"Judicial Reform in Ukraine: Problems and Prospects"

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Progress of the judicial reform

On May 31, 2010, the President submitted the draft law "On Judicial System and the Status of Judges" to the Parliament[1]. On June 3, the draft law was already passed by the Parliament in the first reading without any public and parliamentary discussion. On July 6, a draft of the law for the second reading was promulgated, which contained virtually no significant amendments to the previous draft. And already on July 7, the Parliament adopted the law as a whole. Human rights and other non-governmental organizations as well as public activists (132 persons in total) addressed the President with a petition to veto the law[2], however the President signed the law and it was enacted on July 27, 2010.

Despite the varying assessments of this reform, the majority however tends to believe that the reform had its positive sides but aggravated the situation significantly as it unbalanced the judicial system and made judges more dependent on the politicians. In addition, a number of novelties may be considered violation of the right for fair trial.[3]

The positive sides include a clear procedure for selection of judges and their social and material provision defined by the law, the finalized establishment of specialized courts: administrative, civil, criminal and commercial courts, as well as elimination of military courts. However, the function of the Supreme Court, which has lost almost all of its powers, remains rather weird. In this situation, there is actually no effective system of a coherent judicial practice. The Supreme Court is deprived of any capacity to influence the judicial practice of specialized courts.

The main drawbacks of the judicial reform can be summarized as follows[4]:

1. Significant extension of functions vested in the High Council of Justice for appointment and dismissal of judges, as well as application of disciplinary proceeding to judges. Moreover, it is envisaged by the law that chairmen and deputy chairmen of all the courts, except the Supreme Court, are to be appointed and dismissed from their positions by the High Council of Justice upon submission from a respective judicial council. At the same time, the High Council of Justice remains a political body that is formed mainly by other public authorities. In addition, part 1 in

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[1] Available here: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=37806.

[2] Please refer to the petition text here: http://helsinki.org.ua/index.php?id=1279436602.

[3] For example, refer to the *New Law on the Judicial System: Fast and Poor Justice from Smart but Dependant Judges*, http://www.pravo.org.ua/?w=r&i=&d=861; *Law on the judicial system and status of judges – pros and cons*, „Svoboda" radio, http://www.radiosvoboda.org/content/article/2119835.html.

[4] http://www.khpg.org/index.php?id=1298296524

article 131 of the Constitution defines the powers of the High Council of Justice comprehensively, but the above mentioned powers are not there.

2. The President reserves the power to establish and eliminate courts upon submission of the Minister of Justice and the chairman of the superior specialized court (article 19 of the law), which contradicts clause 1 in article 6 of the European Convention on Human Rights demanding the court to be established by law. That means that the "judicial proceedings in a democratic society should be ruled by law, the source of which is the parliament, rather than depend on the discretion of the executive power".

3. Article 86 of the Law "On Judicial System and the Status of Judges" preserves the inquisitional procedure for disciplinary prosecution of judges according to which a member of the High Qualification Commission of Judges or the High Council of Justice will check the judge, make a conclusion upon the check outcome and participate in passing a verdict on the disciplinary case. In other words, a member of the disciplinary authority is virtually an investigator, a prosecutor and a judge in relation to the judge in one person. This violates the principle of the competitiveness and impartiality. According to European standards, the disciplinary procedure should be like defined in clause 1, article 6 of the European Convention on Human Rights and should guarantee the right of defense to the full extent[5].

4. It is envisaged that the Congress of Judges of Ukraine and the Council of Judges of Ukraine should equally represent every judicial jurisdiction. As the result, the judges of general courts are under-represented. This way of forming the highest representative body of judges results in representation of over 6 thousand judges of general courts by a lower number of judges than 2.5 judges of commercial and administrative courts in total. The Congress of Judges is entitled to elect judges to the High Qualification Commission and the High Council of Justice. These both agencies have a broad competence in issues of selection, career and responsibility of judges that's why they should fall under requirements valid for "an independent agency with substantial representation of judges elected by other judges in a democratic way"[6].

