

The West and the Imprisonment of Yulia Tymoshenko

WHEN IS POSITIVE LEVERAGE NOT ENOUGH?

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Serhiy Kudelia
George Washington University

When is Western leverage ineffective in shaping a neighboring country's internal policy making and enforcing democratic norms? I address this question by analyzing the failed attempts of Western governments to prevent the jailing of Ukraine's opposition leader, Yulia Tymoshenko. I argue that prevailing theories that account for the effectiveness of Western leverage by focusing either on the attractiveness of conditional benefits offered to a target country or the latter's structural characteristics are inadequate to explain Tymoshenko's case. Instead, I draw on bargaining models of international relations to show that the characteristics of a contested issue may limit the ability of outside actors to exert positive leverage to prevent democratic regression in hybrid regimes.

Leveraging Benefits and Vulnerabilities

One account of the Western capacity to promote favorable policies in a target country, offered by political scientist Milada Vachudova, points to the importance of tangible rewards offered for compliance. In particular, a credible promise of European Union membership has often been mentioned as the strongest incentive for the democratizing states of Central Europe to fulfill strict policy requirements imposed from outside. In Ukraine's case, although the EU never confirmed Kyiv's eligibility for membership, it offered to conclude an ambitious Association Agreement (AA) containing provisions for establishing a Deep and Comprehensive Free Trade Area (DCFTA). This clause promised to enhance the competitiveness of Ukrainian producers, improve their access to the EU market, create a more favorable business climate, and add 2-3 percent growth to the country's annual GDP. Still, the Ukrainian leadership refused to stop the prosecution of opposition leaders, even after the EU explicitly conditioned the signing of the AA on their release.

Another account, elaborated by Steven Levitsky and Lucan Way, stresses the role of structural characteristics of a target country, particularly its economic weakness, the

strength of its ties to the West, and its reliance on other powers for support. Although Ukraine's economy has been growing since 2010, it has not recovered from the 2008 crisis. Its current account deficit has deteriorated, substantially increasing the need for outside financing. Moreover, Ukraine remains one of the poorest countries in Europe, with an estimated GDP per capita (2011) of \$7,200. Hence, it should have been particularly interested in using the new opportunities for economic development offered through the DCFTA. Moreover, over the last two decades, Ukraine developed extensive economic and human ties to the West. EU members account for a third of Ukraine's international trade, and the EU receives the second largest number of Ukrainian labor migrants in the world. Western foundations, meanwhile, have long maintained close ties with Ukrainian civil society. Still, these close and longstanding links with Ukrainian society did not strengthen Western leverage on the issue of Tymoshenko's jailing. Finally, although Russia often backed some undemocratic actions of the Ukrainian authorities, it publicly criticized Tymoshenko's prosecution suspecting that it could undo the Russian-Ukrainian gas treaty. Hence, the Ukrainian authorities could not rely on Moscow's political support in this case.

Issue Characteristics and Leverage Constraints

Bargaining models of international conflict have shown that the characteristics of the issues at stake may have a decisive impact on the outcome of negotiations. They specifically demonstrate that two sides are less likely to reach an agreement when contested issues are:

- 1) intangible, linked to objectives such as prestige, influence, or values;
- 2) indivisible, lacking a range of compromise solutions equally acceptable to both sides; and
- 3) equally salient to both parties.

The third characteristic makes it harder to resolve a dispute by linking it to progress on another unrelated issue. For linkage to succeed, as political scientist James D. Morrow argues, the bargaining sides would have to exhibit an asymmetry of interests on the main issue that then would allow them to engage in a mutually beneficial exchange on another.

The issue of Tymoshenko's jailing had all three characteristics that tend to lead to bargaining failures. It was intangible to President Viktor Yanukovich because it was directly related to the vital goal of his political survival. Its intangibility from the Western perspective was related to its symbolism as an abrogation of such values as the rule of law and political freedoms critical to the European integration project.

