



RESILIENCE OR RESISTANCE?  
THE INTERPLAY OF HUMAN RIGHTS AND NATIONAL SECURITY  
IN UKRAINE'S SECURITY SECTOR GOVERNANCE,  
ILLUSTRATED THROUGH THE CASE OF GEORGIA

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## ABSTRACT

Following the events of 9/11, security sector governance has noted a shift in seemingly competing priorities of national security, democratization, and preventing human rights abuses via the series of checks and balances. Western democracies responded to the increased terrorism threats by arming intelligence institutions with broadened mandates or establishing new structures, undermining the existing traditions of oversight and governance. Distinct characteristics of these approaches include 1) broad mandates of intelligence services, 2) lack of clear normative definitions of their powers and competencies, 3) insufficient oversight mechanisms, and 4) duplication of police functions or arming these institutions with powers of arrest and detention. Such countermeasures have been criticized in Western democracies for increased risks of human rights violations and political biases in intelligence institutions. However, their role in the security sector reform in Eastern Europe and the South Caucasus region remains largely unexamined. On the one hand, facing an existential threat of Russian military invasion, countries such as Ukraine and Georgia are incentivized to increase the powers of intelligence institutions and the security sector in general. On the other hand, extending the mandate of the security sector could contribute to democratic backsliding since these countries have been struggling to overcome the soviet induced legacy of corruption, political policing, and human rights abuses.

Additionally, a military invasion of Russia without a clear end to the conflict in sight might blur the legal boundaries between war and peace. The absence of carefully defined competencies might lead these institutions towards unchecked utilization of powers only resorted to wartime usage for a limited timeframe. This creates a legislative vacuum, with potential risks and challenges that are also insufficiently assessed.

This thesis argues against arming the intelligence institutions of the security sector with broad and overlapping powers of investigation, arrest, and detention without sufficient oversight mechanisms in Ukraine. Instead, it proposes a legal framework built on human rights protection and democratic control over security services as key factors in establishing modern, post-conflict security, free from authoritarian influences, and the risk of state capture. The argument is based on a legal framework analysis of Ukraine's security sector, descriptive statistical analysis of its institutional competencies, a case study on Georgia, and other relevant practices.

Keywords: Security Sector Reform, National Security, Good Governance; Rule of Law, Human Rights, Ukraine, Georgia, Case Study

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To my friends and fellow students in Vienna and Tbilisi, and to the people of Ukraine and Georgia who keep moving forward and never waver in the face of adversity and tyranny, I applaud your pursuit of liberty and freedom.

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## LIST OF ABBREVIATIONS

- CoE - Council of Europe
- EU - European Union
- EUAM - European Union Advisory Mission
- ECtHR - European Court of Human Rights
- NGO - Non-Governmental Organization
- CSO - Civil Society Organization
- SSU or SBU - Security Service of Ukraine (Sluzhba Bezpeky Ukrayiny)
- NABU - National Anti-Corruption Bureau of Ukraine
- SSG - State Security Service of Georgia
- SSR - Security Sector Reform
- ECtHR - European Court of Human Rights
- DCAF - Geneva Centre for the Democratic Control of Armed Forces
- OSCE - Organization for Security and Co-operation in Europe
- UN - United Nations
- NATO - North Atlantic Treaty Organization

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## INTRODUCTION

In 2006, Mikhail Saakashvili, the president of Georgia at that time, spearheaded a radical change in criminal law and procedure after an unknown assailant inflicted serious injuries on three police officers from a newly established police force in Georgia. “No probation period, everybody in prison!” declared President Saakashvili. The statement reflected the sentiments of the majority of the population at that time, who were fed up with the high levels of crime and corruption in Georgia. The incident, which caused significant public outcry, is considered to be a pivotal moment in Georgia’s history. It was marked by a drastic reduction in petty crimes and an unprecedented decrease in corruption. However, this so-called “zero tolerance policing” also resulted in grave violations of human rights by police and other security sector institutions in the name of security and state formation.<sup>1</sup> The urgent demand for the criminal justice system to demonstrate effectiveness contributed to the establishment of a highly controlled and biased judiciary, with acquittal rates at around 0.04 percent in the Tbilisi City Court (the biggest court in Georgia) in 2010.<sup>2</sup> Shortly after the initiative, in 2007, the incumbent government laid the foundation of an informal control mechanism of the Judiciary via a system of loyal judges and former prosecutors.<sup>3</sup> After the change in government in 2012, the mechanism took up life on its own and eventually developed into a judicial oligarchy - a pyramid-like system in which a few influential judges manipulated the judiciary for their benefit.<sup>4</sup> Ten years after the National Movement's rule, this informal institutional flaw persists and is widely considered to be the gravest threat to the rule of law and democracy in Georgia.

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<sup>1</sup> Carnegie Endowment for International Peace “Georgia’s Choices: Charting a Future in Uncertain Times,” p.24, 2011.

<sup>2</sup> Ibid, p. 25

<sup>3</sup> Nino Tsereteli, “Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia,” *German Law Journal* 24, no. 8 (November 2023): 1469–87, <https://doi.org/10.1017/p.1473>, 2023.

<sup>4</sup> Ibid, p.1473.

Several factors influenced Georgia's strict approach to petty crime and corruption. First and foremost, during the transition period, Western scholars argued that a military coup was the most significant danger post-Soviet states faced.<sup>5</sup> Additionally, similar to the Ukrainian context, Georgia's national interests were threatened by its inability to control its breakaway regions, the threat of military intervention from Russia, organized crime, and corruption.<sup>6</sup> Like many other post-soviet countries, in its pursuit of ensuring national and public security at all costs, the state has made several strategic blunders in security sector reform. After achieving independence, Georgia's main objective was to fully control its security sector.<sup>7</sup> However, as it turned out, the fears of a military coup in the post-Soviet states were exaggerated.<sup>8</sup> It was also increasingly clear that unchecked vertical control of the security sector by the political elite alone could not address the challenges inherited from the Soviet Union. These challenges include duplication of police competencies by intelligence services, lack of coordination and irrational spending of resources, misuse of intelligence and investigative powers for political purposes, weak parliamentary control, unchecked power, corruption, human rights violations, and the significant risks of the formation of "political police."<sup>9</sup>

In a different timeframe, similar to the case of Georgia, Ukraine underwent rapid and disorganized security sector reform from 1998 to 2014. This rushed approach led to

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<sup>5</sup> Hans Born, Marina Caparini, and Philipp Fluri, "Security Sector Reform and Democracy in Transitional Societies," p.19, 2000.

<sup>6</sup> Hans Born and Albrecht Schnabel, "Security Sector Reform in Challenging Environments," p 121, 2009.

<sup>7</sup> Security sector – the combination of institutions, including the police, prosecutor's office, courts, and other governmental or non-governmental organizations, responsible for administering, managing, implementing, and supervising security (Geneva Centre for Security Sector Governance (DCAF), *The Security Sector, Roles and Responsibilities in Security Provision, Management, and Oversight*, p. 2.

<sup>8</sup> Hans Born, Marina Caparini, and Philipp Fluri, "Security Sector Reform and Democracy in Transitional Societies," p. 9, 2000.

<sup>9</sup> Giorgi Tsikarishvili and Tatia Koniashvili, *Democracy Research Institute (DRI): State Security Service – Duplication of Competences and Parallel Investigative Systems*, 2020, 54. see also, *Democracy Research Institute (DRI): Anti-Corruption Agency - Legal Framework and Gaps in Practice*, p.21-22, 2022, available at: [https://www.democracyresearch.org/files/2871.09.2023%20geo%20\(1\).pdf](https://www.democracyresearch.org/files/2871.09.2023%20geo%20(1).pdf); Gnomon Wise opinion #21/01; (2021); available at: <https://gnomonwise.org/public/storage/publications/February2021/yTsMs3BNQbsPP4xQDgHt.pdf>



institutional gaps and blind spots, including fragmentation, lack of coordination among internal security agencies, and a shortage of expertise that Russia effectively exploited at the start of the armed conflict in 2014.<sup>10</sup> After the Maidan Revolution, similar to the case in Georgia, lawmakers in Ukraine decided to significantly restructure internal security institutions instead of keeping them as they were. They disbanded whole units, such as the riot Police (Berkhut), many of whom were loyalists of the previous government and had participated in large-scale human rights violations during the Maidan Revolution.<sup>11</sup> However, issues of corruption, accountability, clientelism, and “systems of patronage,” characteristic of the Soviet context, remained unresolved.<sup>12</sup> Existing hostilities have led to a lack of civilian legislative and parliamentary control over these institutions, posing significant human rights and security sector governance risks that have not been adequately evaluated.

The similarities between Ukraine and Georgia can be summarized in two ways. Firstly, both countries must further pursue security sector reform to combat the ongoing Russian aggression. Secondly, they are challenged to overcome the Soviet legacy of corruption, weak rule of law, and clientelism in state institutions and politics. In that regard, an example of Georgia can be valuable for Ukrainian stakeholders for its achievements in corruption prevention, police reforms, and improving accountability. It can also serve as a lesson to avoid. Erroneously prioritizing national security at the stage of institution-building later caused these structures to take a life on their own and to operate based on historical momentum rather than democratic governance and rational choices.<sup>13</sup> The case of Georgia also answers whether implementing a reform within a limited timeframe is worth the trade-off of not adhering to best practices.<sup>14</sup>

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<sup>10</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*.

<sup>11</sup> Ibid, p. 18

<sup>12</sup> Ibid, p. 40-4

<sup>13</sup> Giorgi Tsikarishvili and Tatia Koniashvili, Democracy Research Institute (DRI), *Anti-Corruption Agency - Legal Framework and Gaps in Practice*, p.19, 2022.

<sup>14</sup> Hans Born and Albrecht Schnabel, “Security Sector Reform in Challenging Environments,” p 121, 2009.

This pressing dilemma for Ukraine's current and future governments has no simple and clear-cut solutions. Best practices and potential solutions for described institutional and structural challenges may not always account for the time constraints and limited windows of opportunity that democratic governments face.<sup>15</sup> However, if we consider Georgia's example, the answer to whether taking shortcuts to desired outcomes and disregarding recommendations in pursuit of reforms is worth it is - probably not. As such, this paper warns against hasty and drastic reorganizations and other "quick fix" solutions. These approaches produce weak institutions that cannot withstand political pressure or maintain their achievements when the political landscape changes.<sup>16</sup> In addition, the underdevelopment of Eastern Europe and the potential backlash to the reforms that do not represent the interests of the majority of the population must be taken into account.<sup>17</sup>

This thesis argues against arming the intelligence institutions of the security sector with broad and overlapping powers of investigation, arrest, and detention without sufficient oversight mechanisms in Ukraine. Drawing on the example of Georgia, it showcases the potential pitfalls of prioritizing national and public security over human rights protection and underscores how such approaches lead policymakers down the slippery slope of arming otherwise fragile institutions with the unchecked powers of investigation and intelligence gathering. These institutional problems can manifest in one of two ways. Firstly, such structures can not resist political pressure, corruption, and human rights violations. Alternatively, Institutional flaws can take on a life of their own, and hastily formed structures can become additional problems to solve in the pursuit of the rule of law and democracy rather than aiding the process. Instead,

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<sup>15</sup> Ibid, p. 121.

<sup>16</sup> Ibid, p.130

<sup>17</sup> Bogdan Iancu, "Handle with Care: On the Contextual Preconditions of Rule of Law Restoration," *Verfassungsblog*, December 22, 2021, <https://verfassungsblog.de/handle-with-care/>.

this thesis proposes a legal framework built on human rights protection and democratic control over security services as key factors in establishing a modern, post-conflict security sector free from Soviet-induced heritage, authoritarian influences, and the risk of state capture.

To achieve its objective, the paper employs a holistic methodology that includes analysis of the available public information, examining the legislative framework, as well as the experience of Ukraine, Georgia, and other countries with local context in mind, conducting descriptive statistics analysis, desk research, and case studies. The first chapter of the thesis sets a theoretical framework examining the relationship between seemingly competing goals of national security and human rights protection in the security sector reform of Ukraine and how it is shaped by civil society, relevant stakeholders, and the international community. The second chapter, of the thesis examines the root causes of the resistance to democratic norms in the Ukrainian security sector reform and critically evaluates to what extent the concept of local ownership applies to the Ukrainian and Georgian contexts. Chapter three offers a more in-depth analysis of how the interaction of human rights and national security balanced in the most pressing areas of preventing corruption, limiting the powers of intelligence institutions with sufficient checks and balances, and pushing back against a system of clientelism and oligarchic influences in politics. Finally, the case study of Georgia adds temporal and historical dimensions to the argument showcasing the detrimental consequences of ruling elites prioritizing national security interests at the expense of human rights, international standards, and best practices. In the end, the thesis argues that human rights protection and national security are not mutually exclusive goals.<sup>18</sup> On the contrary, the success of the security sector

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<sup>18</sup> Argument made by William W Burke-White, in “Human Rights and National Security: The Strategic Correlation,” *Harvard Human Rights Journal* 17 p. 250, 2004.

reform requires prioritization of both values at the strategic and legislative levels, as well as in informal institutional practices.