5. Article 80 of the Law "On Judicial System and the Status of Judges" envisages that the judges should be selected to the court of a higher level or another specialization on the way of electing judges for lifetime. However, this procedure does not provide for a contest and does not set any criteria for selecting judges, there is only a provision saying that the candidates should submit an application and be interviewed at the High Qualification Commission of Judges, and there is also a requirement concerning some length of judicial work experience. At the same time, clause 4.1 of the European Charter on the Statute of Judges, clause 29 in Opinion No. 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges prescribe that the length of work experience should not be the guiding principle for promotion of judges, the professional experience and number of work years should be viewed only as an additional basis for independence of the judge.

6. Articles 66 and 69 of the Law "On Judicial System and the Status of Judges foresee an obligation for a judge appointment candidate to complete a six-month special training first at a specialized institute of higher juridical education matching the IV level of accreditation, and

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[5] Clause 3 of Principle VI in Recommendation No. (94) 12 "Independence, Efficacy and Role of Judges", clause 60 b in Opinion No. 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges, clause 69 in Opinion No. 3 (2002) of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

[6] Clause 45 in Opinion No. 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges.

afterwards at the National School of Judges. The training of future judges at a specialized institute of higher juridical education of the IV accreditation level (Institute of Professional Judges Training in Odesa and the similar faculty of the National Juridical Academy named after Yaroslav Mudriy in Kharkiv) operating within the system of the Ministry of Education and Science contradicts recommendations given in clause 66 of Opinion No. 10 (2007) of the Consultative Council of European Judges "Councils for the Judiciary in the service of society". According to European standards, special training of judges may not be performed by educational institutions dependent on the education ministry in particular in matters of accreditation. This should be done by an autonomous institution under the judiciary control.

7. The action limitation periods and procedural time limits for appeal of judgements were reduced, and the opportunity for appeal in cases on certain types of administrative offences were eliminated thus potentially restricting the right for access to court or the right for appeal of judgements. The terms for conduct of proceedings were significantly reduced as well, which will affect the quality of proceeding when the judges are highly overloaded.

8. Decreasing financial and social security of judges In particular, the right of the judge for retirement for health reasons was abolished; the severance pay for the retiring judge was cut; the list of positions qualifying for judicial employment record was narrowed; a regulation was introduced concerning the provision of only service housing to judges who need to improve their housing conditions; the right for free medical care in public health care institutions is granted only for retired judges and members of their families; the procedure of judges' social insurance was changed and a number of other financial and social benefits was abolished. The Law has cut the current allowances for judges while promising to pay a high salary starting from January 2015.

One of the first consequences of the reform was the massive submission of retirement applications from judges with a long work record[7]. By the end of 2010, there were 700 of them, which account for 10% of all the judges. Further on, the government pursued the staff turnover in courts in order to establish a complete control over the judiciary system. The method of selecting the "right" judges and coming down on disloyal judges was unleashed. The judges were reassigned even without a contest or without due attention to assessment of candidates during the primary selection. The trend towards using the judges for politically motivated judgements became evident. A lot of judges submitted resignation as a result of this pressure and the number of vacant judicial chairs grew up.

New Code of Criminal Procedure

The adoption of the new Code of Criminal Procedure in April 2012 (CCP, effective as of November 19, 2012) was an important step in the reform of the country's criminal justice system despite some criticism. It has introduced significant progressive changes[8].

1. The judicial control over pretrial investigations was reinforced. Almost all the actions posing a significant interference with human rights and liberties require a preliminary permission of the court. The CCP introduced the post of the investigator judge who is responsible for judicial control at the pre-litigation stages. Actions that are subject to judicial permission but were performed without such permission entail the exclusion of evidence obtained on this way.

[7] Please see also here: "About things that the cadres decide", „Dzerkalo tyzhnia", No. 36 (816) October 2-8, 2010, http://www.dt.ua/1000/1050/70505.

