

Piotr Kimla

*Institute of Political science and International Relations of the
Jagiellonian University in Kraków*

CAN NOMOCRACY BE DECRETED? CONSIDERATIONS IN THE CONTEXT OF THE CONTEMPORARY SITUATION OF UKRAINE

At the beginning of the present article the author will show - referring to the classics of political thought such as Aristotle and Francesco Guicciardini - that Ukrainian society failed, so far, in the art of producing a nomocratic (rule-based) system of government. The author puts forward a thesis that this fact was decisive in the past and is decisive now about the weakness of the Ukrainian state. It opened the way for Russia's interference in the country's affairs and also allowed the excesses of voluntarism on the part of the wealthy and well-connected in the system of power. Then the author points out that - with few exceptions - the lands included in the territory of Ukraine are not subject to the process of formation of nomocratic forms of government typical for Western countries. Certainly nomocratic patterns were not provided to Ruthenia / Ukraine during its relations with the Polish Crown. Therefore, in their laborious construction of the state of law, Ukrainians do not have a tradition to which they could refer. This makes the complicated situation even more difficult, though, as it seems, the aim of another Maidan was to create a law-abiding state.

In the following discussion, I am of the view that reforming Ukraine may occur thanks to a statesman who will be able to gain public support during several terms of office. It does not have to be associated with the transition to authoritarian forms of government that would impede cooperation with the West and increased the credibility of the Russian narrative, which devotes a lot of time to Ukrainian fascism. Leading politicians of the Ukrainian scene would be difficult to place in the role of Men of Providence who could, in the spirit of the rule of law, pursue a policy of equal distance from Russia and the European Union, which seems to be the best use of Ukraine's geopolitical position.

Key words: nomocracy; Ukraine; Polish-Ukrainian connections; solutions to Ukrainian crisis; Ukrainian politicians.

*A claim to national independence
fall not simply because its legitimising version of national history is partly
or wholly untrue -
as often it is. The sense of belonging to a
cultural tradition, can be
subjectively real to the point at it becomes an
objective socio-political fact.*

Neal Ascherson, Black Sea

A clear conclusion emerges from Aristotle's thoughts contained in the pages of Politics that a political system exists when the voluntarism of people in power is limited by means of fixed rules; when principles, rules are stronger than passions, desires, whims of those in power. For this reason Aristotle has difficulty qualifying tyranny as a political system, as – regardless of whether it exists in the form of one-person, a group or the majority – tyranny refers to a situation when the whims of the ruling trample and demean the rules. The opposite of tyrannical power is political power, which is exercised over “equals”. The rulers learn to exercise political power through their earlier subjugation to it and, therefore, through shaping the virtue of obedience to the rules within themselves. Aristotle says “It has been well said that ‘he who has never learned to obey cannot be a good commander’¹. Many centuries later, the politician and historian Francesco Guicciardini, a contemporary of Machiavelli, will give an almost complete definition of political freedom, which he will describe as a situation in which legal rules and institutions are stronger than the appetites of an individual².

The findings of the above-mentioned classics lead to pessimistic observations when related to the situation of Ukraine today: first, the contemporary young Ukrainian statehood has not yet been subjected to a political system – the rules there permanently lost out to the will of the rulers, as well as the will of people with strong networks in the system of power; second, Ukrainians have not yet tasted political freedom. Their lives have unrolled over quicksand created by the unbridled appetites of powerful

¹ Arystoteles, Polityka, transl. L. Piotrowicz, ks. III, 2, 9, in: Ibid., Dzieła wszystkie, Warszawa 2001, t. 6, p. 82 ² See G. Mosca, Historia doktryn politycznych od starożytności do naszych czasów, transl. S. Kozicki, Warszawa b.r.w.

individuals rather than on the stable ground based on the immovability of law and institutions embodying it². The triumph of these appetites over legal principles ruined the awareness of obedience to the rules and respect for authority among citizens. In general, Ukrainians failed to create a nomocratic system. They functioned in a non-nomocratic system, which by its nature leads to anarchy in social life.

The fundamental question that I would like to put forward: if yet one more drive for change on the part of Ukrainians is going to lead to a greater chance of creating a nomocratic form of government? Indeed, it seems that the creation of a reliable nomocracy is a condition that is the most difficult to meet, but also one necessary for the existence of Ukraine as a fully sovereign state. It is difficult to dispute that, to a large extent, it was the absence of the rule of law that allowed the Russian Federation to corrupt important figures of Ukrainian political and economic life, and even create a party representing a more Russian than Ukrainian point of view.