# 1. THEORETICAL FRAMEWORK: HUMAN RIGHTS APPROACH TO NATIONAL SECURITY

The primary objective of the security sector and specifically associated intelligence services is to safeguard the state and its populace from national security threats.<sup>19</sup> While the objective is shared by different intelligence institutions worldwide, the way states regulate their mandate or define responsibilities varies greatly. Some states choose to divide this task between internal and external intelligence services with overlapping or segmented mandates. Others prefer single entities within the state armed with external and internal surveillance competencies.<sup>20</sup> Both approaches are acceptable in international law. However, their power of collecting, analyzing, and sharing information related to national security<sup>21</sup> sets these institutions apart from the police and other security sector services. Another distinctive feature of these institutions is their secrecy, which creates further challenges for democratic accountability and supervision.<sup>22</sup> In summary, although these services may not seem compatible with the principles of power-sharing and democratic governance at first glance, they are necessary to prevent more serious "existential" threats to the state's national security, which ordinary police powers are not equipped to handle.<sup>23</sup>

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<sup>19</sup> Martin Scheinin and UN Commission on Human Rights Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," p. 1, 2005, <https://digitallibrary.un.org/record/564925>.

<sup>20</sup> Hans Born and Ian Leigh, *Democratic Accountability of Intelligence Services*, Policy Paper / Geneva Centre for the Democratic Control of Armed Forces 19 (Geneva: DCAF), p. 4, 2007.

<sup>21</sup> Martin Scheinin and UN Commission on Human Rights Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," p. 2, 2005, <https://digitallibrary.un.org/record/564925>.

<sup>22</sup> Hans Born and Ian Leigh, *Democratic Accountability of Intelligence Services*, Policy Paper / Geneva Centre for the Democratic Control of Armed Forces 19 (Geneva: DCAF), p. 4-5, 2007.

<sup>23</sup> Hans Born, Loch K. Johnson and Ian Leigh, *Who Is Watching the Spies? Establishing Intelligence Service Accountability*, vol. First, 2005. vol. 1, p. 5, 2005.

Following the Cold War and the fall of the Soviet Union, after a brief, peaceful period, the competencies of these institutions notably increased. After the events of 9/11, the field of security sector governance noted a shift in seemingly competing priorities of national security, democratization, and preventing human rights abuses via the series of checks and balances. Western democracies responded to the increased threats of terrorism by arming intelligence institutions with broadened mandates or establishing new structures, undermining the existing traditions of oversight and governance.<sup>24</sup> UN Special Rapporteur Martin Scheinin, in his 2005 report on the “Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,” outlines distinct characteristics of the above approaches. These include 1) broad mandates of intelligence services, 2) lack of clear normative definitions of their powers, and competencies, 3) insufficient oversight mechanisms, and 4) duplication of police functions or arming these institutions with powers of arrest and detention.<sup>25</sup> Such countermeasures have been criticized in Western democracies for increased risks of human rights violations and political biases in intelligence institutions.<sup>26</sup> In its 10/15 resolution, the Human Rights Council expressed a “serious concern” at the instances of human rights violations. It urged states to ensure the compatibility of counter-terrorism measures with international law.<sup>27</sup>

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<sup>24</sup> Hans Born, Loch K. Johnson and Ian Leigh, *Who Is Watching the Spies? Establishing Intelligence Service Accountability*, vol. 1, p.5, 2005.

<sup>25</sup> As outlined by Martin Scheinin and UN Commission on Human Rights Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, “Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism,” December 28, 2005, <https://digitallibrary.un.org/record/564925>.

<sup>26</sup> Human Rights Council, Tenth Session, Resolution 10/15. Protection of human rights and fundamental freedoms while countering terrorism, 2009, para.7

<sup>27</sup> Human Rights Council, Tenth Session, Resolution 10/15. Protection of human rights and fundamental freedoms while countering terrorism, 2009, para.7

In developed democracies, such countermeasures have fallen out of favor due to concerns over potential risks to democracy and human rights. As for the context of Eastern Europe and the South Caucasus regions, their role remained largely unexplored. During the described timeframe, Georgia and Ukraine faced increasing threats of force, resulting in unfolding military interventions, creating further incentives for increasing the mandate of internal and external intelligence services and security institutions. Simultaneously, these states were trying to overcome the heritage of corruption, political police, and human rights abuses left by the Soviet Union. Understanding this environment is crucial for further conceptualizing the connection between human rights and national security in Ukraine, which should be analyzed in the context of international law and the best practices of Western democracies. Additionally, this thesis aims to assess whether the solutions to counter threats of terrorism and organized crime are suitable for Ukraine, which is currently dealing with the existential threat of full-blown military intervention. Alternatively, one could argue that such policies are ill-equipped to respond to the challenges the state faces and that traditional approaches viewing human rights as “luxury” and “subordinate” to national security interests, characteristic of the Cold War timeframe, are more warranted.<sup>28</sup>

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<sup>28</sup> William W Burke-White, in “Human Rights and National Security: The Strategic Correlation,” *Harvard Human Rights Journal* 17 p. 252, 2004.

## 1.1. Defining “Soviet” - lack of democratic traditions as the root challenge of reform

The term "post-Soviet" carries a colonial connotation and is often criticized for oversimplifying the nuanced and diverse contexts of the former Soviet Union states by grouping them under one umbrella term.<sup>29</sup> Ironically, this perspective mirrors the original Soviet approach toward these countries, denying their unique experiences and achievements both before and after the fall of the Soviet Union.<sup>30</sup> Dmitry Kurnosov in his analysis of the extra-constitutional constitution-building in 90s Russia, rightly asks: “What is Soviet?”<sup>31</sup> Implying the rudimentary nature of stamping the Soviet label to a set of complex social, historical, legal, and political events in an attempt to explain their development. Similarly, in the beginning stages of the security sector reform in Ukraine, experts blamed “Soviet” culture for the challenges of democratization of the armed forces, building civil-military relationships, and the general indifference of police and intelligence institutions.<sup>32</sup> Such interpretations can be ambiguous or, at worst, suggest significant and irreparable problems within the institution, public sector, or society. However, these inherent flaws have a more mythological nature, flaws rarely exist and cannot be remedied. Post-Soviet also acquired political significance and is often used to describe certain reforms or policies as old-fashioned or to diminish political opponents by portraying them as ideological successors of the old regime, regardless of their actual

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<sup>29</sup> Vasyl Cherepanyn, “Reckoning with Eastern Europe’s Colonial Trauma | by Vasyl Cherepanyn,” Project Syndicate, May 2, 2023, <https://www.project-syndicate.org/commentary/europe-must-recognize-colonialist-legacy-in-ukraine-by-vasyl-cherepanyn-2023-05>.

<sup>30</sup> Dovilė Sagatienė, “Challenging the ‘Post-Soviet’ Label and Colonial Mindsets: NATO Summit in Vilnius,” *Verfassungsblog*, July 11, 2023, <https://verfassungsblog.de/challenging-the-post-soviet-label-and-colonial-mindsets/>.

<sup>31</sup> Dmitry Kurnosov, “Beware of the Bulldozer: What We Can Learn from Russia’s 1993 Extra-Constitutional Constitution-Making,” *Verfassungsblog*, January 7, 2022, <https://verfassungsblog.de/beware-of-the-bulldozer/>.

<sup>32</sup> “Security Sector Reform, Does It Work? Problems of Civil-Military and Inter-Agency Cooperation in the Security Sector | DCAF – Geneva Centre for Security Sector Governance,” 236–237, accessed April 5, 2024, <https://www.dcaf.ch/security-sector-reform-does-it-work-problems-civil-military-and-inter-agency-cooperation-security>.



aspirations.<sup>33</sup> Widespread usage of this term in the political sphere and fear of the politicians being associated with anything “Soviet” suggests the deep unpopularity of the ideology and its encompassing political, economic, and administrative measures in most countries formerly part of the Soviet Union. Furthermore, even if these terms are used in connection to legitimate systematic issues within the security sector, such as corruption and flawed judicial reforms, interpreting these problems as natural constituents of the Soviet past is mostly misleading. The historical impact of the Soviet occupation and its subsequent dissolution may explain the lack of functioning institutions in certain states. However, unexamined general claims that Soviet heritage somehow predetermined the systematic problems that the security sector governance in Ukraine faced after the fall of the Soviet Union can oversimplify the issue and misdiagnose the root cause.

To start with, some of these theories do not account for the success stories of the Baltic states and other “post-Soviet” countries in the fields of economy, human rights, state-building, and security sector reform, among others.<sup>34</sup> Furthermore, it is unclear why Soviet heritage is a precondition of systematic issues such as corruption, distorted judicial governance, or lack of civil oversight over the security sector. These issues are also characteristic of countries never occupied by the Soviet Union in Africa or the Middle East. Yet, what these contexts have in common with some “post-Soviet” states is that they are plagued with weak institutions and lack a tradition in the rule of law or democracy.<sup>35</sup> Finally, the soviet doctrine on national security and its approach toward human rights was based on its “Voyennaya Doktrina” (military

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<sup>33</sup> Carnegie Endowment for International Peace “Georgia’s Choices: Charting a Future in Uncertain Times,” p.18, 2011.

<sup>34</sup> Dovilė Sagatienė, “Challenging the ‘Post-Soviet’ Label and Colonial Mindsets: NATO Summit in Vilnius,” *Verfassungsblog*, July 11, 2023, <https://verfassungsblog.de/challenging-the-post-soviet-label-and-colonial-mindsets/>

<sup>35</sup> Charles Manga Fombad, “Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects” no. 4, p.1010, 2011

doctrine) that was later imposed on Eastern European countries such as Ukraine.<sup>36</sup> As such, the top-down decisions were highly centralized and deeply pro-Russian or pro-Bolshevik. Rather than serving the interests of the member states of the Union.<sup>37</sup> The Deliberate transfer of this repressive and discriminatory doctrine that was drafted to fit the interests of a narrow interest group, rather than the whole country itself lacks common sense and is less plausible.

Provided that Ukraine's understanding of national security and human rights interaction is not a byproduct of the "Soviet culture" or heritage, one might ask what it is based on and what variables influence this relationship in the national legislation and informal day-to-day practices of its institutions. This question, however, has no straightforward answer. Democratic backsliding or lack of democratic governance can be attributed to cultural factors and society's values, or at the very least, the underdevelopment of ideals crucial to such order and institutional performance.<sup>38</sup> In the Ukrainian context, the democratization challenges of the security sector are more likely to be the result of the absence of democratic traditions and its encompassing institutional practices.<sup>39</sup> Specific challenges include relatively young institutions, insufficient monitoring mechanisms, and weak civil oversight.<sup>40</sup> Rather than soviet heritage, this point of view better explains inconsistencies characteristic of Ukrainian security sector reform. It accounts for the general indifference (though not resistance) of high-ranking intelligence officials and the security sector towards democratizing the civil-military

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<sup>36</sup> Born, Caparini, and Fluri, "Security Sector Reform and Democracy in Transitional Societies," p.21, 2000.

<sup>37</sup> *Soviet Decisionmaking for National Security*, Edited by Jiri Valenta and William C. Potter, Vol. 47, p.38, (Taylor & Francis Group, 2021).

<sup>38</sup> Christian Welzel, "Democratic Horizons: What Value Change Reveals about the Future of Democracy," *Democratization* 28, no. 5 (July 4, 2021), 933, <https://doi.org/10.1080/13510347.2021.1883001>.

<sup>39</sup> "Security Sector Reform, Does It Work? Problems of Civil-Military and Inter-Agency Cooperation in the Security Sector | DCAF – Geneva Centre for Security Sector Governance," 239, accessed April 5, 2024, <https://www.dcaf.ch/security-sector-reform-does-it-work-problems-civil-military-and-inter-agency-cooperation-security>.

