness of horizontal checks and balances in young democracies can be interpreted in two ways. On the one hand, the absence of balancing elements in a system may well lead to the semi-autocratic behavior of the president. On the other hand, checks and balances in political terms may easily lead to impasse-situations, which is hardly desirable during the transition process.

Short summary: On the basis of several interlinked problems, Ukrainian democracy bears defects in several of its partial regimes. The problems consist of a constitution which offers (too many) powers to the president. If the incumbent uses these powers, the almost automatic result is the development of a strong power vertical that cannot be controlled by any other institution. Ironically, however, the presidential system developed because of the weaknesses of the only institution to check the president before 1996: parliament. The ideological and territorial rifts between different parliamentary groups were so strong that no stable parliamentary majority was at reach in the first decade after Ukrainian independence. For regional and economic forces, it was therefore much more promising to organize themselves outside of parliament and therefore to a certain extent beneath the institutional system altogether.

This underlying situation explains the most decisive defects in the partial regimes: A (electoral regime) and D (horizontal accountability). The electoral regime is endangered not least because the presidential elections are by far the most important turning point of the political system. So much is at stake that both incumbents and the opposition do not bring up the power to break with deeply imprinted Soviet electoral practices. The same mechanism endangers horizontal accountability. Presidents in Ukraine have so far needed to fight a hostile parliament and at the same time faced a regionally and economically segmented pluralism not fully represented in the political institutions of the regime. Therefore the president and his entourage have had to rely almost exclusively on elections to exert power.

These weaknesses are, of course, partly rooted in the former Soviet regime. The way accession to power is institutionalized in CIS countries has resembled Soviet practices until now. As long as post-socialist or liberal opposition forces do not get close to acquiring majorities at the polls, elite recruitment is bureaucratic and protectionist. Actors with a regional or a sectional power base become included on executive terms, be it into the presidential apparatus or into governments. Typically, parliament is only very partly the place where competing interests are dealt with. This has effects on elite formation, because actors are potentially able to run for high offices only when they have gone through the executive, not the legislative, apparatus. Therefore, it is not parliamentary competition but loyalty to the president which includes or excludes potential rivals from the political scene. At the same time, systematically cutting down the power resources for groups not belonging to the recruitment networks of the executives has been a condition for safeguarding the vertical power structure.

Altogether, it is hardly surprising that only a small minority of 20 percent of the population of Ukraine is at least partially content with the state of democracy in their country (White 2000: 276). Moreover, in 2004 about 56% of Ukrainian citizens thought that events in Ukraine were developing into the wrong direction; none of the official bodies (president, parliament, government, parties etc. had more than 5 of a 10–point approval rating).¹⁴ As social costs were inflicted in times that were supposed to be "the building of democracy" in public culture, both notion and idea of democracy are associated with

¹⁴ See: Pavlenko, Rostyslav, *Pered vyboramy 2004: liudy i vlada vse shche po rizni boky*, <<http://www.pravda.com.ua/archive/2004/may/25/1.shtml>>.

a decline in living conditions and ineffective power struggles. Whenever the strictly vertical regime structure was loosened, the existing frictions in society were reflected in deadlocks in the political sphere, especially in parliament. This makes it rather improbable that the defective democracy of Ukraine will return to more liberal and less delegative government practices in the short term. Arguably, even the more "democratic" president Yushchenko will have to struggle with the structures of the system. As our analysis implies, a simple change of faces in the country's most important political seat is only one of many things which have to change in order to put Ukraine on a straighter road to non-defective democracy.

4. The presidential election of 2004: electoral conduct and results

Both the electoral campaign and the determination of results of the 2004 presidential election proved to be heavily defective. During and after the electoral campaign, numerous violations of democratic norms have been reported. Mainly, these can be derived from the information of the election observation mission led by OSCE/ODIHR which listed the following problems already after the first round:

- interference by the state administration in favor of Prime Minister Viktor Yanukovich,
- bias by the state media in favor of the candidate Yanukovich,
- disruption or obstruction of opposition campaign events by the state authorities,
- inadequacies in the Central Election Commission's handling of citizens' complaints,
- mass problems with voter lists (information about inaccuracies in the voter lists came from 40% of districts).¹⁵ According to the Committee of Voters of Ukraine estimates, problems of the voter lists disallowed up to 10% of voters to exercise their right to vote.¹⁶

After the first round of elections, Bruce George, MP President of the OSCE Parliamentary Assembly and Special Coordinator for the short-term observers noted, that "with a heavy heart, we have to conclude that this election did not meet a considerable number of OSCE, Council of Europe, and other European standards for democratic elections (...) Consequently, this election process constitutes a step backward from the 2002 elections."¹⁷

The observers did see as encouraging, however, the very high level of participation by the electorate and civil society in the election process. At the same time, the Head of the CIS Executive Committee, Executive Secretary of CIS Vladimir Rushailo, who headed the CIS observers mission, claimed that the elections were free and fair, marked only

¹⁵ See the reports for both rounds of the presidential elections at the OSCE site: <<http://www.osce.org/odihhr>>. See also the Committee of Voters of Ukraine reports on: <<http://www.cvu.org.ua>>. Data on monitoring of Ukrainian media during the campaign can be found on the Civic Coalition "New Choice 2004" site: <<http://www.monitor.org.ua/?do=45&id=5755&ln=en>>.

¹⁶ See Committee of Voters of Ukraine report: <<http://www.cvu.org.ua/>>.

¹⁷ See the statements of observers from key international monitoring organizations at the Institute of Mass Information site: <<http://eng.imi.org.ua/?id=read&n=1373&yy=2004>>.

with "minor, technical drawbacks".¹⁸ Observers from CIS gave very similar comments concerning the elections in Belarus, Kazakhstan, Azerbaijan and other countries, where OSCE condemned elections as non-free and unfair.¹⁹ State Ukrainian television, and the TV channel *Inter*, close to Kuchma's Administration head V. Medvedchuk, during the election day of 31.10.2004 extensively cited the CIS observers, who said that the elections are running smoothly, without violations – except for Western Ukraine, where there were "numerous" violations (voting in place of relatives that had left to work abroad, entering the voting booth in groups of 2-3 people, etc.). Also, an independent publicist site "Ukrainska pravda" published an allegedly intercepted *temnik* (media guidelines) from Kuchma's Administration head Medvedchuk, which described exactly such behavior (in order to apply for nullification of the elections in the West of the country) – along with undermining the value of exit-polls, whose results were expected to demonstrate Yushchenko's victory.²⁰

Still on the first round, it is also noteworthy that the Central Election Commission (CEC) started announcing results of elections from prisons and the Donbass constituencies, where Yanukovych had a clear advantage. Yet, as the number of processed ballots exceed 60%, it became clear that Yushchenko was ahead of Yanukovych. Then the CEC (on the afternoon of November 1) ceased calculating the results, having processed 97,67% of the ballots and calculated virtually all votes given in support of Yanukovych. It did not calculate further ballots until November 10. In the meantime, both Yanukovych and Yushchenko filed protests to the CEC and to the courts, citing violations and demanding the re-calculation of results in the Western/Central and Eastern/Donbass constituencies, respectively.²¹

Finally, after 10 days of counting the ballots and processing the candidates' appeals, the CEC announced that V. Yushchenko had won the first round, receiving 11.125.395 votes (39.87% of total votes cast); V. Yanukovych came second, receiving 10.969.579 votes (39.32%).²² The candidates accused each other of violations and declared their intent to win in the run-off.

Table 2. Results of the presidential elections in Ukraine, 2004.

Name	First Round, 31.10.2004		Second Round, 24.11.2004		Repetition of second round, 26.12.2004	
	%	Votes re- ceived	%	Votes received	%	Votes re- ceived
Yushchenko V.	39.87	11.125.395	46.61	14.222.289	51.99	15.115.712
Yanukovych V.	39.32	10.969.579	49.46	15.093.691	44.20	12.848.528

¹⁸ Nabludateli SNG: vybory na Ukraine proshli po zakonu: <<http://www.ukraine.ru/news/231493.html>>; Rushailo dal vysokuju ocenku usloviyam dla raboty nabludatelej <<http://www.temnik.com.ua/news/4186795b69ed1/>>.

¹⁹ Lukashenko meshajut prazdnovat „elegantnuju pobedu“, Polit.ru, 19 October 2004: <<http://www.polit.ru/event/2004/10/19/lukapraz.html>>; Nabludateli SNG: vybory v Chechnie proshli bez narushenij, Nezavisimaya gazeta, 30 August 2004: <<http://news.ng.ru/2004/08/30/1093859047.html>>.

²⁰ See: Temnik Medvedchuka na vybory <<http://www.pravda.com.ua/archive/2004/october/31/3.shtml>>.