[8] http://www.khpg.org/index.php?id=1362642470

2. It is prohibited to use the out-of-court evidence. This novelty increases the role of the judge as the judge of fact, makes the position of litigators more equal and promotes the competitiveness of litigators, restores the principle of impartial investigation of the evidence. In addition, it allows to shorten the duration of pretrial investigations through reduction of bureaucracy and motivates the litigators to take the case to the court faster.

3. The doctrine of competitive expertise is enforced. According the new CCP, each of the litigators can resort to the help of an expert witness and competitive expert findings may arise in the court. However, it is necessary to provide for respective budgetary funds to pay for services of experts in cases, where the defense is provided through the system of free legal assistance.

4. A detailed specification is provided for procedures used for solving various issues that arise during the pretrial investigation: searching, preventive measures, etc.

5. The right of prosecuting authorities to permit the participation of an attorney for defense in a case was excluded. Only the defendant can decide whether to invite the attorney for defense (except when the legal assistance is provided for free).

6. The assignment of attorneys paid by the state is possible only through the Centers of Free Legal Assistance. This is an important safety lock against the use of "puppet attorneys".

7. Introduction of the doctrine *"fruits of the poisonous tree"*, when not only the evidences received by violation, but also the evidences received with the help of information originating from unacceptable evidences are considered unacceptable.

One of the really positive effects of the CCP was a significant decrease of criminal arrests, a two-fold decrease of the annual number of detainees in pretrial detention centers, and the overall reduction of convictions. The system of free legal assistance introduced on January 1, 2013 and enactment of the Law on the Bar should also be mentioned among the changes for the better in the system of criminal justice.

Attempts of the government to alter the Constitution

In 2013, the government declared that the next step in the judicial reform had to be the introduction of changes to the Constitution. At the same time, the political dependence of the judiciary was aggravating.

On July 4, 2013, the President submitted to the Verkhovna Rada a draft law on introduction of changes to the Constitution of Ukraine concerning the reinforcement of guarantees for independence of judges[9]. On October 10, 2013, the Verkhovna Rada preliminary approved this draft law with 244 votes. In order to be finally adopted, it should be supported at the next regular session (starting after February 2014) with at least 300 votes of people's deputies.

According to this draft law, the Verkhovna Rada will be withheld from the judicial manpower formation. All the decisions on appointment, transfer and removal of judges will be taken by the President upon submission of the High Council of Justice, and regarding the transfer – by the High Qualification Commission of Judges. The judges will be appointed immediately for lifetime (at the moment, the President first appoints the judge for 5 years, and afterwards the judge is elected by

[9]The draft law on introduction of changes to the Constitution of Ukraine concerning the reinforcement of guarantees for independence of judges No. 2522a dated July 4, 2013. // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=47765

the Verkhovna Rada for lifetime). The majority in the High Council of Justice and the High Qualification Commission of Judges will consist of judges elected by the congress of judges. The draft law also suggests legalizing the powers of the High Council of Justice to appoint court chairmen and their deputies upon submissions made by respective councils of judges.

According to many experts, the adoption of this law cannot eliminate the dependence of judges on the political power. On the contrary, it will still reinforce the President's influence on the judicial system, because the President will take part in the further career of judges in addition to their appointment. The High Council of Justice and the High Qualification Commission of Judges continue to be the instrument that the President and his administration use to exercise influence on the judiciary system. Although the majority in these agencies will be formed by judges elected by judges as it is required by European standards, the congress of judges, that will do it, is now completely dependent on the President.

In simple terms, if this law is passed, it will ultimately seal the absolute dependence of judges on the mafia. Fortunately, it is not likely that over 300 members of parliament will vote for it in the context of the current political crisis.

Access to justice

According to the Law "On Introduction of Changes to some Legislative Acts of Ukraine on Payment of the Court Fee" dated September 19, 2013, the rate of the court fee grew up by two times almost in all types of cases. Moreover, the legislator imposed charging of the court fee even for persons punished by the court for administrative offence.

