

JUDICIAL REFORM IN UKRAINE: MISSION POSSIBLE?

POLICY REPORT

EXECUTIVE SUMMARY

Today's justice sector reform is by far the most comprehensive one in the modern history of Ukraine. What are the preconditions for this reform? Is it possible to transform Ukraine's judiciary by keeping the old courts that failed to provide justice in the last 25 years of the country's independence, or should Ukraine rebuild its court system completely? What results could be achieved by implementing European standards in the judiciary in today's Ukraine and what is the impact of the EU-Ukraine Association Agreement?

Recently Ukraine's constitutional provisions regarding judiciary were changed, opening the door for a full-fledged judicial reform, allowing, among other things, the creation of an entirely new Supreme Court. At this stage of the reform, the political leadership of the country and its civil society are concentrated on simultaneous development and adoption of the necessary secondary legislation and its implementation.

Even though this process for the most part follows the existing Strategy for judicial reform, its success is far from decided. So far it is unclear whether the legislative framework provides enough effective tools, and the risk of further exertion of political influence on courts remains. Considering this, it is very important to not leave Ukrainian political elites alone with these choices. To ensure the survival of the reform, maximum public and international oversight and involvement are needed, in both legislative work and implementation.

In order to fulfill its obligations under the EU-Ukraine Association Agreement, Ukraine still has to adopt and implement a legislative package, considering the demands from civil society and international community. At the same time, it is crucial to limit the informal practices in the court system, especially when it comes to selection process of the new Supreme Court and proceedings in the newly established courts.

The EU and the rest of the international community should closely observe further legislative steps and involve civil society in the assessment of its implementation.

Taking into account that the European standards on the composition of the judicial governance bodies based on the principle of "majority of judges elected by judges" do not work in transitional democracies, Ukraine might need to change this approach, with recognition from the EU and international organizations.

The policy report analyzes the current state of justice sector reforms in Ukraine after the 2013-2014 Revolution of Dignity, provides some answers to the questions stated above, and sets out recommendations for further actions of Ukrainian authorities and international partners to make this crucial reform succeed.

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This policy report covers period from March 2014 till December 2016.

This policy report is prepared within the framework of the International Renaissance Foundation (IRF) European programme initiative's in-house project 'Implementation of select reform commitments under Association Agreement'. The project is implemented within the Open Society Foundations' network effort to assess and report on the progress made by Georgia, Moldova, and Ukraine in the implementation of political commitments of Association with the EU.

The views, opinions and statements expressed by the authors and those providing comments are their only and do not necessarily reflect the position of the IRF. Therefore, the IRF is not responsible for the content of the material.

INTRODUCTION

The EU-Ukraine Association Agreement lists rule of law and fight against corruption among the “key elements of strengthening the cooperation between the parties.” Needless to say, both elements cannot exist in a country where the judicial system does not function properly, and since this is the case for Ukraine’s justice institutions, this sector therefore has to be reformed substantially. Justice sector reform is among the most demanded by the public at the moment¹.

In 2015, the Strategy for Judicial Reform was adopted by the decree of the President of Ukraine². It primarily focuses on strengthening judicial independence, making it more efficient and accountable, and renewing the judiciary. To implement the Strategy, in the last two years Ukraine has adopted a number of legislative measures, which culminated in passing constitutional amendments regarding judiciary together with the new edition of the Law “On Judiciary and Status of Judges” in June 2016. These changes initiated a comprehensive judicial reform as a second part of the Strategy, including some extraordinary measures such as creation of an entirely new Supreme Court (SC).

However, it is still unknown whether this reform will result in strengthening the rule of law and effective fight against corruption in the near perspective. Its comprehensiveness demands time — several years have to pass before the full-scale change is complete, both in terms of creating a proper legal framework and implementing it. In the best-case scenario, at least 3 years are needed for appeal courts to be reorganized, where the largest number of trials will end. Given the reluctance of the current Ukrainian political establishment to reduce political dependence of the justice institutions (including PGO and investigatory bodies), it is highly likely that it will try to maintain as much control over the judiciary as possible. And even if Ukraine had the best possible laws, the ability to influence selection of judges and administering of justice through informal practices still remains due to the inability of the justice system as a whole to prevent and adequately react to such intrusions.

