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CONTENT

ANALYSIS OF CONSTITUTIONAL CHANGES CONCERNING JUSTICE

Independent judiciary is an essential attribute of a democratic government and an important factor in establishing the Rule of Law. Events of the late 2013 and early 2014 confirmed the presence of serious problems in the Ukrainian judiciary. Not only it was inable to resist the arbitrary rule but also condoned and encouraged manifestations of autocracy. This objectively angered the society, which was receptive to immediate measures aimed at restoring confidence in the judiciary and the right to a fair trial. As these measures failed to deliver tangible positive results, the judiciary remained disoriented and demoralised. The need to reform the constitutional basis of the functioning of the judiciary became apparent.

The Constitutional Commission established by the President of Ukraine has developed draft amendments to the Constitution (concerning justice), which on 2 June 2016 were adopted by the Parliament. Implementation of constitutional changes through necessary regulatory mechanisms was translated into action by adoption of several important laws – "On the Judiciary and the Status of Judges", "On the High Council of Justice", "On the Constitutional Court of Ukraine", "On Agencies and Persons Performing Compulsory Enforcement of Court Decisions and Decisions of other Authorities", and "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts". The process of implementing amendments to the Constitution concerning justice and the status of the Constitutional Court implies introduction of their provisions and legal mechanisms in the practice of establishing the judiciary bodies, appointment of judges and improvements in legal proceedings based on the new framework.

The Constitutional Court, in turn, should gain genuine social recognition and respect by improving important elements of its status through exemplary adherence to its constitutional powers.

In these processes, it is vital to promptly identify problems linked to inadequacy and unconstitutionality of certain provisions of the above laws, as well as the means of their application. This analytical report and all the materials presented in this publication are part of these efforts.

The Analytical Report consists of three sections:

The first section reviews current state of the implementation of constitutional changes concerning justice.

The second section analyses the issues linked to constitutional changes concerning the status of the Constitutional Court of Ukraine.

The third section offers brief conclusions and recommendations.

In addition to the Razumkov Centre's experts, this Analytical Report was prepared by professor, Doctor of Law M. Kozyubra (Chair of the Department of General Theoretical Law Science and Public Law at the National University "Kyiv-Mohyla Academy"), V. Venher, Ph.D. in Law (Associate Professor of the Department of General Theoretical Law Science and Public Law at the National University "Kyiv-Mohyla Academy"), P. Stetsyuk, Doctor of Law (Retired Judge of the Constitutional Court of Ukraine), professor A. Boyko, Doctor of Law (Member of the High Council of Justice).

Note: The analytical report and articles in this publication were prepared before 15 December 2017.

1. IMPLEMENTING CONSTITUTIONAL CHANGES CONCERNING JUSTICE: CURRENT STATE AND PROBLEMS

On 2 June 2016 the Verkhovna Rada of Ukraine has formally completed a rather lengthy process of amending the Constitution of Ukraine to reform the justice system. On that day, the Parliament adopted the Law of Ukraine "On Amendments to the Constitution of Ukraine (concerning Justice)", which was based on a relevant bill, developed by the Constitutional Commission under the President of Ukraine and submitted to the Verkhovna Rada on 25 November 2015 – the Registration No. 3524 (Draft Law).

The explanatory note to this draft law points at rather ambitious purpose of such constitutional changes, as they are necessary, first of all, for establishing the independence of the judiciary, including through its de-politicisation; for strengthening tools and mechanisms of the accountability of the judiciary to society, as well as for introducing appropriate and more effective constitutional principles of staff renewal of the judicial corps.[1]

As noted above, the draft law was elaborated by the Constitutional Commission, established on 3 March 2015 by the President of Ukraine. At the same time, the President's legislative initiative was based on previous significant developments that were somewhat redefined and refined. The European Commission for Democracy through Law (the Venice Commission) has been emphasising for many years that the most serious criticism concerning the judiciary and the public prosecutor's office of Ukraine stems from the Constitution, as set forth in the following opinions:

- Opinion on the draft law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law), adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), CDL-AD (2012)019;
- Opinion on the draft law on the Amendments to the Constitution, Strengthening the Independence of Judges, and on the Changes to the Constitution proposed by the Constitutional Assembly, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), CDL-AD (2013)014;
- Joint Opinion on the draft law on the Public Prosecutor's Office of Ukraine, endorsed by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013), CDL-AD (2013)025;
- Opinion on Proposals Amending the draft law on the Amendments to the Constitution of Ukraine to Strengthen the Independence of Judges of Ukraine, adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), CDL-AD (2013)034;
- Opinion on the draft law Amending the Constitution of Ukraine submitted by the President of Ukraine on 2 July 2014, endorsed by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), CDL-AD (2014)037;
- Joint Opinion by the Venice Commission and the Directorate General Human Rights and Rule of Law on the Law on the Judiciary and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL-AD (2015)007.[2]

The draft law does include a number of new provisions aimed at strengthening the institutional and functional independence of the judiciary in Ukraine, based on European and international standards in this area. This was welcomed by the Venice Commission in its final opinion on the draft law, issued in October 2015.[3] **Specifically, the Venice Commission welcomed the removal of**

[1] The explanatory note to the Draft Law "On Amendments to the Constitution of Ukraine (concerning Justice)" – Official website of the Verkhovna Rada of Ukraine, *http://w1.c1.rada.gov.ua/pls/zweb2/webproc 4_1?pf3511=57209*.

[2] Preliminary Opinion of the European Commission for Democracy through Law (the Venice Commission) on the proposed Constitutional Amendments regarding the Judiciary (CDL-PI (2015)016-e) – the Venice Commission, *http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e*.

[3] Opinion of the European Commission for Democracy through Law (the Venice Commission) on the proposed Amendments to the Constitution of Ukraine regarding the Judiciary, CDL-AD (2015)027 – the Venice Commission, *http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)027-e*.

the power of the Verkhovna Rada to appoint the judges for an unlimited term and dismiss them; the abolition of probationary 5-year periods for junior judges; the abolition of the "breach of oath" as a ground for dismissal of judges; introduction of the competition-based selection of judges of the Constitutional Court; and the introduction of the constitutional complaint.

Yet despite generally positive comments on the proposed novelties to the content of the Constitution of Ukraine, the Venice Commission in its previous opinion expressed quite rightful reservation: **"…the effective reform of the judiciary in Ukraine is not only a question of adopting relevant constitutional provisions but also depends on the political will and commitment to create a truly independent judiciary"**.[4]

Remarks of the GRECO experts on this aspect were even more specific: "…without a doubt, amended provisions of the Constitution of Ukraine concerning justice… are essential for fostering the judicial reform and achieving its ultimate goal – practical realisation of the Rule of Law principle and ensuring every person's right to a fair trial by an independent and impartial tribunal. At the same time, **implementation of progressive provisions of the Constitution of Ukraine has been decisive for achieving this goal, above all transmission and realization of the "spirit" of legal norms in the "letter" of the law, that is, adoption of legislative acts to further improve and supplement the constitutional norms"**.[5]

Therefore, even opinions of international experts, let alone current Ukrainian political and legal realities of operation of the updated Constitution of Ukraine incite critical thinking about the process of their implementation both in the national legislation and in real life for more than a year.

Legally questionable, if not totally unacceptable, is the fact that the **"implementation" of constitutional changes commenced before their actual adoption**. The problem is that the new version of the Law "On the Judiciary and the Status of Judges" was passed by the Parliament on 2 June 2016 immediately before the final vote for constitutional amendments. Despite positive observations on the number of substantive provisions of the Law by international expert community,[6] it is this situation that has repeatedly been the subject of harsh criticism of both domestic and international experts.[7]

We agree that the development of the "implementation law" in parallel with the main constitutional text should become a normal practice. Such an approach would produce better understanding of the proposed method of constitutional settlement of particular issues by all parties involved, and open up the opportunity for adopting the Law "On the Judiciary and Status of Judges" with a broad public discussion of its provisions, including possible improvements, adjustments, and the like, eventually serving as a good prerequisite for its future application. Unfortunately, **the adoption of the Law "On the Judiciary and the Status of Judges" before passing the Law "On Amendments to the Constitution of Ukraine (concerning Justice)" had a somewhat different purpose. It once again revealed one of the main "illnesses" of the powers that be – the supremacy of political expediency over the requirements of the Constitution and the Rule of Law.**

To implement the constitutional model of the High Council of Justice and to determine the organisational principles of its functioning as a body fundamentally different from the High Justice Council within the justice system, on 21 December 2016 the Verkhovna Rada adopted the Law **"On the High Council of Justice"**. As stated in the **OSCE expert opinion on the Draft Law "On the High Council of Justice" (analysed provisions were not substantially modified since the adoption of the bill), the draft law is positive, while its provisions are well-formulated**.[8] This does not mean that the Law has no shortcomings, which can stir more criticism when systematically applied with other legislation.

On 13 July 2017 the Verkhovna Rada has passed **the Law "On the Constitutional Court of Ukraine", introducing essentially new regulations for the organisation and the rules of procedure of this court.** Having reviewed the draft provisions of the said law, the Venice Commission noted that "the revised Chapter XII of the Constitution of Ukraine and the Law of Ukraine 'On the Constitutional Court of Ukraine' (draft as of 1 November 2016) improve the position of the Constitutional Court of Ukraine as compared with previous provisions…".[9] We should note, however, that the final draft of the Law "On the Constitutional Court of Ukraine" was adopted with certain adjustments compared with the draft submitted for the Venice Commission's consideration.

The list of holistic "implementation laws" – as least at the moment – ends with the **Law of Ukraine "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts"**, adopted by the Verkhovna Rada on 3 October 2017. **This law aims at improving approaches to procedural aspects of legal proceedings in Ukraine.** It presents new versions of three key procedural codes (the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, and the Code

[4] Preliminary Opinion of the European Commission for Democracy through Law (the Venice Commission) on the proposed Constitutional Amendments regarding the Judiciary (CDL-PI (2015)016-e) – the Venice Commission, *http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e*.

[5] Evaluation Report Ukraine, "Corruption prevention in respect of members of parliament, judges and prosecutors", dated 23 June 2017 – *https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207*.

[6] The OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and the Status of Judges JUD-UKR/298/2017 – Office for Democratic Institutions and Human Rights, *https://www.osce.org/odihr/335406?download=true*.

[7] See, for example, the National Security and Defence, 2016, No. 5-6, p.3-9, 22-32; 75-79, etc.

[8] The OSCE Expert Opinion on the Draft Law "On the High Council of Justice" – *http://jrc.org.ua/upload/steps/94d8e6a4b926009ff2cfcce79b5465bc.pdf*.

[9] Opinion of the European Commission for Democracy through Law (the Venice Commission) on the Draft Law "On the Constitutional Court of Ukraine", CDL-AD (2016)034-e – the Venice Commission, *http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)034-e*.

of Administrative Justice of Ukraine); significantly modifies the Criminal Procedure Code and the Code on Administrative Offences; and amends more that 20 other laws of Ukraine. **This law is key to reforming the judiciary, as it is expected to introduce new specific procedural tools for protecting human rights in the court in each situation, recognising negative practices of the functioning of Ukrainian courts to date.** Unfortunately, signing of this Law by the President of Ukraine and its subsequent entry into force did not avoid violation of the constitutional procedure.

The Head of State signed the law only on 22 November 2017 – more that 1.5 months after its adoption, whereas in line with Part 2 of Article 94 of the Constitution, the President should sign the law within 15 days of its receipt from the Chairman of the Verkhovna Rada of Ukraine, who signs the law and forwards it to the President immediately after the adoption (Part 1 of Article 94 of the Constitution), or returns it to the Verkhovna Rada with substantiated and formulated proposals for re-consideration.

In fact, the law was "on hold" for more than a month as provisions of Part 3 of Article 94 of the Constitution ("Should the President of Ukraine fail to return a law for reconsideration within the established period, such law shall be deemed to have been approved by the President of Ukraine and shall be signed and officially promulgated") were ignored. We should emphasise that **blatant legal (in this case – constitutional) nihilism became, in essence, the norm of conduct in the highest bodies of state power, threatening the very existence of the state.**

Therefore, the above laws, adopted by the Ukrainian Parliament pursuant to new provisions of the Constitution of Ukraine in the area of justice, not only have different and quite difficult history of consideration and approval by the Verkhovna Rada and the signing by the President, but they are also of particular importance for the implementation process.

In view of this, and for more systematic understanding of the essential significance of changes and the current state of the implementation of constitutional provisions at the legislative level, the following key blocks will be analysed: (1) changes to the constitutional and legal status of a judge; (2) improvement of the judicial system; (3) improvement of the principles of legal proceedings and changes in the functioning of the Constitutional Court of Ukraine.

Changes to the Constitutional and Legal Status of a Judge. The High Council of Justice in the Structure of Judicial Bodies

Here, we should prioritise increasing requirements and professional standards of the judicial corps, as well as opportunities for its renewal.

For this purpose, Article 69 of the Law "On the Judiciary and the Status of Judges" specifies relevant provisions of the Constitution and stipulates that a citizen of Ukraine who is at least thirty years old and no older that sixty-five years of age, has a higher education in law and practical experience in law for at least five years, is competent, honest and has command of the state language, may be nominated to the position of a judge.

Provisions of para. 2, Part 3 of Article 127 of the Constitution stipulating additional requirements for candidates for the position of a judge were practically implemented in Articles 28 and 38 of the Law "On the Judiciary and the Status of Judges". Such additional requirements include professional experience as an attorney or a judge, as well as scientific experience in the field of law.

In addition, the law specifies the constitutional provision that other requirements for judges of specialized courts may be established in terms of education and professional experience, as Article 33 of the Law "On the Judiciary and the Status of Judges" introduces requirements for judges of specialized courts necessary to resolve a certain category of cases, where a judge must, above all, possess special knowledge (professional experience in cases on intellectual property and experience as patent attorney).

Introduction of the new "integrity" category and the establishment of a separate institution – the Public Integrity Council – was another novelty. Given current political and legal realities, the working experience of the latter is quite ambiguous (primarily in terms of professionalism, independence and impartiality), but in general it can be viewed as positive, although it requires additional substantive analysis.

Obviously, innovations presenting stronger requirements for candidates for the position of a judge (e.g. older age) and introducing a competitive selection procedure for appointing a judge are intended to increase the competence and resilience of future judges that ultimately has to improve the quality of justice.

We should generally welcome an open access of experienced lawyers and academics to the staffing of the Supreme Court, the High Court on Intellectual Property and courts of appeal, which can significantly reinforce the HR capacity of the judiciary system through introduction of new methods and approaches to the administration of justice. However, one should not ignore the unfortunate mistake made by lawmakers – while adopting the new version of the Law "On the Judiciary and the Status of Judges", they banned access to the competition to the Supreme Court for academics, who have earned their degrees in scientific institutions rather that educational establishments. Afterwards this error was corrected by changes to the text of the Law. However, the formal and literal interpretation of these provisions of the Law "On the Judiciary and the Status of Judges" by the High Qualifications Commission of Judges of Ukraine (which may raise doubts about its professionalism) at the time of commencement of the selection procedure to the Supreme Court made participation of many academics in this competition virtually impossible.

The lawmakers also focused their attention on the principles of independence and immutability of judges, primarily on the impossibility of political influence of legislative and executive powers on the judicial branch, which is a generally accepted international standard that must be definitely applied in any democracy.

The exclusion of political authorities from the processes of appointing, transferring and dismissing judges was repeatedly emphasised by the Venice Commission and other international institutions.[10] Consequently, the removal of staffing and statutory issues in the field of justice from the mandate of political bodies (the Verkhovna Rada and the President of Ukraine), and their transfer to an independent constitutional body of the state power and judicial governance (the High Council of Justice) is an extremely important indicator that recent constitutional amendments comply with democratic values and international standards of justice.

The limitations of power (at least at the level of the Law) of the President of Ukraine in appointing judges should be welcomed, as the President retains purely "ceremonial" role in this process. Any possible expansion of power of the head of state through the interpretation of constitutional norms in this situation is inacceptable, while combination of this factor with the abolition of practice of the first appointment of a judge for a five-year term and the introduction of an unlimited term instead may significantly reinforce the guarantees of the judge's independence.

Speaking of the Verkhovna Rada of Ukraine, by now the Parliament has handed all the materials and recommendations of the High Qualifications Commission of Judges of Ukraine to the High Council of Justice, which, in turn, has started to exercise its constitutional powers – review materials, make decisions and present submissions for appointment of judges to the President of Ukraine. At the moment, however, this process is neither flawless nor quick, generating rightful criticism among the public. And the situation becomes particularly acute in the current context of functioning of the judiciary, as **Ukraine already has dozens of courts, where the number of judges is critically below (sometimes twice as low) the planned staffing level**.

Pursuant to the constitutional requirements, the Law "On the Judiciary and the Status of Judges" **distinguishes the grounds for dismissal of a judge from office and the grounds for termination of a judge's tenure**. Such a distinction is progressive and practically feasible. The dismissal of judges shall occur only following the appropriate procedure and on the basis of confirmed data, and therefore requires action by the body responsible for the judge's career. On the other hand, termination of a judge's tenure as a result of a certain legal fact does not require any special decision but occurs automatically. However, the way how specific grounds for dismissal of a judge are implemented needs to be more precise and correct. For example, this concerns such grounds as violation of a judge's obligation to confirm the legality of the source of property. Such grounds generally correlate with relevant international standards and are justified in the Ukrainian context. However, this should not jeopardise the principle of the independence of judges, thus requiring more thorough legislative regulation, taking into account possible risks of abuse.

In this regard, the international experts' remarks on the possibility of appealing against the High Council of Justice decision on a dismissal of a judge, especially based on the procedure stipulated by Article 20 of the Transitional Provisions of the Law "On the Judiciary and the Status of Judges", are particularly relevant. The OSCE experts recommend "…**to reconsider the limitations to the right of appointed judges to appeal against their dismissal based on a negative outcome of their evaluation procedures** pursuant to Article 20 of the Transitional Provisions of the Law, by allowing the Supreme Court to review all aspects of the decision to dismiss taken by the High Council of Justice".[11]

Such remarks on the implementation of constitutional provisions are extremely important in view of fully justified removal of "breach of oath" from the list of grounds for dismissal of judges in the process of amending the Constitution. The exclusion of this ground for dismissal occurred in strict conformity with international standards, taking into account rather harsh criticism of the Venice Commission and other professional international institutions. The European Court of Human Rights was particularly rigorous in this regard in the case of Oleksandr Volkov v Ukraine (application No. 21722/11).

Therefore, it is still important to maintain reasonable balance between the legislative regulation and practical application of relevant provisions of the Constitution of Ukraine. Any transformation of the existing grounds for dismissal, stipulated by the Constitution and the Law "On the Judiciary and the Status of Judges", into new "breach of oath" is unacceptable. The OSCE experts also had some reservations, as Article 109 of the Law "On the Judiciary and the Status of Judges" appears to suggest that "…a decision of ECHR that has found the facts which may constitute grounds for imposing a disciplinary sanction on a judge could lead to sanctions against this judge, without a domestic disciplinary procedure… It is recommended to revise this provision, to clarify that a decision of the ECHR could, depending

[10] Opinions of the Venice Commission CDL-AD (2013)014: CDL-AD (2015)027; CDL-AD (2015)007; opinions of the Consultative Council of European Judges, such as No. 18 "The position of the judiciary and its relations with other powers of state in a modern democracy", and others.

[11] The OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and the Status of Judges JUD-UKR/298/2017 – Office for Democratic Institutions and Human Rights, *https://www.osce.org/odihr/335406?download=true*.

on circumstances, lead to initiation of disciplinary proceedings, but would not replace the need for such procedures".[12]

The Constitution of Ukraine (Article 131) granted to the High Council of Justice the broad range of powers that strengthen independence of the judiciary and increase its accountability to society. Specifically, the High Council of Justice shall function having powers to:

1) present submission for the appointment of a judge to office;
2) decide on the violation by a judge or a prosecutor of the incompatibility requirements;
3) review complaints as regards decisions of the relevant body imposing disciplinary liability on a judge or a prosecutor;
4) decide on dismissal of a judge from office;
5) grant consent for detention of a judge or keeping him or her under custody;
6) decide on temporal withdrawal of the powers of a judge to administer justice;
7) take measures to ensure independence of judges;
8) decide on transfer of a judge;
9) exercise other powers defined by the Constitution and laws of Ukraine (specifically, the constitutional provisions stipulate that the court shall be established, reorganised or dissolved by law, which draft shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine after consultations with the High Council of Justice (Article 125), and that expenditures for the maintenance of courts shall be allocated separately in the State Budget of Ukraine, taking into account proposals of the High Council of Justice (Article 130)).

However, the Constitution did not outline the general task to be performed by the High Council of Justice, namely ensuring the independence of the judiciary. This task is explicitly regulated by the Law of Ukraine "On the High Council of Justice" (Article 1), which defines this entity as "a collective independent constitutional body of public authority and judicial governance, which functions in Ukraine on a permanent basis to guarantee the independence of the judiciary and its functioning on the grounds of responsibility, accountability before the society, and to guarantee establishing of an honest and highly professional judicial corps in compliance with the provisions of the Constitution and the laws of Ukraine, as well as with the professional ethics in the functioning of judges and prosecutors". Obviously, it would be expedient to include this task directly in the Constitution.

It should be noted that the Law "On the High Council of Justice" expands the range of powers of this body in addition to those determined by the Constitution). Article 3 of this Law lists other powers of the High Council of Justice, such as to:

- provide the administering of the disciplinary proceedings as a disciplinary body with regard to a judge;
- establish bodies to review disciplinary cases against judges;
- take measures to guarantee authority and independence of justice;
- adopt a decision on recalling judges from retirement;
- agree on the number of judges in a court;
- provide binding advisory opinions regarding draft laws on the establishment, reorganisation or liquidation of courts, on the judiciary and the status of judges; summarise recommendations from courts, judicial agencies and institutions regarding the legislation on their status and functioning, on the judiciary and the status of judges;
- appoint and remove the Head of the State Judicial Administration of Ukraine and his/her deputies;
- execute other powers related to administering and ensuring financial and logistical support of courts.

These powers suggest that it is the High Council of Justice, in collaboration with other judiciary bodies, that will implement the judicial reform with the task to form a new Supreme Court, the High Court on Intellectual Property and the High Anti-Corruption Court; to optimise the system of courts of general jurisdiction; to ensure qualitative renewal of the judicial corps; to create appropriate conditions for the functioning of courts, and the like. Therefore, the High Council of Justice, as a constitutional body, should serve as a backbone for independence and accountability of the judiciary.

The Transitional Provisions of the updated Constitution related to justice provide for the establishment of the High Council of Justice (*Vyshcha Rada Pravosuddya* – new) through reorganisation of the High Justice Council (*Vyshcha Rada Yustytsiyi* – old).

According to the Constitution, the High Council of Justice shall consist of 21 members: ten of them shall be elected by the Congress of Judges of Ukraine plus the Chairman of the Supreme Court shall be a member of the High Council of Justice *ex officio*. Other ten members representing legal profession shall be appointed by the Verkhovna Rada (2 members), by the President (2), the Congress of Advocates of Ukraine (2), the All-Ukrainian Conference of Public Prosecutors (2), and the Congress of Representatives of Law Schools and Academic Institutions (2). The new procedure of forming the High Council of Justice introduced an important provision consistent with the Council of Europe standard for the composition of judicial councils, where at least half of members should be judges elected by judges.

As for the members of the High Council of Justice, who must be citizens of Ukraine who have attained the age of 35, have command of the state language, have

[12] The OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and the Status of Judges JUD-UKR/298/2017 – Office for Democratic Institutions and Human Rights, *https://www.osce.org/odihr/335406?download=true*.

a university degree in law and not less than 15 years of working experience in the field of law and belong to the legal profession, Article 6 of the Law "On the High Council of Justice" introduces another very important eligibility criterion – the political neutrality. A member of the High Council of Justice, whose responsibility is to defend the independence of the judiciary, should be politically neutral. Ideally, the High Council of Justice should bring together law professionals with deep familiarity of the judges' job and readiness to instil principles and culture of judicial independence.

It must be admitted that the Law "On the High Council of Justice" is fully in line with the basic provisions of the Opinion No. 10 of the Consultative Council of European Judges (CCEJ) that determines the main powers of councils for the judiciary.

The CCEJ defines two broad categories of roles and tasks of judicial councils – management of judges' careers and relationships of the judiciary with other branches of power. Only a few members of the Council of Europe recognise both of these tasks and grant relevant powers to their judicial councils. There is a widespread practice, where the entire range of court administration issues, especially allocation of the state budget funds to ensure financial, logistical and other support of courts, remains under the authority of the executive power; the same is true for the appointment and promotion of judges, as these are influenced by the executive or legislative branches.

Instead, in line with amendments to the Constitution of Ukraine concerning justice and the provisions of the Law "On the High Council of Justice", Ukraine's Council of Justice is empowered to appoint, dismiss, and promote judges, as well as to influence the administration of courts, as it participates in determining the expenditure of the State Budget of Ukraine for the maintenance of courts, judicial agencies and institutions, and approves allocation of budget expenses between courts (excluding the Supreme Court). These powers allow the judiciary to keep balance with other branches of power in Ukraine. This is an important step towards the independence of the judiciary, while prior to these changes the President and the Verkhovna Rada of Ukraine have played an important role in the appointment, dismissal and career development of judges.

The High Council of Justice shares its functions related to judges' careers with the High Qualifications Commission of Judges, playing a decisive role in this regard. At the same time, the High Council of Justice may disagree with the High Qualifications Commission on its recommendations for judge candidates if there are sufficient grounds for that.

An important step towards finalising the mechanism of interaction between different branches of state power was to provide the High Council of Justice with the authority to issue binding opinions regarding draft laws on the establishment, reorganisation or liquidation of courts, on the judiciary and the status of judges; to summarise recommendations from courts, judicial agencies and institutions regarding the legislation on their status and functioning; to present proposals regarding the state budget expenditure on the judicial system; to approve redistribution of government expenses (excluding the Supreme Court); to approve norms of staffing and logistical support of courts, and the like. These powers enable the High Council of Justice to play a decisive role in ensuring financial, logistical and other types of support for the courts. **Recent trends confirm that the independence of the judiciary from the executive power in these matters becomes essential.**

Another important development is that the lawmakers allowed the High Council of Justice to collaborate with other entities, primarily with the government agencies, and to take measures to guarantee authority and independence of judges.

Balancing the independence and accountability of judges would be a huge improvement for Ukraine, and the High Council of Justice now has powers to attain this balance.

The High Council of Justice shall become a sole disciplinary body for judges and monitor the observance of law and ethics by judges and prosecutors.

The law provides quite a detailed procedure for considering disciplinary complaints on the actions of judges and, at the same time, establishes necessary guarantees for the protection of judges in the course of disciplinary proceedings that are in line with the standard of a fair trial, set forth in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

According to the law, the High Council of Justice has set up three Disciplinary Chambers that serve as primary disciplinary bodies. At the same time, the rapporteur in a disciplinary case, who to a certain extent performs the public prosecutor's function, shall not participate in the adoption of the decision to impose or refuse to impose disciplinary liability on a judge. The High Council of Justice in its full composition has the authority to fully review the decisions of the Disciplinary Chambers on the case. Both the Disciplinary Chamber and the High Council of Justice in its full composition shall adopt decisions in disciplinary cases by a simple majority of votes, whereas prior to these changes the old High Justice Council had to adopt decisions in disciplinary matters by a constitutional majority of votes.

Limitation of the court control over the High Council of Justice decisions in disciplinary cases is another novelty.

Grounds on which the Supreme Court may annul the decisions of the High Council of Justice concerning disciplinary liability of a judge imply limited court control, therefore following the review of an appeal against High Council of Justice decision the court may cancel such a decision only for the following reasons:

1) the composition of the High Council of Justice that adopted the corresponding decision did not have the powers to do so;

2) the decision was not signed by any of the members of the High Council of Justice who adopted it;

3) the judge was not duly notified of the session of the High Council of Justice;

4) the decision does not refer to the grounds specified by the law on imposing disciplinary sanctions against a judge and fails to define reasons on the basis of which the High Council of Justice reached its opinion.

Apparently, in assessing decisions of the High Council of Justice the court is limited to establishing the grounds for disciplinary liability set forth in the decision, and the motives justifying the decision itself. The court may also assess the observance of the procedural requirements in the disciplinary case (the powers of the High Council of Justice, the presence of the signatures of all members involved, proper notification of the judge in question about the High Council of Justice session) without reviewing the established facts of the case or evaluating the evidence and circumstances that influenced the selection of the type of disciplinary action.

The High Council of Justice is also authorised to give consent to an arrest or a detention of a judge. Before relevant constitutional changes entered into force, these powers were exercised by the Verkhovna Rada of Ukraine, and their transfer to the High Council of Justice is viewed as one of many important steps that make judges less dependent on political authorities.

Independence and inviolability of a judge are guaranteed by the Constitution of Ukraine (Article 126). A judge shall not be detained or kept in custody or under arrest without the consent of the High Council of Justice until a guilty verdict is rendered by a court, except for detention of a judge caught committing serious or grave crime or immediately after it.

Part 2 of Article 49 of the Law "On the Judiciary and the Status of Judges" determines that a judge detained on suspicion of having committed an act entailing criminal or administrative liability shall be released immediately after his/her identity has been confirmed, unless:

1) the High Council of Justice gave its consent to detain a judge with regard to such act, and

2) a judge was detained during or immediately after committing a serious or grave crime, if such detention is necessary to prevent a crime, avoid or prevent implications of a crime, and to ensure the preservation of evidence of this crime.

This is rather broad legislative recognition of the judges' inviolability and immunity.

The Council of Europe standards provide for the functional inviolability – something that requires protection by constitutional guarantees. Paragraph 71 of the Appendix to Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states on judges explicitly states that when not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen. For example, in the opinion of the Venice Commission, expressed in the *AMICUS CURIAE* Brief for the Constitutional Court of Moldova No. 847/2016 of 13 June 2016, the council for the judiciary may refuse granting its consent for detention of a judge or the use of preventive measures of keeping him/her under custody or home arrest, if a judge is held liable based on the fact linked to the execution of his/her judicial function. Therefore, the immunity of judges is of functional nature.

The Venice Commission has already criticised the excessiveness of provisions on judicial inviolability, although it admits the necessity of taking all measures to ensure that a judge is not exposed to influence, intimidation or humiliation while executing his or her judicial function. Creating unwarranted barriers to proper investigation of crimes committed by judges may contribute to corruption in the judiciary. It is clear that judges need protection from pressure and other unlawful actions by other branches of government, and immunity helps judges to withstand the stress of unjustified persecution with the use of unlawful measures.

The judges, however, must be equal before the law, just like other citizens, especially with regards to substantive grounds for detention, custody or arrest of a judge. It is necessary to ensure balance between these two requirements, as the specifics of the national situation may give advantage to one requirement over another.

Perhaps, the chosen model is not the best one, since a five-day period for considering the submission of the Prosecutor General or his/her deputy requesting consent to take a judge under custody, detention or arrest, determined by the law, is not consistent with the provisions of the Criminal Procedure Code of Ukraine, which establishes much shorter timeframe for performing these procedural tasks. The substantive grounds for detention of a judge should be no different from such grounds determined for other persons, as it complies with the principle of equality before the law.

Article 58 of the Law "On the High Council of Justice" stipulates that the submission by the Prosecutor General or his/her Deputy requesting consent to take a judge under custody, detention or arrest must comply with the requirements of the Criminal Procedure Code, that is, to include substantive and procedural grounds (be well-reasoned and contain concrete facts and evidence providing that the judge committed a socially dangerous act stipulated by the Criminal Code of Ukraine, and justify the necessity of such detention (custody)). Although it would be more expedient for the High Council of Justice to evaluate the existence of concrete facts and evidence substantiating allegations of committing a socially dangerous act by the judge as defined by the Criminal Code of Ukraine, whereas the need for detention, custody or arrest of the judge should be decided by an investigating judge or court in the process of selecting a measure of criminal procedure, as defined by the Criminal Procedure Code. The High Council of Justice must ensure the presence of substantive

grounds for lifting the immunity and inviolability of the judge, while the application of measures of criminal procedure to this judge does not constitute the form of influence.

Similarly, the High Council of Justice gives consent to suspension of a judge from the administration of justice due to facing criminal charges (prior to appropriate amendments to the Constitution, such a consent to temporary removal of a judge from office was issued by the High Qualifications Commission of Judges of Ukraine). Part 5 of Article 49 of the Law "On the Judiciary and the Status of Judges" stipulates that a judge may be suspended from rendering justice for not more than two months due to holding him/her criminally liable based on a substantiated request (motion) of the Prosecutor General or his/her Deputy in the manner stipulated by law. Pursuant to provisions of the Criminal Procedure Code (Articles 155 and 155-1), for a judge to be suspended from rendering justice, it is necessary to establish sufficient evidence indicating that a criminal offense has been committed by a judge, and that there are sufficient grounds to believe that such a measure is necessary for termination of a criminal offense, or that the suspect or the accused, if holding the office, may destroy or forge objects and documents of essential importance for the pre-trial investigation, or exert illegal influence on witnesses and other participants in criminal proceedings, or otherwise illegally obstruct criminal proceedings.

It should be noted that in this case, the lawmakers overlooked the fact that the status of a judge also establishes additional conduct-specific requirements. According to Part 7 of Article 56 of the Law "On the Judiciary and the Status of Judges", a judge shall have obligations both in connection with the administration of justice and beyond, including the duty to display and maintain high standards of conduct in any activity in order to strengthen public trust in the judiciary, and ensure public confidence in judicial integrity and incorruptibility. Therefore, to suspend a judge from rendering justice, it would be enough to establish circumstances that confirm the existence of sufficient evidence indicating that a criminal offense has been committed by a judge. If the judge is reasonably suspected of committing a crime, this very fact already questions the legitimacy of the judge and, accordingly, his/her ability to administer justice. So, the judge should be suspended from rendering justice until this justified doubt is refuted in the manner prescribed by law.

We must admit that implementation of amendments to the Constitution of Ukraine concerning justice over the past year has also revealed a number of vulnerabilities that affect the quality of the judicial reform.

The qualitative composition of the High Council of Justice, reorganized from the old High Justice Council, has not been fully prepared to respond to new challenges, particularly to play a key role in managing judges' careers and ensuring their accountability to society, also struggling to establish the principles of judicial independence and impartiality. Perhaps this is the reason why society has many questions concerning the High Council of Justice, such as lustration of judges in line with the Law "On Purge of Power", specifically regarding decisions on bringing judges, who have considered the lawsuits against the participants of the Revolution of Dignity, to disciplinary responsibility; consideration of submissions to the President about appointments of the Supreme Court judges, and many others. And it is not about the fact that the High Council of Justice currently has only six judges directly elected by judges (there should be ten), while the other four were appointed by actors responsible for the formation of old High Justice Council – consequently, bear no formal responsibility to their colleagues. The problem is about the culture of professional independence and understanding of one's responsibility to the profession and society, which is low both in judges, members of the High Council of Justice, and other representatives of the legal profession.

The reason for this is the absence of an independent and quality professional environment in the field of judiciary, as well as in the advocacy and prosecutorial practice. Therefore, there is no certainty that these professional communities will elect their most honourable representatives to join the High Council of Justice, although it is very important, as strong non-judge members of the High Council of Justice should neutralise any manifestations of inexcusable "corporation" (or pseudo corporation) of the judiciary. Probably, it would be expedient to compose the High Council of Justice by the legislative body with preliminary nomination of non-judge candidates from the professional communities of lawyers, prosecutors, educators, and the like (as they do in some countries), and their election by the qualified (2/3) constitutional majority of the Verkhovna Rada. This would ensure the coordinated position of both the parliamentary coalition and the opposition concerning the most suitable candidates to the High Council of Justice.

During the year of the reform one could observe low consensus among various judicial authorities regarding priorities, stages and dynamics of the judicial reform. And it is not about the administrative subordination under the High Council of Justice, but rather necessary coordination, provided that the High Council of Justice, the High Qualifications Commission of Judges of Ukraine and the State Judicial Administration of Ukraine are all involved in the implementation of the reform. In particular, according to para. 4 of the Transitional and Final Provisions of the Law "On the Judiciary and the Status of Judges", the Supreme Court should have been established within six months after said law enters into force, which did not occur. Also para. 29 stipulates that judicial candidates who were included into a reserve list for filling vacant judicial positions, and into a rating list, in case the termination of a three-year term falls on the period of one year before this law enters into force, and candidates for whom recommendations of the High Qualifications Commission of Judges of Ukraine

were made as of the day when this law enters into force but who were not appointed to a judicial position shall have a right to participate in judicial selection within the procedure established by this law without taking the qualification examination and undergoing special training. Such candidates shall repeatedly take qualification examination and participate in a competition for judicial position based on results of such examination.

More than 1.5 years have passed since the Law "On the Judiciary and the Status of Judges" entered into force, but the qualification exam for these candidates is yet to be held, even though some local courts suffer from significant shortage of judges. Still unresolved is the fate of judges, whose five-year term in the office has ended and they retain their positions of judges, but no procedures for their election to the unlimited term were initiated. Para. 44 of the law stipulates that the High Council of Justice shall approve the Regulation on the Service of Court Security upon the proposal of the State Judicial Administration of Ukraine following consultations with the Ministry of Internal Affairs of Ukraine, and appoint the Chairperson of the Service of Court Security upon the proposal of the State Judicial Administration within two months after this law enters into force, but this was not fulfilled. According to para. 46 (2), the State Judicial Administration of Ukraine shall ensure full exercise of powers by the Service of Court Security, provided by the law, no later than by 1 January 2018, which obviously will not be fulfilled either.

Para. 46 also stipulates that the State Judicial Administration shall ensure the introduction of a Unified (Automated) Judicial Information System to streamline automated case management inside and between courts, in judicial self-government bodies, between courts and judicial self-government bodies, and the State Judicial Administration; to provide protected storage and automated analytical processing of statistical data about the work of a judge, of courts of relevant jurisdictions and levels, the data on judges included in the judicial dossier, and the like. Fulfilment of this task is not properly monitored.

Appointment of judges by the President of Ukraine upon submission of the High Council of Justice is often delayed, sometimes for over six months, although the Law "On the Judiciary and the Status of Judges" (Article 80) demands that the President of Ukraine issued a decree on the appointment of a judge within thirty days of receipt of relevant submission from the High Council of Justice. **Part 1 of Article 80 also establishes** that appointment to a position of a judge shall be done by the President of Ukraine on the grounds and within the submission of the High Council of Justice, without verification of the candidates' compliance with the requirements established by the law, and the procedure for the selection or qualification assessment of candidates. The entire procedure gives the President purely "ceremonial" function. The same article stipulates that

any enquiries regarding a candidate for a judicial position shall not prevent his or her appointment to the office. The facts stated in these enquiries may serve as grounds for the President to raise the issue with the competent authorities for conducting verification of these facts. The question is, what the President should do if the facts presented in enquiries are confirmed, and appointment of this particular candidate to the office can undermine the public trust towards the judiciary? The law has no mechanisms for returning the submission on the appointment of a judge to the High Council of Justice for re-consideration, therefore, this issue needs to be properly regulated.

Probably, it would be inappropriate to bring disciplinary proceedings against judges "under one roof" of the High Council of Justice – the initial consideration of the case by the Disciplinary Chambers, and the appellate review of the disciplinary body's decision to impose or refuse to impose disciplinary liability on a judge by the full composition of the High Council of Justice. It seems this approach does not ensure the unity of practice of the Disciplinary Chambers and fails to remove some subjective factors in the approaches to consideration of certain disciplinary cases.

Lessons learned in implementing changes to the Constitution of Ukraine concerning justice, as well as direct activities of the High Council of Justice give reasons for a generally positive assessment of these changes along with understanding that identified vulnerabilities and bottlenecks need to be eliminated.

It is therefore necessary to understand that high expectations of society from the judicial reform depend on adequate relationships between the branches of power based on the principles of independence of the judiciary, the consensus among the judicial bodies concerning implementation of the reform and understanding of their responsibility to society.

Improvement of the Judicial System

The transition towards the tripartite (three-tier) system of courts in Ukraine at the constitutional level is one of important areas of the judicial reform. The explanatory note to the Draft Law "On Amendments to the Constitution of Ukraine (concerning Justice)" explicitly states that "…the bill establishes a framework

for gradual transition towards the tripartite court system in the long run, when there are sufficient grounds for that… one of prerequisites for such transition is significant improvement of the quality of legal procedure in the courts of the first and appellate instances and corresponding reduction of the number of cassation petitions **(without automatic limitation of an individual's right to appeal in cassation)**...".[13]

Probably, the gradual nature of the process can explain the fact that according to Article 125 of the Law "On Amendments to the Constitution of Ukraine (concerning Justice)", **Ukraine's judicial system, contrary to European practice and recommendations of the Venice Commission, is not determined by the Constitution, but regulated by law**. Even at the stage of drafting the law, for many experts this provision created a threat of preserving the existing system, which is complicated and not always clear even for judicial professionals, let alone ordinary citizens.[14]

It is too early to draw any conclusions about the significance of such threats. However, certain provisions of the Law "On the Judiciary and the Status of Judges" cannot but cause professional concern. **The analysis of this law revealed a number of inconsistencies, uncertainties, and sometimes even odd legal constructions. It concerns, for example, the inclusion of four cassation courts – administrative, commercial, criminal and civil – in the composition of the Supreme Court, which according to established European practice is a cassation court itself. This casts doubts on declared intentions to shift towards a tripartite court system.**

These doubts are further confirmed by other provisions of the Law "On the Judiciary and the Status of Judges" – **the uncertainty of Part 3 of Article 17, which states that "high specialised courts shall operate in the court system"**, as the legal nature and the status of these courts, even despite provisions of Chapter 4, remain unclear, except for the definition of categories of cases to be considered by the High Court on Intellectual Property and the High Anti-Corruption Court, established by the law. Pursuant to Part 1 of Article 31, high specialised courts shall function as courts of first instance, so the question is: what are their relationships (given the principle of instance hierarchy, set forth in Part 1 of Article 17) with the courts of appeal and the Supreme Court?

The above-mentioned Law on amendments to procedural codes of Ukraine also failed to fully remove these inconsistencies. **Legislative uncertainty in these and other issues will inevitably lead to internal contradictions within the judicial system, undermining its organisational unity and the unity of court practice.**

"Strong recommendation" of the Venice Commission to abolish the high specialised courts with the administrative courts remaining an autonomous system, expressed during the review of amendments to the Constitution, escaped the attention of the lawmakers.[15] This recommendation is fully in line with the trends observed in the countries of continental Europe (in particular, where the constitutions specifically mention administrative courts and their peculiarities – just like the amended Ukrainian Constitution today). This important specificity of administrative justice that has been repeatedly emphasised by both national and foreign experts suggests that sooner or later Ukrainian legislators will have to return to this issue, detaching administrative courts into a relatively autonomous "vertical" system, removing elements inspired by the current political situation. The new edition of the Constitution of Ukraine enables this process.

The authority of the Supreme Court under the Law "On the Judiciary and the Status of Judges" is in fact limited to the powers of its Grand Chamber, outlined in quite general terms. As in the previous laws on the judiciary and the status of judges, the most prevalent are extrajudicial powers (including issuance of conclusions regarding draft laws on the functioning of the judiciary), which are not directly linked to the Supreme Court's status as the "highest court".

In the absence of clear definition, this yet again can lead to inconsistencies in the practice of the Supreme Court, for example, in the practical implementation of the Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, adopted in 2013 and ratified by the Verkhovna Rada on 5 October 2017.

According to this Protocol, highest courts and tribunals of a High Contracting Party may request the ECHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or protocols hereto. Also, the requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. However, **since in addition to the Grand Chamber (which, in fact, holds no powers of the cassation instance), the Supreme Court includes a number of specialised cassation courts that establish chambers for adjudicating certain case categories taking into account specialisation of judges, it remains unclear, which one of them may seek an advisory opinion from the ECHR.**

Preferred legislative regulation on the commencement of work of the Supreme Court also causes certain reservations. Without getting deep into specifics of the procedures of competitive selection of the Supreme Court judges, which, despite some shortcomings, was a new and unprecedented step forward for Ukraine, attention should be drawn to the lack of system and proper organisation. The fact that **under the Law "On the Judiciary and the Status of Judges", the Supreme Court should have been actually formed in April 2017,**

[13] The explanatory note to the Draft Law "On Amendments to the Constitution of Ukraine (concerning Justice)" – Official website of the Verkhovna Rada of Ukraine, *http://w1.c1.rada.gov.ua/pls/zweb2/webproc 4_1?pf3511=57209*.

[14] See, for example, the National Security and Defence, 2016, No. 5-6, p.5, 78.

[15] Opinion of the European Commission for Democracy through Law (the Venice Commission) on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as Approved by the Constitutional Commission on 4 September 2015. Adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).

but newly appointed judges took the oath only on 11 November 2017, raises questions about the legitimacy of further formation of such an important judicial body outside the deadlines clearly and unambiguously set by law. Moreover, some stages of the competition sparked serious criticism as to their legality and validity due to our already chronic disease – legal nihilism.

On 29 March 2017 – the next day following the announcement of the results of the practical assignment – the High Qualifications Commission of Judges of Ukraine passed the decision, which established the minimum acceptable score for testing and practical assignment, that is, lowered one of the examination criteria, and announced general results of the first stage of the qualification assessment ("Examination") within the competition for the vacant positions of judges of the cassation courts in the Supreme Court. As a result, candidates who did not get enough points for the practical assignment, and whose total score for testing and for practical assignment was below the minimum score, still continued to participate in the competition. As one might expect, said decision was heavily criticised by experts and the public.

It appears that the newly established Supreme Court may encounter challenges linked to its excessive political structuring. Specifically, the Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and Other Legislative Acts" provides that the Supreme Court will have procedural mechanisms ensuring the unity of law enforcement practice within a single cassation proceeding. The explanatory note to the draft law states that "… **as a general rule, the Supreme Court shall consider cases in the panel of three or more unpaired judges**. Shall the panel disagree with the enforcement practice in such legal relations that takes place in decisions of another panel within the same chamber, other chambers of the same cassation court, or other cassation courts, this panel may refer the case to the chamber to which this panel belongs, or to the joint chamber of the relevant cassation court, or to the Grand Chamber of the Supreme Court respectively".[16] **The lack of legal certainty in these matters may in fact paralyse activities of the Supreme Court's structures.**

As noted above, the Law "On the Judiciary and the Status of Judges" **introduces two new high specialised courts as courts of first instance – the High Court on Intellectual Property and the High Anti-Corruption Court.** The former has been established[17] recently, and formal procedures on selecting judges and addressing other organisational issues are currently underway. At the same time, even the preparation of legal framework for launching the High Anti-Corruption Court has not been addressed, which is quite controversial.

The anti-corruption court (either as a "High" court, or a system of courts, or specialisation of judges) should still be established, no matter how controversial this issue is, because the Law "On the Judiciary and the Status of Judges" not only announced the existence of such court, but also outlined conditions for its formation and the competition for positions of its judges (Para. 16 of the Transitional Provisions).

One should not overlook the fact that the Law "On the Judiciary and the Status of Judges" declared creation of the High Anti-Corruption Court as the sole court for considering corruption-related cases. It was not the idea of introducing a specialised anti-corruption court, but this manifestation of the original fecklessness of the authors of the bill that caused rejection and criticism in the professional environment. The declared status of the "High" (extra-system) court without lower courts gave it this obvious "special" tag, although formation of special courts is prohibited by the Constitution. The peculiarity of this court (in its system or extra-system incarnation) appears both in the proposal to adopt a separate law on its status and in the proposed procedure for selecting candidates for positions of anti-corruption judges, as it is suggested to set up a special competition commission for these purposes. At the same time, according to current law, this is the responsibility of the High Qualifications Commission of Judges of Ukraine and the High Council of Justice.

In this context, the proposed additional guarantees for anti-corruption judges, such as higher salaries compared to those of judges of other jurisdictions and advanced security arrangements, openly contradict the general principle of the unity of the judiciary. It is appropriate to recall the opinion of the Consultative Council of European Judges on the specialisation about "the risk of giving judges the impression that their expertise in their specialist field places them in an elite group of judges… resulting in the lack of public confidence in judges".

These (and some other unnamed) special features of the anti-corruption court must be taken into account and nullified in the course of its establishment.

Introduction of a separate subsystem of specialised anti-corruption courts within the system of criminal courts of general jurisdiction is in line with the principle of specialisation of judges. At the same time, the idea of introducing the High Anti-Corruption Court in the form, proposed by the authors of the Draft Law "On Anti-Corruption Courts" (Reg. No. 6011) is unacceptable. According to this bill, the High Anti-Corruption Court will not only administer justice as a court of first instance but will also review its own decisions under appeal procedure. In some cases, the judges of the High Anti-Corruption Court will act as judges of first instance, and in others as judges of appellate instance.

[16] The explanatory note to the Draft Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts" – official website of the Verkhovna Rada of Ukraine, *http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415.*

[17] The Decree of the President of Ukraine "On the Creation of the High Court on Intellectual Property" No. 299 dated 29 September 2017.

This is confirmed by Article 3 of the bill: "Judges of the Appeals Chamber shall not participate in criminal proceedings as a court of first instance. Judges of the Appeals Chamber who previously adopted the court decision, shall not participate in its appellate review".

The same article states that the review of effective decisions of the High Anti-Corruption Court under cassation procedure shall be exercised by the Grand Chamber of the Supreme Court. At the same time, Article 5 of the bill provides for the creation of the Anti-Corruption Chamber within the Criminal Cassation Court of the Supreme Court of Ukraine to review verdicts and decisions of the High Anti-Corruption Court, by which the consideration on the merits of the case has been completed. Contrary to the provisions of Article 3, Article 5 of the same bill establishes that only the decision of the Anti-Corruption Chamber of the Supreme Court can be submitted to the Grand Chamber for review, thus enabling double cassation in the corruption cases. Perhaps, this makes sense, but **generally speaking, the provisions of the Draft Law "On Anti-Corruption Courts" give an impression of chaotic conglomeration of different novels**.

Attempts to combine two judicial instances on the same cases in one court is a questionable know-how. In most countries, judicial systems are organised in a way that each stage of court proceedings (instances) involves judicial institutions responsible for only one type of court procedure. This ensures the legality and validity of adopted court decisions, eliminates violations of the law and restores justice. Interconnectedness of court instances disallows subordination of lower judicial bodies to the higher ones; it prevents any influence of the courts of appeal (cassation) on beliefs of judges of first instance, or the influence of the cassation courts on both lower courts in making decisions in specific cases. The Ukrainian judicial system is also built this way.

In addition to the way of creating anti-corruption jurisdiction, proposed by the law and formalised in the bill "On Anti-Corruption Courts", the Draft Law No. 6529 "On Amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges' (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offenses)" proposes the specialisation of judges in courts of criminal jurisdiction. This option is possible, yet there are some serious reservations. In particular, the process of establishing an independent specialised system of criminal courts may continue indefinitely. In accordance with the law, the specialisation of judges (including for the anti-corruption cases) should be introduced by a decision of the assembly of judges of a relevant court without any competitions. The same process should occur in the courts of appeal.

An Anti-Corruption Chamber should be established within the Criminal Cassation Court, taking into account the specialisation of judges. It should be borne in mind, however, that hundreds of judges' positions remain vacant, and the High Qualifications Commission of Judges is yet to begin the selection process. Also, one should not forget about the upcoming large-scale assessment of current judges of the local and appellate courts against the criteria of competence, integrity and professionalism. As a result, the prospects of completing anti-corruption specialisation of judges become rather vague.

On the other hand, the introduction of special anti-corruption courts in the system of justice is not something exotic. In fact, it can be set up and staffed by judges within several months. It is known that the National Anti-Corruption Bureau of Ukraine (NABU) has three territorial departments in Lviv, Odesa and Kharkiv. The Prosecutor General mentioned up to three thousand anti-corruption pre-trial proceedings and closed cases, while according to the NABU there are several hundreds of them. Therefore, district anti-corruption courts should be established in Kyiv and in the above-mentioned regions, along with the Kyiv-based Appellate Anti-Corruption Court and the Anti-Corruption Chamber within the Criminal Cassation Court. It would be rather easy to determine the number of judges for each of these courts, and to organise a competition for all judicial positions in these courts with the support of the High Qualifications Commission of Judges of Ukraine.

The most questionable in this regard is the procedure of selecting candidates for the judges' positions in said instances of the anti-corruption court, taking into account special requirements for judges of anti-corruption courts. The admissibility of establishing such requirements stems from the last sentence of Part 3, Article 27 of the Constitution of Ukraine: "The law may provide additional requirements for being appointed to the position of a judge".

Following on from reiterated recommendations of the domestic and international experts, including the Venice Commission, the Constitution of Ukraine stipulates that **courts are established, reorganised and dissolved by law**. Moreover, relevant draft law shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine after consultations with the High Council of Justice. It is too early to discuss how this provision will work, as it was **temporarily suspended until 31 December 2017 by the Transitional Provisions of the Constitution – until then the establishment, reorganisation and dissolution of courts shall be exercised by the President on the basis and under the procedure prescribed by the law. Pursuant to this provision, the President of Ukraine accepts relevant authority**. Furthermore, the professional community (primarily judges) and the general public currently engage in lively discussion on possible optimisation of the country's court system and the ensuing issue of guaranteeing the right to access justice in the event of significant expansion of territories under the jurisdiction of new district courts.