The issue of Tymoshenko's jailing was also indivisible for both sides. Any compromise on her imprisonment would have lowered the risks for further opposition activity and could have encouraged defection even among Yanukovich's allies. Therefore, Yanukovich could not accept any bargain short of a lengthy jail term for his

principal political foe. By contrast, the West refused to recognize Tymoshenko's trial as fair and transparent and demanded her unequivocal release.

Finally, when the West realized that its public criticisms were insufficient to deter Yanukovich, it tried to exercise its leverage by linking the resolution of the issue to an offer of future rewards (conditionality) in the form of signing and ratifying the AA. However, since they both equally prioritized Tymoshenko's case over a linked issue, they could not reach a compromise. Yanukovich's political strategy and risk assessment on the domestic level, therefore, decisively influenced his response in dealing with his Western counterparts.

Domestic Level: Sending a Signal to Repress

Post-Soviet ruling elites, as political scientist Henry E. Hale has demonstrated, perpetuate themselves in power by relying on a hierarchical system based on the distribution of rewards and punishments from a patronal president to subordinate client groups. After the Orange Revolution, Ukraine shifted from a concentrated to divided executive system with several power centers fiercely competing with each other. The lack of a unified authority structure also diversified control over law enforcement agencies between different political groupings. Yanukovich began his presidency with an attempt to reconstitute a single vertical of power that would guarantee his long-term survival. This required him not only to demonstrate his ability to distribute rents and patronage among his closest allies, but also to signal his resolve to sanction his main opponents.

Tymoshenko became a central target of Yanukovich's crackdown on the opposition for several reasons. First, despite her electoral defeat she consistently remained the second most popular politician in the country and the unequivocal leader of the opposition. Second, Yanukovich's own public support took a nosedive with unprecedented speed during the first year of his presidency, declining from 40 percent in May 2010 to less than 10 percent in May 2011. His political insecurity may also have been reinforced by the narrow margin of his victory over Tymoshenko and his own failure to win the majority of votes. Third, Tymoshenko refused to recognize the election results and remained in irreconcilable opposition to Yanukovich. Fourth, once she returned to the opposition, Tymoshenko promised to oust Yanukovich through popular mobilization and was said to be behind a major protest wave against the government's tax code in November 2010. Given her organizational skills, financial resources, and mobilizing role during the Orange Revolution, she would most likely lead any attempted popular challenge against the authorities. Finally, her international stature meant that any coercive actions against her would credibly communicate to the domestic audience the authorities' strong resolve to repress any potential challengers.

Yanukovich publicly signaled his intention to use coercion against Tymoshenko shortly after his inauguration. Over the next year, the Security Service (SBU), the General Prosecutor's Office (GPO), and the Control and Revision Office (KRU) conducted in-depth investigations of Tymoshenko's activities. The investigations alleged

misappropriations of up to \$7 billion, while the GPO opened criminal cases against Tymoshenko and about a dozen other high-level officials from her government.

Initially, the charges against Tymoshenko centered on two episodes of alleged malfeasance as prime minister. In April 2011, these episodes were sidelined in favor of a new criminal case that eventually led to her conviction. The charges against Tymoshenko in the so-called “gas case” centered on directives she issued as prime minister in January 2009 to the state-owned oil and gas company Naftogaz to sign a ten-year agreement on gas supplies with Russia’s Gazprom. According to the prosecution, Tymoshenko exceeded her formal authority in issuing these directives, while the unfavorable terms of the gas contract led to state budget losses of about \$440 million.

The prosecution moved the gas case forward quickly and decisively. The court proceedings, chaired by 32-year old judge Rodion Kireev, were held with what the Danish Human Rights Committee characterized as “remarkable urgency.” The turning point in the trial was his decision in August to detain Tymoshenko for contempt of court, which the Danish monitors called “disproportionate and unjustified.” Her conviction to seven years in jail was announced shortly thereafter. Most striking, however, was the further relentless prosecution of Tymoshenko. The day after the sentencing, the GPO announced the re-opening of a previously closed case that charged Tymoshenko with tax evasion and property embezzlement when she was chairman of the gas trading company United Energy Systems in the 1990s. The GPO also announced it was investigating her alleged financing of a 1996 contract murder of Donetsk governor Yevhen Shcherban.