At the same time, reform has already delivered tangible results — due to constitutional changes and introduction of a very comprehensive electronic system for disclosure of judges’ assets, income and expenditures, around 1,000 judges resigned voluntarily, opening positions for newcomers. In addition, in November 2016 a competition to the new SC was announced, and Public Integrity Council, a civic body to oversee the process of selection and vetting of judges, was formed. Finally, new investigative and prosecutorial bodies have been created, such as the National Anticorruption Bureau of Ukraine and the Specialized Anticorruption Prosecution, to tackle high-level corruption cases.

BASELINE

Ukrainian legal system has little in common with judicial systems of developed countries in Europe and worldwide. According to the World Justice Project Rule of Law Index 2016, out of 113 countries Ukraine was ranked 78th according to its rule of law requirements implementation³, and is currently ranked 99th out of 105 countries in judicial independence by the Index of Public Integrity⁴.

Gallup finds that before the Revolution of Dignity the level of trust to Ukrainian courts was one of the lowest in the world (16%)⁵. OECD findings

¹ Reforms in Ukraine – Public Opinion Poll (as of May 2016), Available in Ukrainian at: <http://dif.org.ua/article/reformi-v-ukraini-gromadska-dumka-naselennya>.

² Strategy for Judicial Reform. Available in Ukrainian at: <http://zakon4.rada.gov.ua/laws/show/276/2015>.

³ Rule of Law Around the World - 2016. Available in English at: http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf.

⁴ Index of Public Integrity. Available in English at: <http://integrity-index.org/>.

⁵ Confidence in Judicial Systems Varies Worldwide. Available in English at: http://www.gallup.com/poll/178757/confidence-judicial-systems-varies-worldwide.aspx?utm_source=confidence%20in%20judiciary&utm_medium=search&utm_campaign=tiles.

⁶ OECD / Organization for Economic Cooperation and Development. Available in English at: <http://www.oecd-ilibrary.org/docserver/download/4215081e.pdf?expires=1483799409&id=id&accname=guest&checksum=D73CDBB18D7CDD5D0A4CDFCF61AAC4CE>.

of 2014 suggest that Ukraine occupied the final position in the degree of confidence in courts (12%) compared to other member states⁶. The situation did not change much after the Revolution of Dignity. According to 2015 polls, less than 1% of the population trusts courts completely, whereas only 8% trust courts somewhat⁷. In 2016 the situation did not change either. The level of trust still does not exceed 10%, and the balance of trust is negative at -72,5%⁸. Likewise, businesses do not trust Ukrainian courts — the vast majority of surveyed entrepreneurs named present state of the judiciary as the main obstacle to investment and economic growth⁹, not the Russian aggression and the armed conflict in the East of Ukraine.

When analyzing the reasons for low confidence in the judicial system, specific problems of the judiciary can be ascertained: more than 94% of the population think corruption is the principal issue, while the vast majority also recognize that political dependence and impunity are key problems of the system¹⁰.

Corruption is indeed a problem in different branches of power in Ukraine — according to the Corruption Perception Index provided by Transparency International, in 2015 Ukraine was ranked 130th out of 167 states where the research was conducted¹¹.

The problem of political dependence of Ukraine’s judiciary has two dimensions: institutional and mindset related. The first one is relatively easy to tackle, especially considering that much has already been done on the constitutional level, both in terms of composition of the judicial and the decision-making process on judges’ careers. The second type of dependence, however, can be remedied only with time or by replacing current judges with new professionals with a different mindset.

The other common issue of Ukraine’s justice sector is impunity. While the judges could be relatively easily removed¹² on political grounds, it was, and still is, hard to prosecute them for wrongdoings. The prosecution and the judiciary were protecting each other, and the public had almost no influence in the disciplinary or criminal proceedings of such cases.