²¹ See respective official campaign sites: www.razom.org.ua (Yushchenko), www.ya2004.com.ua (Yanukovych).

²² See the Central Election Commission site: <<http://www.cvk.gov.ua/wp0011>>.

Moroz O.	5.81	1.621.154				
Symonenko P.	4.97	1.388.045				

Source: Central Electoral Commission; <http://www.cvk.gov.ua/wp0011e>.

After the results were announced, the agitation campaign unfolded again. According to many observers, the final stage was even more "dirty" than the campaign before the first round: marked by abuse of power, intimidation of the voters by the authorities, monopoly by the authorities of news on the main channels (and their employment to defame Yushchenko, portraying him as a "radical" and even "fascist"²³), involving social institutions (like Moscow Patriarchy Orthodox Church) in agitation in favor of the incumbent prime minister Yanukovich.²⁴

The comments on election day were even tougher than on the first tour. As already mentioned, according to the OSCE special coordinator Bruce George, the second round did not match Ukraine's obligations on free elections before the OSCE, Council of Europe and "the European standards of democratic elections". Similar statements were issued by the EU and NATO representatives as well as by the US state department.²⁵ On the contrary, just like after the first round, Russian observers called elections "free and fair", and Russian president Putin congratulated prime minister Yanukovich for his victory when the CEC, after having calculated 99% of the ballots, showed Yanukovich's victory by 3%.²⁶ However, a day later Putin withdrew his congratulations, saying that he meant "the winner of the exit-polls", not the elections (interestingly, both of the two exit-polls, that were completed on election day, showed the victory of V.Yushchenko, not V.Yanukovich).²⁷

According to the international observers and Committee of Voters of Ukraine, the second tour of elections was distorted by mass violations. The main types of violations were:

- Manipulations with absentee voting (people voting several times);
- Manipulations with mobile boxes, which allowed voting outside the polling stations (for instance, in Mykolaiv oblast 35% of the votes were cast outside the polling stations);
- Falsification of the participation in the vote (in Donetsk oblast, for example, the CEC reported that by the time the polling stations were closed, 78% of voters took part in the elections. Yet, four hours after the stations were closed, this figure was changed to 96%. As a result, in some constituencies in Donetsk and Luhansk the alleged number of voters reached 102-105%);

²³ Vijna proty Yushchenka. Plan rozmishchennya „chornukhy“, Ukrainska Pravda, 19 November, 2004: <<http://www3.pravda.com.ua/archive/?41119-1-new>>.

²⁴ Sobolev, Yehor, People that won't go away, Mirror Weekly, 20-26 November, 2004: <<http://www.mirror-weekly.com/ie/show/522/48443/>>.

²⁵ Vybory ne vidpovidajut mizhnarodnym standartam – OBSE, Ukrainska Pravda, 22 November, 2004: <<http://www-all.pravda.com.ua/archive/2004/november/22/news/35.shtml>>.

²⁶ See the Central Election Commission site: <<http://www.cvk.gov.ua/wp0011e>>.

²⁷ Putin robyt krok nazad? Ukrainska pravda, 23 November, 2004: <<http://www3.pravda.com.ua/archive/2004/november/23/news/40.shtml>>.

- Expulsion of the opposition commission members and observers from the polling stations, infringement of journalists' rights on the stations;
- Attacks of criminals on the polling stations, attempts to spoil the ballot boxes and the ballots.²⁸

As a result, according to CVU experts, the falsifications distorted about 2.8 million votes; especially in Donetsk, Luhansk, Zaporizhzhya and Mykolaiv oblasts.²⁹ Yet, despite these facts, the Central Election Commission calculated the results – and, in the course of calculating, increased the participation rate in Donetsk oblast (see above).

Somewhat unexpectedly to many Western and domestic observers, the population took action. In Kyiv and other major cities (first – Western, then Central and Eastern Ukraine) massive rallies with 50.000 – 150.000 people in support of Yushchenko gathered. They were opposed by 1.000 – 30.000 supporters rallying for Yanukovych. The supporters of Yanukovych quickly disbanded, whereas meetings in support of Yushchenko increased in manpower.³⁰ In a week, the number of protesters in Kyiv reached one million, supported by several hundred thousands in other cities throughout Ukraine.³¹ Meanwhile, local and regional councils in some areas of Ukraine started to recognize Yushchenko as president, condemning the “falsified” results of CEC counting.³²

Yushchenko's team appealed to the Supreme Court, citing massive violations. The Court ruled (on December 3, 2004) to nullify the results of the second round, due to numerous violations, and vote again "within three weeks", which resulted in December, 26, as the last and most likely possible day. The parliament was to amend the law on elections in accordance to the Court decision; the materials concerning electoral violations were transferred to law enforcement agencies for criminal investigation.³³

Simultaneously, the opposition made political moves to ensure support within the decision-making elite. On November 27, the parliament declared the elections results invalid by a majority of votes. Many deputies of the former pro-Kuchma majority supported the act. In turn, Yanukovich called for back-up in his home region. On November 28, a gathering of local councilors in Severodonetsk (Luhansk oblast) demanded an "autonomy" of Eastern and Southern oblasts of Ukraine. Some heads of local administrations, local politicians (like head of Kharkiv oblast administration E. Kushnariov) made claims undermining the integrity of the country. Yanukovich was present there and

²⁸ For details on these and other violations, see the Committee of Voters of Ukraine site: <http://www.cvu.org.ua/?menu=fp&po=doc&lang=eng&date_end=&date_beg=&id=691>.

²⁹ KVU vyklyche Medvedchuka i Yanukovycha na dopyt pro falsyfikacii u 2,8 miliony golosiv, *Ukrainska pravda*, 23 November, 2004: <<http://www3.pravda.com.ua/archive/2004/november/23/news/29.shtml>>.

³⁰ Regiony za Yushchenka, *Ukrainska pravda*, 23 November 2004: <<http://www3.pravda.com.ua/archive/2004/november/23/regiony.shtml>>.

³¹ For the day-to-day chronicle of mass protests in Ukraine, called "Orange Revolution", see: Crisis Time-table: A History of a Ukrainian Revolution, *The Kyiv Post*, 9 December 2004, P.6 (see <www.kyivpost.com>), or (in Ukrainian): <<http://www.pravda.com.ua/archive/2004/december/9/2.shtml>>.

³² Interfax News Agency Newslines: <<http://www.interfax.kiev.ua/secure/go.cgi?1,0>>.

³³ The text of the Supreme Court decision see here: <<http://www2.pravda.com.ua/archive/2004/december/3/5.shtml>>. For brief content, see, for example: *The Guardian*, 4 December 2004: <<http://www.guardian.co.uk/ukraine/story/0,15569,1366414,00.html>>.

promised to act as instructed by the participants.³⁴ The opposition called for no-confidence in the government, accusing it of electoral fraud. On December 1 this decision passed, again marking the appearance of a "new majority" – a group of 230-250 deputies who were ready to support Yushchenko on crucial issues.

The US, the EU, and a good number of other countries also called the 21 November run-off unjust, refusing to recognize Yanukovich's victory. Putin, who did recognize it, appeared in minority, and felt the consequences already on November 25, when the EU leaders firmly disagreed with him and even cut a meeting in The Hague.³⁵ Moreover, the Europeans offered mediation in the negotiations between Yushchenko, Yanukovich and Kuchma. The OSCE Secretary General Jan Kubis, the Secretary-General of the Council of the EU and EU High Representative for the Common Foreign and Security Policy (CFSP) Javier Solana, the President of Poland Alexander Kwaśniewski, the President of Lithuania Valdas Adamkus, and the Speaker of the lower house of Russia Boris Gryzlov arrived in Ukraine to broker talks and persuade the parties in the necessity of compromise: to refrain from use of force, to agree to the proposed run-off, and to reach an agreement on a possible post-election settlement. The talks finally resulted in a compromise of December 8 (see below).³⁶

Taken together, it were developments on four levels which hindered the Kuchma and Yanukovich camps from their intention to install a successor through mass violations and electoral fraud: a) mass protests, b) the readiness of some political elites to support Yushchenko, c) the position of the Supreme Court, and d) the reaction of the international community.

