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Director General	Anatoliy Rachok
Editor	Valeriya Klymenko
Layout and design	Oleksandr Shaptala
Technical support	Volodymyr Kekukh

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Editorial address:
16 Lavrska str., 2nd floor,
Kyiv, 01015
tel.: (380 44) 201-11-98
fax: (380 44) 201-11-99
e-mail: info@razumkov.org.ua
web site: www.razumkov.org.ua

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CONTENT

"Judicial Reform in Ukraine: Progress, Problems and Prospects" was conducted by the Razumkov Centre with the support of the Matra programme of the Embassy of the Kingdom of the Netherlands.
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JUDICIAL REFORM IN UKRAINE: CURRENT RESULTS, PROSPECTS AND RISKS OF THE CONSTITUTIONAL STAGE

The process of establishing the judiciary in Ukraine since its independence has been quite inconsistent and contradictory – not only due to its heritage, but also because it has often been accompanied by acute political confrontation and attempts of opposing political forces and governmental teams to gain control over the judiciary. Reformation activity that was initiated and implemented in this period did not lead to establishment of an independent and fair court in Ukraine.

After the 2010 Presidential Election, the new President Viktor Yanukovych announced that another judicial reform was going to take place, which led to dramatic changes in the national judiciary. Analysis of these changes and their consequences gives reasons to assume that, through this reform, the President managed to enhance his control over judicial authority, to restrict its independence, and to weaken self-government of judges. Significant rotation amongst judges also took place. In general, it has considerably deteriorated judicial situation in Ukraine.

Today, the judicial reform has reached its final – constitutional – stage.

On 10 October 2013, the Verkhovna Rada pre-approved the Presidential draft Law "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges". The corresponding Decree of the Verkhovna Rada of Ukraine was supported by 244 deputies. All opposition factions of the Parliament (*Batkivshchyna*, UDAR, *Svoboda*) manifested against adoption of the law claiming that implementation of its provisions would compromise not only the judicial independence, but also the democracy in Ukraine.

The course of preparation and adoption of this draft Law (obtaining, *inter alia*, positive resolution of the Venice Commission) revealed tendencies that have been characteristic of the 2010 judiciary reform since its initiation. Thus, national legislation in the recent years has been using European standards in quite a peculiar way by borrowing the form and filling it up with "appropriate" contents. In fact, what we have now is not an approximation of national laws to international judicial norms and standards, but adjusting these norms to situational needs by using controlled and dependent judiciary in Ukraine. Hence, this is a selective adoption of recommendations and guidelines of international institutions.

As it is widely known, the Venice Commission gave a generally positive opinion on the draft Law mentioned above. It was this draft (as well as the resolution of the Constitutional Court of Ukraine and the declaration signed by 30 deputies of the Parliamentary Assembly of the Council of Europe) that the President's representative and deputies of the Party of the Regions faction mostly relied on when encouraging their colleagues to support pre-approving the bill.

Accepting the above-mentioned documents of European institutions we should obviously have some reservations. *Firstly*, the draft law contains genuine "European" provisions able to deceive European structures that evaluate new laws from their own European perspective. *Secondly*, current evaluations of the "Ukrainian progress" by European institutions have somewhat enforced nature stipulated by soon-to-happen Vilnius summit and possibly by the Association Agreement to be signed between the European Union and Ukraine at the summit. While mainly stressing its positive progress towards the association, Europe also seeks to maintain Ukraine's European integration prospects. *Thirdly*, there are reasons to assume that current authorities have used peculiar means to push its legislative initiatives not only inside (in the Parliament and Constitutional Court), but also outside the country – on the international realm.

Preliminary approval of the Presidential draft Law on amending the Constitution has had a dramatic impact on the judicial reform. On the one hand, it has enabled to legitimise the key legislative changes approved in 2010 and to enshrine provisions in the Constitutions, implementation of which may politicise the judiciary to an even bigger extent and increase the dependence of judges. On the other hand, it has generated a political and expert discussion aimed at searching for a compromise, which results might involve the following: excluding the most risky provisions for the independence of judges and courts, at least, and preparing a new bill approved by all key political forces of the country, at best.

Current situation calls for ensuring fair and independent justice, as well as stimulates governmental representatives, opposition and the society to look for optimal ways out.

The analytical report consists of four chapters.

The first chapter outlines general features of international documents that guarantee human rights to a fair trial and provides documents' extracts essential for "young democracies" that Ukraine belongs to.

The second chapter gives brief analysis of the progress, current results and consequences of the 2010 judicial reform.[1]

The third chapter describes the process of the constitutional stage of the judicial reform and provides a detailed analysis of the draft Law "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges".

The fourth chapter makes general conclusions as well as offers proposals and recommendations aimed at improving national justice.

[1] Detailed analysis of this stage of the judicial reform is available at: Judicial reform in Ukraine: Current Results and Prospects (*in Ukrainian*). Informational and analytical materials of the Razumkov Centre, April 2013. – *http://www.razumkov.org*.

1. COURT WITHIN THE SYSTEM OF STATE GOVERNANCE: INTERNATIONAL NORMS AND STANDARDS

Since gaining independence, the system of justice in Ukraine has actually been in a state of continuous reformation. As a rule, every reformatory step in the sector has been made under the slogans of independence of the judiciary and harmonisation of the national judicial system and the judiciary with international and European norms and standards.

In particular, the 1992 Concept of the Judicial and Legal Reform was primarily designed "to guarantee autonomy and independence of judicial bodies from the influence of the legislative and executive branches", and also "to implement democratic ideas of justice worked out by the world practice and science".[1] In 2006, Ukraine's President by his Decree approved the *Concept for improving the justice system to ensure fair trial in Ukraine in line with European standards*.[2] Finally, the Law "On the Judicial System and the Status of Judges" that started the judicial reform was adopted in 2010 with the aim of "reforming the judiciary in line with international standards".[3]

Given all that, before coming to the analysis of the 2010 judicial reform, it makes sense to make a brief review of the key international documents shaping the above-mentioned international standards and setting targets for Ukraine seeking to actualise its constitutional status of a democratic state governed by the rule of law.

Below, one will find the summary description of international documents and institutions that guarantee and defend the human right to a fair trial by setting norms and standards of justice tested by the world practice. Extracts from the documents mentioned in the text are presented in the Annex to this Section "*International norms supporting the human right to a fair trial…*".[4]

1.1. INTERNATIONAL DOCUMENTS AND INSTITUTIONS THAT GUARANTEE AND PROTECT THE HUMAN RIGHT TO A FAIR TRIAL

Currently, the main international documents legally binding on Ukraine that establish the right of every human to a fair trial and equality of all before justice are the UN General Declaration of Human Rights and International Covenant on Civil and Political Rights,[5] and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[6] These (and other) documents are incorporated in the national legislation of Ukraine and must be unconditionally followed.[7]

The efficiency of these documents is ensured by appropriate institutional mechanisms created on their basis or for their implementation – bodies performing continuous control (monitoring) of the progress of the fulfilment of commitments assumed with signing of one or another international document by member states.

For instance, pursuant to Article 28 of the International Covenant on Civil and Political Rights, the Human Rights Committee was set up within the system of the UN bodies in 1977 to control the implementation of that Pact by member states.[8] To promote observance of the principles of the rule of law, protection of civil rights and freedoms by the UN member states, the UN Human Rights Council was established[9] and a mechanism of Universal Periodic Review (UPR) was introduced to assess the situation in the field of human rights in every UN member state. Ukraine currently undergoes the second UPR procedure: on 14 March 2013, the 22nd session of the UN Human Rights Council meeting in Geneva reviewed the progress

1 Verkhovna Rada Resolution "On the Concept of the Judicial and Legal Reform in Ukraine" No. 2296 of April 28, 1992. – Verkhovna Rada of Ukraine web site, *http://zakon4.rada.gov.ua/laws/show/2296-12*.

2 President of Ukraine Decree No. 361 of May 10, 2006. – *Ibid*., *http://zakon4.rada.gov.ua/laws/show/361/2006*.

3 Memorandum to the Bill "On the Judicial System and the Status of Judges". – *Ibid*., *http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=37806*.

4 The Annex also gives sources of extracts from the documents quoted in the text.

5 The Declaration and the Pact are incorporated in the so-called Charter on Human Rights, also including the 1976 International Pact of Economic, Social and Cultural Rights and Optional Protocol to it (1976). The Charter on Human Rights is also known as the International Bill of Human Rights. Ukraine is a party to all constituent parts of the Charter (except the Optional Protocol to the Pact of Economic, Social and Cultural Rights that was signed in 2008 but not ratified) and Optional Protocols to the *Covenant* on *Civil and Political* Rights No.1 (acceded in December 1990) and No.2 (acceded in March 2007).

6 See: Convention for the Protection of Human Rights and Fundamental Freedoms.

7 Pursuant to Article 9 of the Constitution of Ukraine: "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine", the Law "On International Treaties and Agreements", as well as the Vienna Convention on the Law of International Treaties, acceded by Ukraine in 1986.

8 Observance of the principles of the rule of law, protection of civil rights and freedoms by states is also controlled by the UN General Assembly, the *UN* High *Commissioner* for *Human Rights* (that institute was established in 1994) and other UN bodies.

9 Pursuant to UN General Assembly Resolution No. 60/251 of March 15, 2006, the Council has the status of an auxiliary body of the General Assembly.

achieved in the observance of human rights in Ukraine and gave recommendations intended to improve situation in that field.[10]

On the European level, the key document for protection of human rights (including the right to a fair trial) is the above-mentioned European Convention on Human Rights. Article 6 of the Convention provides: "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …*". That article is considered as a pillar of formation and activity of a democratic state governed by the rule of law. In pursuance of separate provisions of the Convention, a number of protocols have been adopted which, together with the main document, make up the so-called System of the European Convention on Human Rights.[11]

In pursuance of the Convention, and in order to guarantee and defend the rights of its citizens, the European Court of Human Rights (ECHR) was set up to control the observance of its provisions by member states by considering people's complaints about violation of their conventional rights (Box "*The European Court of Human Rights*").

The Court judgments are binding on the concerned states.[12] The Committee of Ministers of the Council of Europe controls the execution of judgments. If a state refuses to do so, it may face the Court following a suit filed by the Committee of Ministers. Long non-execution of ECHR judgments may lead to political implications only, including the suspension of the Council of Europe' membership.

Having ratified the Convention on Human Rights in 1997, Ukraine incorporated its provisions in the national legislation and undertook to execute ECHR judgments in all cases to which it is a party. Since then, Ukrainian citizens have been under the ECHR jurisdiction.

The ECHR practice and the European Convention on Human Rights are to be applied by Ukrainian courts as sources of law.[13]

1.2. INTERNATIONAL INSTITUTIONS AND DOCUMENTS SETTING NORMS AND STANDARDS FOR THE JUDICIAL ACTIVITY

The importance of the judiciary, its role in the system of checks and balances of democratic governance and in protection of civil rights and freedoms, implementation of the principle of the rule of law make international institutions especially attentive to such issues as the courts structure, the status of judges and judicial procedures. The international law has a comprehensive system of international legal acts setting standards and criteria that should be followed by states when building and supporting their judicial systems, providing the legislative basis for the relations of courts with legislative and executive bodies, and also requirements to the conduct, selection, appointment, promotion, responsibility of judges, etc.

This system incorporates the UN General Assembly resolutions, first of all – Resolutions No.40/32 and No.40/146 of 1985 that approved the *Basic Principles on the Independence of the Judiciary*; documents adopted by the Committee of Ministers of the Council of Europe, its consultative and expert bodies and forums held under its auspices (Box "*Consultative bodies of the Council of Europe …*"). Those documents, as a rule, are advisory, but the UN and the Council of Europe member states, respectively, deem it necessary to take their provisions into account when developing national legislations and in the practice of organisation and support of the judicial activity, and the Council of Europe's Charter entitles the Committee of Ministers to apply to the member states with inquiries about implementation of measures aimed at fulfilling its recommendations.

Consultative bodies of the Council of Europe dealing with issues of law and justice[14]

European Commission for Democracy through Law (Venice Commission of the Council of Europe) is a consultative body of the Council of Europe dealing with the constitutional law. It was established in 1990 to help post-socialist states reform their constitutions and legislation in line with such norms of the Council of Europe as democracy, the rule of law, human rights and freedoms. The Commission includes experts – reputable lawyers, judges of High courts, etc. appointed by states for four years.

European Commission for the Efficiency of Justice (CEPEJ) was established in 2002. The Commission includes 47 experts (one from each member country of the Council of Europe). Its activity aims to enhance the quality of operation of the judicial and law-enforcement systems of the Council of Europe member states.

Consultative Council of European Judges (CCJE) established in 2000 to assist with observance of Article 6 of the European Convention on Human Rights. The Council may only include judges from the Council of Europe member countries. The Council's activity is intended to enhance independence, impartiality and competence of judges.

On the European level, the fundamental documents setting the standards for operation, role and status of the judiciary and guarantees of judges' independence currently include the *European Charter of Judges* adopted by the European Association of Judges in 1993;[15] the *European Charter on the Statute for Judges* adopted by participants of a multilateral meeting in July 1998; *Recommendation of the Council of Europe Committee of Ministers to member states on judges: independence, efficiency and responsibilities* adopted in 2010; opinions of the Consultative Council of European Judges (CCJE) and some other documents.

Those documents are especially important for Ukraine, since most of them take into account the specifics of the so-called "emerging democracies", i.e., post-socialist states that embarked on the path of democratic development but lack proper democratic traditions, established political and legal culture, and deep civic consciousness of the state

[10] For more detail see Annex "*Universal Periodic Review of observance of human rights*".

[11] All in all, 15 Protocols to the Convention have been adopted. Ukraine is a party to all currently effective protocols.

[12] Pursuant to Article 46 of the Convention: "Any of the High Contracting Parties may at any time declare that it recognizes as compulsory 'ipso facto' and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention".

[13] Law "On Execution of Judgments and Application of Practices of the European Court of Human Rights", Article 17.

[14] Those bodies are supplemented by the Consultative Council of European Prosecutors (CCPE) – a consultative body of the Committee of Ministers Council of Europe established in 2005, and the Lisbon Network for the judicial system officer training established in 1995.

[15] European Association of Judges is a regional group of the International Association of Judges (founded in 1953). Ukraine has been active in it since 2004.

THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

The Court was established in 1959 pursuant to Article 19 of the European Convention on Human Rights. It has been working in its present format since 1998, when the Court was united with the European Commission of Human Rights.

ECHR is an independent body funded from the Council of Europe budget. The number of judges corresponds to the number of the Council of Europe member states (one judge from each state; now – 47). Judges are elected by PACE from each member state of the Council of Europe by a majority of votes from among three candidates offered by the state for a period of 6 years (with a right to be re-elected). ECHR judges represent not their states but solely the Court. No national authorities can exert influence on the ECHR, which presents an additional guarantee of its independence, neutrality and impartiality.

For consideration of the cases referred to it, the Court, dependent on the complexity of the case, sits in the format of committees of three judges, chambers of seven judges and the Grand Chamber of 17 judges. A judge elected from a state that is a party to a case must be member of a chamber or the Grand Chamber. The Grand Chamber includes the Court President, his deputies, and judges nominated in line with the Court Regulations. The Grand Chamber powers encompass passage of judgments in interstate disputes, in cases rejected by a Court chamber,[1] and in cases in which a Court chamber passed its judgement but a party to the case filed a petition for the case transfer for consideration to the Grand Chamber. In the latter instance, if a case "raises a serious question affecting the interpretation or application of the Convention or Protocols thereto or raises a serious issue of general importance", not a single judge from the chamber that passed the judgment in the case may sit in the Grand Chamber, with the exception of the Chamber President and the judge who represented a state-party in the case.

The Grand Chamber decisions are final. **A Chamber's decision becomes final**: a) if the Parties declare that they will not request the case to be referred to the Grand Chamber; b) three months from the judgment date, if reference of the case to the Grand Chamber has not been requested; c) when the panel of the Grand Chamber rejects the request to refer the case to the Grand Chamber. The final judgment shall be published.

As a rule, **ECHR judgments contain individual and general measures** (they may also envisage *measures of "amicable settlement"*).

Individual measures:

• Obligation of the defendant state to reimburse damage (material and moral) and legal costs to the claimant. The amount ("amount of just satisfaction") is established by the Court, its payment by the defendant state is obligatory (Article 41 of the Convention).

• restoration of the violated rights, i.e., restoration (where applicable) of the legal status the claimant had before the violation of provisions of the Convention concerning him, which may be done in the form of re-consideration of the case by a national court (including restoration of proceedings in the case), as well as re-consideration of the case by an administrative body.

General measures – measures intended to remove the possibility of a similar violation of rights of other persons, i.e., to remove systemic problems that led to violation of the Convention' provisions. They also include publication of ECHR judgments in official state periodicals.

Measures aimed at restoring the violated right[2] and general measures are not specified in the ECHR judgement, the defendant state determines and implements them on its own.

No executive writ has been issued following an ECHR judgment, the claimant is not obliged to personally present the judgment for execution or somehow push such execution. The defendant state is obliged to execute the Court judgment to the benefit of the claimant after it receives a notice from the ECHR that its judgment has become final.

ECHR and Ukraine

The first ECHR judge from Ukraine was elected in 1996. Now, the ECHR Judge from Ukraine is Hanna Yudkivska (elected in April 2010). For the period of her maternity leave, Stanislav Shevchuk was appointed the *ad hoc* judge from Ukraine.

In 1998, the post of the Commissioner in Charge of Observance of the Convention for the Protection of Human Rights and Fundamental Freedoms was instituted, charged with the functions of representation of Ukraine's Government in ECHR and the European Commission of Human Rights (active at that time).[3]

In 1999, the Law of Ukraine "On Executive Procedures" was adopted to take into account the need of execution of ECHR judgments, in particular – payment of just satisfaction. In 2004, pursuant to Article 3 of the Law, execution of ECHR judgments was vested in the section of enforcement of judgments of the State Executive Service Department of the Ministry of Justice.

In 2006, **the Law of Ukraine "On Execution of Decisions and Application of the Practice of the European Court of Human Rights"** was adopted, that:

• **provides that Ukrainian courts when considering cases must take the European Convention on Human Rights and the ECHR practice as the source of law**;

• **specifies the procedure for execution of ECHR judgments by Ukraine's state bodies** – with the exception of the procedure for re-consideration of cases (meanwhile, re-consideration of cases is allowed as an additional individual measure on the basis of procedural codes of Ukraine);[4]

• **defines general measures aimed at executing the ECHR judgments** as "measures aimed at removing the systemic problem specified in the Judgment and its prime cause" and refers to such measures the following: "(a) introduction of amendments to the effective legislation and the practice of its application; (b) introduction of amendments to the administrative practice; (c) arrangement of professional training for study of the Convention and the Court practice for prosecutors, barristers, law-enforcement officers, officers of immigration services, other categories of workers whose professional activity is related with application of the law and keeping in custody; (d) other measures determined – on the condition of supervision by the Committee of Ministers of the Council of Europe – by the defendant state in line with the Judgment to ensure remedy of systemic defects, termination of violations of the Convention caused by such defects and guarantee utmost reimbursement of the effects of those violations" (Article 13).

Within the framework of the Law implementation, in particular:

• the Commissioner in Charge of Observance of the Convention for the Protection of Human Rights and Fundamental Freedoms was renamed the Government Commissioner in the Affairs of the European Court of Human Rights.[5] The Commissioner's activity is supported by the Secretariat established within the system of the central staff of the Ministry of Justice (with the rights of a department) and the Commissioner's representatives working in the Main Department of Justice of the Autonomous Republic of Crimea, regional departments and city departments in Kyiv and Sevastopol and heading regional divisions of the Commissioner's Secretariat. Currently, the Government Commissioner for the ECHR Affairs is Nazar Kulchytskiy;

• the Ministry of Justice issued Orders No.67/5 "On Conduct of Expert Examination of Drafts of Regulatory-Legal Acts for Compliance to the Convention for the Protection of Human Rights and Fundamental Freedoms" and No.68/5 "On Conduct of Expert Examination of Regulatory-Legal Acts Subject to State Registration for Compliance to the Convention for the Protection of Human Rights and Fundamental Freedoms" of 15 August 2006. Methodological Recommendations for Conduct of Expert Examination of Regulatory-Legal Acts (Their Drafts) for Compliance to the Convention for the Protection of Human Rights and Fundamental Freedoms (Methodological Recommendations for Expert Examination of Drafts of Regulatory-Legal Acts) were worked out.

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1 According to Article 30 of the Convention: "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects".

2 There are exceptions to this rule, in particular: if it deals with violation of the claimant's rights at his dismissal from some public post, ECHR may oblige the defendant state to reinstate the claimant in the former position as an additional individual measure.

3 CMU Resolution "On the Commissioner in Charge of Observance of the Convention for the Protection of Human Rights and Fundamental Freedoms" No.557 of April 23, 1998.

4 National codes of procedures mention re-consideration of court judgments on grounds of establishment by an international judicial institution whose jurisdiction is recognised by Ukraine of violation of international obligations by Ukraine during the court consideration of the case. See: Code of Civil Procedure (Article 354), Code of Business Procedure (Article 111-15), Code of Administrative Justice (Article 236), Code of Criminal Procedure (Article 446).

5 CMU Resolution "On Measures at Implementation of the Law of Ukraine 'On Execution of Judgments and Application of the Practice of the European Court of Human Rights'", No.784 of May 31, 2006.

political elite and society. In fact, the Venice Commission, mentioned above, was established to assist the "emerging democracies", and the specifics of these countries is taken into account when issuing recommendations and conclusions by bodies of the Council of Europe.

Therefore, the post-socialist countries, including Ukraine, building democratic states governed by the rule of law, can use the experience of developed democracies, their consultative and practical assistance.

1.3. KEY NORMS AND STANDARDS OF THE JUDICIAL ACTIVITY

Summary and analysis of provisions of the above-mentioned documents make it possible to single out the main norms and standards of operation of the judicial branch, as well as the actors executing justice – the courts and judges.

Independence of the judicial branch was certainly the priority norm, ensured, in particular, through the independence of courts and judges and, according to international norms, is to be enshrined in national documents of the highest level (constitution or other constitutional acts).

Meanwhile, three **specific features of implementation of this norm** deserve a mention.

***First*, practical provision of independence of courts critically depends on the political will**. In particular, the *Venice Commission Report on the Independence of the Judicial System* stressed "[…] As experience shows in many countries, however, **the best institutional rules cannot work without the good will** of those responsible for their application and implementation".[16]

***Second*, independence of courts always presumes practical observance of judicial ethic standards by judges**. Judges themselves should give no pretext for pressure on them. *CCJE Opinion No. 3 (2002)* reads: "The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures mean that **judges should behave in such a way as to avoid conflicts of interest or abuses of power**" (Para. 37).[17]

***Third*, independence of courts and judges cannot be separated from their responsibility**. In particular, the Preamble of the UN document "*Basic Principles on the Independence of the Judiciary*" emphasises: "[…] judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens". Next, it reads: "The principle of the independence of the judiciary entitles **and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected**" (Para. 6).[18]

Hence, ensuring the independence of courts mainly depends not on the existence of relevant national legislation but on the presence/absence of political will among the state actors who truly adhere to the principles of judicial independence, as well as on the activity of the judicial branch and judges, who in turn conduct fair/unfair hearings. On the other hand, it is the practical operation of courts (and judges) and their responsibility that determine the efficiency of the judicial branch, and therefore, its public legitimacy and citizens' confidence.

Independence of the judiciary, courts and judges

Independence of the judicial branch (achieved, *inter alia*, through the independence of judges) is not a goal-in-itself but a prerequisite for the exercise of the human right to justice, the principle of the rule of law. "[…] The purpose of independence […] is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence. […] The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law" (Recommendation CM/REC (2010) 12, Para. 3-4).[19]

There is a distinction between external and internal independence of courts and judges. External independence means independence of the judicial branch from the influence (pressure) of the legislative and/or executive branches. Internal – is the independence of courts and judges from judicial bodies.

Independence of the judicial branch and its guarantees are fixed in national legislations and implemented, first of all, through proper provision of the judicial branch and its officials with resources (including financial) and legislatively provided special procedures of selection, appointment and promotion of judges, as well as their proper social security and protection.

Regulatory-legal foundations of independence of the judiciary, courts and judges. The key principles of independence of the court and the status of judges should be enshrined in the Constitution (internal norms of the highest level), more specific norms (rules) – by norms not below the legislative level.[20] The law should specify all aspects of appointment/dismissal of judges, their remuneration and security measures.

Key principles of independence of judicial bodies: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law" (Para. 11).

Independence from external influence. Recommendation CM/REC (2010) 12 establishes: "The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts" (Para. 11).

[16] Report on the Independence of the Judicial System. Part 1: Independence of judges. – European Commission for Democracy through Law (Venice Commission), Strasbourg, March 16, 2010, p.4. Hereinafter, emphasis in quotations from documents is added.

[17] CCJE Opinion – hereinafter, the short title of the Opinion of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe.

[18] Basic Principles on the Independence of the Judiciary. – *http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx*.

[19] Recommendation CM/REC – hereinafter, the short title of the CM/REC Council of Europe Committee of Ministers' Recommendation to member states.

[20] See: European Charter on the Statute of Judges, Para. 1.2; Opinion No.1 (2001) CCJE on standards concerning the independence of the judiciary and the irremovability of judges, Para. 14; Recommendation CM/REC (2010) 12 on judges: independence, efficiency and responsibilities, Para. 7.

That is why "the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal" (Para. 18).

Basic Principles on the Independence of the Judiciary: " […] It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary" (Para. 1).

CCJE Opinion No.1 (2001): "[…] **decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law**. […] with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively" (Para. 65).

Provision of internal independence. The principle of internal independence of courts means that "the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity".[21]

CCJE Opinion No.1 (2001): "The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. **He or she is thus servant of, and answerable only to, the law**. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary" (Para. 64).

Funding of the judiciary

The state must provide judicial bodies with appropriate means (including financial) enabling them to properly discharge their functions, and provide judges with facilities for proper performance of their duties, in particular, for consideration of cases within reasonable terms. This refers to sufficiency of judges and qualified auxiliary personnel, as well as resources, premises and equipment.[22]

In particular, **proper funding of courts** is seen as a precondition of their independence. Say, *CCJE Opinion No.2 (2001)* notes: "[…] the funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions (Para. 2). […] Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence" (Para. 5).

Independence of judges is also critically dependent on **judges' remuneration** (salary). The law should guarantee the Judges' remuneration. Its level is to match the respect for their job, the scope of their duties, and the "burden of responsibility". In particular, the *European Charter on the Statute of Judges* recognises the role of proper remuneration of judges as a factor protecting judges "from pressures aimed at influencing their decisions and more generally their behaviour" and stresses the importance to guarantee payment of sick leaves and old-age pensions (Para. 6). Meanwhile, the *Venice Commission* believes that "Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out".[23]

Noteworthy, *CCJE Opinion No.1 (2001)* pays particular attention to new democracies: "[…] it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living" (Para. 62).

It provides that decisions on the scope of funding of courts, remuneration and social benefits for judges should be taken by **involving courts and judges.**

CCJE Opinion No.2 (2001): "It was therefore important that the arrangements for parliamentary adoption of the judicial budget include **a procedure that takes into account judicial views**" (Para. 10).

European Charter on the Statute of Judges: "Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare" (Para. 1.8).

The appointment and career of judges

All decisions on appointment/dismissal of judges, their promotion, expiry of office, application of disciplinary sanctions should be taken with participation of a body independent from the legislative and/or executive branches, formed by judges and mainly composed of judges (except the members by virtue of their office). The body is to take part in solving issues dealing with the probationary period of judges (where applicable), and in disciplinary proceedings, where such body should have a decisive say. **The norm of existence of an independent body is especially important for new democracies**. At the same time, there should be a possibility to appeal against decisions of disciplinary bodies in court.

Independence of judges is also secured by the requirement to obtain the judge's personal consent to his movement to another court or another position. An exception to this principle is permitted only in cases where the transfer represents a disciplinary sanction; in case of legal changes to the court system; and in case of a temporary assignment to reinforce a neighbouring court.[24]

European Charter on the Statute of Judges: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention **of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers** following methods guaranteeing the widest representation of the judiciary" (Para. 1.3).

[21] Report on the Independence of the Judicial System …, Para. 72.

[22] See: Basic Principles on the Independence of the Judiciary, Para. 7; European Charter on the Statute of Judges, Para. 1.6; Recommendation CM/REC (2010) 12…, Para. 33, 35.

[23] Report on the Independence of the Judicial System …, Para. 51.

[24] European Charter on the Statute of Judges, Para. 3.4.

CCJE Opinion No.1 (2001): "Informal appointment procedures and overtly political influence on judicial appointments in certain States **were not helpful models in other, newer democracies, where it was vital to secure judicial independence by the introduction of strictly non-political appointing bodies**" (Para. 34).

Recommendation CM/REC (2010) 12: "Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an **independent authority** or a court with all the guarantees of a fair trial and provide the judge with the **right to challenge the decision and sanction**. Disciplinary sanctions should be proportionate" (Para. 69).

Bodies involved in appointment and promotion of judges are to consider the professional and personal qualities of candidates and acting judges. The body should develop a system of criteria that it should make public and available for the corps of judges and the entire society.

Noteworthy, **when deciding on the appointment of a candidate for a judge, it is recommended to consider not only his previous activity but also the previous activity of his family members**.

CCJE Opinion No.1 (2001): "[…] the authorities responsible in member States for making and advising on appointments and promotions should now **introduce, publish and give effect to objective criteria**, with the aim of ensuring that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency" (Para. 25).

The European Charter on the Statute of Judges provides that the law should specify the circumstances "in which **a candidate's previous activities, or those engaged in by his or her close relations**, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court" (Para. 3.2).

Term of office

According to the European practice, "Ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence".[25] However, where the probationary period is practiced, it should be rather short: 2 to 3 years.

CCJE Opinion No.1 (2001): "It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office" (Para. 57).

Efficiency of the judicial branch: public confidence in courts and judges

Public confidence and respect represents one of the guarantees of judicial efficiency, and is decisively dependent, *firstly*, on the judges' conduct, both when they carry out their professional duties and in their private life. Judges must show availability, respect for individuals, and ability to preserve the secrecy of information they are entrusted with in the course of proceedings.[26]

Secondly, from a perspective of "a thoughtful observer", the positive/negative image of judges depends not only on practical deeds (decisions) of judges but also on the impression those deeds (decisions) may give. The latter demands the judges to provide clear and comprehensive explanations for the substance of their decisions – not only to the parties involved in court proceedings but also to the public. In other words, a judge is to ensure as access to judgment for the society.

Thirdly, it depends on the judges' perception of the public opinion of the court and justice. Judges should be aware of it, accept it (in case the opinion is negative) and determine factors that might have led to such a situation and remove them.

CCJE Opinion No.3 (2002): "**Public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system**: the conduct of judges in their professional activities is understandably seen by members of the public as essential to the credibility of the courts" (Para. 22).

"Judges should […] also ensure **that their professional competence is evident** in the discharge of their duties" (Para. 23).

"**Judges should conduct themselves in a respectable way in their private life"** (Para. 29).

"[…] **the judge answers the legitimate expectations of the citizens by clearly motivated decisions.** Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public" (Para. 40).

CCJE Opinion No.1 (2001): "When adjudicating between any parties, judges must be impartial, that free from any connection, inclination or bias, which affects – **or may be seen as affecting** – their ability to adjudicate independently. […] Not merely the parties to any particular dispute, but society as a whole must be able to **trust the judiciary. A judge must** thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also **appear to a reasonable observer be free therefrom**. Otherwise, confidence in the independence of the judiciary may be undermined" (Para. 12).

Recommendation CM/REC (2010) 12: "Judges, who are part of the society they serve, cannot effectively administer justice without public confidence. **They should inform themselves of society's expectations of the judicial system and of complaints about its functioning. Permanent mechanisms to obtain such feedback set up by councils for the judiciary or other independent authorities would contribute to this**" (Para. 20).

To sum up this brief review, it should be particularly stressed that the cited norms and standards are systemic and effective only in their totality. Their selective and/or partial implementation may lead to distortion of the overall system guaranteeing independence and efficiency of the judicial branch, loss of its public legitimacy as well as bar the discharge of its intrinsic functions. ■

[25] Report on the Independence of the Judicial System…, Para. 82.

[26] European Charter on the Statute of Judges, Para. 1.5.

INTERNATIONAL NORMS ENSURING THE HUMAN RIGHT TO A FAIR TRIAL AS WELL AS THE INDEPENDENCE OF THE JUDICIARY AS AN IMPORTANT CONDITION FOR ITS IMPLEMENTATION		
Human right to a fair trial		
1.	**Universal Declaration of Human Rights** Adopted by the UN General Assembly in 1948; ratified by Ukraine in 1973; entered into force in Ukraine in 1976.	Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him (Article 10).
2.	**Convention on Human Rights and Fundamental Freedoms** Adopted by the Council of Europe in 1950. Ukraine signed in 1995; ratified by Ukraine (with declarations and reservations) in July 1997; entered into force in Ukraine in September 1997.	In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6).
3.	**International Covenant on Civil and Political Rights** Adopted by the General Assembly in 1966. Ukraine signed in 1968; ratified in 1973; came into force in Ukraine in 1976.	All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations ii a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law (Article 14).
The independence of the judiciary and justice		
1.	**Basic Principles on the Independence of the judiciary** Endorsed by General Assembly resolution No.40/32 and No.40/146 as of 29 November and 13 December 1985.	The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (Paragraph 1). The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with die law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (Paragraph 2). The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law (Paragraph 3). There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law (Paragraph 4). It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions (Paragraph 7). The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law (Paragraph 11). Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience (Paragraph 13). Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review (Paragraph 20).

2.	**European Charter on the Law "On the Status of Judges"** Approved at the multilateral meeting organised by the Council of Europe, 8-10 July 1998. (Charter was also supported at a meeting of the heads of the Supreme Courts of Central and Eastern Europe on 12-14 October 1998)	The purpose of the law... is ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights (Paragraph 1.1). The fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level (Paragraph 1.2). In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary (Paragraph 1.3). The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy (Paragraph 1.5). Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which, (the decision of cases requires on every occasion – decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings (Paragraph 1.5). The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period (Paragraph 1.6). Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights, which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them (Paragraph 1.7). Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare (Paragraph 1.8). The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court (Paragraph 3.2). Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period (Paragraph 3.3). A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof (Paragraph 3.4).
3.	**Opinion No.1 (2001) of the Consultative Council of European judges (CCJE) for the attention of the committee of ministers of the council of Europe on standards concerning the independence of the judiciary and the irremovability of judges** (1 January 2001)	Judicial independence presupposes total impartiality on the part of judges. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects or may be seen as affecting – their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that "no man may be judge in his own cause". This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined (Paragraph 12). ***The level at which judicial independence is guaranteed*** The independence of the judiciary should be guaranteed by domestic standards at the highest possible level. Accordingly, States should include the concept of the independence of the judiciary either in their constitutions (Paragraph 14). The fundamental principles of judicial independence should be set out at the constitutional or highest possible legal level in each member State and its more specific rules at the legislative level (Paragraph 16, reference to the European Charter on the Status of Judges).

Basis of appointment or promotion

Appointments should be made "on the merits" based on "objective criteria" and that political considerations should be inadmissible (Paragraph 17).

The central problems remain (a) of giving content to general aspirations towards "merits-based" appointments and "objectivity" and (b) of aligning theory and reality (Paragraph 18).

The authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency". Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect (Paragraph 25).

Seniority requirements based on years of professional experience can assist to support independence (Paragraph 29).

The appointing and consultative bodies

...informal appointment procedures and overtly political influence on judicial appointments in certain States were not helpful models in other newer democracies, where it was vital to secure judicial independence by the introduction of strictly non-political appointing bodies (Paragraph 34).

Tenure – period of appointment

European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence (Paragraph 48).

When tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also Paragraph 3.3 of the European Charter) (Paragraph 53).

It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office (Paragraph 57).

The CCJE considered:

(a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see Paragraph 16 above); (b) that die intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and (c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area (Paragraph 60).

Remuneration

The CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living (Paragraph 62).

Freedom from undue external influence

Freedom from undue external influence constitutes a well-recognized general principle… The difficulty lies rather in deciding what constitutes undue influence (Paragraph 63).

Independence within the judiciary

The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party in side or outside the judiciary (Paragraph 64).

... decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law... with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively (Paragraph 65).

The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence, which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law"... This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case) (Paragraph 66).

The independence of the individual judge in the performance of its functions should be provided regardless of any internal judicial hierarchy (Paragraph 9).

4.	**Opinion No.2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights** (Strasburg, 23 November 2001)	2. The funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions. 3. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources at its disposal in order to perform efficiently. 5. **Although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations**. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. **Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.** 10. The development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget. **The CCJE agreed that it was therefore important that die arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.** 11. One form which this active judicial involvement in drawing up the budget could take would be to give die independent authority responsible for managing the judiciary – in countries where such an authority exists – a coordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees.
5.	**Opinion No.3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality** (Strasburg, 19 November 2002)	The present opinion covers two main areas: (a) the principles and rules governing judges' professional conduct, based on determination of ethical principles, which must meet very high standards and may be incorporated in a statement of standards of professional conduct drawn up by the judges themselves (b) the principles and procedures governing criminal, civil and disciplinary liability of judges ***A. Standards of judicial conduct*** 8. The ethical aspects of judges' conduct need to be discussed for various reasons. The methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice. 11. East European countries that are emerging from authoritarian regimes see law and justice as providing the legitimacy essential for the reconstruction of democracy. There more than elsewhere, the judicial system is asserting itself in relation to other public authorities through its function of judicial supervision. 22. Public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system: the conduct of judges in their professional activities is understandably seen by members of the public as essential to the credibility of the courts. 23. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything, which falls outside the application of the rules of law. As long as they are dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings. They should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions. They should also ensure, that their professional competence is evident in the discharge of their duties. 29. Judges should conduct themselves in a respectable way in their private life. 33. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardize die appearance of impartiality. 37. The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures mean that judges should behave in such a way as to avoid conflicts of interest or abuses of power. 39. Rules of professional conduct should require judges to avoid any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimizing the risk of conflicts of interest. 40. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary of communiqué setting up the tenor or clarifying the significance of their judgments for the public.

		B. Criminal, civil and disciplinary liability 75. As regards criminal liability, the CCJE considers that: i) judges should be criminally liable in ordinary law for offences committed outside their judicial office; ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions. 76. As regards civil liability, the CCJE considers that, bearing in mind the principle of independence: i) the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals (whether with or without permission of the court); ii) any remedy for other failings in the administration of justice (including for example excessive delay) lies only against the state; iii) it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of willful default. 77. As regards disciplinary liability, the CCJE considers that: i) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give (rise to disciplinary sanctions as well as the procedures to be followed; lii) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings; iii) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence; iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges); v) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court; vi) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by die statute or fundamental charter of judges, and should be applied in a proportionate manner.
6.	**Opinion** **10(2007) of the Consultative Council of European Judges on the Council for the Judiciary at the service of society** (Strasburg, 23 November 2007)	The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law (Paragraph 8). The Council for the Judiciary should also embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within die judiciary (Paragraph 12). The Council for the Judiciary is also obliged to safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law (Paragraph 14).
7.	**Recommendation CM/REC(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities** (adopted on 17 November 2010). (replaces Recommendation REC (94)12 “Independence, Efficiency and Role of Judges” of 13 October 1994)	***Judicial independence and the level at which it should be safeguarded*** The purpose of independence is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence (Paragraph 3). The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law (Paragraph 4). Judges should have: • Unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts (Paragraph 5); • Sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court. All persons connected with a case, including public bodies or their representatives, should be subject to the authority of the judge (Paragraph 6).

		The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level (Paragraph 7). Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy (Paragraph 8). A case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary (Paragraph 9). ***External independence*** The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of die rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts (Paragraph 11). If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in die judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal (Paragraph 18). Judges, who are part of the society they serve, cannot effectively administer justice without public confidence. They should inform themselves of society's expectations of the judicial system and of complaints about its functioning. Permanent mechanisms to obtain such feedback set up by councils for the judiciary or other independent authorities would contribute to this (Paragraph 20). ***Internal independence*** The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence (Paragraph 22). Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminaiy rulings or when deciding on legal remedies according to the law (Paragraph 23). ***Recourses*** Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently (Paragraph 33). A sufficient number of judges and appropriately qualified support staff should be allocated to the courts (Paragraph 35). To prevent and reduce excessive workload in the courts, measures consistent with judicial independence should be taken to assign non-judicial tasks to other suitably qualified persons (Paragraph 36). All necessary measures should be taken to ensure the safety of judges. These measures may involve protection of the courts and of judges who may become, or are victims of, threats or acts of violence (Paragraph 38). ***Status of the judge*** The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers (Paragraph 46). However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary) should be authorized to make recommendations or express opinions which the relevant appointing authority follows in practice (Paragraph 47). ***Liability and disciplinary proceedings*** The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence (Paragraph 66). Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate (Paragraph 69).

Sources: Universal Declaration of Human Rights. – *http://www.un.org/en/documents/udhr/*; Convention for the Protection of Human Rights and Fundamental Freedoms. – *http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm*; International Pact on Civil and Political Rights. – *http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx*; Basic Principles on the Independence of the Judiciary. – *http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx*; European Charter on the statute for judges. – *http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf*; Opinion No.1 (2001) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of judiciary and the irremovability of judges. – *https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3*; Opinion No.2 (2001) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights. – *https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP2&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3*; Opinion No.3 (2002) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. – *http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%203_EN.pd*; Opinion No.10 (2007) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society. – *https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3*; Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities. – *https://wcd.coe.int/ViewDoc.jsp?id=1707137*.

2. THE 2010 JUDICIAL REFORM: GOALS AND PROGRESS[1]

The 2010 judicial reform has fundamentally changed all elements of the national judiciary – the judicature, the status of judges, and the exercise of justice. These changes have touched all key aspects of the judicial activity: the structure of courts of general jurisdiction, the national judicature, the courts system and its powers, the procedures for applying to courts and trial procedures, the mechanism for appointing judges, grounds and procedures for bringing judges to responsibility, the system supporting the activity of courts, principles of judges' self-government and even the language of the judiciary.

The essence of the 2010 reform, its goals, objectives, specifics and the nature of its implementation were largely predetermined by prior events, in particular – the attempts to implement the judicial reform in 2006 by then President Viktor Yushchenko (those events are briefly described in the Annex to this section "*Sequence of events that preceded the judicial reform of 2010*"). Mr. Yushchenko failed to win Parliament's consent to adopt the basic bills submitted by him. However, the authors of the 2010 judicial reform used many of its previous provisions.

Goals and objectives of the judicial reform

The content of the reform was determined by its goals and objectives. The situation with the 2010 judicial reform from the very beginning was overshadowed by differences in the formulation of its goals by officials, on the one hand, and opposition politicians, independent lawyers, experts – on the other.

Official goals and objectives of the reform. Starting the judicial reform, *President Viktor Yanukovych* tasked the Working Group on the Judicial Reform established by him to prepare the agreed proposals on all-round reformation of the judicial system, the guarantees of the constitutional right of citizens to judicial protection and to perfect the legislative support for the judicature, justice and the status of judges.