The issue mentioned in the title of the speech carries, of course, a certain dose of provocation. We know well that decreeing nomocracy, the rule of law, is extremely difficult. The creation of a nomocratic system in Western Europe was the result of a long process, with absolute monarchy being an important step in most countries. This raises the interesting question of whether the lands now belonging to the Ukrainian state were involved in the aforementioned process. It seems that, in modern times, it was extremely short-lived and discontinuous within Ukrainian territory. Therefore, it will be difficult for Ukrainians to find examples of the Western-style rule of law in their own history. Such examples were to be provided to Ukraine/Ruthenia at the beginning of the modern period by the Polish Crown, but – according to the famous thesis of Michał Bobrzyński – the civilizational power of the Crown proved too weak to put the law over the will of the magnates of Ruthenia (and not only them, but also those of Lithuania). In his opinion, voluntarism and the related eastern anarchism triumphed over a national-legal order, which would have been overseen by the Crown, had it managed to create a strong government. The final result was the collapse of the entire Polish Republic in the late eighteenth century. “The enemy was repelled on the fields of Grunwald, Bobrzyński says, but Poland was burdened with the formidable task of and colonisation the immense Ruthenian and Lithuanian territories, a task beyond its strength, (...) until it developed a strong governmental power. (...) Let us for a moment consider that these millions of Polish people, this capital and the labour force sent east, had remained within our ethnographic boundaries, what a different turn would our internal development have taken!”³ The author of *Dzieje Polski w zarysie* concludes: “Without the union [Lithuanian-Ruthenian – P.K.] we would not have been able to survive [against the Germanic onslaught – P.K.], while the union, without support from a strong government power, consumed us from the inside”⁴. The way the law functioned in the south-eastern stretches of the noble Polish Republic is explained by Władysław Łoziński in his famous work *Prawem i lewem. Obyczaje na Czerwonej Rusi w pierwszej połowie XVII wieku*. He leaves no doubt that in the First Polish Republic “truly free and not only free, but also independent a great sire, and even he only until an even bigger, mightier one sat on his back”⁵. We can use the magnate Mikołaj Bazyl Potocki as an example of unlimited voluntarism of a great Ruthenian. According to Franciszek Karpiński, he killed over forty people on public roads. He bullied women and Jews. He reportedly ordered them to climb trees and pretend to be cuckoos, and then shot them⁷. Needless to say, he was not held responsible for any of his crimes. One can easily imagine what the impact of such unpunished excesses must have been on society in general, keeping the irrefutable sociological law in mind, stating that the lower classes strive to emulate the upper classes. Ex-Jesuit scholar Hubert Vautrin, while far from being impartial in describing the conditions prevailing in the noble Polish Republic, cannot be denied his acuity of observation. Vautrin indicates that a magnate in the Polish Republic knows not obligations, nor citizen’s rights. “Indeed, he does not consider himself to be a part of a political body, but a centre of everything that surrounds him”⁶. Therefore, “a magnate instils in [his child – P.K.] a sense of power over the area of

² In my opinion, the role of Janusz Lewandowski is under appreciated in Poland. His concept of privatization in the early 1990s prevented the formation of a class of oligarchs in Poland - who have acted as a dead weight to the development of the Ukrainian state.

³ M. Bobrzyński, *Zasady i kompromisy. Wybór pism*, Kraków 2001, p. 70.

⁴ *Ibid.* In the preface to the second edition of *Dzieje* Bobrzyński again writes about the sending of “the best of our forces to the East, to Russia and Lithuania, which meant that the forces remaining in the country, emaciated and weakened, were unable to summon the force to establish a modern government.” See M. Bobrzyński, *Dzieje Polski w zarysie*, Kraków 1887, book 1, p. 22.

⁵ W. Łoziński, *Prawem i lewem. Obyczaje na Czerwonej Rusi w pierwszej połowie XVII wieku*, Kraków 1960, book 1, p. 75. ⁷ See J. Tazbir, *Prace wybrane*, Kraków 2000, book 2.

⁶ *Polska Stanisławowska w oczach cudzoziemców*, Warszawa 1963, book. 1, p. 793.

personal property, detached from the power of the state. He does not bring his child up to serve the homeland because the homeland exists for the child. A magnate's child grows up not to be a member of a social organism, but a parasite that may contribute to the destruction of the people"⁷. Vautrin continues to hold his position that republicanism, which features in the Polish Republic in all its possible forms, is a fiction, behind which lies the decentralised tyranny of powerful magnates, whose impact on society is clearly a hundred times worse than the impact of one central tyranny.

I raise this issue to underline that the relationship of Ruthenia with Poland, for as long as it lasted, did not prove to be an important training in consistently giving priority to the law over the voluntarism of individuals. An enormous problem in terms of respecting the rule of law was, of course, the phenomenon of Cossacks. It is worth noting that "the core of these unique people [Cossacks – P.K.] consisted of deserters. (...) The course of nature and the constant influx of new deserters expanded their numbers quickly. They welcomed visitors from any nation with open arms and all outcasts joined them whose crimes forced them to abandon civilised society. This way they ceased to be fugitives and became a nation. As expected, their customs reflected the stigma that tainted their roots"⁸.