PREVIOUS ATTEMPTS TO ADDRESS THE PROBLEMS OF THE JUDICIARY

Breaking connection with the Yanukovich regime

In April 2014, two months after the Revolution of Dignity, the Law “On the Renewal of Trust in the Judiciary” (so-called lustration law) was adopted, with the aim of severing connections of the judiciary with the previous political power, limiting the ways of undue influence on Ukrainian judiciary, and investigating the wrongdoings of judges who arbitrarily prosecuted peaceful protesters. The Law dismissed all the courts’ presidents, through whom political pressure was wielded on judges, and gave the judges the right to elect their own chief judges. It also dismissed all members of the institutions responsible for judicial careers - the High Qualification Commission of Judges of Ukraine (HQCJ) and the High Council of Justice (HCJ), who were arbitrarily appointed under the previous government - and imposed a ban on their reappointment to judicial governance bodies.

Since the scope of this law was very limited, it was only marginally effective, mainly in terms of reappointment of the judicial governance bodies: the HQCJ and the HCJ were completed re-staffed, which partially improved decision-making on judicial careers, including selection of the

⁷ Two thirds of Ukrainians face corruption in 2015, corruption is key problem of Ukraine - poll. Available in English at: <http://en.interfax.com.ua/news/general/320635.html>.

⁸ 2016 polls by Democratic Initiatives Foundation. Available in Ukrainian at: <http://dif.org.ua/uploads/pdf/13816462815863c78c6b27d3.47743328.pdf>.

⁹ European Business Association Investment Attractiveness Indices (2 quarter, 2015). Available in English at: http://www.eba.com.ua/static/indices/iai/Index_28_eng_2015.pdf.

¹⁰ Judicial reform – expert opinion survey. Available in Ukrainian at: <http://dif.org.ua/article/sudova-reforma-opituvannya-gromadskoj-dumki-suddiv-ekspertiv>.

¹¹ Corruption Perceptions Index 2015: Results. Available in English at: <http://www.transparency.org/cpi2015/>

¹² ECHR decision in case of Oleksandr Volkov v. Ukraine. Available in English at: http://www.legislationline.org/download/action/download/id/4240/file/ECHR_case_OLEKSANDR%20VOLKOV%20v.%20UKRAINE_2011_en.pdf.

¹³ See Judicial reform – expert opinion survey.

¹⁴ A. Natsvlishvili. Judicial reform in Georgia and the Association Agreement, 2016. Available in English at: http://www.osgf.ge/files/2016/EU%20publication/Angarishi_A4___Policy_Brief_Eng.pdf.

¹⁵ Strategy for the reform of the judiciary and related legal institutions. Available in Ukrainian at: <http://zakon2.rada.gov.ua/laws/show/276/2015>.

¹⁶ National Public Opinion Survey, 2016. Available in English at: http://www.fair.org.ua/content/library_doc/fair_gfk_eng.pdf.

new judges. However, 80% of the courts reappointed the same chief judges to their administrative positions. Even though many court heads' elections were held the same day the law came into force, such a high number of re-appointments indicated that the judiciary was not ready for real independence and self-governance and preferred to be controlled.

The work of the Temporary Special Commission on “Maidan judges” was not very effective either. Created to investigate the wrongdoings of more than 300 judges, who sentenced protesters of the Revolution of Dignity, it failed to do so due to its limited mandate, obstacles from the Parliament, and the reluctance of the High Council of Justice to confirm the Commission's decisions in most of the cases. Still, the 22 judges found responsible by the Commission were dismissed from their positions later in 2016.

Attempts to ensure judicial independence and renewal of the judiciary

As the lustration law did not solve most of the problems of Ukraine's justice system, and the public demand for more substantial change remained very high¹³, the need for a more comprehensive judicial reform was evident. One of the key issues was determining how to deal with the “old wine” inside the judiciary, a concern familiar to the other Eastern partnership countries in transition¹⁴.

In autumn of 2014 the Judicial Reform Council was established as a consultative body to the President. The idea was to unite representatives of the President, the Government, and the Parliament together with judges, practicing lawyers, legal scholars and civil society experts to develop necessary policy-making solutions. In practice, the composition and the mandate of the body enabled President Poroshenko and his Administration to become key policy-makers of the reform.

As a result, the Council developed a comprehensive “Strategy for the reform of the judiciary and related legal institutions” approved by the decree of the President¹⁵. The document identifies 5 pillars of the judicial reform, which correspond with the main issues of the judicial system mentioned above:

- Increasing independence of the judiciary;
- Streamlining judicial governance and the system for judges' appointments;
- Improving competence of the judiciary;
- Increasing transparency and accountability of the judiciary;
- Increasing efficiency of justice and streamlining the competences of different jurisdictions.