Later, submitting to Parliament the Bill "On the Judicial System and the Status of Judges" critical for the reform, the President outlined four main goals for adopting the Law, and therefore – for implementing the judicial reform:

- reforming the system of justice in line with international standards;
- enhancing the role of courts and the status of judges in society;
- ensuring the independence of judges from influence on them, including from within the system of justice;
- simplifying the procedures for access to courts for every citizen.[2]

Later on, the President and other officials who played a key role in the reform specified its goals and objectives. According to them, **the official goals and objectives of the 2010 judicial reform were in full compliance with the Constitution of Ukraine, international legal documents, Ukraine's National Security Strategy, European practice and modern theories of justice.**

Assessments of the 2010 reform by many opposition politicians, independent lawyers, experts, judges were entirely different. At the very beginning of the reform the *Supreme Court Chairman (SCU) Vasyl Onopenko* noted the danger that the reforms will hide the attempts "to build a system for getting the 'required' judgment",[3] the desire "to establish 'private' rules for justice by all means", and "to establish an absolute and total control of the judiciary".[4]

SCU judges expressed concern over the reformers' desire to revise the Constitution and to nullify the constitutional status of the SCU.[5]

Experts who analysed the new legislation and monitored its application came to the conclusion that guarantee of the human right to a fair trial had not become the true goal of the judicial reform. **The true goal of the reformers was "to make judges dependent on and controlled from one centre".**[6]

Parties involved in the judicial reform: the reformers and their opponents

Every reform (law) has its authors, ideologists, strategists, and implementers. As concerns the 2010 judicial reform, its authors and implementers, together with its substance, make it easier to identify true reasons behind these transformations as well as personal responsibility for its effects.

Main actors involved in the reform are the President, Parliament and the Constitutional Court. Each of them played a part in its implementation.

President and his team. There is no doubt that the key role in the judicial reform belongs to President Viktor Yanukovych and his team – the persons who determined the ideology of the reform, the content of specific legislative acts, and also arranged for their practical implementation.

At the same time, one should recall the role of Viktor Yanukovych's predecessor – Viktor Yushchenko,

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1 For detailed analysis of the previous stages of the judicial reform and the reform of 2010 (statements, events, documents, legislative novelties, etc.) see: Judicial reform in Ukraine: current results and immediate prospects, information and analytical materials of Razumkov Centre. – Kyiv, April 2013, p.17-76. Razumkov Centre web site – *http://www.razumkov.org.ua* (*in Ukrainian*).

2 Sources: President of Ukraine Decree "On the Working Group on the Judicial Reform" No.440 of March 24, 2010; Explanatory note to the Bill "On the Judicial System and the Status of Judges" (reg. No.6450 of May 31, 2010). Hereinafter for references to documents of Parliament, the President, the Constitutional Court see the Verkhovna Rada web site, *http://www.rada.gov.ua*.

3 See: Vasyl Onopenko: "It fell to me" (speeches, letters, interviews, chronicle of events – 2006-2010). – Kyiv, 2010, p.424 (*in Ukrainian*).

4 Supreme Court of Ukraine Chairman Vasyl Onopenko: "Judicial system stands still, waiting for a verdict". – *Dzerkalo Tyzhnya*, May 15, 2010, p.6.; Vasyl Onopenko: "It fell to me"…, p.479.

5 See: Appeal of Judges of the Supreme Court of Ukraine to President of Ukraine Viktor Yanukovych of May 11, 2010 (*in Ukrainian*).

6 Kuybida R. Courts and justice: from the Soviet model to the present day. – Centre for Political and Legal Reforms web site, March 12, 2013, *http://www.pravo.org.ua* (*in Ukrainian*). *Emphasis added – Ed.*

who from the very start of his tenure had been trying to strengthen his influence on the judicial branch but failed to achieve that. However, his efforts were helpful to later reformers.

The judicial reform has been central to building a strong presidential "hierarchy of power". Right after his inauguration, Viktor Yanukovych declared the need to implement the judicial reform, set up a relevant Working Group and defined its objectives and terms of activity. Later, he submitted to Parliament the Bill "On the Judicial System and the Status of Judges" for an immediate consideration. All this gives grounds to label this reform as "the judicial reform of Viktor Yanukovych", since it would have never taken place without his "blessing" and political support.

The key members of the presidential team involved in implementation of the judicial reform (starting from drafting bills, lobbying in Parliament and ending with their practical implementation) are the three persons: Oleksandr Lavrynovych – the Minister of Justice and the Head of the Working Group; Serhiy Kivalov – the Chairman of the parliamentary Committee on Justice (in charge of reviewing all bills passed in the framework of judicial reform) and a member of the Working Group; and Andriy Portnov – Deputy Head of the Presidential Administration, Head of the Main Department on Judicial Reform and Judicial System and a member of the Working Group.

Andriy Portnov was entrusted with the key task to practically implement legislative provisions of the reform – as his meeting with the President showed right after the Law "On the Judicial System and the Status of Judges" had come into force.[7]

Verkhovna Rada. Pushing his reform, President Viktor Yanukovych had a faithful ally – the Parliament, where the pro-presidential majority (although formed in a constitutionally doubtful way) guaranteed the support and backing for his legislative initiatives.

In particular, Parliament promptly responded to Viktor Yanukovych's request to immediately consider the Bill "On the Judicial System and the Status of Judges": it became a Law in slightly more than one month.[8] Comments and proposals by the Main Legal Department of Parliament were ignored, and the proposals made by opposition before its second reading were rejected.

The process of adoption of the Law showed that the Parliament's role in judicial reform has been reduced to legislative formalisation of the President's proposals without any serious changes. Later on, the Parliament promptly adopted other legislative acts dealing with the judicial reform, including numerous amendments to the Law "On the Judicial System and the Status of Judges" (20 amendments within three years after its adoption).

Constitutional Court. The list of authors of the 2010 judicial reform will be incomplete without the Constitutional Court of Ukraine (CCU). *First*, its rulings passed before implementation of the reform influenced many of its key provisions. *Second*, it laid down the key preconditions for implementing the judicial reform initiated and implemented by Viktor Yanukovych (e.g., it ruled constitutional the formation of the above-said pro-presidential majority). *Third*, the CCU checked the key provisions of the judicial reform against the Constitution of Ukraine and found them constitutional. Therefore, it "constitutionally" formalised the judicial reform of Viktor Yanukovych (Box "*Role of the Constitutional Court of Ukraine…*").

Opponents of the judicial reform. As concerns the judicial reform, Viktor Yanukovych was politically opposed by the parliamentary opposition that not only stood against changes in the domain of justice put forward by him but raised before the CCU the issue of compliance of the key provisions of judicial reform with the Constitution.

Mr. Yanukovych's reform had been initially met with strong opposition from the judicial branch: the Supreme Court of Ukraine and the Council of Judges of Ukraine. The SCU Chairman Vasyl Onopenko, the SCU judges and the Council of Judges made numerous public statements and appeals to the President and Parliament, stressing their erroneous approaches to reformation of the judicial system and serious negative repercussions that might follow the adoption of the bills proposed by its authors. The SCU had more than once approached the CCU requesting to review compliance of laws adopted for the reform with the Constitution.

However, such resistance brought no result, since the main actors of the reform – the President, Parliament, and the CCU, did not share the position of the judiciary.

After the adoption of the Law "On the Judicial System and the Status of Judges" and its gradual implementation, and also after the replacement of the SCU leadership, the attitude of the judiciary to the reform changed dramatically: it gave up its criticism and expressed full support for the on-going reform.

In particular, the 11th Congress of Judges (22 February 2013) highlighted positive changes in the domain of justice and expressed its support for the President's actions aimed at perfecting the judiciary.[9]

The analysts outline three specific features of the Congress: *first*, the abrupt change in assessments of the judicial reform and its effects; *second*, an unanimous support for all proposed decisions; *third*, drafting and approval of these decisions beyond the judicial branch and according to a predetermined scenario.[10]

The recent period has seen a reversal in the position of the supreme judicial self-governing bodies regarding the main threats to the judicial independence. It is noteworthy that before the reform, they saw such threats in the activity of the political authorities (President, Parliament) and HCJ;[11] and after the reform, they are referring to the activity of mass media, public and human rights organisations and public protests against specific judgements.[12]

7 See, e.g.: Head of State met Deputy Head of Presidential Administration of Ukraine Andriy Portnov in the Crimea. – *http://www.president.gov.ua* (*in Ukrainian*).
8 The Bill was registered on May 31, the Law was adopted on July 7, 2010.
9 Decisions of 11th Ordinary Congress of Judges of Ukraine of February 22, 2013. – Web portal "Judicial branch", *http://www.court.gov.ua*.
10 In particular, the Supreme Court Judge V.Kosarev said: "…I have a feeling that the Congress' decisions on all matters are already prepared". See: Ivanova N. Congress of Judges of Ukraine: Life in a new format. – Rakurs, February 28, 2013, *http://racurs.ua* (*in Ukrainian*).
11 See, e.g.: Decision of 8th Ordinary Congress of Judges of Ukraine of June 26, 2007 "On Progress of Implementation in the State of the Constitution and Laws of Ukraine Concerning Provision of Autonomy of Courts and Independence of Judges". – Web portal "Judicial branch", *http://www.court.gov.ua* (*in Ukrainian*).
12 See, e.g.: Decision of the Council of Judges of Ukraine "On Appeal of the Council of Courts of Ukraine to Mass Media" No.52 of September 21, 2012. – *Ibid*.

ROLE OF THE CONSTITUTIONAL COURT OF UKRAINE IN IMPLEMENTING THE 2010 JUDICIAL REFORM

The substance and implementation of the judicial reform of 2010 were largely shaped by CCU rulings – those passed in course of the reform and adopted earlier. Noteworthy, not all CCU judges supported those rulings, presenting their special opinions on them.

Its key decisions are discussed below.

The CCU rulings passed before the 2010 judicial reform (adoption of the Law "On the Judicial System and the Status of Judges")

Ruling No.8-pn/2010 of 11 March 2010 enabled to lower the status of the Supreme Court and made the basis for modification of the judicature during the reform. The Ruling dealt with official interpretation of the terms "supreme judicial body", "high judicial body", "cassation appeal", contained in Articles 125 and 129 of the Constitution. CCU ruled that provisions of those articles meant that: a trial allowed only one cassation appeal and reconsideration of the judgment; high courts exercise powers of courts of the cassation instance with respect to judgments of the concerned specialised courts; the constitutional status of the Supreme Court does not allow legislators to give it powers of a cassation court with respect to judgments by high specialised courts, exercising powers of the cassation instance.

In fact, the Ruling termed as cassation courts only high specialised courts, while the Supreme Court of Ukraine ceased to be such and became "the supreme judicial body" with an uncertain procedural status. On the one hand, this removed from trial the so-called double cassation, on the other – created legal (constitutional) preconditions for legislative lowering of the procedural status of the Supreme Court and impairment of its influence on the national judicature.

The Ruling met mixed assessments of lawyers and politicians, many of whom considered it insufficiently legally sound, controversial and enabling deprivation of the Supreme Court of the constitutional status of the supreme judicial body, making it a "mock" judicial body and even effectively removing it beyond the judicial system.[1]

However, right after the announcement of the Ruling, national deputies of Ukraine Andriy Portnov and Volodymyr Pylypenko submitted to the Verkhovna Rada the Bill "On Amendments to Some Legislative Acts of Ukraine to Bring Powers of the Supreme Court of Ukraine in Compliance with the Constitution of Ukraine" (reg. No.6211 of 18 March 2010), seeking to deprive the Supreme Court of the right to review judgements of high specialised courts in administrative and business cases in a cassation procedure and to leave it only with the right to review judgments in connection with an international judicial institution establishing violation of international commitments by Ukraine during the trial.[2]

Later, this CCU Ruling made the basis for the judicial reform, in particular, setting up the new judicature (a new high specialised court), the status of the Supreme Court and high specialised courts. A reference to that Ruling is found in the Explanatory Note to the Bill "On the Judicial System and the Status of Judges"[3] put forward by the President, it was also mentioned by Andriy Portnov, who presented the Bill in Parliament.[4]

Ruling No.11-pn/2010 of 6 April 2010, created the basic preconditions for the implementation of the judicial reform. Considering the issue of the right of individual national deputies of Ukraine to personally take part in formation of a coalition of parliamentary factions in Parliament, the CCU ruled that "individual national deputies of Ukraine, in particular, those not belonging to the parliamentary factions that initiated creation of a coalition of parliamentary factions in the Verkhovna Rada of Ukraine, may take part in formation of a coalition of parliamentary factions in Verkhovna Rada of Ukraine".

Therefore, that legally doubtful[5] Ruling ruled constitutional the creation of the pro-presidential coalition "Stability and Reforms" in Parliament, which enabled, *first*, further functioning of the Verkhovna Rada of the 6th convocation (in line with then effective Constitution, if it failed to form a coalition within one month after the termination of the previous coalition, the powers of the Verkhovna Rada might be terminated early), *second*, the adoption of laws wanted by the President, including for implementation of the judicial reform. **In this context, it may be said that the Constitutional Court facilitated (enabled) implementation of the kind of the judicial reform implemented in 2010 on the initiative of President Viktor Yanukovych.**

The CCU Rulings passed during implementation of the judicial reform

Ruling No.2-pn/2011 of 11 March 2011, in case of constitutionality of separate provisions of the Law of Ukraine "On High Council of Justice" legitimised new grounds for dismissal of judges for "breach of oath" and the procedure for appeal against acts of the High Council of Justice at HACU. The case was prompted by a constitutional motion of 53 national deputies of Ukraine in which they requested to rule unconstitutional the provisions of the Law "On Amendments to Some Legislative Acts of Ukraine on Prevention of Abuse of the Right to Appeal" of 13 May 2010, concerning: the right of the High Council of Justice (HCJ) to demand from courts the copies of entire court cases, consideration of which is not yet finished; establishment of the procedure for appeal against acts of the High Council of Justice solely at the High Administrative Court of Ukraine (HACU) (previously, those acts were appealed against at a District Administrative Court with the right to further appeal against its judgment in appellate and cassation procedures); description of acts involving breach of judge's oath.

In pursuance of that Law, in spring and summer of 2010, HCJ adopted a number of high-profile decisions recommending dismissal of judges for "breach of oath", among them was a judge of the Supreme Court Oleksandr Volkov. This looked like a demonstrative reprisal against "inconvenient" judges in order to intimidate judges and make them pass "correct" judgements. Then Supreme Court Chairman Vasyl Onopenko said that in the result of such actions of HCJ, "judges are now afraid of passing lawful judgments".[6]

Having reviewed the case almost one year after the adoption of the Law, CCU ruled unconstitutional only one of those legislative novelties – empowerment of HCJ to demand from courts copies of court cases, consideration of which is not finished. The other novelties were ruled constitutional.

However, earlier (on 18 October 2010), the **Venice Commission in its Opinion pointed out that all these provisions of the Law were legally ungrounded**. In particular, it noted that: the right of HCJ to demand from courts copies of court cases consideration of which is not stopped aroused serious concern regarding guarantees of independence of judges; the risk of politicisation of disciplinary proceedings is high and can have a chilling effect on judges, in that way weakening their independence. The Commission also noted that under the new procedure for appeal, judges are deprived of an opportunity to appeal in cases of their dismissal considered by HACU. Furthermore, the procedure for formation of the so-called "fifth chamber" of HACU should be precisely determined by the law in order to comply with the requirements of the fundamental right of access to a court.[7]

On 9 January 2013, the European Court of Human Rights in its Judgment in the case of Oleksandr Volkov versus Ukraine came to the conclusion that the review of the case of judge Oleksandr Volkov by HACU was insufficient and could not neutralise the defects regarding procedural fairness at the previous stages of the domestic proceedings. ECHR in fact stressed that the impossibility of appellate and cassation appeal in that category of cases had breached the applicant's right to a fair trial. It also stated that at the time of consideration of the case of judge Oleksandr Volkov by HCJ, Parliament of Ukraine and HACU, there was no consistent and restrictive interpretation of the notion of "breach of oath". Due to this fact, as well as to the absence of proper legal guarantees, the effects of the relevant provisions of the national legislation

1 See: At the procedural crossroads. – *http://legalweekly.com.ua/index.php?id=16061&show=news&newsid=121962* (*in Ukrainian*).
2 *http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=37311.*
3 *http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=37806.*
4 *http://static.rada.gov.ua/zakon/skl6/6session/STENOGR/03061006_50.htm.*
5 For more detail see: Razumkov Centre Statement in connection with the Constitutional Court Ruling. – *http://www.razumkov.org.ua/ukr/news.php?news_id=333* (*in Ukrainian*).
6 See: Big legislative gamble. – Yurydychnyi Visnyk Ukrayiny, 2010, August 10, p.3 (*in Ukrainian*).
7 See: Joint Opinion of the Venice Commission and Directorate General of Human Rights and Legal Affairs of the Council of Europe concerning the Law of Ukraine "On Amending Certain Legislative Acts of Ukraine in Relation to the Prevention of Abuse of the Right to Appeal" of October 18, 2010. – *http://www.pravda.com.ua/articles/2010/10/19/5492776/.*

were unpredictable. On this basis, the Court assumed that nearly any misbehaviour by a judge occurring at any time during his career could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge of "breach of oath" and lead to his removal from office.[8]

Ruling No.5-pn/2011 of 16 June 2011, in the case following a constitutional motion by the Supreme Court banned courts to suspend acts of the Verkhovna Rada and the President of Ukraine to secure a claim, and to pass judgments prohibiting any actions on their part. The CCU ruled constitutional the provision of Article 117 of the Code of Administrative Justice banning security of claims by suspending acts of the Verkhovna Rada and the President of Ukraine or barring them from commitment of certain acts. The CCU reasoned its position, in particular, by saying that "banning security of an administrative claim by court by suspending acts of the Verkhovna Rada and the President of Ukraine or barring them from commitment of certain acts is related with the importance of their activity, presumption of constitutionality of their acts and actions and is caused by that the use of such means of security in the interests of a claimant may lead to violation of rights of an indefinite number of persons".

Furthermore, CCU refused to consider the portion of the constitutional motion dealing with the need of constitutional definition of the new procedure for judicial appeal against acts, actions and inaction of the Verkhovna Rada, the President and the High Council of Justice – on the basis of lack of jurisdiction to establish amenability of cases of appeal against acts, actions and inaction of the Verkhovna Rada, the President and the High Council of Justice to the High Administrative Court of Ukraine.[9]

Experts in the constitutional law saw the CCU refusal as yet another way to avoid solving urgent issues concerning the protection of human rights and freedoms, if they affect the interests of the supreme bodies of power. Furthermore, that Ruling gave another instance of absence of uniform criteria for admission of cases for consideration, where CCU, in the conditions of very much similar legal substantiation of unconstitutionality of legislative provisions, in one case considers the issue of their constitutionality, in another one – stops the proceeding in connection with insufficient legal substantiation of their unconstitutionality.[10]

Ruling No.7-pn/2011 of 21 June 2011, in the case of powers of state bodies in the field of justice expanded the constitutional powers of the President and the High Council of Justice in the field of justice. By that Ruling CCU termed constitutional provisions of the Law "On the Judicial System and the Status of Judges" dealing with specific powers of the President, the Verkhovna Rada, the High Council of Justice and the State Court Administration of Ukraine.

It ruled constitutional the provisions of the Law:

- that entitled the President to liquidate courts of general jurisdiction and to transfer judges elected for an indefinite term from one court to another court of the same level and specialisation. ***The Constitution does not give such powers to the President;***
- whereby if a candidate standing for a judge for an indefinite term fails to collect the number of votes provided by the Law, the Verkhovna Rada holds another voting (the same procedure is provided in the new law for dismissal of judges elected for an indefinite term – it was also ruled constitutional);
- whereby the State Court Administration of Ukraine was empowered to determine the number of judges in courts;
- whereby the High Council of Justice was empowered to review/cancel decisions of the High Qualification Commission of Judges of Ukraine of establishment of the results of qualification examination of a candidate for judge, of refusal to recommend a candidate for election a judge for an indefinite term, of bringing judges to disciplinary responsibility. ***The Constitution does not give such powers to the High Council of Justice (Article 131).***

Fundamentally important in that case was termination of the constitutional proceeding verifying the constitutionality of the legislative provisions empowering the High Council of Justice to appoint judges to administrative positions. As the reason, CCU referred to incompliance of the constitutional motion to the requirements provided by the Constitution and the Law "On the Constitutional Court of Ukraine".

Ruling No.17-pn/2011 of 13 December 2011, ruled constitutional limitation of the right of citizens to apply directly to the Supreme Court, and introduction of admission by High specialised courts of cases for proceeding to the Supreme Court. CCU, in particular, ruled constitutional provisions:

- of the codes of procedure that introduced admission of cases for proceeding to the Supreme Court by High specialised courts;
- of the codes of procedure reducing procedural terms for application of citizens to court.

It also ruled constitutional legislative novelties that allowed the use of regional or minority languages in courts, along with the official language.[11] Noteworthy, in its Ruling No.8-pn/2008 of 22 April 2008, in the case of the language of the judiciary CCU ruled that the sectors where the Ukrainian language as an official one was obligatory in exercise of powers by the state authorities included "activity of the judicial bodies".

By and large, the judicial reform of 2010 was kind of a record-holder by the number of legislative provisions constitutionality of which was challenged at the CCU.

In particular, 54 national deputies in a constitutional motion requested the Constitutional Court to rule unconstitutional as many as 55 legislative novelties introduced by Laws "On the Judicial System and the Status of Judges", "On High Council of Justice" and the codes of procedure. The Supreme Court in its constitutional motion dealing with the Law "On Amendments to Some Legislative Acts of Ukraine for Prevention of Abuse of the Right to Appeal" adopted on 13 May 2010, requested recognition of unconstitutionality of eight legislative novelties and the Law in general. In another constitutional motion analysing only two aspects of the judicial reform (deprivation of the Supreme Court of the constitutional status of the supreme judicial body and reduction of guarantees of material support and social protection of judges), the Supreme Court requested recognition of unconstitutionality of six legislative novelties. There were other motions, too, requesting recognition of unconstitutionality of some legislative novelties passed during the judicial reform (in particular, a constitutional motion by 53 national deputies regarding correspondence of some provisions of the Law "On High Council of Justice" to the Constitution).

Analysis of CCU decisions following the mentioned constitutional motions shows that **the only body of constitutional jurisdiction for all officially challenged legislative provisions of the judicial reform ruled unconstitutional only two**. The first of them was the right of HCJ to demand from courts copies of court cases consideration of which is not stopped, introduced by Article 25 of the Law "On High Council of Justice".[12] The other one – envisaged by Article of the 138 Law "On the Judicial System and the Status of Judges" limitation of pensions and life-long monthly pay for retired judges.[13] The CCU either ruled all other provisions constitutional, or it rejected to initiate/terminated constitutional proceedings in them.

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8 See: Judgment of the European Court of Human Rights in the case of Oleksandr Volkov vs Ukraine of January 9, 2013.

9 Constitutional Court of Ukraine Ruling to Reject Institution of Constitutional Proceeding in the Case of Constitutional Motion by the Supreme Court of Ukraine Concerning Correspondence to the Constitution of Ukraine (Constitutionality) of Some Provisions of the Code of Administrative Justice of Ukraine, Laws of Ukraine "On High Council of Justice", "On Amendments to Some Legislative Acts of Ukraine on Prevention of Abuse of the Right to Appeal" of October 12, 2010, No. 64y/2010. – *http://www.ccu.gov.ua* (*in Ukrainian*).

10 See: Kyrychenko Yu. Defence of human rights and freedoms by the Constitutional Court of Ukraine from violations by Parliament, the President, the Government: monitoring of activity in 20102011. In the digest: Judicial protection of human rights and freedoms from violations by Parliament, the President, the Government of Ukraine: materials of conference of January 23, 2012. – Kyiv, 2012, p.4042 (*in Ukrainian*).

11 Constitutional Court Ruling of December 13, 2011, No. 17pn/2011 in the Case of Constitutional Motion by 54 national deputies of Ukraine Concerning Correspondence to the Constitution of Ukraine (Constitutionality) of Some Provisions of the Law of Ukraine "On the Judicial System and the Status of Judges", the Code of Criminal Procedure of Ukraine, the Code of Business Procedure of Ukraine, the Code of Civil Procedure of Ukraine, the Code of Administrative Justice of Ukraine. – *http://www.ccu.gov.ua* (*in Ukrainian*).

12 See: Constitutional Court of Ukraine Ruling of March 11, 2011, No. 2pn/2011 in the Case of Constitutional Motion by 53 national deputies of Ukraine Concerning Correspondence to the Constitution of Ukraine (Constitutionality) of Some Provisions of the Law of Ukraine "On High Council of Justice". – *http://www.ccu.gov.ua* (*in Ukrainian*).

13 See: Constitutional Court of Ukraine Ruling of June 3, 2013, No. 3pn/2013 in the Case of Amendment of the Conditions of Payment of Pensions and Life-Long Monthly Pay for Retired Judges. – *http://www.ccu.gov.ua (in Ukrainian)*.

Therefore, the judiciary was quickly turned into an advocate of the judicial reform and a devoted ally of President Viktor Yanukovych. **Today, the remaining opponents of the judicial reform comprise representatives of the parliamentary opposition, public and human rights organisations, experts and some mass media**.

Specific features of the 2010 judicial reform

1. The reform was implemented in conditions of complete domination of the President in the Ukrainian political system.

For the first time in the history of Ukraine's independence, during the reform implementation, the key issues concerning the judicial activity could be solved in the interests of only one actor – the President. Before that, their solution was a matter of compromise between Parliament and President, by taking into account the opinion of the judicial branch. The need for a compromise was prompted by the political equilibrium, where each key political actor had a possibility to effectively contain intentions and actions of others. At the beginning of 2010 that equilibrium was broken: Parliament was fully controlled by the President, and the judicial branch, as noted above, became his faithful ally.

2. The reform was implemented within a short period of time – in fact, within four months between the inauguration of Viktor Yanukovych and the adoption of the basic Law "On the Judicial System and the Status of Judges".[13] The actual factors that caused such promptness (or, rather, haste) of the judicial reform can be explained by subsequent events that took place in Ukraine involving the "reformed" courts.

3. The reform was designed "behind the closed doors". Publicly, the authorities declared involvement of prominent lawyers, representatives of public organisations, the corps of judges, reputed international organisations in drafting the relevant bills. For instance, the Working Group had 55 members, in that, 26 judges, 15 representatives of the legal sciences, five national deputies and five representatives of legal public organisations.[14]

However, the activity of the Working Group was organised in such a way that both the content of the reform and relevant legislative proposals were decided upon and drafted outside of it. In other words, the Working Group had been established to make an impression that various scholars, judges, human rights activists and parliamentarians were involved in reform process. For instance, the Working Group member Mykola Koziubra admitted that the Bill "On the Judicial System and the Status of Judges" *critical for the reform* was hastily prepared behind the "doors of Presidential Administration", and the Working Group **had never been tasked to do that**.[15]

Furthermore, despite the President's promise given to the Venice Commission Chairman to send bills on the judicial reform to the Commission for expert examination, the Bill "On the Judicial System and the Status of Judges" was sent to the Commission when its recommendation could no longer influence its content.

PACE, in its Resolution dated 4 October 2010, expressed deep regret that the Law of Ukraine "On the Judicial System and the Status of Judges", being the cornerstone of the reform of the system of justice and the key to independence of the judicial branch, "was adopted and enacted in great haste […] without waiting for the opinion of the Venice Commission".[16]

Hence, the Bill "On the Judicial System and the Status of Judges" was drafted behind closed doors, without preliminary discussion with domestic specialists and foreign experts and, the main thing, disregarding comments of the Venice Commission. Its adoption was similarly hasty and lacked in-depth analysis.

4. Many legislative provisions were decided upon without due regard to the *Concept for improving the justice system to ensure fair trial in Ukraine in line with European standards* (enacted by President Viktor Yushchenko's Decree No.361 of 10 May 2006), although logically, the content of the judicial reform was supposed to be decided on its basis.

5. The reform largely ignored the opinion of the judicial branch. At all previous stages, representatives of the judicial branch took part in developing all basic laws on justice; the SCU and the Council of Judges gave concrete legislative proposals that were taken into account during drafting and adoption of relevant laws. In contrast, the 2010 reform deprived the judicial branch of this opportunity.

6. The reform was implemented without due regard to main conclusions and comments by scientific (legal) expert examination. The concerned parliamentary Committee (chaired by Serhiy Kivalov) reviewed the Bill and recommended its adoption by the Verkhovna Rada without the conclusion of the Main Scientific Expert Department; later, Parliament paid no regard to the opinion of parliamentary scientific experts and conclusions of the Main Legal Department.

7. Legislative provisions of the reform in many cases are inconsistent with Constitution. They include, in particular, the provisions on: the system of judicature; status of SCU; the President's rights to abolish courts and to transfer judges elected for an indefinite term from one court to another; the powers of HCJ; the procedure for appointment of judges to administrative positions; the grounds for bringing judges to responsibility; the status of judges; the procedure for admission of cases for consideration by SCU.

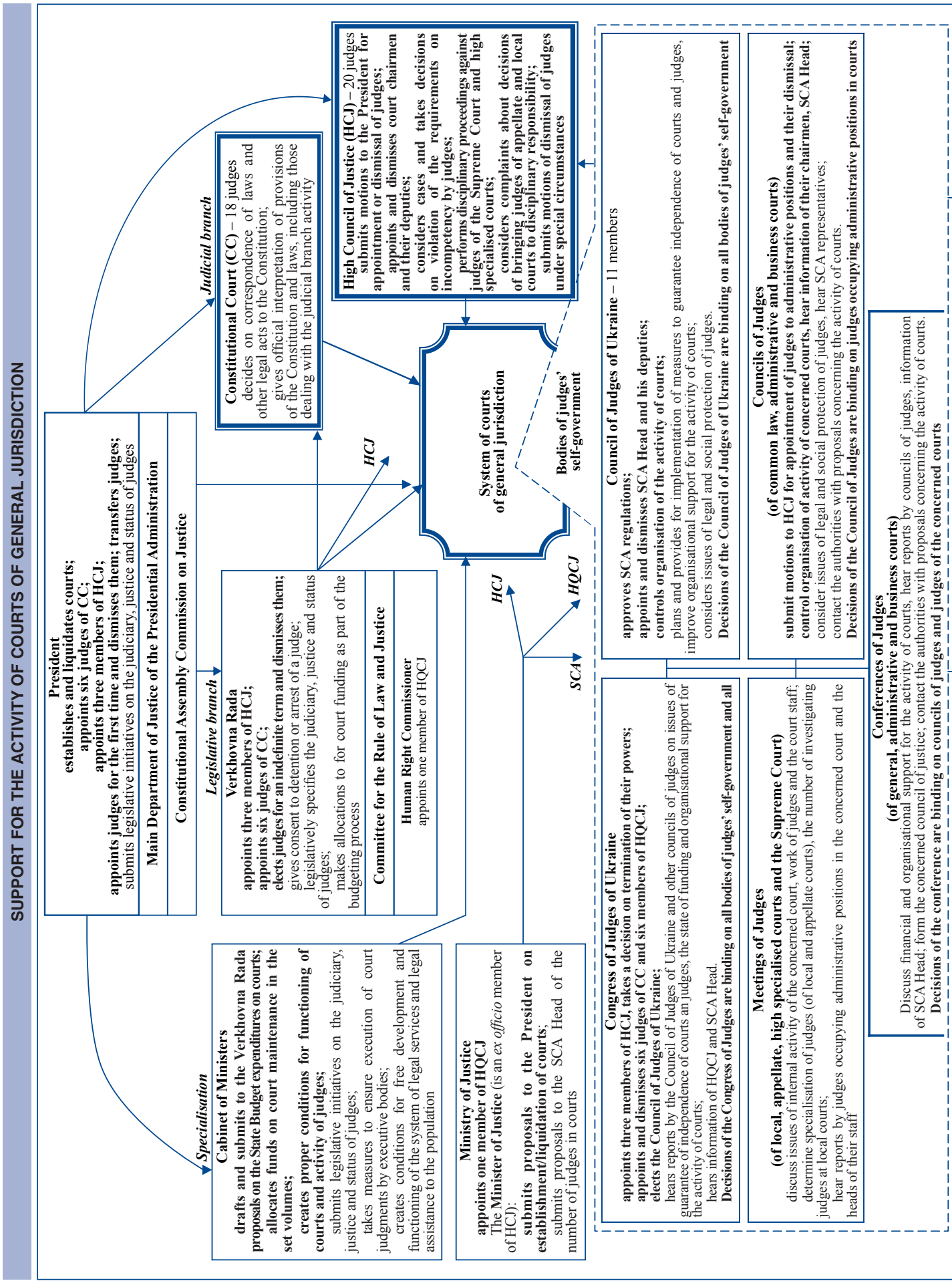
Legislative novelties of the judicial reform and present state of the judicial system

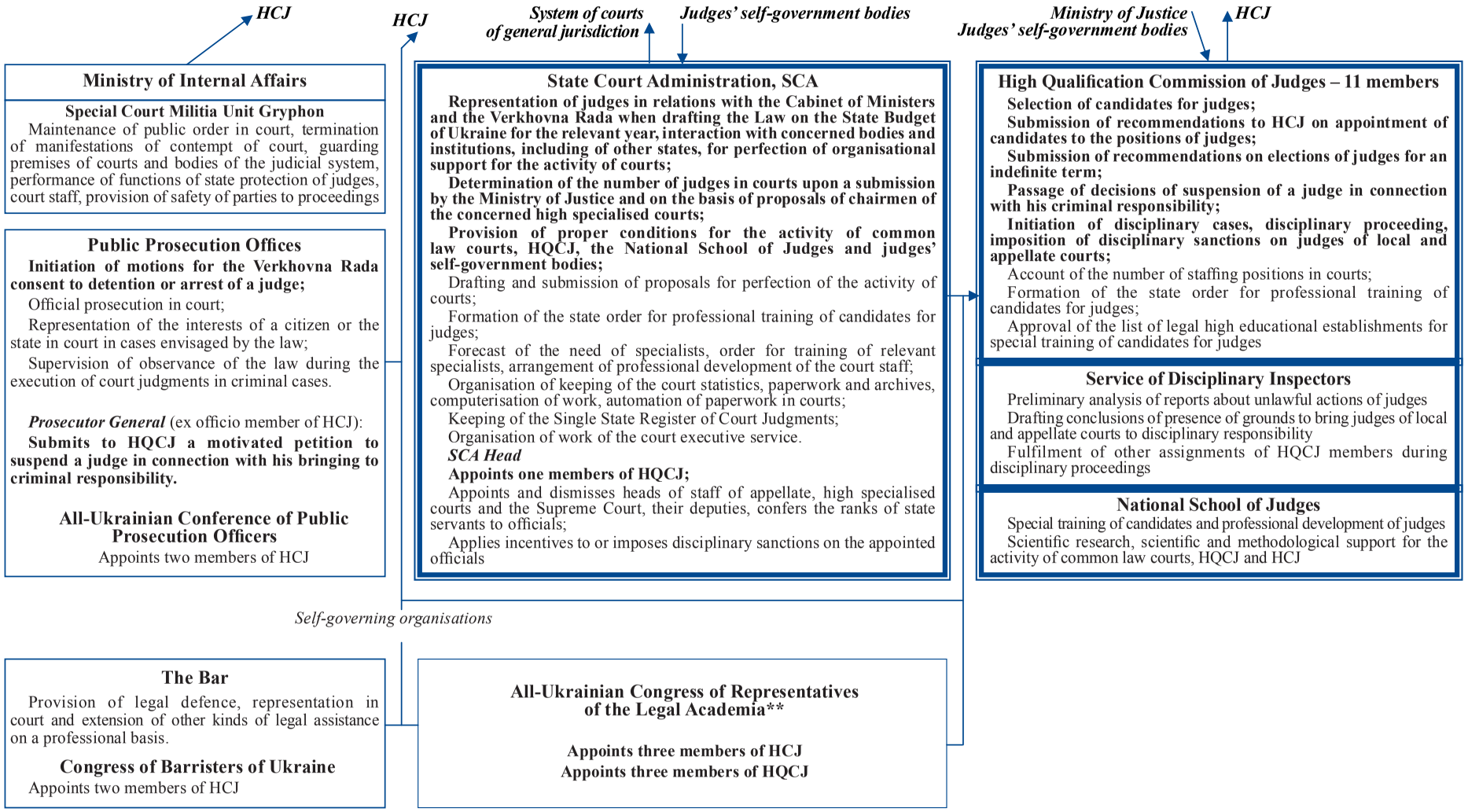
The reform has strengthened the place and role of the judicial branch in the overall system of state governance, substantially influenced the content and style of national judiciary, and has redefined the status of judges and the procedures for support (HR, organisational, financial, informational) of the activity of courts and judges. **As a result, this produced a new quality of the judicial branch**.

The reform changed the principles and key elements of the system of the judicial branch (see "*Support for the activity of courts of general jurisdiction*", pp.20-21).

President. Formally, the President lost some powers – to appoint representatives to the High Qualification Commission of Judges of Ukraine (HQCJU), to perform

[13] Implementation of the so-called "small" judicial reform in 2001 intended to bring the regulatory-legal framework on justice in compliance with the Constitution took five years.
[14] Presidential Decree "On the Working Group on Judicial Reform" No.440 of March 24, 2010 (*in Ukrainian*).
[15] Koziubra M.I. Rule of law and Ukraine. – *Pravo Ukrayiny*, 2012, No.12, p.3063 (*in Ukrainian*).
[16] See: PACE Resolution "Functioning of Democratic Institutions in Ukraine". – VR web site, *http://zakon2.rada.gov.ua/laws/show/994_a57*.


SUPPORT FOR THE ACTIVITY OF COURTS OF GENERAL JURISDICTION
President
establishes and liquidates courts;
appoints six judges of CC;
appoints three members of HCJ;
appoints judges for the first time and dismisses them; transfers judges;
submits legislative initiatives on the judiciary, justice and status of judges
Main Department of Justice of the Presidential Administration
Constitutional Assembly Commission on Justice
Judicial branch
Constitutional Court (CC) – 18 judges
decides on correspondence of laws and other legal acts to the Constitution;
gives official interpretation of provisions of the Constitution and laws, including those dealing with the judicial branch activity
High Council of Justice (HCJ) – 20 judges
submits motions to the President for appointment or dismissal of judges;
appoints and dismisses court chairmen and their deputies;
considers cases and takes decisions on violation of the requirements on incompetency by judges;
performs disciplinary proceedings against judges of the Supreme Court and high specialised courts;
considers complaints about decisions of bringing judges of appellate and local courts to disciplinary responsibility;
submits motions of dismissal of judges under special circumstances
Specialisation
Legislative branch
Verkhovna Rada
appoints three members of HCJ;
appoints six judges of CC;
elects judges for an indefinite term and dismisses them;
gives consent to detention or arrest of a judge;
legislatively specifies the judiciary, justice and status of judges;
makes allocations to for court funding as part of the budgeting process
Committee for the Rule of Law and Justice
Human Right Commissioner
appoints one member of HQCJ
HCJ
System of courts of general jurisdiction
Bodies of judges' self-government
Cabinet of Ministers
drafts and submits to the Verkhovna Rada proposals on the State Budget expenditures on courts;
allocates funds on court maintenance in the set volumes;
creates proper conditions for functioning of courts and activity of judges;
submits legislative initiatives on the judiciary, justice and status of judges;
takes measures to ensure execution of court judgments by executive bodies;
creates conditions for free development and functioning of the system of legal services and legal assistance to the population
Ministry of Justice
appoints one member of HQCJ
The Minister of Justice (is an ex officio member of HCJ);
submits proposals to the President on establishment/liquidation of courts;
submits proposals to the SCA Head of the number of judges in courts
HCJ
HQCJ
SCA
Congress of Judges of Ukraine
appoints three members of HCJ, takes a decision on termination of their powers;
appoints and dismisses six judges of CC and six members of HQCJ;
elects the Council of Judges of Ukraine;
hears reports by the Council of Judges of Ukraine and other councils of judges on issues of guarantee of independence of courts an judges, the state of funding and organisational support for the activity of courts;
hears information of HQCJ and SCA Head.
Decisions of the Congress of Judges are binding on all bodies of judges' self-government and all
Council of Judges of Ukraine – 11 members
approves SCA regulations;
appoints and dismisses SCA Head and his deputies;
controls organisation of the activity of courts;
plans and provides for implementation of measures to guarantee independence of courts and judges, improve organisational support for the activity of courts;
considers issues of legal and social protection of judges.
Decisions of the Council of Judges of Ukraine are binding on all bodies of judges' self-government
Meetings of Judges
(of local, appellate, high specialised courts and the Supreme Court)
discuss issues of internal activity of the concerned court, work of judges and the court staff;
determine specialisation of judges (of local and appellate courts), the number of investigating judges at local courts;
hear reports by judges occupying administrative positions in the concerned court and the heads of their staff
Councils of Judges
(of common law, administrative and business courts)
submit motions to HCJ for appointment of judges to administrative positions and their dismissal;
control organisation of activity of concerned courts, hear information of their chairmen, SCA Head;
consider issues of legal and social protection of judges, hear SCA representatives;
contact the authorities with proposals concerning the activity of courts.
Decisions of the Council of Judges are binding on judges occupying administrative positions in courts
Conferences of Judges
(of general, administrative and business courts)
Discuss financial and organisational support for the activity of courts, hear reports by councils of judges, information of SCA Head; form the concerned council of justice; contact the authorities with proposals concerning the activity of courts.
Decisions of the conference are binding on councils of judges and judges of the concerned courts

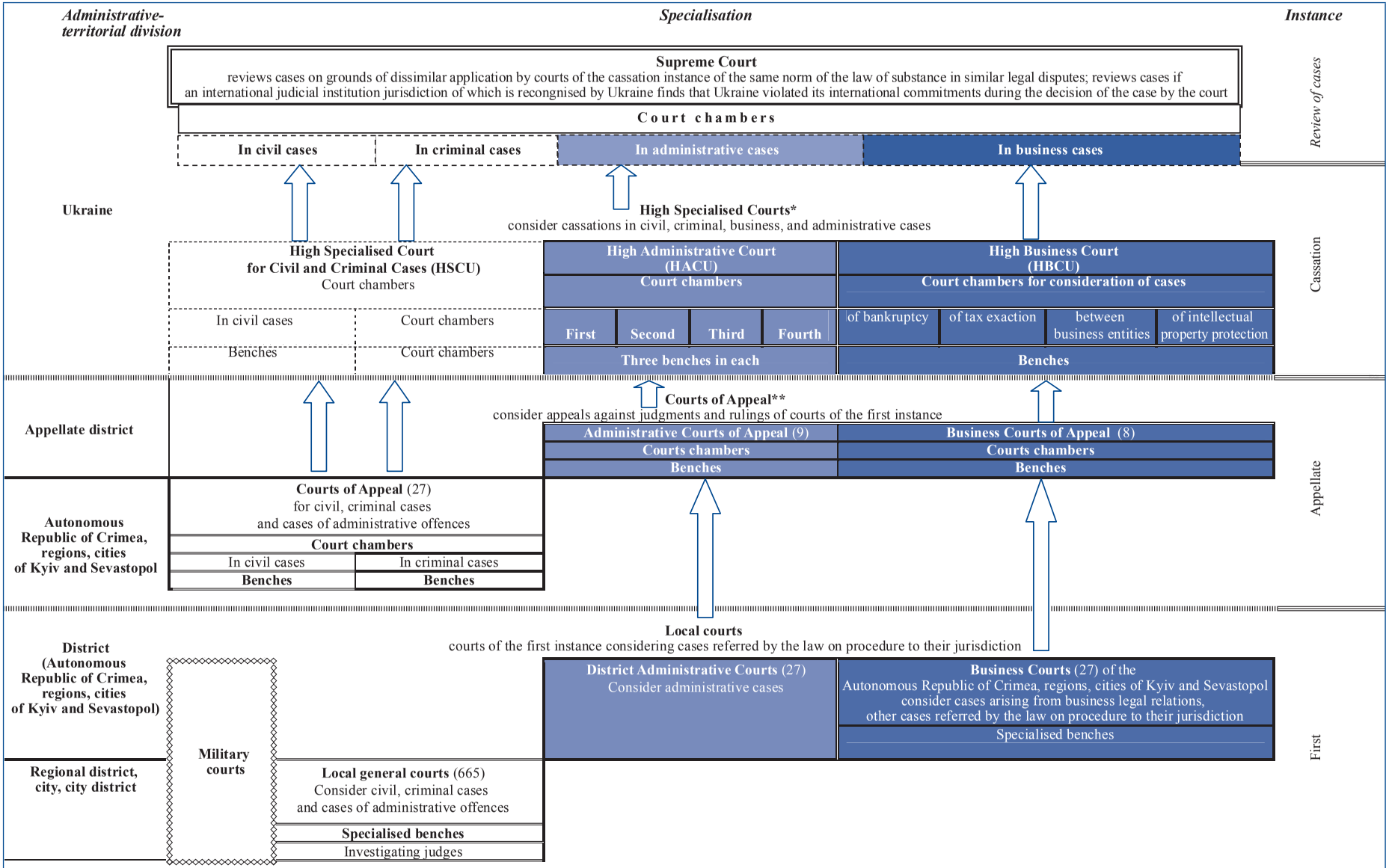


– bodies of the judicial branch.

