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Commentary

Current Challenges for the Implementation of Constitutional Reform on Judiciary in Ukraine on its way towards European Integration

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Abstract

Reform of the judiciary is a key conditionality imposed by the EU, IMF and other donors on Ukraine (UA). Significant reforms of the judicial system approved by the Verkhovna Rada of UA (Parliament) on 2 June 2016 will take effect over the coming months and years. A new Supreme Court and a strengthened system of evaluation, monitoring and appointing judges will come into being. It is the first Supreme Court selection of such scale in history. Never before has there been any competition for the UA Supreme Court. Judges, lawyers and academics are now able to compete. Video streaming has been available at all testing stages, with the exception of the psychological test. On paper at least the independence of the judiciary has been strengthened. How far UA authorities in fact do so will depend on further actions, including the adoption of additional legislation. While the onus is on them to make these reforms work, the EU and the rest of the international community will also need to observe the process closely and take targeted action to ensure that the reforms move in the right direction when required.

Keywords

Ukraine; Constitutional reform; judiciary; legislative amendments; judicial selection; judicial appointments.

One of the main problems in the UA judiciary is the lack of independence of the courts and judges. As prescribed by the Constitution (prior to legislative amendments of 30 September 2016), the President of UA and the Parliament have influence on the selection, appointment and dismissal of judges, while the role of the two existing self-governing bodies – the High Council of Justice (HCJ) and the High Qualification Commission of Judges (HQCJ) – was not fully evaluated. In addition, there is low public trust in the judiciary due to perceived widespread corruption and lack of professionalism within the judiciary (Holovaty 2016; Loschyhyn 2016). Finally, citizen's access to justice is limited by an overloaded court system, lack of available free legal aid and other factors (Mykhailiuk 2014; Skrypniuk 2015).

In addition to building on the existing literature, which focuses on theoretical analysis, the author of the present study was a participant of the Constitutional Commission (the working group on judiciary in the Presidential Administration of UA), numerous conferences and adds this insight to her analysis of constitutional reform including her involvement in high-level meetings with the main stakeholders, developing strategic communication for the judiciary and through working closely with the Supreme Court and the High Council of Justice in the process of drafting and adopting the legislation. Finally, the current paper advances our understanding of recent crucial legal reform in UA by examining the problematic issues within judiciary reform more from a practical than theoretical point of view based on discussions with judges, international donors, HQCJ, members of the Parliament of UA and members of the Presidential Administration of UA. The conclusion outlines further areas of research and legislation that will be needed to implement constitutional reform.

CONSTITUTIONAL REFORM

There is widespread recognition within UA and the international community of the urgent need for deep reform of the judiciary. The amendments to the Constitution promise to underpin a more independent judiciary. According to Shemshuchenko, the most contentious issue of this reform is how to reduce the number of judges who do not meet the requisite standards for competence, professionalism and honesty in order to increase public and foreign trust in the court system (Shemshuchenko 2017). The Constitutional amendments and the new Law on the Judiciary will set the agenda for reform of the judicial system. This is the third time that such significant updating of legislation in this sphere has been made since the Maidan events of 2013-2014 (Verkhovna Rada 2015a; Verkhovna Rada, 2015b). Neither of the previous reforms transformed the judiciary of UA; nor could they be expected to have done. The Strategy for Sustainable Development 'Ukraine – 2020' developed by the National Council for Reforms (adopted by the President on 12 January 2015) envisages two stages in judicial reform. The first entails an immediate update of legislation aimed at restoring confidence in the judiciary. The second stage focuses on systemic legislative changes: the adoption of a new Constitution and, following this, new laws concerning the judiciary and other related legal institutions.

To ensure the independence of the judiciary, the UA Constitution needed to change as the Constitution prior to legislative amendments of 30 September 2016 imposed limitations on judicial reform (Mykhailiuk 2014). This undermined confidence in the state and hampered economic growth (Loschyhyn 2016). President Poroshenko established a Constitutional Commission to address the constitutional impediments to the reform of the judiciary. International donors (OSCE, USAID, Council of Europe, Delegation of European Union to Ukraine, European Union Advisory Mission in Ukraine, etc.) took part in the working group for justice as observers (without voting rights).