<sup>40</sup> Ibid, p. 239.

relationship in the beginning stages of the security sector reform.<sup>41</sup> This entails democratic civilian oversight over security sector institutions and transparency and accountability of the democratic decision-making process.<sup>42</sup> Meanwhile, contrary to the claims of “Soviet” cultural heritage, these forces never objected to the promotion of democratic values in broader society.<sup>43</sup> Through various stages of the reform, the stakeholders, especially officers in the military and other personnel, were hardly informed about the aims, goals, and objectives of such reform, causing misconceptions about its values and purposes.<sup>44</sup> If anything, the Ukrainian context lacked coordination, strategic planning, inclusivity, and monitoring mechanisms, leading to the disorganized formation of security sector institutions.<sup>45</sup> Although security sector reform is inherently complex and unlikely to be flawless, the primary challenges in Ukraine are better explained by a lack of democratic tradition and previous reform experience.

To sum up, certain claims of “Soviet cultural heritage”, in the context of cultural or historical analysis, are valid and cannot be entirely discounted. However, their influence over institutional and legislative flaws of the Ukrainian security sector reform needs further evidence. Stepping away from such vague notions and focusing on the real challenge - the lack of democratic traditions is crucial not only for better explaining the underlying issue beneath the pressing challenges of the security sector reform in Ukraine. Additionally, it showcases potential areas to improve as well as cautions about the urgency of such improvement. The

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<sup>41</sup> “Security Sector Reform, Does It Work? Problems of Civil-Military and Inter-Agency Cooperation in the Security Sector | DCAF – Geneva Centre for Security Sector Governance,” p. 240, accessed April 5, 2024, <https://www.dcaf.ch/security-sector-reform-does-it-work-problems-civil-military-and-inter-agency-cooperation-security>.

<sup>42</sup> Herbert Wulf, *Security Sector Reform in Developing and Transitional Countries Revisited*, p. 1, 2004.

<sup>43</sup> “Security Sector Reform, Does It Work? Problems of Civil-Military and Inter-Agency Cooperation in the Security Sector | DCAF – Geneva Centre for Security Sector Governance,” p. 240, accessed April 5, 2024, <https://www.dcaf.ch/security-sector-reform-does-it-work-problems-civil-military-and-inter-agency-cooperation-security>.

<sup>44</sup> *Ibid*, p 238

<sup>45</sup> “Key Issues and Policy Recommendations Compilation | DCAF – Geneva Centre for Security Sector Governance,” p. 16-17, accessed April 9, 2024, <https://www.dcaf.ch/key-issues-and-policy-recommendations-compilation>.

next chapter of the thesis discusses how Ukraine's approach toward the dynamic interaction of human rights versus national security is shaped by two predominant factors: fragmentation of local ownership characterized by inconsistent involvement of the local actors in the security sector reform and the absence of a deliberate strategic approach from the state.

## **1.2. A bottom-up influence: how civil engagement is shaping Ukraine's approach to national security**

Another distinct characteristic of the interplay between human rights and national security in Ukraine is its apparent grassroots development.<sup>46</sup> Rather than being driven by top-down directives, approaches concerning the primacy of national security or human rights seem to be a product of "bottom-up" decision-making. However, even in that regard, the participation of civil society is highly fragmented by the absence of the necessary oversight mechanisms, legislation, and strategic approaches to regulate, monitor, and facilitate the process.

By pointing out the fragmentation of the process, this thesis does not aim to provide patterns of human rights violations committed during Russia's invasion of Ukraine or to argue against the critical role of civil society in the security sector reform process. Instead, it aims to analyze the interaction of human rights and national security interests in the challenging Ukrainian context and showcase how the relationship is defined by 1) the strong involvement of various groups and actors at a grassroots level combined with 2) weak, relatively young institutions, lack of a deliberate strategic approach and oversight mechanisms making State's response to

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<sup>46</sup> Julia Soldatiuk-Westerveld, Bob Deen, and Ate Lucien van Steenbergen, "Work in Progress: Ukraine's State-Civil Partnership to Reform the Security Sector," p. 2, 2023.

possible human rights violations ineffective 3) recent rollbacks on civilian control and oversight.<sup>47</sup> The thesis also argues that the described public participation model disproportionately represents certain types of organizations that reinforce the day-to-day practical needs of the security sector. Meanwhile, civil societies are oriented on policy work human rights, democratic governance, and accountability and have limited legal and institutional opportunities to shape how Ukraine views the interaction of human rights and national security. A strong and flexible institutional/legislative framework might slowly mitigate possible negative cultural, contextual, and informal elements shaping this interaction.<sup>48</sup>

OECD DAC handbook on Security Systems Reform describes the process as ‘highly political’ with aims of providing justice and security consistent with existing standards of human rights protection and democratic governance.<sup>49</sup> The role of civil society in this process usually does not extend beyond civil oversight and monitoring of the security sector and maintaining its accountability.<sup>50</sup> Nonetheless, Ukraine’s scenario stands for unprecedented involvement of civil society in security sector reform and reinforcing the government’s capacity to resist the Russian invasion from 2014 to date.<sup>51</sup> This unconventional approach can be characterized by volunteer activities strengthening the capacity of the Armed Forces of Ukraine (AFU), assisting the security sector with expert knowledge, and bypassing overly bureaucratic and corrupt practices of the Ministry of Defense by crowdfunding.<sup>52</sup> While such assistance is highly

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<sup>47</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*, p. 24, 2023.

<sup>48</sup> András Jakab, “Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary,” *American Journal of Comparative Law* 68:4, p. 768, 2020.

<sup>49</sup> “The OECD DAC Handbook on Security System Reform: Supporting Security and Justice p. 28, 2014 accessed April 8, 2024, [https://read.oecd-ilibrary.org/development/the-oecd-dac-handbook-on-security-system-reform\\_9789264027862-en](https://read.oecd-ilibrary.org/development/the-oecd-dac-handbook-on-security-system-reform_9789264027862-en).

<sup>50</sup> *Ibid*, p. 118

<sup>51</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*, p. 6, 2023.

<sup>52</sup> *Ibid*, p. 6.

encouraged by the officials, the chief purpose of civil engagement – democratic control, monitoring, and oversight has seen recent pushbacks of its modest achievements.<sup>53</sup> As such, the grassroots activities in Ukraine are actively encouraged to reinforce the security sector in its existential task to overcome the Russian invasion and participate in the reform. However, civil oversight and monitoring mechanisms are not institutionalized or developed. Thus, the type of impact and involvement of civil society in the security sector is highly fragmented. The state can subjectively select which organization to work with or the assistance needed. In return, the civil society lacks functioning accountability/oversight mechanisms.<sup>54</sup>

Simultaneously, as discussed above, evaluation of the security sector reform process suggests that a lack of coordination between structures in the process, strategic planning, and inclusivity might make the values and objectives of such reform unclear for the actual benefactors of the reform – the society and personnel of the security sector. This is problematic in two major ways, among others. Inconsistent involvement of relevant stakeholders (civil society in this instance) fragments the local ownership and casts doubt on the long-term sustainability of its achievements.<sup>55</sup> Furthermore, the lack of strategic human rights-oriented approaches in the security sector reform, as well as the legislation and policy documents, creates a vacuum in governance to be filled by informal institutional elements – such as actual practices and narratives<sup>56</sup> that might heavily favor national security interests and are not necessarily consistent with international human rights standards.

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<sup>53</sup> Ibid, p. 24.

<sup>54</sup> Julia Soldatiuk-Westerveld, Bob Deen, and Ate Lucien van Steenberg, “Work in Progress: Ukraine’s State-Civil Partnership to Reform the Security Sector,” p.23, 2023.

<sup>55</sup> Ibid, p. 32.

<sup>56</sup> András Jakab, “Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary,” *American Journal of Comparative Law* 68:4, p. 762, 2020.

This problem can be illustrated by Russia's military intervention in Ukraine in 2014 and how the security sector reacted to the existential threats to the national security of the country. During the early stages of the intervention, confusion fueled by a lack of coordination between several intelligence institutions, haphazard reforms, overlapping mandates of the intelligence institutions, and most importantly, lack of traditions in a democratic human rights-oriented approach translated into the supremacy of state security over human rights protection.<sup>57</sup> At the same time, the resilience of the security sector increased as it was reinforced by civil society and volunteers.<sup>58</sup> Ultimately, while the involvement of civil society is a strong suit for the security sector reform in Ukraine, instances of documented human rights violations by pro-Ukrainian groups also emerged in the reports of international human rights organizations.<sup>59</sup> Later, these accounts were exaggerated, blown out of proportion, and further distorted by Russian propaganda.<sup>60</sup>

Similarly, from 2014 to 2021, the human rights violations of the Ukrainian side, reported by international organizations in the context of the armed conflict, were predominantly perpetrated by personnel from the security sector or pro-Kyiv militias.<sup>61</sup> Notably, these groups were operating outside the formal command structure.<sup>62</sup> Meanwhile, officials' approach to this interaction remains unclear. Contrary to the post-Cold War United States, interests of national

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<sup>57</sup> Maksym Khylyk and Oleksandr Tytarchuk, "Human Security and Security Sector Reform in Eastern Europe," p. 23, 2017.

<sup>58</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*, p. 18, 2023.

<sup>59</sup> "Ukraine: Summary Killings during the Conflict in Eastern Ukraine," Amnesty International, p.12, 2014 accessed April 10, 2024, <https://www.amnesty.org/en/documents/eur50/042/2014/en/>.

<sup>60</sup> "Ukraine: Summary Killings during the Conflict in Eastern Ukraine," Amnesty International, p.12, 2014 accessed April 10, 2024, <https://www.amnesty.org/en/documents/eur50/042/2014/en/>.

<sup>61</sup> "Ukraine: Summary Killings during the Conflict in Eastern Ukraine," Amnesty International, p.12, 2014 accessed April 10, 2024, <https://www.amnesty.org/en/documents/eur50/042/2014/en/>.also, Human Rights Watch, "Ukraine: Events of 2023," in *World Report 2024*, 2024, 15–16, <https://www.hrw.org/world-report/2024/country-chapters/ukraine>.

<sup>62</sup> "Ukraine: Summary Killings during the Conflict in Eastern Ukraine," Amnesty International, p.17, 2014 accessed April 10, 2024, <https://www.amnesty.org/en/documents/eur50/042/2014/en/>.

security do not triumph over human rights in the formulations or policy documents of Kyiv.<sup>63</sup> Ukraine is a signatory to various international human rights treaties. Human rights and freedoms are enshrined in the constitution of Ukraine as the “essence and course of activities” of the State.<sup>64</sup> The parliament monitors the protection and fulfillment of these rights through oversight mechanisms such as the Authorized Human Rights Representative.<sup>65</sup> Most notably, this includes the areas of national security and defense.<sup>66</sup> However, at the same time, the country is criticized for a lack of oversight mechanisms, rollback on civilian control, willingness to investigate cases of human rights violations, or keeping officials accountable for their actions on several occasions.<sup>67</sup>

Finally, the thesis analyzes how the elements above might further affect the State’s institutional/legislative approaches to human rights and national security. Or if the existing legislative framework will persist in developing more measured policies and practices, preserving and enhancing beneficial aspects of civil engagement while eliminating elements detrimental to human rights protection. In rare cases, the involvement of civil society can damage the security sector reform and contribute to democratic backsliding if it aims to restrict key rights and freedoms and spreads undemocratic values.<sup>68</sup> Replacing the government’s functions instead of reinforcing its capacity might additionally be detrimental to the security sector reform.<sup>69</sup>

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<sup>63</sup> Burke-White, “Human Rights and National Security: The Strategic Correlation,” 251.

<sup>64</sup> Constitution of Ukraine, June 28, 1996, Art 3, <https://rm.coe.int/constitution-of-ukraine/168071f58b>.

<sup>65</sup> Constitution of Ukraine, June 28, 1996, Art.101, <https://rm.coe.int/constitution-of-ukraine/168071f58b>.

<sup>66</sup> “Про Національну Безпеку України,” Офіційний вебпортал парламенту України, (Law of Ukraine On the National Security of Ukraine) June 21, 2018 Art., <https://zakon.rada.gov.ua/go/2469-19>.

<sup>67</sup> “2022 Country Reports on Human Rights Practices,” *United States Department of State* (Ukraine), accessed April 10, 2024, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/ukraine/>. Also, Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform In Ukraine*, p. 23-29 2023.

<sup>68</sup> Geneva Centre for Security Sector, “Civil Society - Roles and Responsibilities in Good Security Sector Governance,” p.5, 2022.