This, in essence, is a "reform within reform" capable of causing upheavals in all aspects of the judicial system. The map of Ukrainian judicature will be redrawn, leaving only 250-270 general district courts instead of the current 585. **Declared as "consolidation" of courts, this process will definitely have negative implications for the citizens' access to justice as the principle of accessible**

justice, among other things, implies reasonable territorial remoteness of judicial bodies from every individual within their jurisdiction.[18]

The need for budget saving is cited as one of the reasons for this "consolidation". The judicial reform, however, is designed to ensure effective justice, even with increased budget expenditure.

The obvious factor of the upcoming "optimisation" of courts is the shortage of judges, as currently there are more than one thousand open vacancies. This situation originates from the policy of "five-year" judges, whose tenure has ended, and hundreds of them were denied the unlimited term in the office.

A step towards significantly greater organisational and financial independence of the judiciary, made at the constitutional level, deserves much appreciation. The logic embodied in the Constitution, according to which the State Budget of Ukraine separately assigns the expenses on the maintenance of courts taking into account the proposals of the High Council of Justice, will undoubtedly contribute to strengthening of judicial independence. Obviously, the High Council of Justice cannot replace the executive or legislative branches in performing the function of determining the state budget expenditure but given the international standards and their practical implementation in different countries, relevant proposals of the High Council of Justice should definitely be taken into account when specifying the cost of the maintenance of courts.

In pursuance of this constitutional logic, some powers of the State Judicial Administration and the Council of Judges of Ukraine have been revised. As a matter of fact, the updated version of the Law "On the High Council of Justice" transferred parts of their financial powers directly to the High Council of Justice. The latter was vested with not so much executive or organisational, as control and supervisory powers. This approach seems to be right.

Improving the Principles of Legal Proceedings

As noted above, the principles of the administration of justice in Ukraine were duly reflected in the updated provisions of the Constitution (concerning justice), and most of them are welcomed. However, currently it is difficult to discuss the level of their practical implementation for two reasons: *first,* amendments to the procedural legislation were adopted by the Parliament only recently, and the President signed the bill into law just the other day. This, obviously, raises the question of why it took more than a year to draft this bill following the introduction of amendments to the Constitution of Ukraine concerning justice, which in no way contributed to the establishment of legal certainty as a component of the Rule of Law. *Second*, the Supreme Court, the commencement of which should mark the beginning of a new judicial practice, has just been formed. This is why the practical advantages and disadvantages of constitutional requirements and relevant procedural novelties can be analysed more substantially only some time later. Nevertheless, some ideas are worth mentioning.

Changes to procedural legislation provided greater legal certainty to some other fundamental provisions of the judiciary, for example, the principle of "a trial within a reasonable time". The explanatory note states that "...the new codes establish a clear procedure and preclusive terms for procedural action (such as introduction into the case, change in the subject or grounds of the claim, the composition of the court during consideration of the case under newly discovered circumstances, terms for submitting evidence), clear stages of the trial, reasonable limitations of possible delay of consideration and suspension of proceedings in the case".[19]

Updated procedural legislation fostered the development of constitutional provisions regarding out-of-court settlement of disputes. In the process of drafting amendments to the Constitution, this procedure was viewed as an effective tool for possible reduction of workload of judges in courts of general jurisdiction, primarily local courts of first instance. **Specifically, the prospects of institutionalisation and further development of mediation were discussed as one of the concepts of pre-trial settlement**. Despite the general support of this idea (relevant bill on mediation has already passed the first reading in the Verkhovna Rada on 3 November 2016), **no active legislative measures to promote mediation were made for more than a year**.

In the meantime, the Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts" attempted to introduce new procedural mechanisms to prevent (and in some cases, render impossible) consideration of cases in the absence of a dispute between the parties, and to settle a dispute between the parties with the participation of an arbiter. The latter, however, has already sparked criticism among mediators, suggesting the need for a specific in-depth analysis.

Another important set of issues concerns professional and responsible representation in the court. Amendments to the Constitution establish the so-called "advocates' monopoly" for such representation, which received mixed reaction from experts and the professional community. Changes to the codes of procedure further support the implementation of this constitutional novelty. However, the representation of persons by lawyers in courts has one reservation – excluding representation in certain cases, including in the so-called "minor matters". The logic of the law suggests that "minor" cases are those where

[18] The judges' comments on the anticipated "consolidation of courts: "The new map of Ukraine's courts: will the access to justice be limited?" – "Sudovo-Yurydychna Gazeta", 10 November 2017.

[19] The explanatory note to the Draft Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts".

damages sought do not exceed 100 subsistence minimums for able-bodied persons, or "short causes" as designated by the court, with the exception of cases subject to consideration only under the rules of general action proceedings and cases, where the amount of claim exceeds 500 subsistence minimums for able-bodied persons.[20]

As it has already been noted during the development of the draft law on the amendments to the Constitution, the problem is not about the greater role of the bar in providing legal aid (the increasing professionalism in its provision is typical for all modern states governed by the Rule of Law), but rather **unpreparedness of the government and the lawyers to ensure free legal assistance, guaranteed by the Constitution (Article 59)**. The government currently does not have financial resources to provide it to low-income people, while the lawyers are mostly uninterested in such assignments as they are not recompensed by the state.

Building the institutional capacity of the bar and its ability to properly exercise its constitutional function remains relevant, as starting from 2018 the representation of interests exclusively by advocates will be carried out in the courts of appeal. A number of conflicts and questionable situations in the lawyers' community, specifically in the Ukrainian National Bar Association, among its officials and even territorial units, suggests the need for legislative regulation of this sector. Unfortunately, despite the declared development of relevant draft law by the Judicial Reform Council, it is yet to be submitted to the Verkhovna Rada for consideration.

Speaking about the procedural innovations introduced by the Law "On the Judiciary and the Status of Judges" and further specified by the Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts", **one cannot disregard the provisions that essentially introduce elements of case law into the legal system of Ukraine**. **More importantly, it is case law in its modern interpretation, where the judicial precedent is not viewed as a decision of the highest court in a particular case, which becomes unconditionally binding for lower courts in hearing similar cases, but rather as a model, a benchmark, a reference point for similar cases in the future**. In this regard, the amended procedural codes somewhat depart from excessively rigid formulations concerning the binding decisions of the Supreme Court, adopted under the circumstances established by law (in particular, upon consideration of an application for reviewing a court decision on grounds of different use of legal standards by courts of cassation), such as in Article 360 of the Civil Procedure Code and in similar provisions of other procedural codes.

According to Part 6 of Article 13 of the Law "On the Judiciary and the Status of Judges", "Conclusions regarding application of legal provisions specified in resolutions of the Supreme Court shall be taken into account by other courts in the application of such legal provisions. A court shall have the right to depart from the legal position expressed by the Supreme Court only if it simultaneously provides respective substantiation". **Similar statements can be also found in the updated codes of procedure, which is generally consistent with the case law practice of the common law legal systems.**

Certain terminological borrowings from this legal family are also found in the Code of Administrative Justice, which operates such widespread common law concepts as "typical and exemplary case", "model decision" (Article 290 of Code of Administrative Justice), and the like. These procedural novelties, if properly implemented in the judicial practice, will undoubtedly contribute to its unity and be able to eliminate popular Ukrainian legal practice of ungrounded changes of previous legal positions. **Still, these procedural innovations required preliminary in-depth study.**

And finally, strengthening the institutional capacity of the enforcement system also deserves attention. **The amendments to the Constitution attempted to consolidate guarantees of the execution of court decisions, making the court that adopted such a decision responsible for supervising its enforcement.**

Here we should emphasise that the Ukrainian Parliament has already taken certain steps in this direction apart from amendments to the Constitution. This particularly concerns the Laws **"On Agencies and Persons Performing Compulsory Enforcement of Court Decisions and Decisions of other Authorities" and "On Enforcement Proceedings" that passed their second reading (preceded by rather meticulous work) on the same day when the Law "On Amendments to the Constitution of Ukraine (concerning Justice) was adopted – on 2 June 2016.** This is why they can hardly be viewed as laws that implement constitutional requirements. Yet one cannot deny their belonging to the constitutional context. **The so-called "enforcement proceedings" reform should be the subject of a separate and scrupulous analysis, especially given the extremely difficult process of introducing the new institution of private executors (enforcement agents) and practical application of mechanisms to encourage executors to promptly and efficiently enforce decisions, first of all, the judicial ones.**

In summary, it may take a while before most provisions of both current laws of Ukraine and those to be adopted (in pursuance of constitutional norms in the wording of the Law "On Amendments to the Constitution of Ukraine (concerning Justice)" to implement the constitutional principles of judiciary) can be properly evaluated, and only after their full practical application.

[20] The Law of Ukraine "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts".

2. THE PROBLEMS OF IMPLEMENTING CONSTITUTIONAL CHANGES CONCERNING THE STATUS OF THE CONSTITUTIONAL COURT OF UKRAINE

The Constitutional Court, also the "sole body of constitutional jurisdiction in Ukraine" according to the original version of the Constitution of 28 June 1996 (Part 1 of Article 147), should become another centerpiece of the reform in the context of the Law "On Amendments to the Constitution of Ukraine (concerning Justice)". The "basic" Chapter XII of the Ukrainian Constitution has been completely overhauled, as all of its articles (No. 147, 148, 149, 150, 151, 152 and 153) were removed, followed by the introduction of important novelties, presented in four new articles (No. 148-1, 149-1, 151-1 and 151-2). All this is the evidence of the reformers' serious intentions not only to change basic principles of functioning of the Constitutional Court per se, but also to partly "adjust" its role and place in the system of government.[1]

On 13 July 2017 the Verkhovna Rada of Ukraine has adopted the Law "On the Constitutional Court of Ukraine". Relevant provisions of updated Constitution subject to implementation were welcomed by the Venice Commission. Among other things, it stated that "the draft law implementing the constitutional amendments is a clear step forward in line with the European legal standards concerning constitutional justice. The Venice Commission welcomes notably the competitive selection of judges; the acceptance of the oath before the Court itself; time limits for the appointment and election of judges; the removal of the dismissal for the 'breach of oath'; the introduction of a constitutional complaint and the rule in draft Article 89.3, even if it is limited; time limits for proceedings; automatic assignment of cases to boards and the possibility for the Court to postpone the invalidity of the law found unconstitutional".[2] Meanwhile, the process of adopting this Law was extremely difficult, and the Parliament was only able to pass it from the third attempt. This fact alone is the evidence of complexity of the implementation mechanisms of constitutional provisions, and to some extent – of their ambiguity.

Many problems with the introduction of constitutional amendments concerning the new status of the Constitutional Court arise from ill-considered, or even inacceptable wording of some provisions, as well as from apparent systemic, legal and technical inconsistencies and shortcomings of novels in the Chapter XII "The Constitutional Court of Ukraine" of the Constitution. This could not but affect the quality and effectiveness of the provisions of the Law "On the Constitutional Court of Ukraine". Apart from adverse effect of the controversial provisions of the Constitution concerning the status of the Constitutional Court on specific provisions of the Law, the lawmakers formulated a number of regulatory directives that created additional obstacles to the formation of the Court and organisation of its functioning as a professional, trustworthy body of constitutional control and in cases established by the Constitution – as the entity responsible for protection of the constitutional rights and freedoms of citizens.

This conclusion can be illustrated by the following provisions of the Law "On the Constitutional Court of Ukraine".

The Law ignores provisions of Article 153 of the Constitution, according to which "organisation and operation of the Constitutional Court of Ukraine, the status of judges of the Court, grounds to apply to the Court and the application procedure, case consideration procedure and enforcement of decisions of the Court shall be defined by the Constitution of Ukraine and by the Law". In contrast to this, Article 3 of the Law, in addition to the Constitution and the Law, identifies "the Rules of Procedure and other acts adopted by the Court" as the "legal framework for the activities of the Court". The Law then allows judges to "exercise other powers determined by the Rules of Procedure" (para. 6, Part 4 of Article 59). The word "procedure" in Article 153 of the Constitution means "officially established or customary process of execution, completion or elaboration of something". In other words, "rules of procedure" and "the procedure" are, in essence, synonyms. This is the classic example of manipulating with "concepts" and "categories" in the law-making process. An attempt to assign the task of establishing a procedure for the consideration of cases to the Constitutional Court by defining this "procedure" as "the rules of procedure" in the Rules of Procedure of the Constitutional Court adopted by the Court itself, contradicts the Constitution.

[1] P. Stetsyuk, Changes to the Fundamental Law of Ukraine Concerning Justice (constitutional and jurisdictional dimension) – "Visnyk Konstytutsiynoho Sudu Ukrayiny", 2016, No. 4-5, p.194-201.

[2] Opinion of the European Commission for Democracy through Law (the Venice Commission) on the Draft Law on the Constitutional Court of Ukraine, CDL-AD (2016)034-e – the Venice Commission, *http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)034-e*.

Article 7 of the Law lists all constitutional powers of the Constitutional Court. At the same time, Part 2 of Article 8 "Limits of the Powers of the Court" states that "for the purpose of protecting or restoring the rights of a person, the Court shall consider conformity to the Constitution of Ukraine (constitutionality) of an ineffective act (specific provisions thereof), which is still applied to the legal relations that have arisen during the operation thereof". **This is an additional power of the Constitutional Court, not stipulated by the Constitution.** Its unconstitutionality is alarmingly obvious, suggesting that the authors of the bill and their masterminds in power are ready not only to ignore the exhaustive provisions of the Constitution, but to directly forge and "dissolve" its content by granting the Constitutional Court powers to revise even ineffective acts by simple law, masking it by the "Limits of the Powers of the Court". Similar approach was demonstrated by the Constitutional Court on 30 September 2010 in the way how it interpreted provisions of the Constitution to justify consideration of the constitutionality of the Law "On Introducing Amendments to the Constitution" of 8 December 2004, which, following its entry into force, "dissolved" in the text of the Constitution.[3] From now on similar action in the future has "legitimate" yet unconstitutional grounds, e.g. regarding the Law "On Amendments to the Constitution of Ukraine (concerning Justice)" dated 2 June 2016.

The composition of the Constitutional Court changes over time, but at any given moment it is a unique mixture of jurists, academicians (in legal science), professional judges of general courts and lawyers-members of parliament. The obvious negative factor accompanying the operation of the Constitutional Court that eventually presents itself is the procedure for the formation of its composition by three branches of power – the President, the Parliament and the Congress of Judges in equal proportions (each nominates six judges). The Law "On the Constitutional Court of Ukraine" establishes specific mechanisms for appointing judges of the Constitutional Court for each of these entities, creating conditions for various kinds of extralegal influence on the process.

The introduction of the "competitive basis" for the selection of candidates to the positions of the Constitutional Court judges implies the presence of the competition and its proper organisation at the very least. The competition as a process of selecting the winner (the best applicant) should be carried out by relevant selection (screening) commission. It is quite logical to expect that members of such commission should at least be capable of assessing the eligibility of applicants and their compliance with the requirements, whereas the commission members' personal, professional, business, moral and other qualities should not cast any doubts both in the professional community and among the general public. Obviously, the commission members (taking into account the specifics of the competition) must meet the same requirements – have "high moral qualities" and be "legal professionals with a recognised level of competence".

Article 12 of the Law entitled "Competitive Basis for Selection of Candidates for the Position of a Constitutional Court Judge" states that "for the position of a Constitutional Court Judge on a competitive basis regarding the persons appointed by the President of Ukraine shall be carried out by a screening commission established by the President of Ukraine. Preparation of the issue on competitive consideration of candidates for the position of a Constitutional Court Judge in the Verkhovna Rada of Ukraine shall be carried out by a committee the competence of which includes the legal status of the Constitutional Court of Ukraine, in the manner established by the Rules of Procedure of the Verkhovna Rada of Ukraine, with account of the provisions of this article. Preparation of the issue on competitive consideration of candidates for the position of a Constitutional Court Judge by the Congress of Judges of Ukraine shall be carried out by the Council of Judges of Ukraine".

By the Decree No. 306 of 4 October 2017, President Poroshenko has established the screening commission for the judicial candidates to the Constitutional Court regarding the persons appointed by the President. This commission includes professor Volodymyr Butkevych (Retired Judge of the European Court of Human Rights, Doctor of Law); professor Mykhailo Mykiyevych (Head of the Department of European Law at the Lviv National University after Ivan Franko, Doctor of Law); Mykola Onishchuk (President of the National School of Judges of Ukraine, Doctor of Law); professor Svitlana Seryohina (Director of the Research Institute for State Building and Local Self-Governance at the National Academy of Legal Sciences of Ukraine, Doctor of Law); and professor Hanna Suchocka (Independent Expert, Honorary President of the Venice Commission, Doctor of Law).[4]

The Parliamentary Committee with the competence regarding the legal status of the Constitutional Court of Ukraine – the Committee on Legal Policy and Justice – was established on 4 December 2014,[5] and on 1 November 2017 it included 32 MPs. Currently (as of 3 August 2017, when the Law "On the Constitutional Court of Ukraine" entered into force) Council of Judges of Ukraine (33 members), was elected on 24 November 2015 at the 13th Congress of Judges of Ukraine.

Obviously, **the members of these entities that in August 2017 were tasked to "prepare the issue of competitive consideration of candidates for the position of the Constitutional Court Judge" are individuals with unknown "moral qualities" and professional "competence", yet they are authorized by the law to arrange the competition for judges of the Constitutional Court**.

Article 148 of the Constitution introduces the following formal requirements to the candidates for the position of a judge of the Constitutional Court: "a citizen of Ukraine who has command in the state language, attained the age of forty on the day of appointment, has a higher legal education and not less than fifteen years professional

[3] For more detail, see the Decision of the Constitutional Court of Ukraine in the case upon the constitutional petition of 252 People's Deputies of Ukraine concerning the conformity with the Constitution of Ukraine (constitutionality) of the law of Ukraine "On Introducing Amendments to the Constitution of Ukraine" No. 2222 dated 8 December 2010 (the case on observance of the procedure of introducing amendments to the constitution of Ukraine) – official website of the Constitutional Court of Ukraine, *http://www.ccu.gov.ua/en/docs/283*.

[4] The Decree of the President of Ukraine "On the Competition Commission to Select Candidates for the Position of a Judge of the Constitutional Court of Ukraine regarding the Persons Appointed by the President of Ukraine" No. 306 dated 4 October 2017.

[5] Resolution of the Verkhovna Rada of Ukraine "On the List, Number of Members and Competences of the Committees of Verkhovna Rada of Ukraine of 8th Convocation", No. 22 dated 4 December 2014.

experience in the sphere of law, has high moral character and is a jurist of recognised competence". The candidate's eligibility against these formal requirements must be confirmed by documents subject to verification. **Speaking about criteria of "high moral character" of the candidate and his/her status of "a jurist of recognised competence", experts agree on their legal uncertainty, as neither the Constitution nor the Law establish references or criteria for determining the presence of such virtues in candidates**.

The ways of determining high moral character and recognised competence, suggested by Oleksandr Vodyannykov, the National Legal Advisor and the Head of the Rule of Law Section of the OSCE Project Co-ordinator in Ukraine are worthy of attention:[6] "When evaluating candidates, it is necessary to proceed from (1) the need to ensure public trust and confidence in the observance of high standards of the constitutional justice by the candidates should they become elected as judges of the Constitutional Court; (2) belief in the fact that public trust and confidence can be ensured only if judges and judicial candidates adhere to high ethical standards of conduct in their professional, public and private lives; and (3) the need to ensure essential and procedural integrity in the evaluation of candidates for the position of a judge of the Constitutional Court.

In order to determine the candidate's eligibility against the criteria of high moral character and recognised competence, it is suggested to:

- to review (if any) the candidate's publications, expert opinions, analytical materials, public speeches, articles, interviews, and court decisions (if the candidate was or currently serves as a judge), etc.;
- to interview on conditions of confidentiality representatives of the legal profession (judges, lawyers, academicians and the like) who had or currently maintain professional relations with the candidate, as well as journalists to obtain their opinions about the legal competence of the candidate, his or her integrity and suitability to perform functions of a judge of the Constitutional Court;
- to explore openly accessible information about the candidate in mass media.

After this, it is necessary to interview the candidate, giving him or her the opportunity to comment on any negative information about the candidate that became known to the commission".

Apparently, the lawmakers were not too preoccupied with defining high moral character and recognised level of competence of candidates for the position of a judge of the Constitutional Court, as Part 5 of Article 12 of the Law does not even mention these qualities: "Following the review of the documents and the information provided by candidates and interviews with them, the screening commission, the Committee, the Council of Judges of Ukraine shall adopt a recommendation for each candidate for the position of a Constitutional Court Judge".

In line with changes to Article 208 of the Law "On the Rules of Procedure of the Verkhovna Rada of Ukraine" concerning the procedure of appointing judges to the Constitutional Court, the right to nominate such candidates is granted to parliamentary factions (deputy groups) and the groups of unaffiliated MPs with membership not less than the size of the smallest deputy group. The list of entities that can apply to participate in the selection of candidates for the position of a judge of the Constitutional Court from the Verkhovna Rada does not include individuals ("self-nominees"). This obviously disregards provisions of two articles of the Constitution. First, Part 2 of Article 38 clearly states that "Citizens enjoy the equal right of access to the civil service and to service in bodies of local self-government". And second, Part 3 of Article 148 establishes that selection of candidates for the position of a judge of the Constitutional Court shall be conducted on competitive basis. This article further establishes the selection criteria for candidates, and the formula "a citizen of Ukraine can be a judge of the Constitutional Court of Ukraine" basically disallows limitation of access to the competition only to those listed in Article 208 of the Rules of Procedure.

All these factors can significantly affect the level of public trust towards the selection of candidates for the position of a judge of the Constitutional Court in terms of fairness, transparency and lawfulness.

We have a paradox here, as amendments to the Constitution and the new version of the Law "On the Constitutional Court of Ukraine" have drastically reduced the guarantees and the scope of rights and freedoms that can be protected through the Constitutional Court. Below are a few examples of that.

Following changes to the Constitution, Part 2 of Article 150 no longer includes the power of the Constitutional Court to provide "the official interpretation… of the laws of Ukraine" upon constitutional appeal of the citizens of Ukraine, foreigners, stateless persons and legal entities.[7] Grounds for the constitutional appeal regarding the official interpretation of the laws of Ukraine included "the presence of ambiguous application of the provisions of the laws of Ukraine by the courts of Ukraine and other bodies of the state power, if the holder of the right to constitutional appeal believes that it can lead to violation of his or her constitutional rights and freedoms".[8] The unique mechanism of the constitutional appeal has somewhat resembled "complaints on unconstitutionality" and "direct appeals".[9] For example, the Federal Constitutional Court of Germany uses them to protect fundamental rights and freedoms of an individual from government encroachments in one case and monitors the constitutionality of laws and other regulatory and legal acts of the state in another.[10]

Within this "constitutional appeal" mechanism the Constitutional Court could verify the law with respect to its constitutionality: "in the event of a dispute over the constitutionality of the provisions of law applied by the court in the general legal procedure, further proceedings on the case shall be suspended. In such circumstances, the constitutional proceeding on the case is initiated, and the case shall be considered by the Constitutional Court of Ukraine as a matter of urgency".[11] This mechanism

[6] O. Vodyannykov, "The Competition to the Constitutional Court from the judiciary: an equation with six unknowns", Online portal "Livyi Bereh" (LB.ua), 13 November 2017.

[7] Article 43 of the Law of Ukraine "On the Constitutional Court of Ukraine" (dated 16 October 1996).

[8] Ibid, Article 94.

[9] For more detail about the constitutional complaint in Germany see the article by Dr. Otto Luchterhand in this publication.

[10] The Constitution of the Federal Republic of Germany of 23 May 1949. Constitutions of Foreign Countries (the manual under the editorship of V. Seryohin), FINN, 2009, p.83-122.

[11] Article 83 of the Law of Ukraine "On the Constitutional Court of Ukraine".

allowed the court of any instance to apply to the Supreme Court of Ukraine, and the latter – to the Constitutional Court with the constitutional petition, pursuant to Article 150 of the Constitution.

Current law "On the Constitutional Court of Ukraine" no longer includes this method of protecting constitutional rights and freedoms of citizens. It was replaced by rather questionable "right to constitutional complaint", which explicitly violates the axiomatic constitutional requirement, where "the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force" (Part 3 of Article 22 of the Constitution).

But this new instrument of the "constitutional complaint", declared as just about the most significant achievement of the constitutional process, was formed and formulated quite carelessly both in terms of meaning and content, and in view of the legal technique.

Provisions of Article 151-1 of the Constitution, also reflected in Part 1 of Article 56 of the Law, determine **the subject of the right to constitutional complaint as a "person alleging that the law of Ukraine applied in a final decision of the court in his or her case contravenes the Constitution of Ukraine"**. The category "person" includes individuals and legal entities – subjects of both private and public law. No party to the trial can be deprived of the constitutional right to appeal to the Constitutional Court under Article 151-1 if it is believed that there are sufficient grounds to apply mechanisms thereof, whether it be an individual, a local community, or a government agency. The Rule of Law principle has universal effect in all legal relationships in the state, therefore it is necessary to remove Part 2 of Article 56 of the law, which states that "public legal entities shall not be subject of the right to constitutional complaint".

The mechanism of realisation of the right to constitutional complaint, set forth in the law, includes provisions that substantially balance apparently excessive expectations from its implementation. Specifically, pursuant to Part 1 of Article 77, a constitutional complaint shall be deemed as admissible by the Constitutional Court subject to its compliance with Articles 55 and 56 of the law, and where:

"1) all domestic legal remedies have been exhausted (subject to the availability of a legally valid judicial judgement delivered on appeal, or, where the law provides for cassation appeal – of a judicial judgement delivered on cassation);

2) not more than three months have passed from the effective date of a final judicial judgement that applies the law of Ukraine (specific provisions thereof)".

Paragraph 1 is obviously out of sync with the content of Article 151-1 of the Constitution, which consists of two sentences. If the first sentence clearly indicates that judicial remedies must be exhausted, the second one basically paralyses the possibility of lodging a constitutional complaint until exhaustion "of any other domestic remedies".

In the statement "all domestic legal remedies have been exhausted", para. 1 combines ideas presented in both sentences of Article 151-1. As we can see, the words "any other" have been dropped out. This allowed specifying in brackets "all remedies", bringing them down to "judicial protection". Despite using this creative method of legal 'acrobatics' to adjust the constitutional requirement, we have to admit that differences exist between the text of Article 151-1 of the Constitution, and the content of para. 1, Part 1 of Article 77 of the Law "On the Constitutional Court of Ukraine" which is unacceptable.

The Constitution does not specify domestic remedies meant by the words "any other". It is obvious that the second sentence of the Article 151-1 of the Constitution is legally uncertain and "foreign". Yet, authors of the Law "On the Constitutional Court of Ukraine" could not ignore it altogether – it would be possible to remove this "alien" statement from the Constitution only during the next period of constitutional amendments and by another parliamentary convocation, as prescribed by Part 2 of Article 158 of the Constitution.

Article 77 of the law also sets a three-month term "from the effective date of a final judicial judgement that applies the law of Ukraine (specific provisions thereof)" to the submission of a constitutional complaint. **The Constitution, however, does not restrict the right to submit a constitutional complaint by any terms, while its Article 151-1 has no reference to the law that may impose restrictions on the exercise of this right by a person. We should not forget that a constitutional complaint cannot be viewed as equivalent of lawsuit.**

The content of the Law "On the Constitutional Court of Ukraine" indicates that the Court's rigour towards observance of timeframe, within which a constitutional complaint must be submitted, is not accompanied by legal certainty as to the time limits within which such a complaint flows in the organs of the Court. The term of constitutional proceedings shall be calculated from the date when it was initiated (six months, unless otherwise provided by the law, or one calendar month), as stipulated by Article 75. At the same time, the law does not specify the period between the date of receipt of the constitutional complaint by the Court and the date of a ruling on initiation of constitutional proceeding, which contradicts the principle of legal certainty – an element of the Rule of Law. In addition, Article 59 expressly provides that "where a Judge-rapporteur is unable for valid reasons (illness, travel, vacation, etc.) to prepare case files for consideration within three months… the Secretary of the Board shall submit a proposal to replace the Judge-rapporteur… Where it is impossible to replace the Judge-rapporteur… a proposal to refer the case to another Board is submitted".

One cannot rule out the possibility of similar situation in another Board. Note that the constitutional complaint flows from the Secretariat to the Board of three judges, to the Senate and possibly to the Grand Chamber.

Since we discuss the matter of the organisation of extrajudicial institution for protecting the rights and freedoms, the following cannot be ignored.

The decision on a constitutional complaint is adopted by the Senate (or the Grand Chamber). But the Board of three judges may reject constitutional proceedings in the case, and such a ruling shall be final. How does this correlate with the fact that a person submits a constitutional complaint to the Constitutional Court? **If the law offers no procedure of appeal against the unanimous ruling of three judges, which is equivalent to the decision of the Constitutional Court, how can a person protect his or her constitutional right, which is considered violated?**

In this regard, it would be expedient to address changes related to removal of Part 3 from Article 150 of the Constitution, and introduction of a separate Article 151-2. Specifically, part 3 of Article 150 stated that "On issues envisaged by this Article, the Constitutional Court adopts decisions that are mandatory for execution throughout the territory of Ukraine, that are final and shall not be appealed". The content of new Article 151-2 of the Constitution is as follows: "Decisions and opinions adopted by the Constitutional Court of Ukraine shall be binding, final and cannot be appealed".

At first glance, both provisions are nearly identical. But the updated Constitution now includes Article 151-1, which introduces the "constitutional complaint". If Part 3 of previous Article 150 covered "issues envisaged by this Article", then outcomes established in Article 151-2 cover "decisions and opinions adopted by the Constitutional Court of Ukraine" – both on issues envisaged by Article 150 and those included in Article 151-1 of the Constitution.

As Article 151-1 of the Constitution establishes the right to the "constitutional complaint", the person cannot be denied of his or her right to appeal against the decision of the Board – even in full membership – when the final decision on the Law (Part 3 of Article 61) is delivered by the Senate.

Strangely enough, the level of protection of the subject of a constitutional complaint is lower than the right to protection of subjects of the constitutional petition: a ruling to initiate proceedings is delivered by the Grand Chamber in the event of disagreement with the Board's ruling to reject constitutional proceedings in the case, regardless of the number of votes. In view of this, the law needs to be amended as regards the procedure for the adoption of a decision to initiate proceedings on a constitutional complaint, and concerning the grounds for rejection to initiate proceedings, namely "inadmissibility of a constitutional complaint" (para. 4, Part 1 of Article 62). **The legal uncertainty of this ground is an obvious justification for violations of the right of a person to constitutional complaint.**

An analysis of foreign legislation confirms that within the constitutional complaint mechanism the constitutional court, unlike the administrative courts, does not consider the matter in order to settle relevant dispute in the case, but rather assesses the constitutionality of the law or other regulatory and legal act.[12]

In the meantime, Article 78 of the Law allows "the Grand Chamber to take measures to secure a constitutional complaint by issuing an interim order that is an enforcement document". Yet, the author of the bill and the Parliament disengaged themselves from the idea of withdrawing the Constitutional Court from the justice system, proposed in changes to the Constitution. **Contrary to the Constitution, granting the Constitutional Court the authority to secure constitutional complaints by issuing enforcement documents transforms the Court into a peculiar body of the "constitutional cassation" in cases to be considered by courts of general jurisdiction.**[13] The more so because "the delegation of the functions of courts, and also the appropriation of these functions by other bodies or officials, shall not be permitted" (Article 124 of the Constitution). **In this regard, it would be appropriate to develop a communication of the Constitutional Court with the relevant court of general jurisdiction, where based on the ruling of the Constitutional Court this court adopts a final decision in the case in which the applicable law was declared unconstitutional.**

As of 24 November 2017, there were 50 constitutional petitions under consideration of the Constitutional Court.[14] The Court did not complete constitutional proceedings for none of them, although many of them were initiated more than a year ago. During this period the Constitutional Court has not adopted any decisions, nor published any opinions. Paragraph 1 of Section IV of the Transitional Provision of the law states that "Constitutional petitions concerning official interpretation of laws of Ukraine (specific provisions thereof) and constitutional appeals received by the Constitutional Court prior to this Law becoming effective, where constitutional proceedings in such cases have not been initiated, shall be returned by the Secretariat of Court to their authors".

Therefore, the Constitutional Court, in violation of all conceivable terms, did not consider constitutional petitions and constitutional appeals for years, specifically in relation to such important Laws as "On All-Ukrainian Referendum", "On Fundamentals of the State Language Policy", "On Purge of Power", concerning the land market and many others, being fully aware that shortly it will be deprived of power to interpret laws. So now the Constitutional Court is instantaneously relieved of largely unpleasant (including for political reasons) duties of formulating a clear legal position regarding the subjects of appeals and petitions.

The stated provision of the Law is clearly inconsistent with the constitutional principle of the Rule of Law and its integral element – the principle of legal certainty. The refusal of the Constitutional Court to carry out proceedings for current constitutional petitions and appeals may lead to unpredictable (for rights and freedoms) consequences of the application of legal norms that need to be interpreted or considered in terms of their constitutionality. After the enactment of the updated version of the Law "On the Constitutional Court of Ukraine", the sole body of constitutional jurisdiction still has to take necessary action in respect of the existing petitions and appeals in accordance with the rules that were effective at the time of receipt by the Constitutional Court. **While enacting the law, the subject of legislative initiative, as well as lawmakers, generally ignored the principle of "legitimate expectations (legal certainty)" of the subject of a constitutional petition or appeal, which is an internationally recognised element of the Rule of Law:**

[12] K. Auriyan, The problems of introducing the institution of the constitutional complaint in Ukraine: admissibility of cases in administrative and constitutional jurisdictions, "Visnyk Konstytutsiynoho Sudu Ukrayiny", 2014, No. 5, p.66.

By the way, following consideration of a constitutional complaint, the Federal Constitutional Court of Germany does not replace the ruling of the court of general jurisdiction by its own decision. Quite the contrary, it draws attention to the provisions of the Constitution that were violated in the appealed decisions. See O. Klein, "Relationships of the Federal Constitutional Court of Germany with the Courts of General Jurisdiction", Conference, Baku, 9-10 November 2006, p.189.

[13] In this situation, one should not ignore the reality of the corruption component against the backdrop of possible political influence on the Constitutional Court and its judges.

[14] Under consideration of the Constitutional Court of Ukraine. Constitutional petitions – official website of the Constitutional Court of Ukraine, *http://www.ccu.gov.ua/novyna/konstytuciyni-podannya-za-stanom-na-24-lystopada-2017-roku*.

persons acting in good faith under the law shall not be deceived in their legitimate expectations.[15]

Adopted constitutional amendments concerning the Constitutional Court, as in case of any other constitutional requirements, are norms of direct effect (part 2 of Article 8 of the Constitution), therefore, there are no formal reservations about their direct realisation: "Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed". The latter directly concerns the constitutional complaint, introduced by the constitutional changes (Article 151-1). This is why **the actual refusal of the Constitutional Court to consider constitutional complaints during the period from October 2016 through August 2017 triggered totally understandable resentment in the professional environment**.

The level of constitutional support for independence and immunity of judges of the Constitutional Court has notably increased, as comparison of the former and current wording of Article 149 of the Constitution and provisions of Article 149-1 clearly point at the legislators' willingness not only to maximise protection of judges of the Constitutional Court from possible political influences, but also to "improve" the procedure of detention, custody and arrest of a judge. Such actions against the judge are prohibited until a guilty verdict is rendered by a court, except for detention of a judge caught committing serious or grave crime or immediately after it. In other cases, it will be necessary to obtain the consent of the Constitutional Court for such actions regarding the judge.

Authors of the Law "On the Constitutional Court of Ukraine" also decided to modify some constitutional provisions. For these purposes, Part 7 of Article 24 of the law states that "a judge of the Constitutional Court shall not be subject to coercive enforcement to any authority or institution other than court".

The new version of Article 149 of the Constitution declares that "a judge of the Constitutional Court of Ukraine shall not be held legally liable for voting on decisions or opinions of the court, except the cases of committing a crime or a disciplinary offence". This provision basically exonerated the responsibility of judges of the Constitutional Court involved in the decision of 30 September 2010, which authorised the usurpation of state power by Viktor Yanukovych. And apparently no one will be seeking to establish their crime.

Part 2 of Article 149-1 stipulates that "dismissal of a judge of the Constitutional Court of Ukraine from his or her office shall be decided by not less than two-thirds of its constitutional composition".

Several attempts to practically implement this constitutional provision in May and June 2017 in connection with the letters of resignation submitted by two judges of the Constitutional Court, elected under the President's "quota" (Yuriy Baulin and Serhiy Vdovichenko) ultimately failed. Although the causes for that were purely subjective, it seems that the introduction of this constitutional novelty was not carefully thought-out, while the constitutional norm itself poses considerable risks of possible abuse of right by the judges of the Constitutional Court, as well as the risks of corruption inside the court.

One of the grounds for dismissal of a judge of the Constitutional Court, defined by the Constitution (para. 2, Part 2 of Article 149-1), is "violation by a judge of incompatibility requirements". The mechanism of its initiation is described in para. 2, Part 1 of Article 21 of the Law: "The issue of violation by the judge of incompatibility requirements shall be considered at a special plenary session of the Court, subject to the availability of an opinion by the Standing Commission of the Court on Regulations and Ethics. Should the circumstances that evidence the violation by a judge of incompatibility requirements be confirmed, such a judge shall be warned of the need to remedy such circumstances within the term determined by the Court. Where the judge has failed to remedy the circumstances, which evidence the violation of incompatibility requirements, within the term determined by the Court, the Court shall adopt a decision on his or her dismissal". This is somewhat free interpretation of the provisions set forth in para. 2, Part 2 of Article 149-1 of the Constitution.

"Violation by a judge of incompatibility principle" is clear grounds for dismissal of a judge of the Constitutional Court. Obviously, the mere fact of violation of incompatibility principle should be sufficient to dismiss a judge from office, as the Constitution does not stipulate any "warnings" or "additional terms" to remedy such circumstances. However, it is possible that a person appointed (elected) to the position of a judge of the Constitutional Court of Ukraine may at that moment be engaged in activities incompatible with functions of a judge of the Constitutional Court and will have to discontinue such activities within the term established by law.

One could agree with identical formula, presented in para. 5, Part 2 of Article 81 of the Constitution (concerning violation of incompatibility principle by the People's Deputy): **"the judge's failure, within twenty days from the date of the emergence of circumstances leading to the infringement of requirements concerning incompatibility of activities of a judge of the Constitutional Court of Ukraine with other types of activity, to remove such circumstances"**. It would be even more beneficial if this provision was included in para. 2, Part 2 of Article 149-1 of the Constitution.

The most important issues concerning functioning of the Constitutional Court of Ukraine should be addressed at special plenary sessions (Part 1 of Article 39 of the Law).

Such activities as election of the Chairman of the Court and swearing-in of newly appointed judges, etc. can only be carried out at special plenary sessions. The special plenary session shall be competent when attended by at least twelve Constitutional Court Judges **empowered under this Law** (Part 3 of Article 39).

Since **13 (out of 14) current Constitutional Court judges were previously empowered by legal acts other than this law, the Constitutional Court by virtue of the current law cannot hold special plenary sessions, which paralyses its effective functioning.**

It is obvious that problems with implementing amendments to the Constitution concerning the status of the Constitutional Court, as well as serious shortcomings in the Law "On the Constitutional Court of Ukraine" can only be addressed by introducing necessary amendments to the Constitution and the law in question.

[15] "This principle also aims at ensuring the individual's confidence in the state – the constitutional value reiterated by the Constitutional Court in Ukraine in its decisions (No. 20 of 1 December 2004; No. 3 of 5 April 2001; No. 5 of 22 September 2005; No. 6 of 9 July 2007; No. 9 of 28 April 2009; No. 2 of 20 January 2012". See S. Rabinovych, Constitutional Principles of Legal Certainty and Protection of Legitimate Expectations in the Activities of Government Authorities – The Lviv University Newsletter, Legal Series, 2014, Issue No. 60, p.168, 175; The General Theory of Law (manual under the editorship of M. Koziubra) – Vaite, 2015, p. 371.

3. CONCLUSIONS AND RECOMMENDATIONS

The following conclusions and recommendations stem from the materials presented above.

1. It is necessary to amend the Constitution in order to eliminate shortcomings in its updated text, specifically:

- on the establishment, reorganisation and liquidation of courts;
- on unconditional right to cassation;
- to include the main task of the High Council of Justice in the Constitution, namely ensuring independence of the judiciary, guaranteeing its functioning on the basis of responsibility and accountability to the society, forming honest and highly professional judicial corps, observing provisions of the Constitution and the laws of Ukraine, promoting professional ethics in the work of judges and prosecutors;
- to clearly define the structure of the Supreme Court and its powers as the judicial body;
- to define the status of prosecution agencies (by powers) as a "service of public prosecution";
- to bring the status of the bar in line with the society's needs and realities;
- to specify the status of the Constitutional Court of Ukraine and the procedure of its formation;
- to remove the second sentence from Article 151-1.

2. To develop the new version of the Law of Ukraine "On the Judiciary and the Status of Judges" to bring it in conformity with the Constitution, and to adopt this law in strict compliance with the Constitution and provisions of the Law "On the Rules of Procedure of the Verkhovna Rada of Ukraine".

3. To amend the Law of Ukraine "On the Constitutional Court of Ukraine" to bring some of its provisions in line with the Constitution.

4. To amend the Law of Ukraine "On the High Council of Justice", clearly defining the status and the procedure of formation of the Public Integrity Council, and to consolidate the right of judges to appeal a decision on their dismissal based on the capability ground.

5. To bring the content of the Law of Ukraine "On the Constitutional Court of Ukraine" in agreement with the Constitution.

6. Pursuant to the OSCE expert recommendations, to cancel restriction of the right of current judges to appeal a decision on their dismissal based on the capability ground.

7. To remove provision that "the judiciary system in Ukraine… shall be defined by the law" from Article 125 of the Constitution, and to clearly define the judiciary system in the text of the Constitution itself.

8. To submit the Draft Law "On Amendments to the Law of Ukraine 'On the Bar and Practice of Law' and Other Related Legal Acts" to the Venice Commission for obtaining relevant opinion.

9. To introduce changes to the new version of the Law of Ukraine "On the Judiciary and the Status of Judges" concerning the specialised High Anti-Corruption Court and the High Court on Intellectual Property to bring their status in conformity with the constitutional requirements concerning systemic features of the judiciary.

10. To refrain from "optimisation" of courts until all courts are adequately staffed by judges, and until the administrative and territorial reform in Ukraine is completed.

11. To introduce changes to specific provisions of the Law of Ukraine "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts", which according to the opinion by the Scientific and Expert Department as well as comments of the Legal Department of the Verkhovna Rada of Ukraine Administration bear the marks of unconstitutionality.

12. Introducing terminological and conceptual borrowings from the common law (Anglo-Saxon) legal systems to the texts of the procedural codes requires in-depth scientific study, as does the introduction of elements of case law in the legal system of Ukraine.

The above information points at serious violations of the constitutional requirements in implementing amendments to the Constitution concerning justice and the status of the Constitutional Court in a number of laws. The Law of Ukraine "On the Judiciary and the Status of Judges", adopted with disregard for the Constitution, may at any moment become the subject of scrutiny by the Constitutional Court, and the Court's conclusions may question the legitimacy of the entire pyramid of the judiciary based on this Law.

Hastened "optimisation" of the system of general courts, coupled with other problems and a compromised implementation process may disrupt their operation and discredit the main objective of the judicial reform – to ensure the citizens' right to a fair trial by guaranteeing proper access to justice.

THE PROBLEMS OF IMPLEMENTING CHANGES TO THE CONSTITUTION CONCERNING JUSTICE AND THE STATUS OF THE CONSTITUTIONAL COURT OF UKRAINE

A Roundtable "The Problems of Implementing Changes to the Constitution of Ukraine Concerning Justice and the Status of the Constitutional Court Of Ukraine" was held on 20 December 2017. It was organized and conducted by the Razumkov Centre in collaboration with the German Foundation for International Legal Cooperation and the Council of Europe project "Support to the Implementation of the Judicial Reform in Ukraine".

The roundtable participants discussed current state and problems of the judiciary system, changes in the constitutional and legal status of a judge, as well as prospects of ensuring the right to a fair trial in connection with changes in the procedural legislation.

Below are the speeches of the roundtable participants in the order, in which they were presented at the event. Texts are based on transcriptions and therefore presented in a slightly abridged form. Some speeches include references by editors.

WELCOMING REMARKS

Pavlo PYNZENYK,
Chairman of the Board of the Razumkov Centre, Deputy Head of the Parliamentary Committee on the Rules of Parliamentary Procedure and Support to Work of the Verkhovna Rada of Ukraine

I am happy to welcome you on behalf of the Razumkov Centre at our roundtable on the problems of implementing constitutional changes in the field of justice and the status of the Constitutional Court of Ukraine.

We would also like to express our sincere gratitude to the Razumkov Centre's partners – the office of the German Foundation for International Legal Cooperation and the Council of Europe project "Support to the Implementation of the Judicial Reform in Ukraine".

The report, developed by a highly reputable team of authors, reviews the implementation process of the last year's amendments to the Constitution concerning justice, including regulatory provisions defining the new status of the Constitutional Court; and illustrates possibilities of ensuring the rights of citizens to a fair trial, established by the Constitution, in the context of changes to procedural legislation.

Considering the date of our event, we could have paraphrased its topic as follows: "What do we have on hand in the area of justice entering the new year? What should we expect in 2018". Generally speaking, it is possible to outline a number of definitely positive points, such as removal of the personnel issues of the justice system from the sphere of competence of political bodies; restriction of the Presidential powers in the process of appointing judges; introduction of the principle of appointing judges for an unlimited term, and the launch of the High Council of Justice. There is also a progress towards greater independence of the judiciary from direct political influences, which is, of course, a positive development. The Supreme Court has been formed on essentially new grounds.

Nonetheless, we still have different reservations and questions concerning many aspects of the judicial reform, expressed by the public and professional circles alike. There are obvious shortcomings in the content of laws adopted pursuant to the implementation of changes to the Constitution that define mechanisms of forming the new judicial system and procedures for exercising powers by judges. There are questions about the constitutional and legal status of judges and access to the judicial profession. There is a professional, and also political discussion concerning introduction (or non-introduction) of the anti-corruption court, the mechanisms for its creation and the ways to achieve its efficiency (if it is established and in what form).

We have to admit that there is much uncertainty regarding the functioning of the constitutional complaint mechanism, which is new for Ukraine. The issue of defining the legal status of the prosecution service, which should be brought in line with relevant social needs, is becoming increasingly more urgent every day. The same applies to lawyers, as the time is ripe. And I am absolutely positive that all these issues can be addressed, as not a single reform in the world has happened without errors, but their correction leads to success. ■

Marten EHNBERG,
The Head of the Council of Europe Office in Ukraine, Representative of the Secretary General in charge of the Co-ordination of the Co-operation programmes in Ukraine

Honourable justices, dear colleagues, it is indeed a pleasure to be here with you today to discuss something that we all worked very hard on – the status of the judicial reform in Ukraine.

Let me first take this opportunity to thank the Razumkov Centre and also the German Foundation for International Legal Cooperation for the willingness to work with us on the task of today's event.

I think we should all acknowledge that the constitutional amendments on the judiciary became a major achievement of the Ukrainian authorities, which brought the justice system of Ukraine in high compliance with standards of the Council of Europe and European standards in general. Reconstituting the Supreme Court, abolishing the five-year probation period for judges, cutting the link between the legislature and the judiciary by removing Parliament from the appointment of judges, amending the codes of judicial procedure, revising the powers of all major judicial institutions, such as the High Council of Justice, the High Qualifications Commission of Judges of Ukraine and the Council of Judges of Ukraine – these are indeed far-reaching changes, and Ukraine deserves a lot of credit for having achieved all this. From our side, we have supported all of this through our project called "Support to the Implementation of the Judicial Reform in Ukraine" and we have provided opinions, technical support and expertise on a number of laws related to the changes that I've just mentioned. Now we are the stage of implementing these changes, and this is a task that we all really need to work together on to ensure that it gets done.

As regards the practical selection and disciplinary responsibility of judges, independence of the judiciary, the uniformity of judicial practice and the execution of judgements of the European Court of Human Rights – all this will show whether the judicial reform is progressing and, of course, increase the trust in judiciary, which is what we will talk about today.

The issues that we want to discuss today are the implementation of the new structure of the judiciary, legal status of the Constitutional Court of Ukraine, and most importantly – implementation of the new proceduralcodes.

I have mentioned the Constitutional Court. Of course, it has a special place in the legal system of Ukraine. Not being a part of the judiciary as such, it was reformed to provide a tool for direct implementation of the European Convention at the national level – a constitutional complaint. In a number of the Council of Europe member-states a constitutional complaint plays the role of a legal remedy, thus allowing an individual to protect his conventional rights at a national level and, of course, prevent the flow of applications to the European Court of Human Rights. This mechanism has not been fully introduced in Ukraine yet, but it should be regarded as a good way to deal with many systemic problems, identified in judgments of the European Court of Human Rights.

I want to say a few words about the procedural codes as well. Special attention has been paid to them in the Council of Europe. We are looking at the mechanisms of the procedural codes for reviewing cases by the Supreme Court following the decision of the European Court of Human Rights. This should provide *restitutio in integrum* for violations detected by the European Court, as well as provide guidance for lower courts on how to improve the implementation of the European Convention.

I would like to mention one interesting detail also in the report by the Razumkov Centre, when we talk about trust in the judiciary, and we see a difference between the people with personal experience with the judicial system and those without.[1] The trust is higher among the former. This is a positive thing, however it does not mean that we should relax and do nothing. Now, we have to work even harder to spread this message that there is an ongoing reform and the Ukrainian system is being reformed and also that people have an increased trust in this. The Council of Europe is proud to be a partner in this process, and we will continue to support Ukrainian authorities, the reform of the judicial system in ways that we hope will also raise trust among the public. ■

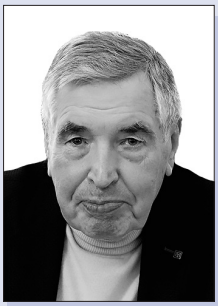
▶ SPEECHES ◀

Doctor Otto LUCHTERHANDT,
Director of the Department for Eastern European Law Studies at the University of Hamburg

I have been working in your country as a legal adviser with the German Foundation for International Legal Cooperation since 1994. And I am very pleased to pay tribute to the subject of today's discussion. It's just great. Based on my personal experience not only in Ukraine, but in many post-Soviet states, I must say that there is very little talk about the effectiveness of reforms. Both specialists and institutions that sponsor such events pay too little attention to this truly key aspect.

[1] The speaker refers to the results of the Public Opinion Survey "*The Judiciary Through the Eyes of Ukrainian Citizens*", included in this publication, p.38.

Now I will switch to German. I want to say that I have divided my speech[2] into two parts. At first I will say a few words about the German system of individual constitutional complaint submitted to the Federal Constitutional Court, and then I will focus on one issue of particular interest: the possibilities and tools to reduce the bulk of complaints that are constantly being submitted to the Constitutional Federal Court. By the way, all 16 Lands have land (constitutional) courts, which is also very interesting and important, but I will only focus on Federal Constitutional Court. In conclusion, I will make some remarks and proposals for Ukraine based on the German experience. ■



Mykola KOZYUBRA,
Chair of the Department of General Theoretical Law Science and Public Law at the National University "Kyiv-Mohyla Academy", Corresponding Member of the National Academy of Legal Sciences of Ukraine

I would like to emphasize only several points. *First*, the judicial reform, of course, shall not be completed just by making amendments the Constitution and even by implementing them in the national legislation.

Second, the problem with the judicial reform is much deeper, as it goes far beyond the implementation of progressive provisions in the national legislation. There are many things that can and should work for the independence of judges. However, our practice (analysis of court decisions) shows that so far, these progressive elements in the Constitution and laws, as well as European standards, have regrettably not found the way to the consciousness of judges. They did not transform into the judges' beliefs or became integral parts of their thinking. At the same time, I would lie by saying that there are no decisions based on in-depth analysis of evidence, judgments of the European Court of Human Rights and other international courts, including the International Court of Justice. This means that the process is underway.

The process has really got off the ground, and I can confirm that public confidence in courts is starting to grow. The changes are still small and hardly noticeable, but they are there – and it's nice to realise that. On the other hand, problems persist, and I must say that some politicians' calls to conduct all-round lustration will not resolve them.

Again, the problem is much deeper, and it seems that we need to start not from the judicial corps, but students. For me this problem is quite familiar because as a professor I see that the way students think changes very slowly. It is too late to try to change the judges' attitudes after they completed their studies and started to work. The process then is much slower than it could have been before. So, I think this issue deserves a very special attention. Only through strong collective effort of higher education, aimed at training of future legal professionals with a new outlook and focused on values rather than on the ritual, as it is often the case today, and when these values transform into internal need and belief of lawyers in general and of judges in particular – only then we will be able not only to drive the reform, but also to achieve the result that we seek. ■

Vitaliy KARPUNTSOV,
Member of Parliament

First of all, I want to express my gratitude to the organisers, because such intellectual discussions are fundamental for making decisions in the Parliament. Such debates are truly needed, and they should probably be more public, and as often and loud as possible. Because it is trendy today for organisations that are in fact engaged in lobbying, to hide behind the "very public work" as non-governmental entities. Unfortunately, we make ochlocratic decisions and often forced to pass them in the Parliament, although later they are very difficult to correct. And because of the lack of professional intellectual discussion and when science is not involved, it is always tempting to squeeze some bad "traditions", mentioned before into the most correct and progressive decisions. One of such traditions is corruption that really descents from student life, as it is still considered normal to bribe a professor in order to pass exam instead of seeking knowledge and working hard to obtain it.