An 'evolutionary' approach (backed by the Constitutional Commission) entails simultaneous enforcement of anti-corruption and educational activities for judges (Holovatyi 2016) and bringing newcomers into the judicial system as vacant positions appear after a respective reassessment. A 'radical' approach requires the establishment of a new simplified judiciary system through constitutional changes and appointment of new judges, through a general clearance procedure of the system. In fact, in order to raise the standard of the judiciary, every judge who wishes to continue his/her work in courts has to participate in a fair open competition together with other applicants from outside the courts (Romaniuk 2017: 5). However, according to the Supreme Court, the dismissal of all judges is manifestly unfounded (Kuybida 2016). This corresponds with the opinion of the European Commission for Democracy through law (known as the Venice Commission, this is an advisory body of the Council of Europe composed of independent experts in constitutional law) that dismissing all the judges, outside very exceptional situations such as constitutional discontinuity, is not in line with European standards (European Commission for Democracy through Law, 2015a) and replacing all judges, who number more than 8,000 in UA, would not be feasible without jeopardising the continued administration of justice.

On 30 September 2016, Constitutional amendments on justice and a new Law on the Judiciary and the Status of Judges (Verkhovna Rada 2016) entered into force. They were prepared after a lengthy dialogue with the Venice Commission and they were mostly welcomed in principle. However, the new Law on the Judiciary was prepared quickly without any consultation with the Venice Commission. It was rushed through the Verkhovna Rada in a manner that was procedurally questionable (Koliuh 2016: 50) and some of its provisions have been sharply criticised by civil society (Reanimation Package of Reforms 2016). The new Law is intended to bring the legislation on the judicial system into conformity with the Constitutional amendments and it also introduces a number of inevitable changes.

These amendments remove the power of Ukraine's Parliament to appoint judges and the power of the President to dismiss them; abolish probationary periods for junior judges and 'breach of oath' as a ground for dismissal; and give the main responsibility for decisions on the career of judges to the HCJ, the majority of whose members will be judges (Constitution of Ukraine 2016). As well as deciding on a submission for appointment and dismissal, the HCJ would also decide on transfer and promotion. Finally, the draft amendments give Parliament the main responsibility for establishing and dissolving the courts under the procedure, which the Venice Commission regards as satisfactory (European Commission for Democracy through Law, 2015b).

SELECTION OF THE NEW SUPREME COURT OF UKRAINE

The Venice Commission has advocated changing the current four-level judicial system in Ukraine to a three-level one with the transformation of the high specialised courts into chambers within the Supreme Court (European Commission for Democracy through Law, 2015b). The new Law on Judiciary addresses this concern by abolishing the three existing high specialised courts which function as courts of cassation and the current Supreme Court of Ukraine and by establishing a new Supreme Court, consisting of a Grand Chamber and four specialised 'cassational courts' (Shtogun 2016: 5). Moreover, the new Law provides for two new high specialised first-instance courts – the High Court for Intellectual Property issues and the High Anti-Corruption Court. The jurisdictions of these two courts are not yet defined.

The qualification evaluation procedure for judges administered by the HCJ consists of an examination and review of candidate's dossiers followed by interviews. The dossier includes data on compliance with ethical and anti-corruption criteria. All applicants are required to undergo an *initial* qualification evaluation to determine whether they are capable of administering justice in the relevant courts. While candidates of the high specialised courts of cassation and the present Supreme Court of UA may apply to become judges of the new Supreme Court, the new Law also provides a basis for fresh blood. For the first time, it allows the appointment of those without judicial or academic backgrounds but who have experience of professional activity as an advocate in undertaking representation in court and/or defence against criminal prosecution for at least ten years. Additionally, it greatly increases the possibility of academics who have never been judges being appointed to the court (Coynash 2016).