* Functions of the main administrator of the State Budget funds for funding the activity of courts are performed by:
the Supreme Court, the Constitutional Court, high specialised courts - funding the activity of those judicial institutions;
SCA – funding the activity of all other common law courts and the activity of qualification commissions of judges of all levels, judges' self-government bodies and SCA proper.

** The Congress is convened by the Council of the Legal Academia established by the All-Ukrainian Congress of Representatives of the Legal Academia (2003, Odesa). In November, 2006, the Council was registered as a private institution (one of its cofounders was Serhiy Kivalov). On May 30, 2009, an ordinary Congress changed the legal status of the Council – it became an all-Ukrainian public organisation, Serhiy Kivalov was elected its Chairman. http://legalweekly.com.ua/index.php?id=16061&show=news&newsid=121661; *http://uals.anticorruption.net.ua/index.php/2012-08-19-18-29-49/315-2012-09-08-01-44-59.html?tmpl=component&print=1&page=.*

SYSTEM OF COURTS OF GENERAL JURISDICTION



* In cases envisaged by the law on procedure, considers cases of the relevant court jurisdiction as a court of the first or appellate instance and considers cases in the event that an international judicial institution the jurisdiction of which is recognised by Ukraine establishes violation of international commitments by Ukraine during the trial, if upon the results of consideration of the issue of admission of the case for proceedings to the Supreme Court of Ukraine it is established that the case is liable to review by a high specialised court.

** In cases envisaged by the law on procedure, considers cases of the relevant court jurisdiction as a court of the first instance.

Appellate administrative courts: Vinnytskyi (covers 3 regions); Dnipropetrovskyi (3); Donetskyi (2); Zhytomyrskyi (2); Kyivskyi (3 regions and the city of Kyiv); Lvivskyi (5); Odeskyi (3); Sevastopolskyi (the Crimea and the city of Sevastopol); Kharkivskyi (3).

Appellate business courts: Dnipropetrovskyi (2); Donetskyi (3); Kyivskyi (3 regions and the city of Kyiv); Lvivskyi (5); Odeskyi (3); Rivnenskyi (5); Sevastopolskyi (the Crimea and the city of Sevastopol); Kharkivskyi (3).

Administrative-territorial division — Links of instances — Links of instances — Created by the reform

special audit of the activity of judges, to determine the number of judges in courts. **In fact, the President's influence on the judicial branch has increased.** He was entitled to appoint judges for the first time and to dismiss them, to transfer judges between courts, to establish and abolish courts.

Parliament. Its powers to solve issues dealing with appointment of judges for an indefinite term were cut. **The concerned parliamentary Committee was in fact fully barred from solving these issues**.

Executive bodies. *The Cabinet of Ministers* and *the Ministry of Finance* retained important tools of influence on the judicial system – due to their powers to decide on the state budget expenditures, mechanisms and norms of social security of judges. *The Ministry of Justice* is represented in HCJ and HQCJU, and submits proposals on creation of courts to the President.

Internal changes within the judicial branch rearranged the system of courts, the principles of their procedural relations, the procedure for public access to justice (Chart "*System of courts of general jurisdiction*").

The Supreme Court (SCU) saw the greatest changes. Its procedural status was lowered, in terms of procedure it was in fact subordinated to lower courts – high specialised courts – and deprived of the "right to try", i.e., to pass final judgements *per se*. A new procedural institution was introduced – admission of cases for proceeding to SCU by a high specialised court. Therefore, SCU was barred from deciding on admission of cases for consideration, and individuals and legal entities – from filing complaints about judgments passed by lower courts to it directly (Table "*Admission of cases by high specialised courts ...*", pp.24-25).

High specialised courts became cassation courts and were empowered to decide on admission of cases to SCU for proceeding – to decide which of their cases SCU may review, and which it may not. A new High Specialised Court of Ukraine for Consideration of Civil and Criminal Cases (HSCU) was established. Its status differs from that of other high specialised courts – the Law made it the high court for local and appellate courts, although according to the Constitution (Article 125), a high specialised court may be superior only to specialised courts.

High Council of Justice (HCJ). Powers of HCJ were substantially widened, first of all, by: entitling it to appoint judges to administrative positions in courts and to dismiss them from those positions (the Constitution does not give it such rights); extension of grounds for dismissal of judges for "the breach of oath". After the reform, HCJ became better "protected" from judicial control, since its decisions may be appealed against only at the High Administrative Court. Meanwhile, the reform did not remove duplication of functions of HCJ and HQCJU in formation of the corps of judges – selection and responsibility of judges.

Judges' self-government. A new procedure for formation of the supreme bodies of judges' self-government (the Congress of Judges and the Council of Judges of Ukraine) was introduced – equal (instead of proportional) representation of every jurisdiction. **Such changes created preconditions for growth of outside influence on the activity of bodies of judges' self-government, their non-transparency, impairment of their efficiency**.

Formation of the corps of judges and staffing of courts. The system of bodies selecting candidates for judges changed – territorial qualification commissions were liquidated, their powers were transferred to HQCJU. The Law regimented the first appointment of a judge; regulated the terms for the President's decision to appoint judges upon the motion of the HCJ; and cut Parliament's powers of election/dismissal of judges.

Amending the procedure for applying to courts and procedures for court trial. The most important procedural novelties included: substantial reduction of the terms of consideration of cases in appellate and cassation courts; a ban for appellate courts to return cases for a new trial; introduction of summon by email or fax in administrative proceedings; provision for the right of an individual to lodge an appeal without filing a preliminary statement of appeal in administrative and civil proceedings.

Codes of procedure **reduced the terms of**: application to court, in particular, the terms of filing statements of claim; consideration of cases by courts; appeal against court judgements; the period of limitation for application to the Administrative Court.

Those measures were intended to ensure the efficiency of justice. Meanwhile, many scholars, lawyers and judges noted **negative effects of these procedural novelties**, seeing in them: the reduction of the substance, scope and guarantees of exercise of the right to judicial protection; reduction of transparency and publicity of court trials; failure to guarantee such principles of justice as competitiveness of parties and freedom to present evidence to court and to prove their soundness.

One specific procedural novelty of the reform was presented by the institution of a new procedure of appeal against acts, actions or inaction of the Verkhovna Rada, the President, HCJ, HQCJU. In this respect, the new Law provided three fundamentally new things: (1) acts (decisions), actions or inaction of the Verkhovna Rada, the President, HCJ, HQCJU are appealed against at HACU; (2) for that, a separate chamber is established within HACU; (3) HACU judgments in such cases are final and cannot be appealed against.

This novelty, in fact, *first*, reduced the content and scope of the right of individuals and legal entities to judicial protection, *second*, weakened judicial control of the activity of those state bodies.

Such an exceptional procedure for consideration of appeals against acts, actions or inaction of the Verkhovna Rada, the President, HCJ, HQCJU in fact means nothing but introduction of a *special court* in that category of cases, important for many citizens and entire society.

Language of justice. The reform provided that courts may use regional or minority languages, alongside with the official language.

In its Ruling No.10-рп/99 of 14 December 1999 (the case of application of the Ukrainian language) CCU produced an exhaustive explanation of provisions of Part 1, Article 10 of the Constitution, in particular, saying in its resolution part that the Ukrainian language as the official one is obligatory for communication throughout the territory of Ukraine during the exercise of powers by the state authorities and local self-government bodies (the language of acts, work, paperwork, documentation, etc.), and in other sectors of public life specified by the law. This includes the activity of the judicial bodies.

A similar legal stand was presented in CCU Ruling No.8-рп/2008 of 22 April 2008 (the case of the language of the judiciary).

The Law "On Ratification of the European Charter of Regional or Minority Languages" (Para. "b", Article 4)

Admission of cases by high specialised courts for proceeding to the Supreme Court and results of their review

	High specialised courts			Supreme Court (court chambers)[1]
	Year	Incoming applications for review of court judgements by the Supreme Court and results of their consideration (% of rulings as a share of the number of applications)		Incoming applications and results of review of cases (% of cancelled court judgements as a share of the number of cases considered following applications)
HSCU	2011	**2 197** *applications were received, in that, 2 017 – in civil and 180 – in criminal cases*. Out of 2 017 applications in civil cases: 2 016 were filed in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance; one – in connection with establishment by an international institution of violation of international commitments of Ukraine during the decision of the case by the court. Out of 180 applications in criminal cases: 157 were filed in connection with dissimilar application by the court of the cassation instance of the same norms of the criminal law to similar socially dangerous acts, which led to adoption of essentially different court judgements; 23 – in connection with establishment by an international institution of violation of international commitments of Ukraine during the decision of the case by the court. Rulings of rejection passed – **827** (37.6%); in that, 771 – in civil and 56 – in criminal cases.[2] Rulings of admission passed – **140** (6.4%); in that, 109 – in civil and 31 – in criminal cases.	In civil cases	**107** applications were received, in that, 100 – in connection with dissimilar application by a court (courts) of the cassation instance of the same norm of the law of substance in similar legal disputes. **75** cases were considered. **41** applications were dismissed; in one case, the proceeding was closed. Court judgements were cancelled, fully or partially, in **33** cases (**44%**), in 28 of them – in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance, as a result of which, substantially different judgments were passed in similar legal disputes.
			In criminal cases	**31** applications were received, in that, 20 – in connection with dissimilar application by a court of the cassation instance of the same norms of the criminal law to similar socially dangerous acts (except issues of assignment of punishment, relief from punishment and from criminal responsibility), as a result of which, substantially different judgments were passed in similar legal disputes. **25** cases were considered. **10** applications were dismissed; in one case, the proceeding was closed. Court judgements were cancelled, fully or partially, in **14** cases (**56%**), in that, in seven cases – in connection with establishment by an international judicial institution of violation of international commitments of Ukraine during the decision of the case by the court.
	2012	**4 434 applications** *were received, 3 094 of them – in civil and 340 – in criminal cases*. Out of 3 094 applications in civil cases: 3 090 were filed in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance; four – in connection with establishment by an international institution of violation of international commitments of Ukraine during the decision of the case by the court. Out of 340 applications in criminal cases: 315 were filed in connection with dissimilar application by the court of the cassation instance of the same norms of the criminal law to similar socially dangerous acts, which led to adoption of essentially different court judgements, 25 – in connection with establishment by an international institution of violation of international commitments of Ukraine during the decision of the case by the court. Rulings of rejection passed – **1 945** (43.9%), in that, 1,794 – in civil[3] and 151 – in criminal cases.[4] Rulings of admission passed – **215** (4.8%); in that, 182 – in civil and 33 – in criminal cases.	In civil cases	**178** applications were received, in that, **175** – in connection with dissimilar application by a court (courts) of the cassation instance of the same norm of the law of substance in similar legal disputes. **177** cases were considered. **81** applications were dismissed; in one case, the proceeding was closed. Court judgements were cancelled, fully or partially, in **95** cases (**53.7%**), in that, in **92** – in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance, as a result of which, essentially different judgments were passed in similar legal disputes; in three cases – in connection with establishment by an international judicial institution of violation of international commitments of Ukraine during the decision of the case by the court.
			In criminal cases	**33** applications were received, in that, 32 – in connection with dissimilar application by a court of the cassation instance of the same norms of the criminal law to similar socially dangerous acts (except the issues of assignment of punishment, relief from punishment and from criminal responsibility), as a result of which, substantially different judgments were passed in similar legal disputes. **27** cases were considered. **16** applications were dismissed; in one case, the proceeding was closed. Court judgements were cancelled, fully or partially, in 10 cases (37%), nine of them – in connection with dissimilar application by a court of the cassation instance of the same norms of the criminal law to similar socially dangerous acts, as a result of which, substantially different judgments were passed in similar legal disputes. Also, **one** case following an application for review of a judgment in a case of an administrative offence was considered; the judgment in the case was cancelled in connection with establishment by an international judicial institution of violation of international commitments of Ukraine during the decision of the case by the court.

HACU	2011	**3 237** applications were received. Rulings passed: of rejection – **2 218** (68.5%);5 of admission – **469** (17.5%).	**In administrative cases**	**464** applications were received, in that, **461** – in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance, as a result of which, substantially different judgments were passed in similar legal disputes. **319** cases were considered. **236** applications were dismissed; in 10 cases proceedings were closed. Court judgements were cancelled, fully or partially, in **73** cases (**22.9%**), in that, in 72 – in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the of the law of substance, as a result of which, substantially different judgments were passed in similar legal disputes.
	2012	**4 491** applications were received. Rulings passed: of rejection – **3 353** (74.7%);[6] of admission – **416** (9.3%).		**445** applications were received in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance, as a result of which, substantially different judgments were passed in similar legal disputes. **492** cases were considered. **349** applications were dismissed; in eight cases proceedings were closed. Court judgements were cancelled, fully or partially, in **135** cases (**27.4%**), in that,: in 133 – in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance, as a result of which, substantially different judgments were passed in similar legal disputes; in two – in connection with establishment by an international judicial institution of violation of international commitments of Ukraine during the decision of the case by the court.
SBCU	2011	**2 441** applications were received. Rulings passed: of rejection – **2 239** (91.7%); of admission – **132** (5.4%).	**In business cases**	**145** applications were received. **73** applications were dismissed. Court judgements were cancelled, fully or partially, in **64** cases (**46.7%**), in that, in 63 – in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance, as a result of which, substantially different judgments were passed in similar legal disputes.
	2012	**1 748** applications were received. Rulings passed: of rejection – **1 437** (82.2%); of admission – **65** (3.7%)[7]		**72** applications were received. **29** applications were dismissed. Court judgements were cancelled, fully or partially, in **43** cases (**59.7%**), in that,: in 40 – in connection with dissimilar application by a court (courts) of the cassation instance of the same norms of the law of substance, as a result of which, substantially different judgments were passed in similar legal disputes; in three – in connection with establishment by an international judicial institution of violation of international commitments of Ukraine during the decision of the case by the court.
Total	**2011**	**7 875** applications were received. Rulings of admission passed – **741** (9.4%).		**747** applications were received. Court judgements were cancelled, fully or partially, in **184** cases (24.6%).
	2012	**10 673** applications were received. Rulings of admission passed – **696** (6.5%).		**728** applications were received. Court judgements were cancelled, fully or partially, in **284** cases (**39%**).

Sources: responses by High specialised courts and the Supreme Court to the Razumkov Centre inquiries; information on web sites of High specialised courts, resolutions by their plenums and other documents: *http://www.vasu.gov.ua/ua/imp_sub.html?_m=publications&_t=rec&_c=view&id=2216*; *http://sc.gov.ua/ua/sudova_statistika.html*; Resolution of HBCU Plenum "On the Results of Work of Business Courts of Ukraine in 2011 and Tasks for 2012" No.1 of March 23, 2012, *http://zakon4.rada.gov.ua/laws/show/v0001600-12*; Resolution of HBCU Plenum "On the Results of Work of Business Courts of Ukraine in 2012 and Tasks for 2013" No.5 of February 21, 2013, *http://zakon2.rada.gov.ua/laws/show/v0005600-13*.

[1] In 2010-2011, cases were reviewed by the full bench of the Supreme Court, irrespective of the former jurisdiction of the case. On October 20, 2011, the Law "On Amendments to Some Legislative Acts of Ukraine Concerning Consideration of Cases by the Supreme Court of Ukraine" was adopted, which restored court chambers in the Supreme Court structure and the procedure of their review of cases in line with their specialisation.

[2] HSCU did not provide information about the grounds for refusal of admission of cases for proceeding to the Supreme Court, arguing that such information was not specified in HSCU statistical reports.

[3] Furthermore, following consideration of applications in civil cases, HSCU on different grounds returned 990 applications to applicants, left 148 without consideration; in five cases refused to accept applications, in four – refused to extend the application term. See: Judicial statistics.. – HSCU web site, *http://sc.gov.ua/ua/sudova_statistika.html*.

[4] Furthermore, following consideration of applications in criminal cases, HSCU on different grounds returned 119 applications to applicants; left 14 without consideration, in 17 cases passed rulings to initiate proceedings in the case. See: Judicial statistics. – HSCU web site.

[5] HACU gave no information about the reasons for refusal of admission of cases for proceeding to the Supreme Court.

[6] Furthermore, HACU returned 603 applications to applicants, left 201 applications without consideration. See: Analytical report on the state of exercise of justice by the High Administrative Court of Ukraine in 2012 – HACU web site, http://www.vasu.gov.ua (in Ukrainian).

[7] In the presented information HBCU noted that the common reasons for refusal of admission of cases for proceeding to the Supreme Court included the irrelevance of dissimilar application by the court of the cassation instance of the same norms of the law of substance in similar legal disputes.

provides for application of regional or minority languages in criminal, administrative and civil justice in Ukraine *solely in terms of permission to present documents and evidence* in regional or minority languages.

So, according to the Constitution and CCU rulings, judicial bodies exercising justice are to use only the official language – Ukrainian.

Instead, the authors of the judicial reform went further, reducing application of the Ukrainian language in all sectors, including the judiciary, by the Law "On Foundations of State Language Policy".[17]

Current results and effects of the 2010 judicial reform

Gains from the reform, with some reservations, include: a new procedure for selection and organisation of practical training of candidates for judges; some procedural changes (in particular, deprivation of the appellate court of the right to send cases for reconsideration to a court of the first instance); reduction of powers of the court chairman and expansion of powers of judges' meetings; accountability of the State Court Administration to the Congress of Judges of Ukraine; a new procedure of suspension of a judge brought to criminal responsibility, automated distribution of cases among judges.

One should also note growth of judges' salaries (first of all, for judges of local courts), funding of the judicial system, and improvement of technical support for courts. So far, those measures have not solved long-standing problems of the judicial system – shortage of personnel and proper court premises, heavy load on judges, etc. – but some steps in that direction were made (diagrams "*Some features of activity, material and technical support…*").

Meanwhile, the judicial reform gave rise to new problems in the domain of justice that turn off its positive results. The judicial system became more dependent and politicised.

Courts became more often used for political goals – to suppress the opposition and opposition-minded citizens and protesters; to intimidate and persecute opponents of the current authorities; to "remove unwanted people".[18]

Experts note a steadily growing tendency by current political authorities to use courts for their political purposes that has become evident in recent years.[19] This is witnessed, in particular, by numerous criminal cases against representatives of the opposition, where courts fully supported the position of the prosecution.[20]

Specific features of the present-day Ukrainian justice witnessing its political bias include:

- active use of courts for solving political problems;
- predictability of court judgements in the so-called political or other publicised cases;
- the coincidence between the position of courts and interests of current political leaders, first of all, in cases dealing with their political activity or exercise of political rights by citizens;

- an asymmetric approach to prosecution of representatives of the political opposition and the ruling political force;
- complete absence of court judgements that cancel decisions, actions or inaction of the President and other senior state officials.[21]

A summary assessment of the 2010 judicial reform and the current state of justice in Ukraine reveals that Ukrainian courts have been unable to perform their "natural" function in a democratic, legal state – to protect human and civil rights and freedoms (Article 55 of the Constitution). In contrast, the courts have ultimately been protecting the state (the current political regime) from its citizens. This goes against the constitutional provision that the guarantee of human rights and freedoms is its main duty, and the state is accountable to people (Article 3 of the Constitution).

Following the reform, the judiciary ceased to exist as an autonomous and independent branch of power. At the present stage, it means not only that courts are now fully controlled by the political regime but also that the judicial system is "built into" the presidential hierarchy.

In fact, Viktor Yanukovych has achieved the goal proclaimed by him on 25 February 2010, in his inauguration speech in the Parliament, saying: "Today, the state is governed by a structure 'sewn' for achieving goals of some politicians. The same can be said about the judiciary and many other important aspects of Ukrainian society. We are to change the existing state of affairs. The structure of all branches of power should serve to achieve one goal – rapid adoption of laws required for the state and their prompt implementation".[22]

Indeed, all branches of power in Ukraine now "serve to achieve one goal" set by one centre. The legislative branch promptly adopts the required laws; the judiciary supports all relevant decisions; and the executive implements them promptly.

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[17] See: Melnyk M. Law on language: fundamentals of the language policy, or a trap? – *Dzerkalo Tyzhnya*, July 28, 2012, p.6 (*in Ukrainian*).

[18] For more detail on use of power for pressure on the opposition see: Opposition in Ukraine: the state, conditions of activity, relations with the authorities. – *National Security & Defence*, 2011, No.78, p.3537. See also: Every year, 13-14 thousand people leaving detention ward get face further punishment – expert. – *Rakurs*, 27 March 2013, *http://racurs.ua/newsprint/8628* (*in Ukrainian*).

[19] See: Kuybida R. Seven signs of decline of justice after the judicial reform of 2010. – Centre for Political and Legal Reforms web site, May 14, 2012, *http://www.pravo.org.ua* (*in Ukrainian*).

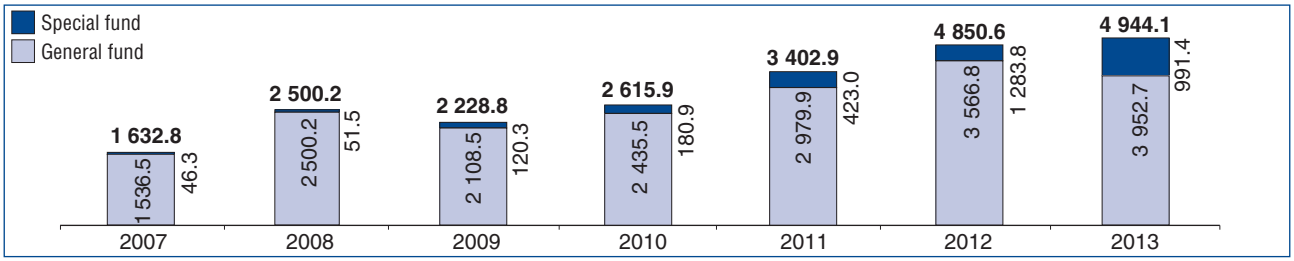
[20] Annual report of human rights organisations "Human rights in Ukraine 2012" was released in Kyiv. – *Ibid*., March 12, 2013 (*in Ukrainian*).

[21] *For comparison*: in 2007-2009, courts of different levels and different jurisdictions passed a great number of rulings invalidating decisions, actions or inaction of then President Viktor Yushchenko, Parliament, the Cabinet of Ministers. Starting from 2010, the situation with such rulings changed fundamentally. This may witness either that the President, other supreme state bodies and officials began to act on the basis, within the limits of powers and in the way provided by the Constitution and laws, or that political dependence of courts became so great that they can pass only judgements favourable for the authorities.

[22] Speech by the President of Ukraine Viktor Yanukovych in the Verkhovna Rada of Ukraine on February 25, 2010. – *http://www.president.gov.ua/news/16600.html* (*in Ukrainian*).

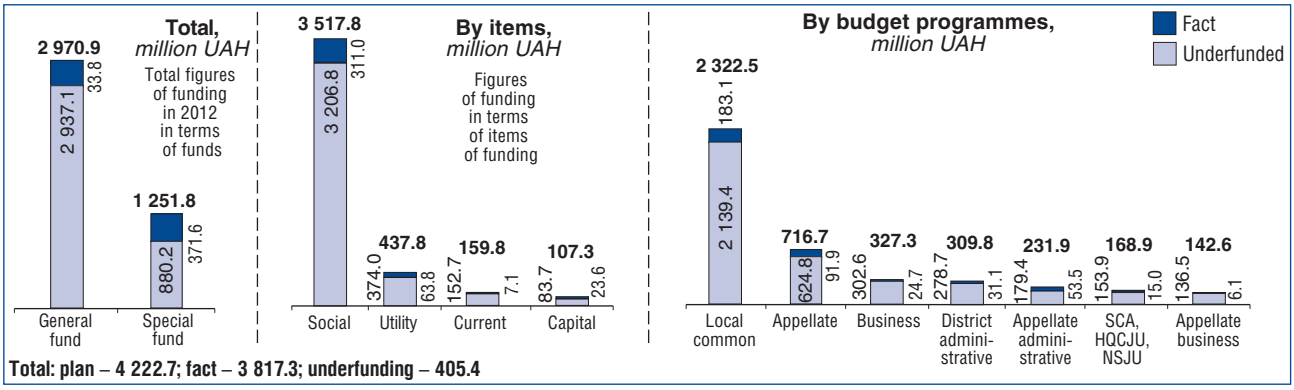
SOME FEATURES OF ACTIVITY, MATERIAL AND TECHNICAL SUPPORT FOR THE JUDICIAL SYSTEM OF UKRAINE

Dynamic of funding the judicial system of Ukraine, *million UAH*



Sources: Laws On the State Budget of Ukraine for 2011 (in the wording of 29 December 2011); On the State Budget of Ukraine for 2012 (in the wording of 8 December 2012); On the State Budget of Ukraine for 2013 (in the wording of 6 December 2012). – Portal of the Verkhovna Rada of Ukraine, *http://www.rada.gov.ua*.

Fulfilment of the plan of the judicial system funding in 2012, including by items and budget programmes



Total: plan – 4 222.7; fact – 3 817.3; underfunding – 405.4

Source: Results of the State Court Administration of Ukraine work in 2012 – Portal "Judicial Branch in Ukraine", *http://court.gov.ua/userfiles/Zvit%20po%20TU%20DSA(1).pdf*.

Staffing level for judges of common law courts in 2011-2013, *as of 1 January*

Courts	2011			2012			2013		
	staff	availability	vacancies, %	staff	availability	vacancies, %	staff	availability	vacancies, %
Local general	4 813	4 409	*8.4*	4 830	4 183	*13.4*	4 839	4 416	*8.7*
Local business	751	633	*15.7*	7 60	637	*16.2*	760	716	*5.8*
Local administrative	672	534	*20.5*	672	591	*12.1*	672	629	*6.4*
Appellate	2 418	1 823	*24.6*	2 425	2 003	*17.4*	2 425	2 086	*14.0*
Total	**8 654**	**7 399**	***14.5***	**8 687**	**7 414**	***14.7***	**8 696**	**7 847**	***9.8***

Staffing level for staff personnel of common law courts in 2011-2013, *as of 1 January*

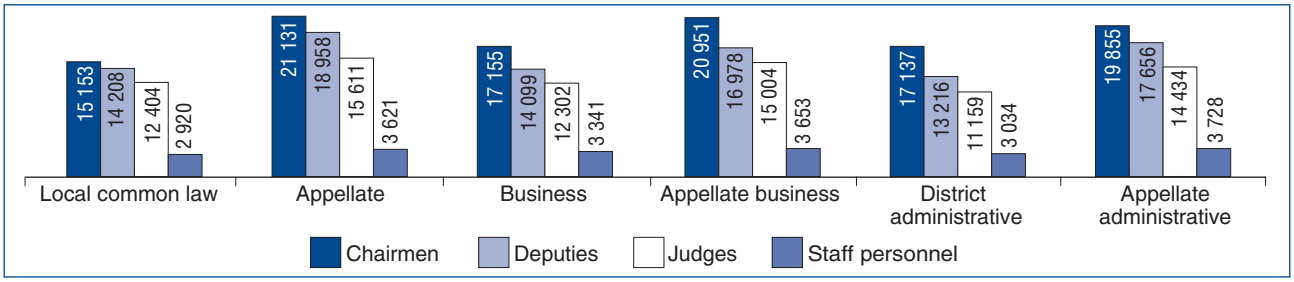
Courts	2011			2012			2013		
	staff	availability	vacancies, %	staff	availability	vacancies, %	staff	availability	vacancies, %
Local general	20 188	19 086	*5.5*	19 899	19 181	*3.6*	19 978	19 000	*4.9*
Local business	2 879	2 269	*21.2*	2 907	2 408	*17.1*	2 907	2 448	*15.8*
Local administrative	2 425	2 034	*16.1*	2 425	2 182	*10.0*	2 562	2 195	*14.3*
Appellate	6 886	4 601	*33.2*	6 908	5 229	*24.3*	7 178	5 691	*20.7*
Total	**32 378**	**27 990**	***13.5***	**32 139**	**29 000**	***9.8***	**32 625**	**29 334**	***10.1***

Source: Report of the State Court Administration of Ukraine work in 2010-2012, *http://court.gov.ua/userfiles/Zvit%20DSA.pdf*.

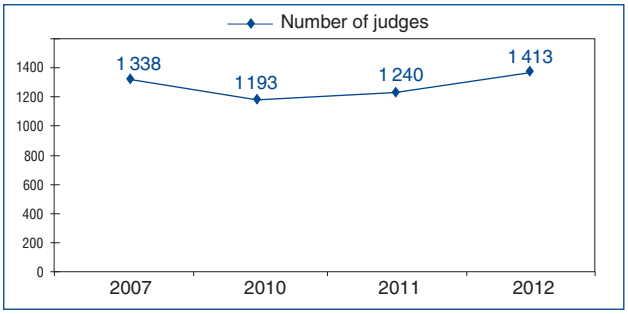
Average salaries of judges in 2010-2013, *UAH*

Courts	Court chairman				Deputy court chairman				Judges			
	2010	2011	2012	Jan 2013	2010	2011	2012	Jan 2013	2010	2011	2012	Jan 2013
Local	7 496	7 321	15 153	18 684	6 433	6 362	14 208	17 298	5 806	5 743	12 404	15 325
Appellate	13 156	11 799	21 131	21 744	10 829	10163	18 958	21 556	8 456	7 952	15 611	18 900
Business	11 704	10 555	17155	21 136	8 833	8 696	14 099	17 362	7 046	6 974	12 302	14 854
Appellate business	15 091	12 936	20 951	23 603	11 619	11 028	16 978	20 679	9 532	9 535	15 004	18 409
Administrative	10 182	9 690	17137	19 282	7 865	7 193	13 216	16 487	6 031	5 660	11 159	13 254
Appellate administrative	12 537	10 756	19 855	22 324	10 761	9 517	17 656	19 757	8 878	7 888	14 434	17 074

Monthly average salaries by occupation in 2012, *UAH*



Official housing queue of judges

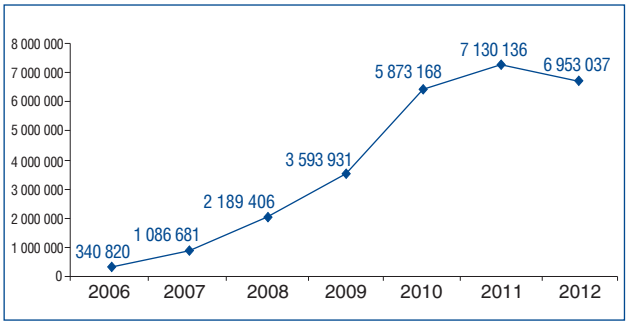


Provision of judges with official housing in 2012, *persons*

Courts	Need	Provided
Local general	783	21
Appellate	260	10
Business	111	1
Appellate business	28	3
District administrative	144	2
Appellate administrative	87	2

Source: SCA response No.69 of March 7, 2013, to the Razumkov Centre's inquiry.

Number of judgments annually entered in the state register



Source: Report of the State Court Administration of Ukraine work in 2010-2012, *http://court.gov.ua/userfiles/Zvit%20DSA.pdf*.

Judges and courts in Europe, 2010

Country	Number of judges per 100 thou. residents	Budget expenses per judge, PPP, $/year	Annual salary of the Supreme Court judges (before taxes)	
			€	ratio to the country average
Estonia	16.7	265 453	43 992	4.6
Latvia	21.2	202 880	26 650	3.5
Lithuania	23.6	161 638	24 444	3.5
Italy	11.0	386 130	176 000	7.3
Poland	27.8	246 010	57 650	5.9
Russia	22.6	168 603	47 265	7.6
Romania	19.0	205 937	43 865	8.2
Slovenia	49.9	249 558	57 909	3.2
Hungary	29.0	193 119	37 986	4.1
Ukraine	**19.3**	**49 830**	**20 388**	**8.6**
Finland	18.0	274 635	120 912	3.3
Average	23.4	218 520	59 732	5.4
Maximum	49.9	386 130	176 000	8.6
Minimum	11.0	49 830	20 388	3.2

Source: Evaluation report on European judicial systems, The CEPEJ evaluation report of European judicial systems, 20 September 2012, *http://www.coe.int/t/dghl/cooperation/cepej/evaluation/*.

The average, maximum and minimum values were calculated on the basis of the data for the mentioned countries.

Provision of courts of general jurisdiction with premises

	Number of courts	Located in proper premises
2007	780	86 (11%)
2010	780	105 (13,5%)
2013	763	108 (14,2%)

Sources: 2007 – Resolution of the Presidium of the Supreme Court of Ukraine, Presidium of the Council of Judges of Ukraine and Board of the State Court Administration of Ukraine "On the Progress of Justice in 2007 and Tasks for 2008" of April 18, 2008, *http://zakon4.rada.gov.ua/laws/show/n0001700-08*; 2010 – Draft Concept of the State Target Programme of Provision of Courts with Adequate Premises through 2016; 2013 – SCA response No.69 of March 7, 2013, to the Razumkov Centre inquiry. In particular, fit premises are operated by 98 local common law courts, Kyiv City Court of Appeal, four business courts of appeal, five local business courts.

INFORMATIONAL AND TECHNICAL SUPPORT OF COURTS

With server equipment

Courts	2010	2011	2012
Appellate administrative	21	25	44
District administrative	39	42	54
Appellate business	12	17	17
Local business	38	54	56
Appellate	82	85	88
Local general	841	975	1 025
Total	**1 039**	**1 198**	**1 284**

With PCs

Courts	2010	2011	2012
Appellate administrative	760	936	1 080
District administrative	1 038	1 254	1 541
Appellate business	769	1 005	1 092
Local business	2 623	2 997	3 063
Appellate	2 645	2 789	2 891
Local general	9 388	13 118	13 899
Total	**17 243**	**22 099**	**23 566**

With office equipment

Courts	2010	2011	2012
Appellate administrative	417	628	715
District administrative	810	1 029	1 197
Appellate business	462	671	726
Local business	1 630	1 819	1 880
Appellate	1 781	2 076	2 152
Local general	9 551	11 419	12 014
Total	**14 651**	**17 642**	**18 684**

With recording systems

Courts	2010	2011	2012
Appellate administrative	67	70	75
District administrative	231	238	324
Appellate business	55	57	57
Local business	268	786	286
Appellate	578	616	618
Local general	4 931	5 180	5 352
Total	**6 124**	**6 447**	**6 712**

Source: Report of the State Court Administration of Ukraine work in 2010-2012, *http://court.gov.ua/userfiles/Zvit%20DSA.pdf*.

SEQUENCE OF EVENTS THAT PRECEDED THE JUDICIAL REFORM OF 2010 (May 2006 - July 2010)

Date	Event, *comment*
	2006
10 May	**President of Ukraine Viktor Yushchenko by his Decree No.361 approved the *Concept for improving the justice system to ensure fair trial in Ukraine in line with European standards.***
27 December	**President Viktor Yushchenko** submitted for consideration to Parliament the Bills "On Amendments to the Law of Ukraine 'On the Judicial System in Ukraine'" (reg. No.2834) and "Amendments to the Law of Ukraine "On the Status of Judges" (reg. No.2835).
2007	
16 March	**Presidium of the Council of Judges and Presidium of the Supreme Court** released an Appeal to the President and national deputies of Ukraine. The Appeal said that "the new stage of reformation of the judiciary sees many inconsiderate, legally faulty, in some cases – unconstitutional legislative proposals". Their implementation would lead to creation of a complex, cumbersome, excessively costly system of courts, which will cause ruination of the integral judicial system, deteriorate accessibility of justice for citizens. It suggested termination of the experiment dangerous for justice and entire Ukraine and beginning of joint generation of a socially, economically and legally sound strategy of the judicial reform and drafting of the relevant bills.
2 April	**President sent to Parliament a letter revoking his Bills (reg. No.2834 and No.2835), reasoning that decision,** *first, by the need to study conceptual comments on those Bills made by the Supreme Court, bodies of judges' self-government, legal entities, public organisations, prominent scholars; second, by the impossibility of a considerate and legally sound approach to consideration of those bills in a situation where* **reformation of the judicial system became overly politicised.** The letter said that under such circumstances, the goal of the judicial reform might be seriously distorted and reduced to attempts of some political forces to assume political control of courts, endangering the constitutional principle of separation of powers and independence of the court. Meanwhile, the **President** issued Decree "On Early Termination of Powers of the Verkhovna Rada of Ukraine" No.264. In its turn, **Parliament** adopted Resolutions "On Early Termination of Powers of Members of the Central Election Commission" and "On Cancellation of the Verkhovna Rada of Ukraine Resolution "On Appointment of Members of the Central Election Commission", which effectively froze CEC work.
3 April	**Pecherskyi District Court in the city of Kyiv** suspended the Verkhovna Rada Resolutions of April 2, 2007. **Parliament**, despite the President's letter and his Decree, adopted a Resolution basically approving the Bills (reg. No.2834 and No.2835) and instructed the Committee on Justice to finalise those Bills, combining them in one, and to submit the finalised bill to the Verkhovna Rada for consideration in the second reading. *Such a decision of the Verkhovna Rada taken during the effectiveness of the President's Decree of early termination of the Verkhovna Rada powers challenged its legitimacy, to say the least.*
5 April	**The Press Service of the Presidential Secretariat** reported seizure of the Pecherskyi District Court in the city of Kyiv by representatives of the Party of Regions, including National Deputy of Ukraine Serhiy Kivalov. Acting Chairman of the Pecherskyi District Court in the city of Kyiv Inna Ortosh said that the former Chairman of the Court Volodymyr Kolesnychenko (dismissed by the President's Decree on March 30, 2007) had broken into her office, beaten up her assistant and taken the court seal. *The President's Representative in the Verkhovna Rada Roman Zvarych termed the events in the Pecherskyi District Court as "criminal banditry". A member of the Presidium of the Council of "Our Ukraine" Party Borys Bespalyi called them continuation of unlawful acts by representatives of the parliamentary anti-crisis coalition. In his opinion, it was related with attempts to influence the Pecherskyi District Court judges to secure immediate cancellation of the judgment that had suspended the effectiveness of the Parliament Resolutions on CEC.*
16 May	**Constitutional Court** by its Ruling No.1-pn/2007 ruled unconstitutional provisions of Part 5, Article 20 of the Law "On the Judicial System in Ukraine", whereby the Court Chairman and Deputy Chairman are appointed/ dismissed by the President, and recommended the Verkhovna Rada to immediately regiment the legislative procedure of appointment/dismissal of judges to administrative positions in courts.[1] *The Ruling:* • objectively weakened the ability of President Viktor Yushchenko to influence the judicial branch, and therefore, the overall situation in the country; • prompted intensification of political struggle for influence on courts; • caused long regulatory-legal uncertainty with support for the organisational activity of courts and, to some degree, their exercise of justice; • prompted the emergence of great many bills and decisions of different bodies (in particular, Parliament, the High Council of Justice, the Council of Judges) on that issue, including clearly unconstitutional; • enabled effective appointment/dismissal of judges to administrative positions in courts by the Council of Judges.
18-23 May	**President Viktor Yushchenko**, despite the mentioned CCU Ruling that had deprived the President of powers to appoint judges to administrative positions, issued 19 Decrees appointing chairmen and deputy chairmen of different courts of Ukraine.
30 May	**Parliament** adopted Resolution "On the Temporary Procedure of Appointment of Judges to Administrative Positions and Dismissal from Those Positions" No.1098, that temporarily, until the legislative regulation, introduced the procedure of appointment/dismissal of judges to administrative positions in courts, whereby court chairmen and deputy chairmen (except the Supreme Court Chairman and his deputies) were to be appointed for five years from among judges of the concerned court and dismissed by the High Council of Justice following recommendations: of the Council of Judges (for specialised courts – of the concerned Council of Judges); of the Supreme Court Chairman (for specialised courts – of the chairman of the concerned high specialised court); meetings of judges of the concerned courts; member of the High Council of Justice. *CCU Ruling No.9-pn/2010 of March 25, 2010, ruled that the Verkhovna Rada Resolution was unconstitutional, since such issues were to be regimented only by the law.* **The Bill "On Amendments to the Law** 'On the Judicial System in Ukraine'" (concerning appointment of judges to administrative positions) was submitted to Parliament (reg. No.3586; author – national deputy Valeriya Matiukha, faction of the Party of Regions).