Perhaps this was exactly the case with the codes that stirred a lot of criticism.[3] As a member of Parliament, I also voted for them. Quite often I have to "push back" many things that my internal scientist and practitioner tells me, and fall for even ochlocratic calls or pressure, and perhaps for the belief in the principle that it is better to move forward than to stand still…

This is why we need such professional discussions – to openly discuss what exactly needs to be changed, how it can be changed, and which changes must be accelerated. Therefore, I want to briefly outline the problems that, in my opinion, should become the focus of the professional community's attention.

[2] Below is the introductory speech by Professor O. Luchterhandt. Full speech, translated from German, is included in this publication as a separate article "*Individual Constitutional Complaint in Germany and Ukraine: the Comparative Analysis*", p.60.

[3] The speaker refers to the Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts", adopted on 3 October 2017; the law entered into force on 1 January 2018.

Consolidation of courts.[4] Will this consolidation optimise logistics for a citizen? Will it help to build new ramps, new bathrooms, a totally new infrastructure thus contributing to the principles of the accessibility of justice, presented in the codes? Regarding the introduction of e-justice: will everyone be able to make use of it? If, by stimulating the development of e-justice, we grant *the right* to pay smaller court fees, then do we offer the *opportunity* to use this right? This is a controversial issue.

The advocates' monopoly. It is being actively lobbied among the lawmakers. But how about the prosecutors' monopoly? If you look at the relevant law, then the prosecutor's office needs to be established in the Parliament, as the Supreme Court now has to deal with the cases of MPs and deprivation of parliamentary immunity, for example. It is worthy to mention both the intellectual court and the qualifications of its judges.[5] We made scholars, practitioners, patent attorneys equal. They are entitled to participate in the competition, but a patent attorney cannot represent interests in court, only the advocate! This is a nonsense, but these topics are poorly discussed as well.

Competitive selection of judges. What do we do if this competitive procedure proved to be humiliating for most highly qualified judges with a degree, consistent professional growth and impeccable reputation – but who refused to debase themselves? How about labour rights of these judges?

The Constitutional Court. When I was a student, I had first collections of the Constitutional Court decisions – they were my reference book with many paragraphs underlined. I mean, every decision was quintessential, and you could use a single paragraph as a basis for the report or even the research paper. But today the Constitutional Court holds no public meetings. It's a shame, and not only on the court, but on the state in general. And how about selection of its judges? No government body can institute rules for itself. The same is true for the Constitutional Court's rules of procedure, but it may go ahead and change the procedure of submitting candidates for the positions of its Secretariat head and deputy head, thus changing the procedure established by the law. Why can't we do the same in the Verkhovna Rada Apparatus, in the public prosecutor's office, or in other state institutions?

Speaking about the Constitutional Court, I still hope that the Committee will hold a professional and open competition. Previously there were some procedural things that I personally challenge both as a member of Parliament and a scholar. For example, the procedure of presenting candidates for consideration to my parliamentary faction was negated. Therefore, there was no actual selection of candidates because they did not present their positions – and it was impossible to interview them.

There are still many problems and unaddressed issues, there is lobbying and opportunities for various influences on the judiciary, including on the Constitutional Court. We need to do something with all that, and the role of scientists and science is crucial. Science has to declare that sacrificing a constitutional institution to please the political establishment is unacceptable. We need discussions to stimulate the Parliament to talk about it, but also to prevent MPs' approval of anything. Blanket lustration and lobbyism is not good. Science should speak loud and clear about these things, and prove that positions of scientists and practitioners, rather than temporary ochloclortic solutions should dominate. Science has to force both the public and the Parliament to depart from those bad "traditions" that slow down our development, including in the field of justice. This is absolutely necessary for making our society fair, and the rights of citizens truly protected. This is necessary to dispel a myth that we move forward and develop dynamically… ■

Kostyantyn KRASOVSKY,
Chief of the Head Department for Legal Policy of the Presidential Administration of Ukraine, Secretary at the Judicial Reform Council

It was nice to hear reports that some positive outcomes of the Judicial Reform Council's efforts launched three years ago are already being felt. Where did we start? The President identified the judicial reform as a priority and established the Judicial Reform Council, and we have devised a plan that eventually transformed into the strategy of reforming the judiciary, the administration of justice and related legal institutions, and developed the principles that the Judicial Reform Council has put into the reform itself – systemic, phased and balanced approaches, public involvement, the use of international and European best practice.

First of all, we managed to formulate the problems typical for the judiciary at that time. And it is important that after formulating them we defined and elaborated a plan of action by areas – the judicial system, the administration of justice and related legal institutions (the prosecutor's office, the bar and most importantly – enforcement of court decisions).

The Law of Ukraine "On Ensuring the Right to a Fair Trial" addressed the most urgent issues that could not

[4] The speaker refers to the President Poroshenko's initiative concerning so-called consolidation of courts. As of the date of the roundtable, the term "consolidation" remained unclear. This inexplicable initiative was questioned by V. Musiyaka during presentation of the publication "The Problems of Implementing Changes to the Constitution of Ukraine Concerning Justice and the Status of the Constitutional Court of Ukraine" at the beginning of the event. However, on 29 December 2017 President Poroshenko signed several decrees (No. 449-454) on the establishment, reorganisation and liquidation of local courts.

[5] The intellectual, or the patent court is a specialized court dealing with intellectual property cases. The speaker refers to the High Court on Intellectual Property, created in Ukraine by the Presidential Decree No. 299 dated 29 September 2017. It is noteworthy that this court, just like the anti-corruption court, should simultaneously serve as the court of first and appellate instances.

have been resolved without amending the Constitution, including restart of the High Qualifications Commission of Judges and the High Council of Justice. I should remind you – at that point the old High Council of Justice did not operate for 13 months, and the High Qualifications Commission – for 9 months, which basically paralysed the work of the judiciary itself. It was not even possible to dismiss a judge on medical grounds. There were problems that we identified, recorded and planned measures to address them.

The next stage included the development of amendments to the Constitution with involvement of the Constitutional Commission. Thanks to its efforts and collaboration with the Venice Commission we managed to adequately and positively resolve the issue of amending the sections "Justice" and "The Constitutional Court of Ukraine".

Currently, we are at the final, implementation stage – I mean the laws "On the Judiciary and the Status of Judges" and "On the High Council of Justice". One should not forget about other laws adopted on 2 June 2016 – "On Agencies and Persons Performing Compulsory Enforcement of Court Decisions and Decisions of Other Authorities" and "On Enforcement Proceedings", which introduce new mechanisms for executing court decisions. This also is worthy of discussion. This is the broad area of reform that is being implemented right before our eyes, and we are directly involved in it through the decision-making, including political, that is, in defining the new rules of the game. Up next is the law on the bar – there are problems that need to be addressed at the policy level, e.g. defining the rules and ensuring the independence of a lawyer, since these are essential for the lawyers' new status. And I would not talk about the advocates' monopoly, as the person's interests can still be represented without involvement of an advocate.

The process of developing laws and institutions nears its completion – in addition to already functioning new High Qualifications Commission of Judges and the new High Council of Justice, the Supreme Court has started its operations on 15 December. All this occurs at the legislative, institutional level. And now we are approaching the individual, human dimension of the judicial reform. Yes, some problems do exist, but a systemic, well-balanced approach already brings some results, although it's too early to talk about the final outcome. The reform dynamics of the past three years – while a little slow – is generally positive and we are heading in the right direction, in line with the plan and set targets. ■

Roundtable, 20 December 2017

Mykola ONISHCHUK,
President of the National School of Judges of Ukraine

On the implementation process. I would prefer not to overuse academism, but we understand that the implementation as a topic of today's discussion has several dimensions and elements. Some speakers already mentioned the *normative implementation*, meaning provisions of the Constitution and adopted legislative acts. The next component is the *institutional implementation*, meaning the elaboration of relevant mechanisms and institutions designed to implement constitutional requirements. It is followed by the *procedural implementation*, which is essential for the judicial process. And finally, we have the *organisational implementation* – something that directly affects the work of the National School of Judges, and also deals with staffing. We have to admit that the first three components – normative, institutional, procedural – have largely been formed, although some problems still need attention – both from our academic environment, and from the the Constitutional Commission and the Parliament.

On the normative component. The first thing worthy of attention in the amendments to the Constitution is the removal of the Chapter "The Prosecutor's Office" and its inclusion in the "Justice" Chapter. Even though it was a simple mechanical transfer of articles from one part of the text to another, we put a lot of effort to regulate the powers of the prosecution in a new way. Now these powers include three components (instead of five): public prosecution, procedural guidance of pre-trial investigation and representation of the state interests in exceptional cases. But I feel these changes are not enough, as the issue, related to the mission and the role of the prosecutor's office in society and its relationship with the judiciary is still "half baked". Regrettably, in the Constitution we did not specify the basis, on which the prosecution should build on. There is this blanket rule – the principles and procedure are determined by law. And it was a mistake – ours, yours, and now that of the Constitution makers – because the prosecutor's office remains a classic executive body with a centralized structure, with the dependence of the lower level prosecutors on their supervisors and complete separation from the judiciary as such. The prosecutor is mentioned only in the context of his territorial affiliation with the court.

Instead, the experience of continental Europe is totally opposite, where the prosecutors acting in courts, for example, have an organic connection with the judicial system. Therefore, our common task is to continue elaborating the status and principles of the work of the prosecutor's office. This can be done without constitutional changes since the blanket rule enables changes in the

organisation and the rules of operation in line with the philosophy of the Constitution. Judging from media reports, this issue is totally overlooked, therefore I would like to urge the academic environment to rethink these issues, as they need to be properly substantiated. This is the first point.

The second issue of the normative implementation is *different (not uniform) status of judges*. As is well known, the unity of the status of judges is an important component of protecting their independence, but we have a problem with that both at the legislative level and in different remunerations for judges. At the moment, this is linked to qualification assessment of judges – only those who have passed the attestation receive salaries based on the new standards. However, the Constitution does not provide for a different level of judicial remuneration for the same amount of work performed, regardless of the fact of their attestation (including for reasons independent of them). Therefore, my recommendation to the State Judicial Administration is to immediately introduce a single remuneration system for judges starting from 1 January 2018.

The next issue in the context of normative implementation is *military courts*. The Constitution and the effective Law "On the Judiciary and the Status of Judges" do not provide for the formation of military courts. The Constitution does mention the specialisation of judges, while the law specifies specialisation of courts according to four categories of cases: civil, criminal, administrative and economic. The law further allows specialisation on the subject principle only in relation to juvenile justice and specialisation of judges, but not courts. It appears that the concept of reforming the judiciary and the administration of justice does not entail the formation of military courts, although we are all aware of the problem and need to study it in detail, refraining from hasty decisions.

In conclusion, I want to emphasise that the reform of justice is a foundation of social change. It is nice to know we are all involved. And we understand that this foundation can make the difference in all directions of development of the Ukrainian state and Ukrainian nation. ■

Roundtable, 20 December 2017

Serhiy KOZYAKOV,
The Head of the High Qualifications Commission of Judges of Ukraine

The first results of the ongoing judicial reform include the competition to the Supreme Court – I want to remind that we never had such a competition, and relevant procedures for the positions of judges were introduced only three years ago. And it wasn't just the competition to the existing Supreme Court – it was, in fact, the creation of a brand new Supreme Court, which already employs 115 judges. Following the establishment of the new Supreme Court, the previous Supreme Court that has been working for several decades, as well as three higher specialised courts will be liquidated.

For the first time ever, in addition to serving judges our competition also attracted academics and lawyers. Every fourth member of the new Supreme Court has no previous experience of a judge. Here's two other important facts: almost half of the judges of the new Supreme Court are women, and so is its President, which is a rare phenomenon in the global practice. In addition, over the past 15 years Ms. Danishevska, the President of the Court was not a judge, but worked in the civil sector.

To date we have already announced a competition to the High Court on Intellectual Property. The HQCJ delegation has recently returned from Germany, where it took a close look at the activities of the Federal Patent Court. We also review the experience of other countries with functional patent courts and we see such courts in most countries became a *success story* (unlike the anti-corruption courts that became unsuccessful in almost all countries where they were established). This is a challenge for us, as by creating the High Court on Intellectual Property, we have to have a successful project. So far, we've received almost 200 applications to fill 21 vacancies in this court, that is, we have 10 candidates per position. And if we establish the High Anti-Corruption Court, this will require a significant effort to make the first successful project.

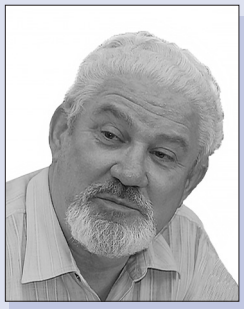
As part of the reform, we have a lot of challenges entering 2018. As a result of actions of some politicians and public activists, we face significant problems with staffing of the courts of first instance and local courts. More that 1,600 judges resigned over a short period of time; staffing of all appellate courts is below 50%; in some courts we have just 25% of judges remaining in the office. 10 local courts ceased their operation altogether, as there are no judges left in them.

This is why this year we announced and conducted a new enrolment. As many as 5,335 candidates submitted

applications to the National School of Judges to fill 600 seats. This is an absolute record suggesting that lawyers trust us and our procedures. Of 700 candidates, who became winners, 300 are assistant judges who will receive education at the National School of Judges for about three months, as stipulated by law. The remaining 400 are lawyers who will be studying for about a year. In summer 2018, these candidates we will have a qualification exam. Similar competitions to local courts are scheduled for the next year. By engaging 700 winners of previous enrolments, we hope to resolve a significant portion of personnel problems in courts of the first instance. At the same time, we are simply obliged to hold competitions to the courts of appeal, where the staffing level is roughly 50%.

In addition, our duty is to perform the procedure stipulated by the transitional provisions of the amendments to the Constitution, namely the qualification assessment of the entire Ukrainian judicial corps – about 6,000 effective judges. This is a very serious challenge, as in addition to the HQCJ members, the procedure involves the Public Integrity Council, as envisaged by law. Therefore, we will have two parallel procedures, thus extending the period needed for assessment.

The law also demands the establishment of the anti-corruption court. So far, there is no relevant draft law, and we are not aware of any particular procedures for establishing this court. I wish they sought our advice on these procedures – it would be very helpful and important – because we already know the mistakes made during the competition to the Supreme Court. It would be expedient to build on this extremely valuable experience. In particular, the competition introduced four psychological tests and an IQ test. We have accumulated a very useful experience, and psychological testing will continue to be applied in Ukraine's judicial system. ■



Viktor SHYSHKIN,
Retired Judge of the Constitutional Court of Ukraine

When we talk about legal nihilism and criticise an ordinary person, we tend to forget that the Parliament and the President are primary legal nihilists. As mentioned earlier, some laws do not comply with the norms of the Constitution. It seems some MPs, when adopting laws or drafting bills, do not read the Constitution altogether. The same is true about the President's team.

I have repeatedly stressed that the Constitution consists of two main parts – principles and positivistic norms. It feels like no one has ever read them in the first section of the Constitution.

We argue to have a legislative system, a system of sources of law. True, the primary source of law in Ukraine is the Constitution, followed by the decisions of the Constitutional Court, but not the laws. Among the variety of forms of the Constitutional Court decisions, we should distinguish two important types. The first type of decisions are those that interpret the Constitution. This is how the Constitutional Court explains both the Parliament and the President how to read the constitutional norms not to distort them with future laws or decrees.

Article 106 of the Constitution and several Constitutional Court decisions (at least four direct and three indirect) clearly state that the powers of the President and the Verkhovna Rada are exhaustively defined in the Constitution, which makes it impossible to expand those powers through laws. Today we all witness the campaign against the NABU and its chief who allegedly did something wrong. The question is: who appointed this person? Wasn't it the Parliament that delegated this authority to the President? I repeat my question: do we live in the parliamentary or presidential republic? Why has the national parliament deprived itself of some powers and the leading role?

Someone mentioned the students and indecent traditions that our future lawyers absorb during their schooling. But what these students are being taught? How can you teach them something positive using such examples? And then we all complain about our investigators, prosecutors and lawyers…

Here's an example: I see these boys – the National Guard and the police. I come over and ask: "Why are you here?". 90% of them just shrugged their shoulders, while a couple of smart officers came up with the correct answer: "We carry out the police measures". "OK, then, do you know the relevant article of the national police act?". They have no idea. "Article 31-a", I prompted. I mean, when you tell people about the police measures, then apart from part 1 of the article you have to read part 2, which states that the population shall be informed about any police measures in a mandatory manner and in advance. Who finished reading the document? This portrays the "quality" of education in our police academies and law schools. They don't study the system of law, approaches and methodology…

Now let's talk about the Law on the Constitutional Court. Someone mentioned the "normal Constitutional Court". Hopefully, it will be normal someday, but today it is irrelevant. Just one example: one judge took the oath in unconstitutional, that is, unlawful manner.[6] Why so? The law clearly states that the procedure for a solemn swearing-in ceremony shall be established by the Rules of Procedure. Are these rules adopted yet? No! Therefore, empowering a judge in an unlawful manner is a direct violation of the law. Let's continue reading: a special plenary session of the Court shall

[6] The speaker refers to judge V. Horodovenko. Appointed as a judge of the Constitutional Court by the 14th extraordinary Congress of Judges of Ukraine on 13 November 2017, he was sworn in on 21 November, based on provision of the new Law "On the Constitutional Court of Ukraine", but on that date the Rules of Procedure of the Constitutional Court were yet to be adopted. There Rules were finally adopted at the plenary session of the Constitutional Court on 22 February 2018.

be convened by the Chairman of the Court within five working days from the appointment of a Constitutional Court judge. The judge was sworn in on his seventh working day. This is the second violation. We are absolutely all right with this judge's persona, but in fact he is illegitimate. And tomorrow anyone can claim that the Constitutional Court's decision was adopted illegally, because the judge himself is illegitimate.

The Law includes a number of other inconsistencies, particularly in the disciplinary proceedings concerning the Constitutional Court judge, circumstances and grounds for his/her dismissal for violation of incompatibility requirements and the like. All these controversial issues require attention and proper resolution in the context of the labour law.

As for the constitutional complaint, we should go back to the professor Luchterhandt's speech.[7] He actually cited para. 4 of Article 93 of the Constitution of Germany with paragraphs 4a and 4b, added in 1960s. This is when the German constitutional complaint – *Verfassungsbeschwerde* – was first introduced. Accordingly, a constitutional complaint may be filed by any person alleging that one of his basic, constitutional right has been violated by public authority. This is why the constitutional complaint should be considered in conjunction with the administrative justice because the matter concerns public authorities. And in addition to basic constitutional rights, listed in Section I, it refers to other rights, indicated, for example in Section II, Article 20 – the right of the German citizens to resistance.[8] This theory is totally different from what our lawmakers used as a basis for regulating the constitutional complaint. In Ukraine, it is the "above-cassation petition", that is, a complaint against decisions of courts of general jurisdiction, if a citizen believes that during consideration of his or her case the court applied allegedly unconstitutional law or provision thereof. I'm not saying that it is bad, but it is different from the German principle. If in Germany one can turn to the Constitutional Court only after passing instances of the administrative justice, then in Ukraine such an appeal is allowed "if other domestic remedies are exhausted". Does this mean that all domestic court instances consider the constitutionality of the law? Does this mean that the authority of the first, appellate and cassation instances include consideration of the law for its conformity with the Constitution? Not at all. In fact, there are many comments on virtually every article of the Law, and there's much needs to be done to improve it. ■

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Viktor KOROLENKO,
Chief of the Presidential Administration Office for Representing the Interests of the President of Ukraine in Courts[9]

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms reads that everyone is entitled to a fair and public hearing of his or her case within a reasonable time by an independent and impartial tribunal established by law. The analysis of the ECHR case law demonstrates that key elements of this right include person's access to justice (courts), publicity of hearing, consideration of the case by a tribunal established by law, independence and impartiality of court, reasonable time and fairness of hearing. How is this right, including said elements, is realised in our updated procedural codes?[10]

Access to courts. A procedural mechanism for leaving a suit or complaint without action was introduced in commercial courts, similar to the mechanism enacted by our procedural law. This approach is used to reduce the number of ungrounded returns of suits or complaints or render it impossible. However, it is necessary for the court to clarify mistakes to a person who appealed to the court and explain that the court will continue considering the procedural document after correcting these mistakes.

E-court. The law introduces a broad procedural mechanism for using IT-technologies in communications between the court and the parties to the case, as well as between the courts. This approach seeks to reduce the load on the judicial system, simplify access to justice, and save time in court proceedings. Now you don't have to wait until the case from the first instance is carried over

[7] Full speech, translated from German, is included in this publication as a separate article "*Individual Constitutional Complaint in Germany and Ukraine: The Comparative Analysis*".

[8] Literally "All Germans shall have the right to resist any person seeking to abolish this constitutional order [of the Federal Republic of Germany as a democratic and social federal state], if no other remedy is available" (Basic Law of the Federal Republic of Germany, Section II "The Federation and the Lander, Article 20, para. 4).

[9] Mr. Korolenko is also a coordinator of two working groups within the Judicial Reform Council.

[10] The speaker refers to the Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts", adopted on 3 October 2017; the law entered into force on 1 January 2018.

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to courts of higher instances in case of appeal. The new procedural law and relevant amendments to the law on the judiciary stipulate that any procedural document arriving in court must be scanned the next day, while the whole case to be uploaded on the server of the court of first instance, so courts of other instances can review case files remotely. If there is a motivated need, all documents submitted to the court in paper may also be requested for direct examination by a court of another instance.

Critics may argue that e-court entails additional inconveniencies for a person, such as obtaining an electronic digital signature (EDS), acquiring a certain minimum of computer literacy and ensuring availability of relevant IT technology for realisation of appeals. I agree that these are objective requirements. But thanks to the measures aimed at the e-court introduction, we expect a significant relief for the judicial system. Moreover, these are lawyers representing the interests of the parties to the case who should be able to use computer equipment, have an EDS and possess necessary skills and knowledge of the procedural law to promptly realise procedural rights of a person.

Full compensation of legal expenses. Until recent changes, we did not actually have full compensation of legal costs. In case of winning, a person, although having spent certain amount of money both on lawyers and other court-related costs, rarely received the court decision on full reimbursement of legal expenses from other parties to the proceedings. This was due to the fact that the procedural law did not clarify the criteria for determining the proportionality of court costs on the one hand, and the procedure of considering claims for compensation was far from perfect on the other. At the moment, a person seeking justice in the court may expect that in the event of winning the case all court costs will be reimbursed.

Motivation for each procedural decision by the criterion of effective court protection. When developing amendments to the procedural codes, one of our tasks was to ensure that a judge is guided not only by clear requirements of the procedural law, but also by the principles of legal procedure and proper understanding of the administration of justice, which is effective protection of individual's violated rights. This is why procedural codes offer a wide discretion to courts at each stage of the trial, and within the entire consideration in a particular instance. But these broad discretionary powers must be exercised with clear motivation and understanding of the purpose of specific procedural steps, decisions adopted by a judge, and whether they truly contribute to effective judicial protection of a person who appealed to the court.

Procedural laws provide for a significant expansion of methods of legal defence and ways of securing lawsuits and evidence. They also allow for accrual of interest in decisions concerning, for example, recovery of fines. You don't have to additionally apply to the court if the size of this fine has increased during the enforcement of the court decision or consideration of the case.

Expanding means and possibilities of proof. The new law enables electronic evidence and the possibility of bringing witnesses in the commercial process, but with application of special "filters" to avoid delays in the consideration of such cases precisely due to the presence of multiple experts. It also envisages involvement of a law expert. By the way, this procedural mechanism is widely used in the procedural law of European countries. This is not an expert in a traditional sense of the court expert, but a specialist in foreign law involved when necessary depending on the subject of proof in a particular case.

The bar. Some speakers mentioned the advocates' monopoly. But here we should bear in mind the concept of "short causes", or minor cases, defined by the procedural laws. I would like to emphasise that changes to procedural laws and implementation of constitutional changes in the context of advocates' monopoly were done with due consideration of relevant court statistics and actual living standards of the Ukrainian population. Therefore, while formulating this concept, we proceeded from the fact that most cases should not be considered with mandatory involvement of an advocate. Thanks to the definition of a "short cause", more than 60% of commercial cases can be considered without advocates. Accordingly, the number of cases without mandatory participation of advocates in civil and administrative courts will be even higher.

Having completed the final version of the procedural laws, we consulted the European experts, who, among other things, answered the question whether mandatory representation of the person's interests in court by the advocate was in line with international justice standards. Their conclusion was that the newly implemented procedural mechanism did not in any way create unnecessary obstacles for the person's access to justice. Moreover, the experts emphasised that the representation at the cassation stage would require a special team of lawyers accredited in the Supreme Court to represent the interests of a person at this stage of proceedings. However, we consider it a little premature. What we need is to gradually reform the bar while keeping an eye on how this fairly liberal procedural mechanism of representation works in courts – and then continue with its further development.

In conclusion, I would like to express my support of the idea that science should be more influential in reforming the judiciary, because this process requires truly gigantic intellectual resources. Without deep scientific comprehension of the proposed reforms, such an intricate mechanism as judicial protection is unlikely to work like a Swiss watch. I hope that these suggestions will translate into reality. ■

Andriy MAHERA,
Deputy Head of the Central Election Commission

We can talk a lot about the Constitutional Commission's groundwork and the laws that triggered the judicial reform, but I'd like to focus on aspects related to the functioning of the Central Election Commission (CEC). For example, Article 151 of Section XII of the Constitution is supplemented with a new second part concerning the subject of consideration by the Constitutional Court, in particular, whether questions proposed to be put to a popular vote comply with the Constitution. This list no longer includes, firstly, the adoption of laws on amendments to the Constitution, and secondly, on the Parliament's decisions to hold an all-Ukrainian referendum on altering the territory of Ukraine.

In broad terms, this is a positive novelty in the Constitution, but it should be further reflected and developed in the laws, namely "On the Constitutional Court of Ukraine" and "On the All-Ukrainian Referendum". Regretfully, the Law "On the Constitutional Court of Ukraine" has only two articles that touch on this aspect – in a very general form and with no clarity. As for the second law, it has not been changed at all. The transitional provisions of the Constitutional Court Law provided for amendments to 11 legislative acts, but the Law "On the All-Ukrainian Referendum" remains unaltered. The question is: at what stage are we to review questions that are put to the All-Ukrainian referendum on their conformity with the Constitution? At the stage of initiating the meeting? At the stage of making a decision? At the stage of reviewing the documents by the CEC? At the stage of collecting signatures, verifying these signatures, or finalising the CEC protocol on the results of signature collection with the demand for a referendum? I mean, there are many nuances that we must think through.

I think that after the CEC has signed the Protocol on the results of the collection of signatures – with 3 million signatures collected and all requirements observed – it would be logical to set a certain term for the President and MPs to apply to the Constitutional Court. All these things need to be written down.

Another question is: does the Constitutional Court today holds a monopoly on recognising constitutionality or unconstitutionality of questions that are initiated for the all-Ukrainian referendum? Simply put, can the CEC refuse to register an initiative group that puts forward, for example, some land-related issues (recently one of the parliamentary parties tried to come up with such an initiative). Therefore, can the CEC refuse, substantiating its decision by the requirements of the Constitution? Interesting question. I still think that the Constitutional Court cannot have monopolistic powers in this area, and if we talk about the CEC, then it could have also initiated a decision on constitutionality at the stage of considering protocols.

The next important question concerns the fundamentals of justice. You might ask: what does it have to do with the electoral process or the referendum? Older version of Article 129 of the Constitution ensured the right to challenge a court decision by the appeal and cassation. In fact, this right was to a certain extent "delegated" to procedural codes, that is, the Code of Administrative Justice could determine specific cases for appeal, and specific cases for cassation. Usually there were no cassation petitions in electoral disputes, but we did have some appeals. Today, the Constitution is very clear: this should be the right to appeal, while cassation is limited only to cases prescribed by law. At the same time, we all want the CEC to declare the election results on the second, third, maybe on the fifth day, but not on the tenth or fifteenth day. I have a question: how can the CEC officially establish the election results when almost every stage – counting of votes at polling stations, clarifying voting records at the district level, or establishing the election results at the CEC level – can become justiciable? I'm not saying it's good or bad – that's the way it is.

Is there any good solution? I don't think we should invent anything new. For example, the Constitution of Moldova states that the election results are subject to mandatory confirmation by the Constitutional Court. Regardless of whoever's interests, the Moldovan Constitutional Court analyses all the circumstances and "seals the deal". If we do not have similar mechanism, then any CEC protocol, specifically the actions of

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the CEC members to establish the election results will be appealed in court. I'm not sure who will make the decision – either the court of appeal or, possibly, the Appeals Chamber of the Supreme Court. But the next question is about the time limit for appeals. Let's remember 2006, when the CEC's actions to establish the results of the parliamentary elections were appealed in the court. The Law defined a five-day term, but the court had been considering the appeal for eight (!) days. If we anticipate an appeal, then we should set a timeframe for submission of appeals, and then – some time for its consideration.

Now let's imagine the situation of 2019, as there's not much time left until the presidential election. It is unlikely that the President will be elected in the first round. According to current law, there will be three weeks (previously two) between the first and second round of balloting. The question is: if the actions of the CEC members in establishing the results of the first voting are appealed in the court, can we adequately ensure holding a repeat vote? Hardly. I hope everyone understands that ballot papers cannot be made in one or even five days. What I mean is that before making any fundamental changes to the Constitution, it is expedient to involve specialists, including in election issues.

Unfortunately, the Constitution, even its 1996 version, has many inconsistencies. For example: the authority of a National Deputy of Ukraine shall terminate prior to the expiration of his or her term in office in the event of a guilty verdict against him or her entering into legal force. However, in the future, this person can once again run for the Parliament if his or her crime was committed by negligence, because the prohibition to stand for election concerns only the intentional crime.

Another interesting nuance: the authority of an MP shall be terminated early if he or she is declared incapable. As for a judge, then pursuant to the new law his authority can be terminated if the court recognises him or her incapable or with *a limited capability*. Perhaps, we should not "unbalance" the text of the Constitution, so when we introduce the new norms, then we should apply them to all subjects concerned. Whenever the change is introduced, we should take into account the requirement regarding the integrity of the text of the Constitution.

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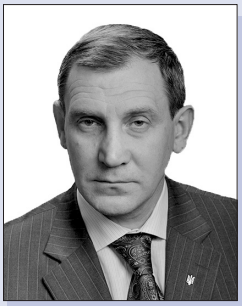
The caseload of courts is truly an acute problem, but it will further deteriorate with the formation of court districts encompassing several rayons. Perhaps, we should refer to historic experience and think about the institution of magistrates, so that minor civic disputes were considered at the community level.

In summary, I want to say that the constitutional reform cannot be carried out hastily and on impulse. I urge to return to the law on the Constitutional Court and the law on the all-Ukrainian referendum, as well as to consider what are we going to do during the presidential and parliamentary elections in the context of mandatory appeal against the decisions and actions of the subjects of electoral process, in particular the CEC. ■



Oleh BEREZYUK,
The Head of NGO "The Ukrainian Legal Association", Advocate

I would like to go back to the topic of this event – "The Problems of Implementing Changes to the Constitution of Ukraine Concerning Justice and the Status of the Constitutional Court of Ukraine". Indeed, we have a lot of novelties – and even more questions that these innovations generate. And I believe that the wall of criticism is totally justified, since these changes were not systematic, and their implementation is quite challenging.

It was painful to hear that nowadays it is OK for students to give bribes for exams. When I was a student, it was abnormal. And I think this shouldn't be normal in any country, especially among lawyers.

Some speakers here mentioned the need to start shaping the legal consciousness of lawyers as early as student years. I cannot but agree more with this. As a student, I remember one lecture where they told us that even in Tsarist Russia judicial reforms were entrusted to legal theorists, rather than practitioners. Why? Because while knowing how the things are, theorists also know how they should be. I believe that this approach is absolutely correct, as it is essentially impossible to implement any quality reform without a clear conceptual vision of a change. Therefore, we must have a theory – I mean, the generalisation of practice – and not just some book-learned philosophy.

I would like to comment on several points. The first concerns the constitutional complaint mechanism. Of course, we learned how this institution works in Germany and what problems it faces.[11] We should definitely take the German experience into account in applying

[11] For more detail see the article by Professor O. Luchterhandt "*Individual Constitutional Complaint in Germany and Ukraine: The Comparative Analysis*".

a constitutional complaint in practice. But I also agree that our institution is different from that in Germany. In Ukraine it resembles a cassation petition, therefore there is a significant risk of setting up another cassation court. The Supreme Court goes hand in hand with the Constitutional Court, which will perform similar functions. And if we start submitting constitutional complaints to the Constitutional Court (as in Germany – 8 to 10 thousand annually), we risk paralysing the entire work of this body. To the best of my knowledge, the Constitutional Court has already received 500 complaints. Therefore, it is necessary to conceptually change the approach, and the sooner – the better.

As for the advocates' monopoly, I regard it as a positive initiative, and not because of my profession. As a legal practitioner, I must say that every lawyer seeks to work in a normal legal system and wants his recommendations to the client to work. Today our justice system is paralysed, and I hope that it will resume its operations with the formation of the new Supreme Court. I believe that by actively participating in the trial, the lawyer will ensure, above all, the fairness of the court decision through acting as an opponent to the prosecutor. In other words, if a professional advocate opposes a professional prosecutor, chances are good to ensure adversarial proceedings and fair decision by judges. Also, an advocate will serve as a peculiar "filter" that helps to decrease the burden on the judicial system by preventing his or her clients from unreasonable lawsuits.

I would like to emphasise that the agreement on rendering legal assistance is not an employment agreement. An advocate is a part of the justice system, and one of the lawyer's functions is to ensure justice, rather than run errands for the client. Therefore, another problem is linked to compensation because a lawyer performs a public function. I think that provision of free legal aid should be funded from the State Budget, though not through the Ministry of Justice (as lawyers in this case become dependent on this executive body) but through the National Bar Association, for example. This issue, however, is controversial and requires separate discussion.

Now back to a constitutional complaint: I think we need to abandon this mechanism in its current form. At the same time, it would be beneficial to focus on operations of the Supreme Court and on one of its major functions – to summarise judicial practice and to ensure uniform application of laws across Ukraine. I am sure this will make our legal system more effective.

Just one practical example. Me and my colleague have been conducting this case for five years already. It is a criminal case. The amount involved is just UAH 540 – ridiculous, right? What's my point? The Constitution says that no one can be held liable twice for one and the same offense.[12] There is a problem with interpreting this provision since it is a question of legal liability of the "same kind". What did we do in practice? We analysed the work of the Boryspil District Court, which in 2013 considered cases of illegal border crossing using forged documents. One article in the Administrative Code establishes administrative liability for this type of offense (border crossing), and a person is brought to justice under the administrative procedure – usually punishable by a fine of UAH 1,700. But at the same time, the law enforcement agencies initiate a criminal case for using forged documents. As a result, a person is held administratively liable on the one hand and bears criminal responsibility on the other for the same offence. We do not have elements of a crime here, but an administrative offense – it is absolutely obvious! What is the difference between the crime and administrative offence? The level of danger to the public. However, of 84 cases in 2013, 83 ended with plea agreements, and one case still continues because of the advocates' insistence on the appeal. We appealed the court decision in criminal proceedings. The case ended up in the Supreme Court, which cancelled the decision by sending the case to the first instance, and here we go again completing the circle. What I mean is that we have this bad practice where the law enforcement agencies investigate crimes that never happened, the prosecutor's office supports them, and the courts make unlawful decisions. To eliminate this, the Supreme Court should summarise the judicial practice and ensure uniform application of the law by courts throughout Ukraine. ■

Roman KUYBIDA,
Deputy Chairman of the Board of the Centre for Policy and Legal Reform

When it comes to implementation, we should focus not only on regulations, but also on the bodies responsible. If the regulations are more or less alright, then the situation with bodies and agencies is less optimistic. When we talk about the new High Council of Justice and the High Qualifications Commission of Judges, I assume there is nothing particularly new in them, except for the word "new", because the longstanding corruption traditions proved to be "nine-lived" and found their way to these bodies.

Here are a few examples. Three members of the High Council of Justice, including its Chairman, receive state awards from the President. The chairman is a judge who is not entitled to any state award pursuant to the law initiated by the President himself. As far as I know, a disciplinary complaint, filed against a judge who is currently chairing the High Council of Justice, is not being considered. Wait a few months – and the deadline

[12] Literally, the Constitution of Ukraine, Article 61: "For one and the same offence, no one shall be brought twice to legal liability of the same type".

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for imposing a disciplinary liability will pass. These are indicative cases that demonstrate the "novelty" of the judicial bodies and the example that they set.

Some comments regarding the qualification assessment and the use of psychological tests mentioned by other speakers. One of these tests is originally called "*loyalty test*". It was translated into Russian as a "*test for trustworthiness*", and into Ukrainian as "*integrity test*". But if you look at the specifics of this test available on the website, it "*allows to study the propensity of a test subject to an explicit or implicit confrontation with the leadership. Subjects with low scores show themselves as rebellious freedom-loving persons often having their own opinion...*", and so on. Therefore, this test can screen out people who are not loyal. Although the test results are classified, some of the candidates made them public, and we can see that "loyalty" is clearly defined as one important criteria. Psychologists interpreted low scores against this criterion as an expression of the judge's impartiality in making decisions, whereas the "ideal judge" should demonstrate very high level of loyalty. This is the evidence that they selected loyal judges during the competition to the Supreme Court.

I admit some progressive changes, in particular regarding the election of a court chair by the entire team. But as we see, the heads of courts continue serving as a "link" for influencing courts. And we see their impunity. For example, a regular judge who was caught for drunk driving, got fired. The head of the court, however, who was also caught on camera while being drunk and even verbally attacking the policemen, remains unpunished. Immediately after the incident he even used the court website to hide and avoid responsibility, arguing that he was not at the wheel. Nonetheless, the Disciplinary Chamber of the High Council of Justice has determined a violation, but "punished" this judge by sending him to the National School of Judges. As far as I know, despite this decision was made quite a while ago, the National School of Judges still has no relevant information from the Council. The second example: the High Qualifications Commission has long since submitted a petition to the High Council of Justice regarding the dismissal of the head of the appellate court of the Cherkasy oblast based on the sound recording of this person trying to influence another judge of the same court. However, as of today, the petition is yet to be considered by the High Council of Justice, although the new law gives only one month for such consideration.

These are just a few examples; there's much more. And they may suggest that the reform has wondered off its declared purpose and something that society has keenly expected, namely, the purge and renewal of the judicial corps and the independence of judiciary. Quite the contrary, it pursues the goal of keeping loyal judges in the office and recruiting the new ones of the same kind. ■

Volodymyr SUSHCHENKO,
Chairman of the Board of the NGO "Expert Centre for Human Rights"

Unfortunately, those who we address our messages, analysis and recommendations to, have already left our meeting, confirming indifference of the authorities towards the expert opinion. Such meetings always follow one and the same scenario: government representatives show up, check in, present their welcoming speeches and leave. Today is different, however, as we have even heard some reports. Serious issues have been raised, but they report on their achievements and all good things that they did, and how we have been moving forward. This is the biggest problem in communication between the experts and authorities.

Let me share my vision of problems raised at this meeting. First of all, the Ukraine's legal system is collapsing. This is my belief, and I can argue with anyone and give examples to support this opinion.

Second, I totally agree with the accents made in the introductory report, in particular the adoption of the Law "On the Judiciary and the Status of Judges" prior to amending the Constitution; problematic and ill-conceived "consolidation" of courts; the advocates' monopoly; violation of the principle of instances in the process of establishing new specialised courts, in particular, the patent court; problems with rationing the activities of the Constitutional Court and the introduction of a constitutional complaint mechanism. These are precisely the reference points that all those involved in decision-making should prioritise. Unfortunately, this isn't the case. Hopefully, it will happen someday, and they will give credence to the expert community.

I represent the public and the legal community, and recently I have had plenty of interactions with lawyers of various areas of expertise within the Ukrainian Bar Association – it brings together more than 5,000 members and organises a lot of very interesting events. My point is that almost everyone I talked to was quite critical about non-systemic, uncomprehensive and ill-conceived measures within this "under-reform", which they are trying to implement in Ukraine. ■

Petro STETSYUK,
Retired Judge of the Constitutional Court of Ukraine

Long time ago, before the First World War, our fellow countryman Bohdan Kistyakivskyi wrote an article "In Defence of Law". As we have heard many reasonable remarks on what is called the constitutional reform of justice, I will focus on defence.

Let me first defend something that we call the constitutional changes concerning justice, which are only 18 months old. I won't talk about all of them, but only those where I have my hand in – changes specifically pertaining to the Constitutional Court. Obviously, there are unclear and negative elements, but there are also positive aspects of these changes.

Despite everything, I would define the introduction of the very phenomenon of a constitutional complaint as something positive. Its content and realisation are a different pair of shoes. Another positive thing is removal of the right to interpret laws from the powers of the Constitutional Court, which was a rather unnatural function for this body. On the positive side are the attempts to introduce competitive grounds for selecting judges. All these are constitutional changes, made at the level of constitutional principles. Perhaps, something went wrong at the stage of implementation, including with regard to rule-making. And one of the reasons, it seems to me, is that current Law "On the Constitutional Court of Ukraine" failed to expand, improve and perfect constitutional changes pertaining to this Court. Specifically, I have questions about its Rules of Procedure and competitive selections.

We can continue talking about many things that should have been done differently, that we should have a single national commission to select candidates for the positions of judges, and that none of the subjects of the appointment of the Constitutional Court judges should have been involved in its formation. But we know these issues perfectly well as we discussed them in our professional environment. And it is obvious that the Law on the Constitutional Court failed to address many problems.

Unlike previous editions, current Law has a new article providing a detailed description of the Constitutional Court's decision. Requirements for the reasoning part of the decision fit in just one line – the mandatory reference to the provisions of the Constitution on which the decision is based. In fact, it should be different. What were the claims in previous years? In many cases, the operative part of the Constitutional Court decisions does not stem from its reasoning part, making these decisions incomprehensible for people. There are many similar examples, and the lawmakers should have been much more specific in this regard.

One more thing. Here I see representatives of academic circles. I also come from the university environment, chairing the department of the constitutional law prior to being elected to the Constitutional Court. And at that time, I have been writing answers to numerous requests from the Constitutional Court judges; later I found these answers in many cases of the Constitutional Court. But in fact, this is abuse of office by these judges. Even today they have the right to demand "other data related to the case" or request "your position" – write this, write that, solve our case! By doing so, they force huge numbers of people to work for them, and benefit from their free work. One case, opened by the Constitutional Court in 2007, concerned the official interpretation of the phrase "official document" in Article 366 of then-effective Criminal Code. The judge-rapporteur sent over 60 (!) requests and inquiries… So many people worked hard and wrote answers – but the Court eventually closed the proceedings. Who should be responsible for their futile work?

Unfortunately, although the Law on the Constitutional Court has introduced certain positive novelties, the room for improvement is enormous. Things that I have heard today suggest the following: (a) the timeliness and importance of such meetings; (b) the practical and theoretical significance of a discussion regardless of who and when left it; (c) the discussion means hope, at least for me. Like it or not, but governments, parliaments, presidents, bosses come and go, and we are here to live with our Constitution. Therefore, we need to do something, and in this situation we do good. ■

Roundtable, 20 December 2017

THE JUDICIARY THROUGH THE EYES OF UKRAINIAN CITIZENS[1]

To study the Ukrainian citizens' attitudes towards the judiciary and their opinions about different aspects of court functioning, the Sociological Service of the Razumkov Centre conducted two public opinion surveys.

The representative survey of the citizens of Ukraine was conducted on 6-11 October 2017, in all regions of Ukraine, excluding Crimea and the occupied territories of the Donetsk and Luhansk oblasts.[2] 2,019 respondents aged 18 and over were surveyed. The sampling error does not exceed 2.3%.

Interviews with the participants of court sessions at the exit of courts were conducted on 30 October – 1 November 2017. Two-stage stratified sampling was used for this survey. Courts were selected at the first stage, and the respondents – at the second.[3] Overall, 99 courts were selected.

Persons aged 18+ who visited courts in connection with the trial (even if their case was not considered on that date or postponed) as plaintiffs, defendants, suspects, complainants, family members of trial participants or victims[4] were interviewed as they left each of selected courts. Overall, 829 respondents in all regions of Ukraine (excluding AR Crimea and the city of Sevastopol) were surveyed. The sampling error does not exceed 3.5%.

Sources of Information about Activity of Courts in Ukraine

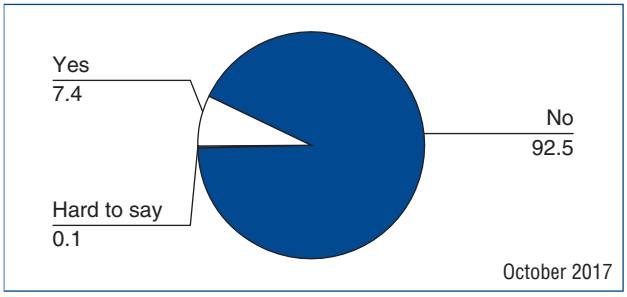
Most Ukrainian citizens (54.7%) receive information about activity of Ukrainian courts only from mass media. 22.1% combine media reports with information obtained from the experiences of family and friends, while 8.7% add their own experience to information from family and friends, as well as media reports. And only 3.6% of the respondents form their opinion about functioning of courts based only on their own experience and that of family and friends. The frequency of references to various sources of information has no statistically significant differences from the results obtained by the Razumkov Centre in November 2012.[5]

As expected, the participants of court proceedings, interviewed at the exit, were most likely to choose the option "My own experience, that of family and friends, and mass media" (52.6%) (Diagram "*What sources do you use to get information about the activity of courts in Ukraine?*", p.39).

The Activity of Courts as Assessed by Citizens with the History of Participation in Trials

Over the past two years, 7.4% of all respondents were involved in court proceedings as witnesses, plaintiffs, defendants, offenders, suspects, victims, experts, judges, advocates or members of the court staff. Most respondents (3%) participated in trials as plaintiffs.

Over the past two years, have you participated in legal proceedings in any capacity (as a witness, plaintiff, defendant, offender, suspect, victim, expert, judge, advocate, court employee, etc.)?
% of respondents



The majority of those involved in court proceedings as plaintiffs, defendants, offenders, victims, witnesses or experts (50.7%), participated in civil cases; 24.7% – in commercial cases; 14.5% – in cases of administrative offences; 7.2% – in criminal cases; and 4.6% – in claims against government bodies, local self-governments, or their representatives (Diagram "*What kind of proceedings did you take part in?*", p.40).

[1] The study was commissioned by the Council of Europe Office in Ukraine.

[2] The survey results are representative for the adult population in government-controlled areas of Ukraine by key socio-demographic indicators: age, gender, type of settlement and region.

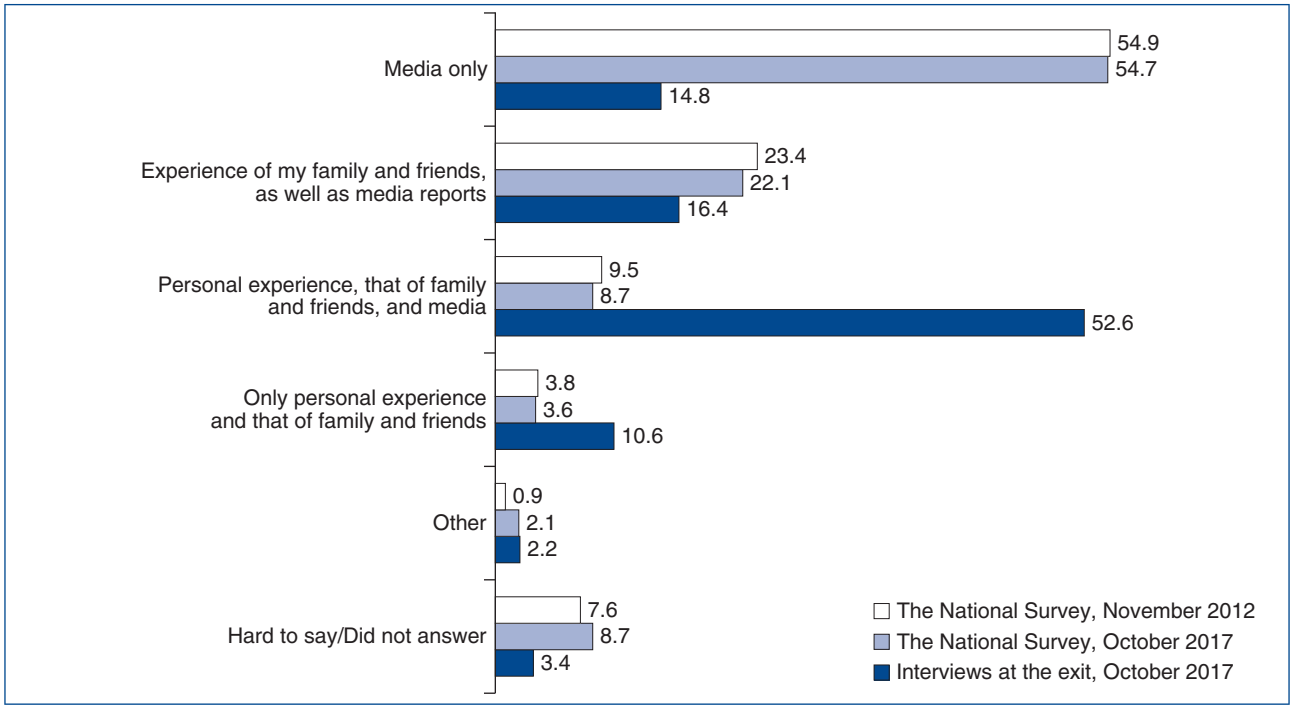
Multistage random sampling was used at the initial stages, with quota-based selection of respondents at the final stage.

[3] The courts were stratified by the court instance. In each stratum, random number generation was used to select the number of courts proportional to the share of this stratum in the total number of courts.

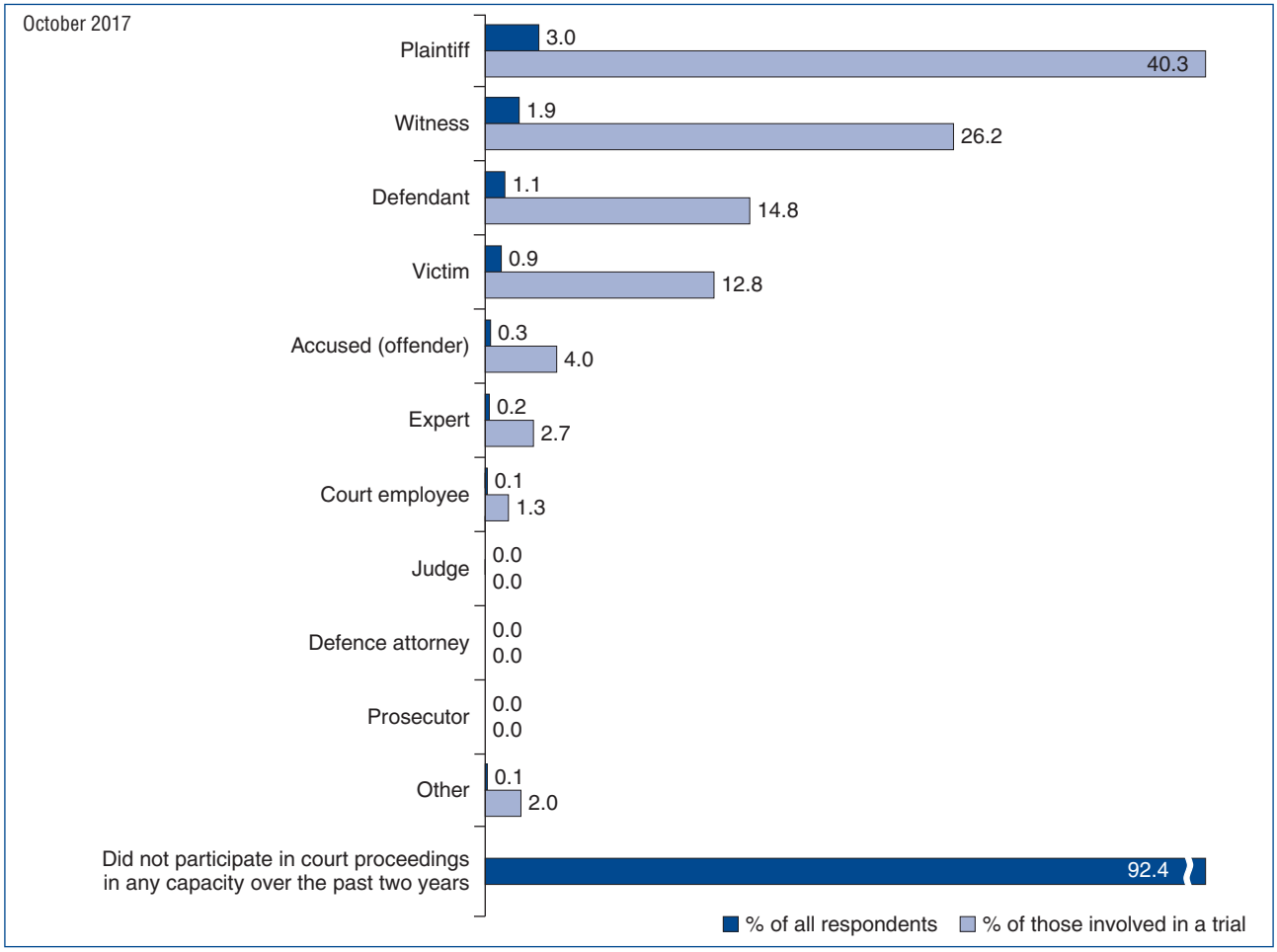
[4] Each fifth person belonging to each of these categories was interviewed. The survey was conducted without interruption from 10 a.m. to 4 p.m. Such construction of sample ensured its representativeness concerning all trial participants.