The Strategy envisaged two stages of changing justice sector legislation. As the first stage of the reform it identified already adopted amendments to the laws to restore confidence in the judiciary, specifically the Law “On Assuring the Right to a Fair Trial”, passed in February 2015. However, the updated law failed to increase the level of trust in the justice sector institutions¹⁶ and to de-politicize the judiciary¹⁷. This was the result of constitutional limitations and lack of political will by the Presidential Administration to reduce control over the judiciary. Out of the 77 general relevant guidelines suggested by the Council of Europe, only 27 were fully taken into account, 21 were considered only partially, and 15 were not taken into account. The rest 14 could only be taken in to account on a constitutional level and/or implementation¹⁸. Moreover, the law created additional problems as it allowed the previously dismissed presidents of the courts to occupy their positions for 4 years, which is twice as long as their previous mandates.

Despite having a number of positive novelties, aimed at renewing the judiciary, envisaging qualification assessment (re-attestation) for every sitting judge was not effective. First of all, assessment of the judges of the Supreme Court of Ukraine and higher courts did not start since the Council of Judges (CoJ)¹⁹ blocked the discussion of its methodology²⁰ to the point where the terms for the assessment expired. The CoJ also initiated an appeal to the Constitutional Court in order to assert that dismissal of judges based on their assessment results was non-constitutional. Finally, when the procedure was approved several months later, it opened the way for the assessment of judges of first instance and appellate courts by the HQCJ. However, since the Constitution did not allow to dismiss judges on the ground of inability to explain the origins of their assets, the assessment proved to be inefficient and was suspended. Due to constitutional limitations, the only measure the HQCJ could apply to such judges was sending them for additional training at public expense, which was very unpopular with both civil society experts and the general public.

Failure to meet public demands and solve the issues of judicial system and the strong resistance from the judges demonstrated the urgent need to switch to the more radical second stage of the Strategy and change the Constitution.

CURRENT STATE OF THE REFORM

Constitutional amendments

Formed in March of 2015 as a consultative body to the President, the Constitutional Commission produced a draft of amendments to the Constitution of Ukraine regarding judiciary, aimed at fighting corruption, renewing the judiciary, and regulating a number of issues connected to the problems of independence, impunity and public accountability of the judiciary.

To address the issue of judicial independence, a number of European standards were proposed. This included lifetime appointment of judges; limitation of the President's and the Parliament's authority to decide on judges' careers; the introduction of the new High Council of Justice with judges elected by their peers constituting the majority. All these measures can potentially contribute to increasing judges' independence, shifting the decision-making powers on judicial careers from political establishment to judicial self-governance bodies, even though the “majority of judges elected by judges” in itself bears great risk to public accountability of the judiciary.

Many of the constitutional amendments concern institutional building of the judiciary as a whole, including courts and judicial governance bodies. Its provisions stipulate the possibility of transition to the simplified three-tier court system in compliance with the numerous recommendations of the Venice Commission (VC). This can potentially make the system more efficient since the final ruling will be delivered faster and can limit the scope for corruption because of more unified case law. Meanwhile, the fragmented system of judicial agencies (HCJ, HQCJ, and CoJ) is temporarily preserved, though the text of the constitutional amendments allows for further simplification of the system. It is worth stressing that this may be considered a compromise between the implementation of the European standards and the need to renew the judiciary in a sustainable way. Restarted in 2014 under the lustration process, the HQCJ has shown itself as much more progressive and ready to fulfill the reform's objectives, and merging it into another body could endanger this progress.

¹⁷ Statement of the Reanimation Package of Reforms on the Law “On Assuring the Right to a Fair Trial”. Available in Ukrainian at: <http://rpr.org.ua/news/zayava-rpr-schodo-novoho-zakonu-ukrajiny-pro-zabezpechennya-prava-na-spravedlyvyj-sud/>.

¹⁸ Information on the Council of Europe guidelines implementation in the law of Ukraine “On Assuring the Right to a Fair Trial”, 2015. Available in Ukrainian at: http://eu.pravo.org.ua/uk/news/view?news_id=114.

¹⁹ The highest permanent judicial self-governance body according to the legislation.