Date	Event, *comment*
31 May	**The Council of Judges** adopted a Decision "On Appointment of Judges to Administrative Positions in Common Law Courts and dismissal from Those Positions" No.50. Taking into account the situation with appointment of judges to administrative positions after the Constitutional Court Ruling of May 16, 2007, and proceeding from the urgent need to ensure proper organisation of activity of common law courts, the Council of Judges decided to assume the function of appointment/ dismissal of judges to administrative positions in common law courts (except the Supreme Court), until the matter is regulated legislatively. The Decision established the procedure whereby judges are appointed for five years to the positions of chairmen and deputy chairmen of common law courts and dismissed from those positions following a motion by the Supreme Court Chairman, chairmen of high specialised courts – following a motion by the Supreme Court Chairman on the basis of recommendations of the concerned Council of Judges, and chairmen and deputy chairmen of other specialised courts – following a joint motion by the Supreme Court Chairman and the chairman of the concerned high specialised court on the basis of recommendations of the concerned council of judges. *From that date and till December 2009, the Council of Judges performed appointment/dismissal of judges to/from administrative positions in courts in accordance with that procedure. The procedure of appointment/dismissal of judges to administrative positions in courts established by the Decision of the Council of Judges was legitimised by the Law "On the Judicial System and the Status of Judges" of July 7, 2010.* **The High Council** of Justice introduced amendments to its Procedures in pursuance of the Verkhovna Rada Resolution of May 30, 2007, "On the Temporary Procedure of Appointment of Judges to Administrative Positions and Dismissal from Those Positions", suspended by a court ruling. This laid down the regulatory-legal framework for the High Council of Justice to appoint judges to administrative positions. Meanwhile, the High Council of Justice cancelled its Decision of May 27, 2004, No.180 regarding termination of powers of the High Council of Justice member Viktor Medvedchuk and resumed his powers – although the Constitution and laws of Ukraine do not refer restoration of powers of members of the High Council of Justice to the competence of the High Council of Justice.
1 June	**The Council of Judges held a meeting.** Speaking at the meeting in connection with the introduction of amendments to the Procedures of the High Council of Justice, Deputy Chairman of the High Council of Justice Mykola Shelest noted: "The High Council of Justice made a final decision on its anti-constitutional course, the course of interference in the judicial activity and pressure on judges making their judgments. This became possible, because over the past six weeks, a majority working for one political force has been formed in the High Council of Justice".
12 June	**The Council of Judges** took a decision to call the 8th extraordinary Congress of Judges of Ukraine and put on the agenda of the Congress the issue of the progress of implementation of the Constitution and laws of Ukraine to secure the autonomy courts and independence of judges.
13 June	**Plenum of the Supreme Court** passed Resolution "On Independence of the Judicial Branch" No.8 that gave courts explanations about uniform and correct application of the law providing guarantees of independence of the judicial branch. The Plenum reasoned the need of such explanations by the wide spread of negative phenomena that posed a threat to the establishment of the principle of the rule of law in the country and exercise of justice on constitutional principles: neglect of the constitutional principle of separation of powers by the legislative body, executive bodies, their officials; interference in organisation of the activity of courts, decision of concrete cases, prevention with the exercise of justice by courts on the principles specified by the law, pressure on judges with threats, blackmail and other unlawful influence, including in the form of adoption of unlawful regulatory-legal acts and individual legal acts, abuse of powers by officials and unlawful granting powers to some state bodies, which enhanced dependence of courts and judges on them; violation of the procedure of bringing judges to responsibility provided by the law, which in some cases witnessed attempts of reprisals against judges for their professional activity.
15 June	**Parliament** (the powers of which were terminated by a Presidential Decree) adopted the Law "On Amendments to the Law 'On the Judicial System in Ukraine'" (concerning the appointment of judges to administrative positions)" (reg. No.3586 of May 30, 2007) that established the procedure of appointment/dismissal of judges to administrative positions, similar to that established by the Verkhovna Rada Resolution of May 30, 2007. Furthermore, it provided that the concerned bodies should bring the decisions on appointment of court chairmen and deputy chairmen taken after the date of adoption of CCU Ruling on May 16, 2007, in compliance with the requirements of that Law.
19 June	**Parliament**: on June 15 adopted the Act "On Amendments to the Law 'On the Judicial System in Ukraine'" (concerning the appointment of judges to administrative positions)" The Verkhovna Rada Chairman Oleksandr Moroz signed it as a law. **Supreme Court Chairman** Vasyl Onopenko applied to the President with a letter requesting him not to sign the Law as clearly unconstitutional. *President Viktor Yushchenko did not sign the Law (he did not respond to that act at all, legally ignoring it).*
26 June	**The first stage of the 8th extraordinary Congress of Judges of Ukraine was held** that, in particular: • drew the attention of the President, Parliament, the Government, the High Council of Justice, political actors to inadmissibility of unlawful interference in the activity of courts and judges, further politicisation the judiciary, use of courts and judges for political and other unconstitutional goals, lawful dismissal of judges, etc; • ruled that the Council of Judges of Ukraine Decision "On Appointment of Judges to Administrative Positions in Common Law Courts and Dismissal from Those Positions" No.50 of May 31, 2007, rest on provisions of the Constitution and laws of Ukraine, legal principles of organisation of activity of courts and exercise of judges' self-government and instructed the Council of Judges to continue to appoint judges in accordance with the procedure established by it until the proper legislative regimentation of that matter; • instructed the Council of Judges and recommended the Supreme Court Chairman Vasyl Onopenko and other judges occupying administrative positions in courts to further defend the interests of judges in Ukraine, to react to any manifestations of interference in the activity of courts and judges, to take part in drafting of bills dealing with the judiciary, the status of a judges, justice, support for the judicial bodies' activity; • approved an Appeal to Ukrainian judges, calling upon judges not to be observers of, and moreover – parties to ruination of the judicial system in Ukraine, and also saying that judges should fully use the mechanisms and tools securing the autonomy of courts, independence and immunity of judges provided by the law, in particular, adequately respond to any attempts of influence on them in order to make them pass a certain decision; • took a decision of early termination of powers of the High Council of Justice member Valentyna Paliy, and also noted that some actions by the High Council of Justice members (appointed by other parties) Lidiya Izovitova, Valeriy Bondyk, Olha Zhukovska, Oleksandr Zadorozhniy might bear witness of their breach of oath of a member of the High Council of Justice. According to the Congress delegates, such actions undermined the trust of Ukrainian judges in the High Council of Justice.

4 July	**President Viktor Yushchenko** by his Decree No.598 terminated the powers of the High Council of Justice member Oleksandr Zadorozhniy (following an application by the 8th Extraordinary Congress of Judges of Ukraine of June 26, 2007 ("On Termination of Powers of a Member of the High Council of Justice").
1 August	**The High Council of Justice** adopted: • a decision "to adopt the conclusion of absence of signs of breach of oath" in the actions of the High Council of Justice members Valentyna Paliy and Oleksandr Zadorozhniy; • an appeal to President Viktor Yushchenko requesting him to cancel his Decree No.598. It also confirmed the powers of the persons named in the Decision of the 8th Extraordinary Congress of Judges of Ukraine as HCJ members.
5 September	The meeting of the High Council of Justice was not attended by all members of the Council elected by the quote of judges.
11 September	**The Supreme Court Press Service** released the opinion of its Chairman Vasyl Onopenko concerning his absence from the meetings of the High Council of Justice, saying that the High Council of Justice neglected the legal principles of its activity, abused its powers, demonstrated bias and tried to work with illegitimate members. Vasyl Onopenko said that he saw no legal grounds to take part in the work of the Council until its activity was brought in compliance with the Constitution and the Law "On High Council of Justice", and that body operated in its legitimate composition and solely on legal principles.
12 September	**The High Council of Justice** accused Vasyl Onopenko of neglect of his oath of a member of the Council, saying that his actions could stop its work.
30 September	**Extraordinary elections to the Verkhovna Rada of Ukraine**
23 November	**The newly-elected Verkhovna Rada of the 6th convocation** re-registered the Bills on introduction of amendments to the laws "On Judicial System in Ukraine" and "On the Status of Judges" (reg. No.0916 and No.0917) submitted (and recalled) by President Viktor Yushchenko as the ones passed in the first reading.
7 December	**The second part of the 8th Extraordinary Congress of Judges of Ukraine was held.** The Congress adopted Decisions "On the State of Justice in Ukraine", "On the State of Financial, Material and Technical Support for the Activity of Common Law Courts", "On Conceptual principles for Further Implementation of the Judicial Reform in Ukraine". The latter decision formulated the corps of judges' idea of the priority and long-term measures of the judicial reform and called the President, Parliament, the Government for constructive cooperation for perfection of the judicature and justice, prevention of ruination of the judicial system and deepening of crisis in the judiciary. Speeches by the Congress delegates and its decisions noted that the Extraordinary Congress of Judges took place in a tense socio-political atmosphere and accomplished critical tasks: prevented manual control of courts, ruination of the judicial system, defended independence of the judicial branch and judges, and also showed unity of the corps of judges, their ability to efficiently solve the problems of its self-organisation on their own.
2008	
12 February	**Parliament** considered in the second reading the Bill "On Amendments to the Code of Business Procedure of Ukraine" (reg. No.0893), depriving the Supreme Court of cassation powers at consideration of business cases. A few votes were missing for its adoption, and the Bill was sent for a repeated second reading.
17 June	**President Viktor Yushchenko** applied to Parliament with a letter requesting immediate adoption in the second reading "of the Bills adopted in the first reading on April 3, 2007", concerning the judicature and status of judges, combining them into one. *As was noted above, on April 2, 2007, the President recalled those bills from Parliament. Therefore, spoke out in favour of adoption of the Bills recalled by him.*
18 June	**The Parliament's Committee on Justice** recommended the Verkhovna Rada to adopt the Bill introducing amendments to the Laws "On the Judicial System in Ukraine" and "On the Status of Judges" (combining two Bills – reg. No.0916 and No.0917) prepared by it for the second reading as a law. The following day, that Bill was put on the agenda of the Verkhovna Rada.
19 June	**Parliament** put the Bill on introduction of amendments to the laws "On the Judicial System in Ukraine" and "On the Status of Judges" on the agenda.
20 June	**Supreme Court Chairman** Vasyl Onopenko said that "an attempt of a coup d'état is being made in Ukraine". It was manifested in insistent attempts by certain forces to illegitimately "privatise" justice through unconstitutional changes. Joint efforts of the key actors at ruination of justice struck the eye. When during the political crisis of 2007 they "tore" courts from different sides, waging political struggle with each other, this time, they joined efforts to establish total control of courts and create "regulatory-legal" capabilities to use courts in political struggle, meet private and corporate interests. They "pushed" consideration of the legally inexistent (not passed in the first reading) Bill "On the Judicial System and the Status of Judges" in Parliament only to establish their control of courts. According to the Supreme Court Chairman, the situation was especially dangerous because the action termed reformation of the judicial system took place under the cover of the President, since letters of support for clearly unconstitutional amendments to the Law "On the Judicial System" come out with his signature.
23 June	**Supreme Court Chairman** Vasyl Onopenko applied to President Viktor Yushchenko with an open letter, in particular, speaking about the non-statesman-like position of the Head of State in the issues of justice, his inconsistency in solution of the problems of justice, inadmissibility of public assessment of court judgements by the President and unfair comments about judges, and also inadmissibility of decisions running contrary to the Constitution and laws of Ukraine.
24 June	**A meeting of judges of the Supreme Court** adopted an appeal to national deputies of Ukraine, calling upon then not to adopt the Bill "On the Judicial System and the Status of Judges" (reg. No.0916 and 0917), since it: • contained provisions inconsistent with the Constitution, international standards of justice, rulings of the Constitutional Court; • envisaged an extensive way of development of the judicial system (an unreasonable increase in the number of courts and judges); • undermined the constitutional status of the Supreme Court; • was passed in the first reading in circumstances questioning its legitimacy. For the participants of the meeting it was evident that the inspirers of urgent adoption of the Bill sought to enhance dependence of judicial bodies, to involve them in political struggle, to impose unlawful approaches to settlement of disputes, to make the court not a body of justice but a body fulfilling political and personal orders, to create mechanisms of unconstitutional influence on the court.

Date	Event, *comment*
9 October	**President Viktor Yushchenko** issued Decree "On Early Termination of Powers of the Verkhovna Rada of Ukraine of the 6th Convocation and Appointment of Extraordinary Elections" No.911 that terminated the powers of Parliament and appointed early parliamentary elections for December 7, 2008.
10 October	**District Administrative Court** in the city of Kyiv (chaired by judge Volodymyr Keleberda) began consideration of a claim of Yuliya Tymoshenko's Bloc to rule the President's Decree No.911 unlawful, and in order to secure the claim, adopted a ruling suspending that Decree and banning CEC to make any steps for the beginning of the election process. **President Viktor Yushchenko** issued Decree No.921 On Introduction of Amendments to the Decree President No.73 of February 2, 2007, that removed from Decree No.73 Article 1 – on appointment of the Judge of the Shevchenkivskyi District Court in the city of Kyiv Volodymyr Keleberda a judge of the Kyiv District Administrative Court. This actually meant dismissal of the judge without citing the grounds and in violation of the established procedure. **The Public Prosecutor's Office in the city of Kyiv** instituted a criminal case against judge Volodymyr Keleberda under Article 375 of the Criminal Code (passage of a knowingly unlawful judgment by a judge).
11 October	**Kyiv Administrative Court of Appeal** began consideration of a complaint about the District Administrative Court Ruling of October 10, 2008. However, the work of the court, as well as of the District Administrative Court in the city of Kyiv, was obstructed by representatives of political parties and national deputies. They physically prevented exercise of justice, exerted psychological pressure on judges who were not let out of official premises (offices, session halls, jury rooms). The blockade lasted several days and extended to the High Administrative Court of Ukraine (nearly 20 national deputies obstructed the work of the Court Chairman and Deputy Chairmen, judges and the court staff).
13 October	**The National Security and Defence Council passed the Decision** "On Immediate Measures to Guarantee Constitutional Voting Rights of Citizens of Ukraine During Extraordinary Elections to the Verkhovna Rada of Ukraine" that instructed the Ministry of Internal Affairs, the Security Service of Ukraine, regional state administrations to take measures to guarantee proper conduct of the extraordinary elections, steadily abiding by the legislation on non-interference in the exercise of justice, any influence on courts or judges. **President Viktor Yushchenko** issued Decrees: • No.922 that liquidated the District Administrative Court in the city of Kyiv and established, from October 14, 2008, the Central District Administrative Court in the city of Kyiv and the Livoberezhnyi District Administrative Court in the city of Kyiv; • No.923 that enacted the above-mentioned NSDC decision.
14 October	**Plenum of the High Administrative Court of Ukraine** issued an Appeal to the Verkhovna Rada, the President, the Cabinet of Ministers, the Council of Judges, the General Prosecutor's Office and the State Court Administration, requesting them, in view of the situation in the activity of administrative courts, to take legislative, organisational and other measures to ensure independence of the judicial branch, defend it from interference on the part of other branches and political parties.
15 October	**President Viktor Yushchenko issued Decrees:** • No.932, that resumed the effectiveness of Presidential Decrees of 2005: "On Transfer of Judge V.M.Kolesnychenko" No.950 of June 15 and "On Appointment of the Local Common Law Court Chairman" No.977 of June 21. The Decree effectively reinstated Volodymyr Kolesnychenko as the Chairman of the Pecherskyi District Court in the city of Kyiv, dismissed by President Viktor Yushchenko from that position on March 30, 2007, by cancelling Decree of June 21, 2005, No.977 that had appointed Volodymyr Kolesnychenko to that post; • No.933, ruling ineffective the President's Decree No.338 of April 24, 2007, that appointed Inna Ortosh the Chairman of the Pecherskyi District Court in the city of Kyiv. Therefore, Inna Ortosh was actually dismissed from the position of the Court Chairman. **Supreme Court Chairman** Vasyl Onopenko applied to President Viktor Yushchenko with a letter requesting him to cancel the Decree of October 13, 2008, on liquidation of the District Administrative Court in the city of Kyiv and establishment of the Central District Administrative Court in the city of Kyiv and the Livoberezhnyi District Administrative Court in the city of Kyiv – as issued with gross violation of the Constitution and laws of Ukraine.
16 October	**President Viktor Yushchenko** issued Decrees: • No.940 that invalidated the President's Decree of October 13, 2008, concerning liquidation of the District Administrative Court in the city of Kyiv and establishment of the Central district Administrative Court in the city of Kyiv and the Livoberezhnyi District Administrative Court in the city of Kyiv; • No.941, that (for the second time) liquidated the District Administrative Court in the city of Kyiv and from October 17, 2008, established the Central district Administrative Court in the city of Kyiv and the Livoberezhnyi District Administrative Court in the city of Kyiv. **The District Administrative Court in the city of Kyiv** sustained the claim by the judge of the Pecherskyi District Court in the city of Kyiv Inna Ortosh and passed a ruling that suspended the President's Decrees No.922 and No.923 of October 15, 2008.
17 October	**President Viktor Yushchenko** issued Decree No.942 of transfer of five judges from the liquidated District Administrative Court in the city of Kyiv to the newly-established Central District Administrative Court in the city of Kyiv. **The Council of Judges** by its decision reinstated Inna Ortosh in the position of the Chairman of the Pecherskyi District Court in the city of Kyiv.
20 October	**The National Security and Defence Council**, having considered the situation with preparation and conduct of early parliamentary elections: • "expresses concern with the events that occurred in the result of attempts, in violation of the Constitution, to appeal in common law courts against the President's decision made within the limits of his constitutional powers, of early termination of powers of the Verkhovna Rada of the 6th convocation"; • termed the progress of implementation of the NSDC Decision of October 13, 2008, unsatisfactory; • took a decision "to propose to the President of Ukraine to consider suspension of the President's Decree "On Early Termination of Powers of the Verkhovna Rada of Ukraine of the 6th Convocation and Appointment of Extraordinary Elections" No.911 of October 9, 2008". **President Viktor Yushchenko** issued Decree No.951, enacting the mentioned NSDC Decision.

21 October	**Presidium of the Council of Judges** issued an Appeal to President Viktor Yushchenko, expressing concern with aggravation of ruinous processes in the field of justice prompted by a new political crisis, and requesting the President to take measures to restore law and order in the country, broken, in particular, by the President's Decrees No.921 of October 10, 2008, No.922 of October 13, No.932 and No.933 of October 15, No.940 and No.941 of October 16, No.942 of 17 October 2008. The Appeal stressed that the creation and liquidation of courts, transfer of judges from one court to another, appointment/ dismissal of judges to administrative positions by those Decrees took place in violation of the procedure established by the Constitution and laws of Ukraine.
13-14 November	**The 9th Congress of Judges of Ukraine was held, attended by President Viktor Yushchenko. The Congress decisions noted that in pursuance of decisions of the 7th ordinary and 8th extraordinary Congresses of Judges of Ukraine, Ukrainian judges and courts, bodies of judges' self-government, despite sometimes direct resistance of some politicians to the establishment of courts as an autonomous branch, achieved some positive shifts in the establishment and further consolidation of an autonomous and independent judicial branch in Ukraine, guarantee of the rule of law and the right of everyone to a fair trial by an independent and unbiased court. However, further development and perfection of justice were obstructed by a number of negative factors** that seriously affected the efficiency of courts and judges, the quality and accessibility of justice. Constitutional guarantees of the autonomy of courts and independence of judges in Ukraine were not fully backed. They on the top state level still did not realise fundamental provisions of the Constitution and international legal acts, whereby the key signs of a law-ruled and democratic state included the presence of an autonomous and independent judicial branch. Some political forces tried to openly exert pressure on judges, roughly interfering in the exercise of justice. All this prevented proper judicial defence of constitutional civil rights and freedoms, led to numerous complaints about court judgments and applications of citizens to the European Court of Human Rights.
16 December	**Parliament** approved the agenda of the third session of the Verkhovna Rada and included in it consideration in the second reading of the Bill "On the Judicial System and the Status of Judges" (reg. No.0916 and No.0917).
2009	
5 January	**Supreme Court Chairman Vasyl Onopenko** applied to the Verkhovna Rada with a letter speaking about the inadmissibility of consideration in the second reading and adoption in general of the Bill "On the Judicial System and the Status of Judges" (reg. No.0916 and No.0917). It said that the Bills submitted by President Viktor Yushchenko (combined in one bill) were adopted in the first reading on April 3, 2007, by the incapable Verkhovna Rada. *First, adoption of the basic law on the judicial system in such a way would question the legitimacy of activity courts, and therefore, the legitimacy of judicial protection of civil rights and freedoms. Second, the Bill was unacceptable for its content: its conceptual provisions were clearly unconstitutional, ignored the principle of the rule of law and legal principles of functioning of the state authorities, envisaged evidently erroneous, legally, socially and economically unsound approaches to judicature. Recognising the urgent need of a judicial reform in Ukraine, the Supreme Court Chairman stated that the Bill, "insistently "pushed" by interested persons and presented by them as reformist, in fact has nothing to do with the true judicial reform".* **The letter carried a request not to consider the Bill in the second reading and not to adopt it in general** – and therefore "to prevent formation of an illegitimate legislative framework for the exercise of justice, ruination of constitutional principles of functioning of the judicial branch".
17 December	**The Constitutional Court** passed Ruling No.32-pn that formally and legally led the State Court Administration out of the President's influence. The Ruling ruled unconstitutional provisions of the Law "On Judicial System in Ukraine" concerning the appointment and dismissal of judges by the President.
22 December	**The Constitutional Court passed Ruling** No.34-pn in the case of appointment of judges to administrative positions, in which, it explained the powers of the Council of Judges concerning appointment of judges to administrative positions, noting that in line with the Law "On Judicial System", "the Council of Judges of Ukraine is empowered to give recommendations for such appointment to the body (official), to which such powers are granted by the law". CCU obliged Parliament to immediately implement its Ruling No.1-pn of May 16, 2007, concerning legislative regimentation of appointment of judges to administrative positions in courts. **The Council of Judges** ceased appointments of judges to administrative positions, having appointed 1 000 judges chairmen and deputy chairmen of courts of different levels, including high specialised courts. ***The Verkhovna Rada*** *for the second time failed to fulfil the CCU order, since* ***the matter had become political rather than legal and therefore could not be resolved during presidential elections.***
23 December	**Parliament** created a Temporary Ad Hoc Commission for preparation of the concept of the judicial and legal reform (Resolution No.1789), having set the term of its activity – six months. *On May 14, 2010, Parliament heard the Commission Report and took notice of it but did not support proposals to extend the term of its activity. Therefore, the draft Concept of the judicial and legal reform prepared by the Commission was not approved.*
25 December	**The Council of Judges**, having taken notice of the CCU Ruling No.34-pn of December 22, 2009, recommended court chairmen and their deputies appointed by it in the period from May 31, 2007, till December 22, 2009, to continue to exercise their powers until the end of the terms of appointment. Furthermore, it was decided to once again apply to Parliament with a request to legislatively regiment appointment of judges to administrative positions immediately. Having considered the situation that arose in HACU in connection with the expiry of the term of office of the Court Chairman Oleksandr Paseniuk provided by the law, the Council of Judges noted that judge Oleksandr Paseniuk was no longer entitled to discharge the duties of the Chairman of that Court. In such circumstances, in accordance with law, the duties of HACU Chairman were to be discharged by his First Deputy Chairman Mykola Sirosh. The Council of Judges denounced blatant neglect of the law with respect to the above-mentioned procedure of discharge of the duties of HACU Chairman by the Presidium of that Court, the Conference of Judges of Administrative Courts of Ukraine, Oleksandr Paseniuk and their acts and decisions inconsistent with the effective legislation.
2010	
17 January	**1st round of elections of the President of Ukraine.**
7 February	**Following the 2nd round of elections of the President of Ukraine, Viktor Yanukovych was announced the winner.**
2 March	**Supreme Court Chairman Vasyl Onopenko and the Council of Judges Chairman Petro Pylypchuk applied to President Viktor Yanukovych** with a letter expressing their vision of the judicial reform. In particular, they saw it necessary, *first, to give up forcible illegitimate "pushing" of the Bill "On the Judicial System and the Status of Judges" (reg. No.0916 and No.0917), second, to decide on the conceptual principles of further implementation of a socially-oriented judicial reform.*

Date	Event, *comment*
11 March	**The Constitutional Court** passed Ruling No.8-pn in the case concerning official interpretation of the terms "supreme judicial body", "high judicial body", "cassation appeal", contained in Articles 125, 129 of the Constitution. CCU decided that the relevant provisions of Articles 125 and 129 of the Constitution meant that: a trial might involve only one cassation appeal and review of judgment; high courts exercise powers of courts of the cassation instance for judgments of the concerned specialised courts; the constitutional status of the Supreme Court of Ukraine did not envisage granting it the powers of a court of the cassation instance concerning judgments by high specialised courts exercising powers of the cassation instance. *Therefore, deemed as cassation courts in Ukraine are only high specialised courts, while the Supreme Court became "the supreme judicial body" with an uncertain procedural status. On one hand, this removed so-called dual cassation from trial, on the other – created legal (constitutional) preconditions for legislative weakening of the procedural status of the Supreme Court and impairment of its influence on the judiciary.*
24 March	**President Viktor Yanukovych issued Decree No.440 that established the Working Group on the Judicial Reform** and appointed the Minister of Justice Oleksandr Lavrynovych its head. The Working Group was set up "with the purpose of immediate preparation of agreed proposals concerning further comprehensive reformation of the judicial system, provision of guarantees of exercise of the constitutional civil right to judicial protection, perfection of the legislative framework on the judicature, justice, status of judges".
25 March	**The Constitutional Court** passed Ruling No.9-pn, which ruled unconstitutional the Verkhovna Rada Resolution "On the Temporary Procedure of Appointment of Judges to Administrative Positions and Dismissal from Those Positions" of May 30, 2007.
6 April	**The Constitutional Court** passed Ruling No.11-pn, providing that "individual national deputies of Ukraine, in particular those not belonging to the parliamentary factions that initiated the creation of the coalition of parliamentary factions in the Verkhovna Rada of Ukraine, may take part in formation of the coalition of parliamentary factions in the Verkhovna Rada of Ukraine". That legally doubtful Ruling ruled constitutional the establishment of the pro-presidential coalition "Stability and Reforms" in Parliament, which enabled, *first, further functioning of the Verkhovna Rada of the 6th convocation (in line with then effective Constitution, if it failed to form a coalition within one month after the termination of the previous coalition, the powers of the Verkhovna Rada might be terminated early), second,* **adoption of laws wanted by the President, including for implementation of the judicial reform.** ***The CCU Ruling created basic preconditions for the judicial reform of 2010.***
11 May	**Judges of the Supreme Court** applied to President Viktor Yanukovych in connection with faulty approaches to the lines of further development of the judicial system chosen by the Working Group on the judicial reform. The argued that those approaches did not rest on the Constitution, and their legitimisation would further ruinous processes in the field of justice, shatter independence of the judicial branch, lead to deterioration of judicial protection of civil rights and freedoms. The appeal requested the President not to take decisions aimed at ruination of justice following the Working Group activity.
13 May	Parliament adopted the Law "On Amendments to Some Laws of Ukraine Concerning Prevention of Abuse of the Right to Appeal" that gave the High Council of Justice powers not envisaged by the Constitution; changed the procedure of appeal against acts, actions and inaction of the President, Parliament, the High Council of Justice. **Supreme Court Chairman** Vasyl Onopenko requested President Viktor Yanukovych to put a veto on the Law.
20 May	**Parliament** adopted Resolution No.2276 that invalidated its Resolution "On Basic Adoption of Bills on Introduction of Amendments to the Law "On the Judicial System in Ukraine" and on Introduction of Amendments to the Law "On the Status of Judges" No.846 of April 3, 2007. ***The Resolution removed formal obstacles for consideration of the concerned Bill of President Viktor Yanukovych, expected to be submitted in the near future.***
31 May	**The Working Group on the Judicial Reform** (its part selected by the Presidential Administration in advance) met in presence of President Viktor Yanukovych, and the Working Group Chairman Oleksandr Lavrynovych presented the Bill "On the Judicial System and the Status of Judges". Conceptual provisions of that Bill were criticised by only one present participant of the Working Group meeting – the Supreme Court Chairman Vasyl Onopenko. **President Viktor Yanukovych** submitted the Bill for priority consideration to Parliament.
2 June	**Supreme Court Chairman** Vasyl Onopenko applied to the Verkhovna Rada with a request not to adopt the Bill "On the Judicial System and the Status of Judges" submitted by the President as running contrary to the Constitution and leading to ruination of the judicial system and growth of dependence of judges.
3 June	**Parliament** passed the President's Bill "On the Judicial System and the Status of Judges" in the first reading.
21 June	**Presidium of the Council of Judges** issued an Appeal to the Verkhovna Rada Chairman Volodymyr Lytvyn, saying that some provisions of the Bill "On the Judicial System and the Status of Judges" were inconsistent with the Constitution, European standards, rulings of the Constitutional Court, recommendations of the Venice Commission, and requested it to arrange parliamentary hearings before the consideration of that Bill in the second reading and to send it for expert examination to the Venice Commission.
7 July	**Parliament adopted the presidential Bill "On the Judicial System and the Status of Judges" in the second reading and in general, as a law.**
12 July	**Supreme Court Chairman** Vasyl Onopenko applies to President Viktor Yanukovych with a letter reasonably requesting him to put a veto on the Law "On the Judicial System and the Status of Judges" adopted by Parliament.
27 July	**President Viktor Yanukovych signed the Law "On the Judicial System and the Status of Judges", starting the judicial reform.**

[1] Administrative positions in courts – positions of the Court Chairman and Deputy Chairman.

3. SECOND (CONSTITUTIONAL) STAGE OF THE JUDICIAL REFORM: PROSPECTS AND RISKS

A proper judicial reform in Ukraine is impossible without amending the Constitution. For years, politicians, judges, scholars, and representatives of international institutions have been pointing that out.[1] In particular, the Venice Commission in its Opinion on the Law "On the Judicial System and the Status of Judges" recommended the Ukrainian authorities to amend some provisions of the Constitution (namely: to ensure that courts are established and removed in accordance with the law; to prohibit the Verkhovna Rada from participating in the process of appointment and dismissal of judges; to change the composition of the High Council of Justice by ensuring that its majority consists of judges elected by their peers; to cancel the probationary term for judges – or at least, to reduce it to two years).[2]

Speaking at the Congress of Judges of Ukraine, in September 2010, President Viktor Yanukovych said that he did not exclude the possibility that "in order to accomplish the reform, relevant amendments will also be introduced to the Constitution of Ukraine".[3] Later, the President on several occasions spoke of the need for constitutional amendments concerning the judicial system, stressing that almost everything in the sector has been regulated by law. "The only part left is the one that has to be regulated in the Constitution".[4] It was also reported that reformation of the judicial system – one of the key lines of Ukraine's European integration – would stay under his personal control.[5]

3.1. CONSTITUTIONAL ASSEMBLY AND SPECIFICS OF ITS WORK

Constitutional Assembly. By Presidential Decree dated 17 May 2012, the President set up the Constitutional Assembly (hereinafter, the Assembly) as a special auxiliary body under the President of Ukraine. The Decree also determined its objectives, structure and composition.[6] Its main tasks included drafting and approval of the *Concept for Amending the Constitution of Ukraine*, as well as the development on its basis and preliminary approval of the bill (bills) introducing amendments to the Constitution.

At the first meeting of the Assembly Viktor Yanukovych named preparation of fragmentary amendments to the Constitution in the domain of justice as one of the main priorities of its activity and stressed that "the constitutional changes should make the basis for building an effective judicial system, introducing European approaches to a profession of lawyer, ensuring the real independence of judges, and establishing an efficient system of judicial self-government".[7]

Commission on Justice and its documents. Within the Assembly, the Commission on Justice was formed, tasked to draft amendments to the Constitution on justice. First of all, the Commission was to work out the *Conceptual principles for perfection of constitutional regulation of justice in Ukraine* (hereinafter, the Conceptual principles).

On 4 December 2012, the Commission approved these principles and submitted them to the Assembly for consideration. On 6 December 2012, the Assembly, having heard and discussed the report by the Commission Chairman Vasyl Maliarenko, stated the following: "To support the general approaches and lines concerning systemic conceptual principles for constitutional and legal perfection of justice in Ukraine developed by the Constitutional Assembly Commission on Justice and to create mechanisms aimed at enhancing the guarantees of independence of judges in order to ensure an efficient protection of human rights and freedoms in Ukraine" (for an extract from the document adopted by the Assembly, see Box "*Conceptual principles for perfection…*").[8]

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1 See, e.g.: Proposals concerning the following steps of the judicial reform in Ukraine. Prepared following discussions during the conference "Judicial reform in Ukraine and world standards of independence of the judicial branch" (October 26-27, 2010, Kyiv). November 12, 2010. – *http://www.fair.org.ua/content/library_doc/Judicial_Reform_Roundtable_Proposals_UKR3.pdf;* Assessment of the Law of Ukraine "On the Judicial System and the Status of Judges" (William Duffey – US Federal District Court, Bohdan Futey – US Court of Federal Claims, Mary Noel Pepys – Attorney). Ukraine Rule of Law project. – *http://www.fair.org.ua/content/library_doc/UROL_Assessment_Report_on_the_Law_on_the_Judiciary_FINAL_UKR.pdf (in Ukrainian*).

2 See: Joint Opinion of the Venice Commission and Directorate General of Human Rights and Legal Affairs of the Council of Europe of October 15-16, 2010, on the Law of Ukraine "On the Judicial System and the Status of Judges".

3 Head of State took part in the 10th extraordinary Congress of Judges of Ukraine. – President of Ukraine web site, September 16, 2010, *http://www.president.gov.ua (in Ukrainian*).

4 Head of state: Constitutional amendments should take account of the commenced reform of the judicial and law-enforcement system. – *Ibid*., February 5, 2013.

5 See: Ukraine will not stop at the stage of implementation of norms of the new Code of Criminal Procedure alone – Pshonka. – Rakurs Internet publication, March 26, 2013, *http://ua.racurs.ua (in Ukrainian*).

6 President of Ukraine Decree "On Constitutional Assembly" No.328 of May 17, 2012, – President of Ukraine web site, *http://www.president.gov.ua* (*in Ukrainian*).

7 The President's speech at the first meeting of the Constitutional Assembly. – *Ibid.,* June 12, 2012 *(in Ukrainian*).

8 Decision of the Constitutional Assembly on the proposal concerning conceptual principles for constitutional and legal modernisation of justice in Ukraine No.12 of December 6, 2012. – *Ibid*., December 6, 2012 (*in Ukrainian*).

CONCEPTUAL PRINCIPLES FOR PERFECTION OF CONSTITUTIONAL REGULATION OF JUSTICE IN UKRAINE* (EXTRACTS)

The Constitutional Assembly' Commission on Justice believes that such perfection of constitutional regulation of issues of justice is to be implemented according to the following conceptual principles:

1) on general approaches to introduction of amendments to the Constitution of Ukraine:

- systematicity and integrity of introduction of amendments to the Constitution of Ukraine, including on justice;
- granting a constitutional status to the laws developing constitutional provisions concerning justice (they are to be adopted by a qualified majority of votes of national deputies of Ukraine);
- incorporation of principles ensuing from the European Convention on Human Rights and Fundamental Freedoms in the Constitution of Ukraine;

2) on the system of judicature:

- change of the principle of building the system of courts in Ukraine from territoriality to ex-territoriality, to reduce administrative pressure on courts and improve accessibility of justice; introduction of the principle of instances in the system of judicature;
- constitutional establishment of powers of the Supreme Court of Ukraine as the supreme judicial body to secure a proper place and role for it in Ukraine's judicial system;
- concentration of all provisions dealing with the Constitutional Court of Ukraine and its judges in a separate section of the Constitution of Ukraine;
- solution of issues of establishment, reorganisation and liquidation of courts by the law following a motion by the concerned judicial body (the High Council of Justice of Ukraine);
- creation of a system of peace justice;
- creation of institutions of alternative (extrajudicial) ways of settlement of legal disputes;
- establishment of constitutional guarantees of the right of citizens to be tried by jury and their participation in the exercise of justice as jurors;

3) on the procedure for selection and appointment (election judges):

- removal of political structures from court staffing;
- removal of political structures from decisions on responsibility of judges;
- staffing of courts and provision of responsibility of judges to one state body – the High Council of Justice. Removal of parallelism and duplication in that process;
- preservation of the probationary term of office of judges (first appointment), being a strong factor of countering corruption and ensuring better staffing of the corps of judges;
- an increase of the age threshold for occupation of the position of a judge (from 25 to 30 years);
- an increase of the length of professional service necessary for occupation of the position of a judge (from 3 to 5 years);
- an increase of the age limit for occupation of the position of a judge (from 65 to 70 years);
- solution of issues of appointment of judges to administrative positions in courts by bodies of judges' self-government (a collective of judges);
- election a judge for an indefinite term by the High Council of Justice;

4) on enhancement of guarantees of independence of judges:

- provision of actual, not declarative independence of judges;
- guarantee of adoption of court judgements by an independent judge in compliance with the law;
- toughening responsibility for any influence on court;
- refusal from the institution of dismissal of judges for breach of oath as resting on vague (unspecified) grounds for legal responsibility of judges;
- provision of proper funding and proper conditions for functioning of courts and activity of judges;
- provision of proper social protection of judges and their families;
- allocation of expenses on maintenance of every court separately by the State Budget of Ukraine;

5) on formation and functioning of the High Council of Justice:

- formation of the High Council of Justice in accordance with the procedure whereby at least half of that body is made up of judges elected by judges;
- exercise of powers by the High Council of Justice members on a full-time basis;
- exclusion from the powers of the High Council of Justice of dismissal of prosecutors for incompetency and, in connection with such exclusion, removal of the General Prosecutor of Ukraine from the High Council of Justice;
- dismissal of judges on grounds not related with commitment of offences by the High Council of Justice;

6) on enhancement of efficiency of the activity of courts:

- provision of optimal load of cases on judges;
- provision of timely and proper execution of court judgements.

* Approved by the Constitutional Assembly Commission on Justice on December 4, 2012. Endorsed by the Constitutional Assembly on December 6, 2012. See: "Decision on the proposal concerning the conceptual principles for constitutional and legal modernisation of justice in Ukraine" No.12 of December 6, 2012. – *http://www.president.gov.ua/news/26372.html*.

After that, the Commission began to work out concrete proposals for amendments to the Constitution resting on those *Conceptual principles*. The Commission met publicly, with other Assembly members, and invited scholars and experts. Judges of all chambers attended a meeting devoted to determination of the constitutional status of the Supreme Court. The Commission's activity was extensively covered by the professional media. As of mid-February 2013, the Commission approved a new wording of only three articles of the proposed Constitution section "Judicial Branch". According to a plan announced at a Commission meeting by its Chairman Vasyl Maliarenko, the Commission was to finish drafting changes to the Constitution (the text of the "Judicial Branch" section) by the end of spring 2013.

However, as soon as 5 October 2012, the Presidential Administration Head Serhiy Liovochkin sent to the Assembly the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" developed by the Presidential Administration and requested its analysis and comments.[9] As it was revealed later, the draft law was sent to the Venice Commission even before the Assembly discussed it.[10]

On the assignment of the Assembly Chairman, the Bill submitted by the Presidential Administration was reviewed by the Commission on Justice. The Commission:

- came to the general conclusion that the bill required all-round finalisation, first of all, to protect judges from unlawful influence and to depoliticise the judicial system;

[9] Mass media reported that the bill was submitted to the Constitutional Assembly by President Viktor Yanukovych. The same was said at the Constitutional Assembly meeting on December 6, 2012, by the President's adviser – Head of the Main Department of Justice of the Administration of the President of Ukraine Andriy Portnov. See: Records of the third meeting of the Constitutional Assembly of December 6, 2012. – Ibid., December 6, 2012 (*in Ukrainian*).

[10] See: Records of the round-table meeting dedicated to conceptual issues of perfection of constitutional principles of justice in Ukraine, December 6, 2012. – *Ibid.*, December 6, 2012 *(in Ukrainian)*.

- termed unacceptable the amendment of the procedure for formation of the corps of judges proposed by the Bill, namely – empowerment of the President to appoint and dismiss all judges, as not contributing to de-politicisation of the judicial branch and independence of judges;
- termed unacceptable the proposed procedure for appointment of judges to administrative positions – by the High Council of Justice, noting that the mechanism of appointment of judges to such positions was critical for independence of judges;
- did not support the proposed procedure for formation of the High Council of Justice.

The Commission termed unreasonable most of other provisions of the Bill and came to the conclusion that the Constitution could be positively improved only on the basis of a comprehensive and systemic approach.[11]

On 6 December 2012, the Assembly heard the report on the Bill. The report was delivered by the Presidential Adviser – Head of the Main Department of Justice of the Presidential Administration Andriy Portnov, introduced by the Assembly meeting chairperson as the leader of the group that had prepared the draft. The Assembly did not adopt any decisions regarding the Bill. Meanwhile, some **Assembly members noted the vague situation with preparation of amendments to the Constitution on justice: on one hand, the Constitutional Assembly established by the President was preparing conceptual principles for such amendments, on the other – the Presidential Administration had drafted fragmentary amendments to the Constitution and pushed their adoption.**[12]

On the same day, the Bill was discussed at a Roundtable arranged by the Assembly leadership and attended by all members and experts of the Venice Commission who produced their thoughts concerning the content of the draft.[13]

Since then, efforts aimed at preparing the amendments to the Constitution of Ukraine on justice have been inconsistent with objectives set in the Presidential Decree and, respectively, with the competence of the Assembly (especially its Commission on Justice). In fact, the bills introducing amendments to the Constitution on justice were drafted outside the Assembly and submitted by the Presidential Administration.

Certain features of consideration of the Bill by the Constitutional Assembly give extra grounds to conclude that the main function of the Constitutional Assembly might be reduced to legitimising amendments to the Constitution never developed by it.[14] The Constitutional Assembly, including one of its members Viktor Musiyaka – who had subsequently resigned due to the fact that "the Assembly was initially used as a cover up" – have highlighted this on many occasions.[15]

3.2. DRAFT LAW "ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE CONCERNING IMPROVEMENT OF THE JUDICIAL SYSTEM AND THE PRINCIPLES OF JUSTICE IN UKRAINE"

As we noted above, the Commission on Justice was to complete drafting the amendments to the Constitution (section on the "Judicial Power") by the end of spring 2013. However, in February 2013, the government and the Assembly leadership made a number of statements that the work was nearing completion.

This was first said by President Viktor Yanukovych who, when meeting the Venice Commission President Gianni Buquicchio on 5 February 2013, expressed his hopes that the Assembly would, *in the near future*, present concrete proposals for a relevant bill on amendments to the Constitution dealing with justice. "We, certainly, will immediately send these proposals for an expert examination to the Venice Commission", – the President said.[16] Viktor Yanukovych had specifically stressed "the Constitutional Assembly has been operating as an autonomous and independent body, as was recommended by the Venice Commission".[17]

On the same day, members of the Coordinating Bureau of the Assembly had a meeting with the Venice Commission leadership, where, according to the President's Press Service, Head of the Commission on Justice Vasyl Maliarenko, when informing the leadership about drafting amendments to the Constitution on justice, said nothing about the completion of the *relevant bill* (since it was only at the initial stage).[18]

However, on 13 February 2013, the Assembly Secretary Maryna Stavniychuk said that in the near future the Assembly would send to the Venice Commission the draft of the first amendments to the Constitution on justice, which was nearing its completion and prepared by taking into account the positions of different commissions of the Assembly and various stakeholders.[19]

On 22 February 2013, the President's official website released a report of another meeting of the Commission on Justice attended by the Assembly Deputy Chairman Yuriy Shemshuchenko, its Secretary Maryna Stavniychuk, the Assembly member Mykola Onishchuk. The report said: "The meeting discussed issues dealing with the draft Law of Ukraine 'On Amendments to the Constitution of Ukraine concerning improvement of the judicial system and the principles of justice in Ukraine', resting on the Conceptual principles for constitutional and legal modernisation of justice in Ukraine approved by the

[11] See: Letter by the Head of the Constitutional Assembly Commission on Justice Vasyl Maliarenko to the Constitutional Assembly Chairman Leonid Kravchuk. – Administration of the President of Ukraine, November 12, 2012, No.636/6710653 *(in Ukrainian)*.