In this context, the political reform again came to public attention and was included into the final compromise.³⁷ During the political conflict in December 2004, reactions to the proposed institutional compromise were mixed. Serhiy Tigipko, the former chief campaign manager of V. Yanukovych, told the 1+1 TV channel, that "if the reform would have been passed before, the elections would not have been as desperate as they were".³⁸ However, other experts suggested that even the reform would not decrease the role and symbolic value of the presidency.³⁹ It needs to be stated that the main source of conflict in late 2004 did not lie in the constitutional arrangement to be established in the future, but in mass law violations that distorted the official results of the elections. Parliament made an attempt to make the most obvious violations more difficult by passing (on November 18, 2004) an amendment to the law on presidential elections, prohibiting absentee voting and voting outside the polling stations.⁴⁰ Yet, president Kuchma refused to sign this bill.⁴¹

³⁴ *The Financial Times*, 29 November 2004: <<http://www.inosmi.ru/translation/215102.html>>; *The Washington Times*, 29 November 2004: <<http://www.washtimes.com/world/20041129-010521-7405r.htm>>.

³⁵ *Liberation*, 26 November 2004: <<http://www.inopressa.ru/liberation/2004/11/26/11:01:00/poutine>>.

³⁶ See debriefing of these events in: Revolution Ends in Classic Political Compromise, *The Kyiv Post*, 9 December 2004, P.1,6: <www.kyivpost.com>.

³⁷ The content of the reform will be presented in the next section (see below).

³⁸ 1+1 Channel Election Maraphon, 22 November 2004.

³⁹ Fesenko, Volodymyr, Moldavskiy variant, *Ukrainska pravda*, 1 September 2003: <<http://www3.pravda.com.ua/archive/?3091-1-new>>.

⁴⁰ See the Parliament of Ukraine site: <<http://gska2.rada.gov.ua:7777/pls/zweb/webproc34?id=&pf3511=19395&pf35401=59155>>.

⁴¹ Kuchma „postavyv khrest“ na nadiyakh opozycii, *Ukrainska pravda*, 19 November, 2004: <<http://www3.pravda.com.ua/archive/?41119-13-77>>.

The combination of all these factors led to a very complicated situation. On the one hand, Yushchenko was supported by millions of protesters, ready to bring down the incumbents that had tried to manipulate their choice. On the other hand, unlike Sakashvili in Georgia, Yushchenko did not enjoy the support of an overwhelming majority throughout the country. The East and Southern regions did support Yanukovich, giving him 60-80% of votes.⁴² Thus, to prevent the escalation of conflict, Yushchenko needed a legitimizing act. Such an act was proposed by the Supreme Court – the re-running of the run-off.

To avoid the threat of repetition of mass falsifications, the opposition demanded again to amend the law on presidential elections: to limit absentee voting and voting outside the polling stations, and introduce a new principle for forming local and regional election commissions so that the commissions were composed of equal numbers of both candidates' representatives.⁴³ Also, the CEC head S. Kivalov had to be replaced, as the opposition blamed him of the electoral fraud happened under his responsibility. For all these changes, an active involvement of the acting president Kuchma was needed, and it was most likely that he would veto them again if his interests were not secured. Possessing this leverage, the incumbents put forward a demand to pass the Constitution reform bill (#4180) as a precondition of changing the electoral law and replacing the CEC leadership. Both sides demanded that their proposals were voted first.

A breakthrough was reached during the EU-brokered talks. In the first days of December 2004, Yushchenko agreed to support the changes to Constitution, yet demanded to postpone their enactment, not to allow Kuchma and his entourage to install a prime minister loyal to them and thus outflank Yushchenko's expected victory in the repeated run-off.⁴⁴

After fierce debates concerning the content of legal changes, the procedure and order of voting (6-8 December), the compromise version was elaborated and supported by the overwhelming majority of 402 (of 450) of the parliamentarians.⁴⁵ The compromise implied a package amendment to

- a) the law on elections (bill 6372-d),
- b) amendments to the Constitution transferring executive power to prime minister (bill 4180), and
- c) amendments to the Constitution allowing more institutional and budget competencies for local and regional self-government (bill 3207-1).

Bill 6372-d was to be valid only for the repeated run-off on December 26, bill 4180 will be enacted either on September 1, 2005, or January 1, 2006 – depending on the time when bill 3207-1 will pass its final reading (it was supposed that in the package it

⁴² As the re-voting of 26 December (held, according to the OSCE observers, in a much more free and fair mode) demonstrated, during the annulled run-off main violations distorted the votes in Central Ukraine and the participation records in the East. Thus, Yushchenko won due to the fact that his supporters were not harassed, there were no more multiple absentee votings in Central Ukraine, and the participation in the East was not artificially inflated. See the respective data from 21 November and 26 December votings on the Central Election Commission site: <www.cvk.gov.ua>.

⁴³ Site of the Ukrainian Parliament, 8 December 2004 vote: <www.rada.gov.ua>.

⁴⁴ Konstitucionnaya reforma kak usloviye sdachi vlasti, Obozrevatel, 6 December 2004: <http://obozrevatel.com/news_files/169203>.

⁴⁵ Poimenne golosuvannya pro pryjnyattya v paketi proektiv zakoniv №4180, №3207-1, №6372-d: Site of the Ukrainian Parliament, 8 December 2004 vote: <www.rada.gov.ua>.

passed only the first reading). The bills are viewed in detail further in the next section as well.

According to the international observers of OSCE/ODIHR and the Council of Europe, voting on December 26, 2004, took place in a more free and fair mode than the first round (31 October) and especially the run-off (21 November). The violations noted by the observers did not seriously affect the result. At least, this position was shared by Western observers. Observers from the CIS countries gave contradicting comments: Russian State Duma first vice-speaker L. Sliska called elections "more transparent and lawful", yet CIS executive secretary V. Rushailo called them "illegitimate".⁴⁶ However, the CEC calculated the results and announced them on January 10, 2005. Viktor Yushchenko has won (51.99% of the votes), and Viktor Yanukovich – lost (44.2%)(see table 2 above).

In the weeks after the announcement of results, Viktor Yanukovich refused to recognize his defeat. Although he resigned from the post of the prime minister on December 31, 2004, he filed his protests to both CEC and the Supreme Court, thereby copying the moves of his opponent after the second round. He claimed that due to amendments in legislation "millions of handicapped people were deprived of the right to vote"⁴⁷, and that there were "massive, numerous violations, recorded and documented"⁴⁸. Yet, these appeals were rejected by the CEC and by the Constitutional Court as not holding sufficient proof of violations that might have disturbed the will of the voters.⁴⁹

5. Institutional reform: competing visions of the constitutional structure

The analysis of section 3 implies that the reported violations in the presidential elections of 2004 should not simply be interpreted as a result of the bad will of one or another actor in the political game. Certainly, some of the violations resemble political practices which Viktor Yanukovich has used in his home region Donbass, while being a governor there. When the expert group of the Friedrich-Ebert-Foundation visited Donetsk in October 2004, the campaign seemed to be biased in favor of the then incumbent prime minister and the former head of the regional administration. By using so-called administrative resources, all opponents seemed to have been barred from open competition, and posters of Yanukovich were present in almost every shop window in the city's main street. Generally, this kind of campaigning seems to be rooted in political practices which generally characterize the politics of that region.⁵⁰ Seen from that end, it seems

⁴⁶ UNIAN News Agency, 27 December 2004: <www.unian.net>.

⁴⁷ However, he did not formulate, how many handicapped people there were, naming different numbers in different interviews (2-3 million); CEC representatives said that generally about 2-3% ask to vote outside the polling stations due to inability to come to the polls – and voting of 26 December showed the same statistics: Palij, Oleksandr, Skilky invalidiv treba Yanukovychu? *Ukrainska pravda*, 4 January 2005: <<http://www2.pravda.com.ua/archive/2005/january/4/2.shtml>>.

⁴⁸ According to a CEC expert, cited by the 1+1 TV channel, documents filed by Yanukovich's team in many instances consisted of Internet printouts and newspaper articles: TSN News on 1+1 Channel, 10 January 2005, 19.30.

⁴⁹ Oberstes Gericht weist Janukowitschs Klage ab, *Frankfurter Allgemeine Zeitung*, 07 Januar 2005: <<http://www.faz.net/s/RubDDBDABB9457A437BAA85A49C26FB23A0/Doc~E814B64BB358A47BEB5F193A0BEFCECBB~ATpl~Ecommon~Scontent.html>>.

⁵⁰ On the peculiarities of Donbass politics, see the independent site "Ostrov" ("Island"): <<http://www.ostrov.org/>>. Also, some reports can be found at the "Telekritika" monitoring site: <<http://www.telekritika.Kyiv.ua/comments/?id=18519>>.

plausible to accuse Yanukovich of using practices which are not in line with the requirements of the OSCE. And, of course, a voter turnout of more than 96% in the Donetsk region and more than 100% in some towns and villages does not raise confidence in the honesty of the vote count.