Yanukovych’s audacious use of coercion to silence his longtime political opponents went far beyond what any of his predecessors ever dared. Although former president Leonid Kuchma was implicated in the murder of a journalist and was alleged to have ordered the killing of several prominent political figures, he rarely attempted to prosecute his political opponents publicly. Throughout his second term, he allowed opposition leaders to stage mass protests, obstruct his political initiatives in parliament, and run for high public office. While there were attempts to use law-enforcement agencies to pressure those businesses that funded the opposition, none of the figures associated with the opposition ended up in jail. Most importantly, judges could still demonstrate relative independence, as was evidenced by Kuchma’s failure to prosecute Tymoshenko. The sentencing of the former prime minister and, several months later, the conviction of another opposition figure and former minister of internal affairs, Yuri Lutsenko, signaled that Yanukovych was willing to use his coercive powers in a very public manner irrespective of any potential costs at home or abroad. The decision to pursue new investigations against Tymoshenko, who by then was already barred from holding any public office until 2021, indicated Yanukovych’s potential interest to safeguard his political future well beyond his possible second term.

For Yanukovych, the prosecution of key opposition leaders was intangible, indivisible, and highly salient. It was related to the intangible goal of consolidating power. It was indivisible since anything short of a prison sentence would have had the opposite effect of that which the president intended, indicating his insufficient control

over the judiciary or his weak resolve to inflict decisive punishment. As a result of these interests, it was also highly salient, especially in comparison to other policies with less relevance to his immediate power interests, like the signing of the AA.

International Level: Misrepresenting Preferences

Although Yanukovich initiated the investigation of the former prime minister right after his inauguration, the West largely ignored it for most of his first year in office. EU officials even praised him for achieving “political stability,” while the United States applauded his decision to give up all of Ukraine’s highly-enriched uranium. The first official mention by the Western government of “an appearance of selective prosecution” in Tymoshenko’s case came in a December 2010 U.S. statement – seven months after the opening of the first criminal case. The EU was even slower to react to Yanukovich’s suppression of the opposition. In late May 2011, following the first attempt to detain Tymoshenko, the office of the EU High Representative for Foreign Affairs and Security Policy pointed to “the danger of provoking any *perception* that judicial measures are used selectively” (italics mine). Moreover, while expressing their concerns with the case, the EU representatives claimed that it would have no effect on the outcome of negotiations over the AA. This position sent a contradictory signal to Ukrainian authorities, indicating that the EU would be interested in signing the agreement despite any disagreements it had with the conduct of Tymoshenko’s trial or its verdict. After Tymoshenko’s arrest, EU officials toughened their rhetoric but remained vague about the consequences of conviction. Following a series of meetings with Yanukovich in the run-up to the sentencing, several European leaders expressed concerns that a conviction would prevent the agreement’s ratification, but they never linked it to the agreement’s signing. Similarly, EU High Representative Catherine Ashton and U.S. Secretary of State Hillary Clinton addressed a letter to Yanukovich calling on him to address Western concerns about the case, but they did not specify the costs of non-compliance.

Ukrainian authorities continuously responded to Western demands by insisting that they could not interfere with the functioning of the judiciary. However, as the trial neared its end, Yanukovich gave the impression to European officials that he preferred a compromise solution. The essence of the compromise from the Western perspective would be the Ukrainian parliament’s decision to decriminalize the articles in the criminal code that Tymoshenko allegedly violated. In his speech at the Yalta European Strategy meeting in mid-September, Yanukovich indicated that he was ready to “modernize” the outdated articles of the criminal code that were the basis for the charges against Tymoshenko. Once the conviction was announced, however, Yanukovich rejected the notion that he made any promises to the West regarding Tymoshenko, asserting that “these discussions should not by any means be cast as a commitment.” The pro-presidential majority in the parliament, meanwhile, refused to make the changes to the Criminal Code needed to release Tymoshenko.