[5] The study was conducted by the Sociological Service of the Razumkov Centre in all regions of Ukraine on 15-20 November 2012. 2,010 respondents aged 18 and over were surveyed. The sampling error did not exceed 2.3%.

What sources do you use to get information about the activity of courts in Ukraine?
% of respondents

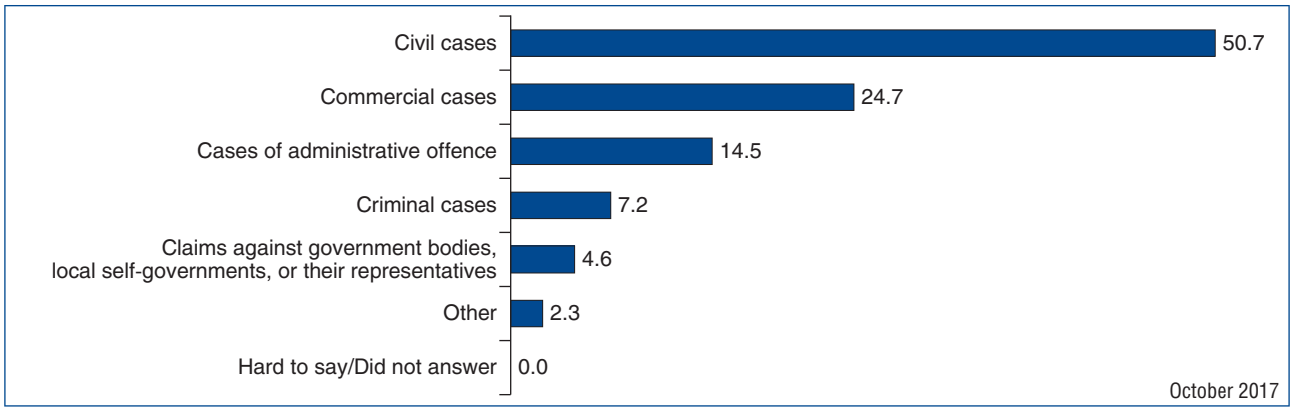


In legal proceedings, you participated as…?*
% of respondents



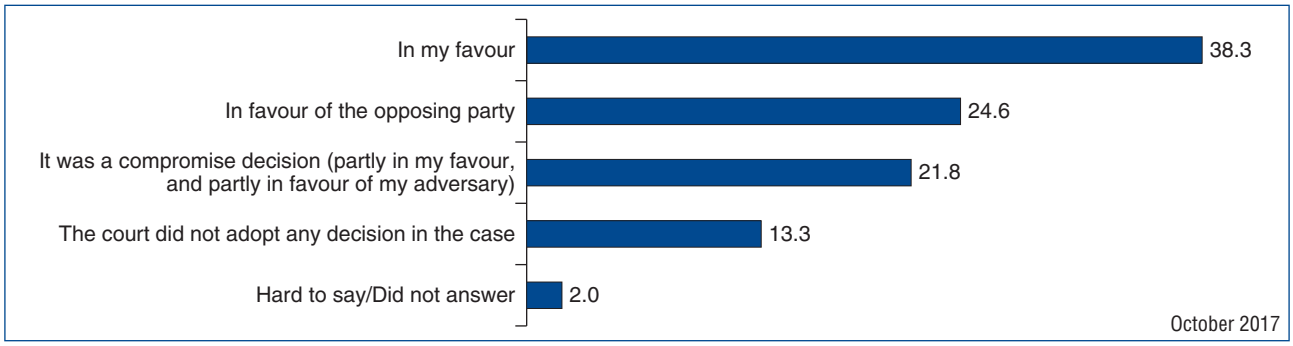
* The respondents were asked to give all acceptable answers.

What kind of proceedings did you take part in?*
% of the respondents, who participated in hearings as plaintiffs, defendants, offenders, suspects, victims, witnesses or experts



* The respondents were asked to give all acceptable answers.

Was the court judgement in your favour or in favour of the opposing party?*
% of the respondents, who participated in hearings as plaintiffs, defendants, offenders, suspects or victims



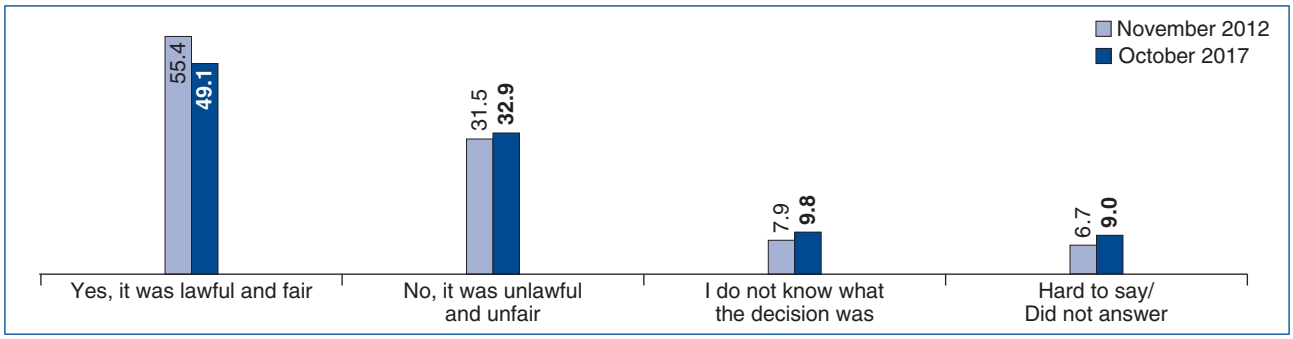
*In case of a single judgement, the respondent could choose one option; if several decisions – all applicable options.

Among those involved in court hearings as plaintiffs, defendants, offenders, suspects or victims, 38.3% reported that the judgement was delivered in their favour; 24.6% – that the judgement was in favour of the opposing party; for 21.8% the judgement was a compromise; and 13.3% reported that the court made no decision altogether.

49.1% of those participating in hearings as plaintiffs, defendants, offenders, victims, witnesses or experts, believe that the judgement was lawful and fair, while 32.9% think that it was unlawful and unfair (9.8% are still not aware of the court decision). These responses were not statistically different from answers obtained during the similar survey in November 2012 (although at that time the respondents involved in hearings were asked to share their experience over five years, instead of two).

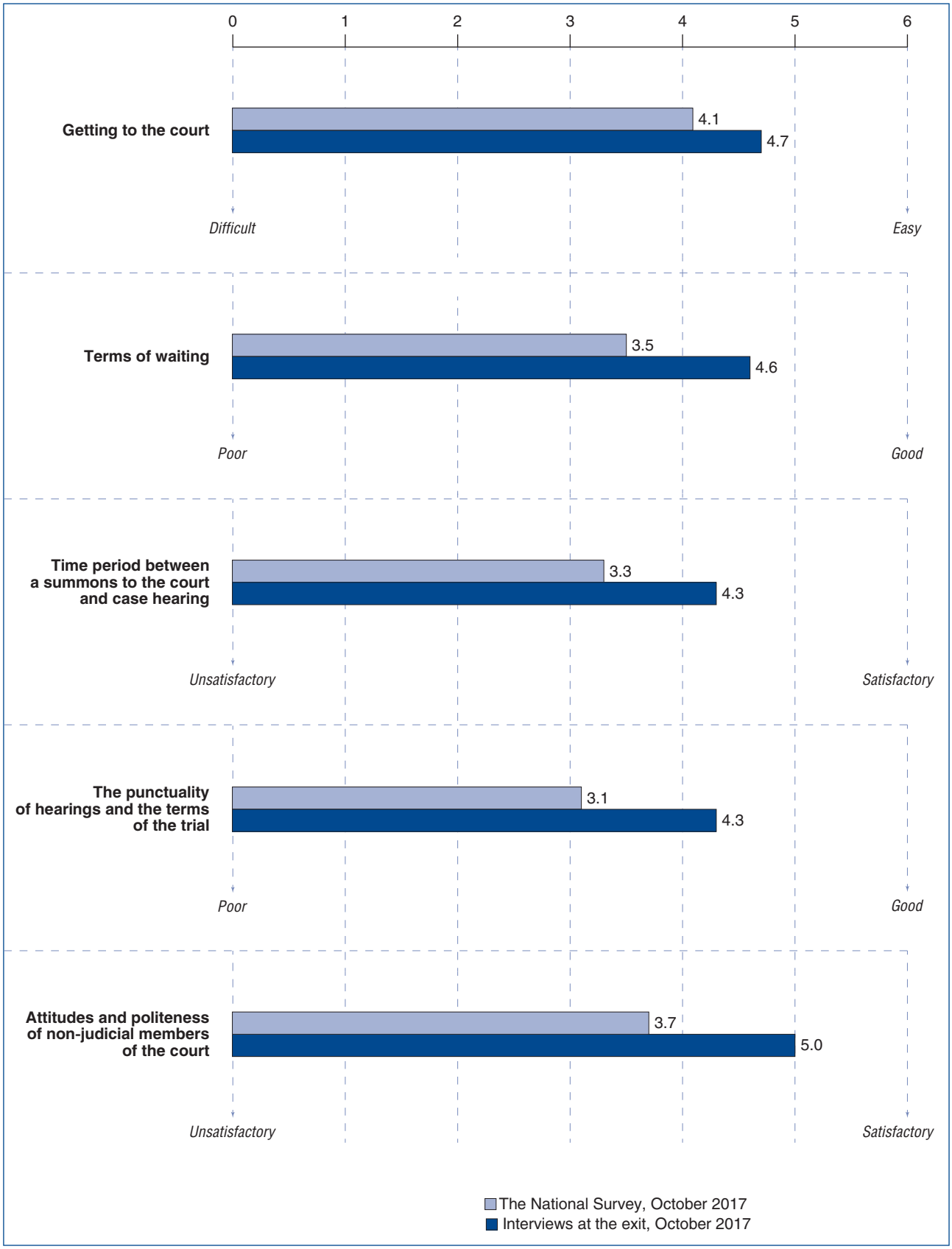
While assessing different aspects of court functioning, those involved in hearings generally believe that it was easy for them to get to the court, while the period between a summons and case hearing was satisfactory. Attitudes and politeness of judges and prosecutors were satisfactory. The impartiality of judges during oral hearings was satisfactory. The respondents, however, were less satisfied with the punctuality of hearings and the terms of the trial – 37% of those involved in court hearings are more likely to consider them "poor", which is roughly the same as the number of those who consider them "good" (38.4%). The timeframe for judgements produced most criticism among the respondents, as 45.5% of them view it as "too long", and for 36.5% it is "justified" (Diagram "*How would you rate ...?"*, p.41).

Was the judgement in a trial you participated in lawful and fair?*
% of the respondents, who participated in hearings as plaintiffs, defendants, offenders, victims, witnesses or experts



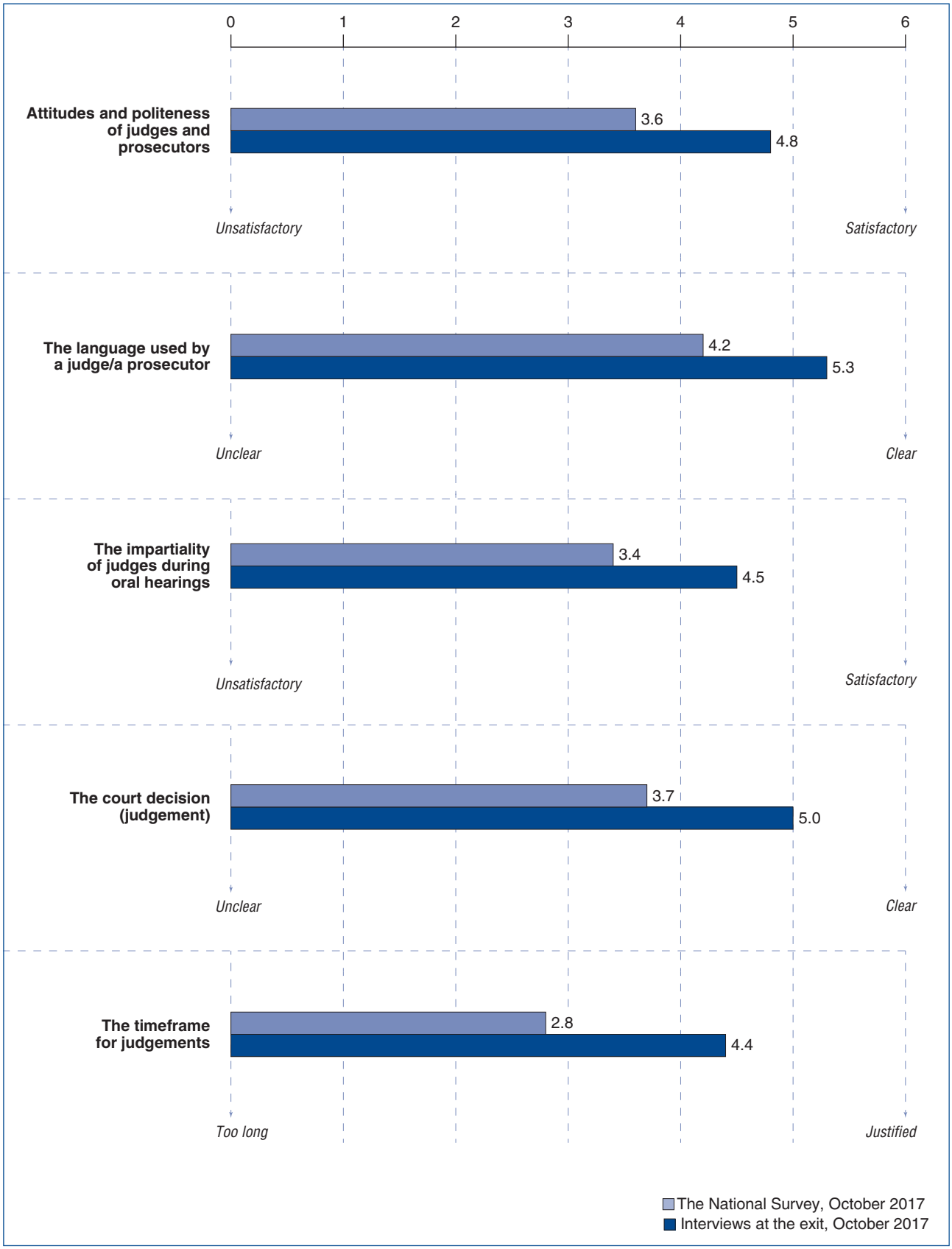
* In case of a single judgement, the respondent could choose one option; if several decisions – all applicable options.

How would you rate…?*
average score of answers by the respondents who participated in hearings as plaintiffs, defendants, offenders, suspects, complainants, witnesses or experts



* Based on the seven-grade scale from "0" to "6" depending on the proximity of the score to the left or to the right.

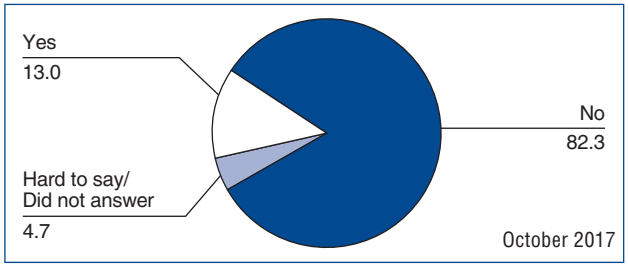
How would you rate…?*
average score
(continued)



* Based on the seven-grade scale from "0" to "6" depending on the proximity of the score to the left or to the right.

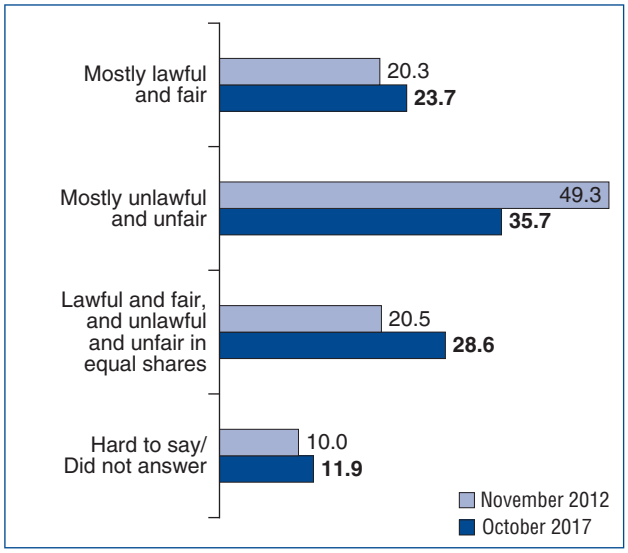
13% of all respondents admitted that over the past two years their family members and close friends participated in court hearings in any capacity (as witnesses, plaintiffs, defendants, victims, offenders, suspects, experts, judges, court employees, etc.).

Over the past two years, have your family members and close friends participated in court proceedings in any capacity (as a witness, plaintiff, defendant, victim, offender, suspect, expert, judge, advocate, court employee, etc.)?
% of respondents



Only 23.7% of respondents having such relatives and friends stated that court decisions in cases, in which the latter were involved, had been mostly lawful and fair, and 35.7% admitted that judgements were mostly unlawful and unfair. For 28.6% of the respondents, court decisions were lawful and fair, and unlawful and unfair in equal shares. If we compare these answers with those obtained in November 2012 (when the respondents assessed the experience of their relatives and friends over five years instead of two), then the share of those who believe that court decision were mostly legal and fair did not change significantly from 2012, but the proportion of those complaining about unlawfulness and unfairness of such decisions has declined (49.3% in 2012). There is also a growing number of the respondents, for whom court decisions were equally lawful and fair, and unlawful and unfair (20.5% in 2012).

Based on their feedback, were the court judgements in trials they participated in, mostly lawful and fair, or mostly unlawful and unfair?
% of the respondents, whose family members and friends participated in legal proceedings in any capacity

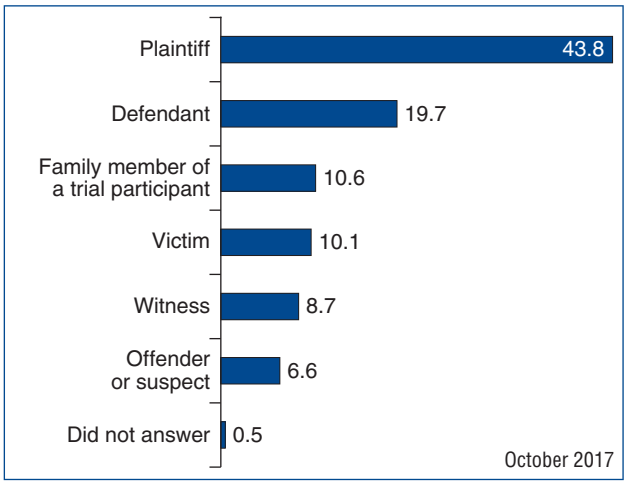


The Activity of Courts as Assessed by Trial Participants as They Leave the Courts

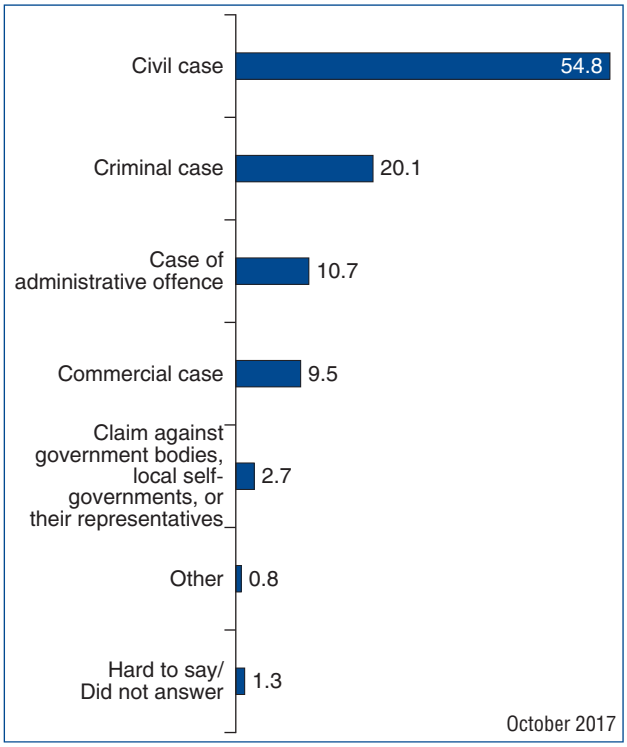
The majority of these respondents participated in court hearings as plaintiffs (43.8% of all those surveyed). 19.7% were involved in hearings as defendants; 10.6% – as family members of trial participants; 10.1% – as victims; 8.7% – as witnesses; and 6.6% – as offenders.

Most of these respondents were involved in consideration of civil cases (54.8%), while others were participants of criminal cases (20.1%), cases of administrative offence (10.7%), commercial cases (9.5%), and claims against government bodies, local self-governments, or their representatives (2.7%).

In what capacity have you visited the court today?
% of the respondents interviewed at the exit



In what case have you been involved today?
% of the respondents interviewed at the exit



36.4% of the respondents reported that on the day of the interview the court did not adopt any decision in cases they were involved in. For 24.2%, court decisions were delivered in their favour, and for 13.5% – in favour of the opposing party. 10.5% of the respondents admitted that the court made compromise decisions. The survey results show that plaintiffs and victims were more likely to get court decisions in their favour (where the judgements were delivered on the day of the interview, 57.7% of the plaintiffs and victims reported receiving positive decisions, and only 16.9% – decisions in favour of the opposing party). Conversely, the defendants and offenders were more likely to report decisions made in favour of the adversary (24.8% and 40.7% respectively).

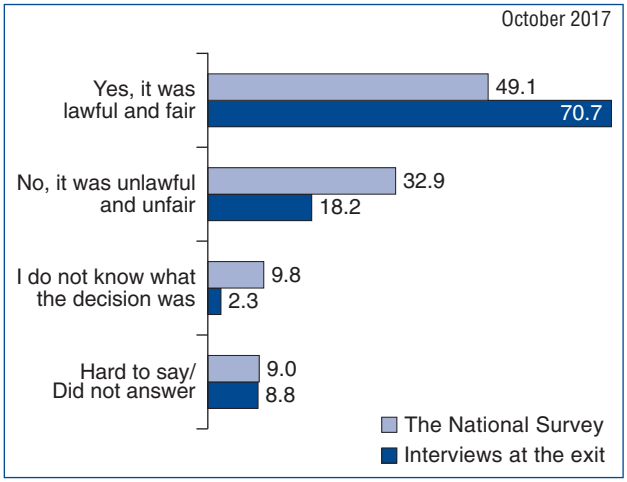
According to the national survey and interviews at the exit, the respondents who reported court decisions that were made in their favour substantially outnumbered those who said that the judgments favoured the opposing party. Such predominance of plaintiffs over defendants among the respondents in both surveys can be explained either by the fact that defendants were more likely to avoid participation in the survey, or that defendants more frequently avoided court sessions, or both.

As many as 70.7% of the respondents among those whose cases were decided upon by the court, view such judgements as lawful and fair, unlike 18.8% of respondents who think that decisions were neither lawful nor fair (additionally, 2.3% are unaware of court decision, and 8.8% found it difficult to answer this question). These answers differ from those collected by the national survey, where only 49.1% of the respondents agreed that their judgement was lawful and fair, and for 32.9% it was unlawful and unfair. In this case, however, the respondents reflected on their experience over the past two years. Therefore, we can be cautiously optimistic about current situation, which seemingly has improved during the past two years.

Of course, the opinion about the fairness of the court decision primarily depends on whether it was delivered in favour of the respondent – if the judgement is considered lawful and fair by 96.2% of those who reported that it was made in their favour (and by 68.2% in cases of compromise), then the proportion of the respondents who share the same opinion despite having the decision made in favour of the opposing party is only 28.6%.

The respondents who believe that the judgment was neither lawful nor unfair, list the following reasons for that: one party hired better lawyers, or was better prepared for the process (25.8%); a judge did not have full knowledge of the materials (24.2%); a person representing one party has a higher social status than the opponent (22.6%); one party has government connections (19.4%); one party bribed a judge (17,7%); a judge disliked one party for whatever reason (16.1%); a judge is somehow affiliated with one party (11.3%); a judge has low qualifications (8.1%); other reasons (14.5%) (Diagram *"If you feel that…?"*, p.45).

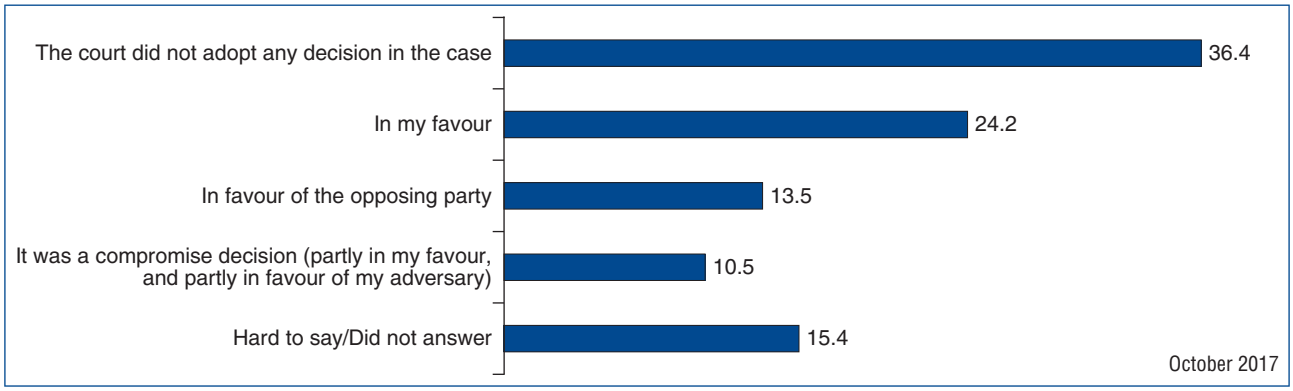
Was the judgement in a trial you participated in lawful and fair?*
% of the respondents, whose cases were decided upon



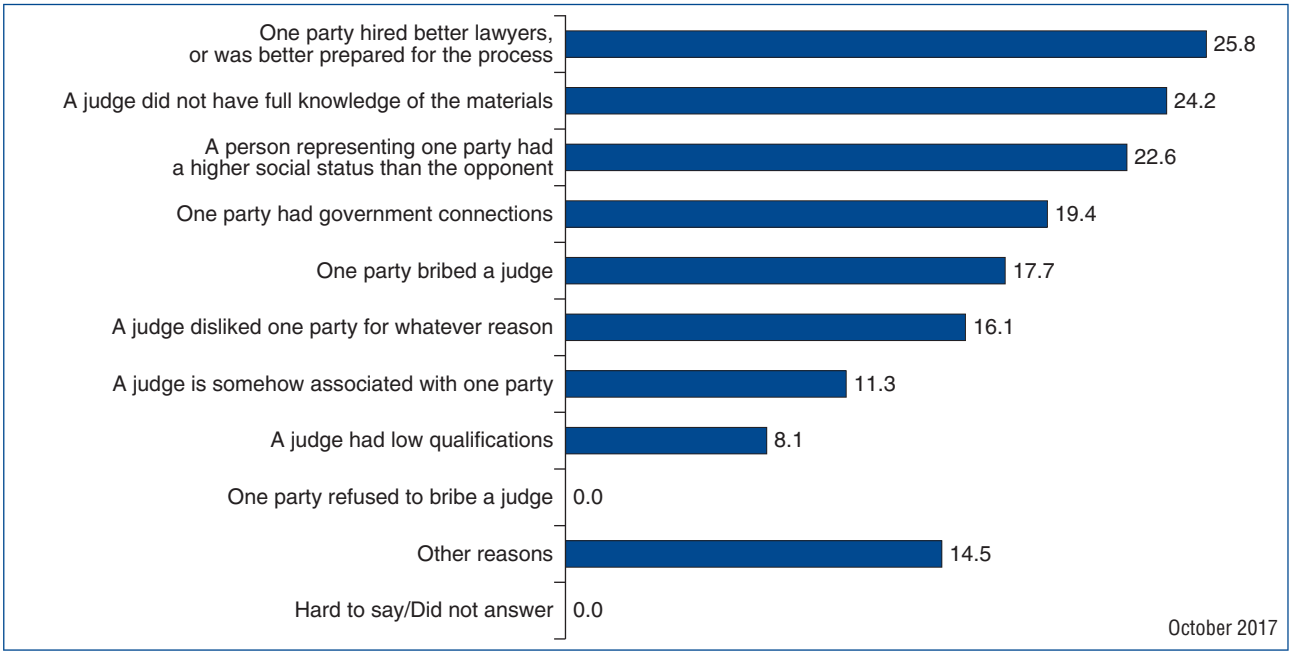
While assessing different aspects of court activities, those involved in hearings mostly think that it was easy for them to get to the court, while the terms of waiting, the punctuality and the terms of trial were good. Attitudes and politeness of the court staff were satisfactory. The language, used by a judge/a prosecutor, was clear; the impartiality of judges during oral hearings was satisfactory, along with clear court decisions. The timeframe for judgements was justified (Diagram "*How would you rate…?"*, p.41).

Scores for all these indicators are notably higher compared to assessments made by the national survey participants, as the latter assessed their own "court

Was the court judgement in your favour or in favour of the opposing party?
% of the respondents interviewed at the exit



If you feel that the judgement was unlawful and unfair, what are the reasons for that?*
% of the respondents interviewed at the exit, whose cases were decided upon, and who considered the court judgement unlawful or unfair (62 respondents)



* The respondents were asked to give all acceptable answers.

experience" over the past two years. Therefore, it can be assumed that the courts' performance against these indicators has recently improved.

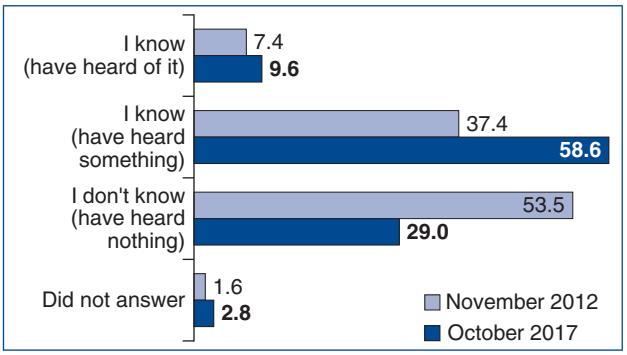
The respondents from Eastern regions were notably more critical in their assessments, especially in such aspects as the punctuality and the terms of trial, difficulties of getting to the court, terms of waiting, and period between a summons and case hearing (Diagram "*How would you rate…?*", p.46).

Only 52.1% of surveyed participants of court hearings admit that they have started on schedule, although most delays were rather short – from 15 to 30 minutes (28%). 7.3% of the respondents had to wait for an hour or more, and 11.9% indicated that the hearing did not take place or was rescheduled to another date (Diagram *"Did the today's court session start…?"*).

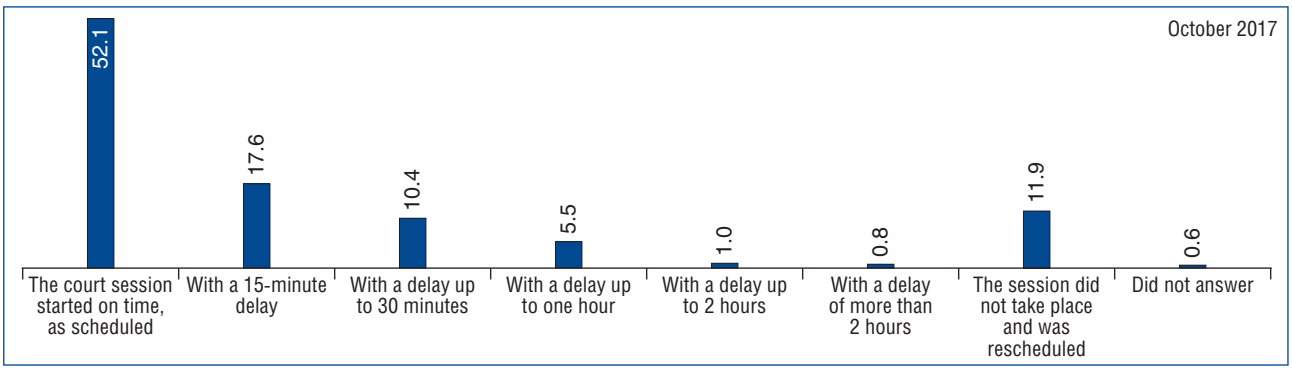
Attitudes towards the Judicial Reform

While answering the question about their awareness of the judicial reform, 9.6% of the respondents said that they knew about it; 58.6% knew something about it; and 29% knew nothing about the reform. If the proportion of those who knew about the reform, as compared to November 2012, demonstrated only a slight rise (from 7.4% to 9.6%), then the number of those who have heard something about it has increased significantly (from 37.4% to 58.6%), with a notable reduction in the share of those knowing nothing about the reform (from 53.5% to 29%).

Do you know (have you heard) anything about the judicial reform in Ukraine?
% of respondents



Did the today's court session start on time, as scheduled, or you had to wait? If yes, then for how long?
% of the respondents interviewed at the exit



How would you rate...?*
average score of answers by the respondents who participated in hearings as plaintiffs, defendants, offenders, suspects, complainants, witnesses or experts

	WEST	CENTRE	SOUTH	EAST
Getting to the court	4.7 *Difficult – Easy*	4.9 *Difficult – Easy*	4.9 *Difficult – Easy*	4.4 *Difficult – Easy*
Terms of waiting	4.8 *Poor – Good*	4.8 *Poor – Good*	4.5 *Poor – Good*	4.2 *Poor – Good*
Time period between a summons to the court and case hearing	4.3 *Unsatisfactory – Satisfactory*	4.4 *Unsatisfactory – Satisfactory*	4.6 *Unsatisfactory – Satisfactory*	3.9 *Unsatisfactory – Satisfactory*
The punctuality of hearings and the terms of the trial	4.4 *Poor – Good*	4.5 *Poor – Good*	4.3 *Poor – Good*	3.8 *Poor – Good*
Attitudes and politeness of non-judicial members of the court	5.0 *Unsatisfactory – Satisfactory*	5.1 *Unsatisfactory – Satisfactory*	5.2 *Unsatisfactory – Satisfactory*	4.7 *Unsatisfactory – Satisfactory*
Attitudes and politeness of judges and prosecutors	4.7 *Unsatisfactory – Satisfactory*	4.9 *Unsatisfactory – Satisfactory*	5.1 *Unsatisfactory – Satisfactory*	4.6 *Unsatisfactory – Satisfactory*
The language used by a judge/a prosecutor	5.2 *Unclear – Clear*	5.3 *Unclear – Clear*	5.3 *Unclear – Clear*	5.2 *Unclear – Clear*
The impartiality of judges during oral hearings	4.3 *Unsatisfactory – Satisfactory*	4.6 *Unsatisfactory – Satisfactory*	4.7 *Unsatisfactory – Satisfactory*	4.4 *Unsatisfactory – Satisfactory*
The court decision (judgement)	4.7 *Unclear – Clear*	5.0 *Unclear – Clear*	5.7 *Unclear – Clear*	5.0 *Unclear – Clear*
The timeframe for judgements	4.2 *Too long – Justified*	4.5 *Too long – Justified*	4.9 *Too long – Justified*	4.2 *Too long – Justified*

* Based on the seven-grade scale from "0" to "6" depending on the proximity of the score to the left or to the right.

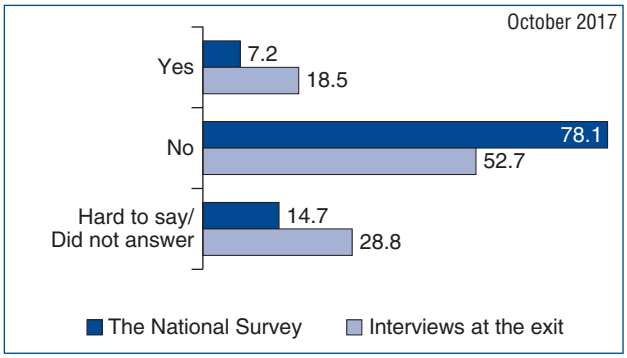
Attitudes to judicial reform are mostly negative (49.1% of the respondents), as only 12.6% of the respondents perceive it positively. Such sentiments are typical regarding all other reforms (land, healthcare, pension, education). Negative attitudes towards the judicial reform are widespread not only among those who are relatively well aware of it (21.1% of positive, and 60.3% of negative attitudes), but even among those who have not heard about it (6.5% and 39.2%, respectively), suggesting disapproval and bias against reforms in general.

Negative attitudes towards the judicial reform are also due to the fact that Ukrainians do not see its results. Only 7.2% of the respondents believe that nowadays courts in Ukraine are autonomous and the judges are independent, while 78.1% have an opposite view. Even among those few with positive attitudes towards the reform, only 20% believe that courts in Ukraine are autonomous and the judges are independent, while 62.7% disagree with this statement.

The share of respondents who believe that courts in Ukraine are autonomous and the judges are independent among those who have been involved in court proceedings over the past two years is slightly higher than among the respondents with no experience of this kind (17.3% and 6.4%, respectively), although the majority of respondents in both groups do not share this belief (68.7% and 78.9%, respectively).

As for the respondents interviewed at the exit, 18.5% think that courts today are autonomous, and the judges are independent. 52.7% think otherwise.

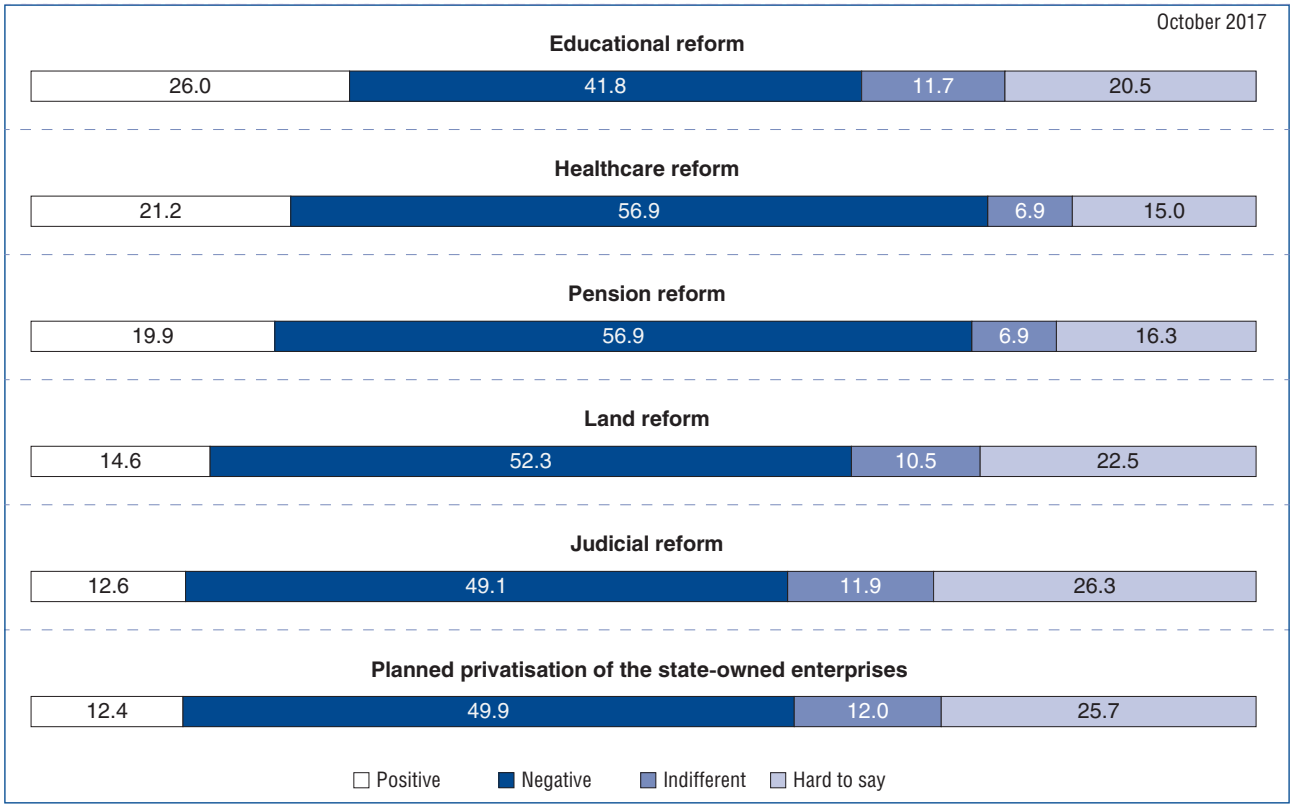
Do you think today courts in Ukraine are autonomous, and the judges are independent?
% of respondents



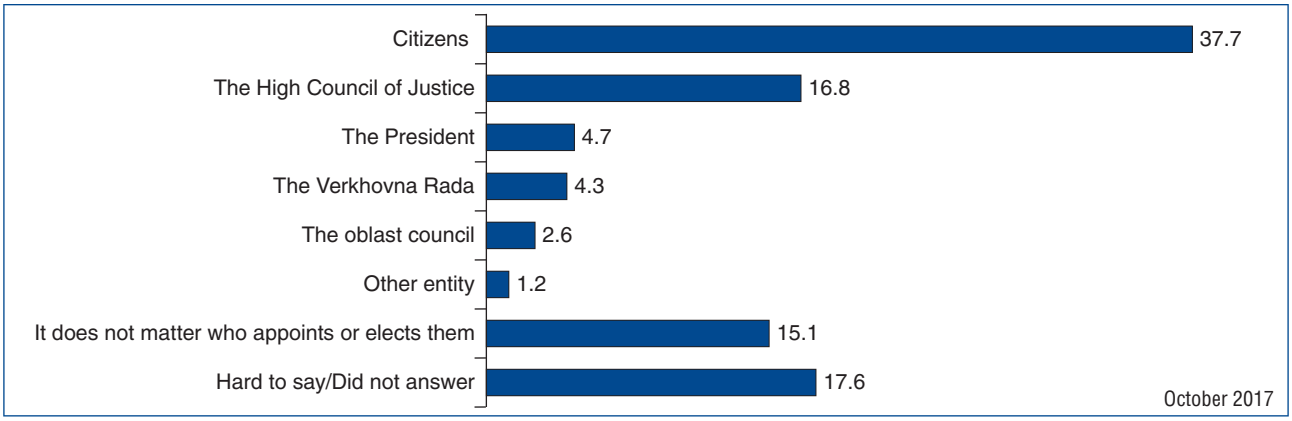
Most Ukrainians believe that for judges to be independent, they have to be elected by citizens themselves (37.7%). The idea of their appointment by the High Council of Justice did not find significant support among the respondents (16.8%), while only a few of them believe that judges should be appointed by the President (4.7%), the Verkhovna Rada (4.3%), or the oblast council (2.6%). Additional 15.1% of the respondents think that it does not matter who appoints or selects judges.

Those who do not think that the judges today are independent – if compared to those sharing the opposite view – are more likely to support their election by the citizens (41.2% and 30.3%, respectively), and fewer of them would like to see judges appointed by the High Council of Justice, the President or the Parliament.

Several reforms are currently underway in Ukraine. Given the information that you have, what is your attitude towards these reforms?
% of respondents



In order for judges to be independent, they have to be appointed (elected) by…?
% of respondents



Similarly, the proportion of those who support election of judges by citizens, is notably higher among the respondents with negative attitudes towards the judicial reform, compared to those with positive attitudes (42.4% and 31.9%, respectively). Those who are critical about the judicial reform are also less likely to support the appointment of judges by the High Council of Justice, the President or the Parliament.

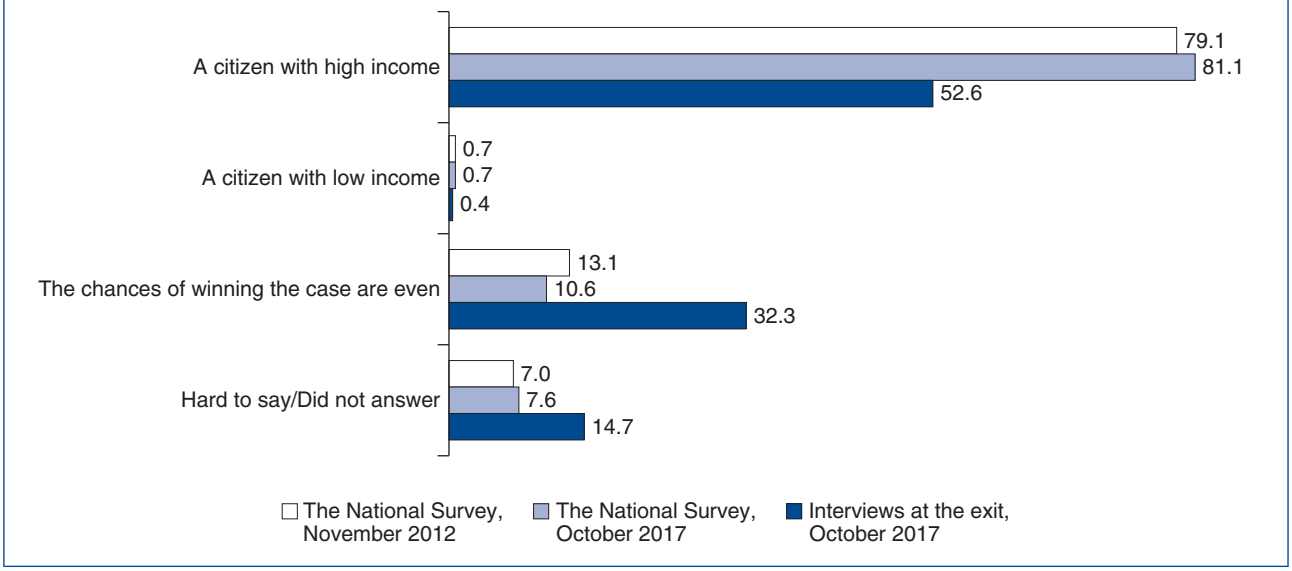
Confidence in the Judiciary and the Overall Assessment of the Activity of Courts by Citizens

The vast majority of Ukrainians do not consider the Ukrainian courts objective and independent. For example, if the opposing parties in court are a citizen with high income and a citizen with low income, then according to 81.1% of the respondents, the former is much more likely to win the case. Similarly, in the case of a dispute between an employer and employee, the overwhelming majority (74.7%) of the respondents believe that the employer will emerge as a winner. If ordinary citizens and government representatives are the parties to the proceedings, more than three quarters (78.1%) of the respondents think that a civil servant has more chances to win the case.

Citizens are convinced that courts tend to rule in favour of the rich and those in power. Public opinion regarding this issue virtually did not change since 2012. Similarly, there are no significant differences between the respondents in terms of age, gender and region in this regard. Moreover, the respondents' answers to these questions at the exit were different from the answers of the national survey participants only in quantitative terms. The majority (52.6%) of the respondents interviewed near courts believe that a citizen with a high income has better chances of winning a case in the Ukrainian court than his or her counterpart with low income. Only 0.4% of those surveyed share the opposite opinion, while about one-third of the respondents (32.3%) think that their chances are even.

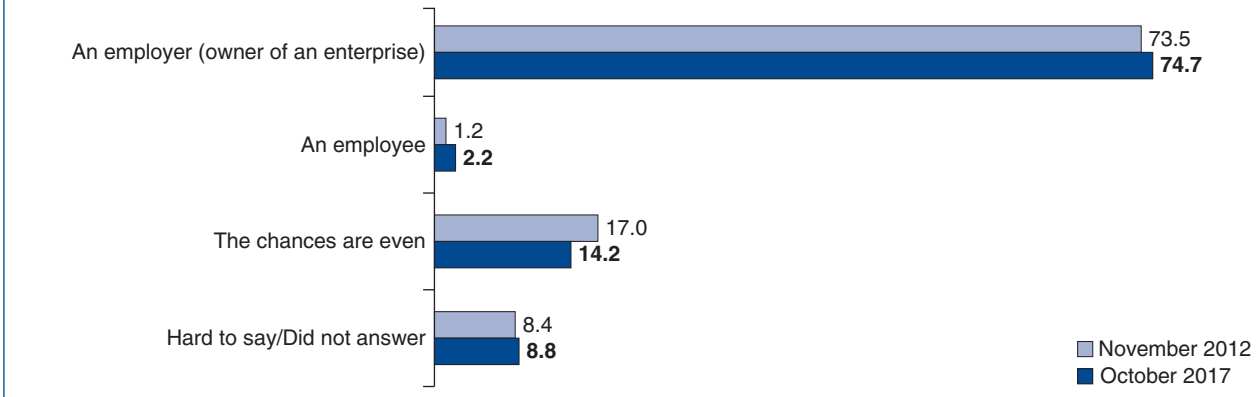
Who has more chances to win the case in Ukrainian courts, if the parties are…?
% of respondents

A citizen with high income and a citizen with low income

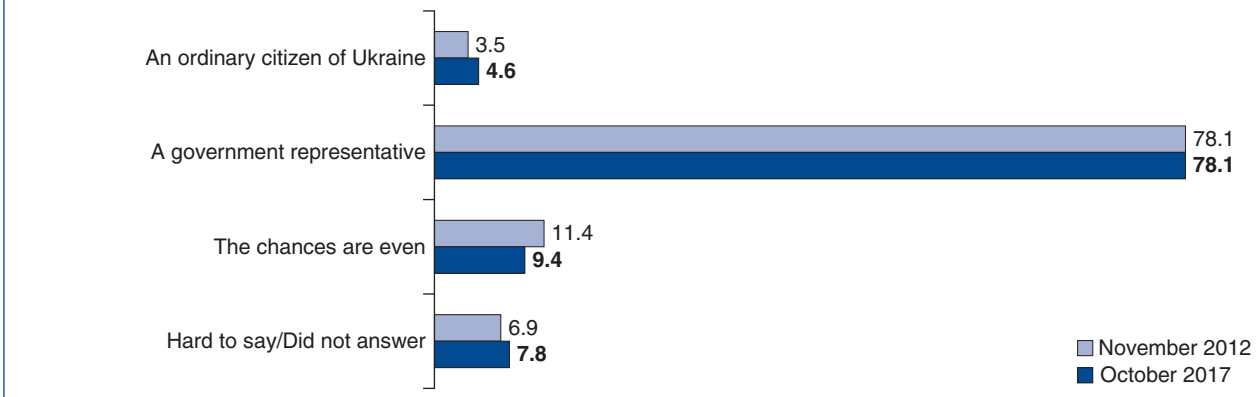


Who has more chances to win the case…?
% of respondents
(*continued*)

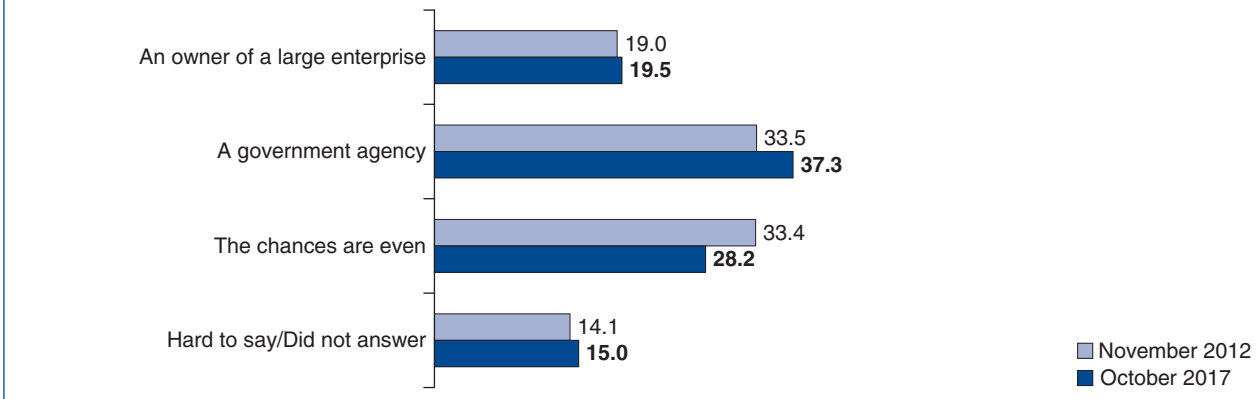
An employer (owner of an enterprise) and an employee



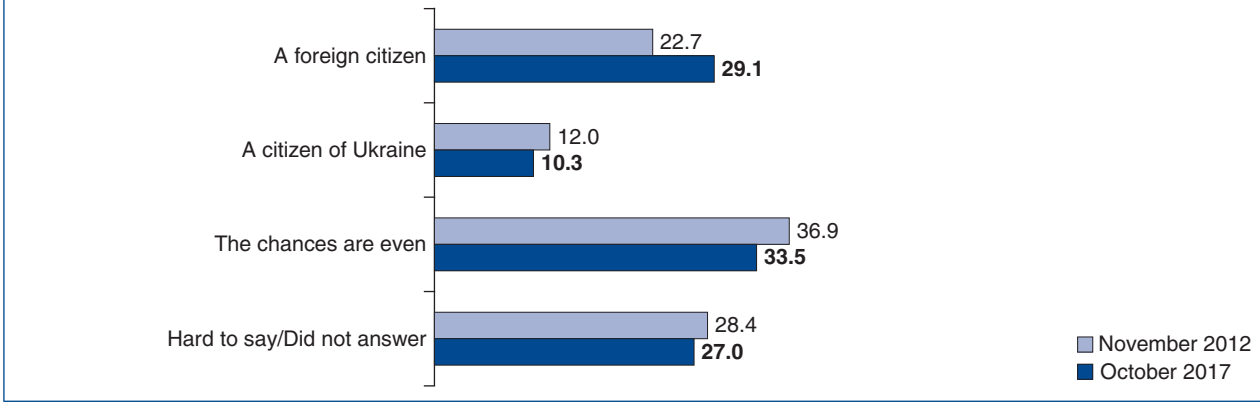
An ordinary citizen of Ukraine and a government representative



An owner of a large enterprise and a government agency



A foreign citizen and a citizen of Ukraine



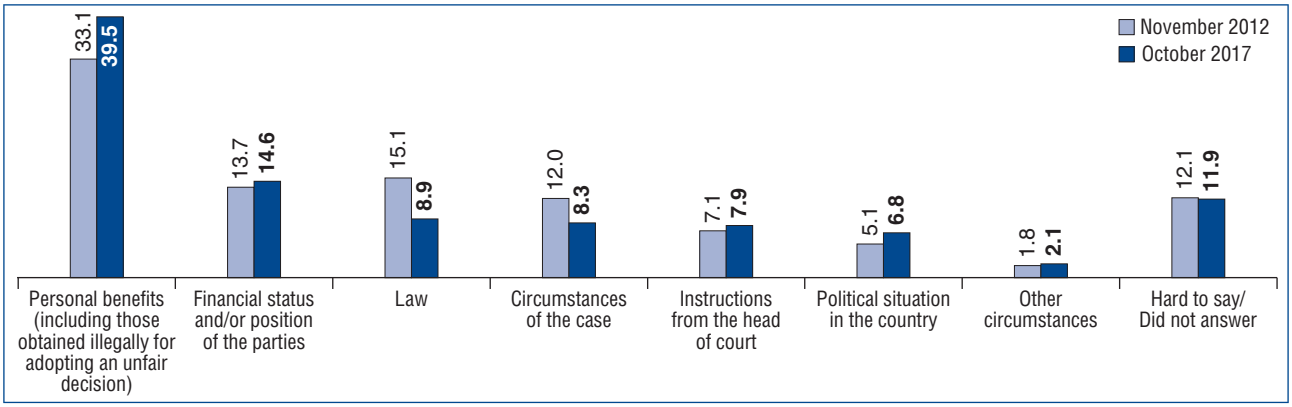
The respondents' assessments of situations, when the opposing parties in the court are the owner of a large enterprise and the government agency, are not so conclusive. Relative majority (37.3%) of the respondents believe that the government has better chances of winning the case, and 19.5% have the opposite opinion. More than a quarter (28.2%) of the respondents think that their chances are rather even, and the remaining respondents find it difficult to answer. In the event of the dispute between a citizen of Ukraine and a foreign citizen, one-third (33.5%) of the respondents consider their chances in the court even. Slightly fewer (29.1%) respondents believe in the victory of a foreign national, and only 10.3% support their fellow countryman.