On the other side, we cannot be sure that any other incumbent high official would not have used the administrative resources of the system. In fact, the analysis of section 3 implies that the rigidity of the presidential system makes it necessary for any person or bloc in power to use the resources offered by the vertical system. As long as neither parliamentary majorities nor a civil society which contributes stability to the system exists, all exercise of executive power depends on the presidential apparatus. Our hypothesis is that the extensive concentration of power is a major source of political instability, and that institutional reforms could be able to overcome this weakness of the Ukrainian political system. In order to illustrate the range of politically possible reforms, we will therefore present the contents of the former debates around constitutional reform in the rest of this chapter before making some recommendations in the concluding section.

The initiation of constitutional reform

For a long time, there have been debates on constitutional reform in Ukraine. Former president Kuchma was always arguing against the broadening of parliamentary competencies. In summer of 2002, he claimed that such steps would be "premature" (Kordoun/Pavlenko 2002). Yet, in August 2002, he came out with the initiative of a "political reform", which precisely prescribed an essential broadening of the competencies of the parliament and the government created by it – at the expense of the president's competencies. Thus, he actually repeated the opposition's claims, yet used them as his own, with the timing that would allow him to enjoy the full control over the executive, and only his successor to face the consequences of the reform.

The majority of experts name Viktor Medvedchuk, the head of presidential administration and the leader of the Social-Democratic Party of Ukraine (united) – SDPU(u), – as the author of the proposed reform (see Gritsenko 2004). The reason for its development is the fact that both SDPU(u) and the so-called "Kuchma clan" (the group from Dnipropetrovsk which is represented, in particular, by Kuchma's son-in-law, businessman-oligarch Viktor Pinchuk) had no own candidates for the upcoming elections. The predictably most probable winners of the elections – Viktor Yushchenko and Viktor Yanukovich were not suitable for Kuchma's closest entourage. Both of them were suspected by Kuchma's entourage to redistribute already privatized property in their favor.⁵¹

V. Yushchenko and his closest entourage were perceived by the incumbent elites as an alien threat. They were suspected of the desire to redistribute the property assets and power in their favor at the expense at the current establishment.⁵² Also, being the prime minister in 2000-2001, Yushchenko implemented a few reform steps in the energy and

Site "Ukrainska pravda" has published a series of materials on the peculiarities of Yanukovich's way to power and Donbass attitude to power: Boiko, Volodymyr, Kurs kryminalnogo premiertoznavstva <www2.pravda.com.ua/archive/2004/may/11/4.shtml>.

⁵¹ D.Vydrin: „Ya vystupav proty nynishnioji imidzhevoji strategii Yanukovycha“, Glavred.info, 11 October 2004: <<http://www.glavred.info/ukr/?art=120941522>>.

⁵² Yushchenko i Yanukovyh: Borotba za lavrovjy vinok liberala, Temnik, 15 October 2004: <<http://www.temnik.com.ua/ukr/criticism/struggle/>>.

agrarian sectors and outlawed barter, which made economic policies more transparent and less prone to private interests' influence.⁵³ In turn, V. Yanukovych was also suspected by his competitors of wanting to "seize for Donetsk elites" the most profitable branches of industry (metallurgy, energy, transport, pipelines etc.).⁵⁴ As playing by the rules did not bear many advantages to Kuchma's entourage, his entourage started playing with the rules (Gritsenko 2004).

A decision of the Constitutional Court of 30.12.2003 which permitted a third term for president Kuchma⁵⁵ may be rather viewed as a demonstration of unity of state power branches and strength of state power inside the country, for the sake of the demoralization of political opposition, demonstrating that the courts are also on the incumbents' side. The characteristics of the first planned constitutional reform were:

- the president was to be elected on nation-wide elections;
- presidential, parliamentary, and local elections were to be held in the same year;
- parliament was to develop a bicameral structure;
- Although a "permanent parliamentary majority" was to be created through a reformed electoral system, the president still unilaterally appointed the "enforcement" ministers.

The observers thought that this project was a part of Kuchma's plan to prolong his tenure according to the "new" constitution – at least for two years, and meanwhile to find a person controlled enough to be a "successor", and let his popularity raise. The project of the constitution was submitted to a "nation wide discussion", held in March-May of 2003. The "discussion" was staged as an organized campaign of "mass support", artificially created and heralded. The official site of the president (www.president.gov.ua) developed a special section, where each region reported, how many thousands of citizens supported the reform bill.

Yet, the "discussion" did not find much interest with the citizens. According to an opinion poll conducted by the All-Ukrainian Sociology Service at the beginning of 2004, when political reform was getting maximum attention from the media, after the "nation-wide discussion" only 6% of respondents marked it as a significant problem; it appeared 20th on the problem list of an average Ukrainian.⁵⁶ Thus, the reform was seen by the population as a totally intra-elite project. The people had a consolidated choice only about one provision of the reform project: 89% stood for the election of president by all of the voters, and not parliament alone.⁵⁷

Meanwhile, the opposition prepared a counter-project: an alternative draft (the so-called "Moroz draft")⁵⁸ and obtained support for it from the specially-created parliamentary

⁵³ See the Freedom House „Nations in Transit“ report for 2000: <<http://www.freedomhouse.org/research/nitransit/2001/index.htm>>.

⁵⁴ Rosijslyj plener ukrainskogo vyborchogo reliefu, Glavred.info, 4 October 2004: <<http://www.glavred.info/ukr/?art=120356213>>.

⁵⁵ See the Constitutional Court of Ukraine site: <<http://www.ccu.gov.ua/pls/wccu/P000?lang=0>>.

⁵⁶ Politychna reforma turbuje ukrainciv u ostanniu chergu: <<http://stb.ua/vikna/19-00/?1.9.2004>>.

⁵⁷ 89% ukrainciv vvzhajut, shcho Prezydent maje obyratysya vsenarodnym golosuvannyam – opytuvannya, UNIAN News Agency, 17 October 2003: <www.unian.net/ukr/news/news-45635.html>.

⁵⁸ It prescribed that the President offers to form the cabinet of ministers at first the party or block that got the most votes at the elections, then to the second by the number of the votes won, and then to a coalition which united the majority of the deputies; if even after that the cabinet of ministers was not formed, the

commission. As a result, the president pulled out of the process by recalling his project from Constitutional Court in August 2003 because of his "dissatisfaction" with the fact that both projects – the presidential and alternative one – were passed to the Constitutional Court by the same procedure, with the signature of speaker V. Lytvyn instead of voting for the president's project and ignoring the alternative one.⁵⁹

After that initiative had failed, the administration of the president changed its tactics. In August 2003, its head V. Medvedchuk conducted separate negotiations with O. Moroz and the leader of the Communists, P. Symonenko. As a result there appeared a draft registered at the Supreme Council (the parliament) as #4105.⁶⁰ The project suggested the election of the president by parliament (that latter got a prolongation of its authorities from 4 to 5 years) starting from 2006, and it further prescribed a constriction of presidential power beginning from 2004.

In September 2003, members of the pro-presidential majority introduced another bill (#4180),⁶¹ identical to #4105 except that it called for holding the election of the president by parliament already in 2004. At the same time, some members of parliament majority proclaimed Kuchma the only candidate for president. The analysts were seriously considering scenarios that Kuchma would run for a third term (or try to occupy the post of the prime minister) after parliament had endorsed the reform bill, or remain president due to the fact that parliament would be unable to gather enough votes to elect anyone instead of him.⁶²

A strange alliance: the Left backing the incumbents' proposal.

In this context, the position of the Left is very interesting.⁶³ Main forces in this sector of Ukrainian body politic are united in two parties: the more Soviet-orthodox Communist party and the more liberal, social democracy-leaning Socialist party (a member of the Socialist International). They both use strong anti-incumbent rhetoric, yet they both vigorously supported the reform bills put forward at the incumbents' initiative.

The Communist party of Ukraine (CPU) was for a long time a convenient sparring partner for the authorities: its rhetoric and theses from the Communist past only have a narrow popularity among the people: enough to ensure that the Communist leadership is elected to the parliament, yet by far not enough to fear them as a real political opponent. Instead, they help incumbents to marginalize other opposition parties, claiming that

Parliament was to be dismissed. The project also established direct elections for the heads of the district and regional state administrations.

⁵⁹ For more details of the process, see: Mostovaya, Yulia, Closed cycle of power generation, in: Mirror Weekly, no. 35 (460), 13-19 September 2003 year: <<http://www.mirror-weekly.com/nn/show/460/41914/>>, and Rakhmanin, Serhii, Legislative intrigue, in: Mirror Weekly, no. 32 (507), 14-20 August 2004: <<http://www.mirror-weekly.com/nn/show/507/47472/>>.

⁶⁰ Available on the official site of the Ukrainian Parliament: <http://gska2.rada.gov.ua:7777/pls/zweb/webproc4_1?id=&pf3511=15751>.