²⁰ Approval procedure of qualification assessment of judges has not been completed. Available in English at: <http://vkksu.gov.ua/en/news/approval-procedure-of-qualification-assessment-of-judges-has-not-been-completed>.

²¹ 653 candidates will compete for the posts of the Supreme Court judge. Available in Ukrainian at: <http://vkksu.gov.ua/ua/news/653-kandidati-wizmut-utchast-u-konkursi-na-posadi-suddiw-wierchownogo-sudu/>.

The renewal of the judiciary was also subjected to big debate. The main goal of the renewal was to bring people with new mindsets into the system. The vast majority of the current judges were trained and appointed either during Soviet times or shortly thereafter. Many of them still rely on the old positivist approach to understanding the law, which is based on absolute supremacy of the written law with little to no regard for human rights. The opaque, arbitrary and corrupt selection procedures of judges also did not attract people with desired mentality or motivation. Finally, for many years judges were subject to political influence, and many of them grew so accustomed to it that they do not believe the system can function otherwise. Numerous trainings with European financial support and expertise did not change the picture much, illustrating that the problem was not in the lack of knowledge, but in the way it was applied. Therefore, it became obvious that the new culture of Ukraine's judiciary can become possible only with new people, and renewal of the judicial corps became one of the main pillars of the reform.

Different actors involved in the judicial reform developed different approaches to the matter of the renewal. While the Judicial Reform Council and the Constitutional Commission were sticking to the vetting procedure, the expert community, namely the Reanimation Package of Reforms (RPR), proposed to gradually create the court system anew with a competitive selection procedure for each judicial position, starting with the new SC. The latter suggestion was based on the successful example of patrol police reform, where the new body was created with new principles, new equipment, and most importantly, new people. Since there were numerous claims that such approach, if applied to the judiciary, would not correspond to the international standards, RPR asked to present their version of the draft law to the VC, and the Constitutional Commission agreed to forward two alternative draft laws.

On October 23, 2015, the Venice Commission issued its opinion on the constitutional amendments. It supported restricting the Parliament in its function to appoint judges, life-time appointment of judges, and ensuring the majority of judges elected by judges in the High Council of Justice. In addition, the VC green-lighted the possibility of appointing judges to new courts on a competitive basis stating that in case of courts' reorganization the judges concerned should have the option to retire or apply for a new position. After a long discussion in the Constitutional Commission the constitutional amendments were supplemented by an almost identical provision, giving more certainty to judges who would like to retire or be reappointed, and at the same time opening the door for an effective renewal mechanism which is based on the VC recommendations.

Another important novelty was brought by the constitutional amendments — failure to fulfill the duty of proving the legal origins of assets and failure to successfully undergo qualification assessment have also become grounds for dismissal of a judge. Implemented at the constitutional level, these new grounds for the dismissal of judges laid the foundation for effective legislative measures to ensure sufficient qualification of judges and to fight against corruption.

The amendments were adopted in full on June 2, 2016 together with the Law “On Judiciary and Status of Judges”. Both acts came into force on September 30, 2016.

The new version of the Law “On Judiciary and Status of Judges” envisions a number of legislative measures regarding the institutional

building of the judiciary that corresponds to the new edition of the Constitution. The biggest novelty of the Law provides for the creation of a new Supreme Court, instead of the previous four cassation courts, that will competitively select all SC justices, allowing sitting judges as well as practicing lawyers and legal scholars to take part.

This was not popular with the old Supreme Court of Ukraine (SCU) and the high specialized courts that were to be dismissed after the new SC is created. The High Administrative Court addressed the President with a suggestion to veto the newly adopted law “On Judiciary and Status of Judges”, which he himself introduced to the Parliament. When that did not happen, the SCU challenged the law in the Constitutional Court, even though the old SCU judges were active members of the Constitutional Commission and the Judicial Reform Council that developed it. At this time, the case is pending at the Constitutional Court.

First results

Adoption of the constitutional amendments together with the secondary legislation, and the new anti-corruption measures and institutions already provided considerable results that would not be possible without the introduction of these policies. Due to constitutional changes and introduction of a very comprehensive electronic system for disclosure of judges' assets, income and expenditures, a large number of judges resigned, opening positions for new legal professionals to enter the system. In addition, in November 2016 a first round of the competition for 120 positions in the new Supreme Court was launched, gathering 846 applications, out of which 653 were successfully admitted to the first round of the contest²¹.

