

Civil law

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LEGAL ANALYSIS OF JUDICIAL REFORM IN UKRAINE

Following the Maidan events the Ukrainian authorities adopted in April 2014 the Law on Restoring Trust in the Judiciary [1] which led to the establishment of an Interim Special Commission for vetting of judges, based on complaints received before December 2014 from the citizens (the Commission deals with the judges who have been involved in any legal proceedings during the Maidan). In October 2014 the Law on Purification of the Government [2] was also adopted with the judges being included in another vetting/lustration process. These parallel vetting/assessment processes contribute to incertitude and distrust within the judiciary towards all Ukrainian authorities' reform efforts.

The President of Ukraine admitted the need for constitutional changes and therefore the Constitutional Commission was established as a consequence. This commission worked on the preparation of draft amendments to the Constitution, [3] guided by opinions of the Venice Commission and other international partners [4; 5; 6].

In his 2016 New Year speech the Ukrainian Prime Minister Arseniy Yatsenyuk called for the replacement of all judges and admitted the judicial reform to be a national priority in 2016. In early 2016 the Minister of Internal Affairs Arsen Avakov claimed that the reform of the Ministry of Internal Affairs and the National Police cannot make a real impact on law enforcement without simultaneous radical changes in the judiciary and prosecution. He even proposed that the courts should stop working for three months while a full replacement of the judiciary takes place.

The Council of Judges, a judicial self-government body, indicated its agreement with this position. There is, then, a consensus that raising the level of judicial independence is essential to the fullest establishment of the rule of law in Ukraine, but there have been still different views on how best to accomplish this.

On 30th September 2016 a new Law on the Judiciary and the Status of Judges [7] together with Constitutional Amendments entered into force. In accordance with this Law, three high specialised courts, which function as courts of cassation, and the current Supreme Court of Ukraine are abolished, and a new Supreme Court must be established. A new

Supreme Court will consist of a Grand Chamber and 4 courts of cassation (administrative, economical, civil and criminal). Additionally, a person may be appointed as Judge of the new Supreme Court of Ukraine only if he or she has at least 15 years of work experience as a judge or as a scholar. Under Art. 39(2), of the previous Law on the Judiciary and the Status of Judges that was in force on 3 August 2010 [8] only a judge with at least 15 years of work experience or a judge of the Constitutional Court of Ukraine could be appointed.

Over 1300 candidates applied for a competition to the Supreme Court of Ukraine: 846 of them submitted the necessary documents, while 193 were not admitted on formal grounds, mostly lawyers and scholars. A “special inspection” was given to 653 candidates: security and integrity checks run by the state institutions, e.g. the National Anti-Corruption Bureau, were conducted. Overall, over 6,000 inquiries were sent out to the relevant state institutions in order to fulfill this demand and as a result some candidates were rejected. Gradually, only over 550 candidates were allowed to take the written exams. The multiple-choice exam results were available immediately afterwards as they were “machine marked”. In this regard it is important to note, that about 12-14% of the candidates did not pass this stage.

After this highly qualified psychologists conducted 30-minutes interviews with the applicants. No media and civil society were allowed to be present because of ethical reasons. Those who passed then had a person to person interview with the members of the High Qualification Commission of Judges of Ukraine on the judicial dossiers. There were four interview panels, one for each Cassational Courts of the Supreme Court: Criminal, Commercial, Administrative, and Civil. A member of the Public Integrity Council was present. All the interviews were accompanied with video streaming.

The new Law on the Judiciary set a deadline of 31 March 2017 for the new Supreme Court to be formed (paras. 4(1), 9 of Final and Transitional Provisions) and for at least 65 Judges to be appointed to it (paras. 4(2), 9 of Final and Transitional Provisions). However, as of September 2017 this deadline was not met.

The package as a whole was the result of a confluence of conflicting forces, by no means all of which were genuinely pro-reform. Moreover, the training of the new Supreme Court judges consisting of stages is foreseen:

an Orientation Course, which should take place before the appointment by the President of Ukraine. It will last for eight days. Various international agencies will contribute. It will be voluntary, but it is to be hoped that the selected judges will attend;

trainings following the Orientation Course: no more than a few days each month;

job trainings prescribed by the Law on the Judiciary and the Status of Judges of no less than 30 academic hours, in 2017 and in the first half of 2018.

The reforms that started on 30 September 2016 may be the most significant achievement affecting the judicial system since the Maidan events of 2013 – 2014. There is disagreement about the extent to which they are able to address its deep-seated weaknesses, and their effectiveness will depend largely upon decisions that will be taken over the next few months. The Ukrainian experts, together with the international community, have undertaken a large amount of work in this area. A key contributor in this process has been the Venice Commission, which is an advisory body of the Council of Europe composed of independent experts in constitutional law.

In general, the amendments to the Constitution of Ukraine regarding justice are welcomed, but further reform is still needed. The main issue the judicial system faces is how to effectively replace compromised judges so as to raise the quality of justice in a manner that is fair and practical.

There are indications that significant numbers of judges are leaving voluntarily for various reasons, e.g. the Constitutional Court Decision [9] of 8 June 2016 makes retirement more attractive.

It should be born in mind that the complex Ukrainian political environment that generated the reforms will probably remain the same. It will therefore also be necessary to give encouragement, sometimes at a high political level, to reform and those seeking it.

It should also be noted that judicial reforms have an impact on every aspect of the criminal justice system, since the work of judges on criminal cases critically determines the effectiveness of the operations of the police and the prosecution. All in all, it is vital that a finger is kept on the pulse of the judicial system so that quick responses can be made.

Sources:

1. Law on Restoring trust in Judiciary (2014) at <http://zakon2.rada.gov.ua/laws/show/1188-18> accessed on 17 September 2017.
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3. Constitution of Ukraine (1996) Vidomosti of the Vekhovna Rada of Ukraine, 30.
4. European Commission for Democracy through Law (Venice Commission) (2015), Joint Opinion on the Law on the Judicial System and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, CDL-AD(2015)007, 23 March 2015.
5. European Commission for Democracy through Law (Venice Commission) (2015), Preliminary Opinion on the Proposed Constitutional Amendments

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6. European Commission for Democracy through Law (Venice Commission) (2015), Opinion on the Proposed Amendments to the Constitution of Ukraine Regarding the Judiciary as Approved by the Constitutional Commission on 4 September 2015, CDL-AD(2015)027, 26 October 2015.
7. Law on Judiciary and the Status of Judges (2016) at <http://zakon2.rada.gov.ua/laws/show/1402-19> accessed on 27 May 2017.
8. Law on Judiciary and the Status of Judges (2010) at <http://zakon2.rada.gov.ua/laws/show/2453-17> accessed on 27 May 2017.
9. Constitutional Court Decision (2016) at <http://zakon5.rada.gov.ua/laws/show/v004p710-16> accessed on 17 September 2017.

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