The fair balance between the court fee rate for filing of lawsuits in administrative and civil cases was disrupted.

If the court fee for filing of a lawsuit against the public authority was lower before, then after the introduction of changes, in case of recovery claims to a public authority, twice as much should be paid (0.2 percent of the claim amount but not less than 1.5 equivalents of the minimum wage and not more than 4 minimum wage equivalents) compared to filing of a lawsuit against a private person through civil justice (1 percent of the claim amount but not less than 0.2 of the minimum wage equivalent and not more than 3 minimum wage equivalents).

Thus, the minimal court fee after these changes of 2013 makes up as much as 1,720.50 UAH for filing of such lawsuits in the administrative procedure, and only 229.40 UAH in the civil procedure. As opposed to this, the public authorities are usually exempted from paying the court fee for filing of pecuniary claims against the private persons.

However, the legislator stipulated that only one tenth of the court fee should be paid when filing a pecuniary claim in an administrative case and the rest will be charged by the court based on results of the trial according to upholding of the claim. However, the risk of losing such a significant sum refrains many plaintiffs from pecuniary claims against the authorities. This risk is also associated with reluctance of administrative courts to decide in favor of reimbursement from administrative authorities.

Thus, the changes in the legislation on the court fee have significantly limited the access to justice, especially in claims of private persons against the authorities.

Situation with selection and prosecution of judges

Formal decisions on appointment of judges, their transfer to other courts and dismissal are taken by the President and the Verkhovna Rada, however they do it only upon submission of the High Council of Justice and the High Qualification Commission of Judges. Both of these agencies, which play a key role in the formation of judicial manpower and prosecution of judges, are anyway controlled by the President and the pro-presidential majority in the Parliament. It is not surprising that in many issues (transfer of judges and their assignment to administrative positions) they act simultaneously, though they take their formal decisions independently from each other.

Selection of judges for positions at the upper level courts as well as for positions of court chairmen and their deputies occurs behind the scenes. The law neither sets objective criteria of selection, nor provides for a contest. It is indicative that most of all judges are transferred from Donetsk and Lugansk regions and later many of them are appointed to senior positions in courts. As a result of this "policy, these are the regions with the highest number of vacant positions of judges[10]. Minor progress could be observed only in the procedure of the first assignment to the position of the judge: the contest made it possible for candidates to get judicial positions despite some manipulations without prior agreements and protection. However, this progress is almost completely offset by the mechanisms of career growth and liability of judges that most the biggest threat to independence of the judge.

In 2013, the government continued with the use of mechanisms of disciplinary liability to put pressure on the judges. The grounds for liability are defined in the law in such a way that any judge can be held liable. The judge can easily loose his/her position for taking of "unassisted" decisions, for example for violation of the trial duration, which became the actually main reason for disciplinary liability of judges in the situation when they are overloaded with cases[11]. The public monitoring[12] suggests that the disciplinary practice is inconsistent and often bears the signs of selective prosecution. That means that the justice is selective towards the judges as well. This all has a restrictive impact on the judges forcing them to censor their decisions on their own even if there is no instruction on a specific outcome of the case.

These and other mechanisms of judges' dependence are exposed in particular in the judgment of the European Court of Human Rights in the case *"Oleksandr Volkov v. Ukraine"* dated January 9, 2013. The European Court of Human Rights made a remark that any trespass maybe be treated as the breach of oath and lead to dismissal of the judge, if this is desired by the disciplinary authority. In view of the use of disciplinary procedure measures for pressure on the judges, the European Court of Human Rights obliged Ukraine to reform the system of judicial discipline[13].

Which constructional changes are needed for the judiciary?

The country extremely needs a genuine rather than a superficial reform that will ensure an affordable, transparent and fair justice, true guarantees of independence for judges, significantly

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[10] There are no judges left for people of Donbas // http://www.pravda.com.ua/news/2013/05/28/6990889.