The rule of law is introduced by the Austrian absolute monarchy to the part of modern Ukraine's territory that was within its boundaries after the partition of the Polish Republic, so on the so-called Western Ukraine. After the First World War, Eastern Małopolska and Volyn found themselves within the Second Polish Republic. Ukrainians living in these districts were once again unlucky in that they didn't permanently experience the impartiality of the Polish state based upon the law, but were subject to the "politics" of the Polish state. The creators of these "politics" often happened to go beyond the limits of the rule of law. Suffice it to mention the pacifications carried out by the Polish Army (during the so-called second pacification some Orthodox churches were demolished). This results in the pessimistic conclusion that the periods Ukraine and Ukrainians were immersed in nomocracy, do not constitute a sufficiently stable and consistent experience, which would be passed over generations. They must therefore construct a system based on the rule of law almost from scratch, without having their own sustainable practices. When, however, we find out that the current Prime Minister Yatsenyuk and his party are backed by none other than Rinat Akhmetov, the pessimism grows deeper. We begin to wonder whether Ukrainian politics has not found itself on the same road of dependency on the will and the money of the oligarchs, which it was to leave once and for all? Without a doubt, the people gathered on Maidan square feared such a scenario. So, does that mean that once again potential aid from the West will be lost?

To believe that a society discouraged and suspicious of authority, not believing in the immutability and impartiality of the law, would be able to bring about honest nomocracy by itself, would be almost tantamount to giving credence to Baron Munchausen's assertion that he had pulled himself out of the swamp by his hair. In my opinion, there are only two ways of extracting Ukraine from the current state of crisis, misery and chaos. Both are based on the appearance of a saviour who would be able to impose his or hers unassailable rule and would also be imbued with a genuine reformist spirit and a free will to introduce the rule of law. I am not convinced by claims that appear, which state that a new quality of political life in Ukraine can be introduced by generational replacement and Ukrainians having contact with the West, studying there and then returning to their homeland. I believe that their good will and knowledge will be lost in an ocean of corruption, networks and overall inability to reform anything. Such hopes are identical to the beliefs of analysts in Poland, who thought that disrespect for the law and authority in the Polish People's Republic will end once full sovereignty is regained. Soviet communism and imperialism have long since been overcome, sovereignty regained, but our lack of respect for authority and a casual attitude to the rules are constantly visible. Starting with compliance with the road code, upon which our lives depend.

"But we must take it as a rule to which there are very few if any exceptions – says Machiavelli – that no commonwealth or kingdom ever has salutary institutions given it from the first or has its institutions recast in an entirely new mould, unless by a single person. On the contrary, it must be from one man that

⁷ Ibid. book 1, p. 793-794.

⁸ See H. Tyrrel, *History of the Russian Empire: From Its Foundation, by Rurik the Pirate, to the Accession of the Emperor Alexander II*, London-New York, b.r.w, p. 117.

it receives its institutions at first, and upon one man that all similar reconstruction must depend”⁹. If Machiavelli is right, it means that this saviour would have to, at some point after instituting democracy, be able to hand over power, which is an extremely unlikely scenario given the expansive nature of power. Or, which is slightly more likely, not have a succession plan. The establishment of democracy by this saviour could occur by means of establishment of his dictatorship. We would then have to deal with a more difficult, worse option, as it would involve opposition of the democratic West, suspension of aid and the easily foreseeable Russian accusation of the saviour forming a fascist state. A transfer to democracy could also be accomplished by means of a democratically elected strong leader (someone similar to Viktor Orbán in Hungary), who would be capable of maintaining a democratic system and simultaneously securing the support of the Ukrainian society for a couple of terms in office. Naturally, someone like Orbán is also suspect in the eyes of the hyper-democratic West. Recently concern over the direction taken by Hungarian politics – which, as is known, is a direction favourable towards Russia – was expressed by the American Republican Senator John McCain, who referred to the Hungarian Prime Minister as a “fascist dictator”. In any case, in Ukraine this would be a head of state who could give himself and Ukrainians the necessary time to implement democracy and for it to solidify. This imaginary politician would also, it seems, be capable of returning to the concept Ukraine acting as an interstate buffer, a neutral country, not related militarily, nor economically to the West or Russia. He would be able to convince the President of Russia that the tight integration of Ukraine into the Eurasian Economic Community is not acceptable to Ukrainians from the west. He would also have no problem explaining to the main decision-makers of the European Union that he cannot agree to tight integration due to the threat from Russia. The geographical location of Ukraine could – in skilful hands – become a real asset, not a curse. It opens up the space for drawing benefits from both co-operation with the West and with Russia. Of course, this type of “equidistance” policy is extremely difficult to conduct in the long term. In the second half of the 1930s Józef Beck was painfully made aware of this, along with all Poles at that time¹⁰. Yet exactly such a policy seems to be the safest and most beneficial solution to Ukraine’s geo-strategic dilemma¹¹.