[12] See: Records of the third meeting of the Constitutional Assembly on December 6, 2012 …

[13] See: Records of the round-table meeting dedicated to conceptual issues of perfection of constitutional principles of justice in Ukraine, December 6, 2012 …

[14] Experts in law, including experts of Razunkov Centre, immediately after the establishment of the Constitutional Assembly envisaged that its task might be reduced to the role of a cover called to hide the true intentions of its use for persona and narrow political goals. See: Melnyk M., Riznyk S. Constitution of the future, or affirmation of the past. – *Dzerkalo Tyzhnya*, June 26, 2012 … *(in Ukrainian)*.

[15] Rudenko L. Viktor Musiyaka: The Constitutional Assembly is used as a respectable cover for implementation of amendments drafted in Bankova St. – *Rakurs*, March 15, 2013, *http://racurs.ua (in Ukrainian)*.

[16] Head of state: Constitutional amendments should take account of the commenced reform of the judicial and law-enforcement system. – President of Ukraine web site, February 5, 2013 *(in Ukrainian)*.

[17] President stressed importance of cooperation with the Venice Commission at each stage of the constitutional process. – *Ibid*., February 5. 2013.

[18] Members of the Coordinating Bureau of the Constitutional Assembly met the Venice Commission leadership. – *Ibid*., February 5, 2013.

[19] Constitutional Assembly has something to send to the Venice Commission – Stavniychuk. – *Ukrinform,* February 13, 2013, *http://ukrinform.ua (in Ukrainian)*.

Constitutional Assembly and prepared by the Commission, and also on some proposals of other commissions and members of the Constitutional Assembly. The Bill also took into account all the good expertise of the relevant bill prepared by a working group in the Administration of the President of Ukraine". It was also reported that the Commission had basically approved the Bill and tasked the Assembly Chairman Leonid Kravchuk to send it to the Venice Commission for an opinion.[20]

Such a request by the Commission to the Assembly Chairman was surprising, to say the least, since two days earlier the Coordinating Bureau of the Assembly passed a decision "to recommend the Constitutional Assembly Chairman Leonid Kravchuk to send the draft Law of Ukraine 'On Amendments to the Constitution of Ukraine concerning improvement of the judicial system and the principles of justice in Ukraine' to the European Commission "For Democracy through Law" (Venice Commission) for an opinion".[21] After that decision, the Commission on Justice recommending Leonid Kravchuk to send the bill for consideration of were nothing but to show the Venice Commission that the Bill had been recommended by the respective Commission of the Constitutional Assembly.

The text of the Draft Law was not made public on the President's official website. Some media published it, reporting that the Commission on Justice had met to consider the Bill in a rush and without journalists.[22]

Analysis of the draft Law shows that, *firstly*, it may be seen as a modified version of the draft Law "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" prepared by the Presidential Administration and termed unacceptable by the Constitutional Assembly' Commission on Justice. *Second*, although several working bodies of the Constitutional Assembly (the Coordinating Bureau, the Commission on Justice) had a role in its consideration, it was in fact prepared by the Presidential Administration.[23]

In March-April 2013, mass media reported that the Assembly Chairman Leonid Kravchuk had sent the bill on amendments to the Constitution concerning justice to the Venice Commission.[24]

Meanwhile, Ukrainian society and even the Assembly's members were not informed of the Bill's content and of the very fact that it had been sent to the Venice Commission. This information was not on the President's official website that covered the Assembly's activity; and journalists who applied to the Assembly for copies of the Bill could not get them.

Later, some media published a copy of Mr. Kravchuk's letter to the Venice Commission dated 29 March 2013, where he spoke of the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" and requesting its examination and an opinion on its compliance with European standards. The text of the Bill was also released.[25]

Requesting the Venice Commission to analyse the draft Law was nothing but a personal decision by Leonid Kravchuk: it was not based on the legal framework governing the activity of the Assembly, did not reflect the Assembly's position,[26] **went beyond powers of its Chairman and was done contrary to recommendations of the Coordinating Bureau and the Commission on Justice. In such circumstances, one cannot consider Mr. Kravchuk's request as a legitimate application to the Venice Commission by Ukraine.** All this let the Assembly Member Viktor Khryzhanivskyi speak about the abuse of powers by the Assembly Chairman.[27]

3.3. DRAFT CONCEPT FOR AMENDMENTS TO THE CONSTITUTION: THE REAL LEGISLATIVE PROCESS

Separate bills on introduction of amendments to the Constitution of Ukraine on justice were actually drafted in absence of a conceptual basis for constitutional amendments. The above-mentioned *Conceptual principles for perfection of constitutional regulation of justice in Ukraine* were approved by the Assembly on 6 December 2012 – after the Administration submitted its bill to the Assembly. The draft *Concept for Amending the Constitution of Ukraine* was heard at a plenary sitting of the Assembly and basically approved only on 21 June 2013 (Box "*Concept for amendments ...*").[28]

The Assembly Decision said that the draft would be finalised by 15 October 2013. The text of the draft *Concept* was not released.[29]

The very existence of two such documents approved by the same body makes nonsense. Another instance of nonsense is that those two documents substantially differ by their substance – in many cases, their provisions are incompatible.[30]

The third instance of nonsense in the situation is that the presidential Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges", *first*, was not drafted by the Assembly, *second*, many of its provisions are incompatible with its documents mentioned above.

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20 Another meeting of the Constitutional Assembly Commission on Justice was held. – President of Ukraine web site, February 22, 2013, *http://www.president.gov.ua* (*in Ukrainian*).

21 Decision of the Coordinating Bureau of the Constitutional Assembly No.12 of February 20, 2013 "On the Draft Law of Ukraine "On Introduction of Amendments to the Constitution of Ukraine Concerning Perfection of the Judicial System and Principles of Exercise of Justice in Ukraine". – *Ibid*., February 20, 2013 (*in Ukrainian*).

22 See: Prymachenko O. Judicial reform – perfection unlimited. – *Rakurs*, February 22, 2013, *http://racurs.ua*. Approval of that bill behind the scene was reported by the Constitutional Assembly member Ihor Koliushko. – Kravchuk's Assembly did not set to the law on referendum. – *Ukrayinska Pravda*, March 18, 2013, *http://www.pravda.com.ua (in Ukrainian*).

23 Kiriyenko O. In the intended direction; Kiriyenko O. A Foreign Case. – *Yuridicheskya Praktika,* 2013, March 12, p.1, 2021 *(in Russian)*.

24 See: Amendments to the Constitution concerning the judicial system will be ready in March – Kravchuk. – *Rakurs*, March 6, 2013, *http://racurs.ua* (*in Ukrainian*); Leonid Kravchuk: "It's enough walking around MPs like a cat around milk!" – March 6, 2013, *http://kp.ua* (*in Russian*).

25 How Portnov wants to rewrite the Constitution. – Forbes, April 11, 2013, *http://forbes.ua (in Russian); She*ll game in the Constitutional Assembly. – *Rakurs,* April 23, 2013, *http://racurs.ua (in Ukrainian*).

26 Ex-CCU judge: "Questions and results may be manipulated at a referendum. Questions are manipulated even now". – *Rakurs*, June 5, 2013, *http://ua.racurs.ua* (*in Ukrainian*).

27 Appeal of the Constitutional Assembly member Viktor Khryzhanivskyi to the Constitutional Assembly Chairman Leonid Kravchuk of June 21, 2013 (*in Ukrainian*).

28 Decision concerning the draft Concept for Introduction of Amendments to the Constitution of Ukraine of June 21, 2013, No.14.– President of Ukraine web site, June 21, 2013, *http://www.president.gov.ua* (*in Ukrainian*).

29 Although the draft of the Assembly envisaged such release.

30 For more detail see: Malnyk M. Comments and proposals to the draft Concept for Introduction of Amendments to the Constitution of Ukraine. – Razunkov Centre web site, September 13, 2013, *http://www.razumkov.org.ua* (*in Ukrainian*).

Draft

CONCEPT FOR AMENDMENTS TO THE CONSTITUTION OF UKRAINE (*extract*)[1]

Judicial power

1. Issues prompting to perfect constitutional regulation of organisation and activity of the judicial branch

Drafting proposals on renovation of constitutional principles of organisation and activity of the judicial branch, the Constitutional Assembly assumes that the judicial branch is the basis of a democratic and law-ruled state and plays a key role in the system of separation of powers, defending human and civil rights and freedoms.

The effective Constitution of Ukraine laid down the basis for establishment, the procedure for organisation and activity of the judicial branch in Ukraine: it proclaimed guarantees of independence and immunity of judges; established the exceptional function of courts in the exercise of justice; extended jurisdiction of courts to all legal relations in the country; laid down the key principles of building the judicial system and fundamentals of the exercise of justice.

Meanwhile, it should be said that the existing constitutional model of organisation and activity of the judicial branch has failed to fully ensure its independence and autonomy, ability to efficiently discharge its main function – exercise of fair, unbiased and public justice within reasonable terms.

The main constitutional problems of providing independent, efficient and fair justice in Ukraine include: insufficient independence of the judicial branch in the system of separation of powers, which on the constitutional level is attributed to the key role of political bodies in the procedures of appointment and dismissal of judges, bringing them to responsibility and stripping of judges' immunity; not all the proclaimed guarantees of independence of judges were practically introduced in the legislation and therefore, not fully implemented in practice, which in the first place refers to inadequate funding of the judicial branch and provision of social guarantees and security of judges and their families; there are no efficient and transparent mechanisms that, on the one hand, could ensure protection of independence of judges, on the other – would allow the judicial system to get rid of incompetent judges undermining the dignity of and respect for judicial bodies; the system of judicature does not ensure sufficient accessibility of justice, consideration of cases within reasonable terms, uniformity of the judicial practice and possibilities for prompt and efficient correction of judicial errors; the declared main principles of the exercise of justice do not fully meet European standards of a fair trial.

Due to the absence, incompleteness or obscurity of constitutional regulation, some critical aspects of organisation and activity of the judicial branch are often miscomprehended and misinterpreted by the legislator, which leads to conflicts, including political, dissimilar practice of law-enforcement, impairment or distortion of the essence of some effective constitutional provisions.

Therefore, **due to those constitutional defects in legal regulation of the judicial system and principles of exercise of justice, the judicial branch in Ukraine lacks respect and trust in society, demonstrates a high corruption perception index, does not fully ensure fair, impartial and public justice within reasonable terms, which results in many applications to the European Court of Human Rights.**

The need of constitutional and legal modernisation of justice is also conditioned by Ukraine's aspirations of European integration. European institutions more than once stressed the need of the judicial branch reform in Ukraine. Meanwhile, the Parliamentary Assembly of the Council of Europe and the European Commission "For Democracy through Law" (Venice Commission) noted that without amendments to the Constitution of Ukraine, a full-scale judicial and legal reform in line with European standards would be impossible.

2. Goal and objectives of the constitutional reform in the judicial branch organisation and activity

The goal of the constitutional reform in the judicial branch organisation and activity is to modify current provisions of the Constitution of Ukraine to bring it in compliance with international standards of accessibility, efficiency and independence of justice.

The main objectives of the constitutional reform in the sector include enhancement of guarantees of independence of courts and judges and removal of key institutional defects in constitutional regulation of the exercise of justice in Ukraine.

3. Ways and methods of problem solution

1). It is proposed to set out the principles of organisation and exercise of justice in a separate section of the Constitution of Ukraine "Judicial Branch". Meanwhile, all the provisions relating to the Constitutional Court of Ukraine and judges of the Constitutional Court of Ukraine should be regimented in a separate section dealing with the Constitutional Court of Ukraine.

Issues immediately dealing with the judicial branch should also be considered integrally, first of all, in the context of perfection of the constitutional principles of human and civil rights and freedoms, including those ensuing from the Convention for the Protection of Human Rights and Fundamental Freedoms.

To ensure stability of the legislation on the judicial branch organisation and activity, and also proceeding from its high public importance, it is proposed to make the laws shaping the judicature and status of judges constitutional, i.e., adopted by not less than two-thirds of the constitutional membership of the Verkhovna Rada of Ukraine.

Modification of the current provisions of the Ukrainian Constitution on perfection of the judicial branch organisation and activity will enable a systemic approach in the constitutional regulation of legal principles of organisation and functioning of the judicial branch and of other actors in the sector (in particular, the Verkhovna Rada of Ukraine, the President of Ukraine, the Public Prosecution and the Constitutional Court of Ukraine).

2). Key importance should be given to enhancement of guarantees of independence of judges.

In this connection, it is necessary:

(1) to remove political structures from the procedure for appointment and dismissal of judges.

With this purpose, it is proposed to remove from the Constitution of Ukraine the provision of election of judges for an indefinite term by the Verkhovna Rada of Ukraine, in that way meeting the Venice Commission recommendations of the need to bar parliament as a political body from the procedure for appointment and election of judges.

Powers of appointment and dismissal of judges and of transfer of judges should be exercised on the basis and following the motion of the High Council of Justice by the President of Ukraine. Such acts of the President of Ukraine should also be endorsed by the Chairman of the High Council of Justice.

Such an approach is expected to remove risks of politicisation of the corps of judges staffing. The President of Ukraine powers in that process will be purely ceremonial and at the same time correspond to his constitutional status;

(2) to cancel the probationary term at appointment of judges.

In view of the repeated comments of the Venice Commission, the procedure for first appointment of judges for a five-year term should be abolished. In this connection it is necessary to toughen the requirements to the persons claiming the position of a judge: to raise the age threshold (from 25 to 30 years) and the minimum length of service in the field of law (from 3 to 5 years). Such changes will contribute to improvement of the quality of the corps

[1] Emphasis added – *Ed.*

of judges, since the persons will have greater professional and life experience. It is also proposed to raise the age limit for judges to seventy years;

(3) to provide for competitive selection and promotion of judges.

The Constitution of Ukraine should provide that appointment and promotion of judges are performed on a competitive basis in accordance with the procedure established by the law, except transfer of judges in connection with reorganisation or liquidation of courts.

Such an approach will meet Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and duties, of 17 November 2010, whereby "decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity";

(4) to give meetings of judges a role in appointment of concerned court chairman.

Court chairmen and deputies (except the Supreme Court of Ukraine Chairman and his deputies) are to be appointed by the High Council of Justice on a proposal of a meeting of judges of the concerned court. For the Supreme Court of Ukraine Chairman, the current election procedure should be preserved, which is to be specified on the constitutional level, also with respect to his deputies;

(5) to elaborate the grounds for and to improve the mechanism of dismissal of judges.

The Constitution of Ukraine should follow the Venice Commission recommendations to separate grounds for dismissal and termination of powers of judges; to constitutionalise the institution of termination of powers of judges; to change "breach of oath" as a reason for dismissal of judges, repeatedly criticised by the Venice Commission. It is proposed to introduce to the Basic Law of Ukraine a provision enabling a judge to appeal against a decision of his dismissal in court. The High Council of Justice should be the main body taking decisions on dismissal of judges and bringing them to disciplinary responsibility;

(6) to change the approaches to immunity of judges.

It is proposed to follow the Venice Commission recommendations to change the existing procedure for scrapping judges' immunity and to transfer the powers of scrapping immunity from the Verkhovna Rada of Ukraine to the High Council of Justice. Meanwhile, taking into account the need to ensure effective guarantees of independence of judges, it was deemed expedient to preserve full immunity of judges, rather than only functional, as recommended by the Venice Commission.

It is also necessary to lift the ban on judges' membership in professional unions, as it is required by the International Labour Organisation Convention No.87 "Freedom of Association and Protection of the Right to Organise" of 6 July 1956, ratified by Ukraine on 14 September 1956, and also meets Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and duties, of 17 November 2010.

3). It is proposed to change the approaches to the status, procedure for formation and functioning of the High Council of Justice.

The Constitution of Ukraine should specify the status of the High Council of Justice as an independent body that supports organisation and activity courts and defends independence of judges; provide for the High Council of Justice functioning on a permanent basis, and give to that body all powers dealing with the judicial branch. Such an approach meets the relevant recommendations of the Venice Commission, removes parallelism and duplication of powers of different bodies in that process.

The High Council of Justice is to have fifteen members, 9 of them – appointed by the Congress of Judges of Ukraine from among active judges, retired judges (representing courts of different instances and specialisation); the National Academy of Law Science of Ukraine, the Congress of Representatives of the Legal Academia will appoint two members of the High Council of Justice each, the Congress of Barristers of Ukraine – two members of the High Council of Justice representing barristers. Members of the High Council of Justice will be appointed for five years.

Therefore, taking into account recommendations of European institutions concerning the formation and powers of the High Council of Justice (as an independent body), it is proposed to remove from that body representatives of the prosecution, including the General Prosecutor of Ukraine, and to remove from the competence of the High Council of Justice consideration of complaints about decisions of bringing prosecutors to disciplinary responsibility, as well as decisions on violation of the requirements of incompetency by prosecutors.

Meanwhile, it is proposed to give the former members of the High Council of Justice *ex officio* (Prosecutor General of Ukraine, Supreme Court of Ukraine Chairman, the Minister of Justice of Ukraine) the right to attend in the High Council of Justice meetings with a deliberative vote, which will contribute to impartial and all-round review of issues falling within its competence.

4). Constitutional provisions should be modified to ensure accessibility and efficiency of justice.

For that, it is proposed:

(1) to change approaches to constitutional regulation of the system of courts in Ukraine, not specifying its hierarchy but providing the main principles of its building in the Constitution.

In particular, the status of the Supreme Court of Ukraine and High specialised courts should be regulated (not elaborating their specialisation). Networking and establishment of other courts are to be decided by a law adopted by Parliament. Such an approach will legislatively simplify the system of courts, producing a judicial system that will ensure accessibility of justice for everyone and removing the risk of procedural delays.

The Venice Commission is known to have criticised constitutional regulation of the system of judicature in Ukraine, terming the present system of courts as rather complex and tangled, which gives rise to the risk of procedural delays;

(2) to clearly specify the status of the Supreme Court of Ukraine as a supreme judicial body.

In the present conditions, there is a need to specify the main powers of the Supreme Court of Ukraine on the constitutional level. Such powers should include guarantees, in procedural forms specified by the law, of similar application of norms of the law of substance and the law of procedure by all courts, and also review of court judgements in case of an international judicial institution passing a judgment against Ukraine. Furthermore, it is proposed to grant the Supreme Court of Ukraine the right of legislative initiative;

(3) to remove obstacles for Ukraine's recognition of the jurisdiction of the International Criminal Court in the context of the Constitutional Court of Ukraine Ruling of July 11, 2001, No.3-y/2001;

(4) to change approaches to networking, establishment, reorganisation, liquidation and funding of courts, in particular, with account of the Venice Commission recommendation to refer issues of networking, establishment, reorganisation and liquidation courts to law regulation (it should also be provided that the relevant bill is submitted by the President of Ukraine following a motion by the High Council of Justice, approved by the Prime Minister of Ukraine);

(5) to guarantee separate funding of every court;

(6) to introduce the institution of peace justice, and also to provide in the Constitution of Ukraine a possibility of alternative procedures of dispute resolution with account of the Committee of Ministers of the Council of Europe position concerning the reduction of load on courts of general jurisdiction (Recommendation No.R (86) 12 of 16 September 1986).

E.g., the presidential Bill and the *Conceptual principles perfection constitutional regulation justice* in Ukraine propose **different** provisions in the Constitution, in particular: in the principles of the judicial system; the procedure for setting out the court network; the actors forming the corps of judges (the Bill suggests exclusion of Parliament from that process and transfer of its powers to the President, the *Conceptual principles* – exclusion of all political actors); the procedure for election of judges for an indefinite term (according to the Bill, judges are appointed for an indefinite term by the President, according to the *Conceptual principles* – by the High Council of Justice); the procedure for appointment of judges to administrative positions; a seat for the Prosecutor General in the High Council of Justice; powers of the High Council of Justice; the status of the High Council of Justice members. Unlike the presidential Bill, the *Conceptual principles* also envisage preservation of the probationary term for judges (their first appointment).[31]

The presidential Bill and the draft *Concept for Amending the Constitution of Ukraine* also differ. They, in particular, **differently** look ay: approaches to constitutional regulation of the system of courts in Ukraine; powers of the Supreme Court; procedures of formation of the High Council of Justice; composition of the High Council of Justice (including the presence of the Prosecutor General in it); the status of the High Council of Justice members. Unlike the presidential Bill, the draft *Concept* proposes to remove duplication and parallelism in the mechanism of formation of the corps of judges (meaning the existence of two bodies – the High Council of Justice and the High Qualification Commission of Judges), and also to extend the Prosecutor General term of office from five to seven years (the President proposed to entirely remove the provision of the five-year term of office of the Prosecutor General from the Constitution).

3.4. BILL "ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE STRENGTHENING THE INDEPENDENCE OF JUDGES": PRELIMINARY APPROVAL IN PARLIAMENT[32]

On 14 June 2013, the Venice Commission on a request of the Assembly Chairman Leonid Kravchuk produced a generally positive conclusion regarding the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" – as generally meeting many recommendations given by it to the Ukrainian authorities in the recent years.[33]

On 4 July 2013, President Viktor Yanukovych submitted the Bill to Parliament.

On 5 September 2013, the parliamentary opposition submitted an alternative bill on amendment of Section VIII of the Constitution "Justice".[34] The motion was signed by 165 national deputies. However, the bill was not registered, since, according to the Verkhovna Rada Chairman Volodymyr Rybak, it was submitted after the term set by the Law "On Rules of Procedure for the Verkhovna Rada of Ukraine".[35]

Meanwhile, the Verkhovna Rada passed a Resolution that put consideration of the presidential Bill on the agenda of the current (third) session and sent it to the Constitutional Court with a request to produce a conclusion concerning its correspondence to the requirements of Articles 157 and 158 of the Constitution. The Resolution proposed to the Constitutional Court "to term consideration of the Bill… immediate".[36]

Two weeks later, on 19 September 2013, the Constitutional Court produced its Conclusion, in which it recognised that the Bill was consistent with those articles of the Constitution.[37]

All that time, the content and prospects of adopting the Bill were in focus of a rather wide discussion. On the one hand, the Bill was supported and promoted mainly by officials – present and former. In particular, the former Supreme Court Chairman, Chairman of the Council of Judges of Ukraine Vasyl Onopenko said: "I do assess the Bill as a big gain and believe that it really enhances guarantees of independence of judges". [38] Former NSDC Deputy Secretary Stepan Havrysh termed that bill "as a step forward".[39]

On the other hand, the Bill was criticised by practicing lawyers, independent experts and representatives of concerned public organisations. In particular, the Centre for Political Legal Reforms President Ihor Koliushko argued that the Bill "maximises the President's influence on the judicial branch".[40] The assessment by Professor Viktor Musiyaka was even more categorical – he said that the Bill would give the President "powers on a par with dictatorial" and "contains all anti-constitutional for the time being amendments to the legislation on the judiciary introduced during the so-called judicial reform of 2010. Now, they want to constitutionalise those changes".[41]

The Bill was also criticised by representatives of the opposition forces. In particular, national deputy Valeriy Karpuntsov (faction of UDAR party) argued that "amendments to the Constitution proposed by the President only enhance the dependence of judges on the authorities", and noted that the Bill contains a number of provisions that interpret recommendations proposed by the Venice Commission and reveals "on paper" approach to considering recommendations of international institutions.[42]

Representatives of international organisations supported the Bill despite public criticism and proposals to bring it

[31] See: Letter by the Head of the Constitutional Assembly Commission on Justice Vasyl Maliarenko to the Constitutional Assembly Chairman Leonid Kravchuk. – Administration of the President of Ukraine, November 12, 2012, No.636/6710653 (*in Ukrainian*).
[32] Reg. No.2522a. – See VR web site, *http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=47765*.
[33] Venice Commission Opinion CDL(2013)014 as of 14 June 2013.
[34] For more detail on the situation surrounding the alternative bill as of July, 2013, see: Opposition drafted alternative amendments to the Constitution but did not manage to have them registered. – *Dzerkalo Tyzhnya* – Ukraine, July 26, 2013, *http://dt.ua* (*in Ukrainian*).
[35] According to the Law, an alternative bill was to be submitted within 14 days after the registration of the primary bill.
[36] Verkhovna Rada Resolution "On Inclusion in the Agenda of the Third Session of the Verkhovna Rada of Ukraine of the Seventh Convocation of the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" and Its Sending to the Constitutional Court of Ukraine" No.437 of September 5, 2013. – VR web site, *http://zakon1.rada.gov.ua* (*in Ukrainian*).
[37] Conclusion in the case following the Verkhovna Rada of Ukraine application for a conclusion concerning correspondence of the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" to requirements of Articles 157 and 158 of the Constitution of Ukraine No.2y/2013 of September 19, 2013 – CCU web site, *http://www.ccu.gov.ua/uk/doccatalog/list?currDir=220985* (*in Ukrainian*).
Noteworthy, CCU spent only three days to consider the case, from the initiation of proceedings to voting for the Conclusion.
[38] See: Bludsha M. Amendments to the Constitution: the president, a waxwork, or a dictator. – *Rakurs,* September 11, 2013, *http://ua.racurs.ua* (*in Ukrainian*).
[39] See: 5th channel web site. – September 25, 2013, *http://5.ua*.
[40] Koliushko: Yanukovych will totally strengthen his influence on the judicial system. – LIGA, September 24, 2013, *http://news.liga.net (in Russian)*.
[41] See: Bludsha M. Amendments to the Constitution …
[42] Karpuntsov: Amendments to the Constitution proposed by the President only strengthen the dependence of judges on the authorities. – UDAR Party web site, September 5, 2013, *http://klichko.org* (*in Ukrainian*).

in compliance with international norms as well as the doubts as to its applicability in Ukraine. For instance, in early October a group of PACE members encouraged Ukraine to adopt the Bill. A declaration signed by 30 European MPs noted: "The fast adoption of the current version of this draft law jointly by all political parties represented in the Ukrainian Parliament will serve as a key value for a comprehensive Constitutional reform that has been repeatedly recommended by our Assembly".[43]

On the eve of the Bill consideration by a plenary meeting in Parliament, on 9 October 2013, the concerned parliamentary Committee on Legal Policy recommended to approve the Bill.

Meanwhile, leaders of the parliamentary opposition factions – All-Ukrainian Association *Batkivshchyna*, Vitaliy Klychko's UDAR, All-Ukrainian Association *Svoboda* – released a join statement saying: "Under the disguise of European integration requirements, the current authorities and the Party of Regions are trying to 'push' a law that will further strengthen authoritarian dictatorship of President Viktor Yanukovych and make his influence on the judicial system unlimited. The Law is inconsistent even with the results produced by the Constitutional Assembly set up on the initiative of the current President".

The statement also called upon the authorities "to sit at the negotiation table with the opposition and to create in the Verkhovna Rada a temporary ad hoc constitutional commission that will generate a common and agreed text of the draft of constitutional amendments. The draft that will really guarantee independence of the judicial system and take into consideration the comments made by the opposition factions".[44]

On 10 October 2013, a plenary meeting of the Verkhovna Rada considered the Bill introduced by Presidential Adviser Andriy Portnov and passed a Resolution of its prior approval. The Resolution was supported by 244 national deputies. Members of the opposition factions (*Batkivshchyna*, UDAR and *Svoboda*) did not vote for the Resolution – since they made a number of critical comments to the Bill (Box "*From the records ...*").[45] The Verkhovna Rada spent a bit more than an hour to discuss the Bill "On Amendments to the Constitution" and to vote for the Resolution on its prior approval.

FROM THE RECORDS OF THE VERKHOVNA RADA PLENARY MEETING CONSIDERING THE BILL "ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE STRENGTHENING THE GUARANTEES OF JUDGES' INDEPENDENCE"

(extracts)

Andriy Portnov, Presidential Adviser

"… Adoption of this Bill presents an important condition for Ukraine's signing of the Association Agreement with the European Union … Provisions of the Bill are aimed at ensuring qualitative transformation of the judicial system, and its content rests on provisions of international standards of justice …".

Arseniy Yatseniuk, Head of the Batkivshchyna faction

"… We have no right to admit privatisation of the judicial system in the country. Responsibility of a judge, his work for Ukrainian citizens and activity in strict compliance with the legislation, the Constitution, law and justice – these are our requirements. We see it necessary to have a meeting with the President and to present a joint, agreed bill".

Nataliya Ahafonova, "UDAR of Vitaliy Klychko" faction

"… There are comments not taken into account by the Venice Commission. We have a mechanism how we can finalise it. And we really should go to dialogue, to compromise – not to pass this law now. So, send it for finalisation to the concerned committee. Take into consideration the opinions not taken into account by the Venice Commission. Hence, this bill will not serve European integration in reality, by its essence …".

Oleh Tyahnybok, Head of the Svoboda faction

"The tactics chosen today by representatives of the Party of Regions is absolutely evident and clear. They tell that they supposedly want to be integrated in Europe, they adopt laws with correct titles, but the essence of those laws represents the opposite …".

Serhiy Sobolev, the Batkivshchyna faction

"… What does this bill actually propose? Total slavery of judges! Judges will now depend not only on the body, the High Council of Justice, selected by the Presidential Administration alone. Does anyone believe that the Congress of Judges of Ukraine will pass independent decisions? We have seen how such decisions are passed …".

Oleh Makhnitskyi, the Svoboda faction

"In case of adoption of the model proposed by the Presidential Administration we will have, on the one hand, courts that will be entirely detached from society, from citizens, and on the other hand, we will have courts fully dependent on and controlled by the presidential power".

Pavlo Petrenko, the Batkivshchyna faction

"The presidential draft of amendments to the Constitution concerning the judicial system effectively turns all judges into slaves of President Yanukovych and his accomplices".*

Prior approval gives a formal legal opportunity to start the procedure for incorporation of proposals and amendments to the Bill. The Bill is to be adopted by the next session and to collect 300 votes. In case of adoption of proposals and amendments the Bill will require a new conclusion of the Constitutional Court.

Therefore, the expert and public discussion of the bill remains on the agenda, to remove the risks that may arise in case of its adoption as a Law.

[43] *http://coe.mfa.gov.ua/en/press-center/news/15350-pisymova-zajava-pa-re-ukrajinsykij-parlament-maje-zavershiti-stvorennya-peredumov-dlya-pidpisannya-ugodi-pro-asociaciju-z-jes*. The Declaration was signed by individual MPs from Azerbaijan, Great Britain, Bulgaria, Armenia, Georgia, Ireland, Spain, Latvia, Lithuania, Moldova, Romania, Croatia.

For reference: Official documents of PACE are resolution and recommendations adopted at its meetings under a specific procedure. A declaration (statement) by a group of PACE members reflects their personal opinion and has no legal and political effect. As of October 1, 2013, there were nearly 690 PACE members.

[44] Parliamentary opposition will not vote for the presidential bill on amendments to the Constitution concerning alleged enhancement of guarantees of independence of judges, – Statement by the opposition factions. – Web site of the United Opposition *Batkivshchyna,* October 9, 2013, *http://byut.com.ua/news/16257.html* (*in Ukrainian*).

[45] Sources: VR web site, *http://iportal.rada.gov.ua/meeting/stenogr/show/5075.html; ** Presidential bill on reformation of the judicial system turns judges into slaves – Pavlo Petrenko. – Web site of the United Opposition *Batkivshchyna,* October 10, 2013 (*in Ukrainian*).

3.5. ANALYSIS OF THE DRAFT LAW "ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE STRENGTHENING GUARANTEES OF JUDGES' INDEPENDENCE"

I. Proposals that arouse no objections and/or do not change the present legislative regulation in the domain of justice

1. To provide the right of everyone to a fair and transparent hearing within a reasonable time by an independent and impartial tribunal established by law (Article 55).

That constitutional novelty almost literally reproduces the provision of Part 1, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms by saying that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".[46]

The Convention was ratified by Ukraine in 1997 and, according to Article 9 of the Constitution, is part of the national legislation.

2. To add to the system of courts of general jurisdiction in Ukraine (territorial division and specialisation) a principle of instances (Article 125).

The novelty reproduces the provision of Part 1, Article 17 of the Law "On the Judicial System and the Status of Judges", saying that "*in line with the Constitution of Ukraine, the courts of general jurisdiction are established on the principles of territorial division, specialisation and instances*". The principle of instances is also dealt with in Part II, Article 19 of this Law.

Noteworthy, according to the content of the Law "On the Judicial System and the Status of Judges", "instances" have long been present in Ukraine "*in line with the Constitution of Ukraine*".

The Constitutional Court also confirmed the constitutional status of that principle. In its Ruling No. 9-рп/2011 of 12 July 2011, it said that the constitutional provisions of Part I, Article 17 and Part II, Article 19 of the Law "On the Judicial System and the Status of Judges", noting that "*analysis of provisions of Parts II, III, IV of Article 125, Item 8, Parts III, IV of Article 129 of the Constitution of Ukraine leads the Constitutional Court of Ukraine to a conclusion that in building the system of courts of general jurisdiction the Law provides not only for the principles of territorial division and specialisation, but also for the principle of instances*".[47]

Hence, by that Ruling, the Constitutional Court established that the principle of instances in building the judicial system in Ukraine **was enshrined** in the effective Constitution.

Meanwhile, assessing the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges", the Constitutional Court in its Ruling No.2-y/2013 of 9 September 2013, maintained the need for amending Article 125 of the Constitution regarding the principle of instances, stressing that: "*The proposed changes supplement the principles on which the system of courts of general jurisdiction in Ukraine is built with the principle of instances*".[48]

Therefore, by that Conclusion, the Constitutional Court established that the effective Constitution **did not provide for** the principle of instances in the structure of judicial system in Ukraine.

Those acts of the Constitutional Court once again demonstrate its inconsistency in expressing its legal stand on the same issue, and also present another proof of the inadequate scientific level and poor legal substantiation of decisions of the only body of constitutional jurisdiction in Ukraine.

3. To ensure that "courts of general jurisdiction are established, reorganised and abolished by the law" (Article 125).

Such a proposal is logical – given the provision of Item 14, Part 1, Article 92 Constitution, whereby the judicature is governed only by laws of Ukraine. The substance of the proposal falls within the notion of the "judicature".

4. To establish that judges of courts of general jurisdiction are appointed for an indefinite term by the President of Ukraine upon and in accordance with a motion by the High Council of Justice (Article 128).

The authors of the Bill make emphasis on the last part of that provision, saying that the President shall appoint judges to their positions only "upon and according to the motion of the High Council of Justice". They argue that this novelty will put forward a fundamentally new approach to the appointment of judges by the President, whereby the role of the head of state in the process will be purely nominal and therefore, this will rule out his influence on the judicial branch.

The explanatory note to the Bill (Item 3) says: "The Head of State will therefore appoint a person to the position of a judge only upon and in accordance with the motion of the High Council of Justice. That means that the role of the President of Ukraine will in fact be ceremonial and depend on the will of the High Council of Justice".

This explanation cannot be deemed convincing.

The proposed changes do not envisage fundamental amendment of the current procedure for appointment of judges by the President. Even now, the President **cannot** appoint a judge **otherwise** than "upon and according to the motion of the High Council of Justice". This directly ensues from Article 131 of the Constitution, the Laws "On High Council of Justice" (Articles 3, 27) and "On the Judicial System and the Status of Judges" (Article 72). Even now, under the Constitution and laws of Ukraine, the President **has no right** not to appoint a person to a position of judge if with respect to him, the High Council of Justice has submitted a relevant notion passed in line with the Constitution and laws of Ukraine. I.e., **in this sense, even now, the President's role in appointment of judges may be called ceremonial.**

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[46] For international documents quoted in the text, see Section 1 of this Report.

[47] See: Constitutional Court of Ukraine Judgment No. 9pn/2011 of July 12, 2011, in the case of principle of instances in the system of courts of general jurisdiction (Para.3.2 of the motivating portion). – *http://www.ccu.gov.ua/uk/doccatalog/list?currDir=146990* (*in Ukrainian*).

[48] Conclusion of the Constitutional Court of Ukraine in the case following the Verkhovna Rada of Ukraine application for a conclusion concerning correspondence of the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" to requirements of Articles 157 and 158 of the Constitution No.2y/2013 of September 19, 2013 (Para.3.6). – *http://www.ccu.gov.ua/uk/doccatalog/list?currDir=220985* (*in Ukrainian*).

In reality, now and in line with the proposed constitutional amendments the President's decision is *legally* decisive for acquisition of the status of a judge. A legal action (legal act) resulting in acquisition (granting) the status of a judge is presented not by a motion of the High Council of Justice but by the President's Decree appointing a specific person a judge. The motion of the High Council of Justice is only advisory. That is why the issuance of a presidential decree appointing someone a judge means not a formal ceremony but a fully-fledged legal decision whether a person gets the status of a judge or not. The same refers to the dismissal of judges.

The President's role in formation of the corps of judges would be ceremonial if it were confined to his mere *presence* at the solemn ceremony of newly appointed judges taking oath.

5. To introduce a provision whereby the majority in the High Council of Justice shall be made up of judges appointed by the Congress of Judges of Ukraine (Article 131).

In principle, under the democratic delegation of judges to the High Council of Justice by their colleagues, that body might really competently and independently exercise the powers of staffing the corps of judges. The principles for formation of the High Council of Justice and its activity are among the key issues, critical for independence of judges in Ukraine.

6. To toughen the requirements to the persons who may claim the position of a judge: the minimum age – from 25 to 30 years, and the length of service in the field of law – from three to five years (Article 127).

This proposal aims to ensure consideration of cases by a judge on the principles of law and fairness, thanks to his life and legal experience.

Meanwhile, one should keep in mind that some countries that raised the age threshold for getting the status of a judge later reversed that decision and restored the previous age requirement.[49]

7. To introduce a provision that candidates for judges are selected on a competitive basis (Article 127).

Such a procedure for selecting judges is already established by the legislation: in line with Articles 66, 71 of the Law "On the Judicial System and the Status of Judges", candidates for judges are selected on a competitive basis.

Therefore, **there is no urgent need to incorporate these legislative provisions in the Constitution**.

8. To extend the powers of the High Council of Justice to giving consent to detention or arrest of a judge (Article 126).

Such a procedure is to ensure proper consideration of the issue of removal of a judge's immunity by a body specially set up for deciding on the career of judges. On the one hand, it is to facilitate criminal proceedings against judges if there is a reasonable need for their detention or arrest, on the other – to defend judges from unreasonable application of those procedural measures.

Expert opinion

Volodymyr HRYNIUK,
Assistance Professor of the Chair of Law at Taras Shevchenko Kyiv National University

The draft Law "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" proposes **amendment of Part III, Article 126 of the Constitution of Ukraine concerning the consent to detention and arrest of judges**.

In line with Para. 5.1 of the European Charter on the Statute for Judges, dereliction by a judge of one of the duties expressly defined by the statute may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges.

The Bill provides that the High Council of Justice will give consent to detention or arrest of a judge following a motion by the High Qualification Commission of Judges of Ukraine.

However, in a criminal procedure, proceedings should rest on the theory of functionalism, whereby an adversarial criminal trial involves three main functions: of prosecution, defence, and judicial consideration.

In our opinion, submission of the motion of the High Qualification Commission of Judges of Ukraine to the High Council of Justice points to inconsistency of that procedural act with the theory of functionalism, since submission of such a motion means, rather, the discharge of the prosecutive function. Furthermore, in a criminal procedure one should speak not of a *motion* but of a petition for arrest or detention of a judge.

In view of the above, we consider that **a reasoned petition for consent to detention or arrest should be submitted to the High Council of Justice by the General Prosecutor of Ukraine**.

Taras YAKIMETS,
Law Expert

The Bill suggests a new wording of Part III, Article 126 of the Constitution to provide that before a verdict of guilty passed by a court, *a judge* cannot be detained or arrested without the consent of the High Council of Justice, given following a motion of the High Qualification Commission of Judges of Ukraine. In that way, the Verkhovna Rada of Ukraine is excluded from the procedure for consent to detention or arrest of a judge. I consider such a proposal premature in present-day conditions. Now, Parliament may be the only public platform that gives an opportunity to present one's position to society. If the Verkhovna Rada is excluded from that process, there will be a real threat that the mechanism of bringing judges to criminal responsibility will be very non-public, which will not only not contribute to independence of judges but will have a reverse effect. **It is apparent that the procedure for scrapping "immunity" from judges in Ukrainian Parliament is rather long and complex, but at the present stage, such amendments to the Constitution would be very dangerous.**

[49] For instance, in Georgia, the minimum age was changed twice over the past 10 years. The 1995 Constitution of Georgia provided that a judge might be a citizen of Georgia who has reached the age of 30 years. In 2005, the Constitution was amended to reduce the age to 28 years. In 2010, the Georgian Parliament adopted new amendments to the Constitution raising the age threshold for judges to 30 years. See: Constitution of Georgia. – Official web site of the Parliament of Georgia, *http://www.parliament.ge;* Law of the Parliament of Georgia "On Introduction of Amendments to the Constitution of Georgia" of December 27, 2005, No.2496. – *Ibid*.

However, this is possible only on the condition that the High Council of Justice is independent and impartial. Otherwise, the situation with regards to solving these issues may deteriorate, since the process of bringing judges to criminal responsibility may become even more opaque and biased.

II. Proposals intended to give the relevant legislative provisions the status of constitutional norms

1. To supplement the list of principles of justice with the new principle of automated allocation of cases among judges (Article 129).

First, this issue is properly regimented by the effective legislation. The general provisions of automated allocation of cases among judges are established by Article 15 of the Law "On the Judicial System and the Status of Judges". Distribution of cases of certain categories in courts is specified in the relevant codes of procedure.[50]

Second, the constitutional status for the provision of automated distribution of cases among judges is legally unjustified. According to its substance, it clearly may not be raised to the level of a constitutional regulation. Allocation of cases deals with a technical (although important) issue of organisation of court activity and gets done before the beginning of consideration of a case (in fact, before the exercise of justice). **That is why the proper place of this provision is where it is now – in codes of procedure or even in bylaws of lower level.**

This opinion is shared by the Venice Commission that "*strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance* ***by the law or by special regulations*** *on the basis of the law, e.g. in* ***court regulations***".[51]

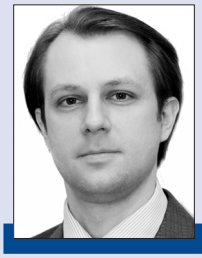
That is, the effectiveness of this European standard depends not on the level of its regulatory regimentation but on the distribution of cases based on impartial and transparent criteria. Automation of that process as such does not rule out a biased approach and different manipulations with distribution of cases among judges.

2. To specify in the Constitution the procedure for transfer of judges to other courts (Article 128).

The transfer of judges to other courts is currently regulated by the Law "On the Judicial System and the Status of Judges". Such legal level of its regulation is considered as quite sufficient. The Constitution is to specify the grounds and procedure for the main goal in the career of a judge – acquisition of a status of judge. Instead, it will be sufficient enough to regulate the issues of judge's career (which are of secondary importance), including the transfer of a judge from one court to another, by "ordinary" laws.

[50] *Namely: administrative cases – Article 151 of the Code of Administrative Justice; business – Article 21 of the Code of Business Practice; civil – Article 111 of the code of Civil Procedure; materials of criminal proceedings – Article 35 of the Code of Criminal Procedure.*

[51] Venice Commission Report on European Standards as Regards the Independence of the judicial system: Part I: independence of judges (CDLAD (2010)004 of March 16, 2010 (Para. 81).