It should be noted that public opinion on these issues has not changed since 2012. There are some minor differences in the distribution of responses in different groups of respondents, but they were not significant and did not affect the general pattern within the group.

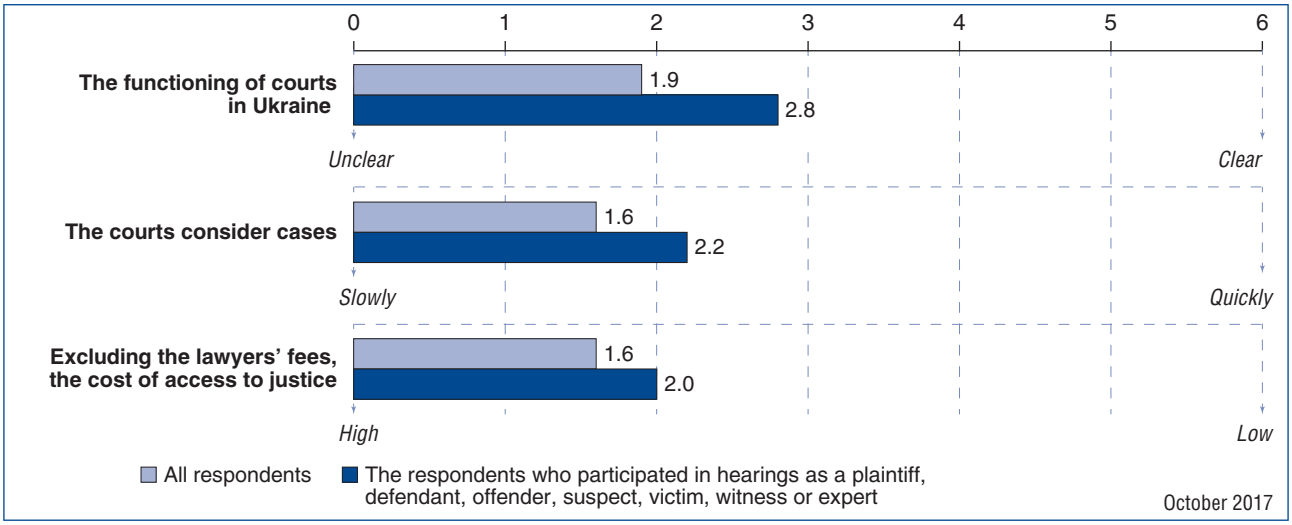
While answering the question about things that judges are mostly guided by when passing court judgments, most respondents mentioned personal benefits (39.5%). The idea of judges being guided by financial status and/or position of the parties found less support (14.6%). Even less frequently the respondents mentioned law (8.9%), circumstances of the case (8.3%), instructions of the head of court (7.9%), and political situation in the country (6.8%). Compared to 2012, we can observe a statistically significant growth of the share of respondents who believe that judges are guided by personal benefits (from 33.1%), while the proportion of those who think that judges are guided by law and circumstances of the case have dropped (from 15.1% and from 12% respectively).

Most citizens struggle to understand the way courts operate in Ukraine. They believe that the process of case consideration is slow, while the cost of access to justice is high. The respondents were asked to use the scale from "0" to "6", where "0" means "unclear", "slow", and "high cost" respectively, and "6" means "clear", "fast", and "low cost". With regard to the clarity of the court functioning, the average score was 1.9 points; the promptness of case consideration scored 1.6 points; and the cost of access to justice collected 1.6 points. The respondents, who were involved in legal proceedings in the past two years, had somewhat better opinion about the judiciary. Therefore, the clarity of the court functioning scored 2.8 points (which, in fact, is an average score); the promptness of judgement received 2.2 points; and the average cost of access to justice scored 2.0 points.

What are judges mostly guided by when passing court judgements?
% of respondents



How would you rate…?*
average score



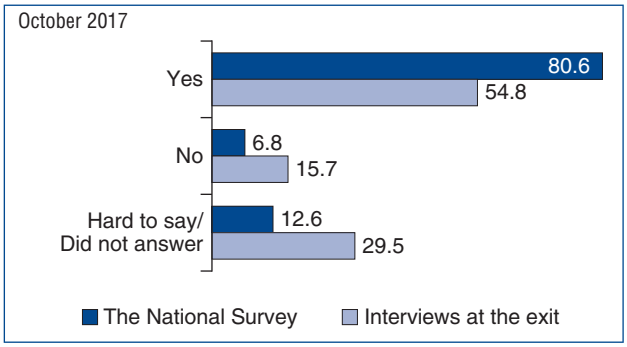
* Based on the seven-grade scale from "0" to "6" depending on the proximity of the score to the left or to the right.

The issue of corruption in government bodies remains in the spotlight of vigorous public discussion. The respondents rated corruption as high in all government agencies included in the questionnaire. Thus, the Security Service scored 3.8 points; the Ministry of Internal Affairs – 3.9 points; the Public Prosecutor's Office – 4 points; and the tax service – 4.1 points; and courts and customs – 4.3 points each. It should be noted that the respondents who were involved in court proceedings in the past two years gave somewhat lower (meaning better) marks – specifically, the corruption rate of courts among them was 3.9 point.

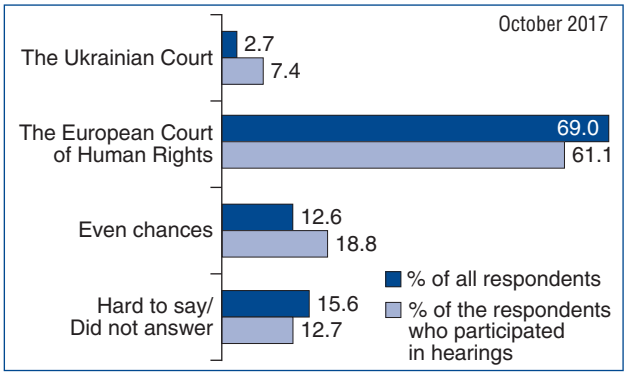
80.6% of the Ukrainians agree with accusations of Ukrainian courts of corruption, political dependence and bias, and only 6.8% of the respondents disagree with this opinion. It should be noted that most respondents who were interviewed at the exit, that is, those who only recently have become acquainted with the judicial system, also agree with these unpleasant characteristics of the Ukrainian courts. However, the overall picture among the latter is slightly more optimistic, as 54.8% of them agree with these accusations, and 15.7% disagree.

More than two-thirds (69%) of the respondents believe that a citizen of Ukraine has better chances of getting a fair judgement in the European Court of Human Rights (ECHR) than in the Ukrainian court. 2.7% of the respondents think the opposite, while 12.6% of those surveyed believe that the chances in both courts are even. The situation is a little more optimistic among those who participated in court hearings over the past two years: 61.1% of them believe that the chances to get a fair judgement in the ECHR are higher; 7.4% trust Ukrainian courts in this regard; and 18.8 % think that the chances are even.

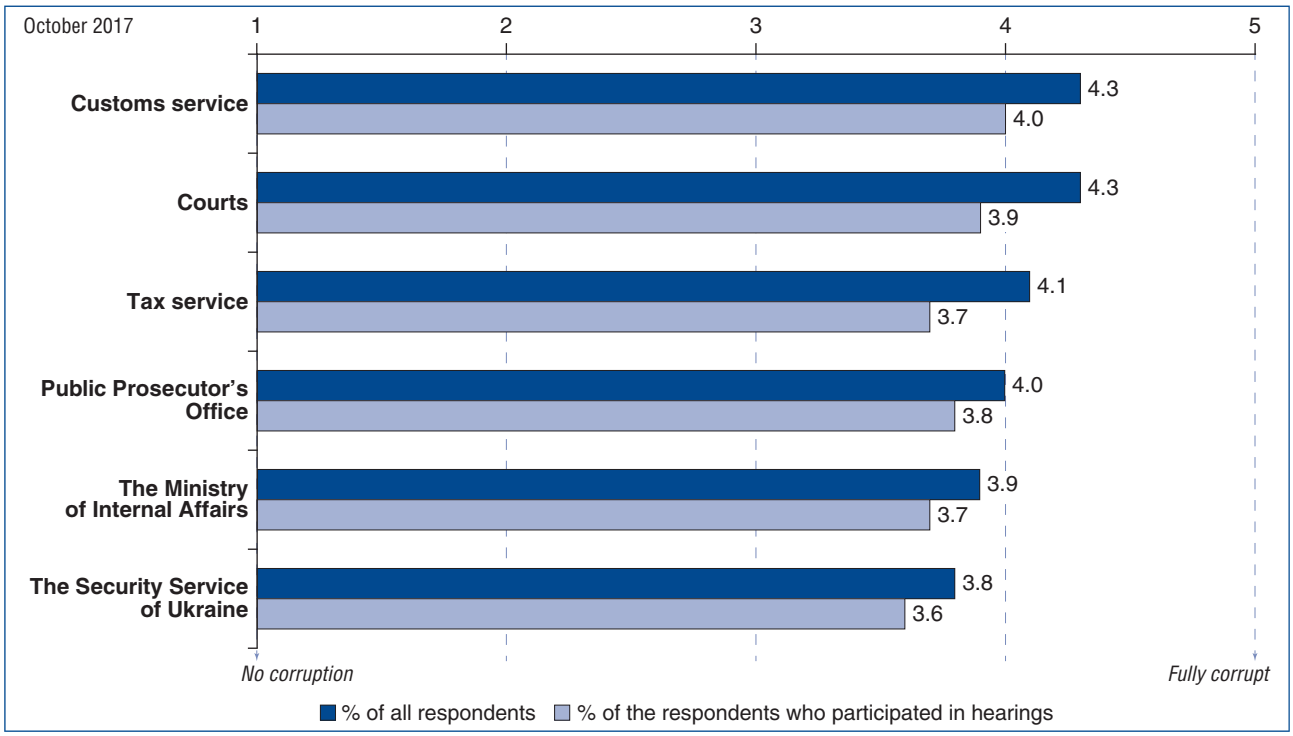
Nowadays the Ukrainian courts are consistently accused of corruption, political dependence and bias. Do you agree with such characteristics of courts?
% of respondents



In which court – the Ukrainian or the European Court of Human Rights – does a citizen of Ukraine have better chances to get a fair judgement in his/her case?
% of respondents



The rate of corruption in the following government bodies and agencies*,
average score



* On a scale from 1 to 5, with "1" meaning there is no corruption at all, and "5" – this body is totally corrupt.

The majority of respondents who believe that Ukrainians have better chances to get fair judgement in the ECHR, point at higher level of independence and impartiality of judges as one of the main reasons for that. Those few respondents with greater confidence in the Ukrainian courts mostly cite better knowledge of laws and legislation by local judges (29.6%).

The Ukrainians' confidence in courts and the judicial system is a rather complicated and controversial phenomenon. To better understand this situation, it is expedient to consider the issue of people's trust in a wide range of the state and public institutions. Currently one group of these institutions enjoys a high level of trust, or at least a positive balance of trust (meaning more citizens trust them rather than not). Such institutions include the Church (confidence in the Church as an institution is traditional and depends little on current situation), agencies directly involved in the protection of Ukraine, and civil society organisations.

The list of the state and public institutions enjoying the highest level of confidence is fronted by volunteer organisations, as 66.7% of the respondents completely or mostly trust them. The volunteer NGOs are followed by the Church (64.4%), the Armed Forces (57.3%), volunteer battalions (53.9%), the National Guard (52.6%), the State Emergency Service (50.5%), non-governmental organisations (48%), the State Border Guard Service (46.4%) – the number of the respondents who trust these institutions significantly exceeds the number of those who do not trust them (Table *"To what extent do you trust the following social institutions?"*, p.53).

The situation with the police deserves additional clarification. For many years, the Ukrainian militia had one of the lowest levels of public trust. The police reform and renaming of militia into police have improved the image of this institution. Initially, citizens responded particularly well to the new patrol police. While trust in the police in general was not much different from the credibility of old militia, people's trust in new "cops" was radically different, and the patrol police enjoyed a positive balance of trust. Thereafter, the levels of trust in the police and the new patrol police started to converge, with confidence in the former increasing, and in the latter – declining. At the end of 2017, the level of confidence in these two previously different police "entities" finally settled at the same level. And it is quite high, especially compared with other state institutions – the balance of trust in the police is close to zero, meaning that the number of people trusting the police is roughly equal to those who do not trust this agency.

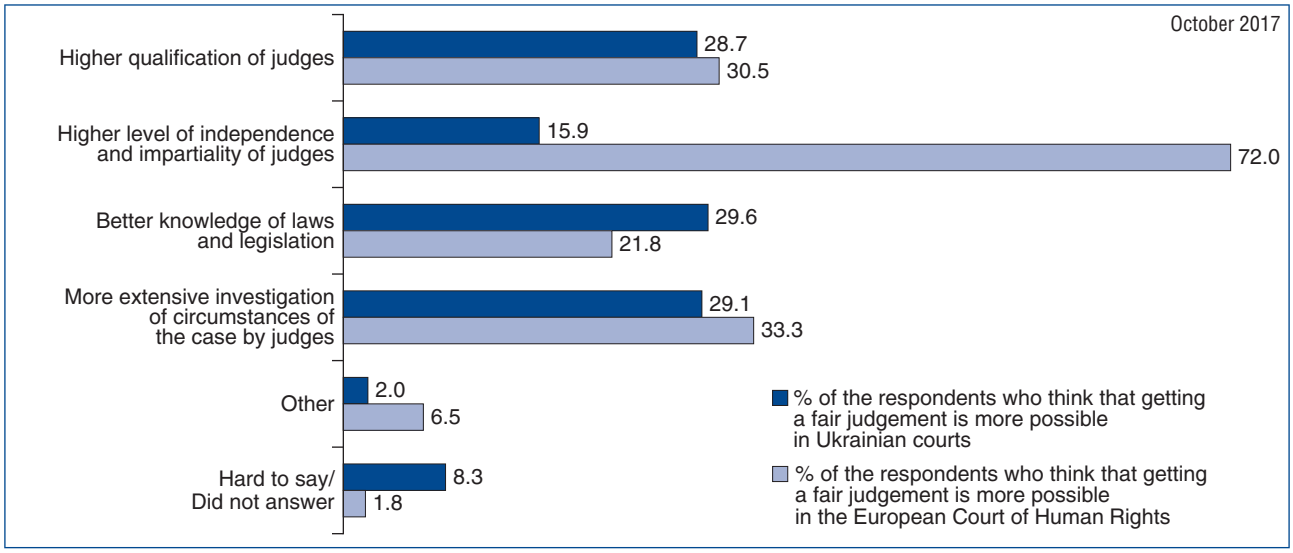
Significantly lower is the level of trust in government authorities. 24.8% of the respondents trust, and 68.2% do not trust the President. The level of trust and distrust in the Cabinet of Ministers is 19.8% and 73.1%, respectively, and the Verkhovna Rada – 13.8% and 80.7%. The state apparatus (public officials) enjoys trust of only 11.2% of the respondents, while 80.7% have no confidence in it. The level of trust in prosecutor's office is extremely low, as only 14.2% of the respondents trust or mostly trust it, while almost three quarters (74.1%) of the respondents do not trust prosecutors.

The anti-corruption agencies also failed to win the public trust. The respondents have some degree of trust in the National Anti-Corruption Bureau (20.1%), the Specialised Anti-Corruption Prosecutor's Office (17.6%), and the National Agency on Corruption Prevention (14.8%). Yet close to 57.5% of the respondents trust none of these agencies.

Ukrainian courts have one of the lowest levels of public confidence, as 80.9% of the respondents expressed their distrust in courts (the judicial system in general), and only 9.3% admitted trusting courts. As for the level of citizen's trust and distrust in specific courts, it is as follows: local courts – 77.4% and 11.9%, respectively; the Supreme Court – 72% and 13.1%; and the Constitutional Court – 66.8% and 14.9%.

In addition, we conducted a small experiment during the study by asking citizens to indicate the level of their trust in the anti-corruption court, which is still non-existent,

How can it be explained?*
% of respondents



* The respondents were asked to give all acceptable answers.

To what extent do you trust the following social institutions?
% of all respondents

	Trust	Mostly trust	Mostly do not trust	Do not trust	Hard to say	The balance of trust*
Volunteer organisations	19.8	46.9	12.4	7.6	13.3	*46.7*
The Church	21.7	42.7	11.2	11.3	13.1	*41.9*
Armed Forces of Ukraine	14.2	43.1	17.4	15.9	9.3	*24.0*
Volunteer battalions	14.1	39.8	15.6	15.6	14.9	*22.7*
The National Guard of Ukraine	12.5	40.1	17.8	16.4	13.2	*18.4*
The State Emergency Service of Ukraine	13.5	37.0	15.3	17.3	16.9	*17.9*
Non-governmental organisations	7.0	41.0	21.0	16.0	15.1	*11.0*
The State Border Guard Service	10.1	36.3	22.7	17.9	13.0	*5.8*
Ukrainian media	6.4	41.9	23.4	19.3	9.0	*5.6*
The patrol police (new)	7.3	33.6	25.2	17.8	16.0	*-2.1*
The National Police	5.7	33.6	27.9	18.3	14.4	*-6.9*
Western media	4.4	29.7	21.2	22.6	22.1	*-9.7*
The Security Service of Ukraine	5.8	29.4	24.2	22.6	17.9	*-11.6*
The Verkhovna Rada Commissioner for Human Rights (ombudsman)	6.4	19.0	20.1	20.6	33.9	*-15.3*
Trade union	3.3	23.2	25.7	24.9	22.8	*-24.1*
The National Anti-Corruption Bureau of Ukraine	2.7	17.4	24.8	32.8	22.3	*-37.5*
Specialised Anti-Corruption Prosecutor's Office	2.6	15.0	24.3	33.2	24.9	*-39.9*
The National Agency on Corruption Prevention	2.3	12.5	22.9	34.8	27.5	*-42.9*
The President of Ukraine	4.4	20.4	30.5	37.7	7.0	*-43.4*
The High Anti-Corruption Court**	2.6	11.1	24.5	36.6	25.1	*-47.4*
The Constitutional Court of Ukraine	2.6	12.3	26.5	40.3	18.4	*-51.9*
The Cabinet of Ministers of Ukraine	1.8	18.0	34.0	39.1	7.1	*-53.3*
The Supreme Court of Ukraine	2.2	10.9	29.8	42.2	15.0	*-58.9*
The Public Prosecutor's Office	2.0	12.2	34.0	40.1	11.7	*-59.9*
The National Bank of Ukraine	2.1	13.2	30.5	44.7	9.5	*-59.9*
Commercial banks	2.4	11.5	29.5	46.0	10.6	*-61.6*
Political parties	2.5	10.5	34.6	40.5	11.9	*-62.1*
Local courts	1.8	10.1	32.5	44.9	10.8	*-65.5*
The Verkhovna Rada of Ukraine	1.3	12.5	35.9	44.8	5.6	*-66.9*
The state apparatus (public officials)	1.1	10.1	35.9	44.8	8.1	*-69.5*
Courts (the judicial system)	1.3	8.0	33.6	47.3	9.8	*-71.6*
Russian media	0.9	3.5	25.8	57.0	12.9	*-78.4*

* The difference between the proportion of those who trust (*fully or mostly*) and those who do not trust (*fully or mostly*).
** This option was offered as an experiment, and the anti-corruption court has not been established on the date of the survey.

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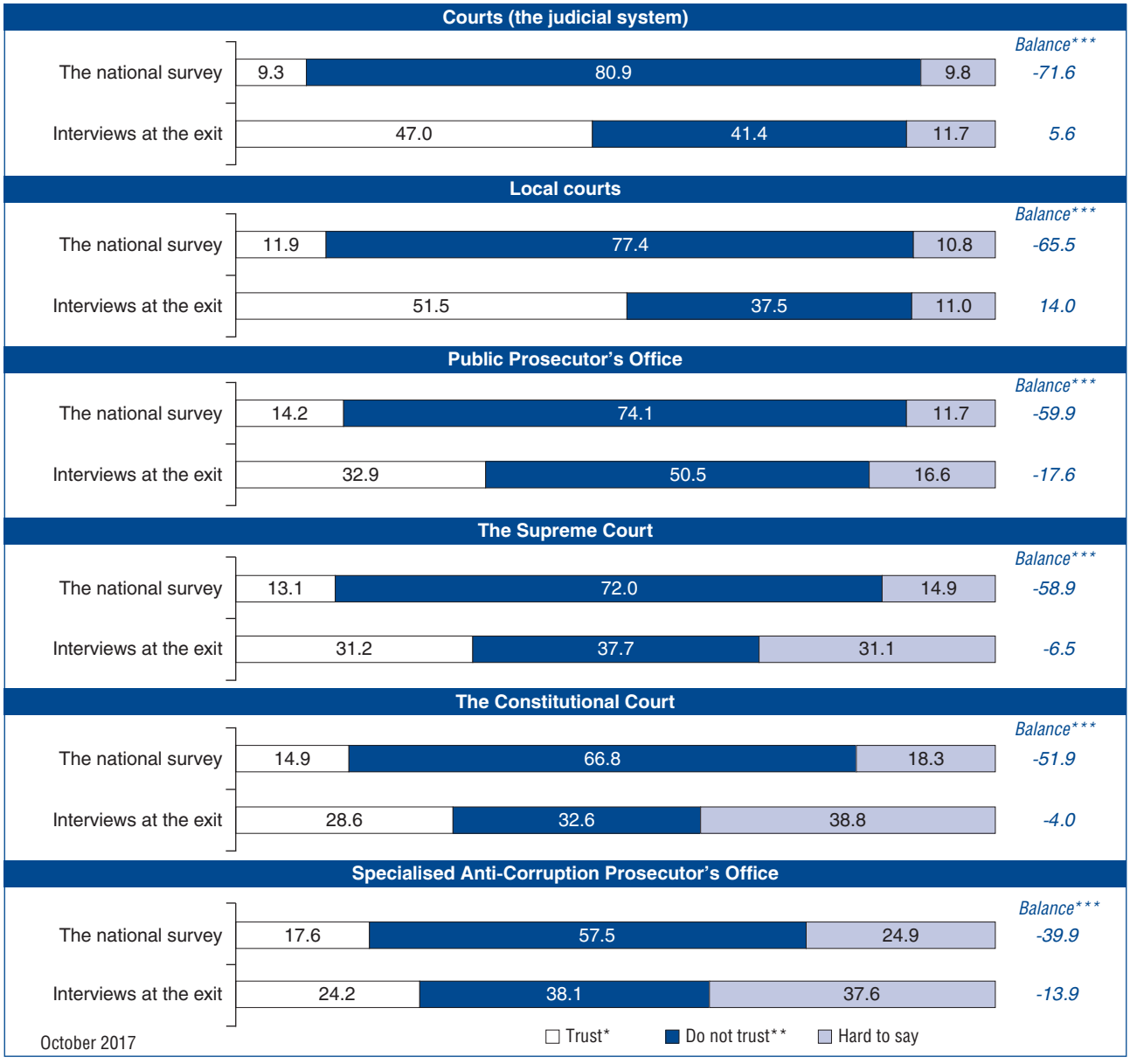
but continues to generate plenty of debate. The respondents' answers showed that this judicial body should not count on the "credit of trust" from the population, as the level of confidence turned to be very low. Only 13.7% of the respondents expressed different degrees of trust in the anti-corruption court, and 61.1% did not or mostly did not trust this body. Such results may suggest that the decisions to trust or distrust the anti-corruption court, as well as other courts and the judicial system, are usually adopted by citizens for political reasons rather than based on personal experience or other real facts. It is very likely that low level of confidence in courts stems from extremely low trust in government bodies as a whole, as 80.7% of the respondents distrust the state apparatus.

This conclusion is further confirmed by interviews of citizens who were leaving courts after having direct contacts with the judicial system. In particular, most respondents with recent experiences of this kind demonstrate trust in the judicial system, as the balance of trust is generally positive. In other words, the number of the respondents who trust courts (47%) was higher than the number of those with no trust in the judicial system (41.4%). The level of trust among citizens who came in contact with the local courts is even higher, with 51.5% of them demonstrating confidence in these judicial bodies (37.5% did not trust local courts). The level of confidence of these respondents in the Supreme Court and the Constitutional Court is somewhat lower, but it is still significantly higher than among the general population. Moreover, it is very likely that the respondents have no experience of contacting the Supreme and Constitutional Courts, so about one-third of them could not decide whether they trusted these courts or not.

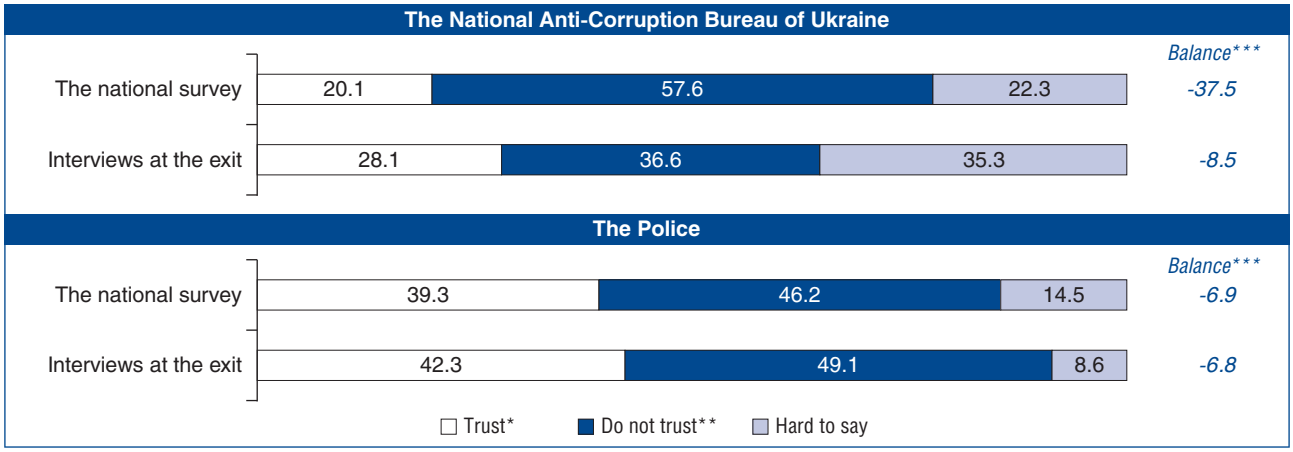
Interestingly enough, the respondents interviewed as they left courts expressed almost the same level of trust in the police as the population in general.

To what extent do you trust the following social institutions?
% of respondents



* The sum of responses "*trust*" and "*mostly trust*".
** The sum of responses "*do not trust*" and "*mostly do not trust*".
*** The difference between the proportion of those who trust and those who do not trust.

To what extent do you trust the following social institutions?
% of respondents (*continued*)



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* The sum of responses "*trust*" and "*mostly trust*".
** The sum of responses "*do not trust*" and "*mostly do not trust*".
*** The difference between the proportion of those who trust and those who do not trust.

Conclusions

Mass media plays a decisive role in shaping public opinion regarding the functioning of the judicial system of Ukraine and the course of the judicial reform, as most Ukrainians receive information about the activity of Ukrainian courts only from media reports.

The comparison of interviews at the exit (where the respondents assessed the activity of the judiciary and the fairness of judgements on the day of the survey) with the results of the national survey (where the respondents – participants of court hearings reviewed their past experience over two years) shows that the assessments made by the respondents interviewed near courts are better than those made by the participants of the national survey in almost every aspect (including the fairness of court decisions). This suggests that the situation has somewhat improved from what has been observed during the past two years.

When assessing different aspects of the activity of courts, the participants of legal proceedings interviewed while leaving the court were also more likely to think that it was easy for them to get to the court, while the terms of waiting, the punctuality and the terms of trial were good; the period between a summons and case hearing was satisfactory. Attitudes and politeness of non-judge court personnel, as well as of judges and prosecutors, were satisfactory. The language, used by a judge or a prosecutor, was clear; the impartiality of judges during oral hearings was satisfactory, along with clear court decisions. The timeframe for judgements was justified.

When assessing the court-related experience of their immediate social environment over the past two years, the respondents surveyed during the national study are much more likely to criticise the lawfulness and fairness of court decisions, although such negativism in their assessments has decreased compared to 2012.

Attitudes to judicial reform are predominantly negative, yet such sentiments are typical with regard to all other reforms (land, healthcare, pension, education). Attitudes towards the judicial reform, as well as reforms in general, significantly depend on people's overall confidence in government.

Negative attitudes towards the judicial reform are also due to the fact that Ukrainians do not see its results, while absolute majority of the respondents believe that nowadays courts in Ukraine are not autonomous and the judges are not independent.

Relative majority of respondents believe that for judges to be independent they should be elected by citizens.

Since most citizens lack personal experience of dealing with courts and shape their opinions about the judiciary based on someone else's experience or media reports, the overall attitude of the population towards the judiciary is negative, while the level of confidence is one of the lowest among all state and social institutions. However, the trust in the judiciary among citizens with recent personal experience of contacting courts is much higher. Moreover, their balance of trust in local courts and the judiciary in general is positive, meaning that the number of those who trust courts is higher than the number of those with no trust.

However, some issues in the functioning of Ukrainian courts stir negative reaction not only among the general public, but also among those with recent personal experience with the judicial system. In particular, the respondents generally believe that courts are more likely to side with wealthy citizens, government bodies and their representatives in their disputes with ordinary people. The overwhelming majority of the respondents also feel that a citizen of Ukraine has better chances of getting fair judicial decision in the ECHR than in the Ukrainian court. The main reason for that, according to many, is higher level of independence and impartiality of ECHR judges.

In other words, negative attitudes towards courts are basically produced by two factors – the negative media space and financial and political influence on judges. The survey results have demonstrated that the impact of the first factor can be effectively eliminated through communication of citizens with courts. The impact of the second factor can be reduced by introducing measures to increase real independence of judges. ■

REFORMING THE BAR

Oleh BEREZYUK,
The Head of NGO "The Ukrainian Legal Association", Advocate

In 2016 the Constitution of Ukraine was supplemented with Article 131-2, which determines that "only an advocate shall represent another person in court and defend a person against prosecution". The exception from this rule was made for disputes of minor importance, for representation before the court of minors or adolescents, as well as for disputes related to the protection of labour, social and electoral rights.

As a result of this innovation, a professional prosecutor will be opposed by a professional advocate in the criminal proceedings, while in the civil process the lawyer will compete against another lawyer. It should even the parties' chances in the case and promote two basic principles of legal proceedings: equality before the law and the court and the adversarial procedure.

An advocate is expected to act in more competent and efficient manner than any other person with no practical experience in the area of human rights. The lawmakers believe that granting an exclusive right to represent interests of a person in the trial to professional lawyers-advocates will facilitate the passing of legitimate and substantiated judgements, as well as considerably shorten the period of case consideration in the courts.

Involvement of adequately trained specialists in a trial will help a judge to save time, as he or she will not need to explain the parties their basic rights and responsibilities. Also, judges will be less likely to adjourn the case due to unpreparedness of the parties. According to the law, a prosecutor and an advocate are personally responsible for the execution of their duties in good faith, otherwise the court may apply legally established sanctions in the form of various disciplinary penalties, including dismissal from office and disbarment. It significantly affects the behaviour

of those involved in the process, disciplines them, and makes them more responsible in performing their professional duties.

It is expected that amendments to the Constitution will bring about positive changes in areas other than justice.

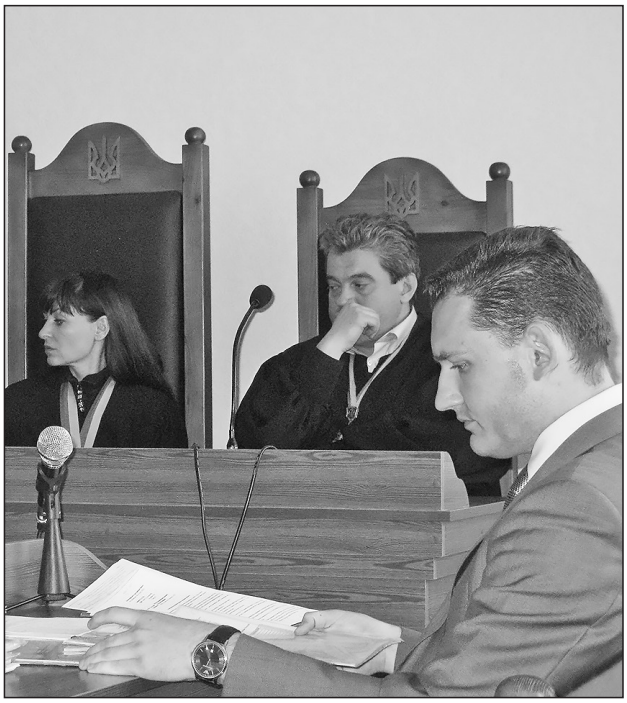
Mandatory participation of an advocate in a trial will certainly contribute to more effective protection of a person from unfair accusations, which at the end of the day should raise people's confidence both in justice and the state in general. It is also obvious that such mandatory participation should facilitate fair judgments and contribute to proper administration of justice, but not everyone can afford services of a professional lawyer. Current system of free legal assistance does not stand up to any criticism, since the Law "On Legal Aid" designates the Cabinet of Ministers and the Ministry of Justice as its administrators, whereas funding mostly comes as a part of the State Budget allocations to maintain the executive bodies. Given such administrative and material dependence on the government, is it possible for a lawyer to be truly impartial and objective, if the state serves as a defendant?

The law raises a number of other questions with no straight answers. The solution may be found in other sectors, such as health care, where medical workers have rich experience of providing free medical assistance. Perhaps, it would be also expedient to study other countries' legislation, in particular, that of Switzerland, where only advocates are allowed to represent interests of the parties in the court. Ukraine could use the Swiss experience to improve its own legal framework that regulates similar issues.

We have to stress that **a lawyer can be fairly impartial and objective being maximally independent of the government**.

For the sake of justice, it would be great for a lawyer to be independent not only of the state, but also of the parties that he or she he represents in court. However, for known reasons this issue can only be discussed theoretically.

Alongside the increasing role of advocates in the trial, it is also crucial to raise requirements to candidates seeking the license to practice law. In the process of professional selection, attention should be paid to the candidate's education and practical experience in the field of human rights. Relevant criteria should not be lower than for potential prosecutors or judges.



In this regard, the selection of candidates must be more responsible and based on unified bar exam procedure. This should be done centrally, e.g. under the auspices of the National Bar Association of Ukraine.

It is clear that recent amendments to the Constitution made current Law "On the Bar and Practice of Law" obsolete, as it fails to meet modern needs. The time for reforming the bar has come, and since this institution is an important part of the justice system, this transformation should occur within the entire legal and judicial reform, while the lawyers need to be more actively involved in the process.

Ukrainian lawyers have a considerable practical experience in protecting human rights and freedoms and representing interests of legal entities in courts, including outside Ukraine. We have enough specialists with profound theoretical knowledge and vast practical experience, capable of developing drafts of relevant regulatory and legal acts, and to present substantiated comments and suggestions. Nowadays we do not need to engage foreign experts, and more importantly – to bother the Venice Commission with relatively simple questions that can be easily answered by the Ukrainian legal professionals. **The only thing that our MPs and government officials need for improving the national legislation is to build a constructive dialogue with the legal community and to pursue a more open policy in implementing the judicial reform**. ■

COMPETITIVE SELECTION TO THE SUPREME COURT: THE PROCESS, RESULTS AND CONCLUSIONS

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Any government policy pursues a specific goal. Unfortunately, Ukraine is yet to develop a long tradition of pondering over it, as we often lack system in making even the most important decisions. But since we finally decided to move towards a civilised global society, we should approach the analysis of the state judicial policy accordingly.

In order to assess whether the experiment of establishing the Supreme Court was successful, we first need to clarify the purpose of its creation.

Without a doubt, the formation of the Supreme Court is the centrepiece of the judicial reform at the present stage. Strategic documents governing the reform – the coalition agreement of the Verkhovna Rada of the VIII convocation and the Strategy for reforming the judiciary, approved by the President[1] – should be viewed as reference points. It is noteworthy that despite being predominantly the parliamentary republic according to the Constitution, in Ukraine it is the President and his Administration that took the lead in developing the judicial reform. Instead, the Programme of Government Actions pays very little attention to this reform – both in terms of volume and subject matter.

Also, one should remember that the very idea of creating the Supreme Court from scratch, and the overall "rebooting" of the judiciary on a competitive basis came from civil society. It was an alternative to the lustration of the judicial branch, opposed to primary qualification – or "re-attestation" – of judges in their offices, suggested by the politicians. Ultimately, the idea of establishing new courts on a competitive basis was accepted by the government as a basis, at least in the context of the Supreme Court and courts of appeal.

The creation of the Supreme Court also would not be possible without changes to the Constitution, which, to a certain extent, is also a programme document. Therefore, it is necessary to consider the philosophy and the text of the new Chapter VIII of the Constitution of Ukraine.

Without going deep into analysis of these documents and ideas of the judicial reform, we can single out the main elements that unite them. These (not necessarily in order of priority) include:

- ensuring independence of judges and courts;
- increasing accountability of judges and courts to the public;
- renewing the judiciary to develop honest and accountable judicial corps.

The creation of the Supreme Court was largely aimed at fulfilling all three tasks.

Disconcertingly, **these tasks failed to materialise in the process of establishing the Supreme Court.**

There were certain achievements from the viewpoint of selection procedures, mainly in logistics and its transparency. Despite the large number of applicants, the process planning, and support was satisfactory, especially compared to previous mass selection of judges.

[1] The Decree of the President of Ukraine No. 276 dated 20 May 2015 "On the Strategy of Reforming the Judiciary, Proceedings and Related Legal Institutions for 2015-2020".

Large volumes of materials about the candidates were made available online, along with broadcasts of their interviews. However, it was difficult for the High Qualifications Commission of Judges to ensure immediate and full compliance even with the provisions of the Law concerning the placement and content of the judge's file.

The transparency of decision-making by the High Qualifications Commission of Judges remained inadequate. Yet the establishment and functioning of the Public Integrity Council is a definite step forward. In light of the crisis of confidence in judicial institutions, transferring parts of the mandate on verifying the integrity of candidates to civil society was the right decision by legislators. Unfortunately, the Council had no effective mechanisms to influence the outcomes of selection. Repeated demands of civil society representatives to reveal individual assessments of candidates against each criterion, or personal voting results to override the conclusions of the Public Integrity Council remained unheard.

The situation with responding to the results of the Public Integrity Council's work by the judiciary is even worse. The High Qualifications Commission of Judges explained overriding of the Council's conclusions by the fact that the Council did not provide proper evidence of the candidates' violations in the form of court rulings or decisions of other competent authorities. Therefore, in defiance of the philosophy of reform, the Commission of Judges transferred the burden of proof to the public body, thus greenlighting any violations by judges, the presence of which has not been previously established by a court or other authority. This situation will have enormous adverse consequences for the qualification of judges, where the standard, unlike the competition, should be even higher.

Such an attitude towards the process resulted in unsatisfactory outcome of the competition. Even in quantitative terms, it can hardly be viewed as a "renewal of the judiciary", as almost 80% of its winners are serving judges,[2] and at least 25% of them do not meet the constitutional criterion of integrity.[3]

The situation is no better in terms of quality. The judges that were recommended to and ultimately entered the "new" Supreme Court include those responsible for the "escape" of Georgiy Gongadze's killer and the imprisonment of current Prosecutor General (then the opposition politician) Yuriy Lutsenko, even despite the fact that the Council of Europe, the EU and Ukraine itself recognised the latter as political persecution. Also, there are judges who cannot explain their wealth (as required by the Constitution), as well as those who made arbitrary decisions against the Maidan activists and judges who covered them up.

These and many other things create an impression that the competition procedures were specifically designed to ensure inclusion of the "necessary" candidates in the shortlist.

Ironically, the judicial bodies responsible for the selection of candidates to the Supreme Court – the High Qualifications Commission of Judges and the High Council of Judges – were formed by the principle "the majority of judges elected by judges", which aims to ensure greater independence of the judiciary. Instead, these bodies bring together many politically dependent members, mostly on the President. In addition, granting leverage in the process of lustration to judges who are themselves subject to lustration is a very strange decision in terms of pure logic. This is why application of this standard in Ukraine (as in many other transitional democracies) did not contribute to independence of the judiciary, and failed to ensure the integrity of the judicial corps.

It has always been beneficial for the political authorities to control judges, and current Presidential Administration is not an exception. Despite some developments, we need to admit that the reform occurred only "on paper". Nothing has changed in the most critical point – the judges still do not feel that they can be truly independent, and that their genuine independence from all kinds of influences is the main goal of reform. This is because the politicians declared one thing but did something very different.

The same is true for the integrity of judges. One can continue making appeals to European standards, but as long as the judges involved in political persecutions or those unable to explain their wealth keep on taking the highest judicial offices at the competitions, society will not believe in any good intentions of the reformers.

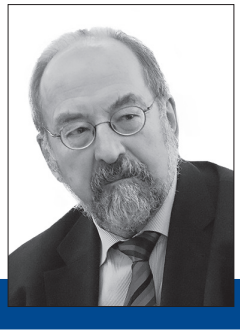
History proves that no modern democratic state can exist without an independent and honest judicial branch. Otherwise it will transform into tyranny or cease to exist.

To prevent this, we need to critically evaluate the events around the competition to the Supreme Court, and to correct the mistakes that have been made. At the very least, we need to change the bodies of judicial governance, and to modify the procedures for training and appointment of future judges. And this needs to be done as soon as possible. ■

[2] See, for example, O. Roshchenko "As many as 80% of old judges can enter the Supreme Court" – The Ukrainian Pravda, 28 July 2017, *http://www.pravda.com.ua/news/2017/07/28/7150748*.

[3] See O. Roshchenko "25% of the winners of the competition to the Supreme Court are disreputable – RPR" – The Ukrainian Pravda, 28 July 2017, *http://www.pravda.com.ua/news/2017/07/28/7150735*.

INDIVIDUAL CONSTITUTIONAL COMPLAINT IN GERMANY AND UKRAINE: THE COMPARATIVE ANALYSIS



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Human and civil rights that are solemnly declared in the national constitutions can be considered legally guaranteed only if their realisation is protected by the state. As known, the most powerful and efficient legal protection that a state can provide to its citizens is the protection of their rights in independent courts. This means that the rights holder – an individual and a citizen – has the right to apply to the court with a complaint if his or her rights are violated by public authorities. This concerns an (individual) constitutional complaint indicating the fact of violation of the fundamental right. Such a complaint is basically no different from the one that private parties may file, for example, against Ukraine in the European Court of Human Rights in Strasbourg (ECHR) in violation of the rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. In Germany, in this case, they talk about the "constitutional complaint". It was introduced in 1951, that is, shortly after the founding of the Federal Republic and in its most powerful form, in recognition of a terrible experience of neglecting human rights during the Nazi rule.

ON THE PROFILE OF A CONSTITUTIONAL COMPLAINT IN GERMANY AND UKRAINE

The form of a constitutional complaint in Germany is considered the most powerful, meaning that a private person can use it virtually against any act of public authority that unlawfully interferes with this person's fundamental rights. These may include acts of all three branches of government: acts of executive bodies, court decisions and even laws passed by legislators. A decisive factor for the complaint to be admitted to consideration is the presence of the act of state that directly affects the fundamental right. That is, the directness and subjectivity are important prerequisites for submitting a constitutional complaint.[1] In case of an administrative act or a court decision addressed to relevant holder of fundamental rights, this approach, of course, does not create any problems.

In the case of a law, however, the situation is somewhat different. The violation of fundamental rights is not an issue if the law (or rather its specific provision), while threatening to punish a citizen or imposing a fine (for example, for violating public order), obliges this citizen to refrain from certain actions, such as taking part in a rally with face covered (a ban on face concealment). In this case, a citizen in Germany potentially has an opportunity to directly apply to the Federal Constitutional Court with a constitutional complaint. However, the success of such a complaint will depend on the answer to the question whether the legislative prohibition to conceal a face is consistent or contrary to this person's fundamental right to freedom of [peaceful] assembly. In other words, does the ban on face concealment constitute a restriction of the freedom of assembly and, therefore, is masking one's face at the

[1] Subjectivity – the act concerns subjective rights of an individual: the right and possibility for a person to file a complaint directly to the Court – *Ed.*

rally considered legitimate in terms of the constitutional right? By the way, in Germany, the legitimacy of such a ban is indisputable.

As for the public authority measure in the form of an ***administrative act*** which in the citizen's opinion violates his or her fundamental right, this citizen should normally first appeal to the administrative court. Only after the citizen has exhausted all possible solutions offered by administrative proceedings or those of other court jurisdictions in different cases, he or she may submit a constitutional complaint. And only in cases where the long litigation process is unacceptable to a citizen for certain reasons and circumstances, the law allows to immediately file a constitutional complaint.

The complaint may be directed both against a final decision of a higher court (as a rule) adopted in relation to this citizen, and against a disputed administrative act which is the subject of court hearing.

Obviously, these exists a whole range of procedural rules that have to be observed for submitting a constitutional complaint, including time limits. But these go beyond our topic. Our main objective is to focus on the legal profile of regulating an individual constitutional complaint in Ukraine, as compared to Germany.

Ukraine introduced a constitutional complaint in amendments to the national Constitution, adopted in early June 2016 (Article 151-1): "*The Constitutional Court of Ukraine shall decide on compliance with the Constitution of Ukraine (constitutionality) of a law of Ukraine upon a constitutional complaint of a person alleging that the law of Ukraine applied in a final decision in his or her case contravenes the Constitution of Ukraine. A constitutional complaint may be lodged after exhaustion of all other domestic remedies*".

The procedure for considering the constitutional complaint is further regulated in the updated Law of Ukraine "On the Constitutional Court of Ukraine", adopted on 13 July 2017 (specifically, Articles 55 and 56, as well as Articles 77 and 78).

The Ukrainian lawmakers decided to adopt a model of the constitutional complaint, which has long been effective in many post-communist states of Eastern and Southern Europe and proved to be quite efficient. Unlike Germany, specific acts of executive bodies (e.g. administrative acts) or the judiciary (e.g. judgements) cannot be the ***direct*** subject to a constitutional complaint – ***only laws*** can. Moreover, not all laws, but only those that served as a basis for final decisions of the highest judicial body of Ukraine in consideration of a legal dispute of a citizen.[2]

This means that Ukraine's model of a constitutional complaint combines the so-called "specific judicial review" and a complaint on the violation of the fundamental right. Its link to specific review is manifested in the consideration of a legal dispute in a specialised court. Its link to individual complaint demonstrates the right of a holder of the fundamental right to **independently** submit an application to the Constitutional Court **directly** to review the norm. To do so, this person has three months from the effective date of the decision of a specialised court. It can be argued that the Ukrainian constitution makers (as well as lawmakers) have chosen a model of a constitutional complaint, which can be attributed to a (specific) judicial review, which in Ukraine can be initiated by a (specialised) court and by the holder of a fundamental right alike. This choice is quite cautious, especially compared with "complaint against a concrete act" that works in Germany. And this caution is quite understandable, given the following two reasons:

- ***first***, if a constitutional complaint extends to specific acts of public authority, there will always be more or less serious problems with delineation of jurisdiction of specialised courts on the one hand, and competencies of the constitutional court on the other (as conformed by international experience), which may potentially lead to conflicts between them;
- ***second***, the number of constitutional complaints subject to review would be much higher compared to trends based on current regulation, introduced in the Constitution of Ukraine.

Recognising the fact that the Constitutional Court of Ukraine must first accumulate experience in reviewing and clarifying the peculiarities of constitutional complaints, such a caution is quite reasonable and justified. The introduction of an individual complaint will undoubtedly lead to a significant increase in the number of applicants applying to the court with relevant submissions. This will result in ***overloading*** of the court. In Germany, this problem emerged shortly after the introduction of a constitutional complaint. To address overloading of the Federal Constitutional Court, the German lawmakers undertook several legislative steps, although this problem is still not fully resolved. The analysis of relevant statistics confirms this fact, as the Federal Constitutional Court continues to receive 8,000 to 9,000 appeals annually, which are marked by applicants as "constitutional complaints". The following two figures are also quite indicative: over 96% of all proceedings in the Federal Constitutional Court are proceedings related to individual complaints, which are successful for only 2% of the complainants![3]

[2] The author refers to so-called *normative* constitutional complaint, whereas in Germany they have *full* constitutional complaint, which, as defined by the Venice Commission, "enables comprehensive individual access to constitutional justice", because an individual "can challenge any act of the government" – *Ed.*

[3] The successful statistics showed "abnormal" increase only in 1990 – the year of the unification of Germany – reaching 17%, but eventually dropped to almost 2% by the end of that year. Since then this figure remains virtually the same.

Such a significant disproportion raises logical question: how to reduce the large number of hopeless and useless constitutional complaints? What legal tools does the court have in this regard?

TOOLS THAT HELP TO PREVENT OVERLOADING OF THE CONSTITUTIONAL COURT WITH USELESS COMPLAINTS ON ALLEGED VIOLATIONS OF FUNDAMENTAL RIGHTS

Taking into account the German experience, it is advisable to raise the question of how to avoid or prevent the overloading of the Constitutional Court of Ukraine following the introduction of a constitutional complaint in advance, meaning right now. With reference to constitutional proceedings in Germany, let me briefly analyse only **five procedural elements** that were helpful for the Federal Constitutional Court:

1. registration of constitutional complaints first in the Court's "General Register", and only afterwards – in the "Register of Proceedings", if the complainant insists upon this after communicating with the Secretariat of the Court;
2. observance of the formal procedure for accepting a constitutional complaint;
3. requirement for the complainant to comply not only with the established procedure for submitting a constitutional complaint, but also for its thorough and qualified substantiation;
4. establishment of a three-judge panel which, in lieu of a Senate of eight judges, review constitutional complaints and, subject to certain prerequisites, have the competence to make a final decision on the merits;
5. introduction of a fee for abuse of the right.

1. The General Register

The General Register is established and introduced pursuant to Rules of Procedure of the Federal Constitutional Court (§§63-65). Two different categories of "appeals" arriving to the desk office of the Court are subject to registration in the General Register:

1. all appeals beyond the sphere of competence of the Court also ***must*** **be registered**;
2. all constitutional complaints that are ***clearly*** inadmissible, or ***clearly*** have no prospect of success, ***can*** **be recorded** in the General Register.