[11] As of the first half year 2013, the average monthly rate of new cases made up 63.5 cases per one judge of the local general court. That means: the judge of a local general court should completely resolve at least 3 cases per day while working without holidays in order to be free of disciplinary liability. As to the administrative courts of appeal – the average monthly load of new cases per one judge makes up 280.7 cases, i.e. one judge should process at least 12 cases every day while working without holidays.

[12] The disciplinary liability of judges in Ukraine: problems of legislation and practice / Kuybida P., Sereda M. – K.: FOP Moskalenko O.M., 2013. – 72 pages. (http://pravo.org.ua/files/A_D_NEW_final.pdf).

[13] Judgement of the European Court of Human Rights in the case "*Oleksandr Volkov v. Ukraine*" dated January 9, 2013. // www.minjust.gov.ua/file/26531

improve the execution of judgments, create better conditions for professional activity of judges. It should be started from improvement of constitutional principles in order to strengthen the judiciary as truly fair and independent in the situation when a new Constitution of Ukraine is created. The following provisions are proposed for the draft of the new Constitution.

1. The draft Constitution should incorporate the idea of independence of the judiciary from the legislative and executive power by stressing its specificity and by providing increased guarantees of its independence. In a law-governed state the court is a *supranational* rather than a national body, because it has to judge the state while avoiding the position of the judge in its own case. In order to stress it, the Constitution should envisage that *the judiciary is ruled by the people's will only if it is expressed as a Law.* Hence, it is prohibited for the judiciary to be the instrument for implementation of political sentiments of the masses; it should function exceptionally on the rule of law grounds.

2. As opposed to article 124 of the current Constitution, the judgments should be made *in the name of the Law* (including the Constitution, if the Constitutional Court is meant) rather than *in the name of Ukrain*e. In this case, the law is above the state.

3. The draft Constitution should completely reproduce article 6 of the European Convention on Human Rights, which protects the right for a fair trial. It should be noted that this is the only fundamental right of the first generation which is absent in the current Constitution (only some of its aspects are included into articles 59 and 62).

4. How paradoxical it might be, the judiciary is not a subject of the legislative initiative according to the current Constitution. The list of these subjects should be extended by including the Supreme Court of Ukraine.

5. Principles of territoriality and specialization of the Ukrainian judicial branch of power, which are present in the current Constitution, should be supplemented with the principle of *the chain of command*.

6. It is suggested that the power of official interpretation of laws be transferred from the Constitutional Court of Ukraine to the Supreme Court. The Constitutional Court will interpret the laws only when they are to be checked for compliance with the Constitution. The Constitutional Court should decide on conformity of laws and other regulations with the Constitution and provide official interpretation of the Constitution.

7. It is necessary to increase the scope of subjects of constitutional requests by including the chairmen of the general jurisdiction courts.

8. Instead of declaring the *general* (unrestrictedly broad) independence and inviolability of judges in article 126 of the current Constitution, the draft Constitution should foresee the preservation of their *functional independence*, i.e. the independence from any pressure or external influence during the exercise of their power.

9. The permission to detain or arrest a judge prior to the verdict of guilty should be granted by the High Council of Justice (please refer to clause 18 for details on its staff and procedure of formation) instead of the parliament, as in article 126 of the current Constitution.

10. The draft Constitution should provide for that *the judges do not assume political obligations to authorities and persons who elected or appointed them.* This guarantee of the political independence is very important.

11. As it is known, the prohibition for judges to pursue "any political activity" did not interfere with some high-ranking judges to participate in parliamentary elections and keep the post for a long time while combining it with the duties of the judge. That's why the draft Constitution should make this prohibition more specific, for example as follows: *"Professional judges may not be members of political parties, movements and trade unions, participate in any political activity, stand for election to public authorities or local governments, hold a representative mandate, fill any paid positions, perform any other paid work except the scientific, teaching and creative work."*

12. A person should be at least 30 years old to fill the position of the judge. The list of requirements to be met by a professional judge, in addition to the present ones in the current Constitution, should be supplemented with *high standards of integrity* and *specialized training in the judicial profession*.