Expert opinion

Oleksandr YERMAK,
Law Expert,
Ukrainian Law Society

International experts more than once noted the problem of distribution of cases among judges in Ukraine – which causes public distrust in courts – and recommended establishment of a system giving confidence in impartial distribution of cases.

International regulatory-legal acts, in particular, the Basic Principles on the Independence of the Judiciary approved by Resolutions 40/32 and 40/146 of the UN General Assembly on November 29 and December 13, 1985, have no requirements concerning automated distribution of cases among judges. They only stress that distribution of cases among judges in their courts is an internal matter of the Court Administration.

The Committee of Ministers of the Council of Europe in Recommendations No. R (94) 12 on the Independence, Efficiency and Role of Judges adopted at the 518th meeting of the Ministers' Deputies on October 13, 1994, noted that distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

Meanwhile, **international regulatory-legal acts and recommendations have no strict requirement of obligatory introduction of automated distribution of cases among judges in the national legislation and practice of court activity. More than that, there is no requirement of introduction of that purely "technical" principle on the constitutional level.**

To be sure, a new level of impartiality is needed during distribution of cases among judges, not depending on the will of the court administration, but retaining a possibility to assign complex cases to more experienced judges.

3. To extend the powers of the High Council of Justice to appointment of judges to administrative positions and dismissal of judges from administrative positions in courts of general jurisdiction (Article 131).

This issue of judge's career even more than that of a transfer of judge to another court cannot be subjected to a constitutional regulation. The issue of appointment (election) of the court chairman in democratic legal states has not been deemed too important. The court chairman is not superior to judges and has no influence whatsoever on the exercise of justice. His functions are confined to organisation of the court's internal operation and are usually minimal, in terms of administrative powers.

One of the main declared goals of the 2010 judicial reform was to fundamentally limit the powers of court chairmen, to deprive them of any influence on the judicial process, and to minimise powers of court staff management, etc. Therefore, the position of a court chairman was to lose its previous importance and to be reduced to solving some internal organisational issues of the court activity. Some previous powers of court chairmen were liquidated with most of them now being transferred

Expert opinion

Taras YAKIMETS,
Law Expert

The issue of appointment of judges to administrative positions in courts is high on the agenda. Despite the legislative steps intended to reduce the influence of positions of the court chairman or deputy chairman, they still have substantial "weight". **The proposal to refer to the powers of judges' self-government bodies the right to elect judges to administrative positions in courts is very sound.** However, in this context, in my opinion, it makes sense to consider an approach whereby court chairmen and deputy chairmen are elected by the staff of the concerned court. One of the reasons is that judges themselves can impartially assess the organisational and professional capabilities of their colleagues and to decide who really deserves to head the court. In small courts, with no more than 5-6 judges, there may be a mechanism of elections on the level of the district appellate court. Furthermore, to ensure rotation of judges elected to administrative positions in courts, it makes sense to limit the term of administrative office in court, for instance, by two consecutive terms.

to the court staff manager (this, by the way, has created a number of organisational and legal problems). Even despite all of that, the fact that the legally "downgraded" status of a court chairman has been artificially raised to the constitutional level is evident.

III. Doubtful proposals

1. To introduce a procedure whereby powers of the Verkhovna Rada would include networking, establishment, reorganisation and liquidation of courts of general jurisdiction following the President's motion (Article 85).

First, granting the President exceptional legislative initiative in the above issues unreasonably expands his powers with respect to the activity of courts. The function of generation of proposals concerning court networking, establishment, reorganisation and liquidation may be vested in the concerned body of the judicial branch or judges' self-government. Under such procedure, the President will also have a legal tool of influence on solution of those judicial issues – the power to veto laws adopted by Parliament.

Second, the provision of the President's motion as a precondition for adoption of a law on the above-mentioned issues means effective deprivation of the Verkhovna Rada of the right to **independently** discharge the legislative function of shaping the national judicature. The proposed wording of Item 27, Part I, Article 85 of the Constitution seems to provide for transfer of powers at solution of said judicial issues from the President to the Verkhovna Rada. **But in reality, such right is given to the Verkhovna Rada only nominally. Without a relevant legislative initiative of the President, it is "dead" – the Verkhovna Rada will not be able to exercise it without the President's will. This means that solution of those issues in practice will entirely depend on the President**.

2. To cancel a five-year term for the first appointment to a position of judge (Article 128).

This proposal is disputable, to say the least.

Indeed, the European practice generally presumes appointment of a judge till his official retirement age (indefinite, lifetime election, or appointment on a permanent basis). It is seen as the least problem-hit approach to formation of the corps of judges, in terms of their independence. The Venice Commission in its opinions has more than once noted the existence of the probationary term for judges in Ukraine as a fundamental problem in the national system for appointment and dismissal of judges.

However, recommendations of the Venice Commission are not reduced to one option. The Venice Commission offered Ukraine an alternative way of solving the problem: either to cancel the probationary term, or to reduce it. In particular, noting the need to amend some provisions of the Constitution of Ukraine, the Venice Commission said: "*If probationary periods are considered indispensable, they should not exceed a relatively short period, e.g. of two years*".[52]

Such a position of the Venice Commission ensues from its Report on appointment of judges, noting: *"The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. […] This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office".*[53]

It is also consistent with the European Charter on the Statute for Judges, stating: *"Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion" (Item 3.3).*

Therefore, European standards entirely admit the possibility of a probationary period for judges, especially in countries "with comparatively new judicial systems", including Ukraine.

[52] Venice Commission Opinion CDLAD(2010)026 of October 16, 2010 (Para. 130).
[53] Venice Commission Report on Judicial Appointments CDLAD(2007)028 (Para. 40, 41).

The probationary term for judges in the present social and legal situation in Ukraine presents a factor constraining corruption and may keep judges from abuses in the exercise of justice.

According to survey results, judges elected for an indefinite term are brought to disciplinary responsibility much more often than judges appointed for the first time (in more than 80% of cases, brought to disciplinary responsibility were judges elected for an indefinite term).[54]

Given all this, cancellation of the probationary term for Ukrainian judges may have serious negative effects on justice. In the present conditions it seems reasonable to reduce the term from 5 to 2 (3) years – this would meet recommendations of the Venice Commission, and the main thing – the needs of domestic justice.

3. To provide for the constitutional status of the Supreme Court by adding that it "in accordance with the procedure and in the way established by the law ensures uniform application of norms of the Ukrainian legislation by all courts of general jurisdiction, and also discharges other powers provided by the Constitution and laws of Ukraine" (Article 125).

Such elaboration is presented as the enhancement of the constitutional status of the Supreme Court. In reality, it may also be used for its impairment or constitutional legitimisation of the present status.

The effective Constitution defines the status of the Supreme Court in the most general form. Part II of Article 125 says: "*The Supreme Court of Ukraine represents the highest judicial body in the system of courts of general jurisdiction*". This makes it possible through "ordinary" laws to determine powers of the Supreme Court in line with its constitutional status of "the highest judicial body". Meanwhile, as the 2010 judicial reform has shown, its constitutional status may also be illegitimately reduced in the same way. **To bring the present status of the Supreme Court in compliance with the Constitution, it need not be amended – only the provisions of the "ordinary" laws that undermined the constitutional status of the Supreme Court should be modified**.

The same refers to the legislative practice after the judicial reform of 2010. For instance, on 20 October 2011, the Verkhovna Rada adopted the Law "On Amendments to Some Legislative Acts of Ukraine Concerning Consideration of Cases by the Supreme Court of Ukraine", which has somewhat improved the legislative regulation of its activity as the highest judicial body.

On 4 October 2013, national deputies Volodymyr Pylypenko and Valeriy Pysarenko submitted for consideration to the Parliament the Bill "On Amendments to Some Legislative Acts of Ukraine Concerning Powers of the Supreme Court of Ukraine"[55] that, according to media reports, was drafted in the Supreme Court and agreed upon with the Presidential Administration.[56] The Bill proposed the extension of powers of the Supreme Court. Meanwhile, it did not plan to reverse the key provisions of the judicial reform that had undermined its status and in fact procedurally subordinated it to the high specialised courts (in particular, preserving: admission of cases by high courts for proceeding to the Supreme Court; priority of high courts in reviewing cases, where the European Court of Human Rights established violation of the European Convention on Human Rights by Ukraine; "flawed" competence of the Supreme Court in reviewing judgments of cassation courts in connection with their breach of norms of the procedural legislation, etc.). In general, the bill does not secure the constitutional status of the Supreme Court as the highest judicial body in the system of courts of general jurisdiction.

Amendments to Article 125 of the Constitution proposed by the presidential Bill will not lead to an automatic "revival" of the Supreme Court.

First, according to the Bill, the Constitution assigns only one function to the Supreme Court – that is, the provision of uniform application of legislative norms by courts of general jurisdiction. The current wording of Article 125 of the Constitution enables vesting more powers in the Supreme Court.

Second, the proposed amendment suggests that the Supreme Court is to ensure the discharge of that function "*in accordance with the procedure and in the way established by the law*". At first sight, such a standard legal formulation arouses no objections. However, they arise.

First of all – it is due to an absolute redundancy of this formulation. The duty of the Supreme Court to exercise its powers "*in accordance with the procedure and in the way established by the law*" is already envisaged by the Constitution (Part II of Article 19, Item 14, Part I of Article 92).

Furthermore, this formulation may be used not to modify the current powers of the Supreme Court, arguing that the effective "ordinary" laws already "determine the procedure and way", in which it is to secure *uniform* application of legislative norms by all courts. And such arguments will make sense, since according to the valid codes of procedure, the Supreme Court reviews court judgements in connection with *dissimilar* application of legislative norms by the cassation court, and its judgments passed following such review are binding not only on all Ukrainian courts but also on all governing bodies.

Anyway, such formulation does not mean that the procedure and way to "guarantee a uniform application of legislative norms" will involve fundamental expansion of the Supreme Court's powers on consideration of cases. Instead, these may be only recommendatory explanations by the Supreme Court Plenum, etc.[57]

The Professor Viktor Musiyaka also shares this opinion, saying that the Bill "establishes a 'decorative' role of the Supreme Court of Ukraine".[58]

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[54] Kuybida R., Sereda M. Disciplinary responsibility of judges in Ukraine: problems of legislation and tactics. – Kyiv, 2013, p.19 *(in Ukrainian)*.

[55] Bill of Ukraine "On Introduction of Amendments to Some Legislative Acts of Ukraine concerning Powers of the Supreme Court of Ukraine" (reg. No.3556) – *http://w1.c1.rada.gov.ua (in Ukrainian)*.

[56] See: Kiriyenko O. Object of silence. – *Yuridicheskya Praktika*, October 1, 2013, p.1, 7 *(in Russian)*.

[57] Such an approach is partially proven by the Bill "On Introduction of Amendments to Some Legislative Acts of Ukraine concerning powers of the Supreme Court of Ukraine" (reg. No.3556) – *http://w1.c1.rada.gov.ua (in Ukrainian)*.

[58] See: Bludsha M. Amendments to the Constitution: the president, a waxwork, or a dictator. – *http://ua.racurs.ua/342 (in Ukrainian)*.

4. To preserve the procedure whereby members of the High Council of Justice exercise their powers on part-time basis (Article 131).

According to the Bill, the High Council of Justice will substantially raise its constitutional status and become the key body in charge of formation the corps of judges in Ukraine. The competence of the High Council of Justice covers all important issues dealing with acquisition of the status of a judge, dismissal of judges, responsibility of judges and prosecutors, consent to detention and arrest of a judge. Furthermore, "ordinary" laws may be used to further extend powers of the High Council of Justice. Exercise of such wide of powers demands from its members to permanently perform a colossal amount of work. This cannot be done properly by combining jobs in the High Council of Justice (working there "on a part-time basis").

Meanwhile, even the High Qualification Commission of Judges remains a permanent body, and its members exercise its powers on a permanent basis (Articles 90, 93 of the Law "On the Judicial System and the Status of Judges).

It has not been ruled out that the constitutional provision for the possibility to exercise powers by members of the High Council of Justice on part-time basis was prompted by the desire to incorporate in it some persons – its current members.

5. To grant the High Qualification Commission of Judges of Ukraine the status of a constitutional body (Articles 126, 131).

Today, there are two bodies in Ukraine directly responsible for the formation of the corps of judges – the High Council of Justice (its status and powers are specified by the Constitution) and the High Qualification Commission of Judges of Ukraine (the status and powers are regimented by an "ordinary" law).

Activity of those bodies is largely duplicated – the procedures for staffing and principles of their functioning are similar. All this not only creates unnecessary parallelism in the work of the two bodies but also complicates the procedure for selecting personnel for judges.[59] Obviously, there is no need to have two separate bodies dealing with formation of the corps of judges (it was noted by 64% of experts polled by the Razumkov Centre; 20% termed such situation justified, 16% remained undecided).

Instead of removing such duplication and vesting formation of the corps of judges in one constitutional body – the High Council of Justice – the Bill proposed raising the status of the High Qualification Commission of Judges to the constitutional level.

The Venice Commission repeatedly spoke against the existence of two bodies with duplicating powers to form the corps of judges. It reiterated this position in its Opinion regarding the presidential bill, noting that it "*maintains its position that there is no need for two separate bodies*".[60]

Expert opinion

Taras YAKIMETS,
Law Expert

The Bill on amendments to the Constitution does not introduce the separation of powers of the High Qualification Commission of Judges of Ukraine and the High Council of Justice. Meanwhile, I consider the proposal to solve the problem of duplication of powers by incorporation of the High Qualification Commission of Judges of Ukraine into the High Council of Justice not quite reasonable. It would be more reasonable to go the way of delimitation of competence of those bodies, which can be done as follows:

- the powers of the High Qualification Commission of Judges of Ukraine should encompass issues of the judge's career, in particular: a) competitive selection of candidates for judges and formation of the reserve; b) preparation of motions for appointment of judges (or their appointment in case of total exclusion of political bodies from that process); c) transfer of judges to other courts (except the Supreme Court of Ukraine and High specialised courts);
- the functions of the High Council of Justice should include control of proper conduct of judges and the quality of discharge of their professional duties, in connection with which, that body should be authorised: a) to decide on bringing judges to disciplinary responsibility; b) to dismiss judges for breach of oath (or to submit a relevant motion for consideration) or on other grounds specified in the Constitution; c) to give consent to transfer of judges to High judicial instances.

The artificiality of such an approach is seen in the names of these bodies (both are "high"), and the main thing – in the scope of the proposed constitutional powers of the High Qualification Commission of Judges. *First*, the High Qualification Commission of Judges is to acquire a constitutional status by adding it to Article 131 of the Constitution that currently specifies the procedure for formation and powers of the High Council of Justice. *Second*, by contrast to the High Council of Justice, the Constitution (Article 131) shall not specify powers of the High Qualification Commission of Judges (which is clear, since they are hard to devise), but only name two of them. This all illustrates its artificial raising to the constitutional level.

The first of such powers was reproduced in the new wording of Part III, Article 126, saying that "*The judge cannot without consent of the High Council of Justice, given upon the motion of the judges' qualification commission, be detained or arrested before the verdict of the court establishing his culpability is issued*". However, it remains unclear on what basis the High Qualification Commission of Judges will prepare its motion. Most probably, on the basis of a relevant application and materials by the Public Prosecutor's Office. In such case, it will be a redundant

[59] The same is noted even by members of both of those bodies and their staff. See, e.g., Hevko V. Reform of Ukrainian justice: expectations and risks (*in Ukrainian*). – *Ukrayinska Pravda*, October 1, 2013, *http://www.pravda.com.ua (in Ukrainian)*.

[60] Venice Commission Opinion concerning bill of Ukraine "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" CDL(2013)014 of June 14, 2013 (Para. 40).

link in the procedure for scraping the judge's immunity, since its function will be confined to mediation between the General Prosecutor's Office and the High Council of Justice. Instead, the General Prosecutor's Office may well submit a reasoned motion of detention or arrest of a judge directly to the High Council of Justice, which will consider it *per se*. Furthermore, by submitting a motion of detention or arrest of a judge to the High Council of Justice, the High Qualification Commission will discharge a function exceeding its status and role – that is, of prosecution.

Another proposed constitutional power of the High Qualification Commission of Judges is to submit a motion of transfer of judges from one court to another to the President. Meanwhile, the motion for appointment and dismissal of judges by the President is submitted by the High Council of Justice, which also may well submit the motion of transfer of judges to the President.

An optimal place of the High Qualification Commission in the mechanism of decisions on the judge's career may be within the High Council of Justice as one of its chambers dealing with the selection of judges.

6. To leave in the competence of the High Council of Justice consideration of some issues concerning responsibility of prosecutors (Article 131).

Therefore, this dualism persists both in the competence of the High Council of Justice and in the procedure for deciding on the prosecutors' career. Powers of the High Council of Justice cover actually the entire range of issues related to staffing of the corps of judges, and only two small issues related to the prosecutors' career, including the decision on breach of requirements of incompetency by prosecutors and review of complaints about decisions to bring prosecutors to disciplinary responsibility.

Reference of those issues to the competence of the High Council of Justice is unreasonable, for a number of reasons.

First, it is not practically needed. Over 15 years of work (1998-2013), the High Council of Justice considered only *two* cases of breach of requirements of incompetency by prosecutors (consideration revealed the absence of a breach) and *four complaints* of prosecutors about the decisions to bring them to disciplinary responsibility (after consideration, two of those complaints were sustained (one – partially), one – left without satisfaction, one – just noted).[61] Those data show the extremely low (nearly zero) efficiency of functioning of the High Council of Justice in the issues of the prosecutors' career referred to its competence.

Second, this is inconsistent with the strategy of reformation of the prosecution. In particular, the Bill "On the Office of the Public Prosecutor" prepared by the Presidential Administration and sent to the Venice Commission envisaged creation of a system of new bodies designed to deal with the prosecutors' career, namely: the High Qualification-Disciplinary Commission of Prosecutors and regional qualification-disciplinary commissions. Their competence includes issues of selection of personnel for prosecution, movement of prosecutors from one position to another, disciplinary responsibility of prosecutors.

Third, reference of those two issues dealing with prosecution to the competence of the High Council of Justice presents at least some reason for the Prosecutor General membership in the High Council of Justice *ex officio*, which, according to the Venice Commission and the European Court of Human Rights, poses a risk for independence of judges.

Reference of issues of the prosecutors' career to the competence of the High Council of Justice might be reasonable if it dealt with the whole range of such issues, and the prosecution were an element of the judicial system.[62]

7. To raise the age limit for judges from 65 to 70 years (Article 126).

First. This novelty is neither a requirement nor recommendation of the Venice Commission.

Second, as far as we know, the issue of raising the age limit for judges was not specially studied (in particular, in relation to the life expectancy of judges). Noteworthy, some European countries where the quality of life is much high, and the life expectancy is longer, on the contrary, reduce the age limit for judges (Germany has recently reduced that age for judges from 68 to 65 years).

Third, there are big doubts whether most of Ukrainian judges aged 65-70 years will be able to properly discharge their powers. This is especially true for judges of local courts who experience the heaviest load at consideration of cases.

Fourth, negative effects of raising the age limit for judges may include hindrance of alternation of generations in the corps of judges, conservation of the present negative stereotypes in the judges' community, etc.

Fifth, one should be aware that by contrast to the proposal to raise the age threshold for acquisition of the status of a judge from 25 to 30 years, the proposal to raise the age limit for judges is not supported by Ukrainian citizens. According to the results of a public opinion poll held by Razumkov Centre, raising of the minimum age necessary to become a judge is supported by 48% of citizens (34% – not supported, 18% – undecided), while the increase of the age limit for judge is considered reasonable by only 11% of respondents, against 76% convinced that this should not be done (13% – undecided).[63]

8. To remove the provision on the Prosecutor General term of office – five years (Article 122).

***First*, this provision goes beyond the scope of that Bill**, since it does not deal with the judicial branch and independence of judges directly. The authors of the Bill "bound" it to independence of judges only by the reference to the stand of the Venice Commission that in the Report

[61] Response of the High Council of Justice to the Razunkov Centre inquiry (letter dated October 3, 2013, No.8860/0/913).

[62] See also the article by S.Prylutskyi "*Public Prosecution in Ukraine: its Role and Position among Judicial Tools for Protection of the Legal Order*", published in this journal.

[63] For more detail see the material "*Courts and judicial reform in Ukraine: Public Opinion*", published in this journal.

"European standards as regards the independence of the judicial system: Part II – Prosecution" noted that "*There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so*". In this connection, the Report recommends, in particular, to appoint the Prosecutor General for a life or relatively long term.[64]

The Explanatory Note gives no other arguments in favour of that constitutional novelty,[65] which gives grounds to suggest the existence of concealed true goals of this proposals. This suggestion is also prompted by the fact that among all recommendations made in the Venice Commission Report on the prosecution service, the authors of the Bill chose only one – on the Prosecutor General term of office. Other recommendations that, according to the logic of the authors of the Bill, also dealt with the independence of judges, were ignored by them.

Assessing this novelty, one should proceed from the fact that European standards mainly focus on the models of the "court prosecutor" – i.e., the models where prosecution is a part of the judicial system. One should also take into account the socio-political realities of the domestic prosecution and its dominant role in the Ukrainian legal system. In its opinion regarding one draft of the Law "On the Office of the Public Prosecutor" the Venice Commission, assessing its specific provisions and referring to the position of the Consultative Council of European Prosecutors, noted that the Council's arguments "*can only be applied with respect to democratic legal traditions, which are in line with Council of Europe values*".[66] This also fully applies to the Venice Commission arguments used by the author of the presidential bill to substantiate a European nature of the proposal to remove the provision of the five-year term of office of the Prosecutor General from the Constitution.

***Second*, this novelty weakens democratic (parliamentary) control of the activity of the Prosecutor General, and therefore – of prosecution as a whole**. In the present political and legal conditions, this may lead to even greater politicisation of prosecution and impunity of prosecutors for the committed abuses.

***Third*, this will affect the equilibrium of political power and implementation of the principle of separation of powers**, since deprivation of Parliament of the right to appoint Prosecutor General will weaken the Parliament's stand in system of state power in Ukraine. This is not the last decision aimed at such weakening. **The next one may involve deprivation of the Verkhovna Rada of the right to pass a vote of no-confidence to the Prosecutor General, entailing his resignation. Such a proposal is contained in the Draft Concept for Amendment of the Constitution of Ukraine**, basically approved by the Constitutional Assembly (a special auxiliary body under the President) on 21 June 2013.[67]

IV. Proposals bearing serious risks for independence of judges

1. To empower the President to appoint all judges for an indefinite term, to dismiss all judges (including judges of the Constitutional Court), to transfer judges from one court to another, to submit to the Verkhovna Rada motions concerning networking, establishment, reorganisation and liquidation of courts of general jurisdiction (Articles 85, 106, 125, 128).

Deprivation of the Verkhovna Rada of powers to elect judges for an indefinite term and to dismiss them, with simultaneous granting the President the exclusive right to appoint all judges for an indefinite term and to dismiss them, means *one-sided* de-politicisation of formation the corps of judges.

The President is a political institution, just as the Verkhovna Rada. The previous President of Ukraine Viktor Yushchenko led "Our Ukraine" Party. The present President Viktor Yanukovych is the honorary leader of the Party of Regions that has the biggest faction in the Verkhovna Rada and controls the executive branch (the Cabinet of Ministers is led by the leader of the Party of Regions Mykola Azarov).

So, **concentration of all powers at formation of the corps of judges and shaping the system of courts in the President's hands will mean his concentration of political influence on the judicial branch. Under the present political and legal conditions, this will naturally make judges to follow the source of such influence, and therefore – dependent on him**.

In the Explanatory Note to the Bill, exclusion of the Verkhovna Rada from the process of election and dismissal of judges is reasoned by the stand of the Venice Commission, suggesting that due to Parliament's involvement in political games, "*appointment of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge*".[68] However, the President, who now has the greatest political "weight" and therefore is the main "political actor", is also not immune from the desire "to have his own judges". The Bill gives him all possibilities for implementation of such desire, since the President will decide actually all main issues of organisation of the activity of the judicial branch in general and the career of every judge in particular – from establishment of courts and determination of their strength to the oath of the judges appointed by him.

The Consultative Council of European Judges saw it necessary to rule out any political influence on the appointment of judges, especially in "young democracies". Its Opinion No.1 (2001) reads: *"informal appointment procedures and overtly political influence on judicial appointments in certain States were not helpful*

[64] Venice Commission Report CDLAD (2010)040 of January 3, 2011 (Para. 37).
[65] See: Explanatory note to the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges". – *http://w1.c1.rada.gov.ua* (*in Ukrainian*).
[66] Venice Commission Opinion No.539/2009 on the draft law of Ukraine "On the Office of the Public Prosecutor".
[67] Decision of the Constitutional Assembly concerning the draft Concept for Introduction of Amendments to the Constitution of Ukraine No.14 of June 21, 2013. – *http://www.president.gov.ua/news/28243.html* (*in Ukrainian*).
[68] See: Venice Commission Opinion CDLAD (2007)003 (Para. 29).

models in other, newer democracies, where it was vital to secure judicial independence by the introduction of ***strictly non-political appointing bodies***" (Item 34).

The Venice Commission more than once criticised political influence on appointments in Ukraine's judicial system. Meanwhile, it fully supported deprivation of the Verkhovna Rada of a role in the process of formation of the corps of judges and transfer of its powers to the President.[69] This seems strange, since in such a way, the danger of political influence on the appointment of judges is not removed – it is only concentrated in another political centre (with the President).

Reasoning the constitutional possibility of empowerment of the President to appoint all judges for an indefinite term and to dismiss them following a motion of the High Council of Justice, the Constitutional Court proceeded from the assumption that "*the High Council of Justice is an independent constitutional body responsible for formation of the highly professional corps of judges*".[70] However, such reasoning is legally formal and does not take into account the real situation with the independence of the High Council of Justice, and therefore, cannot be deemed adequate.

The fact of political dependence and bias of the present High Council of Justice was more than once noted by different state and political figures, legal scholars and experts. For instance, an expert poll held by Razumkov Centre established that only 5% of experts considered the present High Council of Justice an independent and politically unbiased body. Instead, 84% stuck to the opposite opinion (11% remained undecided).[71]

This fact is also established legally – political bias of the High Council of Justice was noted by the European Court of Human Rights in its Judgment in the case of Oleksandr Volkov vs Ukraine.

Noting that "*amendments to Article 131 of the Constitution suggest that the High Council of Justice is made up mainly of judges*", the Constitutional Court came to the conclusion that "*the issue of formation of the corps of judges, transfer and promotion of judges will actually be decided by the judicial branch, which will guarantee its independence from other state bodies*".[72]

One cannot agree with such conclusion of the Constitutional Court. **The thing is that even now, the High Council of Justice mainly consists of judges (11 out of 20). However, this in no way means that personal issues in the judicial system are decided by the judicial branch proper, and by no means guarantees its independence from other state bodies**.

2. To introduce a new procedure for formation of the High Council of Justice and to change its composition (Article 131).

The procedure for formation of the High Council of Justice proposed by the Bill will not ensure its true independence and will not lead to a fundamental change in its membership. Hence, the High Council of Justice will remain a politically dependent body with all negative consequences for justice.

The new procedure for formation of the High Council of Justice formally meets European standards, since it provides that the majority of its members (12 out of 20) will be judges elected by their peers – by the Congress of Judges of Ukraine. However, in the present conditions it will not be properly implemented in Ukraine, since the 2010 judicial reform made judges' self-government almost entirely dependent on the political authorities. In particular, this is proved with the results of the expert poll held by Razumkov Centre. Only 4% of experts are sure that judges' self-government in its present form is sufficient to ensure autonomy and independence of judges. Instead, 31% believe that today, it plays no role at all, 29% admitted certain influence of the present judges' self-government, 26% are sure that it is used by the authorities to control courts and judges. So it will not be independent in nominating representatives of the corps of judges to the High Council of Justice.

According to the leading experts, the practice of the recent years has witnessed that the Congress of Judges is a gathering of *dependent* judges who without any alternative always appoint those (to the relevant bodies, including the High Council of Justice) "who will loyally and faithfully serve the Presidential Administration".[73]

Appointment of four members of the High Council of Justice by the Congress of Barristers of Ukraine and the Congress of Representatives of the Legal Academia (two persons each) also arouses questions. Previous experience gives grounds for doubt if their appointment of the High Council of Justice members will be democratic.[74] It is suffice to say that the previous Congresses of Representatives of the Legal Academia were organised by private institutions, with Serhiy Kivalov involved in its establishment and functioning. The Congress always delegated him to the High Council of Justice (Serhiy Kivalov has been its permanent member since 1998). It may well appoint to the High Council the President's

[69] See: Venice Commission Opinion CDL(2013)014 of June 14, 2013.

[70] Conclusion of the Constitutional Court of Ukraine in the case following application of the Verkhovna Rada of Ukraine for a conclusion concerning correspondence of the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" to the requirements of Articles 157 and 158 of the Constitution No. 2y/2013 of September 19, 2013 (Para. 3.3) – *http://www.ccu.gov.ua/uk/doccatalog/list?currDir=220985* (*in Ukrainian*).

[71] Hereinafter cited are data of the expert poll in more detail described in the material "Judicial reform and state of justice in Ukraine: expert assessments" published in this journal.

[72] See: *Ibid.*

[73] Koliushko: Yanukovych will totally strengthen his influence on the judicial system. – *http://news.liga.net/interview/politics/902564 koliushko_yanukovich_totalno_usilit_vliyanie_na_sudebnuyu_sistemu.htm* (*in Russian*).

[74] See, e.g.: They in BYuT could not share the High Council of Justice. – *http://www.pravda.com.ua/news/2009/06/1/3985693/; Kivalov argues, he and Portnov are legitimate. – http://www.pravda.com.ua/news/2009/06/1/3987874/ (in Ukrainian*).

Expert opinion

Oleksandr VOLKOV,
former Judge of the Supreme Court of Ukraine (1994-2010)

The amendments proposed by the Bill formally do meet international standards for establishment of courts by law, principles of formation of the bodies deciding on the career of judges, and some other guarantees of independence of judges – which was welcomed by the European Commission "For Democracy through Law".

Meanwhile, the Bill puts forward a number of provisions disputable from the viewpoint of compliance with other norms of the Constitution, in particular – formation of the network of courts by the Verkhovna Rada only on the basis of a motion by the President. At that, no amendments are proposed to Article 92 of the Constitution providing that the judicature is shaped only by laws of Ukraine.

The proposal to include provisions on termination of powers of judges of the Constitutional Court in Section VIII of the Constitution is also unclear – since the legal status of such judges is deemed special and regimented by provisions of Section XII of the Constitution.

The Bill pays no attention to important guarantees of independence of judges in terms of the activity of judges' self-government, although it bears a proposal to specify on the constitutional level the "concerned councils of judges". There seems to be an evident attempt to specify the present "overly regulated" state of judges' self-government. In such case, a lawful question arises: can independence of judges be guaranteed through the appointment of the majority of members of the High Council of Justice by the Congress of Judges – with 96 delegates, whose composition and election procedure are strictly regimented by the law and most of whom are elected by conferences of judges, the delegates of which, in their turn, are picked up by the concerned councils of judges (that, by the way, are to be "formed" by those conferences)? Is this "self-government"? And will in this case the essence of "independence of judges" be met only by formal signs of organisation of the structures designed to guarantee it?

I see as unreasonable the proposal to indefinitely extend the possibilities for dismissal of judges "for breach of oath" after the removal of such ground from the text of Article 126 of the Constitution (Para. 4 of the Final and Transitional Provisions). The Bill also does not remove inequality of members of the High Council of Justice due to an increase in the number of officials being its members ex officio.

adviser Andriy Portnov, who has recently had serious achievements in legal science and education – became a doctor of law, professor, Head of the Chair of Constitutional Law at the Taras Shevchenko Kyiv National University.[75]

According to the Law "On the Bar and Advocacy", the Congress of Barristers is organised by the Council of Barristers of Ukraine chaired by Lidiya Izovitova (who also heads the National Association of Barristers of Ukraine). Since the very beginning of the High Council of Justice work (i.e., for over 15 years) Lidiya Izovitova has always been its member representing the bar.[76]

Such a situation was rightfully assessed by the Venice Commission that in its Opinion on the presidential draft of amendments to the Constitution recommended Ukraine to change the legislative procedure for appointing members of the High Council of Justice by the Congress of Barristers and the Congress of Representatives of the Legal Academia "*to ensure democratic election of representatives*" of the bar and the academic community to the High Council of Justice.[77]

Having generally supported the proposed bill on the procedure for formation of the High Council of Justice, the Venice Commission in its Opinion reasoned its support by that "*Article 131 proposes an entirely new composition of the HCJ*". In its opinion, this will happen, in particular, because "*the new proposal is for the judges to elect 12 members*".

However, the Venice Commission has not taken into account a number of important points that indicate that the composition of the High Council of Justice may remain the same.

First, the Final and Transitional Provisions of the Bill (Item 11) provide that "*members of the High Council of Justice who were appointed to the High Council of Justice by the Congress of Judges of Ukraine before the effectiveness of this Law shall continue to discharge their powers till the end of the term of their appointment*". Therefore, in line with new provisions of the Constitution, three of its present members (Hostyantyn Kravchenko, Inna Ortosh, Oleksandr Ydovychenko) will remain in the "new" High Council of Justice.

Second, Prosecutor General Viktor Pshonka and Supreme Court Chairman Yaroslav Romaniuk will remain members of the "new" High Council of Justice.

Third, given the above circumstances, there is a high probability of election of Serhiy Kivalov, Andriy Portnova and Lidiya Izovitova to the "new" High Council of Justice.

Fourth, proceeding from the current situation with the judges' self-government, it is not ruled out that the Congress of Judges of Ukraine will delegate to the "new" High Council of Justice the judges appointed to the present Council by other actors: Serhiy Vynokurov and Mykola Kobylyanskyi (appointed by the President), Volodymyr Kolesnychenko and Vitaliy Kuzmyshyn (appointed by the Verkhovna Rada), Viktor Tatkov (appointed by the All-Ukrainian Conference of Public Prosecution Officers), Ihor Tekmizhiyev (appointed by the Congress of Barristers).

Therefore, there may well arise a situation where in accordance with the new "European" procedure, the majority of the "new" High Council of Justice will be made up of its present members. That is, formally, it may be a new High Council of Justice, but essentially (by its composition and activity) – the current, or the "old" one. Meanwhile, the Venice Commission more than once noted the fact that the High Council of Justice in its present membership is not free of "subordination to political party considerations".[78] Political bias of the

[75] See: web site of the Taras Shevchenko Kyiv National University. – *http://law.univ.kiev.ua/kafedry/konstytutsiinohoprava/Para./128portnovandrii-volodymyrovych?lang=uk_*.
[76] See also the article by S.Safulko "*The bell tolls to the bar*", published in this journal.
[77] See: Venice Commission Opinion CDL(2013)014 of June 14, 2013.
[78] See, e.g., Venice Commission Opinion CDLAD(2010)029.

present High Council of Justice was also noted by the European Court of Human Rights deciding the case of Oleksandr Volkov vs Ukraine.[79]

3. To expand powers of the High Council of Justice, empowering it to appoint judges to administrative positions and to dismiss them from such positions (Article 131).

Such procedure for appointment of judges to administrative positions in courts was established by the Law "On the Judicial System and the Status of Judges", although the effective Constitution does not give this right to the High Council of Justice. **Proposals to constitutionally provide such right of the High Council of Justice give another proof that its appointments of court chairmen and their deputies have been unconstitutional**.

The Venice Commission has never recommended Ukraine to specify in the Constitution the procedure for appointment of judges to administrative positions in courts. Meanwhile, it noted the unconstitutionality of the High Council of Justice right to appoint judges to administrative positions in courts and to dismiss them from those positions granted by the Law.[80] At that, the Venice Commission referred to the stand of the Constitutional Court of Ukraine that in its Ruling No.9-рп/2002 of 21 May 2002, noted that "*reference of submission of motions for appointment of judges to administrative positions in courts to the High Council of Justice does not ensue from the content of the provisions of the Basic Law of Ukraine*".

Therefore, proposals to specify in the Constitution the right of the High Council of Justice to appoint judges to administrative positions in courts also present an attempt to constitutionally legitimise the discharge of unconstitutional functions by the High Council of Justice in 2010-2013.

Furthermore, the proposed approach to the appointment of judges to administrative positions is ungrounded in terms of guarantees of independence of judges and autonomy of courts.

First, any decisions of appointment to administrative positions make the appointees more or less dependent on the appointer. In this case, it is a body beyond the judicial branch.

Second, this will lead to concentration in one body (the High Council of Justice) of excessive powers at solution of HR issues in courts. Such concentration of powers (as well as concentration of similar powers with the President) naturally enhances the danger of outside influence on courts. This danger multiplies in the conditions of effective separation of powers, nullification of the principle of the rule of law, real dependence of the judicial branch.

In view of the above, **it will be reasonable to refer the issue of appointment of judges to administrative positions to the competence of judges' self-government bodies, preliminarily released from political and other influences**.

4. To specify in the Constitution a provision whereby the competence of the High Council of Justice will cover "exercise of other powers provided by the Constitution and laws of Ukraine" (Article 131).

This proposal seems unreasonable, since the legal status of the High Council of Justice as a constitutional body is determined by the Constitution.[81] The need to specify the powers of the High Council of Justice only by the Basic Law is prompted by two points. *First*, it is the importance of the functions discharged by that body for the state and society. *Second*, a real danger that "ordinary" laws will expand the competence of the High Council of Justice, which will further enhance the judges' dependence on it. The reality of such danger is witnessed by the recent legislative practice in this domain, giving the High Council of Justice powers not envisaged by the Basic Law (in particular, the right to demand from courts copies of entire court cases consideration of which is not stopped; to appoint judges to administrative positions).

5. To introduce disciplinary responsibility for commitment of a disciplinary offence envisaged by the law, inconsistent with further service of a judge, as a basis for dismissal of judges (Article 126).

It is proposed to replace breach of oath as the ground for the dismissal of judges.

The Venice Commission expressed concern about the presence of this reason in Ukraine, noting its fuzziness (vagueness) and the particular danger in connection with the possible employment of this reason as a political weapon against judges. It recommended Ukraine to clearly specify the actions of a judge that may involve disciplinary responsibility.[82]

The European Court of Human Rights in its Judgment in the case of Oleksandr Volkov vs Ukraine noted that the grounds for dismissal of a judge for breach of oath envisaged by the Ukrainian legislation are unclear and vague. This violates the principle of legal certainty, leads to unpredictability and selective application of disciplinary measures against judges, endangering their independence.

However, the new reason does not solve the problem. The formulation proposed in the Bill ("*commitment of a disciplinary offence envisaged by the law, inconsistent with further service of a judge*") by its content is also unclear and vague. As well as in the case of "breach of oath", it gives no idea what *specific* breach is meant. This enables preservation of a vague description of signs of breach of oath under a new title – "offence inconsistent with further service of a judge" – in "ordinary" laws.

Therefore, there will still be a possibility to abuse disciplinary measures against judges, leading to growth of their dependence.

[79] See also the article by M.Melnyk "Oleksandr Volkov vs Ukraine: ECHR judgment and its execution", published in this journal.
[80] See: Venice Commission Opinion CDLAD (2010)029.
[81] See: *Ibid*.
[82] See: *Ibid*.

6. To provide disagreement with transfer to another court in case of liquidation or reorganisation of a common law court where a judge served as a basis for dismissal of judges (Article 126).

In practice, such reason may be used to "clear" the judicial system of "unwanted" judges, enhance the dependence of judges on the political authorities and establish control of courts in such a way. For its application, a situation may specially be created where a judge will face a clearly unacceptable proposal of transfer to another court.

Noteworthy, during the judicial reform of 2010 its authors have tried to unconstitutionally introduce a reason for "forced" dismissal of judges in case of reorganisation of courts. Such was a legislative initiative put forward by the draft Law "On Amendments to Some Legislative Acts of Ukraine Concerning Perfection of Work of the Supreme Court of Ukraine".[83]

The Bill suggested amendments to the Transitional Provisions of the Law "On the Judicial System and the Status of Judges" concerning the actual[84] reduction of the number of judges in the Supreme Court from 95 to 20 and leaving, by a decision of the High Qualification Commission, the judges meeting certain criteria. The judges who, in the opinion of the High Qualification Commission, did not meet such criteria were supposed to agree to *voluntary* transfer to other courts, and in case of their refusal – to be dismissed.

7. To leave the Prosecutor General a member of High Council of Justice, being its member *ex officio* (Article 131).

The Venice Commission more than once noted that the membership of the Prosecutor General in the High Council of Justice was inconsistent with the European standards. The same opinion was produced by the European Court of Human Rights in the case of Oleksandr Volkov vs Ukraine.

For instance, previously, the Venice Commission said that: "*The inclusion of the Prosecutor General as ex officio member raises particular concerns, as it may have a deterrence effect in judges and be perceived as a potential threat*".[85] However, in the Opinion on the presidential bill on amendments to the Constitution the Venice Commission somewhat modified its stand, referring to the Explanatory Note to the Bill saying that: "*The reason for his keeping the status of a member of the Supreme Council of Justice is that the Supreme Council of Justice continues to exercise its decision-making authority with regard to the breaches of the incompatibility requirements by the prosecutors, as well as the power to consider the appeals against the decisions on disciplinary sanctions against prosecutors*".[86]

The final version of the Bill submitted by the President to the Verkhovna Rada restricts the legal status of the Prosecutor General as a member of the High Council of Justice, noting that he "*does not take part in voting when the High Council of Justice takes decisions concerning judges*" (this restriction was absent from the Bill sent by Leonid Kravchuk to the Venice Commission). I.e., the Prosecutor General will have a status of a "flawed" member of the High Council of Justice, by itself being legal nonsense.

However, this does not remove a potential threat to independence of judges, conditioned by the presence of the Prosecutor General in the High Council of Justice, since he retains the right to take part in consideration of all issues concerning judges, which may naturally have "a constraining effect on judges".

Additionally, it further questions the rationale behind referring consideration of issues of the prosecutors' career to the competence of the High Council of Justice, as proposed by the Bill.

CONCLUSIONS

Most provisions of the Bill *formally* meet European standards. However, keeping that in mind, it should be first and foremost assessed through the prism of domestic realities. Figuratively speaking, the provisions of the Bill should be correlated with the real political and legal situation in order to predict their effects. If the Bill is assessed like that, one can make an ultimate conclusion of its unacceptability and danger for independence of judges and for the domestic justice as a whole.

The Bill repeats the trend specific of the domestic law-making in the recent times, namely: use of the European standards to preserve and strengthen the undemocratic form of state governance, in case of the judiciary – to enhance the dependence of judges. The algorithm of such use is simple: to borrow the European form and to fill it with the required substance. The European standards are effectively adapted to the domestic realities.