⁶¹ Available on the official site of the Ukrainian Parliament: <http://gska2.rada.gov.ua:7777/pls/zweb/webproc4_1?id=&pf3511=15881>.

⁶² Pogorelova, Iryna, Odno neostorozhnoe dvizhenie – i ty otets "Kuchmy-3": <<http://www2.pravda.com.ua/ru/archive/2004/february/4/1.shtml>>.

⁶³ For information on the left parties in Ukraine and their development see: Ukrainski livi: mizh leninizmom i social-demokratijeju / Za red. O.Harania, O.Maiborody, Kyiv: KM Academia, 2000.

there is "the only real opposition – the Communists; others are simply fighting for power".⁶⁴

This situation is convenient also for the Communists – they have access to mass media, they are not suffering the administrative pressure, their businesspersons (especially those who are in electoral lists of Communists) are not pressed by the controlling authorities. Yet, the electoral support for CPU is falling. On the elections of 2002, they failed in all majority districts (except in five) and for the first time did not get the first place on proportional list. Thus CPU has 60 deputies in the present Rada instead of 112 in the previous.⁶⁵ Additionally, with less than 5% in favor, Communist leader Petro Symonenko only reached fourth place in the first round of the 2004 presidential election, losing the traditional electorate to the Socialists of Moroz and to incumbent prime minister Yanukovych.

In an attempt to preserve its significance, the CPU relies on the implementation of the purely proportional electoral system and the transfer of the decision-making center to parliament, where its votes are still an important force. The CPU wanted to reach these aims in cooperation with the incumbents, that is Kuchma and Yanukovych. They considered the right opposition ("Our Ukraine" and Block of Yulia Tymoshenko (BYT)) as opponents (CPU program calls for "removal of nationalist and bourgeois forces from power"⁶⁶). Moreover, it was "Our Ukraine" which became the main rival for the Communists on the proportional list, because the "Yushchenko phenomenon" (the success of reforms) showed that not only Communists could appeal to social issues. That is why the strategic course of CPU lied in the implementation of the proportional system with a high threshold, increasing the role of parliament in the political system and the discrediting "Our Ukraine" and BYT.

In contrast to the CPU, the Socialists (SPU) positioned themselves as a "real" opposition force. O. Moroz continuously declared the adherence to the idea of transforming Ukraine into a parliamentary republic. Moreover, SPU, like CPU, is interested in an increase of the role of parliament in the political system; in this case the role of the SPU fraction is also increasing.⁶⁷ Thus, O. Moroz took a "strategic" position. He was absent in Kyiv on December 23-24, 2003, when "Our Ukraine", BYT and SPU were blocking the Rada tribune. They claimed to be doing this to ensure that the deputies would have enough time to get acquainted with the new version of the constitutional amendments prepared by the special commission of the parliament. The parliamentary majority together with the CPU then voted by rising hands (violating constitutional regulations about the way of changing the constitution) for adoption of the draft 4105 and directing it toward the Constitutional Court for receiving its verdict on whether the draft violates human rights. In the new year, Moroz entered into negotiations with Medvedchuk and agreed about the support of the reform by the Socialists – provided that the provisions about the election of president by the parliament and reelection of judges by parliament every 10 years (instead of a life tenure) were withdrawn from the document. Medvedchuk agreed and the deal was realized on February 3, 2004, when the parliamentary

⁶⁴ See, for instance: Strakh i nadezhdy Ukrainy pered 16 sentyabrya <<http://pravda.ru/main/2002/09/05/46679.html>>; Opozyciya posle vyborov: legche ne budet <<http://www.ua-pravda.com/opozposvib.shtml>>.

⁶⁵ See the official site of Ukrainian Parliament: <www.rada.gov.ua/depkor>.

⁶⁶ See www.kpu.Kyiv.ua.

⁶⁷ For Moroz's own explanations of these issues, see: Sobolev, Yehor, Alexander Moroz: "I may be dreaming, but this is just what Ukraine needs", in: *Mirror Weekly*, no. 32 (457), 23-29 August 2003: <<http://www.mirror-weekly.com/nn/show/457/41404/>>.

majority together with the CPU and the SPU gathered 304 votes to amend draft 4105 – the same one that had already been accepted for consideration by the Constitutional Court).⁶⁸

At the same time it is possible that O. Moroz was using the support of the "political reform" as a means to press Yushchenko for a more favorable attitude and better bonuses in pre-electoral and especially in the post-election period (when Yushchenko, if elected, would have to count each vote in parliament in order to create a government and be able to pursue his policies with a parliamentary majority). After the first round of the presidential elections, Moroz signed a political accord with Yushchenko, in which he agreed to support Yushchenko in the second round (and urged his voters to do so) – in exchange for (a) a removal of Ukrainian forces from Iraq, (b) the extension of a moratorium on selling arable land until 2007, and (c) supporting the amendments to the constitution before January 1, 2005 in order to enact them in 2006.⁶⁹ These conditions were accepted by Yushchenko: all of these points were outlined in "draft decrees", which he used as a campaign tool.⁷⁰ However, Moroz claimed that *his* faction can vote for the reform bill whenever it sees a possibility to collect the necessary 300 votes – with or without "Our Ukraine".⁷¹ After the first round of elections, the attention of the politicians and the public shifted from the reform projects to recognition or non-recognition of the election results.

The supporting legislation

During the implementation process of the political reform appeared a situation when many experts pointed to the *legal* conditions for the voting on February 3 (in 2004) to be null and void. The Constitutional Court on 17.10.2002 prohibited amending the constitution on extraordinary sessions⁷²; that session was held with some procedure violations; and after all it is hardly possible to "amend an amendment" already sent to the Constitutional Court. However, the Constitutional Court practically recognized these practices, having declared that the bill #4105 did not violate the constitutional premises. However, in the *political* sense, the pro-Kuchma factions, CPU and SPU seemed to be ready to adopt the new changes – their joint manpower at the time exceeded the 300 votes needed for the completion of amendment of the constitution.

One of the key questions that might have brought the "amendment" alliance apart was the law on proportional representation for parliamentary elections. CPU and SPU demanded from Kuchma the adoption and subscription of such a law as an initial condition for its farther support of the reform. At the same time, deputies from the parliamentary majority were against this variant. They insisted on either adoption of a lower passable limit (to 1%, which would let smaller parties come to parliament), or to the majoritarian system (this was laid down in the so-called "Havrysh's draft", which prescribed

⁶⁸ Pogorelova, Iryna, Odyne neoberezhnyj rukh – i ty bat'ko „Kuchmy-3“, Ukrainska pravda, 4 February 2004: <<http://www.pravda.com.ua/archive/?4024-1-new>>.

⁶⁹ See the text of the accord on the sites of both politicians: <www.yushchenko.com.ua> and <www.moroz.com.ua>.

⁷⁰ Yushchenko has signed a dozen of documents, marked as "his first decrees as President"; they touch upon main social, political, anti-corruption, constitutional issues and are to serve as a counterbalance of Yanukovych's extensive social promises and actions (e.g., increase of pensions with special "dotation", rise of wages on the eve of the elections etc.): <www.yushchenko.com.ua>.

⁷¹ Interview of O.Moroz to the 5th channel, 9.11.2004: <www.5tv.com.ua>.

⁷² See the site of the Constitutional Court of Ukraine: <<http://www.ccu.gov.ua/pls/wccu/P000?lang=0>>.

that candidates are nominated in districts by political parties and compete by the rules of a majoritarian electoral systems).⁷³

As a compromise, on 25 March 2004 the parliament adopted the proportional representation law with a threshold of 3%. The new law will take effect in 2005 – to be used in the 2006 elections. Also, the parliament adopted (6 April 2004) a new law on local elections, which prescribes a proportional system to be used for elections of the regional (*oblast*) and district (*rayon*) councils, and a single member district system for village or town councils. These laws were not an easy choice for the "majoritarian" half of the parliament, but they were forced into compliance by Kuchma's administration. This, however, backfired on the day of final vote on the reform. The resentment of this part of parliament became one of the factors that ensured the reform's failure.⁷⁴ On the day of decision on April 8, only 294 instead of the necessary 300 deputies voted for the proposal. The attempts to stage additional voting failed; according to the constitution, if a bill to change the constitution is rejected, parliament can return to it only after a year.

In between, the new law on presidential elections had been adopted on March 18, 2004. It was drafted by members of "Our Ukraine", yet during the debates it was amended by the majority members. As a result, the law (used in the 2004 election) provides for some improvements as compared to the previous one; for instance, a more precise regulation of agitation campaign and the use of media as well as the impossibility to remove a candidate from the campaign; more precise procedures for voting, calculation of the results and election observation. Yet, the law also has serious drawbacks, for example: domestic civic organizations cannot register official observers; the procedure for complaints about the violation of electoral law is quite complicated; the law prescribes the procedure to announce elections null only at a constituency level (if 10% of ballots are spoiled), not on the nation-wide level (this theoretically may lead to a situation in which elections are announced null in the constituencies where the opposition is winning).