13. The first assignment to the position of the judge for three years (instead of five envisaged by the current Constitution) should be done by the President. All other judges should be elected by the parliament for lifetime according to the procedure established by law.

14. The institute of the judge dismissal for the breach of oath should be abandoned because of its diffuse (unspecific) grounds for the legal liability of the judge.

15. It is proposed to extend the list of principles of the judicial procedure, specified in article 129 of the current Constitution, by adding the following principles:

a) supremacy of law and lawfulness;

b) equal access of parties to expertise;

c) the judicature within reasonable terms;

d) enforcement of rights and lawful interests of the victim, compensation of damage to the victim;

e) security of the judgment enforcement.

16. The draft Constitution should define a specific list of powers of the Supreme Court of Ukraine based on its status of the highest judicial entity in the system of general jurisdiction courts. The list should include in particular the revision of judgments in cases with exceptional circumstances, revision of a judgment if there is there is a decision of an international judicial institution against Ukraine.

17. The draft Constitution should envisage financing of courts by the State Treasury of Ukraine through administrations subordinate to the Supreme Court of Ukraine. This order should guarantee the financial independence of the court from the influence of executive authorities and local governments.

18. The draft Constitution should change the status and formation order of the High Council of Justice. Its range of competence should include the following new powers: 1) temporary withdraw judges from exercising of their powers; 2) provide consent for detention or arrest of the judge prior to the judgment of conviction. The High Council of Justice should consist of nineteen members and at least a half of them should have the work experience on the position of a professional judge. This requirement agrees with article 11 of the Universal Charter of Judges (1999) requiring the administrative or disciplinary prosecution of judges to be performed by an

independent entity consisting mostly of professional judges. The draft Constitution should foresee that the congress of judges of Ukraine, the congress of representatives of juridical higher education and science institutions of Ukraine should elect seven members each, and the all-Ukrainian conference of prosecutors – two members. The Chairmen of the Supreme Court of Ukraine, the Head of the Constitutional Court of Ukraine, and the Chief State Prosecutor of Ukraine should be members of the High Council of Justice according to positions.

Necessary amendments to the legislation

The changes to the Constitution should be certainly followed by a package of amendments to the legislation on the judicial system, the status of judges and the judicature, because otherwise they will only aggravate the dependence of judges. It is expedient to adopt respective amendments even without waiting for changes to the Constitution.

Amendments to the legislation should obligatory foresee:

– *reform of the judicial self-government system*. It is necessary to simplify it by abandoning the assigned agencies – conferences and councils of judges of general and specialized courts, so that every court could delegate its representative to superior bodies of judicial self-government. It will apparently entail an increase in the number of delegates, but it will be also more difficult to influence this amount of judges with political means. Moreover, it is necessary to give the assembly of judges a mandate to appoint the chairmen of courts.

– *reform of system for selection of judges*. In particular, contest mechanisms of the career progression for judges based on objective criteria should be foreseen. Define the court where the judge should work, his/her transfer to another court should be in the competence of the High Council of Justice and occur by the contest results;

– *reform of the system of judges' disciplinary liability***.** It is necessary to define the grounds for disciplinary liability more clearly; provide for proportional sanctions, set periods of limitation for the disciplinary prosecution, foresee a competitive procedure of disciplinary proceedings, create a single disciplinary authority. Establish permanent qualification and disciplinary boards within the High Council of Justice and abandon the High Qualification Commission of Judges;

– *stronger role of the Supreme Court in establishment of the consistent judicial practice***.** It is expedient to take the draft law submitted by factions "Batkivshchyna" and "Udar" as the basis and work further on it towards the waiver of interpretations of the Supreme Court and superior specialized courts regarding the use of law outside the judicial procedures, as well as the waiver of unmotivated increase of the Supreme Court composition;

– *revision of court fee rates*. It is necessary to remove the discrimination of plaintiffs filing pecuniary claims against the authorities.

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