Such adaptation, in particular, can deceive European structures assessing the relevant legislative initiatives on the basis of the standard form and their own (European) view of their introduction. Hence, such assessment in many cases leaves unattended the circumstances that reveal the true goals and the substance of the relevant legislative initiatives. This is the reason for the generally positive opinion of the Venice Commission regarding the presidential Bill on amendments to the Constitution on justice. However, one should keep in mind some transformation of the stand of the Venice Commission that on several key provisions (e.g., concerning the membership of the Prosecutor General in the High Council of Justice and the sense of existence of the High Qualification Commission of Judges as an effective "backup" of the High Council of Justice). This may witness that

[83] Reg. No.7447 of December 9, 2010. – *http://w1.c1.rada.gov.ua*

[84] The decrease in the number of the Supreme Court judges to 20 was introduced by Part I, Article 39 of the Law "On the Judicial System and the Status of Judges" in the wording of October 7, 2010.

[85] See: Venice Commission Opinion CDLAD(2010)029 (Para. 30).

[86] See: Venice Commission Opinion CDL(2013)014 (Para. 38).

the authors of the judicial reform have learned to successfully work not only within the country (with Ukrainian politicians and the Constitutional Court) but also internationally to lobby their initiatives.

The Constitutional Court conclusion regarding the Bill did not show soundness and credibility of legal arguments. Additionally, some of its provisions demonstrate the inconsistency of its legal stand on the same issue, to say the least.

In case of practical introduction of provisions of the Bill, guarantees of independence of judges will be enhanced formally ("on paper"), but in reality, the dependence of judges will grow.

The Bill breaks the balance of state power in Ukraine specified in the current Constitution. It substantially changes the constitutional powers of the Verkhovna Rada and the President regarding the judicial branch. It suggested a fundamental change of the situation in the triangle of governance (the Verkhovna Rada – the President – the judicial branch) in favour of the President. The Verkhovna Rada will be entirely barred from the formation of the corps of judges. Meanwhile, the President's powers are substantially expanded – he takes over the solution of all HR issues in the judicial system and issues of organisation of the judicial system activity. This will undermine the system of counterbalances in the national system of governance provided by the Constitution of 1996, thanks to which, Ukraine still has a chance of democratic development.

In such situation, one may even speak about signs of an attempt of breach of the principle of separation of powers provided in Article 6 of the Constitution and specifically implemented in the constitutional powers of each branch and the President.

The Bill deprives the Verkhovna Rada of the right to independently discharge the legislative function of shaping the judicature. It seems to provide for the transfer of powers at networking, establishment, reorganisation and liquidation of courts from the President to the Verkhovna Rada. However, such a right is granted to the legislative body only nominally, since the Verkhovna Rada will be able to exercise it only following a motion by the President. Hence, without a relevant legislative initiative of the President, this right of the Verkhovna Rada is "dead". In practice, this means that the issues of networking, establishment, reorganisation and liquidation of courts will *de facto* be decided by the President, especially if the President has a majority in Parliament that will only formalise his initiatives.

The Bill not only does not remove political influence on the formation of the corps of judges (as claimed by its authors) but will substantially enhance it. While under the current Constitution, political influence on the judicial branch is "diversified" between two political actors – the Verkhovna Rada and the President, according to the Bill, such influence will be concentrated in the hands of one political actor – the President. One should take into account that the Venice Commission for the first time spoke out in favour of transfer of powers at election of judges from the Verkhovna Rada to the President under an entirely different political and legal situation (2006-2008), when the balance of powers between Parliament and the President was entirely different. According to Ukraine's leading constitutionalists, then, it made sense, since the President did not have the vast powers he got in 2010 after the cancellation of the "constitutional reform of 2004".[87]

The Bill legalises novelties introduced to the domestic legislation in the result of the 2010 judicial reform, inconsistent with the current Constitution (in particular, empowerment of the High Council of Justice to appoint judges to administrative positions; expansion of the President's powers of liquidation of courts, transfer of judges elected for an indefinite term from one court to another).

In many cases, the Bill suggests harmonisation of the Constitution by "ordinary" laws of Ukraine. *First*, this is nonsense by itself (since in line with principle of the rule of law, it should be vice versa). *Second*, this points to the artificiality of "raising" provisions of "ordinary" laws to the constitutional level and/or their presently unconstitutional character (the same also refers to automated distribution of cases among judges; competitive selection of candidates for judges; building the system of scourts of general jurisdiction in Ukraine by the principle of instances).

There are grounds to suggest that the proposal to cancel the five-year term of appointment of judges for the first time is intended not to depoliticise the procedure for formation the corps of judges but rather to expand the President's powers in that field by such amendment and to give him the exclusive right to appoint and dismiss judges.

The approach proposed by the Bill will not solve the problem of functioning of the High Council of Justice – it will only outwardly "Europeanise" that body without changing the principles of its activity and most of its current members.

The Bill also contains a number of other provisions that seem legally unsound and pose serious risks for the independence of judges. All this gives grounds to conclude that the Bill shall not be adopted in its proposed form. Its adoption will deteriorate rather than improve the national judiciary. ■

[87] See: Bludsha M. Amendments to the Constitution: the president, a waxwork, or a dictator. – *http://ua.racurs.ua/342* (*in Ukrainian*).

4. CONCLUSIONS AND PROPOSALS

CONCLUSIONS[1]

The judicial reform has become one of the first large-scale legislative initiatives implemented by the new political team of President Viktor Yanukovych after his victory at the 2010 presidential elections.[2] Before its start, the President established control of Parliament by knocking up a pro-presidential coalition there, and strengthened his influence on the executive branch by cancelling the so-called constitutional reform of 2004. Both steps were constitutionally doubtful, and in both cases the key role belonged to the Constitutional Court rulings passed in the interests of the new authorities. Therefore, the President, the Parliament (the parliamentary majority) and the Constitutional Court became the main actors of the 2010 judicial reform.

The judicial reform was prompted by the apparent need for reformation of the national judiciary in line with international standards and practical guarantee of the constitutional civil right to legal protection. Domestic courts did not fully meet those standards and requirements due to both the historic legacy and permanent struggle of political forces and institutions for influence on the judicial branch that has never stopped since Ukraine gained independence and reached its peak in 2007-2009. The necessity and the authorities' intention to reform the system of justice is witnessed, in particular, by the adoption of the *Concept for improving the justice system to ensure fair trial in Ukraine in line with European standards* in 2006.

However, declaring the need for reformation of the system of justice in order to bring it in compliance with international standards in 2010, the new authorities sought to use the reform for achieving their political purposes, namely – to subordinate the judicial branch to the head of state and his political team. "The hierarchy of power" built and strengthened by that team would be incomplete and weak (unprotected) without control of courts.

That is why the processes of preparation and implementation of the judicial reform has a number of specific traits: they took place in the conditions of full domination of the President in the political system of Ukraine; were opaque and non-transparent; bore elements of manipulation of the opinion of Ukrainian society and the international community. The reform also bore such traits as neglect of conclusions and recommendations of scholars and experts, and of the *Concept*, promptness of implementation of measures bordering on hastiness and demonstrating the authorities' resolve to achieve their goals.

By and large, the judicial reform of 2010 has not reached its officially declared goals. Having made some positive steps (a new procedure for selection of candidates for judges; practical training of candidates for judges and regular education of judges; rise of judges' salaries (first of all, for judges of local courts); restriction of powers of court chairmen and expansion of powers of meetings of judges; subordination of the State Court Administration to the Congress of Judges of Ukraine, etc.), it did not solve the most acute long-standing systemic problems, but gave rise to new ones.

First of all, the reform substantially influenced the nature of state power in Ukraine. It put an end (for the time being) to the above-mentioned political struggle for the judicial branch that actually ceased to exist as an autonomous and independent branch and was "incorporated" in the presidential "hierarchy". This undermined the constitutional principle of division of powers; broke the balance of powers found in a democratic state governed by the rule of law (a system of checks and balances), shattered their functional autonomy and independence; liquidated independent judicial control of the legislative and executive branches, the President, prosecution and other bodies of state power. Noteworthy, the unconstitutional change of the status of the judicial branch was achieved through the use of legal tools – adoption and implementation of relevant laws.

Noteworthy, it was not prevented by the Constitutional Court, whose decisions not only legitimised the judicial reform but in some cases laid down preconditions for legalisation and practical implementation of clearly unconstitutional provisions. Analysis of the Constitutional Court rulings, combined with the existing expert and public

[1] See also: Judicial reform in Ukraine: current results and immediate prospects, information and analytical materials of Razumkov Centre. – Kyiv, April 2013, p.91-95. – Razunkov Centre web site, *http://www.razumkov.org*.

[2] It is worth notice that given the trend, substance and effects, the deep changes experienced in 2010 by the national judiciary cannot be termed a judicial reform – since they were generally not progressive and did not improve the situation with justice in Ukraine. Therefore, such transformations may be called a judicial reform with reservations only – for their terminological definition.

assessments of its activity, give grounds to speak about a crisis of constitutional justice in Ukraine.

One should particularly note serious weakening of public and legal control of the activity of courts due to the reform, which creates preconditions for judicial arbitrariness and immunity of judges passing unlawful judgments. Combined with the growth of influence of public prosecution on legal, political, economic and other processes in the state and society, this creates a situation where courts, together with public prosecution and other law-enforcement bodies, are nothing but elements of an integral mechanism of state power mainly focused on the defence of the current authorities.

Specific of the national justice after the judicial reform was predictability of court judgements in cases, in which the current authorities have an interest (so-called political cases, e.g., of Yuliya Tymoshenko, Yuriy Lutsenko and other top officials of the previous government), cases of election disputes, cases of exercise of the civil right to peaceful rallies, etc.). This may also witness growth of political influence on courts and their control from outside.

The reform ensured organisational unity of functioning of judicial bodies (courts) and bodies supporting their activity (the High Council of Justice, the High Qualification Commission of Judges, the State Court Administration) and bodies of judges' self-government. Confrontation specific of 2007-2009 was replaced by cooperation and concerted actions by all those actors. However, that unity should hardly be praised, since, *first*, it was reached through emasculation of the legal substance of activity of those bodies, *second*, it itself enables external (political) control of courts and judges, that is why it has been imposed from outside and pursues goals that are not always consistent with principles of justice.

The reform enhanced dependence of the judicial branch and judges: externally – on other branches and state institutions, first of all, the President and public prosecution; and internally – on the High Council of Justice and court chairmen. This happened, in particular, in the result of unconstitutional expansion of powers of the High Council of Justice, change of the principles of its activity, introduction of new grounds for bringing judges to responsibility.

Meanwhile, it seriously weakened the role of judges' self-government and reduced social guarantees for judges. The reform involved fundamental shifts in personnel that "drained" the professional core of the corps of judges and led to appointment of persons loyal to the government to the key judicial positions.

Therefore, the reform has not solved the long-standing systemic problems of justice, such as politicisation of formation the corps of judges; dependence of courts and judges; regular under-funding of the judicial branch; extremely heavy load on courts and their breach of reasonable terms of consideration of cases; spread non-execution of court judgements, etc. All this, combined with new problems created by the judicial reform, resulted in growing opaqueness of the judicial system and growth of corruption in the judiciary – which, in turn, led to deterioration of accessibility of justice, obstructed exercise of the civil right to a fair trial.

Results of the public opinion polls showed the same: when answering the question about the influence of the judicial reform on the situation with justice in the country in October 2013, the overwhelming majority of respondents said that the situation has deteriorated or has not changed; improvement was reported by only 2% of those polled. A critical public opinion of the level of corruption in the judicial system strikes the eye: 83% consider it corrupt (in that, 47% are sure that in that system, "everything is corrupt").

In the end result, the reform did not remove the fundamental obstacle for Ukrainian courts to performance their social and legal mission – the critically low level of public trust in courts. Now, courts are fully trusted by only 2% of the country citizens, 4% fully supports the judicial system activity. Hence, Ukraine does not have such basic social precondition for the exercise of justice by courts as public trust in courts. This leads to courts losing public legitimacy and also strongly undermines the legal status of the court and the legal meaning of its decisions, substantially lowering the efficiency of discharge of the court functions.

The judicial reform has entered the decisive phase – constitutional. The survey results show that this phase, as well as the entire judicial reform, shows non-transparency, divergence of officially announced and true goals, and also specific use of not only national advisory and public structures but also international institutions, European norms and standards as such.

For instance, in the case of the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges", the Presidential Administration effectively used the Constitutional Assembly to imitate the democracy of the Bill preparation and sending to the Venice Commission for comments, and the *generally* positive opinion of the Venice Commission – to stop further expert discussion and improvement of the Bill.

Meanwhile, practical implementation of that Bill – most provisions of which *formally* meet international

standards – in the context of the Ukrainian social and political realities bears strong risks for the judiciary and the entire system of state governance, since it may lead to establishment of total political control of the judicial branch.

However, preliminary approval of the Bill leaves space for its improvement. Therefore, experts, practicing lawyers, human rights activists, the public now have kind of a "window of opportunities" to finalise the Bill and really bring it in compliance with the European standards of justice and general functioning of a democratic law-ruled state. The "European integration" trend of the Bill stressed by its authors should become its essence rather than a formality.

PROPOSALS AND RECOMMENDATIONS[3]

Practical introduction of the European standards of independence of the judicial branch and fair justice in Ukraine requires certain preconditions, first of all – the political will of the present authorities and all political forces to give up attempts to make courts "domestic and obedient" and to focus on establishment of independent and fair court in the country. Without such political will there will be no shifts for the better in the domain of justice.

Creation of the necessary political, legal and social preconditions for introduction of international standards in the domain of justice in Ukraine requires:

- **true separation of powers into the legislative, executive and judicial branches**;
- **free, fair and democratic elections**;
- **full-scale implementation of the principle of the rule of law**;
- **fundamental reformation of public prosecution**. Today, public prosecution in fact presents a "power structure" with a clear political bias and fully dominates the Ukrainian legal system. The status, functions and powers of public prosecution should be brought in compliance with the European standards. Public prosecution should be immediately stripped of the functions of preliminary investigation and so-called general supervision without any extension;
- **freedom of speech and independence of mass media**. Unbiased and full coverage of the processes taking place within the judicial system (related with the exercise of justice and dealing with the regulatory-legal, HR, financial, organisational and other support for the activity of courts and judges) makes it possible: to rule out unlawful influence on courts and judges; to avoid unlawful judgements; to ensure inevitability of legal responsibility of judges for unlawful judgments, and of other persons – for interference in the activity courts and judges;
- **introduction of public monitoring of the activity of courts**. Monitoring involves the detection, recording and reporting of its defects and violations committed by judges during consideration of specific cases. Such public information may provide the actual basis for the concerned state bodies to make inspections and take the required retaliatory measures.

Further development of the judiciary will be possible only after the restoration of the guarantees of autonomy of the judicial branch and independence of judges that was destroyed by the judicial reform of 2010.

I. Restoration of true autonomy and independence of judges' self-government:

change of approaches to the regulatory-legal framework of organisation and activity of judges' self-government: the legislation should only lay down their legal principles, leaving detailed regimentation of activity to decisions of supreme bodies of judges' self-government – the Congress of Judges and the Council of Judges of Ukraine. This is conditioned by the nature of professional self-government (called to solve issues of internal activity of courts), and also the need to ensure its autonomy and independence;

organisation of the system of bodies of judges' self-government under a new principle – territorial (instead of the principle of specialisation of courts applied now). Such an approach aims to remove artificial factors that divide the judicial system, complicate exercise of justice, weaken independence of the judicial branch. On the one hand, it presumes liquidation of conferences and councils of judges of specialised courts,[4] on the other – establishment of regional conferences of judges;

change of the **principles of formation of the Congress of Judges of Ukraine and the Council of Judges of Ukraine** (in particular, replacement of the principle of equal representation of judges of different court jurisdictions by the principle of proportionality; wider representation of judges in the supreme bodies of judges' self-government – a substantial increase in

[3] These proposals and recommendations were in the focus of an expert discussion in the Razumkov Centre on September 26, 2013. The discussion involved representatives of the judicial branch, legal educational establishments and the academic community, think-tanks, public organisations dealing with the issues of justice.

[4] Such an approach to organisation of judges' self-government is proposed by experts of the Centre for Political and Legal Reforms. See: Ukrainian justice: dimension in the context of European standards (materials of international conference). – Kyiv, September 12, 2013, p. 31 (*in Ukrainian*).

the number of delegates of the Congress of Judges and members of the Council of Judges of Ukraine; change of the procedure for delegation to the Congress; limitation of delegation of judges occupying administrative positions to the Congress);

organisation of the **Congress of Judges of Ukraine under a new procedure**. This procedure is to ensure broad representation of the corps of judges at the Congress whose delegates will be elected on really democratic principles. A ban to elect to the Congress the judges elected as delegates after the effective date of the Law "On the Judicial System and the Status of Judges";

formation of the new Council of Judges of Ukraine. A ban to elect to the Council judges who were its members and members of other councils of judges after the effective date of the Law "On the Judicial System and the Status of Judges";

extension of powers of judges' self-government bodies to appointment (election) of judges to administrative positions in courts;

introduction of the procedure for obligatory coordination of the planned expenditures on the judicial branch (when planning the state budget) **with supreme bodies of judges' self-government** (the Council of Judges of Ukraine), legislative guarantee of allocation of funds to the judicial branch not below the level of actual needs of procedural activity.

II. Provision of the judicial branch functioning on the principles of law:

requalification of some judges – individual check (assessment) of judges for compliance of their acts with the Constitution and laws of Ukraine. Such check (assessment) should focus on the activity of the judges whose judgements bore signs of evident bias (political and other prejudice) or demonstrated behaviour clearly inconsistent with the status of a judge. Such check (assessment) should, in particular, address judges who passed judgements, following which, the European Court of Human Rights established violation of the European Convention on Human Rights by Ukraine.

The procedure should be regimented by a special law and conducted by a specially authorised body (bodies) under a legal procedure with clearly established criteria of selection of judges for the check and assessment of their acts.

For judges appointed for the first time, the procedure for requalification may employ a mechanism of election of a judge for an indefinite term specially modified for this purpose.

Such requalification must also apply to public prosecution officers (and first of all, its leadership) with similar grounds and criteria.

III. Creation of an efficient mechanism of formation of an independent and competent corps of judges:

personal changes in the High Council of Justice with a ban on its membership for persons who already were its members or members of the High Qualification Commission of Judges of Ukraine, or occupied administrative positions in courts after the judicial reform of 2010;

personal changes in the High Qualification Commission of Judges of Ukraine with a ban on its membership for persons who were appointed its members pursuant to the Law "On the Judicial System and the Status of Judges", and also those who were members of the High Council of Justice;

exclusion from the powers of the High Council of Justice of the right to appoint judges to administrative positions in courts, not assigned to it by the Constitution;

provision of a democratic character of the High Council of Justice activity – reinstatement of the previous (applied before the judicial reform of 2010) principles of: determination of the quorum of its meetings; procedure for decision-making; procedure for bringing judges to responsibility, including their dismissal for breach of oath;

establishment of clear and concrete grounds for disciplinary responsibility of judges and for their dismissal for breach of oath – instead of the "vague" and controversial grounds established in the result of the judicial reform of 2010, involving prevalence of personal criteria of their establishment and enabling selectiveness in decisions on judges' responsibility;

enhancement of procedural guarantees of defence of judges from prosecution for commitment of disciplinary offences or breach of oath, such as the provision that the High Council of Justice decision to dismiss a judge for breach of oath is taken by not less than two-thirds of votes of its constitutional composition;

legislative enhancement of a limitations period for responsibility (dismissal) of judges for breach of oath. The absence of such a period not only presents legal nonsense but also: 1) violates the principle of legal certainty of responsibility of judges; 2) presents a strong tool of dependence of judges (they are "kept on a hook" for a long time); 3) enables the High Council of Justice to abuse its powers imposing disciplinary sanctions on judges;

extension of the list of disciplinary sanctions against judges to ensure adequate legal response and a differentiated approach to disciplinary responsibility of judges dependent on the nature of the offence, the kind of guilt, its effects, etc.;

legislative definition of dismissal of a judge for breach of oath as a kind of a disciplinary penalty imposed in line with the procedure for bringing judges to disciplinary responsibility;

unification of the procedure for bringing judges to disciplinary responsibility irrespective of the level of the court where they work;

removal of the current duplication in the judicial branch staffing caused by the existence of two state bodies with similar powers – the High Council of Justice and the High Qualification Commission of Judges. Appointment of one state body (the High Council of Justice) whose competence would cover issues of the judge's career – appointment (election) of judges, their dismissal, disciplinary responsibility. This should simplify and make more effective the mechanism of acquisition of the status of a judge, deprivation of it and bringing judges to responsibility;

provision of a new procedure for oath for newly-appointed judges (as an option: to the Council of Judges of Ukraine or a meeting of judges of a certain region);

amendment of the procedure for transfer of judges elected for an indefinite term from one to another court of the same level and specialisation. The decision of such transfer should be taken not by the President (as now) but by Parliament, whose competence, according to the Constitution, encompasses election of judges for an indefinite term. With time (after the amendment of the Constitution), this function will be vested in the High Council of Justice;

introduction of a competitive procedure for transfer of judges from one court to another court of a high level or a different specialisation;

legislative provision (restoration) of powers of the concerned parliamentary committee concerning consideration of issues of election and dismissal of judges corresponding to constitutional functions of a parliamentary committee (Article 89 of the Constitution). Change of the current procedure for consideration of those issues by the Verkhovna Rada that, *first*, effectively rules out their consideration by the Verkhovna Rada *per se*; *second*, "obliges" the Verkhovna Rada to pass a decision of dismissal of a judge (including for breach of oath) even in absence of grounds for that;

introduction of the practice of "public personalisation" of court judgements – wide public information about the judge (judges) who passed one or another judgment. Such practice should establish in society and in the corps of judges the idea that there are not "anonymous" court judgements and that every judgment is a result of activity of a specific judge. This novelty is intended first of all to raise the moral responsibility of judges, to keep them from adoption of knowingly unlawful judgments under the threat of public condemnation and legal responsibility;

restoration of the previous procedure for appeal in court against acts, actions or inaction of the Verkhovna Rada, the President, the High Council of Justice, the High Qualification Commission of Judges, enabling their review in an appellate and cassation procedure.

IV. Proper guarantees of the right to judicial protection

empowerment of the Supreme Court to review court judgements: 1) of all courts of lower instances, not only courts of the cassation instance, as the case is now; 2) on grounds of dissimilar (incorrect) application by courts of all legal norms (of the law of substance and the law of procedure), not only norms of the law of substance, as the case is now;

abolition of the institution of admission of cases by high specialised courts to the Supreme Court for proceeding, as it 1) creates artificial obstacles for access to justice; 2) unreasonably deprives individuals and legal entities of an efficient national tool of judicial protection of their rights, freedoms and legitimate interests; 3) discriminates the Supreme Court as the supreme judicial body of the state, making it inferior to lower level courts (namely, high specialised courts);

terming the Supreme Court the only judicial body in Ukraine empowered to review cases if a concerned international judicial institution (e.g., ECHR) finds that Ukraine violated its international commitments during the decision of the case by the court;

complete and proper execution of judgments of the European Court of Human Rights. In the context of functioning of the national judicial system, a special role belongs to execution of the ECHR judgment in the case of Oleksandr Volkov vs Ukraine, which, in addition to payment of the damages adjudicated by the court, requires implementation of:

additional individual measures – "the applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date";

general measures aimed at removal of systemic problems noted in the ECHR Judgment and their core reasons (bias and partiality of the High Council of Justice, politicisation of the process of dismissal of judges, absence of a limitations period for dismissal of judges for breach of oath, impossibility of appellate and cassation appeal in such category of judicial cases, differing judicial and other practice of bringing judges to responsibility, etc.);

measures for the review by the High Administrative Court of court judgements passed by the illegitimate bench;

obligatory legal reaction to judgments of the European Court of Human Rights that established violation by Ukraine (its courts) of the European Convention on Human Rights in the form of responsibility of officials whose fault enabled such violation. Such reaction should be an element of execution of ECHR judgments and should involve, e.g., legal assessment of the acts of Ukrainian judges (if necessary – prosecutors and other officials) immediately involved in the passage of court judgements that led to violation of conventional rights and freedoms of individuals and/or legal entities. With this purpose, relevant amendments should be introduced to the Law "On Execution of Judgments and Application of Practice of the European Court of Human Rights" and other laws;

revision of procedural terms reduced in the result of the judicial reform, that in many cases cannot be deemed "reasonable" for fair consideration judicial cases. They: *first*, seriously complicate the exercise of the civil right to judicial protection; *second*, deteriorate the quality of justice since they do not allow the court to fully and comprehensively examine all facts in the case; *third*, create preconditions for greater dependence of judges who in the conditions of excessive load cannot meet them, in that way becoming "violators" of the law and continuously facing the threat of disciplinary and other responsibility;

removal of provisions effectively depriving citizens of access to the cassation instance from the codes of procedure. This applies to the provisions, in line with which, the reporting judge refuses to open a cassation proceeding in a case if "*a cassation appeal is unreasonable, and its arguments do not give rise to the need to check the materials of the case*". Therefore, a judge without consideration of a case in fact passes a judgment in it *per se*, always negative for the applicant in the cassation appeal. In such a way, the concerned persons (parties) are deprived of the right to cassation review of their cases;

introduction of the institution of test cases for consideration of cases of the same (typical) category;

adoption of the Law "On the Procedure for Funding the Judicial Branch in Ukraine" that should specify the procedure for planning budget appropriations for the judicial branch, allocation and distribution of such funds, their use, control of their use, etc. to provide the financial and material basis for independence of courts.

V. Constitutional reform on justice

Given the actual state of justice in Ukraine, its constitutional reformation is to provide for:

refusal from final adoption of the presidential Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" by Parliament due to its predictable negative effects for the independence of judges;[5]

introduction of only those amendments to the Constitution that are really necessary for improvement of the situation in the domain of justice at the present stage, in particular: to reformat the composition of the High Council of Justice; to reduce the probationary term for judges appointed for the first time – from five to two (three) years; to remove breach of oath as a reason for dismissal of a judge.

Optimally, the High Council of Justice consists of 15 members elected by the Congress of Judges of Ukraine (9 persons) and the Verkhovna Rada (5 persons) for five years to work on a permanent basis. The High Council of Justice should include the Supreme Court Chairman *ex officio*. Election of one-third of the High Council of Justice by Parliament (from different factions) is to ensure the best balance of political influence on that body, which cannot be achieved today through the election of the High Council of Justice members by the concerned bodies of the bar and the academic community. To ban repeated election of the same person to the High Council of Justice;

establishment in the Constitution, at a later stage:

of a three-tier judicial system made up of local, appellate courts and the Supreme Court of Ukraine;

of a new procedure for appointment (election), dismissal and scrapping immunity of judges – a body in charge of formation of the corps of judges (the High Council of Justice);

of a new perception of judges' immunity due to the reduction of their so-called personal immunity;

of the provision that justice in Ukraine is exercised in the Ukrainian language.

It seems reasonable to consider introduction of a procedure for regular (every 5 or 10 years) "vote of confidence" in judges presuming the assessment of their work by citizens and/or local self-government bodies with possible initiation of dismissal of a judge. The same also refers to the right to pass a "vote of confidence" in the Verkhovna Rada that will be able to consider this issue on a proposal of not less than one-third of the constitutional composition of Parliament.

The most optimal and productive approach to improve the Constitution in the domain of justice seems to **set up a constitutional commission of the Verkhovna Rada for drafting amendments to the Basic Law** including representatives of all parliamentary factions, involving leading scholars, experts, representatives of public organisations. ■

[5] For analysis of the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" see Razumkov Centre's Analytical Report (Chapter 3) in this journal.

THE JUDICIAL REFORM AND STATE OF THE JUDICIARY IN UKRAINE: EXPERT ASSESSMENTS

Expert surveys on internal policy issues regularly conducted by the Razumkov Centre enable to determine expert opinions about topical issues as well as their ideas of how to solve these issues.

Today, this is highly relevant for the judiciary, arising many complaints from the public. The national political elite, the expert community and society continue to debate on the efficiency of the judicial reform implemented in 2010, guarantees of impartiality, fairness and independence of the national judiciary. In this connection, the results of the latest Razumkov Centre's expert poll are of particular interest.[1]

Assessments and effects of the judicial reform in Ukraine

Experts differently assess the goals, results and effects of the judicial reform initiated by President Viktor Yanukovych. In particular, among the true goals of the judicial reform, those polled often mentioned: subordination of the judicial branch to the President and establishment of his control of courts (56%); enhancement of political and other external influences on the judicial branch (44%). Exactly in those domains, the majority of experts saw tangible effects of the reform – 79% and 72%, respectively (Table "*Assessment of goals and results (effects) of the judicial reform of 2010*").

Meanwhile, only 9-19% of experts see some tangible progress in implementing the officially proclaimed goals such as harmonisation of Ukraine's judicial system with international standards, reduction of corruption in courts, simplification of procedures for citizens' access to court, enhancement of efficiency of judicial protection.

Experts provided mostly positive assessments of the following changes: introduction of competitions to fill vacancies of judges (83%); introduction of obligatory special training of candidates for the judge's office (79%); reduction of litigation terms (69%); cancellation of the appellate instance's right to send cases for review to a court of the first instance (56%) (Table "*How do you assess changes introduced in the result of the judicial reform?*"). A relative majority (48%) of experts welcomed the expansion of the High Council of Justice' powers to bring judges to disciplinary responsibility and to dismiss them from office for a "breach of oath" (a negative assessment was produced by 39%).

Mostly negative assessments were given to the following: depriving natural and legal persons of the right to seek protection directly at the Supreme Court of Ukraine, and establishing an institution for accepting cases for its consideration (80%); reduction of powers of the of Supreme Court (71%); expansion of the President of Ukraine powers to move judges from one court to another (66%); empowerment of the High Council of Justice to appoint court presidents and their deputies (58%), reduction of the terms of appeal and cassation filing (57%).

Expert opinions about the following novelties split almost equally: creation of a new High Specialised Court to consider civil and criminal cases (45% – positive, and as many – negative), restriction of court presidents' role in court management and enhancement of the role of court staff heads (41% and 38%, respectively), reduction in the number of the Supreme Court judges (37% and 41%, respectively).

The judicial reform substantially changed the Supreme Court' status, in particular, it reduced the number of its judges, restricted its procedural powers, introduced the institution for accepting cases for its consideration. According to the majority of experts (64%), the main motives for such changes included the desire to reduce the status of the Supreme Court and to make the judiciary more dependent (Diagram "*As a result of the judicial reform, the status of the Supreme Court…?*"). A relative majority of experts (44%) believes that changes to the status of the Supreme Court worsened the execution of justice in Ukraine, 35% – that they had no effect, and only 5% – that these changes had a positive effect on

[1] The expert poll was held by the Razumkov Centre's Sociological Service from 11 February till 5 March 2013. 140 experts were polled – representatives of the judicial system (judges and court employees), scholars (lecturers of High educational establishments, personnel of scientific research institutions), officers of public prosecutor offices, the Ministry of Internal Affairs, the Security Service, independent lawyers and barristers, representatives of non-governmental think-tanks and human rights organisations, members of the Constitutional Assembly, present or former members of the High Council of Justice, the High Qualification Commission of Judges, officers of the Presidential Administration, staff of the Verkhovna Rada of Ukraine, the 11 High Council of Justice, the State Court Administration, Ukraine's national deputies.

justice (Diagram "*What consequences did changes to the status of the Supreme Court have in the field of justice?*").

Assessing the effects of the laws adopted over three years on the relations between the bar and the authorities, 49% of the experts saw no particular changes; 27% saw an increase in barristers' dependence on the authorities, and only 11% – weakening of such dependence (Diagram "*The laws adopted over the past three years, including the new Law 'On the Bar and Advocacy'"...*).

46% of experts negatively assessed the judicial reform results for the overall situation in the judiciary (20% believe that its results substantially worsened the situation, 26% – that it has somewhat deteriorated). Improvement was seen by only 13% of those polled (in that, 1% reported substantial improvement). Another 35% of experts said that the situation did not change (Diagram "*Assessing the judicial reform results in Ukraine in general, do you think its implementation has ...*").

Independence of the judiciary and legitimacy of court judgements in Ukraine

Almost two-thirds (62%) of all experts mentioned autonomy and independence among the main attributes missing from the judicial branch in Ukraine (Diagram "*What do courts in Ukraine lack most of all?*"). Among the key factors hindering the discharge of the constitutional function of execution of justice by courts, experts most of all mentioned the high level of corruption in the country (4.3 points), dependence of the judicial branch (4.1), and judges' overload with cases (3.9) (Diagram "*To what extent does each of the following factors prevent courts from performing their constitutional function of executing justice?*").

Only 3% of experts called the judicial branch in Ukraine fully independent. Instead, 72% of those polled see it dependent on the President, 53% – on the executive branch, 37% each – on the Verkhovna Rada and public prosecution offices (Diagram "*Is the Judiciary independent in Ukraine ...?*"). Only 5% of experts are sure that the High Council of Justice is an independent and politically impartial body, while the opposite opinion is shared by nearly 84% (Diagram "*Is the High Council of Justice an independent and politically impartial body?*").

According to experts, conditions necessary for effective functioning of the judicial system have been ensured on a mediocre level. Namely (on a five-point scale):

- immunity of judges – 3.5 points;
- high social status of judges – 3.3;
- constitutional and legislative provision of independence of the judicial branch – 3.1;
- responsibility for contempt of court, encroachment on judges, non-execution of court judgements – 2.8;
- adequate public funding of courts – 2.8;
- high professional level of judges and their moral position – 2.7;
- efficient work of judges' self-government bodies – 2.6;
- moral, political and legal traditions resting on recognition of the special role of the court and status of judges – 2.4;
- political will of the state leadership to ensure independence of the judicial branch – 2.2;
- responsibility for exerting illegal influence on court – 2.2 (Table "*To what extent are the following factors now present in Ukraine?*").

Judges of the Supreme Court of Ukraine are usually seen by experts as the most independent in the process of execution of justice (26%). Judges of other courts, according to almost a third (32%) of experts, have equal guarantees of independence (or equally do not have such guarantees (Diagram "*Judges of which court are the most independent in execution of justice?*"). A bit more than half (52%) of experts similarly assessed the (in)dependence of administrative and general courts. At that, 21% of those polled thought that judges of general courts are more independent, 11% – of administrative courts (Diagram "*Which courts are more independent and impartial ...?*").

An important factor of the autonomy of courts and independence of judges might be presented by judges' self-governance. However, **31% of experts believes that self-government of judges in its present form is actually unimportant for the autonomy of courts and independence of judges**, 29% – that it exerts little influence, 26% – that it is used by the authorities to control courts and judges, and only 4% is sure that judges' self-government presents a serious factor of autonomy of courts and independence of judges (Diagram "*Judges' self-government today...*"). According to almost half (49%) of experts, after the judicial reform, the role of judges' self-government in solving internal court issues and ensuring the independence of judges did not change, a quarter of those polled believe that it weakened, and only almost one in eleven (9%) – suggests that it increased (Diagram "*After the judicial reform, the role of judges' self-government in solving issues ...*").

According to more than half (54%) of experts, the main guarantee of independence of the judicial branch and courts is (or, rather, should be) provided by the competence, integrity and impartiality of judges in their execution of justice; a special procedure for appointing judges resting on the principles of impartiality and competence (39%); and the political will of the state leadership to ensure true independence of the court (34%) (Table "*What is the strongest guarantee of independence of the Judiciary and judges?*"). Meanwhile, as noted above, experts gave low assessment to the

presence of political will of the state leadership (2.22), the professional level of judges and their moral position (2.7), as well as to moral, political and legal traditions resting on recognition of the special role of the court and status of judges (2.4).

In such a situation, it is too difficult to ensure the legitimacy of court judgements, their independence from the social and administrative status of parties involved in court proceedings. **A relative majority (38%) of experts believes that the present judicial branch defends mainly representatives of the authorities, 20% – representatives of big business, 16% – the President, and only 9% – representatives of society in general and every citizen in particular** (Diagram "*Whose interests does the current Judiciary defend in the first place?*").

Although almost 41% of those polled said that judges making a judgement are guided by law, nearly as many (40%) believe that they are guided by personal benefit (including illegal reward for the judgement). As decisive motives, 37% of those polled referred to circumstances of the case, 34% – the political situation in the country, 27% – instruction of the court chairman, 21% – property and/or official status of the parties, 16% – precedents of judgements (Diagram "*What are the aspects that usually guide judges when passing a judgment?*").

An important factor of impartiality of court judgements is presented by **the competitiveness and equal opportunities of parties to litigation. However, 62% of experts believe that these conditions are not sufficiently provided**, 18% – that they are not provided at all, and only 13% – that they are fully provided (Diagram "*Are principles of fair competition and equal opportunities provided for parties involved in court proceedings?*").

Assessment of the draft Law "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges"[2]

A relative majority (36%) of experts sees the main goal of the Bill in strengthening dependence of judges on other institution of power, first of all, the President, 19% believes that the adoption of the Bill is to constitutionally legalise the present situation in the judiciary, and only 14% suggests that it will provide more guarantees of independence of judges in the Constitution (Diagram "*The Presidential Administration developed the draft Law 'On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges'. What is the main goal of this Bill?*").

The Bill provides for modification of the procedure of the High Council of Justice staffing (in particular, most of its members will be judges) and expansion of its powers (the right to appoint judges to administrative positions, solution of the issue of deprivation of judges' immunity). On the one hand, experts tend to believe that it will facilitate selection of more qualified judges, enhance impartiality of consideration of issues of responsibility of judges, provide better guarantees of autonomy of courts and independence of judges. Meanwhile, they even more tend to believe that this will enhance dependence of judges on the High Council of Justice (Table "*What do you think will be the consequences of the proposed amendments (stipulated in this Bill) to change the composition of the High Council of Justice …?*").

Barring of the Verkhovna Rada from participation in formation of the corps of judges envisaged by the Bill (cancellation of its present powers of election to the judge's position indefinitely) and expansion of the President's powers (his right to appoint and dismiss all judges and to move judges from one court to another), according to experts, will mainly lead to growth of the President's influence on the judicial branch, make formation of the corps of judges more politicised, enhance political dependence of judges, weaken guarantees of their independence (Table "*What do you think will be the consequences of the proposed amendments (stipulated in this Bill) to deprive the Parliament of its powers …?).*

Experts more tend to believe that cancellation of the "probationary period" for the first appointment to the judge's position, envisaged by that Bill, will lower qualification of judges, prompt corrupt acts, weaken guarantees of their independence (Table "*What do you think will be the consequences of the proposed amendments to cancel the 'probationary period' (the first appointment) for judges…?).*

So, according to almost half (47%) of experts, the procedure of the first appointment of judges should be left the way it is. Another 29% believes that the procedure should be preserved, reducing the "probationary period" from five to three (or two) years, and only 15% believes that the procedure of the first appointment of judges should be liquidated and judges should from the very beginning be appointed (elected) indefinitely (Table "*What would be the right decision concerning the 'probationary period'…?*").

Expert ideas on the judicial reform in Ukraine

The overwhelming majority (70%) of experts is sure that optimal for Ukraine is the three-level system of judiciary (local court – court of appeal – Supreme Court as the cassation instance). The present four-level system (local court – court of appeal – High specialised court as the cassation instance – Supreme Court) is considered optimal by only 21% of those polled (Diagram "*Which system of judiciary is optimal for Ukraine?*").

[2] The Bill was drafted by the Presidential Administration and, in October 2012, sent to the Constitutional Assembly for analysis and submission of proposals.

64% of experts support introduction of **trial by jury**, 56% – lustration of the corps of judges, 49% – deprivation of public prosecutor's offices of the right to conduct pre-trial investigation. Meanwhile, 56% of those polled denounced the proposed **election of judges by citizens** (Diagram "*What is your attitude to each of the following proposals?*"). **Election of judges was the most furiously opposed by experts representing the judicial system (86%).** It was also largely denounced in the academic and analytical community (56%); **and mainly welcomed – by representatives of human rights organisations (67%), law-enforcement officers (53%), independent layers (53%) and barristers (53%).**

Assessing the place and role of **public prosecutor offices** in the system of state governance, experts (59%) mainly tend to believe that it should be an independent supervisory institution not subordinated to any branch of power or the President (Diagram "*What place and role should public prosecution offices have in the system of state governance? Prosecution should be ...*").

Only 11% of experts believe that the present powers of the Supreme Court are optimal, correspond to the Constitution and therefore should not be changed. 22% sticks to the opinion that the Supreme Court should be given back the powers it had before the judicial reform of 2010, 16% – that its powers should be expanded, and a relative majority (39%) sticks to an even more radical opinion and suggests that the Supreme Court should be made the only cassation instance (Diagram "*Is it necessary to change the procedural status (powers) of the Supreme Court of Ukraine?*").

To ensure operation of the Constitutional Court of Ukraine on the principles of independence and impartiality, 31% of experts propose to amendment the procedure for its appointment, 30% – to entirely renew its composition, 7% – to move it from Kyiv to another city of Ukraine. 21% of those polled stick to the opinion that the Constitutional Court should be liquidated, and its functions – transferred to the Supreme Court. Only 14% believe that nothing should be done, since the Constitutional Court already operates on the principles of independence and impartiality (Diagram "*What should be done to ensure operation of the Constitutional Court of Ukraine ...?*").

Almost two-thirds (64%) of experts see it inexpedient to retain two state bodies in Ukraine (the High Council of Justice and the High Qualification Commission of Judges of Ukraine) dealing with formation of the corps of judges (Diagram "*Is it reasonable to have two state bodies in Ukraine ...?*").

Conclusions

Experts mainly negatively assess the effects of the judicial reform initiated by President Viktor Yanukovych, usually describing its main goals as subordination of the judicial branch to the president and enhancement of political and other outside influences on the judicial branch. Therefore, according to experts, the true goals of the reform do not coincide with the claimed ones.

Meanwhile, some changes envisaged by the reform (arrangement of competitions to fill vacancies of judges, introduction of obligatory special training of candidates for the judge's office, reduction of litigation terms, cancellation of the appellate instance's right to send cases for a new review by a court of the first instance, expansion of the High Council of Justice powers to bring judges to disciplinary responsibility and dismiss them from office for oath-breaking) are mainly welcomed by experts.

Experts note non-abidance by the principle of independence of the judicial branch in Ukraine, mainly noting the lack of the political will of the state leadership to ensure true independence of the judicial branch as the reason for such a state of affairs. In such conditions, they believe that the judicial branch in Ukraine primarily defends the interests of representatives of the authorities and big business.

Experts termed as very poor the role of the present judges' self-government in provision of the autonomy of courts and independence of judges. Their assessments suggest that judges' self-government now falls short of the functions and tasks vested in it by the Constitution and the laws.

According to most experts, the draft Law "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" cannot improve the situation with independence of judges (and many experts believe that the situation will even deteriorate).

Assessing lines of the judicial reform in Ukraine, a majority (or a relative majority) of experts stands for:

- **introducing a three-level system of judiciary (local court – court of appeal – Supreme Court as the cassation instance);**
- **introducing trial by jury;**
- **conducting inspection of the corps of judges;**
- **depriving the public prosecutor's offices of the right to conduct pre-trial investigation;**
- **expanding the Supreme Court powers;**
- **defining the status of public prosecutor's offices as an independent supervisory institution not subordinated to any branch of power or the President.**

The majority of experts oppose the existence of two state bodies in Ukraine – the High Council of Justice and the High Qualification Commission of Judges of Ukraine – dealing with formation of the corps of judges.