<sup>69</sup> Ibid, p.5



Security sector institutions and any other can be defined as an “interplay of formal rules, actual practices, and narratives (letter two as an informal institutional element).”<sup>70</sup> Usually, informal institutional elements are mentioned in the context of the rule of law erosion and democratic backsliding. However, they can be powerful preconditions to or even establish naval directions of institutional practices.<sup>71</sup> In the case of Ukraine, strong informal elements - namely, grassroots activities of civil society combined with the state's selective acceptance of assistance in addition to their limited oversight and accountability<sup>72</sup> - play a significant role in shaping Ukraine's approach to human rights and national security. Moreover, the state's response to alleged human rights violations in the name of national security is disorganized and lacks strategic planning and monitoring mechanisms.<sup>73</sup> The discrepancy between formal elements, such as legislation and policy documents, and actual practices of security sector governance suggest expected shifts to one or the other direction. This interaction, primarily involving civil society, is challenging to measure in Rule of Law Indices. However, a deeper analysis of the issue suggests that in the absence of institutionalized and legislative intervention, informal practices strongly favoring national security in its interaction with human rights will only increase the possibility of formal legal instrumentalization in the future. Firstly, informal elements appear to exert as much, if not more, influence as formal elements.<sup>74</sup> This is especially true within the context of the ongoing Russian invasion, which incentivizes prioritizing national security over human rights. Secondly, the need to modify legislative and institutional

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<sup>70</sup> András Jakab, “Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary,” *American Journal of Comparative Law* 68:4, p. 762, 2020.

<sup>71</sup> András Jakab, “Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary,” *American Journal of Comparative Law* 68:4, p. 763, 2020.

<sup>72</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*, p. 24, 2023.

<sup>73</sup> “2022 Country Reports on Human Rights Practices,” *United States Department of State* (Ukraine), accessed April 10, 2024, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/ukraine/>

<sup>74</sup> András Jakab, “Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary,” *American Journal of Comparative Law* 68:4, p. 768, 2020.

frameworks for ever-increasing grassroots activities has been recognized by the state and civil society.<sup>75</sup> Since 2014, Ukraine has gradually facilitated the assimilation of volunteer units in the command chain through new laws and institutional changes.<sup>76</sup> However, while this is a step in the right direction, the challenges of selectivity, lack of systematization, and fragmented involvement of civil society remain unresolved.<sup>77</sup> It can be argued that systematizing certain types of civil society organizations and grassroots activities to facilitate their participation in security sector reform while limiting space for others - especially activities focused on democratic accountability and oversight – can be counterproductive. Instead of supporting democratic governance and human rights protection, these actions can act as the initial stages of transforming informal arbitrary elements into formal laws or institutions.

Overall, the interaction between the state and civil society can be viewed as a double-edged sword. While its involvement in security sector reform is naval and greatly enhances capacity and responsiveness, highlighted informal elements also present significant challenges for governance and the consistent application of human rights standards. In the absence of deliberate strategies at the institutional and legislative levels aimed at optimizing the engagement, accountability, and oversight functions of civil society, informal practices prioritizing national security over human rights protection may become formalized. The remaining chapters of this thesis will discuss specific examples of how the interaction of formal and informal elements of the security sector reform affected its parts. Namely, preventing corruption, limiting the powers of intelligence services, and pushing back against a system of clientelism and oligarchic influences.

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<sup>75</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*, p.6–7, 2003.

<sup>76</sup> Ibid, p. 21-22.

<sup>77</sup> Ibid, p. 38.

### **1.3. Top-down interventions – how the conflict of domestic needs and international expectations influences the security sector legislation of Ukraine**

This chapter reviews how Ukraine's approach to security sector reform, is shaped by international and transnational organizations as well as pressing imperatives of prioritizing national security over human rights.<sup>78</sup> Firstly the chapter discusses the significance of defining national security threats within the legislative framework of SSR. Secondly, the chapter showcases how actual or perceived national security requirements created a conflict between domestic needs and international best practices within Ukrainian security sector legislation. Thirdly, the chapter analyzes the case law of the European Court of Human Rights regarding the national security legislation of its member states as well as the practices and approaches of international and transnational organizations. This is done to showcase the pressing need for more standardized and nuanced practices at the international and transnational levels when evaluating national legislation concerning national security interests and threats. At the end of this chapter, the thesis argues that while international and transnational organizations rarely engage with other states on the issues of national security, to avoid excessive criticism, this vacuum is increasingly exploited by far-right extremist agenda and autocratic regimes, that nonetheless blame "foreign influence" as a strategy to quash dissent and opposition.<sup>79</sup> Consequently, disengaging from the topic altogether is ineffective and counter-narratives are crucial.

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<sup>78</sup> Gergana Noutcheva and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 1, 2024, <https://doi.org/10.1177/00108367241244978>.

<sup>79</sup> Marlene Wind, "The Enemy Within," *Verfassungsblog*, April 29, 2024, <https://verfassungsblog.de/the-enemy-within-2/>.

Following the Cold War, the interaction of national security and human rights is usually discussed within the context of terrorism, espionage, and, in certain instances, organized crime and corruption.<sup>80</sup> While these threats are formidable, they generally do not rise to the existential level of military intervention from another state. European Court of Human Rights (ECtHR) further extends this list to subversion of parliamentary democracy, inciting a military riot, or separatist/extremist organizations.<sup>81</sup>

Defining threats to national security is vital both for the theoretical framework of state approaches and the mandates of intelligence institutions. Especially if a single unit possesses overly broad competencies of investigation and intelligence gathering can lead to significant risks of power misuse and human rights violations. Therefore, best practices dictate, that these services should only interfere in cases of actual threats to national security.<sup>82</sup> Additionally, these definitions are useful as a means to differentiate national security institutions from police as the former is equipped with the mandate to deal with threats to national security.<sup>83</sup>

However, limiting the mandate of intelligence agencies solely to cases of national security threats turned out to be a significant challenge for both Georgia and Ukraine. Like Georgia, Ukraine, includes corruption and organized crime within the scope of its state security services, which are also equipped with intelligence-gathering functions. Georgian law on Georgian State Security Service (SSG) simultaneously arms the institution with the mandate of corruption

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<sup>80</sup> Hans Born, Ian Leigh, "Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies," *The Military Law and the Law of War Review* 45, no. 3–4, p.29, (December 2006) <https://doi.org/10.4337/mlwr.2006.3-4.17>.

<sup>81</sup>Ibid, p. 28

<sup>82</sup> Martin Scheinin and UN Commission on Human Rights Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," p. 1, 2005, <https://digitallibrary.un.org/record/564925>.

<sup>83</sup> Hans Born, Ian Leigh, "Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies," *The Military Law and the Law of War Review* 45, no. 3–4, p.29, (December 2006) <https://doi.org/10.4337/mlwr.2006.3-4.17>.

prevention and investigation.<sup>84</sup> The task shared by several security sector institutions in the country including the special division of the Prosecutor's Office, the Investigative Service of the Finance Ministry, the Investigative Unit of the Defence Ministry, and the General Inspectorate of the Ministry of Justice, effectively duplicating competences of several security sector institutions.<sup>85</sup> Such division (or lack thereof) of powers not only directly contradicts numerous established best practices and advisories, including those recommended by the Council of Europe's Parliamentary Assembly, but also leads to the inefficient spending of the state's material and human resources. More importantly, it cultivates risks of grave human rights violations due to the lack of checks and balances and mandate for arbitrary actions.<sup>86</sup>

Similarly, before 2021, Ukraine's State Security Service (SBU or SSU), an agency with both investigative and intelligence-gathering capabilities, had a relatively well-defined mandate. In addition to its primary role in preventing and investigating cases of terrorism and violent extremism, the SBU was also authorized to investigate corruption and organized crime. However, this was strictly limited to cases that constituted a vital threat to Ukraine's interests.<sup>87</sup> Despite reports of the list of investigated cases being extended further than defined by legislation,<sup>88</sup> the mentioned regulation has been relatively narrow and comprehensive without said institution losing the capacity to be flexible. 2021 amendments to the law, of Ukraine on the State Security Service, signifies changed approaches in that regard. Currently, the SBU has the mandate to investigate crimes against peace, humanity, terrorism, and any act that directly

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<sup>84</sup> Law of Georgia on The State Security Service of Georgia, Art. 5

<sup>85</sup> Giorgi Tsikarishvili and Tatia Koniashvili, Democracy Research Institute (DRI), *Anti-Corruption Agency - Legal Framework and Gaps in Practice*, p.12-15, 2022.

<sup>86</sup> Giorgi Tsikarishvili and Tatia Koniashvili, *Democracy Research Institute (DRI): State Security Service – Duplication of Competences and Parallel Investigative Systems*, p. 22, 2020.

<sup>87</sup> Oleksandr Lytvynenko, Philipp Fluri, and Valentyn Badrack, "THE SECURITY SECTOR LEGISLATION OF UKRAINE," p. 315, 2017.

<sup>88</sup> Peter Dickinson, "Ukraine's Security Service Reform Plans under Threat," *Atlantic Council* (blog), July 13, 2021, <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraines-security-service-reform-plans-under-threat/>.

threatens the vital interests of the country.<sup>89</sup> This is a notable setback in the reform of Ukraine's security sector, particularly given prior debates on the necessity of dismantling SBU's authority to conduct investigatory activities, arrests, and detention. Especially within the context of suggestions to at least transfer the anti-corruption mandate to a different, more transparent entity, which would be better suited for handling economic crime inquiries.<sup>90</sup> While it is difficult to predict every scenario that might threaten national security interests and some degree of flexibility is warranted, arming an institution with broad authority to investigate any case they classify as relevant to national security interests carries the risk of power abuse.<sup>91</sup> Alternatively, Rather than precisely delineating the SBU's powers to reduce the potential for abuse, the amendments assume that said institution will only operate strictly within its competencies, dismissing the likelihood of power misuse or any need for monitoring/oversight over these services.

Considering the significant impact of defining the mandate of intelligence institutions and threats to national security, there is a noticeable lack of international regulations and standardized solutions. The European Union, which has a reputation for "defining what is normal, positions itself as the assistant to reform attributing the adoption of undemocratic standards to the changes in perception, rather than deliberate attempts to avoid the reform."<sup>92</sup> What is more, examples of countries making successful transitions from autocracy to

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<sup>89</sup> Law of Ukraine "On the Security Service of Ukraine". Art. 2, "Про Службу Безпеки України," Офіційний вебпортал парламенту України, accessed April 29, 2024, <https://zakon.rada.gov.ua/go/2229-12>.

<sup>90</sup> Julia Soldatiuk-Westerveld, Bob Deen, and Ate Lucien van Steenbergen, "Work in Progress: Ukraine's State-Civil Partnership to Reform the Security Sector," p.42, 2023. Also Dickinson, "Ukraine's Security Service Reform Plans under Threat."

<sup>91</sup> Martin Scheinin and UN Commission on Human Rights Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," p. 1, 2005, <https://digitallibrary.un.org/record/564925>.

<sup>92</sup> Gergana Noutchevahttps and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 1, 2024, <https://doi.org/10.1177/00108367241244978>.

democratic governance have demonstrated that some form of external pressure, in terms of oversight and reinforcement of positive tendencies can be a crucial component of such change.<sup>93</sup> In the case of Ukraine, such a role could be played by the European Union and the country's attempts toward accession. Especially since said oversight mechanisms implemented during the journey towards EU accession, have positively influenced several former Soviet republics until their integration into the Union.<sup>94</sup> However, this relationship is nuanced and not without challenges. While the EU's role as a "norm entrepreneur" and a role model has had a positive impact on the security sector legislation of Ukraine, this is somewhat mitigated by pushback from local stakeholders and influence groups unwilling to compromise perceived interests of national security (or private gain) for the sake of human rights.<sup>95</sup> These countermeasures consist of formally accepting the concepts of the reform, however in practice either stalling, partially establishing, or countering the reform by formal legislation, procedural acts, or informal procedures making it impossible to implement the change as it was originally envisioned.<sup>96</sup> Ultimately, while the EU's role in democratizing the security sector reform in Ukraine is vital, it can expect to meet resistance on the ground. Furthermore, its involvement in the security sector reform is implemented in the context of international security, while trying to minimize intervening discussions on national security concepts with the host state.<sup>97</sup>

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<sup>93</sup> András Jakab, "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary," *American Journal of Comparative Law* 68:4, p. 770, 2020.

<sup>94</sup> *Ibid*, p. 770.

<sup>95</sup> Gergana Noutchevahttps and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 1, 2024, <https://doi.org/10.1177/00108367241244978>.

<sup>96</sup> Gergana Noutchevahttps and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 1, 2024, <https://doi.org/10.1177/00108367241244978>.

<sup>97</sup> *Ibid*

Similar to the mentioned approach, the European Court of Human Rights grants states a wide margin of appreciation in deciding what constitutes a national security threat for their specific context.<sup>98</sup> This is based on the assumption that member states are better equipped to assess which dangers can be managed by the police, and which require additional safeguards.<sup>99</sup> Furthermore, the court is aware of the potential backlash from applying excessively rigid standards to sensitive national security and security sector reform issues.