To ensure public accountability of the renewal of the judiciary, the Public Integrity Council (PIC) was formed to assess judicial integrity and professional ethics during the selection and vetting of judges. Consisting of 20 members (legal scholars and practitioners, journalists, human rights NGO representatives), this civic body will issue opinions on the integrity of judges and candidates for judgeship which will become part of the judicial file. The original version of the law “On Judiciary and Status of Judges” stipulated that these opinions are not obligatory to follow by the HCJ, which raised a wave of discontent within civil society²². However, on December 21, 2016 the Law “On High Council of Justice” was voted on, including the major demands of civil society. The law set the legal framework for the functioning of the HCJ, a constitutional body responsible for appointment, promotion and disciplining of judges. It also amended the provision of the law “On Judiciary and Status of Judges” which now requires a qualified majority of votes (11 out of 16) in the HCJ to appoint a judicial candidate or to confirm the position of a judge who has a negative recommendation from the PIC. Under the new rules, PIC activity aims to make selection and vetting processes more effective and publicly accountable.

While the future of the selection and qualification assessment procedures is still unknown, there are some tangible results when it comes to solving impunity issues. On September 29, 2016, one day before the constitutional amendments came into force, 29 judges (21 of whom were “Maidan judges” responsible for unlawful prosecution of peaceful protesters) were dismissed by the Parliament of Ukraine on the basis of breach of oath after demands from civil society. Majority of these judges challenged this decision later in court, mainly on the basis of procedural issues, similar to those recognized as a ground to

²² Civil society experts, as well as PIC itself express their concern over absence of real legal powers of PIC. Available in English at: <http://rpr.org.ua/en/news/rpr-warns-against-adopting-the-law-on-the-high-council-of-justice-without-considering-the-demands-of-the-civil-society/>.

²³ Case of Oleksandr Volkov v. Ukraine. Available in English at: http://www.legislationline.org/download/action/download/id/4240/file/ECHR_case_OLEKSANDR%20VOLKOV%20v.%20UKRAINE_2011_en.pdf.

²⁴ AntAC concept note «Why Ukraine needs anti-corruption courts». Available in English at: <https://antac.org.ua/en/publications/why-ukraine-needs-anti-corruption-courts/>.

²⁵ “For independent anticorruption courts” (“ZaNAS”) initiative. Available in Ukrainian at: <http://zanas.org.ua/>.

rule against the state in ECHR Oleksandr Volkov v. Ukraine case²³. While the possibility that the court rules in favor of these judges stays, the act of the Parliament itself is an important precedent on breaking impunity among judges in post-Maidan Ukraine.

Further steps

To provide for the proper implementation of the constitutional amendments and solve the issues of independence, impunity and renewal of the judiciary a number of laws should be elaborated in compliance with the provisions of the amended text of Paragraph VIII of the Constitution. Apart from the newly adopted Law “On Judiciary and Status of Judges”, the Parliament should pass a number of other legislative acts:

- The Law on Anti-corruption Courts
- New law on the Constitutional Court
- New law on Bar
- Law on Legal Education and Access to Legal Profession
- Procedural Codes

These laws should not only change the provisions of existing legislation in compliance with the constitutional amendments, but also provide a comprehensive legal framework to make the reform effective. For example, the amendments to the procedural codes should define the procedures under which justice is administered in the new system, and the laws on Bar and on Legal Education and Access to Legal Profession should substantially change the way lawyers are trained and gain access to the positions of judges and prosecutors in order to ensure their qualification and integrity.

Regarding tackling corruption within the judiciary, specialized anti-corruption courts have to be created in order to ensure effective fight against high-profile corruption. The concept of the anti-corruption courts with a special judges’ selection procedure in which international expert play a key role was developed by a Ukrainian CSO Anti-Corruption Action Center (AntAC)²⁴. The concept was later endorsed by the civil society coalition «Reanimation Package of Reforms», as well as a number of other Ukrainian think-tanks, experts, business associations and top religious and opinion leaders who passed the demands to create such courts to the President of Ukraine²⁵. The idea of creation of such courts was also supported by top European officials²⁶. Since many of the high-profile corruption cases are linked directly to the country’s top officials, these courts must be fully politically independent. This can be achieved only if the new law on anti-corruption courts is passed, setting special requirements and selection procedure for the candidates to these courts. The same law should grant anti-corruption courts and judges maximum autonomy and protection, as well as operational and financial capacities.