All other constitutional complaints, meaning complaints with no apparent "no success" status, are registered directly in the **Register of Proceedings** of the Federal Constitutional Court. The structure of the Register of Proceedings corresponds to the structure of competences of the Court Senates.[4]

The General Register may as well register all submissions containing no specific request or assertion of a claim – such appeals can include only offensive statements towards the Court and its individual judges or criticise their particular decisions. Complaints of general nature against acts of state (sometimes even without specification of such act or a state body that adopted it) are also registered. The General Register may record statements or petitions outside the jurisdiction of the Federal Constitutional Court, for example, citizens' requests to provide certain legal information or information about the ongoing proceedings, or compensation claims for violations of rights.

Although the registration of constitutional complaints in the General Register is not mandatory (it belongs to the discretion of the Court's Secretariat[5]), but the fact is that more than 50% of constitutional complaints filed with the Federal Constitutional Court are not registered immediately in the Register of Proceedings, but go to the General Register (at least, initially). The reason for that is that the Secretariat employs highly qualified lawyers who check these complaints and determine whether they have chances to succeed. Since these lawyers are well aware of the established judicial practice of the Federal Constitutional Court, it is usually an easy job for them to determine a potential "success" of a constitutional complaint. Upon completion of such verification, the Secretariat staff inform the complainant on its results. This is how a dialogue between a citizen and the Secretariat is established even before the Court itself starts dealing with the appeal. Owing to such communication, a citizen in many cases agrees with a legal assessment of his or her complaint made by

[4] The Federal Constitutional Court of Germany consists of two Senates, each of them with eight members. Constitutional complaints on the violation of human and civil rights are subject to consideration by the First Senate. The Second Senate mostly deals with disputes between the state authorities and between the federal government and Lands; it also reviews issues of the recognition of the elections results and the prohibition of political parties, as well as suits against the President of Germany and judges – *Ed.*

[5] The author refers to administrative or judicial discretion, where the subject of discretion (in this case the Secretariat of the Federal Constitutional Court) has no personal interest in the process of legal enforcement, but carried out the powers within its official duties, that is, has the right to act at its own discretion within the limits established by the law – *Ed.*

the Secretariat and eventually withdraws it. In this case, the complaint is deleted from the General Register.

If, however, a citizen insists that his or her complaint should be reviewed by the Federal Constitutional Court, it ***must be registered*** in the Register of Proceedings. In other words, an "appeal" identified by the Secretariat as a constitutional complaint must be transferred to the Court, even if the Secretariat believes that it has no prospect of success. Therefore, this "Secretariat" filter does not work in all cases, especially if the complainant is persistent, and wants his or her "appeal" to be considered by the Federal Constitutional Court judges. In this case, he or she may be warned about the risk of paying a fee for abuse of the right.

As already noted, the Register of Proceedings that records appeals identified as constitutional complaints, may accumulate approximately 5,000 to 6,000 complaints annually. These statistics clearly indicate that adequately functioning Secretariat of the Federal Constitutional Court can serve as an effective and important screen for documents arriving in court, as each year it manages to "filter off" up to 3,000 appeals on their way to the Register of Proceedings, thus significantly relieving the Court and judges.

2. The Most Important Filter: the Procedure for Accepting a Complaint for Consideration

If a constitutional complaint ends up in the Register of Proceedings, then it is time to engage the second important filter – the procedure for accepting the complaint for consideration. Initially introduced in 1963, it grew more and more complicated ever since. The acceptance procedure is mandatory. It should be emphasised that the Federal Constitutional Court may accept a constitutional complaint only in two cases:

1. if the complaint has a "fundamental constitutional and legal significance". A complaint is considered fundamental, if its solution cannot be derived from the content of the Basic Law of Germany, but there is a need for a thorough and additional constitutional review with the adoption of a relevant decision; in other words, if the case is complicated in this regard;

2. if the decision by the Federal Constitutional Court in a case is deemed absolutely necessary for the realisation [restoration] by the complainant of his or her violated fundamental right, and he or she will suffer significant negative consequences if the complaint is not accepted for review and not resolved by the court.

In the absence of any of the above characteristics, the Court may refuse to accept the case for a (more detailed) consideration.

Within the procedure for accepting a complaint, the following two factors play an important role, also serving as filters and contributing to the reduction of the Federal Constitutional Court's caseload in general:

1. the decision on the acceptance of a constitutional complaint for consideration taken by a panel of three judges (instead of all eight judges of the Senate), and
2. the existence of strict requirements to substantiation of a constitutional complaint, implying thorough and reasoned presentation of the complainant's position in relation to the violation of his or her fundamental right (human or citizen) by an unlawful act of public authority, as well as proof that such belief of the complainant builds on the judicial practice, including that of the Federal Constitutional Court.

3. Panels in Both Senates

Both Senates of the Federal Constitutional Court set up relevant panels, taking into account their specific competences. Above all, the panels decide on the acceptance of constitutional complaints, and such decision must be unanimous. This means that if all three panel judges vote against the acceptance of a complaint, then it shall be considered rejected. The decision of the panel cannot be appealed and is final. Similarly, if the panel unanimously concludes that the constitutional complaint is fully reasonable and consistent with the judicial practice of the Federal Constitutional Court, then the panel shall satisfy the constitutional complaint. This means that the panel not only accepts the complaint for consideration, but also decides on its merits. If three judges cannot reach agreement under none of the above scenarios, then the constitutional complaint shall be submitted for its acceptance by the Senate to which the panel belongs. If three members of the relevant Senate agree to accept the complaint, then it shall be considered accepted, and the Senate further reviews it within regular proceedings, initially verifying a constitutional complaint for appropriateness and validity.

4. Thorough Substantiation of a Constitutional Complaint

For many years, the Federal Constitutional Court has been elaborating its practice and gradually strengthened the requirements for the quality and detail of the constitutional complaint. Pursuant to these requirements,

a complainant must provide a substantiated explanation of his or her position and prove that his or her right was violated by a certain act of public authority (state body, local government, institution, fund or public law corporation). If a complainant is unable to do so, or if his or her substantiation is too superficial, it is highly likely that this complaint will be rejected.

The reason for such significant attention of the Court to substantiation is rather simple: the more thorough it is, the easier it will be for the Court to start reviewing legal issues raised in the complaint, verify them and reach decision in a purposeful and prompt manner. In this way, in-depth substantiation also contributes to smooth work of the Federal Constitutional Court.

5. Fee for Abuse of the Right

Pursuant to the Act on the Federal Constitutional Court, the procedures of constitutional complaints and complaints regarding the validity of election results can become subject to "penalties" (or financial sanctions) in case of deliberate lodging of complaints that clearly have no prospects of positive solution. The introduction of such sanction is explained as follows: (1) the legal institution of the constitutional complaint aims at creating the opportunity for a person, whose rights were violated, to restore them and eliminate the unlawful situation; (2) since it is the only justifiable purpose of a citizen's use of the justice bodies funded by the state (or, rather, taxpayers), the lawmakers do not consider deliberate submission of groundless and clearly "hopeless" complaints as reasonable, rational and appropriate way of using this opportunity. As a result, such abuse was made punishable, and the Court presently charges a fee of up to EUR 2,600 for "abuse of the right" (Article 34 of Act).

It is worthy to add that the Federal Constitutional Court is often likely to charge such fees in cases, where the constitutional complaint is formulated in blunt, biased, abusive or humiliating form, or aimed at offending or even harming concrete individuals.

The Federal Constitutional Court's practice of charging fees for abuse of the right may vary. Sometimes the Court applied it more than 300 times a year, and sometimes – only 12. Generally speaking, the Court uses this mechanism quite moderately, so the significance and effectiveness of this sanction are fairly modest. It is primarily linked to the fact that sanctions are usually applied only after submission of a complaint in the court, so the restraining effect of fees is rather limited.

PROPOSALS FOR UKRAINE

1. The German experience suggests that timely, professional and serious **contacts and dialogue** between the **secretarial of the court** and an **individual** appealing to the court can serve as an important "filter". To ensure proper functioning of this tool, it is not necessary to involve lawmakers. The Constitutional Court itself can address these issues through internal procedures and appropriate administrative arrangements. A well-designed, legally flawless and easy-to-read brochure explaining the procedure of lodging and reviewing a constitutional complaint (also available online) will be very useful.

2. Since the constitutional complaint in Ukraine is regulated in the form of modified judicial review and, therefore, is linked to the preceding judicial process (which should normally end with a decision on the merits of the case adopted by the higher court of general instance or relevant specialised court), then there is no urgent need in the **formal procedure for accepting the complaint for consideration**. As the subject of a complaint is limited to the law, on which a court decision was based, the introduction of this procedure would be irrelevant. Depending on the case distribution schedule, the Constitutional Court can, therefore, immediately proceed to reviewing the admissibility of a constitutional complaint.

3. By setting up smaller (by the number) teams of judges that will pass (intermediate) decisions within **"panels"**, the Constitutional Court of Ukraine will also work towards reducing the workload of its senates. In this regard it is quite similar to the structure of the Federal Constitutional Court of Germany.

4. Thorough and qualified **substantiation** of a constitutional complaint by the complainant should be strictly required. And this suggests the involvement of a legal counsel or an academic lawyer. This important aspect of the procedure for submitting a constitutional complaint has to be specifically emphasised in the brochure, mentioned above.

5. The idea of possible introduction of **fees for abuse of the right** also seems relevant, especially when it concerns an individual who has already lost a case in several instances. The existence of such mechanism can limit further submission of "lightminded" complaints to the Constitutional Court in relation to a specific law, the constitutionality of which is not only evident, but is also confirmed by previous decisions. This mechanism can also cover the complainant's legal counsel, since the primary responsibility for submitting inadequate constitutional complaint to the Constitutional Court often rests with the lawyer. ■

LEGAL CONFLICTS IN DETERMINING IMPARTIALITY AND NEUTRALITY IN THE FORMATION OF THE SUPREME COURT

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Trust in the government is determined not by mistakes in management, but by the way the government responds to them
(author unknown)

The legal community, or at least some part of it, has kept an eye on the competition to the new Supreme Court (SC) of Ukraine and consideration of recommendations of the High Qualification Commission of Judges (HQCJ) by the High Council of Justice (HCJ) on the appointment of SC judges and relevant submissions to the President of Ukraine. One of the most explosive topics in the process, especially during the HCJ consideration of the HQCJ recommendations, which captured attention of various mass media and legal professionals was the issue of a conflict of interest, recusals and the presence of grounds for recusals.

Of particular interest was one of the HCJ meetings, where the speaker, while assessing one of the candidates to the position of a SC judge, recommended by the HQCJ, reported having worked with this candidate in one court for more than 10 years and played football in one team, but maintained no friendly retaliations with him, therefore, these facts could not prevent him from being objective and impartial in the preparation of the report and the HCJ decision on the submission to the President on appointing this candidate as a SC judge.

This and some similar situations could not but encourage us to analyse the presence (or the absence) of a conflict of interest, the grounds for recusals (self-recusals) and the ways to address them. The situation analysis showed that this was not a simple legal issue, but a true legal problem of a conflicting and even ideological nature, confirming the need to find good solutions. Obviously, we talk about "ideal", theoretical solution of the problem, as in reality these issues have already been addressed by the High Council of Justice. Yet, everyone is free to look for the best, the most correct correct solution to any legally challenging issue. Rather, this is precisely the task of the legal science.

At its meeting on 5 September 2017, the High Council of Justice focused on the issue of a conflict of interest of its members – Alla Lesko and Alla Oliynyk. The HCJ decided that these persons would not participate in the consideration of materials – both within the HCJ and individually – regarding persons recommended by the HQCJ to be appointed as SC judges, and in the adoption of appropriate decisions. This decision was made by the HCJ following consideration of statements of the HCJ members, A. Lesko and A. Oliynyk dated 21 August 2017 on the possibility of potential conflict of interest in connection with their win in the competition for the positions of judges of the Civil Cassation Court within the SC.

According to the official website of the HCJ, upon request from the HCJ, the National Agency on Corruption Prevention (NACP) in its letter No. 45-10/28335/17 of 14 August 2017 (delivered to the HCJ on 19 August 2017) informed that "the HCJ members, who became the winners of the competition for the vacant positions of judges of the Supreme Court, may not participate in the consideration and adoption of the HCJ decisions concerning the review of the HQCJ recommendations for appointing them to the Supreme Court".[1] The HCJ provides no additional information about the appointment of judges and on presenting (or rejecting) relevant submissions to the President, whereas the NACP letter of 14 August 2017 is not publicly available. Yet on 6 September 2017 Alla Lesko further explained the issue on her *Facebook* page: "… upon the HCJ request, the National Agency on Corruption Prevention issued a letter No. 45-10/28335/17 dated 14 August 2017, which arrived to the High Council of Justice on 19 August 2017, where it stated that ***the fact of the joint work of the High Council of Justice members with the candidate in one enterprise, institution or organisation (in the court, the prosecutor's office, the bar, academic institution or educational establishment, etc.) cannot be the evidence of the presence of private interests in the HCJ members as a prerequisite of a conflict of interest***. This allows the current High Council of Justice to adopt a decision on presenting (or rejecting) submission to the President of Ukraine on my appointment to the position of the Supreme Court judge".[2]

It is easy to imagine that in case of the opposite NACP conclusion – "the fact of the joint work of the High Council of Justice members with the candidate in one enterprise, institution or organisation (in the court, the prosecutor's office, the bar, academic institution or educational establishment, etc.) can be the evidence of the presence of private interests in the HCJ members as a prerequisite of a conflict of interest" – all other members of the High Council of Justice as current co-workers of A. Lesko and A. Oliynyk would be disallowed to participate in the consideration of the HQCJ recommendations on their appointment to the positions of the Supreme Court judges. Under this hypothetical conclusion, both A. Lesko and A. Oliynyk would be actually deprived of the right to be included in the HCJ submission to the President for their further appointment of the SC judges, because it would be *a priori* impossible to form a duly authorized High Council of Justice to consider their recommendations as candidates to the SC. In turn, this simulated NACP response would make it impossible for A. Lesko and A. Oliynyk to exercise their right to become judges of the new Supreme Court, because their participation in the competition would be doomed, as they would have no chance whatsoever to take positions in the SC. This approach would limit these candidates (and hypothetically all other members of the HCJ) in realisation of at least two constitutional rights: the right to free choice of profession and the right to equality (in relation to other judges of High Courts).

Alla Lesko was also correct stating that "I am the judge of the High Specialised Court of Ukraine for Civil and Criminal Cases. By the decision of the Congress of Advocates of Ukraine (by secret ballot procedure) I was appointed as a member of the High Council of Justice and delegated to work in this body for four years. But I am still a judge of the HSCU. Therefore, pursuant to para. 14 of Section XII of the Law "On the Judiciary and the Status of Judges" I had the right to participate in the competition for the position of the SC judge according to the procedure, established by this law".[3] To confirm this right, the candidate did not have to refer to this law, which is the clarifying provision that expressly establishes the rights of judges of high courts of Ukraine and the SC to participate in the competition to the new Supreme Court. If, for example, the relevant HCJ member was a retired judge or a representative academic law association or the bar meeting the requirements set forth in Article 38 of the Law "On the Judiciary and the Status of Judges", he or she could participate in the competition by virtue of this general article.

Given the situation of A. Leskop and A. Oliynyk – current members of the HCJ and winners of the competition to the Supreme Court of Ukraine – from the theoretical viewpoint we have an obvious conflict in legal regulation (***legal conflict 1***), namely:

1) provisions of the Law "On the Judiciary and the Status of Judges" that define grounds for the participation in the competition to the SC, as well as constitutional norms and guarantees, such as "All people are free and equal in their dignity and rights. Human rights and freedoms are inalienable and inviolable" (Article 21), "Citizens have equal constitutional rights and freedoms and are equal before the law. There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics" (Article 24), and "Everyone has the right to labour, including the possibility to earn one's living by labour that he or she freely chooses or to which he or she freely agrees" (Article 43) on the one hand, and

[1] Alla Oliynyk and Alla Lesko shall not participate in the consideration of materials concerning the candidates for the positions of the Supreme Court judges – either by the HCJ, its bodies, or individually – the decision of the High Council of Justice. The HCJ news and reports for 6 September 2017. *http://www.vru.gov.ua/news/2656*.

[2] Alla Lesko, On settling a conflict of interest – *https://www.facebook.com/permalink.php?story_fbid=264884417338147&id=100014497717045*. Hereinafter emphasis added by the author.

[3] Ibid.

2) provisions of laws "On Prevention of Corruption", "On the Judiciary and the Status of Judges", "On the High Council of Justice" that establish guarantees of impartiality and neutrality of the members of the HQCJ and HCJ as the bodies of judicial self-governance, including during competitions for the judicial positions and qualification assessments, on the other. Legislative regulation of the specified range of issues is the subject to higher (constitutional) norms, and the global goal – to form adequate judicial corps. To this end, Article 3 of the Constitution recognizes "the human being, his or her life and health, honour and dignity, inviolability and security… as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State". Pursuant to this fundamental constitutional axiom, Article 6 of the Constitution guarantees that "the state power in Ukraine is exercised on the principle of its division into legislative, executive and judicial power". "Justice in Ukraine shall be administered exclusively by courts" (Article 124). "Justice shall be administered by judges. … A citizen of Ukraine, not younger than the age of thirty and not older that sixty-five, who has a higher legal education and has professional experience in the sphere of law for no less than five years, is competent, honest and has command of the state language may be appointed to the office of a judge. Additional requirements for being appointed a judge may be provided for in the law" (Article 127). "Independence and inviolability of a judge are guaranteed by the Constitution and laws of Ukraine" (Article 126). "A court shall render the decision in the name of Ukraine. The court decision shall be legally binding and is to be enforced" (Article 129-1). Given the importance of justice in the mechanism of the state power, these constitutional provisions determine the direction of legislation and activities of all state institutions towards the maximally transparent, fair, impartial and neutral formation of the judicial corps.

As we can see, equally important constitutional values are thrown into the scale. Therefore, achieving a well-balanced solution for this conflict (or determining what values are more significant) would require profound systemic and doctrinal interpretation of the law with the comparison of proportionality of interests – that of individuals and the public interest, such as the right to a fair trial and confidence in the judiciary across the entire Ukrainian society. This legal conflict is by no means some simple, superficial "five-finger exercise", as it *prima facie* may seem from the text of the NACP letter. In fact, the NACP decision could be based on invisible chain of reasoning. At least, we hope that this was the case.

First of all, it should be noted that the NACP explanation *"the HCJ members, who became the winners of the competition for the vacant positions of judges of*

the Supreme Court, may not participate in the consideration and adoption of the High Council of Justice decisions concerning the review of the High Qualifications Commission of Judges recommendations for appointing of judges and in presentation (refusal) of submissions to the President of Ukraine concerning their appointment to the Supreme Court" – is imperfect in terms of its formulation as it allows misreading and lacks clear definition. Its wording is ambiguous: the HCJ members who became the winners of the competitions to the Supreme Court **(*a*)** may not participate in the consideration and *adoption of the High Council of Justice decisions concerning the review of the High Qualifications Commission of Judges recommendations for appointing of* ***all judges-winners of the competition, recommended by the HQCJ, including themselves***; or **(*b*)** *may not participate in the consideration and adoption of the High Council of Justice decisions concerning the review of the High Qualifications Commission of Judges recommendations* ***for appointing of judges and in presentation (refusal) of submissions to the President of Ukraine concerning their appointment – that is, appointment of the HCJ members who also became winners in the competition – to the positions of the Supreme Court judges.***

Still, based on this NACP letter the High Council of Justice decided that neither Alla Lesko nor Alla Oliynyk should participate in the consideration of the HQCJ recommendations by the HCJ and in the presentation of relevant submissions to the President of Ukraine. We believe it was a right decision as it builds on the classic grounds for recusal that even the first-year law students are well aware of: "no one should be a judge in his own case". Pursuant to part 4 of Article 37 of the Law "On the High Council of Justice", the HCJ may adopt a decision on the refusal to submit a judicial appointment in accordance with para. 1, Part 19 of Article 79 of the Law "On the Judiciary and the Status of Judges" only based on the grounded information obtained by the HCJ within the procedure prescribed by the law, if:

(1) this information has not been subject to consideration by the High Qualifications Commission of Judges of Ukraine; (2) the High Qualifications Commission of Judges of Ukraine has not provided due assessment of this information within the procedure of a qualification assessment of a relevant candidate.

Hence, the HCJ assesses the legality of the procedure and the competition results, as well as the action (or inactivity) of the HQCJ, or essentially performs the function of the court in the formation of the judicial corps within its mandate. Therefore, it is logical and totally predictable that the HCJ members, who themselves participated in the competition for the positions of the Supreme Court judges, are not entitled to assess the legality of the competition procedure as arbiters neither concerning themselves nor other applicants. But if the HCJ members who took part in the SC competition did not win and their participation discontinued, would such a fact have any influence the presence of grounds for recusal and conflict of interest? It seems not. The recusal and conflict of interest stem from the very fact of participation in the competition, regardless of its results. As a result of this fact, a person cannot be viewed as an impartial arbiter tasked with considering the issues of legality of the HQCJ recommendations on the appointment of the competition winners as the Supreme Court judges. To make this conclusion clearer, let us consider another example: would the fact of the judge's divorce affect his ability to consider a case brought by his ex-wife against the third person? The answer is obvious and unambiguous.

However, the question of possibility or impossibility of considering the HQCJ recommendations on the appointment of all 120 candidates as the SC judges by the members of the High Council of Justice is just a "head of the coin" in the conflicting legal regulation to ensure impartiality and neutrality of the HCJ as a jurisdictional body with constitutional responsibility to present relevant recommendations to the President. The "reverse of the coin" is the question whether the HCJ could at all consider the HQCJ recommendations on the appointment of the HCJ members – winners of the competition as the Supreme Court judges? After all, all members of the High Council of Justice are co-workers, and the external observer would see this situation as "colleagues recommended a colleague", as pointed out in many media publications. This question is quite sensitive.

As it became known later, the NACP explanation – ***the fact of the joint work of the High Council of Justice members with the candidate in one enterprise, institution or organisation (in the court, the prosecutor's office, the bar, academic institution or educational establishment, etc.) cannot be the evidence of the presence of private interests in the HCJ members as a prerequisite of a conflict of interest***, served as a basis for the HCJ decisions adopted on 12 September 2017 following consideration of the HCJ members' requests to recuse themselves during consideration of submissions to the President on the appointment of candidates for the positions of judges of the cassation courts within the Supreme Court of Ukraine.[4] After reviewing the report on the HCJ website, it seems that the HCJ members recused themselves predominantly because of their previous joint work with the judicial candidates, recommended by the HQCJ, either in the court, in the university, and for other reasons.[5] Referring to Articles 33 and 34 of the Law "On the High Council of Justice", the HCJ decided to reject most self-recusal requests of the HCJ members during consideration of submissions to the President on the appointment of the Supreme Court judges. The report shows that joint work of the HCJ member with a candidate for the position of the judge in one agency, institution or organisation is not viewed by the High Council of Justice as grounds for satisfying requests for self-recusal. Having watched the broadcasts of the HCJ meetings,[6] we learned about additional motivation for such decisions: "for the HCJ member not to be on friendly or other personal terms with the candidate".

It is worth noting that different response to the HCJ members' requests to recuse themselves during the consideration of the HQCJ recommendations regarding candidates to the Supreme Court, with whom they used to work together in one agency, enterprise, institution or organisation would violate the principle of equality with regard to all the candidates recommended by the HQCJ and to members of the HCJ, being an example of unequal, selective enforcement in relation to the approach applied towards possible consideration of recommendations of the HCJ members – A. Lesko and A. Oliynyk. From this viewpoint, the decisions of the High Council of Justice to disregard the fact of the past collaboration between the SC candidate and the HCJ member as grounds for recusal are logically interlinked and consistent.

Similarly, it should be noted that during the procedure of consideration of the HQCJ recommendations in appointing of judges and presenting submissions to the President, the High Council of Justice has fully met the requirements of anti-corruption legislation on conflicts of interest. To make this conclusion clear, it is necessary (a) to describe the minimum legislative and

[4] The Council considered statements of the HCJ members to recuse themselves during consideration of submissions to the President of Ukraine on the appointments for the positions of the Supreme Court judges – The High Council of Justice news and reports for 13 September 2017, *http://www.vru.gov.ua/news/2699*.

[5] Ibid.

[6] Broadcasts of the High Council of Justice meetings on 14-25 September 2017 – *https://www.youtube.com/watch?v=r2F90PezReM*.

theoretical provisions regarding conflicts of interest, and (b) to monitor compliance of the HCJ actions with these provisions.

A conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities. In other words, a conflict of interest where a public official, in performing his or her duties, has a private (personal) interest, which, although not necessarily but can lead to an improper decision or an unlawful act.[7]

Private interest is not limited to financial or pecuniary interests, or those interests, which generate a direct personal (including unlawful) benefit to the public official. This means that a conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations and associations, and family interests, if those interests could reasonably be considered likely to influence improperly the official's performance of his or her duties. Therefore, despite the fact that far from every conflict between official duties and private interest can lead to improper decisions or unlawful acts, each conflict of interest can produce such a situation, if not timely and properly declared, assessed and regulated.[8]

Conflict of interest is not corruption in itself and does not form the corruption delict, however, if unresolved, it creates preconditions for abuse of public office, deviations from public expectations, and corruption. Violations of the requirements of anti-corruption legislation in terms of prevention and resolution of conflicts of interest incur administrative and disciplinary liability.

The Law "On Prevention of Corruption", adopted on 14 October 2014, distinguishes between two types of conflict of interest: *real conflict of interest* (para. 12 of Part 1, Article 1 of the Law), and *potential conflict of interest* (para. 8 of Part 1, Article 1 of the Law).

Real conflict of interest is a contradiction between private interest of a person and his/her official or representative activities (duties) which affects the objectivity or impartiality of his/her decisions and commitment or non-commitment of actions in the exercise of the said activities (duties). The national definition of real conflict of interest includes three objective components – private interest; official duty, representative duty; and contradiction between them which affects the objectivity or impartiality of the public official's decisions or actions.[9] *Private interest means any tangible or intangible interest of a person, including the one that caused by personal, familial, friendly, or other off-duty relationship with natural persons or legal entities, including those arising from membership or activity on*

social, political, religious or other organisations. It is important to emphasise that the lawmakers used the word "including", that is, the definition outlines only the most typical forms of relationships that may cause tangible or intangible interest, and therefore the list of such relationships is not exhaustive. In practice this means that every public official in performing his or her duties/functions should take into account the whole range of his/her relationships – both legal (juridical) and social (private) that translate into the emergence of tangible or intangible interest. The law does not impose any restrictions or limitations concerning private interests (private life) as such. It is about observing rules of the public official's ethical conduct and assessing his/her private interests through the prism of their possible negative impact on the objectivity of decisions or actions in performing official or representative activities (duties).

The presence of a contradiction between interest and official duties is established in each individual case of executing an order, reviewing a letter or performing a control measure, etc., by comparing the person's official duties and his/her private interest with further determination of ability (or inability) of such interest to influence the objectivity or impartiality of the official's decision or action. It is important to understand that ***conflict of interest shall exist in all cases where a person has private interest that can affect the objectivity or impartiality of his/her decision. Even if decisions taken by the official in the presence of private interest are objective and impartial and in accordance with the law, this may lead to the loss of public confidence in the official and the agency that he/she represents***. Moreover, if private interest "did not provoke" unlawful decision, the presence/absence of the facts of abuse of office, improper benefits or other corruption offenses in decisions and actions of a public official will be subject to a special consideration.[10]

[7] Guidelines for managing conflict of interest in the public service – *https://www.kadrovik01.com.ua/article/198-metodichn-rekomendats-z-pitan-zapobgannya-ta-vregulyuvannya-konflktu-nteresv*.

[8] Methodological recommendations on preventing and managing conflict of interest, approved by the decision of the National Agency on Corruption Prevention No. 2 dated 14 July 2016 – *https://www.kadrovik01.com.ua/article/198-metodichn-rekomendats-z-pitan-zapobgannya-ta-vregulyuvannya-konflktu-nteresv*.

[9] Ibid.

[10] Ibid.

Potential conflict of interest means the presence of a person's private interest in the area in which he/she exercises official or representative activities (duties) that could affect the objectivity or impartiality of his/her decisions, or commitment or non-commitment of actions in the exercise of said activities (duties). Its difference from real conflict of interest is that in the event of potential conflict, the person's private interest may affect the objectivity of his/her decisions or actions only in the future and under certain circumstances. In fact, it is a question of different time span between the emergence and, accordingly, the identification of a conflict of interest, which makes it possible to prevent unlawful decisions or actions at earlier stages.

In this regard, it is important to understand that the impact of private interest can imply two types of consequences, and both will denote its presence:

1. private interest does not result in improper decision or unlawful action by the public official, but making such a decision under conditions of a real conflict of interest undermines public trust in the official and in the agency that he/she represents...;
2. private interest results in improper decision or unlawful action (para. 3 of Methodological recommendations on preventing and managing conflict of interests in the activities of persons authorized to perform functions of the state or local self-governments, and persons equal to them, adopted by the NACP Decision No. 2 on 14 July 2016).[11]

The above shows that the High Council of Justice members did not exclude the presence of *real conflict of interest* that could have affected the objectivity of their decisions in performing their official duties during consideration of the HQCJ recommendations on the appointment of their former colleagues, with whom they used to work in one agency, institution, university and the like, as the Supreme Court judges.

It would seem obvious that during the period of joint work within one agency, enterprise, institution or organisation, its staff members develop not only narrow, purely professional relations, but also rather informal contacts. Every employee forms his or her own opinion about colleagues, which in addition to the level of competence, attitude towards work, diligence and the like is also about their human qualities – decency, adherence to principles, loyalty, flexibility, and so on. Ultimately, collaboration of colleagues shapes mutual attitudes (subjective judgements) towards each other that are again influenced by work-related issues – timely or untimely performance of scope of work within the joint project and its quality; skilful or awkward, ethical or unethical conflict resolution by the colleague; as well as his/her trivial politeness, affinity, humanity, mutual support and objectivity in everyday work, his/her value orientations, outlooks, hobbies, interests, tastes and even a sense of humour or its absence. Together these affect and shape mutual attitudes and appraisals of staff members – respect, mediocrity or even hostility, or admiration. By the way, while electing the jury, the parties to the process take into account all these and similar factors (value orientations). Therefore, in situations where the promotion of an employee (in our case, the former one) depends on the decision of another employee, the conflict of interest is likely there, rather than not.

With introduction of the new Law "On Prevention of Corruption" in 2015, Ukraine put into operation a system of clearly preventive nature that focuses on establishing effective mechanisms to prevent corruption in the public service. ***An effective policy to prevent conflicts of interest has the immediate objective of maintaining the integrity and objectivity of official political and administrative decisions and the system of public administration in general***. Therefore, a modern conflict of interest policy should seek to strike a balance between private and public interest by identifying risks to the integrity of officials; prohibiting unacceptable forms of conflict; managing conflict situations appropriately; and promoting the appropriate resolution of conflict of interest situations. Although a conflict of interest is not *ipso facto* corruption, there is increasing recognition that conflicts between the private interests and public duties of public officials, if inadequately managed, can result in corruption.

Violations of provisions of the Law "On Prevention of Corruption" concerning conflicts of interest incur administrative and disciplinary liability. Meanwhile, the Law introduces the mechanism for preventing and managing conflict of interest with the involvement of duly authorised government body – the National Agency on Corruption Prevention (NACP). Since the main goal of the conflict of interest prevention is, above all, to prevent their occurrence, the Law obligates public officials to take appropriate measures (clause 1 of Part 1, Article 28). Provisions of this norm are primarily aimed at prohibiting the practice of deliberately creating the conflict of interest situation by the public official, and subsequently – taking measures to resolve it. From the date when persons, referred to in para. 1 and 2 of Part 1 of Article 3 found out or should have found out about having a real or potential conflict of interest, they shall be obliged:

1. to report to the immediate supervisor, and if a person holds the position that does not provide for having an immediate supervisor or the position in a collective body – to report to the National Agency or other authority or a collective body determined by the law, where the conflict of interest occurred while exercising authority. Pursuant to para. 2 of Part 3, Article 28 of the Law, the NACP shall explain within seven working days to the reporting person the procedure to resolve conflict of interest;

[11] Methodological recommendations on preventing and managing conflict of interest, approved by the decision of the National Agency on Corruption Prevention No. 2 dated 14 July 2016 – *https://www.kadrovik01.com.ua/article/198-metodichn-rekomendats-z-pitan-zapobgannya-ta-vregulyuvannya-konflktu-nteresv*.

2. not to take any action and not to make decisions under conditions of a real conflict of interest;

3. to take measures to address real or potential conflict of interest.

Parts 5 and 6 of Article 28 of the Law "On Prevention of Corruption" stipulate that if a person doubts whether he/she has a conflict of interest, this person shall seek explanation from the territorial unit of the National Agency. If a person does not receive confirmation about the absence of a conflict of interest, he/she shall act in accordance with the requirements set out in Section V "Preventing and Resolving of Conflict of Interest" of this Law. ***If a person has received confirmation about the absence of a conflict of interest, he/she shall be exempted from liability even if later it is found that there was a conflict of interest in actions regarding which this person sought a clarification.***

Now, we can see that the High Council of Justice has strictly observed the anti-corruption legislation in the procedure of considering the HQCJ recommendations. This is confirmed by the mere fact that the HCJ made an inquiry to the NACP and received the above-mentioned letter[12] on the absence of conflict of interest between former colleagues – the HCJ members and candidates to the Supreme Court. Therefore, the HCJ members shall be exempted from administrative liability under Article 172-7 of the Code on Administrative Offences of Ukraine (violating provisions regarding prevention and resolution of a conflict of interest), even if later such conflict of interest will be found in actions regarding which the HCJ sought a clarification. Some HCJ members spoke publicly about the presence of grounds for identifying a real conflict of interest and requested recusals. By doing so, they have not only demonstrated their integrity and ethics, but also shown their professional and social competence. They proved that they are fully aware of social significance of displaying the HCJ's objectivity and impartiality concerning decisions, taken in such truly historical state-building procedure as the consideration of the High Qualifications Commission of Judges' recommendations and submissions to the President of Ukraine regarding the appointment of the Supreme Court judges.

In making decisions on the presence or absence of circumstances that may prevent the HCJ member from participating in relevant procedures, the High Council of Justice should be also governed by provisions, other that the anti-corruption legislation. Therefore, we have ***legal conflict 2***, namely:

1) provisions of anti-corruption legislation on the one hand, and

2) provisions of procedural (administrative and jurisdictional) legislation on the other.

Moreover, they are not related as a part to the whole. These are two separate, parallel spheres of legal regulation and enforcement, with each pursuing a specific purpose of legal regulation, and consequently – specific norms and specific ways of enforcement. And conflict of interest is at the same time the question of grounds for recusal, that is, the circumstances that exclude a public official from the decision-making on a particular issue. In these matters, both spheres of legal regulation and enforcement overlap. However, they do not "absorb" each other but go in parallel, and each of them will have its legal consequences:

1) improper resolution of a conflict of interest incurs administrative liability under Article 172-7 of the Code on Administrative Offences of Ukraine (violating provisions regarding prevention and resolution of a conflict of interest);

2) improper settlement of recusals entails procedural liability in the form of an unconditional ground for cancelling the decision if there are grounds for disqualification. In this case, the procedural rule of the "improper (powerless) composition of the court" (the arbitrator, the competent jurisdiction body) comes into effect, which is an unconditional, compulsory ground for reviewing and annulling decisions passed by such a court.

Now it would be expedient to cross the t's in the enforcement of anti-corruption legislation by the HCJ and NACP concerning conflicts of interest of its members. As has been mentioned, the HCJ requested, and the NACP provided relevant clarification. In its letter, the NACP confirmed the absence of any conflict of interest. ***But here we should consider two components separately: (1) the procedure for resolving conflicts of interest was duly observed; the HCJ members are exempted from the administrative liability under Article 172-7 of the Code on Administrative Offences; (2) the first fact is by no means an unconditional guarantee that the NACP clarification is correct and fair per se***.

At the very least, this conclusion originates from provisions of Part 6, Article 28 of the Law "On Prevention of Corruption": "If a person has received confirmation about the absence of a conflict of interest, he/she shall be exempted from liability ***even if later it is found that there had been a conflict of interest*** in actions regarding which this person sought a clarification". By introducing this norm, the lawmakers admit that the NACP clarifications may not always be correct, or not quite correct, or fail to take into account all factors (or their significance) at the time of issuance, or incorrect altogether. However, for the purposes of enforcement of anti-corruption legislation, the fact of seeking clarification from the NACP, its receipt and appropriate action would be sufficient. As it can be seen in Article 28,

[12] Alla Oliynyk and Alla Lesko shall not participate in the consideration of materials concerning the candidates for the positions of the Supreme Court judges – either by the HCJ, its bodies, or individually – the decision of the High Council of Justice. The HCJ news and reports for 6 September 2017, *http://www.vru.gov.ua/news/2656*.

the mechanism for resolving conflicts of interest disregards the correctness (or incorrectness) of the essence of the NACP clarifications, and their analysis by the person who sought such clarification is not subject to it. Pursuant to para. 4 of Part 1 and Part 5 of Article 28, if a person did not receive confirmation of the absence of a conflict of interests from the NACP, he or she shall act in accordance with the provisions of Articles 29-36 of the Law. Although it remains unclear, how "finding of a conflict of interest later" should look like. And who can perform such "search" – the court, or the NACP itself after reviewing its original clarification? If it is done by the court, then it would mean that some person appealed against the act or the decision of a public official (government body) on grounds of his/her bias because of a conflict of interest.

But if we try to analyse the NACP's response per se, it wouldn't be easy to do as the NACP letter is neither motivational nor analytical document; it only presents the NACP conclusion that affirms the absence of a conflict of interest in cases of previous joint work in one enterprise or institution. Its full text is not publicly available. One can only guess how this conclusion was made. Probably, the NACP was impressed by the fact that the HCJ members openly articulated a possible conflict of interest and sought the Agency's clarification, so it viewed it as the use of legally established mechanism by the HCJ to resolve conflicts of interest. Indeed, as stated in para. 2 of the Methodological Recommendations of 14 July 2016, "despite the fact that far from every conflict between official duties and private interest can lead to improper decisions or unlawful acts, ***each conflict of interest can produce such a situation, if not timely and properly declared, assessed and regulated".***[13] Moreover, **even if** private interest "did not provoke" unlawful decision, the presence/absence of the facts of abuse of office, improper benefits or other corruption offenses in decisions and actions of a public official will be subject to a special consideration (para. 3 of Recommendations).[14]

At this point, the analysis of anti-corruption sphere of legal regulation can be concluded.

As for the procedural (administrative and jurisdictional) sphere, it is well known that the mechanism of "recusals" or "circumstances excluding participation of a person in the proceedings" represents the interdisciplinary legal institution in all procedural branches of law, as well as administrative law with regard to jurisdictional activity, aimed at implementing the principle of equality of all parties in a trial before the law and the court (para.1 of Part 1, Article 129 of the Constitution), and adversarial procedure and freedom of the parties to present their evidence in the court and to prove the weight of evidence before the court (para. 3 of Part 1, Article 129).

Without going deep into the concept of recusals (self-recusals) and grounds for them, we should note that their definitions in legal science are quite similar by the vast majority of characteristics, and since it goes beyond the objective of our study, we will provide only some comprehensive definitions.

A. Komzyuk, V. Bevzenko and R. Melnyk believe that grounds for recusal (self-recusal, withdrawal) of a judge should include such actual circumstances, in the presence of which one can express doubts about the objectivity of this judge when considering and resolving a particular administrative case. Such actual circumstances include social and legal relations that the judge of the administrative court was or continues to be involved in.[15]

Therefore, grounds for recusal (self-recusal) should not necessarily point to the existence of actual bias of the initiator of self-recusal, since these are circumstances that only cast doubts in his or her objectivity, even in case of the judge's obvious integrity and unwillingness to demonstrate bias. In addition, grounds for recusal can include not only relations that the initiator of self-recusal was or continues to be involved in, which are regulated by the rules of law (legal relationship), but also other social relations, which are regulated by different social norms (traditions, customs, morality, religious and corporate codes and the like), for example, friendships.

Depending on the proceedings under the administrative and jurisdictional process, N. Nikitenko distinguishes (1) grounds for recusal (self-recusal) in the administrative torts; (2) grounds for recusal (self-recusal) in individual complaints proceedings; (3) grounds for recusal (self-recusal) in the disciplinary proceedings; and (4) grounds for recusal (self-recusal) in the cases under the administrative procedure.[16]

It should be noted that grounds for recusal of a person conducting the proceeding are in fact similar for all categories of administrative and jurisdictional processes, but the first two are not fully regulated in the law. The consideration of the HQCJ recommendations by the HCJ regarding the appointment of judges, as well as the HQCJ proceedings concerning competitions should be classified as the third type of grounds for recusal. Moreover, this classification group should be expanded and clarified as follows: "grounds for recusal (self-recusal) in disciplinary, competition, tender and other similar proceedings".

According to Article 33 of the Law "On the High Council of Justice", a HCJ member cannot participate

[13] Methodological recommendations on preventing and managing conflict of interest, approved by the decision of the National Agency on Corruption Prevention No. 2 dated 14 July 2016 – *https://www.kadrovik01.com.ua/article/198-metodichn-rekomendats-z-pitan-zapobgannya-tavregulyuvannya-konflktu-nteresv*.

[14] Ibid.

[15] A. Komzyuk, V. Bevzenko, R. Melnyk, "The Administrative Process in Ukraine" (training manual) – Kyiv, "Precedent", 2007, pp. 128.

[16] N. Nikitenko, "Grounds for recusal (self-recusal) in the administrative and jurisdictional process" – "Herald of the Zaporizhya State University" (legal sciences), 2010, No. 3, pp.89-95, *http://www.stattionline.org.ua/pravo/76/12448-pidstavi-vidvodu-samovidvodu-v-administrativno-yurisdikcijnomu-procesi.html*.

in the review of an issue and is subject to recusal if he/she is personally interested, whether directly or indirectly, in the outcome of the case, or has a family connection with the person whose case is under review or if there are any other proved circumstances giving rise to doubts as to the impartiality. Under such circumstances, a corresponding member of the High Council of Justice shall be obliged to recuse him/herself. According to Part 1 of Article 100 of the Law "On the Judiciary and the Status of Judges", a member of the High Qualifications Commission of Judges of Ukraine shall have no right to participate in the review of issues and adoption of decisions, and shall be subject to the recusal (self-recusal) if there is data on a conflict of interest or circumstances that call his/her impartiality into question. As we can see, *first*, the definition of grounds for recusal of the HQCJ member is tautological. And *second*, all these grounds have one thing in common: they are "circumstances that call into question the impartiality of a member of the HQCJ or HCJ".

Therefore, we need to answer the following questions: (*a*) what is the meaning of recusals/self-recusals of the HQCJ and HCJ members during consideration of issues that fall within their sphere of competence? And (*b*) is, or, rather should *de lege ferenda* the fact of working together with a candidate for a position of a judge or a judge in one enterprise, institution, organisation and the like serve as grounds for recusal of the HQCJ and HCJ member?

First, let us deal with (*a*) *the meaning of recusals/self-recusals of the HQCJ and HCJ members*. It is universally recognised that in the competition and disciplinary proceeding (according to the ECHR approaches) the HQCJ and the HCJ act as courts under Article 6 of the European Convention on Human Rights (for example, para. 83, 86-90 of the ECHR Judgement in the case "Oleksandr Volkov v Ukraine", Application No. 21722/11).[17] It is therefore obvious that requirements as to impartiality and objectiveness of the members of these bodies of judicial self-governance shall be in line with the standards of court independence and impartiality, as well as confidence in their decisions. Pursuant to Part. 1, Article 6 of the European Convention on Human Rights (which is binding according to Article 9 of the Constitution and Article 17 of the Law "On the Enforcement of Judgements and Application of Case Law of the European Court of Human Rights"), in the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an ***independent and impartial tribunal*** established by law.

Appropriate conclusion regarding the question (*b*) "Is, or, rather should *de lege ferenda* fact of working together in one enterprise, institution, organisation and the like serve as grounds for recusal of the HQCJ and HCJ members?" would require multi-logic operation with step-by-step consideration of the following questions:

1) should the fact of joint work with the participant of the proceeding (a candidate, a person against whom disciplinary proceeding is conducted) be viewed as a circumstance that may cast doubt on the objectivity of the decision of a judge, a member of the HCJ or the HQCJ?

2) was the fact of joint work of a member of the HCJ or the HQCJ with a candidate or a person against whom disciplinary proceeding is conducted interpreted by the HCHR as a circumstance of their bias, and if yes, then how and under what conditions?

According to its constant and consistent case-law practice, reflected in dozens of decisions and judgments,[18] the ECHR traditionally proceeds from the fact that "the existence of ***impartiality*** for the purposes of Article 6, para. 1 of the Convention must be determined according to a ***subjective*** and ***objective test***. Under the ***subjective test***, the personal conviction and behaviour of a particular judge is assessed, that is, whether the judge held any personal prejudice or bias in a given case. According to an ***objective test,*** that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality".[19] "It must be decided in each individual case

[17] The European Court of Human Rights judgement in the case "Oleksandr Volkov v. Ukraine", Application No. 21722/11. – *http://zakon2.rada.gov.ua/laws/show/974_947*.

[18] See such ECHR decisions and judgements as Judgement in *Piersack v. Belgium* of 1 October 1982, Application No. 8692/79. – *http://europeancourt.ru/uploads/ECHR_Piersack_v_Belgium_01_10_1982.pdf*; Judgment in *Fey v. Austria* of 24 February 1993, Application No. 14396/88. – *http://hudoc.echr.coe.int/rus#{"itemid":["001-125736"]}*; Judgement in *Bulut v. Austria* of 22 February 1996, Application No. 17358/90 – *http://hudoc.echr.coe.int/rus#{"tabview":["document"],"itemid":["001-57971"]}*; Judgement in *Pullar v. The United Kingdom* of 10 June 1996, Application No. 22399/93. – *file:///C:/Users/USER/Downloads/CASE%20OF%20PULLAR%20v.%20THE%20UNITED%20KINGDOM%20-%20[Russian%20Translation].pdf*; Judgment in *Thomann v. Switzerland* of 10 June 1996, Application No. 17602/91 – *http://hudoc.echr.coe.int/rus#{"tabview":["document"],"itemid":["001-57996"]}*; Judgement in *Findlay v. The United Kingdom* of 25 February 1997, Application No. 22107/93. – *file:///C:/Users/USER/Downloads/CASE%20OF%20FINDLAY%20v.%20THE%20UNITED%20KINGDOM%20-%20[Russian%20Translation].pdf*; Judgement in *Castillo Algar v. Spain* of 28 October 1998, Application No. 28194/95. – *http://hudoc.echr.coe.int/rus#{"tabview": ["document"],"itemid":["001-58256"]}*; judgement in *Esa Kiiskinen and Mikko Kovalainen v. Finland* of 1 June 1999, Application No. 26323/95 – *http://hudoc.echr.coe.int/eng#{"docname":["Kiiskinen v. Finland"],"appno":"26323/95"],"itemid":"001-4627"]}*; Judgement in *Daktaras v. Lithuania* of 24 November 2000, Application No. 42095/98. – *http://zakon2.rada.gov.ua/laws/show/980_005*; Judgement in *Wettstein v. Switzerland* of 21 December 2000, Application No. 33958/96 – *https://hudoc.echr.coe.int/eng#{"itemid":["001-59102"]}*; Judgement in *Grieves v. The United Kingdom* of 16 December 2003, Application No. 57067/00. – *http://hudoc.echr.coe.int/eng#{"docname":["Grieves v. The United"],"itemid":"001-61550"]}*; Judgement in *Kyprianou v. Cyprus* of 15 December 2005, Application No. 73797/01. – *http://hudoc.echr.coe.int/rus#{"tabview":["document"],"itemid":["001-169233"]}*; Judgement in *Farhi v. France* of 16 January 2007, Application No. 17070/05. – *https://www.lawmix.ru/abrolaw/4046 europeancourt.ru europeancourt.ru*; Judgement in *Belukha v. Ukraine* of 9 November 2006, Application No. 33949/02. – *http://zakon2.rada.gov.ua/laws/show/974_272*; Judgement in *Mironenko and Martynenko v. Ukraine* of 10 December 2009, Application No. 4785/02. – *http://zakon3.rada.gov.ua/laws/show/974_567*

[19] See, for example, *Fey v. Austria,* Judgement of 24 February 1993, para. 27, 28 and 30; *Wettstein v. Switzerland,* Application No. 33958/96, para. 42; *Belukha v. Ukraine,* Judgement of 9 November 2006, Application No. 33949/02, para. 49; *Mironenko and Martynenko v. Ukraine,* Judgement of 10 December 2009, Application No. 4785/02, para. 66.

whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal".[20]

So, ***the objective test*** of impartiality of the tribunal (a judge or a panel) in a given case refers to the organisational and functional aspects of the court activity, that is, whether the tribunal and its composition ensured the absence of any doubts in respect of its impartiality. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may rise doubts as to his or her impartiality.

Having reviewed the *YouTube* broadcasts of the High Council of Justice meetings, where it considered the HQCJ recommendations on the appointment of the SC judges and their submission to the President, we can see that (*a*) not all members of the HCJ with an experience of previous joint work with the winners of the SC competition, recused themselves and declared having sufficient grounds for that; and (*b*) requested withdrawals (self-recusals) of other members were not satisfied by the HCJ.

The most popular argument included the absence of friendly relationships between the candidate and the HCJ member, so there are no obstacles for the latter to being objective and impartial in the consideration of application of his/her former colleague.

If we look at this situation through the prism of objective and subjective tests for recusals in the ECHR case law, it becomes obvious that considerations that guided the HCJ members in their decisions to recuse themselves and grounds for that were in line with the subjective test, applied by the ECHR, that is "whether the judge held (or holds) bias or impartiality in the case" and "the personal impartiality of a judge is presumed until there is proof to the contrary". And subjectively, the HCJ members could sincerely believe that nothing prevented them from being impartial while exercising their constitutional duty of presenting submissions to the President on the appointment of the Supreme Court judges.

However, having analysed more than a dozen of the ECHR decisions in cases against the bias of the tribunal, we can see that the governments argued that there were no reasons to question the impartiality of national courts, since the *judges in these cases did not demonstrate any bias with regard to the applicants, fully or partially satisfied different procedural petitions filed by them*, etc. In all cases, the ECHR did not find it necessary to investigate subjective impartiality, as it concluded that the tribunal was impartial under the objective test. At the same time, the ECHR recognised a variety of circumstances (facts) as an objective criterion, which from the standpoint of an external observer could objectively question the impartiality of the court. For example, in the case "*Wettstein v. Switzerland*", Application No. 33958/96, the ECHR recognised the presence of objective impartiality regarding two judges of the Administrative Court of the Canton of Zurich based on the fact that judges-legal representatives R. and L. both shared office premises with lawyer W. (who represented the applicant in the case). The Administrative Judiciary Procedure Act in force at the relevant time contained no provisions as to the incompatibility of such legal representation with judicial activities, whereas in many cantons of Switzerland, the Administrative Court is composed of both full-time and part-time judges. The latter may practise as legal representatives (para. 45-49).[21]

Therefore, impartiality under objective test shall always be sufficient for recognising infringement of the right to a fair trial and hold priority over subjective test. "…in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified".[22] To complete the analysis of integral and comprehensive approach of the ECHR towards impartiality of the tribunal, we can use the following case-law conclusions: "even appearances may be important", or, in other words, "justice must not only be done: it must also be seen to be done".[23] "What is at stake is the confidence which the courts in a democratic society must inspire in the public".[24]

The ECHR case law leads to the following ***conclusion:*** if pursuant to the above the ECHR recognises obligation under Part 1, Article 6 of the European Convention on Human Rights, and Council of Europe member states that ratified the Convention have committed to it (Article 1 of the Convention), then in the above situations judges should not only satisfy requests for recusals, but even recuse themselves. The duty to guarantee the right to a fair trial lies with the state in the person of its authorised bodies – the courts (and more), otherwise the state will not comply with the Convention.

[20] See *Pullar v. The United Kingdom*, Judgement of 10 June 1996, para. 38; *Belukha v. Ukraine*, Judgement of 9 November 2006, Application No. 33949/02, para. 49; *Mironenko and Martynenko v. Ukraine*, Judgement of 10 December 2009, Application No. 4785/02, para. 66.

[21] Judgement of the European Court of Human Rights in the case *Wettstein v. Switzerland* of 21 December 2009, Application No. 33958/96. – *https://hudoc.echr.coe.int/eng#{"itemid":["001-59102"]}*.

[22] See the above-mentioned judgement in the case of *Wettstein*, para. 44, and the *Ferrantelli and Santangelo v. Italy* Judgment of 7 August 1996, Reports 1996-III,pp. 951-952, para. 58.

[23] See the Judgement in *De Cubber v. Belgium* of 26 October 1984, series A, No. 86, p.14, para.26).

[24] See the above Judgement in *Wettstein v. Switzerland*, see *Castillo Algar v. Spain* of 28 October 1998, para. 45.

Therefore, the fact of joint work of a member of the HCJ or the HQCJ with a candidate or a person against whom disciplinary proceeding is conducted could have been interpreted by the HCHR as a circumstance of impartiality under the objective approach, without the need to prove the subjective aspect of impartiality.

This legal approach is nothing new for the Ukrainian legislation. ***Part 2 of Article 32 of the Code of Criminal Procedure of Ukraine*** states that "criminal proceedings on criminal charges against a judge may not be conducted by the court where the accused is holding or held the office of a judge. Where the rule of first paragraph above *(on the territorial jurisdiction)* required that criminal proceedings against a judge should be conducted by the court where the accused is holding or held the office of a judge, such criminal proceedings shall be conducted by the court of another political unit (Autonomous Republic of Crimea, oblast, the city of Kyiv or Sevastopol)". Since in procedural law it is possible to apply the law by analogy, said legislative provision can be extrapolated to all similar legal relationships and matters. After all, it can be replicated in all procedural codes using appropriate wording in order to remove possible legal disputes and arguments on these matters.