This approach provides additional leeway for the member states to tailor legislation to their particular needs and existing threats to national security. However, ECtHR has also been criticized for lacking political influence and giving way to “facade” reforms by not providing explicit steps in its judgments to align the security sector reform legislative framework to the convention.<sup>100</sup> This criticism might be misdirected considering ECtHR’s supplementary role to the national legislation. Presently it seems that the court has adopted a dual approach to its challenges, including the security sector reform legislation. Firstly, it aims to enforce minimal standards of human rights protection to the states that have some trouble being classified even as democracies.<sup>101</sup> Secondly, the court must avoid short-circuiting or otherwise interfering with the debates or divisions that might seem “inherently democratic.”<sup>102</sup> Fulfilling these objectives might mean risking appearing to apply partial and inconsistent standards to what is arguably considered the most critical intrusions within the regulatory framework of the ECHR.

Protecting interests of national security is one of the restricting conditions for certain European Convention on Human Rights (ECHR) provisions, including Article 6 (Right to a fair trial),

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<sup>98</sup> *Liu v. Russia*, No. 29157/09, §85, July 26, 2011.

<sup>99</sup> *Janowiec and Others v. Russia*, No. 55508/07 and 29520/09, §211, October 21, 2013

<sup>100</sup> Hans Born, Loch K. Johnson and Ian Leigh, *Who Is Watching the Spies? Establishing Intelligence Service Accountability*, vol. 1, p. 36-37, 2005.

<sup>101</sup> Angelika Nussberger, “The European Court of Human Rights at Sixty - Challenges and Perspectives,” *European Convention on Human Rights Law Review* 1, No. 1 p.11-13, 2020.

<sup>102</sup> *Ibid*, p. 11-13



Article 8 (Right to respect for private and family life), Article 10 (Freedom of expression), and Article 11 (Freedom of assembly and association), among others. Despite its complexity, ECtHR's case law does not comprehensively define the concept of national security. Moreover, in *Esbest v. the United Kingdom*, the European Commission of Human Rights ("the Commission") sided against the necessity of such clarifications.<sup>103</sup> The Commission argued that certain laws require a degree of flexibility to respond to changing circumstances effectively, indicating that such adaptability is a characteristic of the field regulated, not a defect in the legislation itself.<sup>104</sup> Fundamentally, ECtHR serves as a "last resort" tribunal - not an appellate court - intervening only in the most severe violations after all other remedies have been exhausted. Therefore, it is hesitant to prescribe specific remedies or exact steps needed, maintaining its role as a high-level adjudicator.<sup>105</sup>

A few limitations are applied to the concept such as regulations related to secret surveillance. The work of intelligence institutions is inherently secretive, which presents the court and human rights defenders with the "accident of litigation" dilemma.<sup>106</sup> The court's case law can develop randomly and unpredictably depending on the specifics of cases that reach the court. Discovering human rights breaches committed by intelligence institutions is an additional challenge for ECtHR, assuming that such violations are only apparent once the systematic issue cannot be concealed anymore.<sup>107</sup> In the landmark case of *Klass and others v. Germany*, the European Court of Human Rights (ECtHR) stated that although member states have a degree of discretion in evaluating national security risks and determining the appropriate

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<sup>103</sup> *Esbest v. the United Kingdom*, No. 21341/07, April 2, 1993.

<sup>104</sup> *Esbest v. the United Kingdom*, No. 21341/07, April 2, 1993.

<sup>105</sup> Hans Born, Loch K. Johnson and Ian Leigh, *Who Is Watching the Spies? Establishing Intelligence Service Accountability*, vol. 1, p. 37, 2005.

<sup>106</sup> *Ibid.*, p. 36

<sup>107</sup> *Ibid.*, p.

countermeasures, they must also ensure that adequate safeguard measures are in place.<sup>108</sup> These safeguards must be assessed based on their type, nature, scope, and the available remedies.<sup>109</sup> As for the problematic nature of identifying victims of secret surveillance measures, the court pointed out that it might consider an individual to be a victim of illegal secret surveillance without additional evidence in case national legislation permits such measures and other relevant conditions to be met.<sup>110</sup>

Considering the court's dislike for *actio popularis*, and litigation, this indicates that ECtHR fully grasps the complex nature of intelligence institutions that can safeguard democracy or erode it. Yet, it refrains from offering specific methodologies or steps for security sector reform. Instead, the Court has delineated certain "red lines" for member states, particularly concerning the freedom of speech and expression regarding human rights abuses committed against ethnic minorities under the guise of national security concerns,<sup>111</sup> restricting individuals from serving in the army on the grounds of homosexuality,<sup>112</sup> and expelling individuals based on their political allegiances.<sup>113</sup> The court exercises considerable restraint and limits the margin of appreciation of states when it comes to banning political parties or restricting political discourse, even on contentious matters such as sovereignty, territorial integrity, and minority rights. In the landmark case of the *United Communist Party of Turkey and Others v. Turkey*, which involved the dissolution of a party due to its alleged separatist objectives, the Court determined that while upholding a nation's territorial integrity is a valid goal for national security, disbanding a political party that sought to address delicate political matters through

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<sup>108</sup> *Klass and Others v. Germany*, No. 5029/71, §49 - 50, September 6, 1978.

<sup>109</sup> *Klass and Others v. Germany*, No. 5029/71, § 50, September 6, 1978.

<sup>110</sup> *Klass and Others v. Germany*, No. 5029/71, § 34, September 6, 1978.

<sup>111</sup> *Klass and Others v. Germany* No. 11798/85, § 48, April 23, 1992.

<sup>112</sup> *Lustig-Prean and Beckett v. the United Kingdom* (satisfaction équitale), No. 31417/96, 32377/96, July 25, 2000.

<sup>113</sup> *Vogt v. Germany*, No. 17851/91, §66-68 November 30, 1993.

peaceful dialogue was not justifiable in a democratic society. The rationale was that engaging in dialogue is a "fundamental characteristic" of democracy.<sup>114</sup>

Overall, it seems ECtHR case law limits states' margin of appreciation to define threats to national security to the situations where they might serve as a pretext for infringing upon the rights of ethnic, religious, or other minorities. The European Court of Human Rights is also vigilant to ensure that the incumbent power does not suppress the political arena by curtailing free speech or discriminating against certain religious or political beliefs in the name of national security. Such encroachments are deemed particularly severe and have been subjected to rigorous examination by the ECtHR.

Few arguments can be made against this approach. Firstly, it is apparent that the increased caseload in the ECtHR demands the court to be more normative and systematized rather than individualized in its decisions. Secondly, democratic backsliding in informal practices of intelligence institutions can be especially hard to pinpoint in challenging environments, or countries in transition since these instances cannot be identified with traditional legal methods.<sup>115</sup> Systematic intrusions into personal privacy may occur under the guise of national security interests under the democratic legal framework. Conversely, when human rights abuses become flagrant, it moreover signals the erosion of democracy in these institutions and the state. By that point, any interventions may be less impactful. This phenomenon is apparent in the case of Georgia where existing surveillance laws provide the Operational Technical Agency (OTA) with the technical means, albeit not the legal authority,

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<sup>114</sup> United Communist Party of Turkey and Others v. Turkey, No. 58128/00 §45 January 30, 1998.

<sup>115</sup> András Jakab, "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary," p. 774, 2021.

to carry out surveillance activities without oversight or restrictions.<sup>116</sup> In 2016, the Constitutional Court of Georgia declared this capacity unconstitutional, however, the ruling party eager to retain its considerable influence through unregulated control capabilities, adopted a similar law with minor procedural adjustments.<sup>117</sup> Local CSO-s appealed revised legislation as well. Nonetheless, at this stage, the ruling regime had already packed the constitutional court effectively causing its deadlock.<sup>118</sup> Nowadays, while the legislation of Georgia is overall compatible with the Constitution and the EU human rights standards, incremental procedural errors explained by the need to ensure national security allow the Operative Technical Agency unchecked technical capacity for wiretapping and other covert operations should they disregard legislation within Georgian jurisdiction. Thirdly, this vacuum sometimes created by international actors less willing to engage in discussions about national security interests and best practices to implement, is increasingly exploited by far-right extremist agenda and autocratic regimes, that nonetheless blame these powers of “foreign influence” as a strategy to quash dissent and opposition.<sup>119</sup> While Hungary's Prime Minister Orban and other illiberal elites manipulate national legislation to accrue unlimited power under the justifications of national security, the sensitivity and complexity of this issue should not lead to its neglect by the international community, and Ignoring the topic altogether is counterproductive and fails to address the underlying challenges.<sup>120</sup>

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<sup>116</sup> “Study on the Mandate of the Operational-Technical Agency in Conducting Covert Investigative Activities - Risks and Challenges - დემოკრატიის კვლევის ინსტიტუტი Democracy Research Institute,” DRI, 31, accessed April 15, 2024, <https://www.democracyresearch.org/eng/442/>.

<sup>117</sup> Study on the Mandate of the Operational-Technical Agency in Conducting Covert Investigative Activities - Risks and Challenges - დემოკრატიის კვლევის ინსტიტუტი Democracy Research Institute,” DRI, p.4, accessed April 15, 2024, <https://www.democracyresearch.org/eng/442/>.

<sup>118</sup> Ibid, p.4.

<sup>119</sup> Wind, Marlene. “The Enemy Within.” *Verfassungsblog*, April 29, 2024. <https://verfassungsblog.de/the-enemy-within-2/>.

<sup>120</sup> Renáta Uitz, “Illiberals of the World Unite in Budapest – Yet Again,” *Verfassungsblog*, May 26, 2022, <https://doi.org/10.17176/20220527-062201-0>.

## 2. IN THE NAME OF NATIONAL SECURITY: EXAMINING THE ROOT CAUSE OF RESISTANCE OF THE UKRAINIAN SECURITY SECTOR REFORM

In the previous chapter, this thesis examined the influences on security sector reform in Ukraine from both the selective utilization of bottom-up initiatives by civil society and top-down interventions by the state. The latter itself takes shape from conflicting domestic needs, interests, international expectations, and assistance.<sup>121</sup>

The nature of internal forces driving the reform and sometimes creating resistance to change is worth considering but notoriously hard to assess. Some argue that the issue can be traced to the pre-Soviet feudal networks, lacking separation of social spheres of governance, economic development, and public engagement thus being based on paternalistic relationships and patrimonialism rule.<sup>122</sup> Later these spheres were abruptly united by the imperatives of Soviet governance, effectively reinforcing the underlying issue albeit to various degrees.<sup>123</sup> While simplistically attributing the structural flaws in the security sector reform of post-Soviet countries to institutional influences from the soviet era, has been criticized by this thesis, unlike the vague concept of "Soviet heritage," this perspective considers a variety of interacting contextual factors that influenced region. These include types of political development, prevalent views on the separation of state and religion, and existing traditions of separating "spheres of social action."<sup>124</sup> In that regard, the Soviet occupation of Ukraine and Georgia is one among several factors that preserved and reinforced existing feudal relationships in two

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<sup>121</sup> Gergana Noutchevahttps and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 12, 2024, <https://doi.org/10.1177/00108367241244978>.

<sup>122</sup> Bálint Magyar and Bálint Madlovics, "Stubborn Structures: A Path-Dependence Explanation of Transitions in the Postcommunist Region," *Social Research: An International Quarterly* 86, no. 1, p. 121, 2019.

<sup>123</sup> Ibid, p. 142.

<sup>124</sup> Ibid, p. 142.

primary ways. Initially, it halted socio-economic developments taking place before the Soviet occupation.<sup>125</sup> Subsequently, it facilitated the transformation of feudal patron-client relationships into Soviet bureaucratic patronage systems since informal networks of influence were the sole possibility of acquiring power and resources within that system.<sup>126</sup> Characterizations of these influences vary from “stubborn structures” taking over newly established democratic institutions to informal influences using democracy as a façade to establish monopolized systems of corruption and even – state capture<sup>127</sup>

The presence of informal patronal elements exerting their influence over the security sector reform is supported in the 2023 analysis of Polina Beliakova and Sarah Detzner. The report highlights entrenched patronage influences within the security services as one of the key challenges to reform.<sup>128</sup> Remarkably, these informal centers are mostly clustered within the internal security services such as the police or the SBU rather than institutions directly responsible for state security such as the army.<sup>129</sup> Although initially appearing random, such concentration can be illustrated by the country's specific context. While the security sector institutions play a crucial role in Western democracies, they can be a dangerous tool in the hands of the autocratic powers, to suppress dissent and carry out repressions.<sup>130</sup> These regimes usually coerce internal secret services to protect the interests of the ruling elites rather than ensure national security or public safety.<sup>131</sup>

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<sup>125</sup> Ibid, p. 130.