Up until the EU-Ukraine annual summit in December 2011, the Ukrainian side misperceived the saliency of the case for the EU and seemed convinced that European officials would not sacrifice the agreement that took several years to make. However,

even after the EU refused to initial the AA in December and clearly conditioned its signing on Tymoshenko's release, Yanukovich remained unmoved. Ukraine's Foreign Minister Kostyantyn Gryshchenko stressed in March 2012 that the Ukrainian authorities would reject any attempts by the EU to issue any conditions prior to the signing. Further attempts by major European leaders to influence Ukrainian authorities by boycotting the Central European Summit in Yalta (scheduled for May 2012) faced a similarly unemotional response from Kyiv. Ukraine's Ministry of Foreign Affairs announced the summit's postponement to a "later date" while Yanukovich surmised that a "pause in EU-Ukraine relations would be useful for both Ukraine and the EU." The final attempt to resolve the problem by changing the legislation to give prisoners a chance to receive medical treatment abroad was voted down in parliament. This reaffirmed the saliency that the Ukrainian side attached to Tymoshenko's case, the lack of intermediate solutions to the issue from Kyiv's standpoint, and the futility of positive leverage by the West.

The EU came to view the prosecution as a critical indicator of the Ukrainian authorities' real commitment to democratic norms, particularly their respect for an independent judiciary and political freedoms. Hence, Western leaders treated Tymoshenko's case through the prism of the intangible political values on which the EU is based. Moreover, if the EU agreed to sign the AA with Ukraine despite the jailing of its leading opposition figures it would undermine its credibility in negotiating similar AAs with other non-member states. Therefore, the issue became increasingly salient for the EU. Finally, long jail sentences for Tymoshenko and Lutsenko meant that the EU could not agree on any compromise solution to the problem short of their immediate release. As a result, by the end of 2010 the issue of Tymoshenko's prosecution gained the same characteristics for the EU as it had for Yanukovich. Its position, however, evolved from being a distant observer of the case to becoming an engaged participant.

The Limits of Positive Leverage

Western leverage in Tymoshenko's case failed for two main reasons directly related to the characteristics of the issue for the two sides. First, from the start, Yanukovich linked it to the intangible goal of his political survival and could not accept any intermediate face-saving bargaining solutions, particularly once the trial started. Hence, for Yanukovich the saliency of keeping Tymoshenko behind bars is much higher than the establishment of closer ties to the EU. Secondly, the saliency of the case for the EU evolved gradually and became particularly strong only with Tymoshenko's seven-year sentencing and the conclusion of the talks over the AA. As a result, the West failed to specify the consequences of Tymoshenko's jailing for Yanukovich early in the case or to raise the internal costs of action by threatening to exercise negative leverage (withdrawal of current benefits). With the EU insisting now on her unconditional release, the issue also became indivisible for both sides.

The EU's current policy based on positive leverage alone is insufficient to change Yanukovich's preferences and release Tymoshenko since it would require him to accept immediate domestic costs (reputation losses) and risks (elite division or opposition

mobilization) that outweigh any long-term benefits he could expect to receive from the signing of the AA. The costs of failure in talks over the AA, by contrast, are negligible. Only 3 percent of Ukrainians, according to a February 2012 poll, expressed concerns about problems related to Ukraine's relations with the EU. In addition, there are more Ukrainians who favor joining the union with Russia and Belarus (55 percent) than those who support joining the EU (40 percent).

The bargaining around Tymoshenko's case thus shows how positive leverage may be limited not only due to the structural characteristics of a target country or the insufficient benefits offered, but because of the characteristics of an issue at stake. In those cases where authorities view the issue as critical for the intangible goal of political survival and see no possible compromise solutions to it, they are likely to assess any prospects of future long-term rewards as less salient than the immediate promise of maintaining power. The exercise of external leverage may influence a target's policy only if it can impose substantial immediate costs by withdrawing any current benefits or putting at risk the short-term political survival of the country's leadership.