The necessity to create such courts derives directly out of the current situation with the rule of law and law enforcement in the country. A newly created independent National Anticorruption Bureau of Ukraine (NABU), responsible for investigation of high-profile corruption cases (including cases against judges), already submitted more than 40 cases to local courts. However, the consideration of these cases is largely sabotaged by the old judges who find reasons to delay prosecution of the cases. Of the cases that did not end with a plea bargain, only few are being considered, with the rest of the hearings being continually postponed. This demonstrates the reluctance of old judges to consider politically sensitive cases.

Risks

The main risk of the current stage of justice sector reforms in Ukraine is that the creation of a new Supreme Court, as well as other courts, may still be politically influenced. This may result in the new courts and judges not differing much from the old ones, and the outcomes of important decisions in justice sector still to be decided politically. Therefore, the biggest part of the reform may not yield the necessary result.

The other risk is that adoption of the European standards towards independence of judiciary may inhibit the renewal of the judiciary and make the whole system less publicly accountable. The model of electing majority of judges by judges in judicial governance bodies has already shown itself to be very controversial if not outright disastrous²⁷ in transitional democracies. Given that the vast majority of Ukrainian judges did not undergo the vetting procedure yet, enabling them to select their representatives to vet and discipline may prove more than just problematic. Considering this, Ukraine might need to find an alternative model for judicial governance bodies, such as including a majority of representatives from civil society or creating a system of randomized ad hoc disciplinary panels comprised of recognized lawyers most of whom are not judges.

Another way to balance the decisive role of the HCJ comprised of judges elected by judges could be strengthen the Public Integrity Council even further. So far, there are two major issues with the PIC which are yet to be solved. First of all, its activity is not financed from the state budget which raises the issue of sustainability. Given that the PIC has to assess a very large number of judges and judicial candidates in a very short time (the first 653 contestants to the new Supreme Court have to be assessed within 1.5 months, and the qualification assessment of more than 6,000 judges is to follow), and it is highly unlikely that this work can be accomplished pro bono as an additional occupation. The second issue is the possibility that PIC’s negative opinions will still not be thoroughly considered, and can be formally turned down by 11 members of the HJCJ (10 of 16 members of which are judges). This may result in continuation of the infamous practice of arbitrary decisions by judicial governance bodies and infringe judicial independence and accountability.

Therefore, whether Ukraine will reach high enough level of public accountability in the justice sector and break impunity depends to a great degree not only on the provisions of other laws that are yet to be adopted, but also on their implementation.

²⁶ The idea is i.a. supported by EU Commissioner Hahn and Venice Commission president Gianni Buquicchio. Available in English at: https://ec.europa.eu/commission/2014-2019/hahn/announcements/remarks-johannes-hahn-occasion-meeting-ukrainian-anti-corruption-institutions-verkhovna-rada-kyiv_en and <https://www.ukrinform.net/rubric-politics/2101519-venice-commission-ready-to-support-establishment-of-anticorruption-court-in-ukraine.html>

²⁷ M.Bobek, D.Kosar. Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe. Available in English at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351299.

CONCLUSIONS

Today's judicial reform is by far the most comprehensive one in Ukraine, including amendments to the Constitution regarding judiciary and a number of implementation laws that provide for the creation of the new Supreme Court with competitive selection of candidates among sitting judges, practicing lawyers and legal scholars.

However, the point of no return for justice reforms is not yet passed.

The prior attempts at reforms of 2014-2015 were only marginally effective, solving tactical objectives at times, but largely failing to address the major issues. This can be partially explained by the judges' resistance to reform and the reluctance of Ukrainian political elites (mainly the Presidential Administration) to implement decisive policy moves that would reduce their control over the judiciary and break the vicious circle of impunity.