<sup>126</sup> Ibid, p. 130.

<sup>127</sup> Ibid, p. 142.

<sup>128</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*, p. 28 2023.

<sup>129</sup> Ibid, p. 28.

<sup>130</sup> Christian Gläsel, Belén González, and Adam Scharpf, “The Authoritarian Security Apparatus: Officer Careers and the Trade-Offs in Command,” in *Research Handbook on Authoritarianism* Edward Elgar Publishing, p. 111, 2024.

<sup>131</sup> Ibid, p.111

Furthermore, the ever-changing political landscape and the diverging paths taken by pro-Western and pro-Russian leaders have left internal security services, such as Ukraine's State Security Service (SBU), arguably experiencing an identity crisis. Ukraine's security sector was formed in an authoritarian Soviet state, followed by a transition to a hybrid democracy ruled by rival clans and patronage networks that took over state institutions.<sup>132</sup> At various times, the security sector institutions and judiciary have been utilized to advance specific interests, including President Yanukovich's efforts to quell Maidan protests through military force.<sup>133</sup> Competing priorities of democratization and maintaining the status quo of the elites and the divide between Russia and the West have created deep uncertainties regarding Ukraine's security sector reform. On the one hand, the security sector apparatus was gradually weakened and increasingly used for political purposes under the ruling elites.<sup>134</sup> On the other hand, rather than reforming already existing structures, newly formed institutions like the Patrol Police and network of anti-corruption organizations such as the National Anti-Corruption Bureau of Ukraine (NABU), Anti-Corruption Prosecutor's Office (SAPO), and specialized court system appear to be somewhat successful.<sup>135</sup> They have helped to change public perception of the corrupt and ineffective post-Soviet security sector.<sup>136</sup>

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<sup>132</sup> Bálint Magyar, *Stubborn Structures: Reconceptualizing Post-Communist Regimes*, Central European University Press, p.221, 2019.

<sup>133</sup> Julia Soldatiuk-Westerveld, Bob Deen, and Ate Lucien van Steenberg, "Work in Progress: Ukraine's State-Civil Partnership to Reform the Security Sector," p.27, 2023.

<sup>134</sup> „State Capture, Political Risks and International Business: Evidence from Ukraine under Yanukovich“ – Analysis by Hannes Meissner – Competence Center for Black Sea Region Studies,” accessed May 25, 2024, <https://ccbsr.fh-vie.ac.at/state-capture-political-risks-and-international-business-evidence-from-ukraine-under-yanukovich-analysis-by-hannes-meissner/>.

<sup>135</sup> “Obstacles in the Work of the Anti-Corruption Ecosystem - Transparency International Ukraine,” November 24, 2023, <https://ti-ukraine.org/en/news/obstacles-in-the-work-of-the-anti-corruption-ecosystem/>. Also Julia Soldatiuk-Westerveld, Bob Deen, and Ate Lucien van Steenberg, “Work in Progress: Ukraine's State-Civil Partnership to Reform the Security Sector,” p.40, 2023.

<sup>136</sup> Julia Soldatiuk-Westerveld, Bob Deen, and Ate Lucien van Steenberg, “Work in Progress: Ukraine's State-Civil Partnership to Reform the Security Sector,” p.40, 2023.

On the contrary, reform of long-existing institutions, especially those equipped with internal secret police functions like the SBU, appears prone to reform for various reasons. In his 2019 presidential campaign, Volodymyr Zelensky openly advocated for the reform of the service, particularly cutting back its competencies to investigate corruption and economic crimes, which were often utilized to pressure businesses and exert illegal influence.<sup>137</sup> However, removing the functions that corrupt political leaders had used against their opponents proved to be more challenging than expected. This included the authority to investigate economic crimes and corruption schemes and address issues related to accumulating excessive power and maintaining high levels of secrecy.<sup>138</sup> A deeper exploration of the issue highlights that while the entrenchments are often justified by national security interests or practicality, part of the resistance is motivated by personal gain or wishes to maintain existing privileges within the system.<sup>139</sup> Remarkably, these issues are rarely communicated, despite Ukraine's aspirations to join NATO and the EU and the importance of security sector reform in pursuing this goal. Rather, reluctance to reform translates into formal acceptance but simultaneous indistinct attempts to sabotage the process in practice, either by weakening the specific norm or by implementing counter-norms that contradict wider democratic standards, thereby compromising the underlying principles.<sup>140</sup>

The OECD DAC Handbook on Security Systems Reform outlines social, economic, and political factors, alongside practical concerns about safety and national security, as reasons for

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<sup>137</sup> Oleksiy Sorokin, "Zelensky's First Year: Checking Status of President's Campaign Promises," Kyiv Post, May 20, 2020, <https://www.kyivpost.com/post/7434>.

<sup>138</sup> Polina Beliakova and Sarah Detzner, *Security Sector Governance and Reform in Ukraine*, p. 41, 2023.

<sup>139</sup> Gergana Noutcheva and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 1, 2024, <https://doi.org/10.1177/00108367241244978>.

<sup>140</sup> Gergana Noutcheva and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 1, 2024, <https://doi.org/10.1177/00108367241244978>.



resistance to reform.<sup>141</sup> National security concerns, especially after rhetorically endorsing the reform, are less convincing in this case. Particularly after considering the leeway the EU and ECtHR allow states to define national security threats in their specific context and determine appropriate responses to those risks. On the contrary, the lack of valid reasons to reform could indicate the fundamental undemocratic attitudes of at least some of the stakeholders. Firstly, the lack of valid justifications, suggests a preference for maintaining control over security apparatuses for political purposes, which is currently deeply unpopular and could jeopardize Ukraine's support from the West. Secondly, despite their commitment to Western partnerships and values, the Ukrainian internal security services continue to employ tactics and retain capabilities that closely mirror those used by illiberal regimes to resist change. For example, the practice commonly referred to as 'instrumentalization of laws' is effectively utilized in Hungary to bypass the need for legislative changes when there is a lack of sufficient support, specifically a two-thirds majority.<sup>142</sup> Another example of counter-norm-induced resistance is the case study of Georgia – provided in chapter 4 of this thesis. It showcases how undemocratic attitudes justified by actual or perceived national security concerns of the ruling regime were materialized by adopting counter-norms and procedures prescribed in subordinate normative acts.

Those norms continued to be upheld and supported by informal practices within the security sector institutions, even though they conflicted with the principles of reform, international

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<sup>141</sup> “The OECD DAC Handbook on Security System Reform: Supporting Security and Justice p. 28, 2014 accessed April 8, 2024, [https://read.oecd-ilibrary.org/development/the-oecd-dac-handbook-on-security-system-reform\\_9789264027862-en](https://read.oecd-ilibrary.org/development/the-oecd-dac-handbook-on-security-system-reform_9789264027862-en).

<sup>142</sup> András Jakab, “Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary,” *American Journal of Comparative Law* 68:4, p. 778, 2020.

human rights standards, and the Georgian constitution, which have a hierarchical superior status over those laws and procedures.

As such, this thesis has showcased that, the reluctance to democratize in the contexts of Ukraine or Georgia could be caused either by legitimate concerns for national security or interests of entrenched influences to maintain existent privileges or assist the incumbent regime to preserve and consolidate its influence. However, this thesis aims not to pinpoint the exact cause in every scenario but to highlight the counterproductive and paradoxical outcomes of compromising human rights for national security interests, which ultimately fail to fulfill either objective. This argument is further supported in this chapters which analyze Ukraine's attempts to address the national security concerns caused by informal networks of Influence, organized corruption, and clientelism through a set of de-oligarchization and lustration laws. Furthermore, analyzing how the SBU duplicates police roles, including investigating economic crimes to pressure political opponents, reveals that abusing human rights under the guise of national security not only weakens the institution but also generates narratives that harm national security interests. Finally, the case study of Georgia adds temporal and historical dimensions to the argument. It illustrates the detrimental consequences of ruling elites prioritizing national security interests at the expense of human rights, international standards, and best practices. Such infringements contribute to the development of weak, path-dependent institutions that struggle to withstand political pressure and facilitate state capture—the very risk these institutions were originally designed to guard against.

### 3. LUSTRATION LAWS AND DE-OLIGARCHIZATION: LEGAL REFORMS AS INSTRUMENTS OF MILITANT DEMOCRACY OR POST-SOVIET “WITCH HUNT”?

Following the Maidan revolution, the national security implications of multiple clan-like informal networks competing for power, taking over state institutions, and in some cases amounting to state- capture became increasingly apparent to the public. The demand to cleanse the social, economic, and most importantly political spheres from these entrenched influences materialized into a set of lustration laws and de-oligarchization measures. Public discontent towards the civil servants of the former regime soon translated into the law on “the Purification of Government.”<sup>143</sup> The law was designed to prohibit individuals who could potentially threaten the newly established democratic systems because of their past actions, while also broadly eliminating corruption.<sup>144</sup> As for the attempts to de-oligarchize the political sphere, in 2021 Ukraine, later followed by Georgia proposed the draft law on de-oligarchization. In the end, the laws were ultimately rejected in both countries following significant criticisms from the Venice Commission.<sup>145</sup>

A comprehensive review of these attempts to liberate society from the perceived grip of the Soviet past and hostile Russian influence goes beyond the scope of this thesis. However, the scope of these laws – protecting national security interests and justifications provided for the concerns of possible human rights violations- underscores the willingness of ruling powers to

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<sup>143</sup> Kanstantsin Dzehtsiarou, “Lustration in Ukraine: Political Cleansing or a Tool of Revenge?,” *Verfassungsblog*, June 26, 2015, <https://verfassungsblog.de/lustration-in-ukraine-political-cleansing-or-a-tool-of-revenge/>.

<sup>144</sup> European Commission for Democracy through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) Of Ukraine, p. 20, 2015.

<sup>145</sup> “The Paradox of De-Oligarchization | Wilson Center,” accessed June 10, 2024, <https://www.wilsoncenter.org/blog-post/paradox-de-oligarchization>.

instrumentalize legislation against political opponents or attempts to fight the symptom, instead of the deep, underlying issues itself.

For instance, Ukraine's law on "The Purification of Government." aims to keep clientelist elements of the former regime who, have committed human rights violations and/or undermined the national security of Ukraine from the public office.<sup>146</sup> While the practice of lustration has been widely accepted as a tool in the arsenal of "militant democracies," said law differs from similar legislation adopted in European countries both in its scope and potential of the abuse of powers.<sup>147</sup> The approach combines the dual objectives of addressing national security concerns and preventing corruption, sometimes equating sanctions as appropriate for these vastly different issues.<sup>148</sup> The law has also been criticized for containing elements of collective guilt and barring people from public service solely due to their association with the regime of President Yanukovich.<sup>149</sup> Draft law on de-oligarchization, targeting the excessive political influence of the rich, further expanded on this "personalistic approach" by identifying individuals who wield significant political and economic power (oligarchs), associating their presence with national security risks, and implementing targeted restrictions against them.<sup>150</sup>

Assuming such laws are not intended to be used against civil servants who oppose the current government, the fundamental issue is that they address the deep-rooted cultural, political, and

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<sup>146</sup> Kanstantsin Dzehtsiarou, "Lustration in Ukraine: Political Cleansing or a Tool of Revenge?," *Verfassungsblog*, June 26, 2015, <https://verfassungsblog.de/lustration-in-ukraine-political-cleansing-or-a-tool-of-revenge/>.

<sup>147</sup> European Commission for Democracy through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) Of Ukraine, p. 19, 2015.

<sup>148</sup> European Commission for Democracy through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) Of Ukraine, p. 19, 2015.

<sup>149</sup> European Commission for Democracy through Law (Venice Commission), Interim Opinion on the Law on Government Cleansing (Lustration Law) Of Ukraine, p. 20-21, 2014.

<sup>150</sup> Andrii Nekoliak, "No Country for 'Old Men': The Ukrainian Bill on Oligarchs," *Verfassungsblog*, June 15, 2021, <https://verfassungsblog.de/no-country-for-old-men/>.

historical factors of the problem in a simplistic "us versus them" approach. This is problematic for several reasons showcased below:

Firstly, this approach could trigger a backlash and paradoxically reinforce resistance among civil servants and business elites who might feel threatened or singled out. In several authoritarian regimes, public officials often exhibit opportunistic and survivalist traits, rather than blindly following orders.<sup>151</sup> For this reason, with the Ukrainian context in mind, attempts to sabotage the system after the regime change is relatively unlikely. However, targeting this group collectively after reinstating democratic order might paradoxically result in a deeper disregard for human rights standards, enhanced unity among the group, and intensified support for the former regime.