In addition, this legal approach is fully in line with ***Part 1 of Article 15 of the Code of Judicial Ethics:*** "a judge has a right to self-recusal… ***if a judge has personal knowledge of evidence or facts which may influence the outcome of the case***",[25] and the fact of joint work with one of the parties to the proceedings (in our case – with the candidate for the position of the SC judge) is exactly the case, because it is clear that the judge (in our case – the member of the HCJ or the HQCJ) has much greater knowledge of the candidate that it can be obtained from his or her file or other documents and materials of the competition, and when necessary – to learn even more from own sources.

In addition, ***para. 2.5. of the Bangalore Principles of Judicial Conduct*** also expresses internationally recognised arrangement that **"*a judge shall disqualify (recuse) himself or herself from participating in any proceedings… in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially*"**.[26]

Therefore, for the reason of joint work of judges (judges in the meaning of Article 6 of the European Convention on Human Rights, including the members of the HCJ and the HQCJ), with the parties to the proceedings (the candidates for the positions of judges of the new Supreme Court), **the former should recuse themselves**. At the same time, many members of the legal community can come up with a totally logical question: would not these self-recusals totally paralyse the functioning of the High Council of Justice because of the lack of legal quorum to decide on the submissions to the President of Ukraine on the appointment of Supreme Court judges?

We believe that in this case it is expedient to follow the same para. 2.5 of the Bangalore Principles of Judicial Conduct: *"disqualification (recusal) of a judge shall not be required if no other tribunal can be constituted to deal with the case"*. In other cases, if self-recusal of one or even two members of the HCJ during consideration of the submission to the President on the appointment of a Supreme Court judge did not affect the quorum for adopting such a decision, then the member should request, and the HCJ should satisfy his/her recusal. Indeed, confidence in justice and efforts to restore it are very delicate. The entire idea of implementing the judicial reform and forming the new Supreme Court in Ukraine is about restoring confidence in justice. In view of this goal of paramount importance and the value demanded by Ukrainian society, **treating the issue of self-recusals in the formation of the new Supreme Court as a trifle cannot be justified, even if this was done to demonstrate the beauty of the law in action**.

We believe that voicing these arguments during consideration of self-recusal requests and their satisfaction would be positive for ensuring proper perception of the HCJ procedure of presenting submissions to the President, restoring confidence in justice, strengthening trust towards the newly formed Supreme Court, and dispelling speculations of all disbelievers. Ultimately, the proposed algorithm can also have an important deontological effect on the entire judiciary, since the best method of educating is one's own experience, while the HCJ is empowered to consider disciplinary proceedings against judges, including for non-compliance with the judicial ethics, e.g. failure to recuse himself or herself even under objective grounds to do so.

We think that one should be guided by eagerness to be proud of the level and quality of domestic administrators of the law, which, of course, are not limited to the highest bodies of judicial self-governance. This is why we tried to find an ideal model for addressing this issue. Of course, it is always easier to criticise or suggest something *post factum* instead of offering adequate and timely legal solution in the course of events. Yet, we believe that the High Council of Justice had enough time and organisational and human resources to analyse grounds for self-recusals, and to offer the best solutions.

The law under current development of social relations, legislation, its multiple aspects and the diversity of law enforcement is not and cannot be simple and straightforward. The law and its application always represent a balance of various interests. Only in this case it becomes "the art of good and justice". And applying the law is not so much about taking a side of one's interest and placing one's own conviction into the scale, as about finding the balance of such interests (private and public). ■

[25] The Code of Judicial Ethics, approved by the 11th Congress of Judges of Ukraine, *http://court.gov.ua/userfiles/Kodex%20sud%20etiki%281%29.pdf*.

[26] The Bangalore Principles of Judicial Conduct of 19 May 2006, adopted by the United Nations Economic and Social Council on 27 July 2006, №2006/23. – *http://zakon2.rada.gov.ua/laws/show/995_j67*.

KEY CONSTITUTIONAL NOVELS OF THE JUDICIAL REFORM: IS EVERYTHING THAT GOOD?

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The government made an important step towards increasing confidence in the judiciary and improving the justice system as a whole. Society views changes to the Constitution of Ukraine, passed on 2 June 2016, and the adoption of the new wording of the Law "On the Judiciary and the Status of Judges" differently, but efforts to "remove" the existing problems can be welcomed.

So, what are the main changes that recent constitutional amendments have already made or are expected to produce?

Article 124 introduced the following novelties.

The first novel, which for some reason goes unnoticed in the analysis of the reform content, concerns the possibility to establish a mandatory pre-trial dispute resolution in laws. In retrospective, the provisions of Articles 5-11 of Chapter II "Pre-trial Settlement of Economic Disputes" of the old Economic Procedure Code of Ukraine (1991) were considered as mandatory pre-trial dispute resolution.

Enshrining this provision in the Constitution means departure from the position set forth in the Constitutional Court's decision dating back 2002. The operative part of this decision explicitly stated that even the law cannot restrict the right of an individual to assess courts for settling disputes.[1] The decision was based on the interpretation of Article 124 of the Constitution (1996). Obviously, the courts are encumbered with cases, therefore creating an effective and efficient system of alternative dispute resolution in Ukraine is vital. However, in this case, it is not about possible alternative dispute resolution, but about mandatory pre-trial settlement in cases determined by law. And these are somewhat different approaches.

Restriction of the right of an individual to immediately apply to a court is dubious from the standpoint of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Also, this provision of Article 124 is inconsistent with Article 55 of the Constitution, which stipulates that human and citizen's rights and freedoms are protected by the court. As stated in one of the theoretical and practical commentaries to the Constitution: "In highly developed and extensive area of protection of human rights and freedoms, Article 55 of the Constitution of Ukraine plays a pivotal role. Part 1 of this Article establishes the right to judicial protection, which in international practice is called "the right to trial" or the "right to justice".[2] True, the "right to a court" and the right of access" enshrined in Article 6 of the Convention are not absolute. They may be subject to limitations, but these must not restrict or reduce access left to the individual in such a way or to such an extent that the very essence of the right is impaired.[3] The High Commercial Court of Ukraine has also objected the introduction of pre-trial settlement.[4] So far, the laws did not determine any cases for mandatory pre-trial settlements. We believe that the Constitution of Ukraine should provide for the possibility of pre-trial dispute resolution, delegating

[1] The Decision of the Constitutional Court of Ukraine upon the constitutional appeal of LLC "Campus Cotton Club" Trading House concerning official interpretation of Article 124.2 of the Constitution of Ukraine (on pre-trial settlement of disputes) No. 15 of 9 July 2002 – official website of the Constitutional Court of Ukraine, *http://www.ccu.gov.ua/docs/464*.

[2] The Constitution of Ukraine. Theoretical and Practical Commentary" – Kharkiv, 2011, *https://coollib.com/b/340418/read#t56*.

[3] See, for example, *Philis v. Greece*, para. 59; *De Geouffre de la Pradelle v. France*, para. 28; *Stanev v. Bulgaria*, para. 229. Guide on Article 6. Right to a fair trial (civil limb) – The Council of Europe, the European Court of Human Rights, 2013, p. 14.

[4] HCCU is against mandatory pre-trial settlement of disputes – "Zakon I Biznes", 2 June 2015, *http://zib.com.ua/ua/116613-vgsu_proti_obovyazkovogo_dosudovogo_vregulyuvannya_sporiv.html*.

procedural issues to relevant laws. We think it is not expedient to make pre-trial settlement mandatory. You have to trust the parties to a dispute, as they are able to decide whether to use or not to use a pre-trial settlement mechanism. It is their time that is spent on the dispute, and it is their rights and interests that were violated, therefore they should keep the right to decide on how to address the problem, especially since the parties are paying a court fee, which completely or partially compensates the state's costs on dispute resolution.

The next novel is more of a clean-up, "cosmetic" nature, and it concerns removal of people's assessors as trial participants – a mechanism, through which people could directly participate in the administration of justice. The existence of this institution in the Constitution of Ukraine until 2016 was a kind of tribute to Soviet tradition.

So far, the participation of jurors in the judicial process has been formal, unlike the Western type juries, whose opinion can decide the fate of a person, and whose involvement is more typical for criminal proceedings, and less – for other types of proceedings. As for Ukraine, juries can participate in all kinds of legal proceedings, as confirmed by Part 5 of Article 124 of the Constitution. Until recently, there were some cases of such participation in civil proceedings. Having analysed drafts of three new procedural codes, adopted on 3 October 2017 it can be argued that the situation has not changed. The new legislation does not provide for the participation of jurors in neither commercial nor administrative cases. As for the civil process, the list of cases and types of proceedings for the jury involvement remains intact.

We believe that in line with Part 5 of Article 124 of the Constitution, the jurors can participate in all types of processes, so it would be expedient to think about introducing this mechanism in the commercial and administrative proceedings. However, their involvement must pursue a specific goal in relations that have a major social significance or require public control over administration of justice. Therefore, instead of purely mechanic introduction of jurors in the procedure, we need to build on these important aspects.

Changes, introduced in Part 6 of Article 124, pave the way for the ratification of the Rome Statute of the International Criminal Court by Ukraine, signed back on 20 January 2000. Having reviewed the constitutional petition of the President on the conformity of the Constitution to the Rome Statute of the International Criminal Court (the Rome Statute case),[5] the Constitutional Court of Ukraine on 11 July 2001 issued the following opinion: "the Rome Statute of the International Criminal Court, signed on behalf of Ukraine on 20 January 2000, submitted to the Verkhovna Rada of Ukraine for rendering consent of thereof compulsion, is hereby recognised non-conforming to the Constitution of Ukraine, to the extent concerning the provisions of para. 10 of the Preamble and Article 1 of the Statute, by which 'the International Criminal Court… complements the national criminal justice authorities'".

We hope that following these amendments to Article 124 of the Constitution, it will not take long for the Verkhovna Rada to ratify this document, with subsequent submission of relevant Note by the Ministry of Foreign Affairs of Ukraine to the depository. In the context of ongoing "hybrid war", the opportunity to join this system of justice will allow to bring to trial war criminals, who participate in the armed conflict in the Donbas and contributed to the annexation of Crimea.

The next important novels enshrined in Article 125 of the Constitution and further developed in the provisions of the Law "On the Judiciary and the Status of Judges" *concern the court system of Ukraine*.

Once again, the Supreme Court restored its status of the highest court in Ukraine's judicial system, while three high specialised courts – on civil and criminal cases, commercial, and administrative – were liquidated. This removed the additional link between the appellate courts and the Supreme Court, thus abolishing "double cassation" in all types of proceedings. The presence of clear three-tier judicial system is typical for probably all democracies in the world. This novelty should be viewed as positive both in terms of accelerating the consideration of disputes and optimising the state budget expenditure.

Despite the liquidation of high specialised courts, they will hardly disappear in the full sense of the word. These courts, albeit in somewhat different capacity, may continue functioning in accordance with the law, as stipulated in Part 4 of Article 125 of the Constitution. This concerns the High Court on Intellectual Property and the High Anti-Corruption Court, specified in the law "On the Judiciary and the Status of Judges". We view creation of these courts as another positive development.

While the formation of the anti-corruption court is totally reasonable, the idea behind creation of a separate court for intellectual property relations remains unclear. Would not it be then logical to establish separate courts on the protection of property rights, on juvenile justice, on corporate disputes, on tax disputes, and the like?[6] The explanatory note to the Draft Law "On the Judiciary and the Status of Judges" briefly states that "the creation of these courts is consistent with positive experience of European countries, enabling quick and prompt

[5] Case No. 1-35, Opinion No. 3 dated 11 July 2001 – official website of the Constitutional Court of Ukraine, *http://www.ccu.gov.ua/docs/350*.

[6] This opinion is shared by some legal practitioners. See N. Kucheruk, "What's the problem with the High Court on Intellectual Property? The lawyer's opinion" – online-portal "Espreso", 5 October 2017, *https://espreso.tv/news/2017/10/05/v_chomu_problema_vyschogo_sudu_z_intelektualnoyi_vlasnosti_dumka_yurysta*.

consideration of disputes falling within their jurisdiction by highly qualified judges of relevant specialisation" .[7] We agree that cases in the said areas are rather complicated, but this cannot be an absolute argument for allotting them to a separate part of the judicial system. True, the establishment of specialised courts is a global practice. For example, specialised courts for labour disputes exist in many countries – the United Kingdom, France, Austria, Belgium, Finland, Japan, Israel).

Therefore, this segment of the judicial reform raises several questions:

1) why these courts are called "High" if, in fact, they are courts of first instance?

2) who will perform the functions of the appellate instance?

Pursuant to the provisions of the new Economic Procedure Code of Ukraine (Part 3 of Article 26), an Appeals Chamber shall be established within the High Court on Intellectual Property with a mandate to review court's decisions on appeal. However, the requirements for judges of the courts of appeal are quite different from those of the first instance. And it is not quite correct when judges review the decisions of their colleagues from the same court. In this situation we also see certain corruption risks involving at least the official dependence of all these judges on their superiors.

There might also be a problem with practical implementation of such an important principle as the accessibility of justice. Prior to the creation of a specialised court, relevant cases were considered by local general and commercial courts, evenly distributed throughout Ukraine. Now all these disputes will be accumulated in the above-mentioned High Court based in Kyiv. And this may create additional obstacles to justice for citizens from distant locations.

In our opinion, *one of the main weaknesses of the judicial reform of 2016-2017* is *the fear of another radical step – to liquidate commercial courts* as Soviet-era holdover associated with the activity of the state arbitration, and later – the arbitration courts.[8] Ukraine's Western neighbours, such as Poland, Germany, France, the United Kingdom, have no "economic" courts, and this is logical, because the processes cannot be different under uniform material relationships, regulated by uniform substantive law for individuals and legal entities. Liquidation of such courts would remove the eternal problem of delimiting jurisdictions of civil and commercial courts. We are aware that this idea has both supporters and opponents, but see no arguments concerning the constitutionality or expediency of commercial courts. Part 5 of Article 125 of the Constitution provides for creation of administrative courts only ("administrative courts shall function to protect human rights, freedoms, and interests of a person in the sphere of public law") and does not entail creation of commercial courts. As to the expediency of further existence of commercial courts, it does not mean that we have to fire all judges, but rather "unite" judges specialising in civil and commercial disputes within one institution. These courts can as well be called "civil". The main point is not the title but realisation of the need to consider all property private legal relations under the uniform procedural rules. We truly hope to see real reform in this area.

Certain amendments to the Constitution concern the subject of the abolition of immunity of judges. Until the 2016 changes, a judge could not have been detained even at the crime scene until the Verkhovna Rada gave consent to his or her arrest. Now, "a judge shall not be detained or kept under custody without the consent of the High Council of Justice until a guilty verdict is rendered by a court, except for detention of a judge caught committing serious or grave crime or immediately after it" (Part 3 of Article 126).

On the one hand, this is a positive development in terms of accelerating decisions concerning a particular judge. But on the other, much will depend on the composition of the High Council of Justice. The presence of members associated with the judicial profession may cause a sense of "frank pledge". Moreover, such situation may arise or disappear depending on the specific composition of Council at a given time.

Another important provision of Article 126 concerns holding an office for unlimited term. Judges will no longer be appointed for a five-year probation, but immediately for unlimited term following an open competition. This rule is expected to strengthen the independence of judges, because during the probation period they could become dependent on various government bodies that eventually decided on their termless appointment.

[7] The explanatory note to the Draft Law "On the Judiciary and the Status of Judges" – online-portal "Liga Zakon", *http://search.ligazakon.ua/l_doc2.nsf/link1/GH3NI00A.html*.

[8] TN: the "state arbitration" and "arbitration courts" in the Soviet judicial system were the courts for economic and commercial cases, and not to be confused with the traditional Western "arbitration" (dispute resolution outside courts).

In addition, this has become a responsibility of a new body – the High Council of Justice, which should also accelerate the process of appointing a judge from the announcement of a competition until the issuance of the Presidential Decree on the appointment of a specific person who has completed all stages of selection process.

In the context of the above, the lawmakers *changed requirements to persons eligible for the position of a judge*. Now a citizen of Ukraine, not younger than the age of thirty and not older that sixty-five, who has a higher legal education and has professional experience in the sphere of law for not less than five years, is competent, honest and has command of the state language may be appointed to the office of a judge. Additional requirements for being appointed a judge may be provided for in the law (Article 127 of the Constitution). If everything is quite clear regarding citizenship, age, length of service, and command of the state language, then other norms with so-called "evaluative" criteria, such as "competence" and especially "honesty" (or integrity) cause debate. So far, there are no clear criteria for determining who is "honest", since it is a set of certain moral qualities of a person. One can agree with S. Hlushchenko that "integrity is a deep category that includes all aspects of morality and, in essence, means transformation of good into professional ethical sphere. The combination of morality and good allows to define the area of integrity of a person who performs public functions, specifically his or her competence, self-discipline, unselfishness, honesty, firmness, fairness... we believe that the integrity of a judge (a judicial candidate) as a duty of a person who is a judge or intends to become one, and as a person's realisation of his or her real moral and psychological portrait is multifaceted".[9]

In accordance with current legislation, the Public Integrity Council[10] should assist the High Qualifications Commission of Judges of Ukraine in determining the eligibility of judicial candidates in terms of integrity criteria. This vagueness of the term "integrity" raised the Public Integrity Council's doubts about certain individuals who passed selection and were appointed to the positions of the Supreme Court judges by a decree of the President of Ukraine No. 357 dated 10 November 2017.

The "competence" and "integrity" are evaluative concepts, so these criteria for judicial candidates are often compared with similar criteria for other people. The decision on whether this particular candidate is more competent or honest than the other one should be made by people with their own ideas of competence or integrity. It is, therefore, necessary to develop and formalise certain common approaches in this regard.

To ensure *independence of the judiciary from political influences of other branches of power, Article 131 of the Constitution provides for the functioning of the High Council of Justice (HCJ)*. Its mechanisms are further clarified in the Law "On the High Council of Justice". From now on this body addresses all issues concerning a particular judge – presents submission on the appointment; reviews complaints as regards decisions of relevant agencies imposing disciplinary liability on a judge or prosecutor; decides on dismissal of a judge from office, and so on.

However, can the High Council of Justice be viewed as the body that fully guarantees impartiality in decision-making? The question stems from who forms the Council, who are its members, and how its decisions are passed. Most members of the HCJ that oversees the judiciary are delegated by judges themselves. Also, the decisions of the Council are adopted by simple majority of votes (Part 1, Article 34 of the Law "On the High Council of Justice"). Having gained support of just one HCJ member, 10 judges can pass almost any decision. However, the High Council of Justice is not a body of judicial self-government. Therefore, it would be advisable to reduce the number of representatives of the judiciary in the Council, and to increase the membership of law schools and academic institutions that are unaffiliated with any branches of government. It would balance the number of votes from state authorities, including the judiciary, thus ensuring more informed decisions.

For the first time ever, Article 128 of the Constitution introduces an important regulation on appointing judges only on the competition basis. At the same time, it is still possible to depart from this general rule in some cases specified by the law (but not the Constitution itself). We believe that this totally contradicts the very idea of selecting truly competent and professional judges to the judicial system.

Speaking about novelties in the protection of individual's rights and interests in court, we refer to Part 3 of Article 131-2, according to which "only an advocate shall represent another person in court and defend a person against prosecution". Exceptions may include labour, social, electoral disputes and matters of minor importance, where the right to representation can be granted to persons without license to practice law. Some experts called this innovation an "advocates' monopoly" and a restriction of the rights of ordinary citizens who might not be able to hire a professional lawyer. Others refer to the European experience and suggest that this provision will give people the opportunity for better legal protection.[11]

[9] S. Hlushchenko, "Novels of the judicial reform: the concept of professional ethics and integrity in the context of qualification assessment of a judge (candidate for the position of a judge) – "Chasopys Tsyvilnoho i Kryminalnoho Sudochynstva", No. 6 (33), 2016, pp.76, 77.

[10] Article 87 of the Law "On the Judiciary and the Status of Judges".

[11] See, for example, "Monopolisation of the bar: what to expect?" – "Yurydychna Hazeta", 30 May 2016, *http://yur-gazeta.com/publications/practice/inshe/monopoliya-advokaturi-shcho-na-nas-chekae.html*; Court representation by an advocate from 2017 – official website of a lawyer O. Kucheriavyi, 5 January 2017, *http://kucheriavyi.com/predstavnictvo-advokata-u-sudi-z-2017-roku*; "The advocates' monopoly within the judicial reform – opinion of the human rights advocate"– online-portal "Novynarnia", 9 June 2016, *https://novynarnia.com/2016/06/09/advokatska-monopoliya-sudovoyi-reformi-dumka-pravozahisnika*.

The significance of this issue invited several official explanations. For example, the resolution of the Plenum of the High Administrative Court "On the legal opinion concerning the procedure of representation of bodies of state power and local self-governments in courts, introduced by the Law of Ukraine No. 1401-VIII dated 2 June 2016 'On Amendments to the Constitution of Ukraine (concerning Justice)'" indicates that the representation of such authorities in courts shall be carried out through the prosecutor.[12]

Having granted the right of representation to advocates only, the lawmakers forgot about interests of legal entities. If we clearly interpret provisions of the Constitution (Article 131-2), it does not specify the representation of individuals and legal entities. And what should we do with corporate lawyers and counsels in this situation?

The State Fiscal Service of Ukraine offered the following explanation concerning representation of legal entities in courts: "Pursuant to para. 14.1.226 of Article 14 of the Tax Code of Ukraine, an independent professional activity also refers to lawyers, provided that such person is not an employee within this independent activity. An individual practicing law can be an employee of a legal entity and/or individual entrepreneur in the position that does not stipulate for the practice of law or legal services. Therefore, this individual cannot represent his or her employer as an advocate. At the same time, this individual may perform practice of law individually or within organisational and legal forms of a law firm or bar association (in line with Part 3 of Article 4 of the Law of Ukraine "On the Bar and Practice of Law")".[13]

This means that for legal entities to have their interests represented in court, it will be necessary to hire external lawyers in addition to their in-house legal advisors and counsels who might even have licenses to practice law. This, in our opinion, is incorrect and inappropriate.

The new versions of procedural codes specify that "a legal entity shall participate in the case through its director or a member of an executive body authorised to act on its behalf in accordance with the law, statute, regulations (self-representation of a legal entity), or through a representative" (Part 3 of Article 57 of the Economic Procedure Code of Ukraine). We feel that the lawmakers tried to clarify the constitutional provision by granting the right of representation to a member of the executive body. In other words, by including its legal adviser or counsel into the executive body, a business entity can avoid hiring an external lawyer to represent its interests in court. The new procedural codes, however, disregarded peculiarities of certain legal entities, specifically schools of higher education (universities, institutes and the like), which do not have executive bodies.

The Constitution of Ukraine does not directly suggest gradual "reboot" of all Ukrainian courts based on the competition, but we think that it would be the right thing to do. The competitive selection of the Supreme Court judges has already been completed. Not all candidates "survived" this process, and not all candidates for these important positions are "flawless". But the competition would attract more legal professionals with no previous experience of work in the court system, including academics and advocates, and we truly hope that this "fresh blood" and the absence of negative judicial experience in some new judges of different levels will finally help to restore people's confidence in courts.

Finally, we have to emphasise that amending the Constitution and adopting the new wording of the Law "On the Judiciary and the Status of Judges" does not conclude Ukraine's judicial reform. This process is long and complicated. As a follow-up to the reform, on 3 October 2017 the Verkhovna Rada adopted new versions of three procedural codes – the Civil Procedure Code, the Commercial Procedure Code and the Code of Administrative Justice. Their opening articles immediately suggest unification of the procedure of case hearing in courts of different jurisdictions. Such unification may contribute to elaborating the established practice of application and understanding of procedural law. Significant changes have also been made to the Criminal Procedure Code and the Code on Administrative Offenses. The adoption of all legislative acts is a logical continuation of amendments to the Constitution and other legislation concerning the administration of justice.

To complete the judicial reform, it will be necessary to pass a number of bylaws, specifically in the area of e-justice and the formation of the intellectual property and anti-corruption courts. It is also critical to complete re-qualification of all judges at all levels as soon as possible, and accordingly to complete manning of many courts that currently have no judges at all.

Therefore, saying that another judicial reform in Ukraine has been fully implemented would be wrong. The core of the reform is not about legislative changes, but about new approaches and understanding of justice by all those involved – judges that are corruption-free, society that does not provoke corruption, and the government that does not put strain on judges or law enforcement agencies. ■

[12] The resolution of the Plenum of the High Administrative court of Ukraine No. 5 dated 13 March 2017 – official website of the HACU, *http://www.vasu.gov.ua/plenum/post_plenum/postanova_plenumu_5_13-03-2017*.

[13] In-house lawyer cannot represent his employer. Explanation of the State Fiscal Service of Ukraine No. 1603 of 15 August 2017ю – online-portal "Ty I Pravo", *http://tuipravo.info/novyny/646-shtatnyi-advokat-ne-mozhe-predstavliaty-svoho-robotodavtsia.html*.

THE LAW ON THE CONSTITUTIONAL COURT OF UKRAINE: THE THIRD ATTEMPT

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It has been about a year since entry into force of constitutional amendments[1] that, according to many national experts, have substantially "adjusted" the fundamental principles of functioning of the constitutional control mechanism in Ukraine,[2] when the Parliament has finally adopted the new Law "On the Constitutional Court of Ukraine".

It is the third law on the Constitutional Court (CCU), adopted in Ukraine since its independence. The first law "On the Constitutional Court of Ukraine" dating back to 1992 was not implemented in practice. The second law, adopted several years afterwards, remained in effect for more than 20 years. The adoption of each of these laws was normally preceded by appropriate constitutional amendments, which mostly "clarified" the procedure of the CCU formation, the scope of its powers, peculiarities of consideration of specific categories of cases, and the like. On several occasions the lawmakers also tried to "clarify" the constitutional and legal status of this body per se.

While adopting the "first" Law "On the Constitutional Court of Ukraine" on 3 June 1992, then-parliament (which was called the Verkhovna Rada of the Ukrainian Soviet Socialist Republic (Ukrainian SSR) shortly before that, which was elected prior to the declaration of Ukraine's independence, and which mostly consisted of the Soviet party and economic "nomenclature") was guided by political intuition rather than by legal motivations. After all, at the time of adoption of this Law, there was no constitutional framework for establishing a full-fledged constitutional control mechanism in Ukraine. Changes to the Constitution (Fundamental Law) of the Ukrainian SSR in 1990-1991, which contained some provisions on the Constitutional Court of the Ukrainian SSR,[3] as well as constitutional amendments of the first half of 1992[4] did not address this issue. Particularly challenging was the definition of the content and scope of powers of the future body of constitutional control. However, by adopting the Law "On the Constitutional Court of Ukraine" in 1992, the Parliament defined it as "an independent body within the system of judicial power, designed to ensure compliance of laws, other regulatory acts of the legislative and executive powers with the Constitution of Ukraine, and to ensure protection of constitutional rights and freedoms of an individual". Its composition should include the Chairman, two Deputy Chairmen and 12 members. All of them were to be elected by the Parliament upon personal proposals from the Speaker of the Verkhovna Rada and the President.

The Constitutional Court was to exercise its powers "by considering cases on the constitutionality of laws and other regulatory acts in a court session", as well as providing relevant conclusions. It was supposed to take proceedings in matters of non-conformity with the Constitution of:

(1) current (effective) laws and other acts adopted by the Verkhovna Rada of Ukraine;

(2) adopted but not effective laws and other acts of the Verkhovna Rada of Ukraine.

It was expected that the CCU would also review cases on non-conformity with the Constitution and the laws of Ukraine of:

(1) decrees and executive orders of the President;

(2) resolutions of the Presidium of the Verkhovna Rada;

1 The Law of Ukraine "On Amendments to the Constitution of Ukraine (concerning Justice)" dated 2 June 2016.

2 For more detail see "Amendments to the Constitution on Justice: Expert Opinions" in the National Security & Defence, 2016, No. 5-6, p.42.

3 The Law of the Ukrainian SSR "On Amendments and Additions to the Constitution (Fundamental Law) of the Ukrainian Soviet Socialist Republic".

4 The Law of Ukraine "On amendments to Part 1 of Article 112 of the Constitution (Fundamental Law) of Ukraine".

(3) laws and other acts adopted by the Verkhovna Rada of the Autonomous Republic of Crimea and its Presidium;

(4) resolutions and directives of the Cabinet of Ministers of Ukraine and the Council of Ministers of the Autonomous Republic of Crimea.

In addition, the mandate of the Constitutional Court included the consideration of cases involving:

(1) violation of the competence of bodies and persons of state power, specified in the Constitution;

(2) violation of the distribution of competences of local councils of different levels established by the Constitution of Ukraine and the Constitution of the Republic of Crimea, as well as competences of local councils and bodies of the state executive power;

(3) legitimacy of calling elections and referendums.

The CCU was also to consider cases of non-conformity with the Constitution of Ukraine and international treaties recognised by Ukraine of any law or other regulatory act that violates constitutional rights and freedoms; to review disputes between the national and territorial entities of Ukraine; to give conclusions on the observance of the Constitution and laws of Ukraine by the President, the Prime Minister and other members of the Cabinet, the Chairman of the Supreme Court, the Chairman of the High Arbitration Court, the Prosecutor General of Ukraine, as well as diplomatic and other representatives of Ukraine in case of early termination of office; to review the constitutionality of activities and involuntary liquidation of political parties, international and national NGOs operating in Ukraine.[5]

Obviously, delegating such considerable and important powers of the state to a newly created body was simply unrealistic in political and legal realities of that time. Perhaps, this is the reason why the personal composition of the CCU – apart from election of its Chairman, Leonid Yuzkov – was never formed, and this body failed to begin its operations.

Eventually, the original Ukrainian Constitution, adopted on 28 June 1996, established that "judicial proceedings [in Ukraine] are performed by the Constitutional Court of Ukraine and courts of general jurisdiction (Part 3 of Article 124). The Constitutional Court was defined as "the sole body of constitutional jurisdiction in Ukraine" with exclusive right to "decide on issues of conformity of laws or other legal acts with the Constitution of Ukraine", as well as provide "opinion on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature" and "opinion on the observance of the constitutional procedure for investigation and consideration of the case of removing the President of Ukraine from office by the procedure of impeachment" (Articles 146, 151 of the Constitution), etc.

Accordingly, the Law "On the Constitutional Court of Ukraine", passed by the Parliament on 16 October 1996, includes provisions that the CCU "decides on and provides opinions on issues concerning:

(1) constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea;

(2) conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature;

(3) the observance of the constitutional procedure for investigation and consideration of the case of removing the President of Ukraine from office by the procedure of impeachment within the authority set forth in Articles 111 and 151 of the Constitution of Ukraine;

(4) official interpretation of the Constitution and laws of Ukraine;

(5) conformity of draft law on introducing amendments to the Constitution of Ukraine pursuant to the requirements of Articles 157 and 158 of the Constitution of Ukraine;

(6) violation of the Constitution or laws of Ukraine by the Verkhovna Rada of the Autonomous Republic of Crimea".[6]

Eventually, more than twenty years of the CCU's functioning within this regulatory and legal framework revealed all its strengths and weaknesses, which resulted in numerous legislative acts adopted during 1997-2016.

Constitutional changes of 2016 concerning justice affected in one way or another almost every provision of the Constitution regarding the constitutional control as such. These changes significantly adjusted the content and the scope of the Constitutional Court's powers, let alone organisational arrangements of its work. In addition, the Constitution now clearly demands the competitive selection of candidates for the position of a Constitutional Court judge.

Contrary to constitutional requirements of 1996, the Constitutional Court is no longer responsible for "performing judicial proceedings together with courts of general jurisdiction"; the lawmakers also removed the provision that the Constitutional Court "is the sole

[5] The Law of Ukraine "On the Constitutional Court" (1992).

[6] Ibid.

body of constitutional jurisdiction in Ukraine" and the responsibility to provide official interpretation of the laws of Ukraine. The same constitutional changes introduced the institution of constitutional complaint. Also, the CCU now can provide opinions on the conformity with the Constitution of Ukraine of questions that are proposed to be put to a popular vote, and so on.

The constitutional novels aimed at introducing the constitutional complaint mechanism in Ukraine, removing the right to officially interpret laws from the powers of the Constitutional Court (which is rather unnatural for the body of constitutional control), and strengthening guarantees of independence and immunity of the Constitutional Court judges are almost indisputably positive.

In the meantime, some other novelties generated diverse reactions and feelings in the expert community, ranging from mild surprise to serious concern about the consequences of practical implementation of the adopted constitutional changes.[7] That is why the public kept a close eye on the development and introduction of the new Law "On the Constitutional Court of Ukraine". After all, Article 153 of the Constitution (in the wording of the Law "On Amendments to the Constitution of Ukraine" (concerning Justice), clearly stated that "organisation and operation of the Constitutional Court of Ukraine, status of judges of the Court, grounds to apply to the Court and application procedure, case consideration procedure and enforcement of the Court decisions shall be defined by the Constitution of Ukraine and by the law".

The new Law "On the Constitutional Court of Ukraine", adopted by the Verkhovna Rada on 13 July 2017, is notably different from its "predecessors" (of 1992 and 1996), at least by external characteristics. It is "bulkier" in its text part; at times it is overly detailed for a legislation of its level of regulation of social relations; it contains significant number of blanket rules for lower-level acts (the Rules of Procedure of the Constitutional Court of Ukraine); and it is clearly overloaded with "alien" norms (requirements not directly related to the subject of legal regulation of the Law) in its final part (Section III, Final Provisions). At the same time, the Law itself is structurally divided into two main sections – "Section I. The Constitutional Court of Ukraine", and "Section II. Constitutional Proceedings". It is noteworthy that the title of the first section is identical to the title of the Law ("Section I. The Constitutional Court of Ukraine", and the Law of Ukraine "On the Constitutional Court of Ukraine"). The latter, obviously, is not the best technical and legal solution. At the same time, the content of the first and second sections of the Law, their size, internal structure and their very titles suggest that the lawmakers tried to combine in

this law two separate documents, which probably were drafted as separate laws.

The above provision of Article 153 of the Constitution provides an exhaustive list of acts that determine "the organisation and operation of the Constitutional Court of Ukraine, status of judges of the Court, grounds to apply to the Court and application procedure, case consideration procedure and enforcement of decisions of the Court". Meanwhile, when adopting relevant provisions of the new Law "On the Constitutional Court of Ukraine" to further strengthen this constitutional requirement, the lawmakers clearly exceeded their constitutional powers and violated Part 2 of Article 8 of the Constitution, according to which "laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it". After all, Part 2 of Article 3 of the Law "On the Constitutional Court of Ukraine" (namely, "Legal Framework for the Activities of the Court") states that "the management of the internal operations of the Court and the relevant procedure for consideration of cases under this Law shall be established by the Rules of Procedure of the Constitutional Court of Ukraine". In other words, the Constitutional Court may adopt the Rules of Procedure of the Constitutional Court of Ukraine. However, these Rules of Procedure cannot in any way replace the Law "On the Constitutional Court of Ukraine", since only "the Constitution of Ukraine and the law" determine "the organisation and operation of the Constitutional Court… case consideration procedure and enforcement of decisions of the Court" (Article 153 of the Constitution). If the lawmakers believe that, among other things, the Rules of Procedure of the Constitutional Court of Ukraine could determine the procedure of case consideration and enforcement of the Court's decisions, then this document (that is, the Rules of Procedure of the Constitutional Court of Ukraine) should be approved by the law of Ukraine (similar to the Law "On the Rules of Procedure of the Verkhovna Rada of Ukraine").

[7] P. Stetsyuk, Changes to the Fundamental Law of Ukraine concerning justice (constitutional and jurisdictional dimension) – "Visnyk Konstytutsiynoho Sudu Ukrayiny", 2016, No. 4-5, p.194-201.

Article 148 of the Constitution states that "the Constitutional Court of Ukraine shall be composed of eighteen judges of the Constitutional Court of Ukraine. The President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each shall appoint six judges to the Constitutional Court of Ukraine. Selection of candidates for the position of a judge of the Constitutional Court of Ukraine shall be conducted on competitive basis under the procedure prescribed by the law".

This Article should have encouraged the lawmakers to include relevant provisions on the creation of a single national commission to select candidates for the positions of the Constitutional Court judges in the new law "On the Constitutional Court of Ukraine". At the same time, recognising the need to ensure impartial, highly professional, moral and ethical functioning of this body, none of the subjects of the appointment of the Constitutional Court judges should have been involved in the formation of such commission. On the other hand, the general public, and specifically the academic and legal community of Ukraine, should receive broad access to the formation of such competition commission. Previous experience as a CCU judge, scientific accomplishments in the field of constitutional law, the nationwide credibility and other qualities should be advantageous for the candidates to this commission.

Part 7 of Article 148 of the Constitution establishes that "a judge of the Constitutional Court of Ukraine shall step in his or her office as of the date of taking the oath at the special plenary session of the Court". This novel is the part of recent constitutional changes. Swearing-in of a judge of the Constitutional Court was previously regulated solely by the provisions of the Law "On the Constitutional Court of Ukraine (1996). Part 3 of Article 17 of the law stated that "the judge of the Constitutional Court of Ukraine shall take oath at the session of the Verkhovna Rada in the presence of the President of Ukraine, as well as the Prime-Minister of Ukraine, the Chairman of the Supreme Court of Ukraine or persons who perform their duties". Today, pursuant to Part 7 of Article 148 of the Constitution, the new Law "On the Constitutional Court of Ukraine" includes the following provision: "1. A judge shall become empowered upon taking the oath at a special plenary session of the Court… 2. A special plenary session of the Court shall be convened, within five working days from the appointment of a Constitutional Court Judge to the position, by the Chairman of the Court or a Judge performing his duties. 3. The solemn swearing-in ceremony of a Constitutional Court Judge at a special plenary session shall take place in the Courtroom. The procedure for a solemn ceremony shall be established by the Rules of Procedure [of the Constitutional Court]" (Article 17 of the Law "On the Constitutional Court of Ukraine"). The lawmakers also included in the Article the text of the oath of a judge of the Constitutional Court: "I, (name and last name), in assuming the office of a Judge of the Constitutional Court of Ukraine, hereby solemnly swear my allegiance to Ukraine, to be independent, honest and conscientious while discharging the high duties of a Judge of the Constitutional Court of Ukraine, to ensure the supremacy of the Constitution of Ukraine, to protect the constitutional order of the State by affirming human rights and freedoms".

This vision of implementing the constitutional requirement of Part 7 of Article 148 seems a little ill-conceived. It immediately raises several reasonable questions: before whom a newly appointed judge of the Constitutional Court should take his or her oath, especially concerning "allegiance to Ukraine"? Who will represent the Ukrainian state at this special plenary session of the Constitutional Court? The limited time for swearing-in of the newly appointed judge of the Constitutional Court is also unclear. Another question is: why the lawmakers place an oath by a newly appointed judge of the Constitutional Court in dependence on the contents of the internal document of the Court?

The reason behind these questions was immediately confirmed by the first swearing-in of a newly appointed judge of the Court after the enactment of the new Law "On the Constitutional Court of Ukraine". After all, without any fault on the part of this judge, the procedure of his oath taking was accompanied by several violations of Article 17 of the Law.

First, the swearing-in ceremony took place later than "within five working days from the appointment of a judge to the position".[8] *Second*, on the date of swearing-in of a newly appointed judge, the Rules of Procedure of the Constitutional Court contained no provisions "establishing the procedure of the solemn ceremony".[9]

The introduction of a constitutional complaint in Ukraine was probably the most significant achievement of the constitutional reform of 2016 concerning justice. The very idea of presenting a constitutional complaint was not only progressive per se, but also perfectly consistent with the main purpose of a constitutional control mechanism in any modern democracy – to ensure the all-round protection of human rights and freedoms.

[8] The solemn swearing-in ceremony of a new Constitutional Court judge was held in the Court – official website of the Constitutional Court of Ukraine, *http://www.ccu.gov.ua/novyna/vidbulasya-urochysta-ceremoniya-skladennya-prysyagy-suddi-konstytuciynogo-sudu-ukrayiny*.

[9] Rules of Procedure of the Constitutional Court of Ukraine – ibid, *http://www.ccu.gov.ua/docs/177*.

The latter was also vital for Ukraine, because the main task of the Constitutional Court (at the time of adoption of the constitutional amendments concerning justice in 2016) was "to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the State throughout the territory of Ukraine" (Article 2 of the Law "On the Constitutional Court of Ukraine"), while "human rights and freedoms and their guarantees" should determine the essence and orientation of the activity of the Ukrainian state (Part 2 of Article 3 of the Constitution). Hence, it was logical to entrench the right to a constitutional complaint in Article 55 of the Fundamental Law ("Everyone shall be guaranteed the right to apply with a constitutional complaint to the Constitutional Court of Ukraine on grounds defined in this Constitution and under the procedure prescribed by law") and state the content of a constitutional complaint in Chapter XII of the Constitution (Article 151-1, "The Constitutional Court of Ukraine shall decide on compliance with the Constitution of Ukraine (constitutionality) of a law of Ukraine upon a constitutional complaint of a person alleging that the law of Ukraine applied in a final decision in his or her case contravenes the Constitution of Ukraine. A constitutional complaint may be lodged after exhaustion of all other domestic remedies").

However, the quality of implementation of constitutional requirements frequently depends on the presentation of relevant provisions in legislation. One of the most obvious defects in this regard is linked to so-called "excessive regulation". The latter may significantly impede practical implementation of the constitutional provisions in general, and if related to constitutional rights and freedoms – to become a real obstacle for their realisation. It is quite possible that problems of this kind may occur in realisation of the right to a constitutional complaint, as the lawmakers specified the following requirements (Part 2 of Article 55 of the Law "On the Constitutional Court of Ukraine"):

"A constitutional complaint shall indicate:

(1) surname, name, patronymic (if any) of a citizen of Ukraine, foreigner or a stateless person, his or her residential address (place of stay of a foreigner or a stateless person), or full name and registered address of a legal entity, as well as the telephone number, e-mail address, where available;

(2) information about an authorised person acting on behalf of the subject of the right to a constitutional complaint;

(3) summary of the final court judgment in which relevant provisions of the law of Ukraine were applied;

(4) report of proceedings of the relevant case in courts;

(5) specific provisions of the law of Ukraine to be reviewed for their conformity with the Constitution of Ukraine, and particular provisions of the Constitution of Ukraine against which such law of Ukraine is to be reviewed for conformity;

(6) substantiation of alleged unconstitutionality of a law of Ukraine (specific provisions thereof), specifying those human rights safeguarded by the Constitution of Ukraine, which in the opinion of the subject of the right to constitutional complaint, have been violated by application of this law;

(7) information regarding documents and materials referred to by the subject of the right to constitutional complaint, with copies of such documents and materials attached;

(8) a list of the attached materials and documents. A copy of the final court judgment in the case of a subject of the right to constitutional complaint shall be duly certified by the adjudicating court".

It seems that some of the requirements for the content of the constitutional complaint provided by the Law "On the Constitutional Court of Ukraine" are excessive (in particular, paragraphs 3, 4 and 6 of Part 2 of Article 55), and present objective difficulties for anyone who would like to exercise his or her constitutional right to a constitutional complaint. In addition, the requirement set forth in para. 8 to present "a copy of the final court judgment in the case of a subject of the right to constitutional complaint… duly certified by the adjudicating court in accordance with established procedure", given the opportunities of providing a photocopy of a court decision or extracting necessary documents from the Unified State Registry of Court Decisions, appears to be an example of blatant bureaucracy.

Presented above are just a few examples of obvious "weaknesses" of the new Law "On the Constitutional Court of Ukraine". On the other hand, this new (third) law contains a number of innovative provisions, bears the mark of social progress, and attempts to systematically address an extremely important segment of social relations associated with proper functioning of the constitutional control. And this is truly important, since the future of Ukraine as a constitutional state without an adequate, modern and progressive constitutional control is unpredictable. ■

PROCEDURAL GUIDANCE IN PRE-TRIAL INVESTIGATION WITHIN THE PUBLIC PROSECUTION BODIES[1]

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Five years have passed since the entry into force of the Criminal Procedure Code, which introduced the concept of procedural guidance in pre-trial investigations of criminal offences by the Ukrainian prosecutors.

Pursuant to the UN Guidelines on the Role of Prosecutors,[2] the international standards for prosecution activities and the function of procedural guidance in pre-trial criminal proceedings strictly separate the office of public prosecutor from judicial functions.

Under these standards, prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

The role of a prosecutor as a procedural supervisor in the pre-trial investigation is also highlighted in the PACE Recommendation "The Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law".[3]

On 2 June 2016, upon the initiative of the President, the Verkhovna Rada of Ukraine adopted amendments to the Constitution concerning justice, which, among other things, changed the constitutional functions of the prosecution service that were duly reflected in the "Justice" Chapter of the Constitution. Specifically, one of the main functions of the public prosecutor's office under Article 131-1 of the updated Constitution is **"organisation and procedural supervision during pre-trial investigation, decision on other matters in criminal proceedings in accordance with the law, oversight in covert and other investigative and search activities of law enforcement agencies"**. This constitutional provision, therefore, combines two functions of a public prosecutor – "procedural supervision and organisation" of pre-trial investigation, and distinguishes them from "oversight" over activities of law enforcement agencies in general. This does not make actual exercise of these functions clearer and creates additional obstacles.

The analysis of the constitutional law theory, criminal procedural law and public prosecutor's activities, as well as the legislative and regulatory framework that

[1] Based on the study report on the role of the public prosecutor at the pre-trial stage of criminal proceedings, conducted by the expert group with the International Renaissance Foundation in five regions of Ukraine in 2016-2017. For more detail see "Public Prosecutor: Directs? Coordinates? Supervises? Investigates", *http://ecpl.com.ua/wp-content/uploads/2017/10/prokuror_infografic.pdf*.

[2] Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, *http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx* . Translated into Ukrainian by the Centre of Policy and Legal Reform: *http://pravo.org.ua/files/oon_com_split_1.pdf*.

[3] The Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1604 (2003) "*The Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law*", *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17109&lang=en*.

provide insight into the main functions of the prosecutor's office and pre-trial investigation agencies, leads to a conclusion about the existence of closely interlinked concepts, such as "criminal prosecution", "criminal proceedings", "supervision over observance of laws by the authorities carrying out detective operations, inquiries and pre-trial investigation"; "procedural guideline of pre-trial investigation of crimes" and "public (state) prosecution". The issue of understanding and applying these concepts during the period since adoption of the Criminal Procedure Code (2012) and the introduction of amendments to the Constitution (2016) requires additional interpretation of their interrelations and peculiarities.

It should be noted that in most civil law countries the public prosecutor's office mainly serves as a body of "criminal prosecution", that is, searches, detects and discloses individuals who committed a criminal act; supports public (state) prosecution of these individuals in court; and supervises the legality of pre-trial investigations of criminals, including those detained in penitentiary institutions. This term is widely used in foreign legislation and practice of the criminal justice bodies of Belarus, Italy, Russian Federation, France, Germany and some other European states.

In the context of functions and powers of the public prosecutor's office, the Ukrainian legislation uses THREE terms (word combinations):

(*a*) organisation and procedural guidance in pre-trial investigation;

(*b*) supervision over observance of laws by the authorities carrying out detective operations, inquiries and pre-trial investigation;

(*c*) prosecution in court on behalf of the state.

By content, these terms are generally identical with the notion of "criminal prosecution", although somewhat larger in volume.

The term "criminal proceedings" unveils specifics of activities of all parties and participants in criminal procedural relations and covers the two main stages: pre-trial investigation of criminal offenses and court consideration of criminal case / criminal proceedings. Not entitled to perform criminal prosecution, the court, however, exercises judicial control over the observance of constitutional rights and freedoms of an individual and a citizen by all parties to criminal proceedings at the stage of pre-trial investigation of crimes.

The Ukrainian legislation has no clear definition of the terms "organisation and procedural guidance" in pre-trial investigation. The Law "On the Public Prosecutor's Office" mentions this term only once in the context of prohibition of disciplinary actions against the public prosecutor who has provided ***procedural guidance*** in a pre-trial investigation in case of acquittal or termination of criminal proceedings by court.[4] Similarly, the Criminal Procedure Code of Ukraine refers to it only once, specifically in Part 2 of Article 36, which describes the powers held by a public prosecutor in *supervising the observance of laws* ***in the form of procedural guidance in a pre-trial investigation***.

In other words, the lawmakers understand "procedural guidance" as a form of supervision over observance of laws during the pre-trial investigation. Yet, the legislation of Ukraine does not elaborate on the content of this form of supervision, nor does it explain how it differs from other forms of supervision. Moreover, neither the CPCU, nor the current Law "On the Public Prosecutor's Office" provide detail on the meaning of prosecutorial supervision over observance of laws during a pre-trial investigation. Accordingly, this does not clarify the meaning of procedural guidance, which is a form of such supervision.

The lack of explicit and clear definition of the term "procedural guidance" in the legislation leads to some uncertainty regarding the role of procedural supervisor in criminal proceedings. It is unclear whether a prosecutor actually performs the role of an investigator, assuming full responsibility for its effectiveness and results, or he simply oversees the lawfulness of actions of other persons involved in the procedure (an operative, an investigator), while remaining an external observer for the time being.

Having examined the prosecutor's powers of supervision in the form of procedural guidance as defined by Part 2 of Article 36 of CPCU, we suggest that the balance has shifted from supervision over legality towards immediate participation of a prosecutor in pre-trial investigation. For instance, only **7 out of more than 20 powers** of the prosecutor in said article of CPCU **can be considered as related to oversight**, including:

- having full access to materials, documents and other information relevant to the pre-trial investigation;
- overturning unlawful and arbitrary decisions of investigators;
- raising the issue of suspension of the investigator and appointment of another investigator with the head of the pre-trial investigations agency provided there are grounds for such suspension;
- supporting or refusing to support the motions of an investigator filed with the investigating judge on the conduct of investigative (detective) actions, covert investigative (detective) actions, other procedural actions;
- approving requests for international legal assistance or referral of criminal proceedings made by the pre-trial investigation authority;

[4] Article 43 of the Law of Ukraine "On the Public Prosecutor's Office".

- approving or refusing to approve the indictment, motions for coercive measures of medical or educational nature;
- verifying the documents concerning surrendering a person (extradition) provided by the pre-trial investigation agency prior to referring them to a senior prosecutor, etc.

The analysis of these CPCU provisions shows that most of the prosecutor's powers are linked to **directing the course of investigation**, namely instructing the investigator, pre-trial investigation agencies, or relevant field units to conduct certain investigative (detective) or procedural actions or conduct these actions by the prosecutor. For instance, a public prosecutor has the powers **traditionally attributed to an investigator**, specifically:

- to initiate pre-trial investigation;
- to personally conduct investigative (detective) and procedural actions;
- to notify an individual of suspicion;
- to draw up an indictment.

In addition to the above, the prosecutor-procedural supervisor is also entitled to rights reserved for the **public prosecution in general**, such as:

- to file a civil lawsuit in the interests of the state or citizens who are unable to defend their rights due to a physical or material condition, being underage or elderly, incapacitation or partial incapacitation;
- to apply to the court with an indictment, a motion to impose coercive measures of medical or educational nature, a motion to discharge an individual from criminal liability;
- to appeal court decisions and so on.

Therefore, in practice the functions of the procedural supervisor and the investigator are often mixed, thus preventing optimisation of the pre-trial investigation process.

It should be noted that the term "organisation and procedural guidance" definitely requires a clear legal definition to avoid contradictory interpretations in theory and, more importantly, in the practical work of prosecutors, investigators and operative officers (detectives) of the law enforcement agencies.

In current practice of pre-trial investigation of criminal offenses, the overwhelming majority of prosecutors-procedural supervisors do not fully understand their new function. Some of them continue exercising "supervisory powers" over investigators and operatives, trying to avoid any direct involvement in the organisation and guidance of pre-trial investigation; others, on the contrary, keep interfering in the organisational and procedural activities of an investigator in order to influence the entire process of gathering evidence with their instructions.

At the same time, when making important procedural decisions, such as "procedural apprehension of the suspect", "serving the notice of suspicion", or "choosing a restraint measure of detention", many procedural supervisors are not willing (or simply afraid of) to take responsibility for these decisions or deliberately complicate the procedure for adopting them.

The practice suggests that procedural guidance in pre-trial investigation of criminal offenses by prosecutors should build on basic principles that include procedural **independence, unchangeability, impartiality and objectivity**.

While analysing the observance of **procedural independence** by procedural supervisors, it is necessary to emphasise that international organisations that aim to coordinate and establish certain standards for national prosecution authorities in member states pay significant attention to formulating the principles of prosecutor's activities in the role of a state prosecutor, as well as in the role of a procedural supervisor in pre-trial investigation.

Current **UN Guidelines on the Role of Prosecutors** stipulate that states shall ensure that prosecutors are able to perform their professional function without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. The same guarantees of the prosecutor's independence are established by the PACE Recommendation "**The Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law**".

The legislation of Ukraine also establishes guarantees for the independence of a public prosecutor, as set forth in Part 2 of Article 16 of the Law "On the Public Prosecutor's Office". Such an **independence shall be ensured by**:

1) special procedures for appointment to, and dismissal from, the position, and disciplinary sanctions;
2) procedures of exercise of powers stipulated in procedural and other laws;
3) prohibition of illegal influence, pressure and interference with the exercise of public prosecutor's powers;
4) statutory procedures for financing and organisational support for the public prosecutor's offices;
5) established financial, social and pension support for public prosecutors;
6) functioning of the prosecutorial self-governance institutions;
7) statutory personal security arrangements for public prosecutors, members of their families, their property, as well as other legal safeguards.