At the same time, the ownership of the reform by the President made it possible to change the Constitution. Additionally, civil society's active promotion of an effective judicial reform agenda and the help of several active members of Parliament (both from opposition and the coalition) made it possible to incorporate bold steps in the reform, such as creating a new Supreme Court and strengthening the Public Integrity Council. Therefore, it is safe to conclude that at this stage, the reform is a result of a political compromise between different political actors and Ukraine's civil society. This in many ways defined the character of the reform – a set of very comprehensive and far-reaching legislative measures that incorporate many different ideas and have a broad range of possible outcomes.

The latter do not solely depend on the legislative framework. There are a lot of other important factors that contribute to the shape of the reform, including institutional capacity, mentality, training, professional ethics and cooperation with neighboring institutions such as investigative and prosecutorial bodies. What this implies is that the main ingredients of a successful judicial reform in Ukraine are strong political will and proper implementation. Ukrainian political leadership and bureaucracy are usually lacking in both.

This is why it is so important that the process of judicial reform in Ukraine is closely observed and supported by the international community. It plays a key role in pushing the reform towards implementation of the European standards and in ensuring effectiveness of the reform measures. These two aspects do not always coincide (as in the case of Council of Europe's "majority of judges elected by judges" rule for judicial councils), and it gives Ukrainian political leadership an opportunity to "hide" behind the European standards and use them as the excuse to not adopt effective reform measures. This is why it is of outmost importance that Ukrainian judicial reform policymaking has effectiveness at its core, and the standards are applied with a certain flexibility.

It is also crucial that the international community continues monitoring Ukrainian reforms and further steps of political elites who are still reluctant to implement effective reform measures without a significant nudge from the donors. At the same time, it is of outmost importance that the international community and Ukraine's civil society keep cooperating closely to find and promote the most effective solutions for judicial reform in Ukraine. One of the most challenging obstacles for future cooperation could be finding an alternative model for judicial councils in Ukraine, especially in the case of the High Council of Justice.

The latter already demonstrated its reluctance to reform and acts more as a judicial corporation rather than a disciplining body. Additionally, the resistance to establish independent anti-corruption courts with international experts playing a key role in the judges' selection procedure is expected to be extremely high. The officials of the Presidential Administration already expressed their position against international involvement in the selection procedure.

RECOMMENDATIONS

The following recommendations can be given to the stakeholders of the judicial reform in Ukraine.

The Ukrainian authorities:

- adopt legislation that implements a full-fledged judicial reform (new versions of the Laws “On Constitutional Court”, “On Bar”, procedural codes and the Law “On Legal Education and Access to Legal Profession”);
- adopt the Law “On Anti-corruption Courts” taking into account demands from the civil society and build a system of autonomous anti-corruption courts with the involvement of international experts in the selection of judges;
 - revive reforms of the other justice sector institutions, mainly investigative bodies and the prosecution;
 - communicate reform objectives and outcomes (both achievements and challenges) to the society extensively and objectively;
 - implement the European standards, but do not take them as the only objective - find innovative and bold decisions to address current challenges of the justice sector in Ukraine in cooperation with civil society;
 - strengthen the Public Integrity Council and provide for its state financing;
 - limit informal practices in courts and judicial bodies, particularly with regards to selection process of the new Supreme Court and proceedings in the newly established courts;

The European Union:

- take measures to support the reform by defining tangible outcomes and demanding their achievement as opposed to abstract notions such as “respect for Rule of Law” or “strengthening judicial independence”;
- support establishing of autonomous anti-corruption courts with the leading role of independent international experts in the judges’ selection procedure as the key indicator, condition this as a benchmark to financial aid;
 - exercise additional vigilance with the Ukrainian authorities as to further policy-making, especially when it comes to anti-corruption courts, engage in the dialogue with Ukrainian civil society which is the main driver of this part of the reform;
 - continue to work closely with Ukrainian authorities and civil society on the other parts of justice sector reforms (mainly investigation and prosecution) which are essential to the success of the judicial reform;
 - be open to the discussion on the implementation of the European standards that do not work as designed in the transitional democracies such as Ukraine. Some adaptation may be required when it comes to the composition of judicial governance bodies, i.e. including the majority of representatives of the civil society; shift towards alternative assessment mechanisms such as Public Integrity Council or similar.