Secondly, reducing complex issues to simple 'us versus them' or 'good versus evil' dynamics can hinder the incumbent government's ability to implement effective reforms aimed at institutional development and overcoming systemic challenges. One key takeaway from The Case Study of Georgia in Chapter 4 highlights the potential dangers of using state security apparatus to commit human rights violations under the guise of protecting national security or democracy. It reveals how government structures can be co-opted as tools of authoritarian governance, regardless of the incumbent government's geopolitical orientation. This strategy can paradoxically compromise the principles of national security and democracy it claims to uphold. Indeed, in the absence of systematic reform focused on building institutional capacity, instead of a more “personal approach” Ukraine has chosen which threatens to blur the lines between the democratic governance and system of rival influence networks competing for

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<sup>151</sup> András Jakab, “How to Return from a Hybrid Regime to Constitutionalism in Hungary,” *Verfassungsblog*, December 11, 2021, <https://verfassungsblog.de/how-to-return-from-a-hybrid-regime-to-constitutionalism-in-hungary/>.

power instrumentalizing legislation and state institutions.<sup>152</sup> Remarkably, the draft law on de-oligarchization initially proposed by Ukraine was equally favored by Georgian lawmakers and the security sector apparatus, despite significant differences in political outlook and geopolitical stance.<sup>153</sup>

Thirdly, the adoption of personalistic, discriminatory legislation and systems, rather than enhancing a country's security and sovereignty, prove detrimental. This is because Russia views the undemocratic norms and institutions resulting from the Soviet legacy as vulnerabilities that can be exploited to undermine a country's democracy and national security.<sup>154</sup> Undoubtedly, a hybrid regime that combines elements of the new post-Soviet Nomenklatura and a mafia state finds it easier to understand and exploit the institutional corruption of another country.<sup>155</sup> Networks of informal influence can be manipulated, threatened, targeted, or bought off without significant public resistance. On the contrary, a strong institutional framework based on the rule of law and accountability reduces the likelihood of such abuses.<sup>156</sup>

Instead of resorting to personalistic measures that exacerbate the fundamental issues of paternalistic relationships and patrimonial rule, the country would benefit more from adopting

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<sup>152</sup> European Commission for Democracy through Law (Venice Commission), *The Law of Ukraine on Preventing Threats to National Security Associated with Excessive Influence by Persons Who Wield Significant Economic and Political Weight in Public Life (Oligarchs)*, p. 15, 2021.

<sup>153</sup> *Ibid.*, p. 5.

<sup>154</sup> Gergana Noutcheva and Kateryna Zarembo, *Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024*, accessed May 27, 2024, <https://doi.org/10.1177/00108367241244978>.

<sup>155</sup> Bálint Magyar and Bálint Madlovics, "Stubborn Structures: A Path-Dependence Explanation of Transitions in the Postcommunist Region," *Social Research: An International Quarterly* 86, no. 1, p. 121, 2019.

<sup>156</sup> András Jakab, "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary," *American Journal of Comparative Law* 68:4, p. 764, 2020.

systematic approaches recommended by the Venice Commission. However, the Commission does not have the authority to prescribe specific models or detailed legislative procedures. Additionally, it can be challenging to name effective transition models relevant to the Ukrainian context. Newly established security sector institutions like the Patrol Police and the network of anti-corruption organizations have shown to be more effective in terms of operational capacity, public engagement, and democratic governance compared to older institutions, which some scholars characterize as the political police inherited from the Soviet union marked by traditions of undemocratic governance.<sup>157</sup> As such, considering the clear contextual, historical-geographical, and economic differences, the unification of East Germany by Germany can serve as a useful example. Specifically, it illustrates a relatively peaceful instance of transitional jurisprudence.

Institutional stability and social security are regarded as the key drivers of sustainable change in Germany's experience.<sup>158</sup> It made it possible to attempt more overt acts of facing history and prosecuting elites of the old regime.<sup>159</sup> While the assimilation plan for East Germany included a range of cultural and institutional strategies, due to the considerations of practicality, Germany heavily favored the letter in case these measures occasionally conflicted.<sup>160</sup> Cultural strategies, albeit important were only secondary to institutional approaches and despite the undertakings of purges and so-called “lustration laws” transit was made relatively peaceful by the German constitutional court that on several instances navigated a compromise between the

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<sup>157</sup> Julia Soldatiuk-Westerveld, Bob Deen, and Ate Lucien van Steenberg, “Work in Progress: Ukraine’s State-Civil Partnership to Reform the Security Sector,” p. 41, 2023.

<sup>158</sup> Jan-Werner Müller, “East Germany: Incorporation, Tainted Truth, and the Double Division,” in *The Politics of Memory and Democratization*, ed. Alexandra Barahona De Brito, Carmen Gonzalez Enriquez, and Paloma Aguilar, p.248, 2001, <https://doi.org/10.1093/0199240906.003.0009>.

<sup>159</sup> Ibid, p.248.

<sup>160</sup> Ibid, p.257.

requirements of lustration law and the idea of so-called “militant democracy with the needs of unification.”<sup>161</sup>

Therefore, security sector reform in Ukraine must first focus on establishing and strengthening democratic institutions that will eventually have the capacity to incorporate and influence structures that lack such traditions before attempting more radical measures of militant democracy such as lustration and de-oligarchization. Considerably, compared to the German example, where the resurgence of previous authoritarian elites was virtually impossible,<sup>162</sup> it is not the case for Ukraine due to the ongoing Russian military intervention, structural governance issues, and economic shortcomings. To mitigate these risks, it's essential to not only establish new democratic institutions but also to implement a paradigm shift in security sector reform. This requires removing the so-called political police functions from relevant institutions, thereby reducing the potential for deep-state conspiracies. By concurrently limiting the powers of these deeply entrenched institutions, it becomes less probable that they can undermine the government or retain their political police identity, which could resurface if illiberal elites regain power.

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<sup>161</sup> Ibid, p. 257

<sup>162</sup> Jan-Werner Müller, “East Germany: Incorporation, Tainted Truth, and the Double Division,” in *The Politics of Memory and Democratization*, ed. Alexandra Barahona De Brito, Carmen Gonzalez Enriquez, and Paloma Aguilar, p.1, 2001, <https://doi.org/10.1093/0199240906.003.0009>.



## 4. CASE STUDY – GEORGIA’S PARALLEL INVESTIGATION SYSTEMS AND PITFALL OF PATRONAL POLITICS

In the above chapters, the thesis discussed the consequences of ruling elites prioritizing national security interests at the expense of international human rights standards, and best practices. Namely, how it contributes to the development of weak, path-dependent institutions that struggle to withstand political pressure and facilitate state capture—the risk these institutions were originally designed to guard against.

The case study of Georgia adds temporal and historical dimensions to the argument. It outlines how the initial haphazard and hurried formation of security sector institutions like the court or the State Security Service of Georgia (SSG) eventually developed autonomous dynamics post-government change. These institutions resisted democratization efforts initiated by the EU, international donors, and through a series of adopted counter-norms and informal practices. Finally, driven by the deeply embedded path dependency, and institutional momentum, these institutions were ultimately entrenched as protectors of the pyramid-like dominant network of informal influence -Bidzina Ivanishvili, the richest man in Georgia.<sup>163</sup>

In this thesis, the security sector reform in Georgia following its initiation in 2003 is categorized into three distinct phases: 1) Establishment and foundation of institutions, 2) period of relative autonomy, and 3) state capture and power consolidation. Throughout all stages, national security concerns were regularly used to justify risks or instances of human rights violations resulting from the excessive powers of these institutions or the lack of democratic oversight. This justification itself evolved slightly following the Russian military invasion of

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<sup>163</sup> “Is Georgia a Captured State?,” Transparency International - Georgia accessed June 12, 2024, <https://transparency.ge/en/blog/georgia-captured-state>.

Ukraine. Initially, actions cited as necessary for national security over time were framed as essential for national sovereignty and independence, even though some measures paradoxically threatened those very principles.<sup>164</sup>

Initial flaws of the security sector reform were a direct byproduct of the political context of the country. In 2003 following the Rose Revolution, political leaders in Georgia found themselves facing a heavy legacy of corruption, poverty, and non-existent institutions.<sup>165</sup> Key issues facing the newly elected government included the monopolization of state resources by oligarchs, as well as everyday crime and corruption.<sup>166</sup> However, rather than adhering to best practices and reform plans jointly developed by international organizations, and civil society, security sector institutions slowly leaned towards centralizing power and exhibited a lack of democratic oversight. The international community and experts warned against this hasty and haphazard approach to reform. Nonetheless, imminent threats to national security and the urgent need for change were repeatedly cited as excuses for deviating from established practices.<sup>167</sup> In that regard, the case study of Georgia also answers whether implementing a reform within a limited timeframe is worth the trade-off of not adhering to best practices.<sup>168</sup>

With hindsight two major flaws can be identified from this period. Firstly, similar to Ukrainian de-oligarchization attempts, pro-western leaders in Georgia took a more personalistic approach to fight rampant crime rates and capture of state institutions by several informal networks of influence. This included the arrest of prominent corrupt figures and oligarchs and the so-called zero-tolerance policy towards petty crime and corruption leading to several cases of human

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<sup>164</sup> Burkadze, Zarina. "Georgia's Struggle with Authoritarianism." *Social Justice Center* (blog), June 12, 2024. <https://socialjustice.org.ge/en/products/sakartvelos-chidili-avtoritarizmtan>.

<sup>165</sup> Carnegie Endowment for International Peace "Georgia's Choices: Charting a Future in Uncertain Times," p.11, 2011.

<sup>166</sup> Ibid, p, 11.

<sup>167</sup> Hans Born and Albrecht Schnabel, "Security Sector Reform in Challenging Environments," p 121, 2009.

<sup>168</sup> Ibid, p. 121, 2009.

rights violations.<sup>169</sup> However, hence the initial flaw – instead of promoting the development of democratic institutions and systematic approaches, public demand for immediate results encouraged shortcuts that ultimately subordinated the judiciary, law enforcement, and intelligence institutions to a pyramid-shaped network centered around President Saakashvili.<sup>170</sup> Secondly, disregard for best practices resulted in what can be characterized as institutional path dependence or institutional momentum. The concept used to describe how institutional development can be shaped by its initial design as well as its history and its informal practices is not new and must be considered one way or another when discussing institutional building in countries that have a history of communist totalitarian regimes.<sup>171</sup> However, the previous government's imperative for quick fixes and instant gratification doubtlessly enhanced these characteristics instead of minimizing them. This included subjugation of the judiciary, via a system of loyal judges and former prosecutors to ensure the support of the justice system in the quest against corruption and rampant crime rates.<sup>172</sup> And the centralization of power by the Ministry of Internal Affairs (the largest security sector institution from 2005 to 2015, encompassing both police and intelligence functions) for the same purposes.<sup>173</sup>

During these early stages, while addressing serious human rights violations, such as instances of unpunished murders committed by law enforcement, representatives of the previous government frequently cited national security concerns. The reform plans formed initially were

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<sup>169</sup> Carnegie Endowment for International Peace “Georgia’s Choices: Charting a Future in Uncertain Times,” p.11, 2011.

<sup>170</sup> Carnegie Endowment for International Peace “Georgia’s Choices: Charting a Future in Uncertain Times,” p.7, 2011.

<sup>171</sup> Bálint Magyar and Bálint Madlovics, “Stubborn Structures: A Path-Dependence Explanation of Transitions in the Postcommunist Region,” *Social Research: An International Quarterly* 86, no. 1, p. 113-114, 2019.

<sup>172</sup> Nino Tsereteli, “Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia,” *German Law Journal* 24, no. 8, p.1473, 2023 <https://doi.org/10.1017>.

<sup>173</sup> Hans Born and Albrecht Schnabel, “Security Sector Reform in Challenging Environments,” p 121, 2009.

<sup>173</sup> Ibid, p. 121.

dismissed as "futuristic" or "idealistic" by some government officials, meanwhile, the concerns were over human rights violations and the suppression of political opponents.<sup>174</sup>

The second stage, of relative autonomy, emerged after the 2012 elections and the change of government. The change itself was partly triggered by instances of unaddressed human rights violations. Following the public demand for reform, the ruling party – the Georgian Dream announced a set of reforms including the separation of intelligence gathering and investigation competencies from the Ministry of Internal Affairs.<sup>175</sup> The separate reform package was aimed at the Judiciary which was no longer controlled by the vertical of the ruling party since the 2012 elections and the subsequent change in government.<sup>176</sup>

In the second stage, from 2012 to approximately 2019, despite attempts by civil society and international actors, the initial flaws of design, institutional momentum, and informal practices developed during the ruling period of the previous government caused security sector institutions to further diverge from the principles of democratization and accountability. While these institutions were provided a certain degree of autonomy, this newfound independence was quickly used to exchange it with the ruling party for political loyalty and mutual support. The most straightforward example of this is judicial reform, where the control over the judiciary system and the possibility to convict officials of the former government was used by the influential network of the judicial elite, in return for constitutional entrenchment and lifetime appointments.<sup>177</sup>

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<sup>174</sup> Ibid, p.121.