These compromises made on another field, however, did not save the amendment project. The goals of its authors were quite clear – to shift the center of decision-making from the president to the government. A move to a more balanced system in itself, this initiative was to be implemented already before the elections, still under Kuchma – and, it was feared, that Kuchma would use his power over the present parliament to become prime-minister (or control this figure).⁷⁵

The content of the amendments to the constitution

The analysis of the content of the reform proposal suggests that it was written to make the prime-minister a powerful figure indeed. The changes outlined below were put forward in both bill #4105 and a "reserve" bill #4180 (see above). After the voting on February 3, 2004 (which was to put the reform proposal in accordance with the Constitutional Court recommendations and the Venice Commission comments: see also the text by Iris Kempe in this volume) the system of relations between president, parliament, and government was to operate as follows:

⁷³ See the official site of Ukrainian Parliament: <http://gska2.rada.gov.ua:7777/pls/zweb/webproc4_1?id=&pf3511=12614>.

⁷⁴ Politreforma provalylasya [Political reform has failed], *Ukrainska pravda*, <<http://www.pravda.com.ua/archive/?4048-2-new>>.

⁷⁵ Gritsenko, Anatoliy, So, is it prolongation after all? In: *Mirror Weekly*, no.7 (481), 14-20 February 2004: <<http://www.mirror-weekly.com/nn/show/481/45585/>>.

- The government steps down before a new parliament, not a new president. During the month after the opening of the first session of parliament (or collapse of previous coalition) parliament has to create a majority coalition (from the fractions which have together 226 or more votes). If the coalition is not created within one month, the president has the right to dissolve the parliament.
- The coalition proposes to the president the candidate of prime minister. The president submits this candidate for the approval of parliament within 15 days after he receives it. This procedure leaves many open questions – for example, whether the president can disagree with the proposal of the coalition; what to do if parliament does not support the candidate from the coalition after some time, etc. In any case, if the parliament fails to form a government within a month after the introduction of the candidate by the president, the latter has the right to dissolve parliament.
- Ministers are appointed and dismissed by parliament upon the proposition of the prime minister.
- The president proposes to parliament candidates for defense and foreign affairs ministers, and a head of the Security service.
- Parliament, but not the president, accepts the retirement of the cabinet of ministers and ministers.
- The tenure of parliament is prolonged from 4 to 5 years (but the present parliament will be reelected in 2006).
- A deputy can lose his mandate and be expelled from parliament if he leaves a fraction or block, on whose list he was elected, - or “according to the decision of the leadership” of the fraction or block.
- The government, not the president, appoints the heads of regional and district state administrations.
- The government defines also the structure of the central bodies of executive power on the proposal of the prime minister; in the same way it appoints and dismisses the chiefs of the executive power bodies that do not belong to the Cabinet of ministers (including the tax administration).
- Members of the government can at the same time retain membership in parliament.
- The president retains a veto power which can be overridden by a 2/3-majority in parliament.
- The president is elected by the people for 5-year term.

According to the reform, the main powers of the president would be shifted to the prime minister. The president would retain mainly the right of the legislative initiative and the right to summon the Council of national security and defense (it consists of the chief ministers), but the decisions must be signed by the prime minister to take effect. Also, the president can stop the decrees of the cabinet of ministers, yet this decision is to be endorsed by the Constitutional Court. Consequently, with this model Ukraine would develop into a parliamentary system with a comparatively strong prime minister.

However, as already mentioned, in April 2004 this scenario still failed a few steps from its realization due to the wide discrepancy of interests in the pro-reform coalition and

due to the unpredictability of president Kuchma who was suspected of using the reform for his own purposes. Further reasons that brought failure include:

- resentment of the MPs elected in single member districts, who were forced to support the purely proportional electoral system (in order to receive support of the Left). Some of them missed the final voting, thus protesting against the pressure on their interests;
- protest of the centrist factions against the *methods* used by the Kuchma administration (which included pressure on business and blackmail for those that intended not to vote or hesitated);
- low interest of the "Regions of Ukraine" (Donetsk) faction, which was more interested in preservation of the presidential competencies for their representative Yanukovych and thus did not ensure presence and voting discipline;
- refusal of speaker V. Lytvyn to violate the rules of procedure in parliament and stage additional votes (eventually Lytvyn headed the People's Agrarian Party and together with its faction left the pro-Kuchma majority; such a move is associated by the observers with personal conflict between Lytvyn and president administration head Medvedchuk).

Still, the pro-Kuchma majority had at its disposal a "backdoor scenario". Bill #4180, which was a verbatim copy of #4105 (except that it provided for electing the president by parliament already in 2004), still existed. This bill was amended (to resemble #4105 even more) and voted on June 23, 2004 in the first reading (276 votes). The plan then was to pass it by 300 votes in the fall. In early September, however, the pro-Kuchma majority had collapsed. First, the faction of People's Agrarian party (headed by speaker Lytvyn) announced that it would leave the majority. The next day the Kharkiv-based group "Democratic initiatives" also left the majority.⁷⁶ This made it impossible to gather 300 votes in support of reform before the presidential elections, and no second vote was scheduled.

Given this lack of certainty about the determination of the top candidates to decentralize the decision-making system, the pro-Kuchma factions attempted to complete the reform between the two rounds of the elections. Yet, due to the breakup of the majority in parliament, the difference of interests among the parliamentary factions, and general skepticism of the elites towards the reform project, these attempts failed.⁷⁷ The bill surfaced only as a part of compromise between the opposition and the incumbents during the Orange Revolution.

The further road of reform

As described above, constitutional reform became a powerful bargaining chip and was adopted even before the re-election took place. The text, however, underwent one crucial change: the president retained the right to appoint (and dismiss) the heads of regional (oblast) and district (rayon) state administrations, on advice of the prime minis-

⁷⁶ Protesting against the plans to transfer 43% of stocks of an oil company "Ukratnafta" to the state-owned company Ukrnafta. When Kuchma ordered to stop the deal, the faction returned to the majority – but the latter still does not have necessary 226 votes.

⁷⁷ See, for instance: Leonid Kravchuk: "I Am Against Amending The Constitution Between The First And Second Rounds Of The Presidential Elections" in: Mirror weekly, no. 36 (511), 11-17 September 2002: <<http://www.mirror-weekly.com>>.

ter. This will undoubtedly make the life easier for president Yushchenko in his reform attempts, yet it creates complications for future "cohabitations", should a president and a cabinet represent different political forces. It is possible, thus, that the constitution will undergo further changes already within nearest years.

Another crucial moment about the adoption of the reform as a part of a compromise is the timing of its enactment. It is conditioned by the adoption of another amendment package – bill 3207-1. The latter introduces a new constitutional entity – a community (*hromada*): an association of dwellers of a municipality or village (or several villages). Communities elect their heads. "Common interests" of the communities are implemented through rayon and oblast councils and their executive bodies. The councils adopt respective budgets and control their implementation. The competencies of state and community bodies are to be separated by law.⁷⁸

If this bill is adopted (by 300 votes in parliament out of 450, starting from the 2005 spring session) before autumn 2005, the amendments to constitution under bill 4180 will take effect from September 1, 2005. If this is not the case – then from January 1, 2006. The cabinet, appointed by the president in early 2005, is to work until the parliament elected in 2006 (on party lists) meets for the first session.

This effectively gives new president 8-12 months to enjoy the ultimate power over the executive. In addition to the tasks of economic and political reforms that new power faces, this time will be used by all political forces for the preparation to another decisive event – the parliamentary elections on March 27, 2006. The forces that win the elections will form the cabinet and gain the main leverage to control the executive.

6. After the elections is before the elections: the aftereffects of the constitutional reform

After being inaugurated, V. Yushchenko is facing several big problems: the need to reconcile the country, to put forward economic reform, to combat corruption and the shadow economy, to fulfill the EU-membership-oriented program, yet preserving friendly terms with Russia. However, as Ukrainian society has felt the successful uprising, the due demand for democracy in society might create an atmosphere necessary for changes.⁷⁹ The newly elected president inherited not only the problems of pre-election Ukraine, but also the conflicts of the post-election period: the need to ensure his legitimacy in the entire Ukraine, the need to find a way not to alienate the losing side, and the need to embody a new constitutional model in a way that would prevent such conflicts in the future.