Ukrainian civil society has been very active in exposing the lifestyles of public servants that are at variance with their official income. The status of the Public Integrity Council has been much/repeatedly criticised (Halushka 2016; Kuybida 2016). Since civil society cannot elect members of the HCJ, the Public Integrity Council provides the only means by which it can participate in the selection and evaluation of judges. Halushka concludes that its inability to apply to the HCJ to open disciplinary proceedings or to appeal against a decision is a great disappointment (Halushka 2016), although its role was significantly strengthened as a result of the Law on the HCJ which the Parliament adopted on 21 December 2016. If the Public Integrity Council concludes that a judge or judicial candidate does not meet the criteria of professional ethics and integrity, the HCJ may issue a decision confirming the ability of such judge or judicial candidate to administer justice in the appropriate court only if such decision is supported by at least 11 of its 16 members. It is an innovation and how effective it will be remains to be seen.

UA civil society organisations active in the judicial sphere have given and continue to supply impetus to reform. International agencies pay much attention to them since they provide insights that would not be available otherwise (International Center for Policy Studies 2015). However, a great need for caution still exists. Informed judicial reform activists are actually quite thin on the ground and on

occasion the objectivity of some of their statements is questionable (Chudyk 2016). Therefore efforts to enhance the critical and analytical facilities of civil society will pay dividends over the long term.

Despite the judiciary and its deficiencies having a high public profile in UA and the international community's desire to see reform, there are still powerful domestic forces very resistant to change. President Petro Poroshenko invested considerable political capital in pushing the reforms through the Parliament. Their adoption on 2 June 2016 is regarded as a personal triumph (Makarenko 2016). However the political machinations lying behind their adoption are the object of speculation (Kuybida 2016; Olszański 2016) and may have involved deals with groupings that have a deep interest in maintaining the judicial status quo.

General expectations are that the new Supreme Court consisting of four cassational courts and a Grand Chamber will promote harmonisation of case-law and a more uniform application of the law but the extent to which it will do so depends to a considerable degree on the adoption of procedural legislation that has yet to be passed. The initial qualification evaluation still needs to be completed for the vast majority of judges. The new Law on the Judiciary has introduced elements that strengthen it. It should lead to the departure of at least those judges who do not meet the requirements of capability of administering justice in the courts to which they are appointed but this process needs to be monitored and its overall effectiveness is by no means assured (Shemshuchenko 2017: 38-39). How many of those currently serving as judges in Ukraine are for whatever reason not suited to administering justice is unknown, however an influx of outsiders who have been tried and tested in the qualification evaluation to courts of such sensitivity as the Supreme Court should increase public confidence in the judicial system as well as in all likelihood raising the quality of the administration of justice.

CONCLUSIONS AND RECOMMENDATIONS

The current approach of the UA authorities to the reform remains a legalistic one with numerous amendments and changes to laws and with detailed provisions included in primary legislation. Although reform of the judiciary is a long-term process, Ukrainian society expects rapid changes. The formation of the new Supreme Court is a crucial step in reforming the entire judicial system. The final result sets the tone for all judicial reforms to follow. The new Law on the Judiciary does not go as far as many would have wished and the procedural awkwardness surrounding its adoption remains problematic but it does contain some promising elements. Revisions of the applicable law on the Bar, the Constitutional Court and codes of civil and criminal procedure will also be needed. Finally, legislative reform must be followed by proper implementation. The establishment of new courts, the functioning of the Public Integrity Council and the increase in the salaries of judges (Verkhovna Rada, 2015a; Verkhovna Rada 2015 c) requires time, resources, institutional effort, political will, as well as a push from the international community. The outcome of these developments depends to a considerable degree on future decisions (Reanimation Package of Reforms 2016).

There are legitimate concerns about the effects of large-scale departures on the efficiency of the court system. Judicial vacancies create unique opportunities for new entrants to the judiciary who have been thoroughly tested and are untainted by corruption and connections with the past. The Final and Transitional Provisions of the new Law set forth a demanding array of deadlines, in particular for the new Supreme Court. In the past, reforms have been stymied by the failure to meet such deadlines. Change will be incremental and evolutionary; but these reforms create the possibility for policy to leap forward at several points over the next year and a half. In all these circumstances the support of the EU and its Member States will be essential.

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