<sup>175</sup> Lika Sajaia, Sopho Verdzeuli, and Nazli Yildirim Schierkolk, *Reform of the Security Service in Georgia: Results and Best Practices*, p. 12, 2018.

<sup>176</sup> Nino Tsereteli, "Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia," *German Law Journal* 24, no. 8, p.1473, 2023 <https://doi.org/10.1017>.

<sup>177</sup> Ibid, p.1473- 1474.

The formation of the State Security Service of Georgia turned out much more complex, due to the lack of constitutional guarantees. Nonetheless critically important, the reform highlighted the fundamental reluctance of the ruling elite and said services to create an intelligence institution that aligns with the principles of a democratic society. However, given the public demand for reform and the unpopularity of expressing undemocratic views, similar to the phenomenon described by Gergana Noutcheva and Kateryna Zarembo, the reluctance to reform translated into rhetorical and normative acceptance without substantive implementation in the legislation.<sup>178</sup> Simultaneously, procedural norms and subordinate normative acts that contradicted these very principles were adopted. This created contradictions within the legal system. At a fundamental level, the principles adopted in the constitution and key legal acts were fully compatible with international standards. However, in practice, institutions tended to rely on undemocratic procedural norms and subordinate acts issued by public officials, despite their hierarchical inferiority and conflict with the principles of reform, international human rights standards, and the Georgian constitution itself.

The most prominent example of how the Georgian security sector resisted and countered public demands for reform is the creation of an independent State Security Service (SSG). This development stemmed from a politically biased and overpowered Ministry of Internal Affairs, leveraging counter-norms, informal institutional practices, and justifications of national security to maintain its stance.<sup>179</sup> After the introduction of the draft project, concerns were voiced about the service's duplication of police functions while being equipped with

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<sup>178</sup> Gergana Noutcheva and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed June 4, 2024, <https://doi.org/10.1177/00108367241244978>.

<sup>179</sup> Giorgi Tsikarishvili and Tatia Koniashvili, *Democracy Research Institute (DRI): State Security Service – Duplication of Competences and Parallel Investigative Systems*, p. 8, 2020.

exceptional powers typically reserved for cases involving national security risks.<sup>180</sup> Legal scholars and civil society argued that duplication of police functions and investigative intelligence gathering competencies allowed SSG to commit a plethora of human rights violations, including illegally obtaining sensitive information on a criminal case, circumventing judicial checks and balances prescribed by legislation, wiretapping political opponents and irrationally spending resources.

However, the decision-makers responded firstly by citing national security concerns, that the excessive competencies of the SSG were caused by and limited to the increased threats to national security.<sup>181</sup> Although the SSG's mandate was limited and narrowly defined by law, specialized procedural norms and exceptions introduced in the same legislation contradicted this principle.<sup>182</sup> The Prosecutor General further contributed to the resistance with his subordinate acts directly contradicting the legislation thus being invalid in that regard.<sup>183</sup> Furthermore, he routinely used discretionary powers to distribute criminal law cases to the SSG despite the absence of any national security threats.<sup>184</sup> Finally, the institution and its officials conveniently choose to favor undemocratic procedural norms and subordinate acts despite their hierarchical inferiority and conflict within the system of legal norms. Table 1 illustrates non-exclusive forms of resistance undertaken at the legislative, procedural, and informal levels to stall security sector reforms from 2012 to 2019.

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<sup>180</sup> Lika Sajaia, Sopho Verdzeuli, and Nazli Yildirim Schierkolk, *Reform of the Security Service in Georgia: Results and Best Practices*, p.6, 2018.

<sup>181</sup> "Statement of the Ministry of Internal Affairs of Georgia," Ministry of Internal Affairs, accessed June 14, 2024, [//police.ge/en/shinagan-saqmeta-saministros-gantskhadeba/8481](https://police.ge/en/shinagan-saqmeta-saministros-gantskhadeba/8481).

<sup>182</sup> Giorgi Tsikarishvili and Tatia Koniashvili, *Democracy Research Institute (DRI): State Security Service – Duplication of Competences and Parallel Investigative Systems*, p. 22, 2020.

<sup>183</sup> Giorgi Tsikarishvili and Tatia Koniashvili, Democracy Research Institute (DRI), *Anti-Corruption Agency - Legal Framework and Gaps in Practice*, p.11, 2022.

<sup>184</sup> Ibid, p. 11

**Table 1 – Reform objectives and counter-measures**

Objectives of the Reform	Counter measures (norms/practices)	Risks of Human Rights Violation	National Security Justifications	Reasons for Resistance
SSG's mandate is limited to national security threats	<ul style="list-style-type: none"> <li>• Exceptions and counter-norm in the legislation</li> <li>• General prosecutor's subordinate directive</li> <li>• Routine use of the (exceptional) discretion to distribute cases by General prosecutor</li> <li>• Adoption of practices by institutions</li> </ul>	<ul style="list-style-type: none"> <li>• Circumvention of procedural rights guaranteed in criminal law</li> <li>• Illegal surveillance and wiretapping</li> <li>• Chilling Effect on Politicians and NGOs</li> </ul>	<ul style="list-style-type: none"> <li>• Broad mandate supports risk prevention</li> <li>• Changing context and practices of other countries</li> </ul>	<ul style="list-style-type: none"> <li>• Monopoly over surveillance apparatus</li> <li>• Maintain regular funding from State budget</li> <li>• Historical momentum</li> </ul>
Implementing Checks and Balances on the Secret Surveillance Apparatus	<ul style="list-style-type: none"> <li>• Carry out facade reform</li> <li>• Limit the recourses of monitoring institutions</li> <li>• Adopt subordinate acts and informal practices contradicting constitution</li> <li>• Constitutional court stalling the plea of CSOs since 2016</li> </ul>	<ul style="list-style-type: none"> <li>• Illegal surveillance and wiretapping system</li> <li>• Chilling Effect on population especially politicians and NGOs</li> <li>• System of total control</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of trust towards third party network providers</li> <li>• Increased risks of terrorism and military intervention</li> </ul>	<ul style="list-style-type: none"> <li>• Parrarel system of investigation</li> <li>• Illegal surveillance aid law enforcement efforts</li> <li>• Tool of political control</li> </ul>

Despite significant achievements in the spheres of combatting everyday corruption, security sector reform and institutional building in Georgia suffer from two major diseases institutional path dependence and informal networks of influence in judiciary and other security sector institutions. These flaws played a decisive role in forming the successful resistance barring substantial reform of security sector institutions since 2012. Notably, the third stage of institutional change, when power was consolidated under the ruling party of Georgia and the

richest man in the country – Bidzina Ivanishvili,<sup>185</sup> exposed the façade nature of national security concerns. These issues were no longer expressed after the incumbent government announced a geopolitical shift, or when parliament adopted measures that contradicted the constitution and undermined the very interests these institutions had sworn to protect.

The case study offers a few key takeaways, at first, it showcases the superiority of systematized approaches to personalized punitive measures in security sector reform. Institutions can slowly change faulty informal practices,<sup>186</sup> however, the reverse can also be true. In the case of Georgia flawed initial design and previous elites' fixation on quick results and disregard for best international practices and models led to the formation of fragile, undemocratic, institutions unable to withstand political pressure and tend to maintain a democratic facade only until it is no longer necessary, rather than truly fulfilling their intended roles.

Another significant issue is the evolution of how risks and actual instances of human rights violations are justified by national security concerns. In the initial phases of the reform, some of these fears might have merit, however, failure to prioritize the institutional building aspect instead of neutralization of threats such as corruption, and oligarchization turned detrimental. The present shift in security sector institutions from justifying actions based on national security to protecting state sovereignty reveals actual double standards. These concerns are no longer voiced when protected interests are threatened by the government or powerful elites, highlighting that the underlying resistance is fueled by the deeply undemocratic attitudes of key stakeholders instead of voiced national security concerns. Indeed, the concerns for safety and national security were never voiced and those very institutions remained indifferent when

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<sup>185</sup> Davit Zedelashvili, "The Rule of Law in Georgia: What Can the EU Leverage?" *Verfassungsblog*, March 5, 2021, <https://verfassungsblog.de/rule-of-law-georgia/>.

<sup>186</sup> András Jakab, "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary," *American Journal of Comparative Law* 68:4, p. 763, 2020.



Bidzina Ivanishvili – the Oligarch and de facto ruler of Georgia announced repressions of dissent when daily reports of unidentified armed groups attacking civil society activists and media personnel were aired.<sup>187</sup> Such factors must be accounted for by the international community when undertaking security sector reform in described contexts.

Finally, external actors such as the EU Delegation, Advisory Mission, and NATO take great pride in adhering to the principles of local ownership – tailoring the reform to the needs and attitudes of local stakeholders.<sup>188</sup> Chapter 2 of the thesis also analyzed the reluctance of international and transnational organizations to engage with other states on the issues of national security to avoid excessive criticism. However, the case study demonstrated how this vacuum is exploited by fundamentally undemocratic attitudes to preserve and maintain their grip over the system while creating the illusion of reform. While this thesis does not suggest the national security priorities of host countries must be dictated by external influences. It is important to acknowledge specific contexts like the one discussed and recognize that such attitudes should not be solely attributed to the local ownership aspect of reform. Overall, the case study highlighted the false dichotomy that prioritizes national security over human rights protection and underscores the criticality of human rights protection being the cornerstone of the SSR, for institutional resilience, especially in countries with totalitarian pasts such as Ukraine and Georgia.

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<sup>187</sup> “With a Controversial New Law, Georgia Invites Bids from Russia and the EU,” accessed June 14, 2024, <https://carnegieendowment.org/russia-eurasia/politika/2024/06/georgia-russia-vs-west?lang=en>.

<sup>188</sup> Gergana Noutcheva and Kateryna Zarembo, Normative Power at Its Unlikeliest: EU Democratic Norms and Security Service Reform in Ukraine, 2024, accessed May 1, 2024, <https://doi.org/10.1177/00108367241244978>.

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## CONCLUSION

The main argument of the thesis is that human rights are not a luxury, but rather the key component of security sector reform, to promote institutional resilience and prevent entrenchment. The argument is especially relevant for the countries with totalitarian pasts such as Ukraine and Georgia.

The thesis also demonstrates that human rights violations are often overlooked in security sector reform, due to national security concerns. This creates a false dichotomy between human rights and the advancement of national security interests. The case study of Georgia serves as a cautionary tale against such approaches. In that respect, the thesis offers a twofold argument. Firstly, it reveals the double standards and fundamentally undemocratic attitudes of key stakeholders resorting to such justifications. However, the thesis also argues that human rights should remain a top priority, even in situations where there are legitimate national security concerns. Other approaches, analyzed in this thesis have been shown to institutionalize human rights violations and strengthen informal networks of influence more suited to an authoritarian regime than a democratic society. As such, Georgia's case study can be a valuable resource for advocates of systemized institutional approaches in Ukrainian SSR prioritizing human rights protection and democratic control over the security sector. This contrasts with the security sector reform efforts focusing on instrumentalizing legislation against individual threats, potentially undermining institutional practices meanwhile.<sup>189</sup>

Finally, by examining the underlying causes of conflict and resistance within the legal framework of Ukrainian SSR, the thesis showcases the deficit of international engagement with

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<sup>189</sup> European Commission for Democracy through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) Of Ukraine, p. 19, 2015.

the host state's legislation and practical approaches to national security interests. This argument is built on the case law of the ECtHR which grants states a wide margin of appreciation in determining national security threats for their specific context.<sup>190</sup> Additionally, the thesis points out that the EU and other major international actors are unwilling to critically evaluate the host state's legislation and perception of national security interests to avoid criticism. Normative and political vacuum – established due to the very practices are often exploited by fundamentally undemocratic attitudes aiming to undermine the rule of law and human rights protection. In that regard, the thesis further underscores the need for standardized and nuanced approaches to regulations concerning national security interests and threats, not only at the national level but also at international and transnational levels.

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<sup>190</sup> Liu v. Russia, No. 29157/09, §85, July 26, 2011.

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