Altogether, a new window of opportunity for the constitutional shape of Ukraine has opened after the presidential elections. One of the main concerns in the debates of the years 2003 and 2004 was the possibility of incumbent president Kuchma coming back for a third term once the constitutional amendments had been passed. Of course, it is

⁷⁸ Interestingly, the bill 3207-1 also provides for a different mechanism of creation of the cabinet (similarly to Greece or Bulgaria, a party or block which received the most mandates is given a chance to nominate the prime minister). Yet, as bill 4180 has been adopted before, 3207-1 may be adopted only in parts which do not contradict 4180.

⁷⁹ This is the Economist's view, see: Ukraine's Presidential Election: an Orange Victory, *The Economist*, 1 January 2005, P.19-20.

hard to say if this scenario was realistic or not. Looking at the case of Lukashenka's Belarus, Kuchma would not have been the first president in the CIS to do so.

Both the attempt to install the successor "administratively" and to implement the reform under Kuchma's control failed. Yet, our argument is that the compromise reached by Ukrainian elites might really open a way for more balanced system of power. The idea of installing a parliamentary system as developed by the bills #4105 and/or #4180 offers a solution to various problems of Ukrainian politics. The most important problem so far has been that all power resources were concentrated in the hands of one person, who in turn did not depend on institutionalized support. The overview in chapter 2 has shown that in the CIS, the concentration of power in one hand bears the strong danger of developing a defective democracy or taking an even further step back to authoritarianism. The need to deprive the Ukrainian presidency of its exceptional powers over the executive is acknowledged by most scholars and political forces (see Pavlenko 2002).

The debate centers on the actual mechanism of relationships between president, parliament and cabinet as well as the timing and the conditions of the reform implementation. These are main elements of the model of embedded democracy lined out in section 2. Some scholars in Ukraine argued that bill #4180 satisfies the necessary requirements: it puts enough powers over the cabinet into parliament's hands, yet retains "control competencies" in the hands of the president. Moreover, as the role of the president is traditionally strong in the CIS countries (he is culturally viewed as the head of state, the "guarantor" of the constitution, of status quo, staying "above" politics), it is possible to predict that he will remain a central figure in the power balance even without exclusive control over the executive (Fesenko 2004).

Other scholars, however, point to numerous drawbacks of the bill: it introduces further uncertainty into the mechanism of selecting and managing the executive, which might create instability of the cabinet; it is unclear how the president and the cabinet divide competences over security and international issues; the prosecutor's office received its Soviet-time competences of general overview back, which might be used for political goals.⁸⁰

In any case, the regime of horizontal checks and balances would be considerably strengthened by changes according to bill #4180. Whether optimists (like Fesenko) or pessimists (like Koliushko) are right, will be determined already within the first year of Yushchenko's presidency. This is by far the most serious institutional challenge the new government is facing.

The installation of a parliamentary system needs several preconditions for successful functioning and retaining its democratic nature: free political parties and free mass media are essential. Given the political practices of recent years, independent courts to uphold the institutional order are a condition as well. These conditions may be created simultaneously with the establishment of the new constitutional model. In fact, a more competitive, "horizontally rich" model, which compels the main political forces to create a coalition (i.e., to reach a compromise), might be a better soil for cultivating democratic procedures and traditions (as opposed to autocratic rule and power abuse in the presidential model).

In any case, a parliament organized around factions elected through party lists is to become more representative. In consequence, the main political groups will have strong

⁸⁰ Koliushko, Ihor, and Tymoshyk, Viktor, Have you read the bill 4180? A critical assessment of Ukrainian political reform, *Ukrainska pravda*, 19 December 2004: <<http://www2.pravda.com.ua/en/archive/2004/december/15/1.shtml>>.

incentives to be more inclusive of different issues and regional groups. The need to also run for local councils by party lists pushes the main forces to create – or make alliances with the existing – networks of civil institutions, which would be influential on the local level and will thus provide support for the respective parties and blocks. However, the formation of structured coalitions or oppositional groups is not sure at the moment. A look at the election results of the presidential elections implies that the country is deeply divided. Still, up to now there are no structured power blocs behind the two candidates. Rather, both Yushchenko and Yanukovich were supported by incoherent groups which were held together mainly by geographical affiliations. It remains to be seen if political competition will be more centered around social conflicts which are able to be transformed into political programs. In a way, then, our optimism concerning the constitutional reforms depends on additional changes outside of the constitutional sphere. Electoral reform will only contribute to a better structured political system if politics become rooted in society to a higher extent.

Also, it needs to be stated that a parliamentary model in itself does little to separate "money and politics", as main financial and industrial groups will continue to stand behind the main parties and blocks. Yet, it does help to diversify the risks of lobbyist influence on policy-making and make the very lobbying process more competitive and transparent. Under the presidential model, the obvious primary target for lobbying is exclusive: only the president and his administration matter. Under a parliamentary system with a strong prime minister, a lobbyist pressure on the government will compete not only with similar proposals from other groups, but also with party interests, the parliamentary agenda and other matters, which will increase in value for the decision-makers.

However, one important (and interlinked) aspect should be taken into consideration in order to ensure implementation of the reform. First, the reform, and the constitutional model which it will bring, should be accepted by all key political actors. Otherwise the legitimacy of the rules of the game will be undermined again, further destabilizing the situation and endangering the fledgling democracy, bringing another conflict into the system. The constitution of 1996, which appeared as a result of a compromise, enjoys high legitimacy. A constitution installed by force and against strong disagreement in parliament will not. Thus, to have the reform widely accepted, one should take into account the interests of all main political forces, and this is exactly one of the main challenges for the new president after such a contested election.

In a backward perspective, it even seems advantageous that the decision for constitutional reform came in a situation of high political uncertainty. A decision in spring or summer of 2004 would have had the danger of extending the status quo of an incumbent president. During 2005-early 2006, the new government will have to prove its merits and gather support for its party lists on parliamentary elections – in order to retain power. Likewise, members of the old elite like V. Yanukovych or V. Medvedchuk with their supporting groups will prepare for parliamentary elections.

With potent financial and media leverage, entrenched positions in local bureaucracy, these "clans" will undoubtedly have advantages in these elections. If the new government fails in its reform efforts, or if it engages in internal feuds, a return of the *ancient regime* is not impossible. Then Kuchma's entourage might not only lobby for notable positions in the executive (otherwise any coalition in parliament may fail to form a government), but also to undermine the newly elected president's legitimacy by accusing him of inefficient policies – concealing that he is almost deprived of powers.

Viktor Yushchenko enters his term at a new stage of development of the Ukrainian political system. Since 1999, the main friction does not run between the old and the new regime (Communists against all the rest) any more. Therefore, the new president does not need to fulfill Kuchma's function to unite all-to-many different groups against a Communist backlash. Instead, the main conflict runs around the Kuchma status quo, which is one of bureaucratization, verticalization, and the protection of several financial-industrial groups in the country – versus the change of the establishment and the introduction of the "pendulum" between the main centrist forces: those having been united around Yushchenko and Yanukovych respectively during the electoral phase (see text by Oleksandr Sushko and Oles' Lisnichuk in this volume).

It will be difficult for the new government to win a parliamentary majority – but this difficulty might be the necessary condition for the consolidation of the like-minded parties and development of Ukrainian party system from "polarized pluralism" (in the terms of Sartori 1976) to a more effective and accountable stage. The immediate risk of return of the former incumbents might keep the civil society, awakened by the Orange Revolution, vigilant and ready to control government, whoever occupies its positions.⁸¹ Conflicts between presidents and prime ministers from different political camps were able to be internalized into the institutional system in France, Poland, Croatia, Portugal, Ireland and several other countries as well. The proposed constitutional reform is the main tool to turn political conflicts from outright power battles into embedded struggles for rational political solutions to societal problems.

Comprehensive summary

The present constitutional setup of the Ukrainian state was created as a compromise between president and parliament, yet the constitution leaves the mechanism of relationships within the "president-parliament-government" triangle vague. In the absence of adequate pressure from the opposition, the constitutional model was shaped by the internal struggle within the incumbent camp, and the decision-making system appeared as president-centered, secluded, non-transparent and unresponsive.

It provoked conflicts between government and parliament, thus lowering the effectiveness of the system. The weak party system (aggravated by limited chances for parties to play the leading role in elections), abused media (often used as a propaganda machine), and underdeveloped civic institutions sector (with low possibilities to effectively advocate the interests before the authorities) made the authorities less prone to public scrutiny. Thus, the objective to decentralize decision-making and thus to strengthen horizontal accountability in order to make the government more dependent on parliament, not on the president, seems wise. All major political forces have declared the intent to pursue such reforms and even agreed in legally binding acts. Yet, the perspective of implementation of these declarations appeared only when over-centralization of power was seen by the main political players as a threat to the status-quo.