The contemporary political context begs the question of whether Petro Poroshenko or Arseniy Yatsenyuk could be cast in the role of this saviour? Is one of them *il principe nuovo*? Both have been present in Ukrainian politics since the 1990s. They have already held the highest posts in the country and undoubtedly belong to the ruling elite. Yatsenyuk was a member of the Supreme Council, Minister of Economy, Foreign Minister and Speaker of Parliament. Poroshenko was a member of the Supreme Council, Minister of Economic Development and Trade, as well as Minister of Foreign Affairs. Each of them also ran a business. Poroshenko, as everyone knows, gained the title of King of Chocolate. Yatsenyuk ran a law firm in the 1990s dedicated to the privatisation of state enterprises. I am trying to indicate here that both politicians bear some measure of responsibility for the condition of the Ukrainian state and its economy. Will these politicians be able to inspire society and obtain solid support for themselves? Journalists in Poland overlook the fact that the last elections, where they were held, had a turn-out of fifty-two percent among those eligible to vote. Fifty-two percent in a situation where the east is embroiled in a war and, in consequence, there being a risk of a part of the country becoming detached and even its sovereign existence endangered. Should this not cause a truly mass participation in elections? If this failed to happen, does that not tell us a lot about the degree of apathy and lack of faith in a better future among Ukrainians? OSCE observers (Michał Boni from Poland) emphasised that they did not see enthusiasm or optimism among the voters. Enthusiasm and optimism are needed when one wants to implement thorough reforms. Reforms that will have to hurt people because it will suddenly be necessary to raise electricity prices and install gas meters in homes; reduce budgetary spending, which would mean freezing the already modest pensions and benefits. All

⁹ N. Machiavelli, *Rozważania nad pierwszym dziesięcioksięciem historii Rzymu Liwiusza*, przeł. K. Żaboklicki, in: tegoż, *Wybór pism*, transl. J. Gałuszka i inni, Warszawa 1972, ks. 1, IX, p. 265.

¹⁰ See S. Cat-Mackiewicz, *Polityka Józefa Becka*, Kraków 2012 and A. Bocheński, *Między Niemcami a Rosją*, Kraków 2009. For opposite opinions see J. Beck, *Ostatni raport*, Warszawa 1987.

¹¹ Since writing those words, President Petro Poroshenko has announced the end of Ukraine’s non-bloc status in the Polish parliament and declared his wish to apply for membership of his country in the North Atlantic Treaty Alliance and the European Union. It is obvious that Russia will not see the above statement as friendly. Contrary to appearances however, its response must be balanced and all indications are that it will be. Many Ukrainian commentators emphasize that through his policy towards Ukraine, President Vladimir Putin has done more for the consolidation of Ukrainian autonomy than has been achieved in more than twenty years of the Ukrainian state’s existence.

this in a situation where the value of the hryvnia to the dollar declined by almost half. How to effectively fight with ubiquitous corruption, which is a struggle that must go hand in hand with vetting, as Ukrainians decided to perform it. One can understand the rationale behind the decision to conduct vetting. However, performing a vetting procedure in a country without well-established democratic rules and one very far from the principles of a country based on the rule of law, could result in a spectacle that will astound Europe and perhaps the world. Will the vetting procedure not become a political war waged with files when it is conducted twentythree years after Ukraine's independence, in a post-Soviet country, a country with a corrupt state apparatus and an equally corrupt justice system? Indeed, the Vetting Act itself shows a division into those equal and more equal, something characteristic of non-democratic regimes.

The vast majority of Poles are keeping their fingers crossed for Ukraine's success. This is dictated by a strategic interest, as defined by, among others – the very popular – Jerzy Giedroyc and Zbigniew Brzeziński. According to constantly repeated opinions, a sovereign Ukraine distances us from the ever threatening Russia (hardly anyone thinks of asking the question whether our support of Ukraine does not attract the attention of a hostile Russia, thus bringing it closer to us, while the idea is to put more distance between us), while Russia without Ukraine must lose its imperial ambitions. However, only a few Poles are aware that the success of Ukraine, which would be to build a normally functioning state, seems to be close to a miracle. Without a doubt, Andrew Wilson is right when, in his excellent work *Ukrainians* he states: “The construction of a (...) country based on the rule of law will be particularly difficult as long as the Ukrainian elite still thinks and acts according to the old Soviet habits – the rule divide et impera, clientelism and kompromat”¹².

¹² A. Wilson, *Ukraińcy*, przeł. M. Urbański, Warszawa 2002, p. 337.