When performing prosecutorial functions, a public prosecutor shall be independent of any illegitimate influence, pressure, interference, and shall be guided in their operation exclusively by the Constitution and the laws of Ukraine (Part 2 of Article 16 of the same law).

Central and local government authorities, other public institutions, their officials and officers, as well as individuals and legal entities and their associations shall be obliged to respect independence of the public prosecutor and refrain from exercising influence of any form on a public prosecutor in order to prevent execution of his duties or taking illegal decision.

A public prosecutor may submit a statement about a threat to his/her independence to the Council of Public Prosecutors of Ukraine which shall be obliged **to immediately check and consider such statement** with his/her participation and, **within its authority,** established by this Law, **take necessary measures to eliminate the threat** (Part 6 of Article 16).

Article 17 of the Law "On the Public Prosecutor's Office" regulates the matters of subordination of public prosecutors and execution of orders and instructions, which is also significant for ensuring independence and impartiality of a procedural supervisor. Part 1 of this article directly states that public prosecutors shall exercise their powers within the limits established by law and shall be subordinated to their superiors only in respect to implementation of written administrative orders related to organisational aspects of public prosecutor's work and operations of public prosecutor's offices. Administrative subordination of public prosecutors shall not be a ground for limiting or infringing their independence in the exercise of their prosecutorial powers.

When exercising powers associated with performing prosecutorial functions, public prosecutors shall be independent and independently make decisions on the procedure of exercising such powers in compliance with the law and shall execute only those instructions of higher public prosecutor, which comply with Part 3 of this Article (17).

Higher public prosecutors of higher level shall be entitled to instruct public prosecutors of a lower level, coordinate their certain decisions and carry out other actions directly related to this public prosecutor's implementation of prosecutorial functions exclusively within the limits and in compliance with the procedure set by law. A public prosecutor shall not be obliged to follow higher public prosecutor's orders and instructions which raise doubts as to their legality unless the public prosecutor receives them in writing, as well as obviously criminal orders or instructions.

At the same time, despite the above provisions aimed at ensuring independence of public prosecutors in criminal proceedings from any interference, current CPCU contains a provision that can cause doubt and, in some cases, threaten the independence of a public prosecutor. Specifically, Part 6 of Article 36 of the Criminal Code of Ukraine states that "*the Prosecutor General of Ukraine, heads of regional prosecutor's offices, heads of local prosecutor's offices, their first deputies and deputies,* ***when supervising over observance of laws during the pre-trial investigation may revoke illegitimate and unjustified orders issued by investigators and subordinated prosecutors*** *within the time limits of pre-trial investigation as specified in Article 219 of the CPCU. The prosecutor supervising over observance of laws during the respective pretrial investigation shall be notified of such revocation*".

This wording in the CPCU in practice makes the public prosecutor fully dependent on a higher-level prosecutor, as the latter has the right to interfere with the procedural activities, which is directly prohibited by the Law "On the Public Prosecutor's Office", whereby higher-level prosecutors have the right to instruct the lower-level prosecutors only in administrative matters.

We should emphasise, however, that the Law "On the Public Prosecutor's Office" offers **additional guarantees of independence of prosecutors** with the Specialised Anti-Corruption Prosecutor's Office.[5]

The principle of **unchangeability** of a prosecutor in criminal proceedings aims at ensuring its sustainability and personal responsibility of a procedural supervisor for outcomes of such proceedings.

In line with the Ukrainian legislation, the prosecutor to perform the duties of prosecutor in a specific criminal proceeding (*procedural supervisor*) shall be appointed by the head of an appropriate prosecutor authority upon the commencement of pre-trial investigation. If necessary, the head of the prosecuting authority may appoint a team of prosecutors to perform duties of prosecutors in a specific criminal proceeding and also, the team leader to govern other prosecutors.[6]

The procedural supervisor shall perform the duties of prosecutor in a specific criminal proceeding (which includes pre-trial investigation and judicial proceedings) from its commencement to the very completion.[7]

At the same time, a public prosecutor is appointed to a permanent position and can be removed from office, or his/her powers may be suspended only on the grounds and according to the procedure established by the Law "On the Public Prosecutor's Office" (Part 3 of Article 16). Part 2 of Article 37 of CPCU highlights that "*the prosecutor shall perform the duties of prosecutor in a specific criminal proceeding from its commencement to the very completion. Another prosecutor may perform the duties of prosecutor in this same criminal proceeding solely in the cases stipulated for in Parts 4 and 5 of*

[5] Part 5 of Article 8-1 of the Law of Ukraine "On the Public Prosecutor's Office".

[6] Part 1 of Article 37 of the Criminal Procedure Code of Ukraine.

[7] Part 2 of Article 37 of the Criminal Procedure Code of Ukraine.

Article 36, Part 3 of Article 313, Part 2 of Article 341 of this Code, and Part 3 of this Article".

In the meantime, the practice of appointing prosecutors, including their appointment as procedural supervisor, shows that this principle is frequently disregarded, leading to serious shortcomings and flaws at all stages of criminal proceedings**.**

The principles of impartiality and objectivity of procedural guidance are secured in the provisions of Part 1, Article 36 of CPCU, which specify powers of a prosecutor in the criminal process and establish that "*a public prosecutor in the course of performing his/her duties in compliance with the requirements of the present Code, is independent in his/her procedural activities, and any interference therein on the part of persons who have no legitimate authority, shall be forbidden. State authorities, local self-government, enterprises, institutions and organisations, officials and other natural persons shall be required to execute legitimate demands and procedural decisions of a public prosecutor".*

The practice of exercising such powers by a procedural supervisor demonstrates that prosecutors do not always adhere to the requirements of the legislation.

The following key weaknesses were identified both in the organisation of procedural guidance within the structure of prosecution bodies, and in its regulatory and methodological support:[8]

1. there is an artificial distribution of the procedural guidance function within the Prosecutor General's Office between different deputies of the Prosecutor general. It results in disruption of internal management processes and, in some cases, inadequate cooperation between different structural units, as well as excessive bureaucracy related to reaching agreements on procedural decisions;
2. the bulk of the workload of prosecutors in the units of supervision in criminal proceedings within the Prosecutor General's Office and regional prosecutor's offices is the so-called "area-based control" over the prosecutors of lower levels. Often, it constitutes interference with the work of procedural supervisors in specific proceedings, which is in direct violation of the current criminal procedure law;
3. the prosecutor's offices lack a well-reasoned approach to determining the number of prosecutors at each level (local and national), or ensuring balance in distribution of workload between them. Moreover, there is no unified set of criteria for the workload of an individual prosecutor conducting procedural guidance;
4. development of differing local approaches to the exercise of procedural guidance in criminal cases;
5. the existing system of statistics and analysis of prosecutor's office performance in criminal proceedings is based on "manual" shaping of data and mechanical compilation of indicators. The data is incomplete and fragmented, and electronic reporting tools are rarely used.[9]

There is an urgent need to improve the functioning of procedural guidance,[10] because:

1. in practice, prosecutors have different views concerning the function of procedural guidance, its meaning and forms. In the legislation, the term "procedural guidance" is used in different contexts, which does not contribute to a unified understanding of the meaning and role of this function of the prosecutor's offices;
2. according to the Constitution of Ukraine, the organisation of pre-trial investigation is one of the functions of the public prosecutor's office, whereas the Criminal Procedure Code assigns this role to the head of a pre-trial investigation agency. As a result, in practice, functions of these two positions significantly overlap, often preventing effective cooperation between these institutions. At the local level, cooperation between the investigation agency and prosecutor's office is often based on personal contacts of their heads, accompanied by "informal" agreements regarding joint activities and decisions;
3. despite rather clear legislative safeguards for the procedural supervisors' independence, in practice, they are dependent on their immediate superiors and the prosecutors of the higher-level prosecutor's offices exercising the "area-based control". The range of possible interference with the procedural activities of the prosecutor is quite broad – from accessing the materials of criminal proceedings through the Unified Register of Pre-Trial Investigations to reducing bonuses and transferring the case to another prosecutor only based on reporting at various operational meetings attended by the management;
4. the principle of "unchangeability" of a prosecutor is not always observed in practice. There are widespread instances when prosecutors are replaced at different stages of pre-trial investigation. Groups of prosecutors are not an exceptional instrument; they are created almost in every case.

[8] The study "The role of the public prosecutor at the pre-trial stage of criminal proceedings"", p.10, *http://ecpl.com.ua/wp-content/uploads/2017/10/prokuror_infografic.pdf*.

[9] Ibid.

[10] Ibid, pp. 7-8.

As a rule, only the senior prosecutor in charge of the group is familiar with case files while the rest of prosecutors are engaged mostly on ad hoc basis;

5. the existing practice of negative consequences for public prosecutors for acquittals and other lawful actions alleviating the situation for the suspect (release without a notice of suspicion, initiating a less severe restraint measure) is one of the reasons behind violations of the principles of objectivity and impartiality in criminal proceedings and de facto denials to collect exculpatory evidence.

The above suggests the following recommendations for better understanding of the role of procedural guidance, for improving the structure of the prosecution system in exercising of procedural guidance, and for implementing a "standard model" of quality performance of a procedural supervisor, namely:[11]

1. to exclude the elements of supervision inconsistent with procedural guidance through legislative amendments and leave procedural guidance as a single function of the prosecutor's office during pre-trial stage of criminal proceedings;
2. to separate the functions of the head of pre-trial investigation agency and procedural supervisor concerning organisation of pre-trial investigation by distinguishing between organisational and procedural functions and assigning the organisational functions to the head of pre-trial investigation agency;
3. to develop indicators to measure the effectiveness of prosecutors' provision of procedural guidance and introduce a system of regular evaluation;
4. to develop a quality management system for prosecutor's performance based on minimum requirements for provision of procedural guidance, regular internal peer review by most experienced colleagues, needs assessment concerning training and professional development of prosecutors – procedural supervisors, as well as regular training activities;
5. to harmonize the structure and key functions of the prosecutor's offices ensuring that these functions are consistent with each other, in particular, by eliminating overlaps of functions and tasks between structural units;
6. to eliminate the function of area-based control performed by the higher-level prosecutor's offices and redistribute human and financial resources to strengthen local prosecutor's offices;
7. to develop reasonable criteria for determining workload for prosecutors – procedural supervisors and the optimal number of procedural supervisors for prosecuting authorities of different level;
8. taking into account the international practice of using dossiers of public prosecutors, to analyse the feasibility of using the outdated instrument of supervisory proceedings. To consider the possibility of integrating the dossier into the electronic criminal case system in the future;
9. to take action for ensuring procedural independence of prosecutors, in particular: to discontinue the practice of reporting on the progress of investigation at operational or other meetings; to ban heads of prosecutor's offices from giving written and verbal instructions on the investigation process; to discontinue the practice of "informal punishment" of prosecutors for taking lawful action that mitigates the situation of the suspect or apprehended/accused individual; to ban approvals for procedural documents from the superiors;
10. to review relevant internal regulations on the exercise of procedural guidance and restrict the regulatory powers to the matters of organizing the work of prosecutor's offices and managing, without interference with procedural activities of prosecutors.

The model of procedural guidance in a pre-trial investigation can be presented as a logframe (matrix), when immediately after receiving an application or notification about the committed crime the procedural supervisors must verify the relevance of grounds for including this information in the Unified Register of Pre-Trial Investigations (URPI), as well as grounds for:

- making actual (physical) and procedural apprehension of a suspect;
- serving the notice of suspicion to a person concerned and assigning a measure of restraint in the form of arrest (restriction of movement);
- conducting search of a dwelling, seizure and arrest of communication means and correspondence;
- approving or personally participating in investigative actions concerning only/or with involvement of minors, chronically ill persons, pregnant women and mothers with many children;
- drawing an indictment and performing functions of a public (state) prosecutor in criminal proceedings, where this prosecutor served as a procedural supervisor.

At the same time, investigators from pre-trial investigation agencies should be granted greater autonomy in making procedural and forensic decisions regarding the planning and implementation of individual investigative actions, tactical operations and combinations aimed at gathering evidence concerning the event and the elements of criminal offense committed. Their investigative and operational search activities that imply forced interference with the constitutional rights and freedoms of an individual and a citizen must be coordinated with the procedural supervisor. ■

[11] The study "The role of the public prosecutor at the pre-trial stage of criminal proceedings", pp.10, *http://ecpl.com.ua/wp-content/uploads/2017/10/prokuror_infografic.pdf*, pp.14-15.

THE CONSTITUTIONAL COMPLAINT AND CRIMINAL LAW

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In the past five years, the courts of Ukraine have pronounced sentences to 95-150 thousand persons annually, while 70-80 thousand received the status of victims in criminal proceedings. Therefore, over the past five years, more than 1 million people came within the purview of criminal liability law, either as defendants or victims. While disagreeing with judgements of the courts of first instance in criminal conflicts, more than 50 thousand people every year filed appeals against the verdicts of these courts, and thousands filed cassation petitions.[1] Several hundreds of Ukrainians exercised their right to apply to the European Court of Human Rights (ECHR) and used other remedies.

The Law of Ukraine "On Amendments to the Constitution of Ukraine (concerning Justice) dated 2 June 2016 introduced another means of legal protection called the constitutional complaint. So far, there have been only several constitutional complaints about the constitutionality of the law on criminal liability, which is strange because the Criminal Code of Ukraine (CCU) is "packed" with provisions that are questionable in terms of constitutionality. Quite often criminal legal conflicts are artificial precisely due to the faults of the law on criminal liability. However, the consequences of guilty or not guilty verdicts for a particular person are significant. This points at the need to study issues related to opportunities of using the constitutional complaint mechanism both for protecting interests of a person who is a party to criminal proceedings and for improving the Criminal Code.

The first constitutional complaint arrived in the Constitutional Court on 10 October 2016,[2] and by 14 November 2017 their number reached 410. Of these complaints only 12 – judging from their titles – may relate to the law on criminal liability, but one of them directly refers to the unconstitutionality of certain provisions of the CCU, and another one refers to the Code on Administrative Offenses of Ukraine (CAOU).

As for the remaining ten complaints, there probably exist grounds for rejection of constitutional proceedings in the case, stipulated in Article 62 of the Law "On the Constitutional Court of Ukraine" (hereinafter – the Law). The point is that, according to Part 1 of Article 55 of the Law, a constitutional complaint is an application to review the conformity with the Constitution (constitutionality) of a law of Ukraine or individual provisions thereof, but the very titles of these submissions suggest that they are not constitutional complaints as they contain petitions to "review the criminal case of the convicted applicant", "overturn the conviction", "recognise opinions of the court, the prosecutor, the investigator on the application of legislation in criminal proceedings as violating the rights of individuals and contradict the Constitution of Ukraine", or "review the constitutionality of a resolution of the Verkhovna Rada of Ukraine" and "the decision of the panel of judges of the Chamber for criminal cases of the Supreme Court of Ukraine" (which are neither the law nor specific provisions of the law).

The registered constitutional complaint by I. Hyrya (No. 18/3010 (17) of 14 August 2017) on the conformity with the Constitution of Ukraine of provisions of para. "b" of Article 254-2 of the old Criminal Code of

[1] In 2016, as many as 15.7 thousand cassation petitions, cases, appeals, motions and materials of criminal proceedings were registered with Chamber of Criminal Cases of the High Specialised Court of Ukraine for Civil and Criminal Cases (HSCU); of them 12.8 thousand cases and materials were considered on merits. See "HSCU reviewed the performance of courts of civil and criminal jurisdiction in 2016 and outlined tasks for 2017" – official website of the High Specialised Court of Ukraine for Civil and Criminal Cases, 3 February 2017, *http://sc.gov.ua/ua/novini_za_i_pivrichchja_2017roku/u_vssu_proanalizovano_rezultati_roboti_sudiv_civilnoji_i_kriminalnoji_jurisdikcij_u_2016_roci_ta_okr.html*.

[2] See "Constitutional complaints at the Constitutional Court of Ukraine as of 14 November 2017" – official website of the Constitutional Court of Ukraine *http://www.ccu.gov.ua/novyna/konstytuciyni-skargy-shcho-nadiyshly-do-konstytuciynogo-sudu-ukrayiny-za-stanom-na-14-2*.

Ukraine (1960), which was applied in the judgement of the Military Court of the Central Region of Ukraine dated 29 August 2000 in a criminal case against the applicant and Yu. Korobka will probably be rejected for two reasons: (1) it refers to the old court decisions, while pursuant to para. 3 of the Final Provisions of the Law, "a constitutional complaint may be submitted if a final judicial judgement in the case of a person became effective no earlier than 30 September 2016"; and (2) the Constitutional Court is unlikely to change its legal position, formulated in the Ruling of 30 June 2004 No. 55-u/2004 on the refusal to initiate open constitutional proceedings upon the constitutional appeal of a citizen I. Hyrya regarding the official interpretation of the provision of paragraph "b" of Article 254-2 of the Criminal Code of Ukraine (1960).

The constitutional complaint by O. Svyechkaryov (No. 18/4833 (17) of 9 November 2017) on the conformity with the Constitution of Ukraine of provisions of Part 1 of Article 33, Part 10 of Article 294, Parts 1, 2 of Article 268, and Article 130 of CAOU can be more promising in this regard. Judging by the numbers of articles, the complaint deals with court decisions that convicted a person for driving under the influence. Unfortunately, it is impossible to analyse this constitutional complaint as it remains unpublished.

Therefore, currently there are no specific constitutional complaints pointing at the unconstitutionality of the provisions of the law on criminal liability. However, it is safe to say that grounds for their submission do exist, and their consideration by the Constitutional Court may be linked to a number of questions that above all require theoretical contemplation and subsequent approbation. These include:

1. What is the meaning of the words "the law of Ukraine" in the context of the "constitutional complaint", provided in Article 151-1 of the Constitution and in Part 1 of Article 55 and other provisions of the Law, and what exactly is "the law of Ukraine on criminal liability (its specific provisions)" applied in the final court decision in the case?

The words "law of Ukraine" in the Law are used in all cases that refer to the constitutional complaint. According to the Constitution of Ukraine, the law is a normative legal act, which the Verkhovna Rada of Ukraine adopts on the issues specified in the Constitution, and the President of Ukraine signs it, accepting it for execution, and officially promulgates it. This apparently should leave no doubt that other acts, other than those meeting said criteria, cannot be accepted for consideration. But there are some doubts.

First, Part 3 of Article 57 of the Constitution reads that "Laws and other normative acts that determine the rights and duties of citizens, but that are not brought to the notice of the population *by the procedure established by law, are not in force*".[3]

As is known, the procedure for the promulgation of laws is currently regulated by the Presidential Decree No. 503 "On the Procedure of Official Publication of Regulatory and Legal Acts and Their Entry into Force" dated 10 June 1997. Since this Decree, just like other decrees, is not a law, then all laws determining the rights and duties of citizens, which were brought to the notice of the population by the procedure established by this Decree, *rather than by law*, are ineffective. In other words, currently Ukraine has no laws in effect, other than those that do not determine the rights and duties of citizens.

To fix this situation, it is necessary to adopt a law on the procedure of bringing normative and legal acts that determine the rights and duties of citizens to the notice of the population and use it as a basis for promulgating all relevant laws – and only after that they can be considered effective.

Second, although the Law refers not just to "the law", but to "the law of *Ukraine*", all international treaties ratified by the Verkhovna Rada should also be considered as laws of Ukraine. This conclusion builds on Part 1 of Article 9 of the Law "On International Treaties of Ukraine", which states that the text of an international treaty of Ukraine shall be recognized as *an integral part of the law* on ratification. This is important in view of criminal law, since Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) establishes that "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national *or international law* at the time when it was committed". Here we should point that punishable under Article 438 of the Criminal Code are "any other violations of the rules of war that are considered legally binding by the Verkhovna Rada"; under Article 439 – "the use of WMD prohibited by international agreements that are considered legally binding by the Verkhovna Rada", and under Article 440 – "development, production, purchasing, storage, distribution and transportation of WMD prohibited by international agreements that are considered legally binding by the Verkhovna Rada". This means that national courts can directly apply provisions of relevant international treaties ratified by Ukraine as provisions of the law of Ukraine on criminal liability.

Third, despite provisions of Article 17 of the Law "On the Enforcement of Judgements and Application of Case Law of the European Court of Human Rights", which states that while adjudicating cases the courts shall apply the Convention and the case law of the Court as *a source of law*, the ECHR's case law cannot be considered as the law of Ukraine. After all, concepts of "the law of Ukraine" and "a source of law" are obviously not identical, as the law of Ukraine is not the sole source of law, and the term "the law of Ukraine" does not cover the concept of "the case law of the Court". In its practice, the ECHR takes into account the national legislation, including the laws of Ukraine,

[3] Hereinafter emphasis added by the author.

while in the processes of law-making and enforcement of the laws of Ukraine the ECHR's case law is given due consideration.[4] For example, Part 5 of Article 9 of the Criminal Procedure Code of Ukraine (CPCU) clearly states that "the criminal procedural legislation of Ukraine shall be applied in the light of the case law of the European Court of Human Rights". Therefore, we can only talk about the mutual influence of these two sources of law.

Fourth, neither decrees of the Cabinet of Ministers of Ukraine, issued from 18 November 1992 through 21 May 1993 pursuant to the Law "On Temporary Delegation of Authority to the Cabinet of Ministers of Ukraine to Issue Decrees in the Field of Legislative Regulation" dated 18 November 1992, nor Presidential decrees issued within three years after the Constitution of Ukraine enters into force (in line with para. 4 of Section XV "Transitional Provisions" of the Constitution) can be considered as the laws of Ukraine. Although some of these acts are still in effect, neither the Cabinet's decrees nor Presidential orders have ever been adopted according to the procedure appropriate for laws or recognised as the laws of Ukraine. Therefore, these are *bylaws*.

Fifth, Parts 1 and 2 of Article 3 of CCU indicate that "the Criminal Code of Ukraine… shall be the Ukrainian legislation on criminal liability", and "the laws of Ukraine on criminal liability adopted after the entry of this Code into force, shall be incorporated in this Code after their entry into force". At first glance, it may seem that the words "Ukrainian legislation on criminal liability", "the laws of Ukraine on criminal liability" and "the Criminal Code of Ukraine" have the same meaning as there are no relevant legislation or corresponding laws functioning outside the Criminal Code of Ukraine.

Here we should refer to the Constitutional Court Decision concerning the interpretation of the term "legislation" (No. 12 of 9 July 1998), which states the following: "The term 'legislation'... may be used in different meanings: in some cases it refers to the laws only; in other cases – mostly codified – the term 'legislation' may include both laws and other acts of the Verkhovna Rada of Ukraine, as well as acts of the President of Ukraine, the Cabinet of Ministers of Ukraine, and in some cases – regulatory legal acts of the central executive bodies" (para. 3 of the reasoning part). In para. 1 of the operative part, the Constitutional Court further clarified this position by mentioning current international treaties of Ukraine that are considered legally binding by the Verkhovna Rada and omitting executive orders of the President and the Cabinet of Ministers, as well as regulatory acts of central executive bodies.

Since apart from the title and wording in Part 1 of Article 3, the Criminal Code no longer refers to the term "Ukrainian legislation on criminal liability", but actively uses the term "the law (laws) of Ukraine on criminal liability" in many of its provisions, it can be assumed that the former was used by mistake, and the lawmakers never intended to include bylaws as components of the CCU.

Further on, Article 3 of the CCU disregards laws (or specific provisions thereof), adopted as a follow-up to the provisions of the Criminal Code, but for various reasons not incorporated in the CCU after their entry into force. There are three broad groups of such laws:

1) laws defining the procedure of execution of criminal liability in different forms, or liberation from such liability. These include laws "On the Rehabilitation of Victims of Political Repressions", "On the Administrative Supervision of Persons Released from Places of Confinement", "On the Application of Amnesty in Ukraine"; relevant amnesty laws repeatedly adopted in different years; a number of provisions of the Criminal Procedure Code of Ukraine, the Criminal Executive Code of Ukraine, CAOU, the Code of Labour Laws of Ukraine, as well as other laws or their specific provisions (primarily those concerning the obligation to dismiss the convicted persons and the prohibition of their employment in certain positions);

2) the final and transitional provisions of the laws that amended the CCU. These include, for example, "The Final and Transitional Provisions" of the Law of 5 April 2001, which put the CCU (2001) into action, or "The Final Provisions" of the Law of 15 April 2008, which defined the peculiarities of applying the CCU provisions in the context of humanization of criminal liability;

3) certain provisions of other laws, if a change or cancellation of which may actually lead to criminalization or decriminalization of an act, or to strengthen or mitigate criminal liability. For example, the adoption of the new Criminal Code in 2001 decriminalized smuggling of currency valuables. However, in 2002 the Customs Code of Ukraine defined currency valuables as a type of goods, thus criminalising smuggling once again – until 2011, when the lawmakers removed from the CCU (Article 201) referral to goods as a subject of contraband. Another example: it is the Tax Code of Ukraine (para. 5, Subsection 1, Section XX), rather than the CCU, determines whether offenses against property constitute a crime. As a result, multiple changes to tax legislation repeatedly introduced artificial criminalization (or decriminalization) of common types of property-related offences (such as theft and fraud).

All three groups of the above laws (or their specific provisions) can be verified for the constitutio nality if they were applied in the final court decision in a criminal case.

[4] See S. Shevchuk, "Conformity of the case law of the European Court of Human Rights and the Constitutional Court of Ukraine" – "Visnyk Konstytutsiynoho Sudu Ukrainy", No. 4-5, 2011.

Sixth. Even though the laws of Ukraine on criminal liability adopted after the CCU's entry into force are incorporated into it after their own entry into force (Part 2 of Article 3 of the CCU), the lawmakers sometimes act contrary to the established rule: relevant laws of Ukraine, adopted following enactment of the Criminal Code, though included in it after their entry into force, remain non-operational. This concerns, for example, the law of 14 October 2014, which supplemented Article 366-1 of the CCU. It entered into force on 26 October 2014 but was *put into operation* only on 26 April 2015. Such conflicts should be resolved in favour of a person prosecuted without extending the validity of the article to acts committed in the period prior to its enactment, based on Part 2 of Article 58 of the Constitution: "No one shall bear responsibility for acts that, at the time they were committed, were not deemed to have been an offence by law".

And seventh, separate structural elements (norms) of the law of Ukraine on criminal liability, such as chapters, articles, parts of articles, notes, paragraphs, clauses, sentences, phrases, words and figures, should be viewed as its specific provisions, therefore each of these elements can be recognised as unconstitutional.

2. Can the Criminal Code of 1960 be viewed as "the law of Ukraine on criminal liability", and its provisions to become subject to verification for the conformity with the Constitution of Ukraine based on the constitutional complaint?

The loss of effect of the old Criminal Code (1960) on 1 September 2001 is rather relative. The provisions of the previous CCU, demonstrating the phenomenon of ultra-active criminal law, can be used independently in the form of retrospective application of the law on criminal liability, and also applied in conjunction with the requirements of the current Criminal Code, for example, when establishing a specific criminal content of individual forms of plurality of crime.[5]

Therefore, provisions of the previous Criminal Code (1960) can be reviewed for their constitutionality on the grounds of constitutional complaint, even though according to para. 3 of Section III "Final Provisions" of the Law "a constitutional complaint may be submitted if a final judicial judgement in the case of a person became effective no earlier than 30 September 2016". One should also consider Part 2 of Article 77 of the Law, which stipulates that "as an exception, a constitutional complaint may be accepted, when *more* than three months have passed from the effective date of a final judicial judgment that applies the law of Ukraine (specific provisions thereof), where the Court declares its consideration as being necessary on the grounds of public interest". Also relevant is the provision of Part 3 of Article 63 of the Law, according to which if the Senate or the Grand Chamber finds that the issues raised in the constitutional complaint are of particular social importance in the protection of human rights, the Court may reject the termination of the consideration of such complaint, even if its withdrawal has been requested by the subject of the right to constitutional complaint.

This system of exceptions in practice gives the Constitutional Court broad discretion to ensure that human rights are protected with the maximum possible guarantee.

3. What "human rights" does Article 55 (para. 6, Part 2) of the Law refer to in the context of specifying human rights safeguarded by the Constitution of Ukraine, which in the opinion of the subject of the right to constitutional complaint, have been violated by the application of the law? Should these rights be exceptionally constitutional, or just those listed in Chapter II "Human and Citizen' Rights, Freedoms and Duties" of the Constitution?

Pursuant to Article 151-1 of the Constitution, the Constitutional Court shall decide on compliance with the Constitution of Ukraine (constitutionality) of a law of Ukraine upon constitutional complaint of a person alleging that the law of Ukraine applied in a final decision of his or her case contravenes the Constitution. Therefore, this article is not about contradiction of the law with human rights, but rather its contradiction with the *Constitution of Ukraine*. Similarly, the Law dwells on "human rights safeguarded by the *Constitution of Ukraine*" (para. 6, Part 2 of Article 55). Therefore, said rights should be certainly understood as constitutional rights only, but not as human rights guaranteed, for example, by the Convention for the Protection of Human Rights and Fundamental Freedoms or the Civil Code of Ukraine – of course, apart from human rights that are simultaneously safeguarded by the Constitution.

As for the second part of the question, it is obvious that human rights are determined not only in Chapter II, but also in other chapters of the Constitution, and the Constitutional Court agrees with this statement.[6] See, for example, Chapters I, III, IV, VIII.

Article 8 declares that in Ukraine the principle of the rule of law is recognised and effective, and guarantees appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution; Article 19 states that the legal order in Ukraine is such that no one shall be forced to do what is not envisaged by law. Article 14 guarantees land property rights, while Article 17 guarantees that the Armed Forces or other military formations shall not be used by anyone to restrict the rights and freedoms of citizens. Article 13 establishes the right of every citizen to utilise the natural objects of the people's property rights in accordance with the law.

[5] For more detail, see O. Dodurov, M. Havronyuk, "Criminal Law" (training manual) – Vaite, 2014, pp. 22.

[6] See, for example, para. 1 of the operative part of the Decision in the case on the equality of parties in the trial No. 9 dated 12 April 2012.

Article 70 and some other articles guarantee citizens' right to vote at the elections and referendums, and that elections to bodies of state power and local self-government are free and held on the basis of universal, equal and direct suffrage, while voters are guaranteed the free expression of their will.

Article 92 establishes that human and citizen's rights and freedoms, the guarantees of these rights and freedoms, as well as the rights of indigenous peoples and national minorities are determined exclusively by the laws of Ukraine.

Article 129 sets forth fundamentals of administering justice, which can be also viewed as rights, or, rather, guaranteed opportunities: the equality of all participants in a trial before the law and in court; ensuring that the guilt is proved; adversarial procedure and freedom of the parties to present their evidence in court and ensure that it meets the burden of proof; providing the accused with the right to defence; ensuring the right to appeal and, in cases prescribed by law, the right to cassation. The same Article establishes that a judge shall be independent and governed by the rule of law, while Article 147 stipulates that the Constitutional Court shall act on the basis of the rule of law principles.

Therefore, *all* constitutional rights without exception should be understood as "human rights" under para. 6, Part 2 of Article 55 of the Law. It is particularly important, because according to constitutions of some other countries (e.g. Spain or Germany), grounds for a constitutional appeal include protection of a limited scope of constitutional rights and freedoms.[7]

4. Which provisions of the law of Ukraine on criminal liability are questionable in terms of their constitutionality?

There are quite a few of them.

First, these are all provisions of the Criminal Code that establish criminal liability for acts that other laws of Ukraine – primarily the Code of Administrative Offences of Ukraine – entail administrative liability.

The problem is that the CAOU within the Ukrainian legal system is not really a code of administrative misconduct, but rather criminal-administrative code, or, in the meaning of Article 61 of the Constitution, a law that provides for *liability of the same type* to that established by the Criminal Code. It is predetermined by at least three factors, namely, that:

1) the Special Part of the CAOU, along with administrative misconduct (such as offenses against the established order of management in various spheres, which consist in violation of certain rules, procedures, etc.), also entails liability for acts of a criminal nature, that is, related to violence, theft and destruction of property, disturbance of public order and the like (domestic violence, petty theft of property, disorderly conduct (hooliganism), involvement in prostitution, bringing a minor to the state of intoxication, illicit production of narcotic drugs or psychotropic substances, planting or cultivation of opium poppy or cannabis, and many more);
2) misconduct and offences under the CAOU can be subject to criminal sanctions (such as arrest, correctional works, public works), while the CAOU does not provide for the possibility of relief from liability or punishment, or substitution with lighter punishment;
3) during the investigation of so-called administrative offences, coercive measures typical for *criminal* proceedings may be applied (detention, personal search and examination of belongings, seizure of personal belongings and documents, etc.). The CAOU provides for a purely inquisitorial process with no elements of a competitive one, while said measures are carried out without any judicial control and no adequate guarantees of the right to protection. Meanwhile, these can help to retrieve evidence, essential for a certain criminal proceeding. The fact of the applicant's administrative arrest being directly linked to his apprehension and custody as a suspect in a criminal case was specifically mentioned in the ECHR Judgment in the case of *Doronin v Ukraine* of 19 February 2009. The CAOU authorizes officials, most of whom do not have legal education, to draw up reports (protocols) on the offense and make legally important decisions restricting human rights (administrative detention up to three days, a penalty in the form of deprivation of special right, and the like).

At the same time, according to Part 2 of Article 9 of the CAOU, administrative liability for the offences under this Code shall occur unless these offences by their nature entail criminal liability in accordance with the law. Similar provision is included in Part 2 of Article 458 of the Customs Code of Ukraine. However, there are many examples where the Criminal Code, and the CAOU, and the Customs Code, or other law impose liability for the same acts that cannot be distinguished by any quantitative or qualitative indicators. Therefore, based on the requirement of Article 62 of the Constitution "All doubts in regard to the proof of guilt of a person are interpreted in his or her favour", in such cases the person should be brought to responsibility, which is the lightest for this person.

Persons can be held liable for the same acts:

- Article 172 of the CCU (gross violation of labour law), and Article 41 of the CAOU (violation of requirements of labour legislation);
- Article 220-2 of the CCU (falsification of financial documents for the purposes of concealing signs of bankruptcy or stable financial insolvency), and Article 166-16 of the CAOU (falsification of documents reflecting financial activity during the bankruptcy proceedings);
- Article 204 of the CCU (sale of illegally manufactured alcohol), and Article 177-2 of the CAOU (sales of counterfeit alcoholic beverages);

[7] M. Hultay, "The constitutional complaint within the mechanism of accessing the constitutional law" (monograph) – "Pravo", pp. 62, 88.

- Article 245 of the CCU (destruction or impairment of forests by fire), and Article 77 of the CAOU (destruction or damage of forests resulting from careless handling of fire, violation of fire safety requirements in forests, which caused a forest fire or its spread on large area);
- Article 252 of the CCU (wilful destruction or impairment of territories of sites of natural conservation by fire), and Article 77-1 of the CAOU (burning of vegetation within the objects of the natural reserve fund);
- Article 269 of the CCU (illegal transportation of explosive or flammable substances by aircraft), and Article 133 of the CAOU (violation of the rules for carriage of dangerous substances or objects in air transport);
- Article 277 of the CCU (actions taken to render communication routes, buildings on these routes and rolling stock inoperative, where these actions could cause an accident of a train), and Article 109 of the CAOU (laying of objects on the railroad tracks that may disrupt the traffic of trains);
- Article 283 of the CCU (unauthorised non-emergency stopping of a train), and Article 109 of the CAOU (unauthorised non-emergency stopping of a train);
- Article 304 of the CCU (engaging minors in drinking alcohol), and Article 180 of the CAOU (bringing a minor to the state of intoxication);
- Article 307 of the CCU (transfer of narcotic drugs or psychotropic substances to places of imprisonment), and Article 188 of CAOU (concealed from inspection transfer of substances that cause doping to persons held in penitentiary institutions);
- Article 333 of the CCU, and Article 212-4 of the CAOU (violation of the regulations of international transfer of goods and materials subject to the state exports control);
- Article 334 of the CCU, and Article 113 of the CAOU (violation of international flights regulations);
- Article 351-1 of the CCU (failure by an official to comply with the lawful requirements of the Accounting Chamber, a member of the Accounting Chamber; creating artificial obstacles for their work; providing knowingly false information), and Article 188-19 of the CAOU (failure to comply with the lawful requirements of the Accounting Chamber, a member of the Accounting Chamber; creating artificial obstacles for their work in execution of their official duties, providing false or incomplete information);
- Article 395 of the CCU, and Article 187 of the CAOU (violation of rules related to administrative supervision).

This list is not exhaustive.

Para. 22 of Part 1, Article 92 of the Constitution establishes that acts that are crimes, administrative or disciplinary offences, and liability for them shall be determined exclusively by the laws of Ukraine. This essentially means that the specific elements of crimes and administrative offences must be meaningfully different, cannot coincide, and must be determined by different laws. In cases where one and the same act is viewed as a crime by the CCU, and an administrative offence by the CAOU, it turns out that the CCU calls this act a crime, which is not. This violates the constitutional requirement "Everyone is guaranteed the right to know his or her rights and duties" (Article 57 of the Constitution).

The problem concerns not only individuals, but also legal entities under private law as they can be subjects of the right to a constitutional complaint on the one hand and be subject to criminal legal measures on the other (Articles 96-3 - 96-11 of the CCU). Along with criminal prosecution, administrative sanctions for the same acts can be imposed on independent entrepreneurs and authorized representatives of legal entities pursuant to the laws "On the Protection of Economic Competition" (Articles 50, 52), "On the Protection against Unfair Competition" (Article 21), "On the State Market Supervision and Control over Non-food Products" (Article 44), "On Labour Protection" (Article 43), and the like. For example, Article 203-2 of the Criminal Code establishes responsibility for gambling business (maximum punishment is a fine of up to 50 thousand non-taxable minimum incomes), and Article 3 of the Law "On the Prohibition of Gambling Business in Ukraine" (the Gambling Ban Law) punishes for organising or conducting games of chance (maximum penalty is a fine of 8,000 minimum wages).

Second, Part 1 of Article 57 of the Constitution guarantees every person's right to know his or her rights and duties. This means that one cannot allege a person in violation of the CCU provisions that were formulated in contradiction to Article 3 of the same Code: "The criminality of any act, and also its punishability and other criminal consequences shall be determined exclusively by this Code". In this regard, we should recall several dozens of articles in the Special Part of the Criminal Code, whose blanket dispositions deal with violations of rules, orders, legislation, and so on, that is, violations of the requirements included, among other things, in bylaws. It is the Criminal Code that must specify and describe all acts that entail criminal liability. For example, if a person is held liable for the violation of fire safety rules, then the Criminal Code should specify, which rules, and where they can be found (here we need to clarify that if the Rules of the Road, for example, are universally known, then "current transport regulations related to traffic safety", mentioned in Article 291 of the CCU, are not).

In addition, according to Part 2, Article 74 of the Criminal Code, "a person convicted of acts made no longer punishable by law shall be immediately discharged from punishment imposed by a court". As a result, in some – rather frequent – cases a person may be serving punishment for an act in violation of the rule that was cancelled without changing provisions of a relevant CCU article, under which this person was convicted (for example, a substance, for producing of which this person had been sentenced, is no longer viewed as narcotic).

The provision of Part 2 of Article 68 of the Constitution ("*ignorance* of the law shall not exempt from legal liability"), coupled with Part 1 of Article 19 of the Constitution, according to which no one shall be forced to do what is not envisaged by legislation, can be interpreted as if ignorance of a regulatory and legal act, other than the law, cannot serve as grounds for legal liability altogether. A person has to be aware of certain rules only because they derive from his or her official, professional, parental or other duties that have been

explained to this person in accordance with the law. Therefore, bringing an average person to criminal liability, for example, for violating the rules of water protection, is rather questionable, as such violation was caused by ignorance of very specific bylaws. In all cases where the act is in violation of the rules, requirements of the legislation, or special duties of a person, appropriate disposition of Criminal Code articles should describe characteristics of the special subject of the crime.

The impossibility to know one's duties may also be explained by the fact that the CCU is crammed with evaluative terms that typically characterise the acts and consequences of the crime. From the CCU articles it is sometimes unclear which damage or harm entails criminal liability (when it comes to such definitions as "significant damage to the interests of a citizen, state and public interests, or interests of the owner", "prejudice to the interests of Ukraine", "significant harm to health" or "damage to health resorts and rehabilitation zones"). At the same time, one and the same consequence of a crime in different CCU articles may be grave or special grave, or entail substantial or significant damage. For example, Part 1 of Article 137 of the CCU describes "*substantial harm to the health of the victim*", Part 2 of the same Article provides aggravating circumstance – "*death of a minor or other grave consequences*", while Part 4 of Article 323 deals with "*substantial harm to the health of the victim or other grave consequences*". From this wording it may seem that substantial harm to the health and the death of a minor are the consequences of the same magnitude. Similarly, Article 242 of the Criminal Code recognises "death of people" and "mass destruction of flora and fauna" as the consequences of the same nature and gravity. Some articles of the CCU refer to such grave consequences as "accidents with people", "massive spread of disease among people", "accidents", "fire", "serious environmental pollution", while in others the grave consequence is equivalent to the damage to property in the amount less than the cost of the cheapest car. Most articles of the CCU do not define the term "grave consequences" altogether, and only a few define them in cases, where these are caused by material losses.

This approach suggests the lack of any gradation of social values, taken under protection by the Criminal Code, disregarding provisions of Article 3 of the Constitution: "The human being, his or her life and health, honour, dignity, inviolability and security are recognised in Ukraine as the highest social value".

Third, all those numerous provisions of the Criminal Code that entail different liability of certain categories of the population for one and the same act, should be considered discriminatory and contrary to Articles 8, 21, 24, 129 of the Constitution ("In Ukraine, the principles of the rule of law is recognised and effective"; "All people are free and equal in their dignity and rights"; "Citizens have equal constitutional rights and freedoms and are equal before the law"; "The main principles of justice are… equality of all participants in a trial before the law and the court"). For example, theft of someone else's (military) property by a serviceman shall be punishable (without aggravating circumstances) by imprisonment for a term from 3 to 8 years, while the same crime committed by a civilian entails a fine, correctional works, or imprisonment for a term up to 3 years. Neglect of official duty that resulted in material damage and committed by a civilian shall be criminally punishable if this damage equals to or exceeds 100 non-taxable minimum incomes; in case of military personnel, such damage should be equal or exceed 250 non-taxable minimum incomes. In line with Articles 133 and 134 of the Code of Labour Laws, the employees, whose tools, devices, special clothing and other objects provided by their employers, were damaged due to their negligence, shall bear only material responsibility in the amount of the damage done, which, however, shall not exceed their average monthly earnings. For servicemen, such acts imply serious criminal liability.

The same is true about some corruption-related crimes, when the liability for identical acts (e.g. improper benefits or abuse of office) is different, depending on the state share (51% or 49%) in a statutory fund of an enterprise, where the person in question is working.

In some cases, the law establishes disciplinary or administrative responsibility for some individuals, and imposes criminal liability for others for the same acts. A vivid example of that is Article 390 of the Criminal Code, according to which persistent avoidance of work, or systematic violation of public order or established rules of residency by a person sentenced to restraint of liberty shall be punishable by imprisonment for a term up to 3 years. The same type of punishment shall be applied to persons who demonstrate persistent disobedience to lawful requirements of the administration of correctional institution (Article 391), and the analysis of court verdicts confirms that hundreds of persons in Ukraine have been sent to prison simply for refusing to make their bed or wash dishes on multiple occasions.

Equally discriminatory – but this time with regards to victims of crimes and their families – are the provisions of the Criminal Code that envisage different punishments for murders of certain categories of persons or their close relatives in connection with the performance of their official or public duties. Judging from sanctions in relevant articles, the life of a judge, a juror or a lawyer seems to be less valuable than that of a statesman, a leader of a political party or a military commander. The same applies to three Criminal Code articles that establish different liability for taking various categories of hostages, as well as multiple articles implying different responsibility for interference in the activities or violence against different categories of public officials, and the like.

Fourth, according to Article 12 of the CCU, gravity of crime is recognised as a criterion for their classification, while the role of formal classifier by this criterion is placed on sanctions, included in the articles of the Special Part of the Code. Therefore, having compared elements of crimes, for which the Criminal Code establishes the same, completely *identical* sanctions, we have to conclude that the gravity of intended grievous bodily injury, which caused the victim's death, unlawful purchase of special technology for secret obtaining of information, which caused a substantial damage to

state and public interest, rape of a minor, and unlawful appropriation of a vehicle worth more than $8,000 is identical. From this comparison we can see the true place of human life and health, honour, dignity, inviolability and security (recognised by Article 3 of the Constitution as the highest social value) in the hierarchy of social values. From this perspective, how can anyone possibly view the sanctions of relevant CCU articles as proportional?

Fifth, certain provisions of the Special Part of the Criminal Code introduce criminal liability for the acts that are sanctioned by the Constitution and even considered as socially useful.

For example, Article 279 of the CCU entails responsibility for blocking transportation routes by obstructing the traffic or any other method, where it disrupted normal operations of traffic, while Article 293 punishes organisation of group activities that seriously disrupt public order, or significantly disrupt operations of public transport, any enterprise, institution or organisation, and also active participation therein. In the meantime, the CCU disregards the fact (for example, in the notes to these articles, as in Part 3 of Article 204-1 of the CAOU) that pursuant to Article 39 of the Constitution the validity of these CCU provisions cannot extend to cases related to realisation of the citizens' constitutional right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government, and for which no restrictions were established by the court in accordance with the law. In other words, road blocking or significant disruption of the public transport operation may occur only because the number of the rally participants exceeds capacity of the infrastructure. Similarly, no person shall be held liable for acts related to protecting himself or herself from the mortal danger to one's own life or the lives of other people, as well as dwelling, as stipulated by Articles 27 and 30 of the Constitution. The same applies to situations where an act committed by a person is a reaction to violation of his or her constitutional right which cannot be limited, such as resistance to a public officer in response to encroachment by the latter on this person's dignity, or unlawful violation of his or her right to freedom, or theft of the employer's property in response to groundless non-payment of salaries, or destruction of a certain property item that violates the human right to safe environment.

Sixth, quite questionable in terms of their constitutionality are all provisions of the Criminal Code that fail to comply with the principles of legality and legal certainty, and consequently – the rule of law principle, which is recognised and effective in Ukraine (Article 8 of the Constitution). In line with the Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary meeting on 25-26 March 2011, "accessibility of the law means that the law is to be intelligible, clear and predictable", "legal certainty requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable", while "the Parliament shall not be allowed to override fundamental [human] rights by ambiguous laws"; even though "the need for certainty does not mean that discretionary power should not be conferred on a decision-maker where necessary, provided that procedures exist to prevent its abuse. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficiently clarity, to give the individual adequate protection against arbitrariness [of government]".[8]

Legal uncertainty also contradicts provisions of Article 57 of the Constitution ("everyone is guaranteed the right to know his or her rights and duties"), and of Article 62 ("an accusation shall not be based on… assumptions", while "all doubts in regard to the proof of guilt of a person are interpreted in his or her favour".

For example, legal certainty is out of the question, when we talk about liability for so-called "hooliganism", since the disposition of Part 1 of Article 296 of the CCU is based on purely evaluative terms – "serious disturbance of public order", "motives of explicit disrespect to community", "most outrageous or exceptionally cynical manner". Nonetheless, in 2016 alone as many as 1,065 persons were sentenced under this article, only because judges "assumed" the presence of *serious* disturbance or *exceptional* cynicism in these people's actions.

Cases of misinterpretation of the Criminal Code provisions by courts also occur, as demonstrated by the Constitutional Court Decision No. 10 dated 18 April 2012 in the case concerning application of the qualifying element "officer of a law enforcement agency" to officials of the State Executive Service. According to this Decision and contrary to the traditional views of the Ukrainian lawyers, provisions of Article 2 of the Law "On the State Protection of Court and Law Enforcement Personnel" (defining the term "officer of a law enforcement agency") were ruled as inapplicable in interpretation of relevant CCU article.

5. Which constitutional complaint shall be deemed inadmissible in terms of para. 4, Part 1 of Article 62 of the Law?

Pursuant to Article 62 (para. 4, Part 1), inadmissibility of a constitutional complaint is one of the grounds for rejection of constitutional proceedings in the case. Part 4 of Article 77 of the Law further explains that the Court shall reject constitutional proceedings by declaring a constitutional complaint inadmissible, where the content or demands of such constitutional complaint are manifestly ill-founded or where the right to submit a complaint has been abused.

To clarify grounds for inadmissibility, we need to answer two questions: (1) what content or demands of a constitutional complaint are *manifestly* ill-founded, and (2) what the *abuse of the right* to submit a complaint means.

[8] Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), *http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-ukr.*

The answer to the first question is included in parts 1-3 of Article 77, which establish criteria for *admissibility* of constitutional complaint. Therefore, such complaint may be considered as inadmissible:

(*a*) by formalisation (if it fails to comply requirements set forth in the Article 55 of the Law concerning the content, attached documents, procedure of certification of a copy of the final court judgment in the case);

(*b*) by subject (if the subject is a person who was not a party to the proceedings, or legally incapable person, or a legal entity under public law);

(*c*) by exhaustion of all domestic legal remedies (if no legally valid court judgment is delivered on appeal, or, where the law provides for cassation appeal – a judicial judgment delivered on cassation is available);

(*d*) by limitation period (if more than three months have passed from the effective date of a final court judgment, with the exception of circumstances set forth in parts 2 and 3 of Article 77 of the Law).

As for the abuse of the right to submit a complaint, this concept is purely evaluative, meaning that the applicant most likely will be denied consideration of his or her complaint, if this person submits the second complaint on the same matter, although the Court has already ruled on the merits of a complaint, rejected initiation of proceeding in the case, or ruled about its closing. The repeat application cannot be viewed as the abuse of the right to submit a complaint after it was returned to the subject by the Head of the Secretariat, as the Law expressly states that "any return of a constitutional complaint shall not preclude repeat application to the Court in compliance with this Law" (Part 3, Article 57).

There exists certain conflict between provisions of parts 2 and 3 of Article 57 of the Law (according to which the Secretariat shall conduct preliminary review of applications to the Court, and where *the form* of a constitutional complaint is non-compliant with this Law, the Head of the Secretariat shall return it to the subject of the right to constitutional complaint), and provisions of parts 2-6 of Article 37, Part 3 of Article 61, Part 2 of Article 63, Part 1 of Article 67, and parts 1 and 4 of Article 77 of the Law (according to which the issue of inadmissibility of a constitutional complaint by its form falls within the competence of the Court, rather than its Secretariat). Pursuant to Article 50, the Secretariat can return the constitutional complaint to its subject only in case of obvious errors in its form (e.g. if a subject submitted the constitutional complaint, but named it "cassation petition", "constitutional petition", or "constitutional appeal", or when the title of this complaint already demands cancellation of certain ruling, and the like).

6. What are the legal implications of unconstitutionality of provisions of the law of Ukraine on criminal liability, established by the Constitutional Court, in the context of its recognition as exceptional circumstance (Part 3 of Article 459 of the CPCU)?

On 3 October 2017 the Parliament adopted, and on 30 October 2017 submitted to the President of Ukraine the Law "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Justice of Ukraine and other Legislative Acts" (Reg. No. 6232 dated 23 March 2017). As of 19 November 2017, the President has not yet signed this bill into law.

This law introduces amendments to various provisions of the Criminal Procedure Code of Ukraine, including those concerning legal consequences of the unconstitutionality of the law, established by the Constitutional Court (Articles 459-467 of the CPCU).

If this Law enters into force, the following algorithm can be applied.

As determined by the Constitutional Court, unconstitutionality of provisions of the law of Ukraine on criminal liability, applied by the court during the settlement of a case, is recognized as an exceptional circumstance. Such circumstance shall serve as grounds for review of judicial decisions of any instance, which have become legally effective but have not been enforced yet. A person concerned has the right to file an application in the form specified in Article 462 of the CPCU to review the court decision within 30 days from the date of official promulgation of the Constitutional Court's decision. This application shall be submitted to the court of the instance, which was first to make a mistake being unaware of the law's unconstitutionality (or provisions thereof).

Further, the application to review the court decision shall be considered by the court for no longer than two months from the date of its receipt in accordance with the rules established by the CPCU for criminal proceedings in the court of the reviewing authority. At the same time, the court may rule to suspend the execution of a judicial decision under consideration until the end of the review process; it also has the right not to examine evidence regarding the circumstances established in a judicial decision under consideration, if not disputed. Having reviewed the case with due consideration of the Constitutional Court decision, the court has the right to overturn a sentence or ruling, to deliver a new sentence or ruling, or to leave an application without satisfaction.

A court decision on the effects of criminal proceeding under exceptional circumstance may be reappealed in accordance with the procedure established by the CPCU for appealing decisions of the court of the relevant instance. As the new court decision comes into effect, decisions of other courts in this criminal proceeding shall be null and void. If the article of the Special Part of the Criminal Code, under which the person was convicted, is declared unconstitutional, then all relevant provisions of the law of Ukraine on criminal liability shall lapse from the date of the decision of the Constitutional Court on their unconstitutionality – in this case the sentence and corresponding decisions of other courts confirming this sentence, become subject to annulment.

Therefore, the mechanism of a constitutional complaint – if adequately used – can have a positive effect both on the protection of the rights of convicts, and on the quality of the law of Ukraine on criminal liability. ■