The realization of the various scenarios concerning constitutional reform depends on backstage agreements; the main factors are the immediate interests of the key players rather than strategic thinking or conscious tailoring of the most effective system. How-

⁸¹ Some signs of this are already seen: on January 5, 2005, some dozen protesters rallied in Kyiv against the alleged participation of M. Azarov, Kuchma's loyal vice-prime minister, in a new government. After the protesters, both Azarov and members of Yushchenko's team openly denied perspectives of his involvement in the new cabinet: Novaya vlast vyderzhala svoj pervyj urok? Obozrevatel, 5 January 2005: <http://obozrevatel.com/news_files/175282>.

ever, this might be the way of "natural decentralization" of Ukrainian decision-making, which would come out of necessity and mutual mistrust of the main political forces rather than from a benevolent act of the country's leadership. After the elections, the winners are compelled by already adopted legislation to fulfill the reform; implementing it in practice might become the only way to reach reconciliation with other forces.

In the vocabulary of the model of defective democracy, the proposed constitutional reform mainly aims at the partial regime of horizontal accountability. The other partial regimes of democracy, and in Ukraine particularly the electoral regime, are seen in their interlinkages with the system of power distribution. It has been argued that the defects of the electoral regime as well as the civil rights and political liberties regimes at least partially go back to the "rigidity" of the presidential system (Linz 1994). Therefore, constitutional reform will arguably stretch out into the other partial regimes. However, the defects in civil rights and political liberties depend on other factors as well. For example, a much stronger commitment of political leaders to guarantee civil rights and political liberties than shown in the recent presidential elections seems crucial. Without constitutional reform, however, the prospects of a different style of government in Europe's second biggest state would have been even dimmer. In order to overcome the defects of democracy, both the constitution and political leaders are in need of change.

7. Cited Literature

- Almond, Gabriel / Verba, Sidney, 1963: *The Civic Culture*. Newsbury Park: Sage.
- Beichelt, Timm, 2001: *Demokratische Konsolidierung im postsozialistischen Europa. Die Rolle der politischen Institutionen*. Opladen: Leske+Budrich.
- Beichelt, Timm, 2004: *Autocracy and Democracy in the European CIS*. In: *Democratization*, vol. 14.
- Bendel, Petra / Croissant, Aurel / Rüb, Friedbert (Hrsg.), 2001: *Hybride Regime. Zur Konzeption und Empirie demokratischer Grauzonen*. Opladen: Leske + Budrich.
- Carrère d'Encausse, Hélène, 1978: *L'empire éclaté. La révolte des nations en URSS*. Paris: Flammarion.
- Conradt, David P., 1980: *Changing German Political Culture*. In: Gabriel Almond / Sidney Verba (Hrsg.): *The Civic Culture Revisited*. Boston: Little&Brown, S. 212-272.
- Dahl, Robert A., 1989: *Democracy and its Critics*. New Haven: Yale University Press.
- Dergachev, Oleksandr, 2002: *Rol' političeskich partij v formirovanii gosudarstvennoj politiki v Ukraine*. Kyiv: Manuskript.
- Dergachev, Oleksandr, 2002/03: *Parlamentskie vybory i novaja političeskaja situatsija v Ukraine*. In, vol. 27, no. 4, S. 19-34.
- Fesenko, Volodymyr, 2004: *Mif pro slabkoho prezydenta pry synomnu prem'eri*, in: *Day*, no. 38., <http://www.day.Kyiv.ua/27317/>.
- Götz, Roland / Halbach, Uwe, 1996: *Politisches Lexikon GUS. Dritte Auflage*. München: C.H. Beck.

- Gritsenko, Anatoliy, 2004: So, is it prolongation after all? In: Mirror weekly, no.7., <http://www.mirror-weekly.com/nn/show/481/45585/>.
- Haran, Olexiy, / Pavlenko, Rostyslav, 2004: Ukraine. In: Nations in Transit 2004. Democratization in East Central Europe and Eurasia (A Freedom House Survey): N.Y., Rowman & Littlefield Publishers, p. 624-646.
- Held, David, 1996: Models of Democracy. Cambridge: Polity Press.
- Hellman, Joel S., 1998: Winners Take All. The Politics of Partial Reform in Postcommunist Transitions. In: World Politics, vol. 50, S. 203-234.
- Huntington, Samuel P., 1991: The Third Wave. Democratization in the Late Twentieth Century. Norman: University of Oklahoma Press.
- Karatnycky, Adrian, 2004: National Income and Liberty. The 2003 Freedom House Survey. In: Journal of Democracy, vol. 15, no. 1, S. 82-93.
- Kordoun, Olexiy / Pavlenko, Rostyslav, 2002: Vid taktyky do strategii, abo Yaka konstytucijna reforma potribna Ukraini, in: Liudyna i polityka, no.5.
- Kordoun, Olexiy / Pavlenko, Rostyslav, 2000: S(t)ymuliovana stabilizaciya, abo Zakonoproekt vartistiu v 30 milioniv, in: Liudyna i polityka, no.3.- P.2-9.
- Kuzio, Taras, 1998: Ukraine. State and nation building. London: Routledge.
- Kuzio, Taras / Wilson, Andrew, 1994: Ukraine: *Perestroika* to Independence, New York: St.Martin's Press.
- Lindner, Rainer, 1998a: Die Ukraine zwischen Transformation und Selbstblockade. Wirtschaft, Politik und Parteien; regionale und ausländische Interessen vor den Parlamentswahlen 1998. Ebenhausen: Stiftung Wissenschaft und Politik (SWP - AP 3058).
- Lindner, Rainer, 1998b: Kucmas Stuhl wackelt. Transformationsstau und Interessendivergenzen in der Ukraine. In: Osteuropa, vol. 48, no. 8/9, S. 920-937.
- Linz, Juan, 1994: Presidential or Parliamentary Democracy. Does it make a Difference? In: Juan Linz / Arturo Valenzuela (Hrsg.): The Failure of Presidential Democracy. Baltimore: The Johns Hopkins University Press, S. 3-87.
- Linz, Juan / Stepan, Alfred, 1996: Problems of Democratic Transition and Consolidation. Baltimore/London: Johns Hopkins University Press.
- Löhr, Brigitte / Kohler, Friedemann (Hrsg.), 1991: Die Sowjetunion im Umbruch. Eine Zwischenbilanz. Bonn: Bundeszentrale für politische Bildung.
- Merkel, Wolfgang, 1999a: Defekte Demokratien. In: Wolfgang Merkel / Andreas Busch (Hrsg.): Demokratie in Ost und West. Frankfurt am Main: Suhrkamp, S. 361-381.
- Merkel, Wolfgang, 1999b: Systemtransformation. Opladen: Leske+Budrich.
- Merkel, Wolfgang / Puhle, Hans-Jürgen / Croissant, Aurel, et. al., 2003: Defekte Demokratie. Band 1: Theorie. Opladen: Leske + Budrich.
- Merkel, Wolfgang, 2004: Embedded and Defective Democracies. In: Democratization, vol. 14, S. im Erscheinen.
- Offe, Claus, 1998: Die politisch-kulturelle "Innenseite" der Konsolidierung. Eine Anmerkung über Besonderheiten der postkommunistischen Transformation. In:

- Hans-Jürgen Wagener / Heiko Fritz (Hrsg.): Im Osten was Neues. Aspekte der EU-Osterweiterung. Bonn: Dietz, S. 110-114.
- Ott, Alexander, 1999: Die Ukraine vor den Präsidentschaftswahlen im Herbst 1999. Köln: BIOST Bericht.
- Pavlenko, Rostyslav, 2002: Parlamentska vidpovidalnist uriadu: svitovyi ta ukrainski dosvid. Kyiv: KM Akademia.
- Pogorelova, Iryna, 2004: Falsificate. In: Ukrainska Pravda, 9.4.2004.
- Ryabchuk, Mykola, 2003: Dvi Ukrainy: realni mezhi, virtualni vijny. Kyiv: Krytyka.
- Schmidt, Manfred G., 2000: Demokratietheorie. 3. Auflage. Opladen: Leske + Budrich.
- Shugart, Matthew, 1993: On Presidents and Parliaments, in: East European Constitutional Review, Vol.2, No.1, P.30-32.
- White, Stephen, 2000: Russia's New Politics. The Management of a Postcommunist Society. Cambridge: Cambridge University Press.
- White, Stephen / Rose, Richard / McAllister, Ian, 1997: How Russia Votes. Chatham: Chatham House Publishers.
- Wolchik, Sharon L. / Zviglyanich, Volodymyr (Hrsg.), 2000: Ukraine. The Search for a National Identity. Lanham u.a.: Rowman & Littlefield.