To ensure operation of the Constitutional Court of Ukraine on the principles of independence and impartiality, experts most often see it necessary to change the procedure for appointing its members and/or totally renew its staff.

On the initiative of the President Victor Yanukovych, a number of laws aimed at reforming the judicial system were adopted in 2010 (including the Law "On the Judicial System and the Status of Judges")

Assessment of goals and results (effects) of the 2010 judicial reform,
% of experts polled

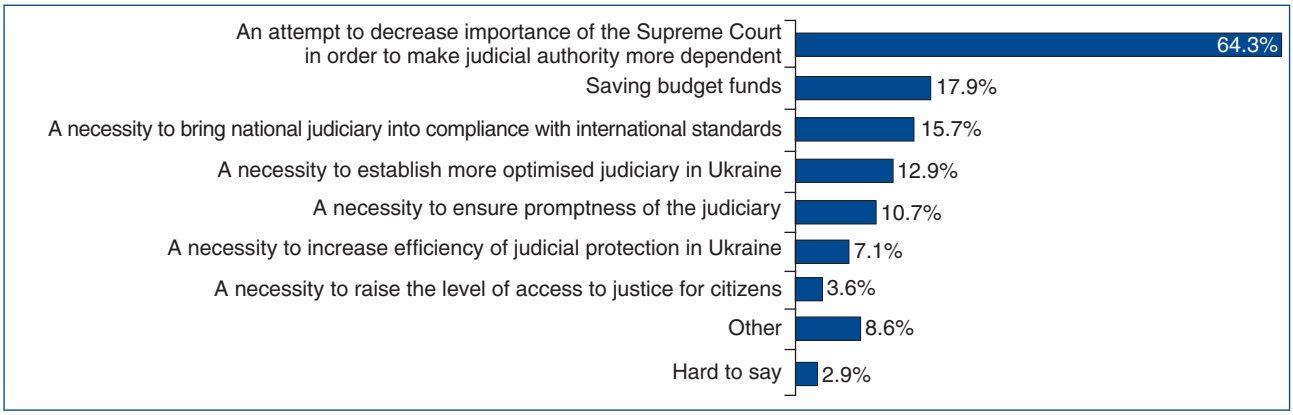
What were the main goals of the judicial reform?*	Goals / Results (effects)	Has the reform achieved these results (consequences)?**	
		Yes	No
55.7	Subordination of the judicial authority to the President and establishment of his control over courts	79.3	8.6
44.3	Increased political and other external influence on the judicial authority	72.1	13.6
30.0	Neutralisation of judicial control over the branches of power and protection of their representatives from possible legal responsibility	50.0	19.3
28.6	Reforming of the judicial system according to international standards	8.6	80.0
16.4	Reduction of corruption in courts	15.0	72.1
14.3	Increased efficiency of judicial protection in Ukraine	15.7	75.0
12.9	Provision of independence of judges from external influences, including those within the judiciary	5.7	85.0
11.4	Simplification of the procedure for applying to the court for every citizen	18.6	70.7
10.7	Increased importance of court and higher status of judges in society	12.1	82.9
2.1	Hard to say		

* Experts were asked to give not more than three answers.
** "Hard to say" choice is not provided in the Table.

How do you assess changes introduced in the result of the judicial reform?
% of experts polled

	Positive	Negative	Hard to say
Competition to fill vacant judge positions	82.9	6.4	10.7
Introduction of a special mandatory training for candidates for judge positions	79.3	14.3	6.4
Shorter terms for reviewing cases in courts	68.6	20.0	11.4
Cancellation of the option of sending a case for reconsideration to a court of primary jurisdiction by a court of appeal	55.7	32.1	12.1
Wider competence of the High Council of Justice in terms of bringing the judges to disciplinary responsibility and their dismissal for "breach of oath"	47.9	39.3	12.9
Establishment of the new High Specialised Court for Civil and Criminal Cases	45.0	45.0	10.0
Reduced importance of courts' heads in managing courts and increased role of heads of court administrations	41.4	37.9	20.7
Reduced number of judges of the Supreme Court of Ukraine	37.1	40.7	22.1
Shorter terms for filing appeals and cassation appeals	34.3	57.1	8.6
Granting of the right to appoint heads of courts and their deputies to the Supreme Council of Justice	26.4	57.9	15.7
Reduced competence of the Supreme Court of Ukraine	21.4	71.4	7.1
Depriving natural and legal persons of their right to address the Supreme Court directly; establishment of an institution for accepting cases for its consideration	13.6	80.0	6.4
Wider competence of the President of Ukraine regarding transfer of judges between courts	12.1	66.4	21.4

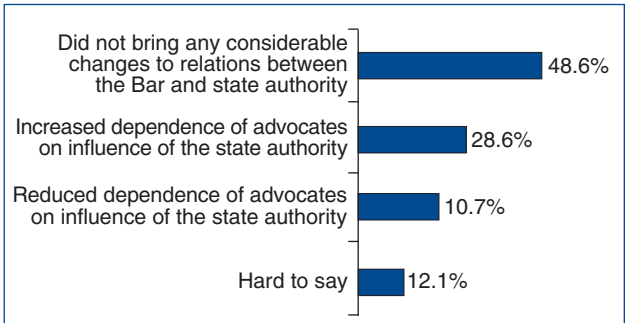
As a result of the judicial reform, the status of the Supreme Court has undergone significant changes, in particular, reduction in the number of judges, less procedural powers, introduction of an institution to allow cases for its consideration. What were the main reasons to change its status?*
% of experts polled



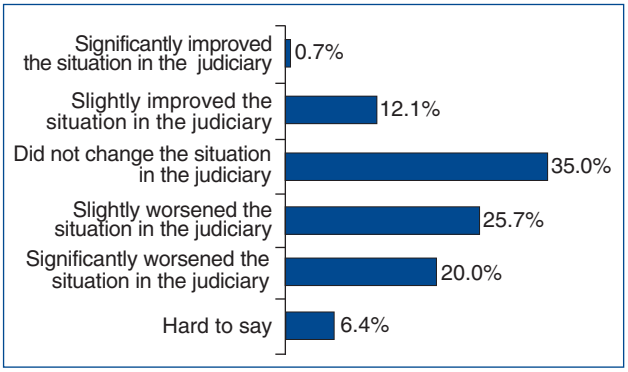
* Experts were asked to give not more than three answers.

What consequences did changes to the status of the Supreme Court have in the field of justice?
% of experts polled

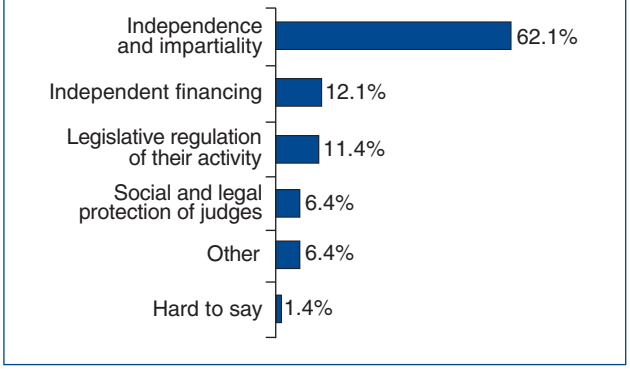
**The Laws adopted over the last three years, including the new Law "On the Bar and Advocacy" ..., **
% of experts polled



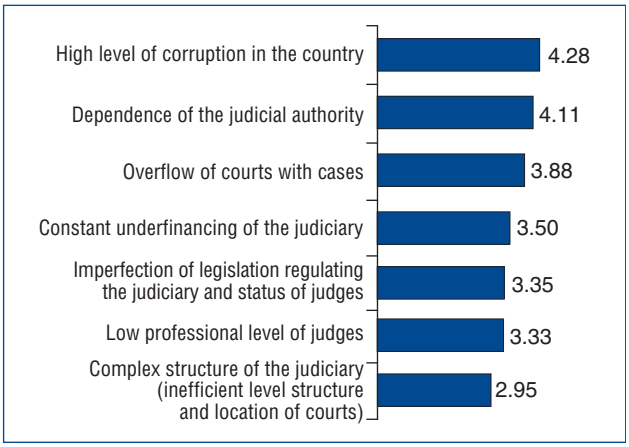
Assessing the judicial reform results in Ukraine in general, do you think its implementation has ...,
% of experts polled



What do courts of Ukraine lack most of all?
% of experts polled



To what extent does each of the following factors prevent courts from performing their constitutional function of executing justice?*
average rate



* On a 5-point scale, where 1 means that the factor does not prevent at all, and 5 – strongly prevents.

Is the Judiciary independent in Ukraine? If not, what branches of power and institutions does it depend on?*
% of experts polled

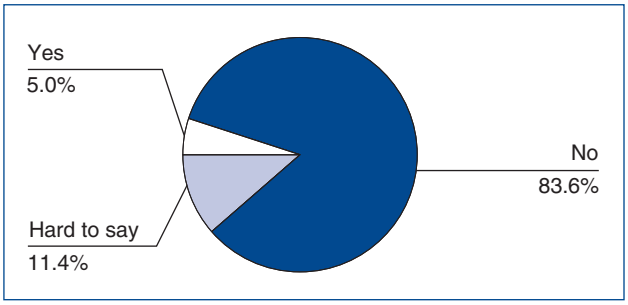
* Experts were asked to give all acceptable answers.

To what extent are the following factors are now present in Ukraine?*
average rate

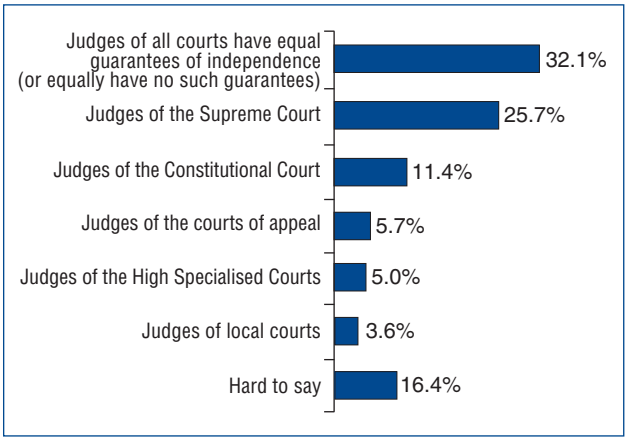
Immunity of judges	3.48
High social status of judges (fee, social security, state protection of a judge and his/her family members, etc.)	3.30
Constitutional and legislative provision of independence of judicial authority	3.10
Responsibility for contempt of court, encroachment on a judge, non-execution of court judgments	2.80
Proper state funding of courts	2.78
High professional level of judges and their moral position	2.70
Efficient work of judges' self-government bodies (the Congress of Judges of Ukraine, conferences, councils, meetings of judges)	2.61
Moral, political and legal traditions based on recognising a special role of the court and status of judges	2.39
Political will of state leaders to ensure independence of the judicial branch	2.24
Responsibility for exerting illegal influence on courts	2.15

* On a 5-point scale, where 1 means that this factor is not present at all, and 5 means that this factor is present in full.

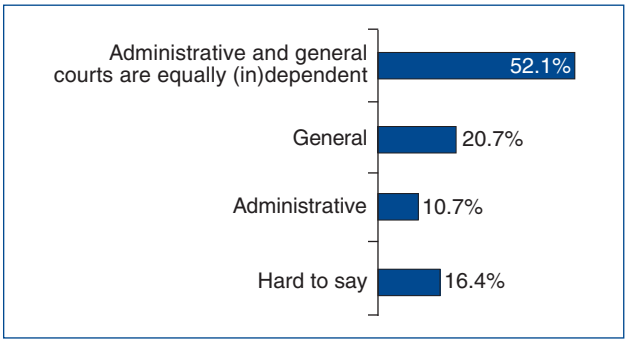
Is the High Council of Justice an independent and politically impartial body?
% of experts polled



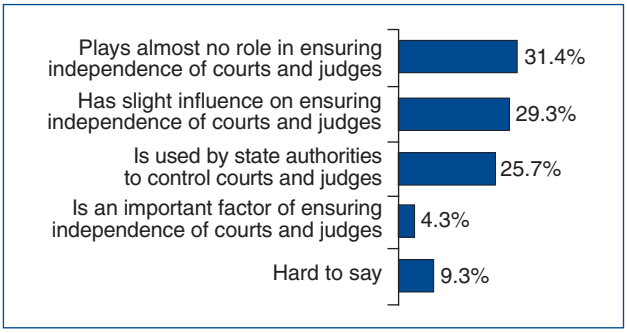
Judges of which court are the most independent in execution of justice?
% of experts polled



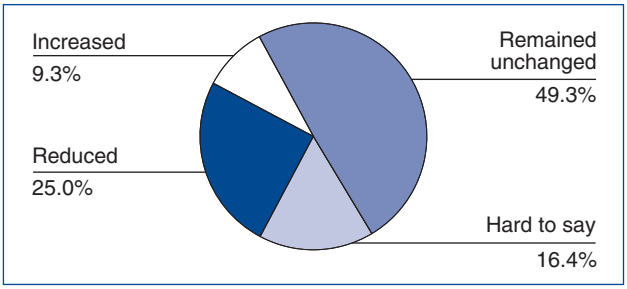
Which courts are more independent and impartial in the process of executing justice – administrative or general ones?
% of experts polled



Judges' self-government today ...,
% of experts polled



After the reform, the role of judges' self-government in solving issues of internal court activity and ensuring independence of judges has ...,
% of experts polled

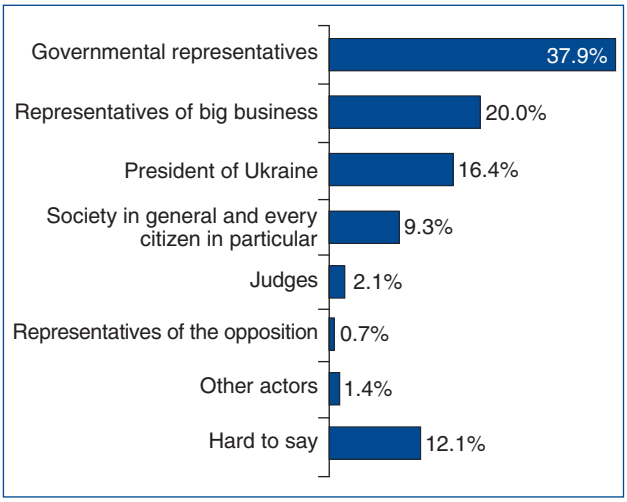


What is the strongest guarantee of independence of the judiciary and judges?*
% of experts polled

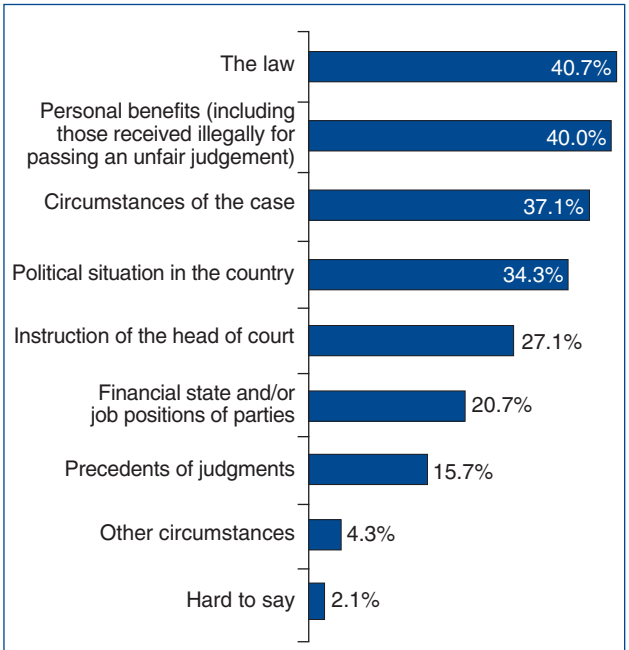
Professionalism, integrity, and impartiality of judges in execution of justice	53.6
A special procedure for appointing judges based on objectivity and professional integrity principles	38.6
Political will of the state authorities to ensure true independence of court	34.3
Responsibility for exerting illegal influence on judges, intrusion to court activity and showing disrespect to it	21.4
Proper state funding of the judiciary	20.7
Moral, political and legal traditions that define a distinctive social role of the court and status of judges	19.3
High level of social provision of judges (renumeration, etc.)	16.4
Immunity of judges (special procedure for bringing them to criminal and administrative responsibility)	14.3
Absence of internal subordination of judges (in particular, to the head of court)	13.6
Automated (objective) allocation of cases between judges	10.7
Efficiency of judges' self-government bodies	4.3
Other	3.6
Hard to say	2.1

* Experts were asked to give not more than three answers.

Whose interests does the current Judiciary defend in the first place?
% of experts polled

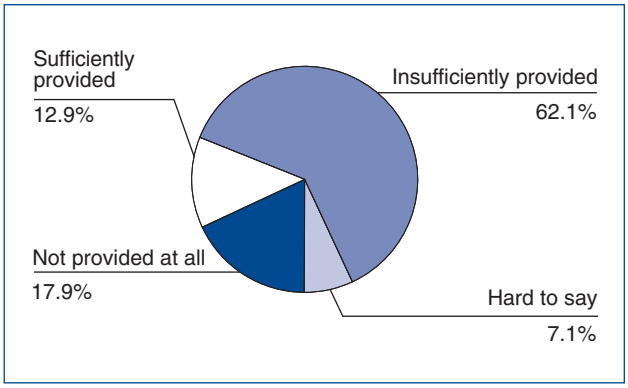


What are the aspects that usually guide judges when passing a judgements?*
% of experts polled

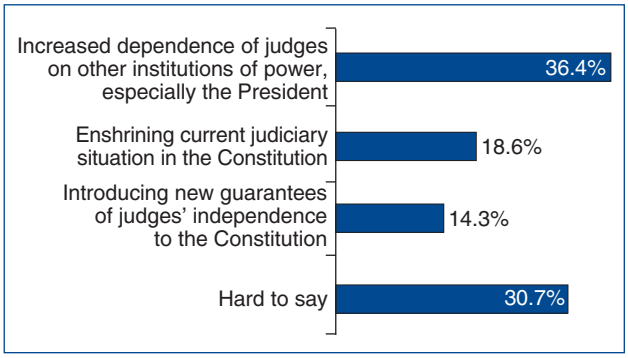


* Experts were asked to give not more than three answers.

Are principles of fair competition and equal opportunities provided for parties involved in court proceedings?
% of experts polled



The Presidential Administration developed a draft Law "On Amendments to the Constitution Strengthening the Independence of Judges". What is the main goal of this Bill?
% of experts polled



What do think will be the consequences of the proposed amedments (stipulated in this Bill) to change the composition of the High Council of Justice (in particular, that its majority should be represented by judges) and to extend its authority (in particular, to granting the right to appoint judges to administrative positions, settling the issue of cancellation of judicial immunity)?*
average rate

It will interfere with selection of more qualified judges	*+0.62*	It will help select more qualified judges
It will reduce impartiality in considering the cases of responsibility of judges	*+0.57*	It will strengthen impartiality in considering the cases of responsibility of judges
It will reduce guarantees of independence of courts and judges	*+0.30*	It will support guarantees of independence of courts and judges
It will increase dependence of judges on the High Council of Justice	*–1.75*	It will decrease dependence of judges on the High Council of Justice

* On an 11-point scale from -5 to +5, where -5 stands for maximum exposure of consequences described by the statement on the left, +5 stands for maximum exposure of results described by the statement on the right and 0 stands for absence of consequences and results in this regard.

What do think will be the consequences of the proposed amendments (stipulated in this Bill) to deprive the Parliament of its powers (the right to appoint all judges to their positions, dismiss and transfer judges between courts) and to grant them to the President?*
average rate

It will reduce the guarantees of independence of judges	*–1.88*	It will strengthen the guarantees of independence of judges
It will increase political bias of appointing judges and their political dependence	*–2.03*	It will depoliticise the process of appointing judges and reduce their political dependence
It will support influence of the President on judicial authority	*–3.03*	It will reduce influence of the President on judicial authority

* On an 11-point scale from -5 to +5, where -5 stands for maximal exposure of consequences described by the statement on the left, +5 stands for maximal exposure of results described by the statement on the right and 0 stands for absence of consequences and results in this regard.

What do think will be the consequences of the proposed amendments to cancel the "probationary period" (the first appointment) for judges?*
average rate

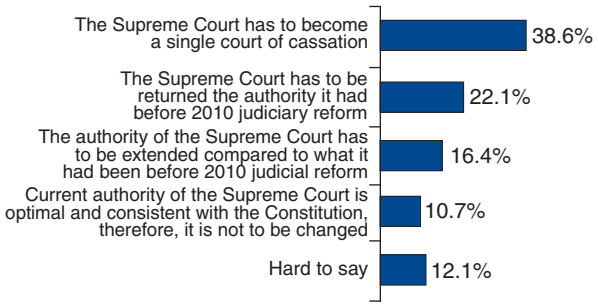
It will reduce the guarantees of independence of judges	*–0.36*	It will ensure the guarantees of independence of judges
It will stimulate the corrupt conduct by judges	*–1.09*	It will become an additional anti-corruption element in the judicial sphere
It will lower the qualification level of judges	*–1.21*	It will raise the qualification level of judges

* On an 11-point scale from -5 to +5, where -5 stands for maximum exposure of consequences described by the statement on the left, +5 stands for maximum exposure of results described by the statement on the right and 0 stands for absence of consequences and results in this regard.

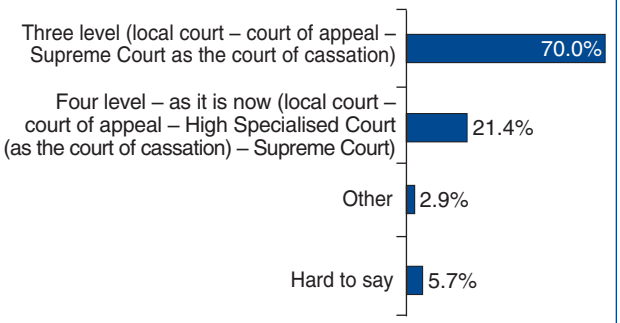
What would be the right decision concerning the "probationary period" of a judge (the first appointment for five years)?
% of experts polled

The procedure for appointing judges for the first time shall remain unchanged	47.1
The procedure is to be kept, but the "probationary period" shall be cut from five to three (or two) years	28.6
The procedure for appointing judges to their positions for the first time is to be cancelled; judges shall be appointed (elected) for life	15.0
Hard to say	9.3

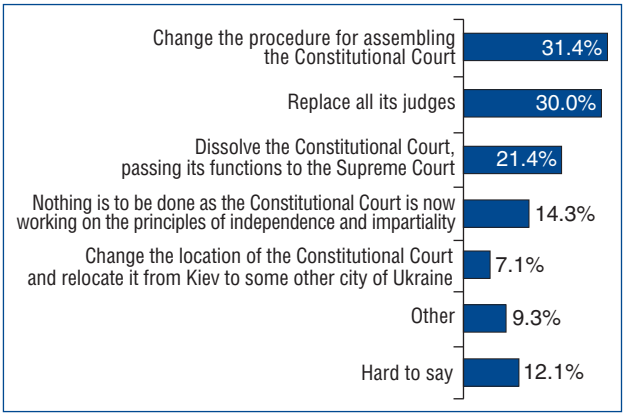
Is it necessary to change the procedural status (powers) of the Supreme Court of Ukraine?
% of experts polled



Which system of judiciary is optimal for Ukraine?
% of experts polled

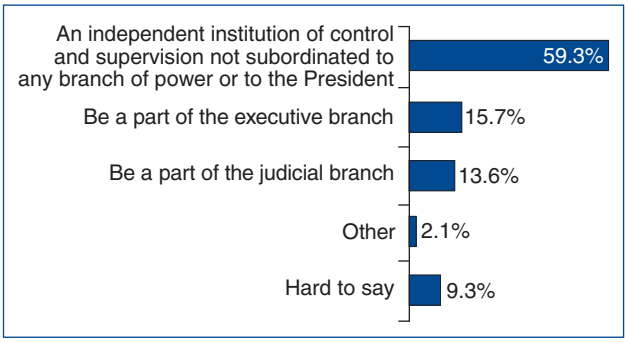


What should be done to ensure operation of the Constitutional Court of Ukraine based on the principles of independence and impartiality?*
% of experts polled

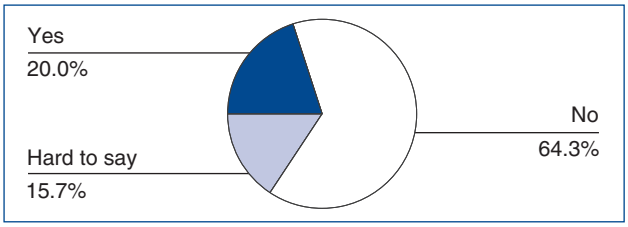


* Experts were asked to give all acceptable answers.

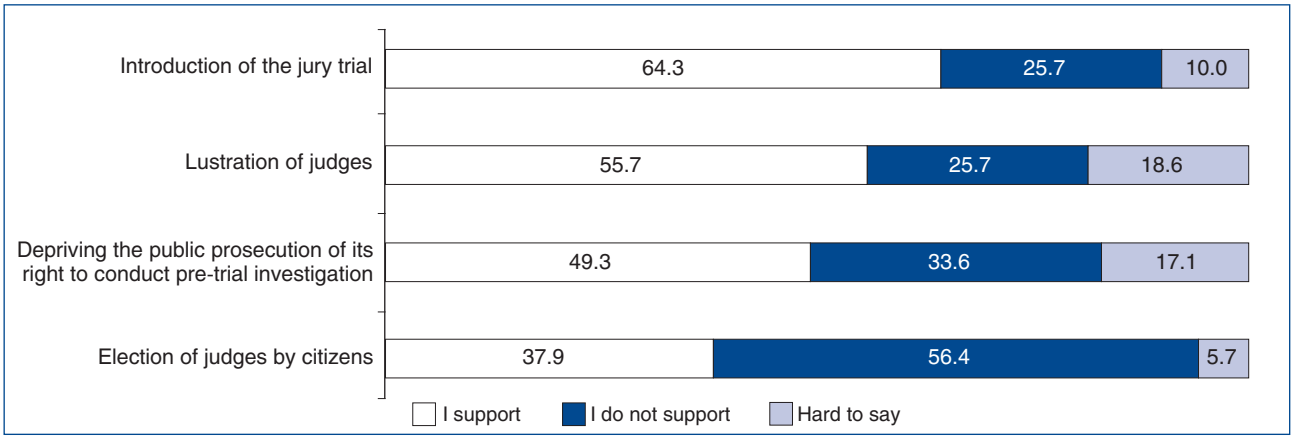
What place and role should public prosecution offices have in the system of state governance? Prosecution should be …
% of experts polled



Is it reasonable to have two state bodies (the High Council of Justice and the High Qualification Commission of Judges of Ukraine) responsible for formation of the corps of judges (selection of judges, responsibility of judges, etc.)?
% of experts polled



What is your attitude to each of the following proposals?
% of experts polled



COURTS AND JUDICIAL REFORM IN UKRAINE: PUBLIC OPINION

Sociological service of the Razumkov Centre has been monitoring public support for the governmental institutions (courts among others) since 2001. Implementation of the first project stage included researching citizens' opinions and evaluating their awareness of courts' activity, the judicial reform, etc. as well as their own experience of applying to courts and/or participating in court proceedings.

The second stage involved monitoring of public confidence in court and support of its activity. The citizens were asked for their opinion on the results of the judicial reform as well as their attitudes to certain high profile events related to the law enforcement system in general.

Provided below is the data of national sociological surveys summarised in Tables and Diagrams.[1] Its analysis leads to the following conclusions and observations.

1. For the past 10 years, the level of social support for the activity of Ukrainian courts has been gradually yet persistently decreasing. While in 2001-2004, about 10-11% of population supported the courts' activity, in 2011-2012, the percentage fell down to 6%. Accordingly, the amount of those disapproving the activity of courts grew from 40% to 60%, respectively.

The only exception was a short period after the 2004 Presidential election. In February 2005, 21% of citizens completely supported the activity of courts, 32% supported some certain measures and only 29% were completely against it. Nevertheless, in October 2005 the level of confidence fell to 6% and the level of disapproval reached 39%.

Later on, the level of full support remained low and increased slightly only after the 2010 Presidential elections (reaching 9% in April 2010). **However, starting from 2011 and up till now – despite the judicial reform – it has remained critically low.** In July 2013, **only 4% of Ukrainians claimed to completely support the activity of courts**, while 65% opposed it completely (Diagram "*Do you support the activity of courts in Ukraine?*").

2. Public confidence in national courts remains critically low. As of July 2013, only about 18% of population more or less trusted the Ukrainian courts and only **2% supported them unconditionally**. 74% did not feel that courts in Ukraine were worth their trust, whilst 46% of them were not ready to rely on them at all. Index of trust in courts was -56% bringing them to the lowest position among 10 state institutions named in the survey, along with the police (Table *"Do you trust the following state institutions ...?"*).[2]

The growth of confidence in courts, in February 2005, may be attributed to a few factors. *First*, such a high appraisal (for Ukraine) of the court's activity might be seriously boosted by the role the court had played in settling the sharp social and political crisis that arose during the Presidential election in 2004. This refers to the Supreme Court ruling of 3 December 2004, that invalidated the results of the second round of voting at the 2004 presidential elections and gave grounds for a repeated voting at those elections (the so-called third round).

Second, such a level of support for the court activity may be attributed to the general high support enjoyed at that time by the new ruling team led by President Viktor Yushchenko and Prime Minister Yuliya Tymoshenko.

Third, at that time, the Ukrainian judicial system was not so dependent, politicised and compromised as it became later. This gave citizens grounds to hope that under the new government, courts would be more independent and impartial.

3. The cited figures correlate with social image of judicial authority, courts and judges. And this image tends to get worse, while the negative evaluations of the judicial system are likely to linger on. As of July 2013, **only 16% of respondents** (it was 22% in August 2012) **were positive that Ukraine has a working constitutional principle of separation of powers into legislative, executive and judicial, and 11%** (23% in August 2012) believed that **judicial authority was an independent branch.**

Meantime, **51% of respondents believe that judicial authority depends on the President** (42% in August 2012), 14% think that it is influenced by legislative branch (as much as in August 2012) and 18% – by the executive branch (14% in August 2012).

As we can see from the data provided, **in almost a year the social opinion on the judiciary and its independence has deteriorated significantly. Ukrainians showed**

[1] Results of surveys carried out by the sociological service of the Razumkov Centre between October 2001 and October 2013. Surveys covered all regions of Ukraine and more than 2 000 respondents, which is a representative selection for the population of Ukraine over 18 years old by main socio-demographic characteristics. Sampling error is 2.3%. Surveys of August and December 2012 were carried out co-jointly with I. Kucheriv Democratic Initiatives Foundation.

The most recent survey was carried out by the Razumkov Centre's sociological service between 30 September and 8 October 2013. 2010 respondents participated. Sampling error is 2.3%.

[2] Index of trust is a difference between the sum of "Mostly trust" (support) and "Trust" and "Mostly distrust" and "Distrust" answers.

Compared to August and November, the full trust to courts remained almost the same, and the number of those who didn't trust courts grew up by 10%. Previous data in details are available at: "Judicial reform in Ukraine: current results and near-term prospects". Informational and analytical materials of the Razumkov Centre, April 2013, p.125 , *http://www.razumkov.org.ua*.

a rapidly growing belief that current judicial authority depends on the President (Diagram *"Does the Ukrainian state provide for ...?"*, Table *"Are these institutions and branches of power ...?"*).

Starting from December 2012 critical evaluation of independence of courts and judges has not changed, since only 7% of citizens consider courts and judges to be independent in Ukraine, and 80% believe otherwise (Diagram *"Are there independent courts and impartial judges in Ukraine?"*).

Public opinion on corrupt practices and political bias of national courts has also remained unchanged: **only 8% of respondents did not agree with the accusation of corruption, political partiality and bias**; meantime the percentage of those who agreed grew from 76% to 81% (Diagram *"National courts are often accused of ...?"*).

It is also characteristic that respondents had difficulties naming the main institution of national law enforcement system (this question was not answered by a relative majority (28%) in December 2012 and 20% in July 2012). Meantime, according to the results of both surveys, **leading position belongs to the Public Prosecution,** as it was named by a quarter of recipients, and 17% opted for the court (9% in December 2012) (Diagram *"Which body dominates Ukraine's law enforcement ...?"*).

4. Special attention should be paid to evaluations of the level of corruption in domestic judicial system. In October 2013, spread of corruption in the judiciary was noted by 83% of citizens, 47% were positive that corruption spans every component of the system and 36% believed that "corruption was quite common". Only 2% believed there was "almost no" corruption.

In terms of corruption indices, the judiciary was the first among 17 areas of the survey. (Table *"How widespread is corruption in ...?"*).

This situation is observed for the first time in the whole period of monitoring social opinion on Ukrainian corruption by the Razumkov Centre (since 2000).

5. Summarised negative attitude to Ukrainian courts brings up an issue of the sources people use, as well as their own experience of participation in trials. The majority (55%) of respondents said they found out about courts' activity from media, one third relied on media and experience of their families (23%) and their own (10%). (Diagram *"What sources do you use to get information ...?"*).

10% told about their own participation in proceedings in recent five years. 16% said their family members or close friends had this kind of experience (Diagrams *"Over the last five years, have you participated in legal proceedings ...?"* and *"Over the last five years, have members of your family or close friends participated in ...?*). **In general, 21% of citizens of Ukraine have some kind of experience in court proceedings, either their own or through close people they trust.**

Among respondents that claimed their own participation in trials: one third participated as claimants, 28% – as witnesses, 20% – as defendants and 11% were victims (Table "*In the legal proceeding, you participated as…"*). **The majority (54%)** of those participating as claimants, defendants, offenders, victims, witnesses or experts **took part in civil proceedings**; 17% were actors in criminal cases; 11% participated in administrative proceedings; and **only 7% took part in hearings of claims against state agencies, local authorities or their representatives** (Diagram *"What kind of proceedings did you participate in?"*).

6. Assessments of legitimacy and impartiality of court judgments are also noteworthy. 60% of those who participated as claimants, defendants, offenders or victims claimed the judgment to be fair and legitimate. On the other hand, perception of legitimacy significantly relies upon who benefited from the decision. Thus, judgments are considered legitimate and fair by 91% of those who won the case, and only 15% of those who lost it (Table *"Was (were) the court judgment(s) in your favour ...?"*, Table *"Was (were) the court judgment(s) ...?"*).

Therefore, we can assume that evaluation of legitimacy and impartiality of court decisions by the parties concerned can be somewhat subjective. On the other hand, it is obvious that the court does not provide enough justification and explanation of its judgments to the parties and does not aim to prove legitimacy and fairness of the decision.

This is probably why feedbacks of respondents' friends and family members, who participated in trials, about court decisions are mainly negative: about a half (49%) told that based on stories of their relatives and friends who participated in hearings, court decisions were mostly unlawful and unfair, and only 20% told that their families and friends described decisions as "mostly fair and legitimate" (Diagram *"Based on their feedback, were the judgments of trials they participated in ...?"*).

7. Only 15% of citizens think that judges are governed by law when adopting a decision and 12% believe that they consider the case itself. On the contrary, most of them (61%) are positive that judges are guided by something other than law or circumstances of the case, such as personal benefits, including those received illegally for adopting an unfair decision (33%), financial state and/or job positions of parties (14%), instruction of the head of the court (7%), political situation in the country (5%) and other circumstances (2%).

Notably enough, the shares of answers to this question among all respondents and those who participated in trials are not much different in terms of statistics (Diagram *"What are judges mostly governed by ...?"*).

Similarly, answers to **who is more likely to win the case in Ukrainian court** do not differ as well. An overwhelming majority of respondents and trial participants was sure that better **chances of winning the case belong to**:

- **citizens with high level of income over those with low income** (79% of all respondents and 82% of those having participated in court proceedings);
- **employer over an employee** (74% and 75%, respectively);
- **government representative over an ordinary citizen** (78% and 83%, respectively).

Only in cases of disputes between a state agency and an owner of a large enterprise, as well as between a citizen of Ukraine and a foreigner, the opinions either split (34% of all respondents believe that government agency has more chances to win, 33% think that chances are even) or stood for equal chances of a Ukrainian and a foreign resident (relative majority of 37%) (Table *"Who has more chances to win the case ...?"*).

The bottom line is that the majority (59%) of respondents believe that a citizen of Ukraine is more likely to win a case in the European Court of Human Rights. Only 4% prefer domestic courts. Meantime 71% of those who voted for the European Court explain that it provides higher level of independence and impartiality of judges (Diagram *"In which court – Ukrainian or European Court for Human Rights....?"*, Table *"How can it be explained?"*).

8. Factors influencing the image of national courts include citizens' attitude to judgments in publicised cases. Thus, a relative majority (40%) believes that initiating a criminal cases and court trials against Yulia Tymoshenko were caused by the authorities' intentions to get rid of a political opponent. The same relative majority (42%) thinks that criminal proceedings against former high-level officials are used to defeat political opponents (Diagrams *"Is the initiation of criminal proceedings and trials against Yulia Tymoshenko ...?"*, *"Some representatives of the opposition declare that ...?"*).

Citizens' assessments of judgements made during the 2012 Parliamentary election are not favourable for courts as well.

Only 9% of respondents said that these processes demonstrated autonomy, independence, and competence of domestic courts. Meantime, the **majority (53%) believe that they proved otherwise, namely:**

- the current authorities' ability to secure court judgements required to win the election (21%);
- dependence of judicial authority on the President (16%);
- political bias of courts and judges (16%) (Diagram *"What was demonstrated by trials in election related cases ...?"*).

As for wholesale prohibition by courts of peaceful assembly during the election (accompanied with long-term calculation of votes), the relative majority (43%) of those surveyed in December believed that court judgments were based on the intention to suppress the opposing vote. It should be pointed out that following the election campaign, the mass opinion has slightly changed for the worse: in July 2013, 47% told the same (Diagram *"Recently, the courts of Ukraine ...?"*).

9. An extensive proof of a critically low level of trust in law enforcement authorities and – indirectly – in courts was provided by events that took place in June-July 2013 in a village called Vradiivka (Mykolaiv region). Responding to a severe offence against a local woman committed with participation of a police officer, and delays in initiating the proceeding, local community resorted to aggressive actions and stormed a local police department. It could have actually led to mass punishment of police representatives.

The events caused active public reaction. By the mid of July only 15% of respondents have not heard about it, while the vast majority (73%) confirmed their awareness of what had happened (Diagram *"Do you know anything about the protest actions ...?"*).

It is revealing (and quite alarming) that **two thirds (65%) of all respondents and 77% of those who heard about Vradiivka events justify the assault on police department.** 8% and 9%, respectively, stood against it. Meantime, **52% said that they would take part in mass actions against police tyranny** (20% – "under any circumstances", 32% – "under certain circumstances"). At the same time, only 11% (1% and 10% respectively) were ready to help protect the police (Diagrams *"Was the assault ...?"*and *"Would you participate in mass actions like this?"*).

Another alarming sign for law enforcement and judicial system is an increasing appreciation of mob law recorded at the time of Vradiivka events. While in May 2012, 46% of respondents thought of it as quite acceptable, in July 2013, this number increased to 58%, 17% of them believed that "given our situation, mob law is the only way to punish offenders", almost 42% think that "mob law is inacceptable in general, but can be justified in some cases". The number of those who considered it completely unacceptable fell down from 48% in May 2012 to 35% in July 2013 (Diagram *"We can now hear calls to ...?"*).

Of course, this data first of all proves high level of social pressure at the time of extraordinary events. However, this public attitude shall not be ignored, as it also proves that the society does not believe that current government can ensure proper level of justice in the country.

10. Although it has been over three years since the start of 2010 judicial reform and, now, it is going through the constitutional stage, the citizens do not have enough information about it. In November 2012, 54% of respondents reported they "have not heard" about it. In October 2013, when answering about its results, 43% chose answers that included "*I do not know anything about the reform...*", 25% said it was *"difficult for them to tell anything about the reform and its results*"

(Diagram *"Do you know (have you heard) anything about the judicial reform ...?"* and Table *"In 2010, there was a judicial reform ..."*).

Meantime, **based on their own beliefs and opinions of the current state of court and judiciary, Ukrainian citizens think that in order to improve the situation it is appropriate to:**

- cancel immunity for judges (87%);
- replace all judges (72%);
- increase age threshold required to hold a position of judge to 30 years old (relative majority – 48%);
- introduce the election of judges by citizens: 68% of respondents think that it should be done to combat corruption in courts; 40% (relative majority) opted for this procedure for appointing judges as the one to improve their independence (Diagrams *"Do you support the following propositions ...?"* and *"In order for judges to be independent ..."*).

11. Performance evaluation of the 2013 judicial reform as of October 2013 is rather pessimistic. 22% of those who are aware of the reform believe that it did not achieve its goal and the judiciary situation in Ukraine has neither got worse (13%) nor remained unchanged (9%). 8% believe that "genuine goal of the reform was not to improve judiciary, but to set control over courts and make them adopt 'right' decisions. This is the goal that has been achieved". Only **2% of respondents were positive that the reform has "fulfilled its declared purpose and judiciary situation in Ukraine has improved"**.

39% of respondents "knowing nothing about the reform" stated that the judiciary situation has got worse (21%) or remained unchanged (18%). Only 4% believe that things have improved (Table *"In 2010, there was a judiciary reform ..."*).

Therefore, only 6% of citizens, regardless of their awareness of the reform, mentioned that judiciary situation has got better in recent years, while 27% did not feel the change and 35% (relative majority) believe it has worsened.

12. As it was said before, amendments to the Constitution of Ukraine are being currently developed, including those related to the judiciary. One of the proposed amendments is to deprive the Parliament of its right to appoint judges for an unlimited term and to grant it to the President. Survey results proved that it will not have enough support in the society, as the majority (57%) of citizens are sure that it will lead to increased dependence of courts on the President and his influence on the Judiciary. 27% were not sure about their attitude to the abovementioned changes and only 20% can tell that positive changes will take place, such as improved judicial protection of citizens' rights and freedoms (12%), better quality of the judiciary (8%), increased independence of judges (4%) (Table *"President Victor Yanukovych has proposed to make amendments to the Constitution ..."*).

CONCLUSIONS

Although it has been over three years since the 2010 judicial reform, its results are still invisible for the population of Ukraine. Moreover, public opinion tends to point out deterioration of the situation with the judiciary.

Legitimacy of the judiciary is seen by the society as critically low and social support for Ukrainian courts keeps declining. Currently, only 2% of citizens trust the courts completely and almost half of the society (47%) puts no credit in courts. This evaluation of judiciary has adverse effects on trust in social system and the state in general.

Among the most urgent problems of the Ukrainian judiciary the citizens named dependence of court on other branches of power and institutions, as well as its corruptness. Judiciary system is considered the most corrupted among different social spheres: 47% are sure that judicial system is "spanned with corruption" and only 2% think that there is "almost no" corruption at all.

Dependency and corrupt activity of courts leads to biased court decisions. Only a quarter of those polled believe that judges are governed by law or by case circumstances when passing judgments, while the majority are sure about selfish or situational motivation of judges. They believe that it leads to unequal chances of citizens to win trials depending on their social and financial status. Judgments in celebrated political cases, particularly against opposing politicians, are also evaluated mostly negative.

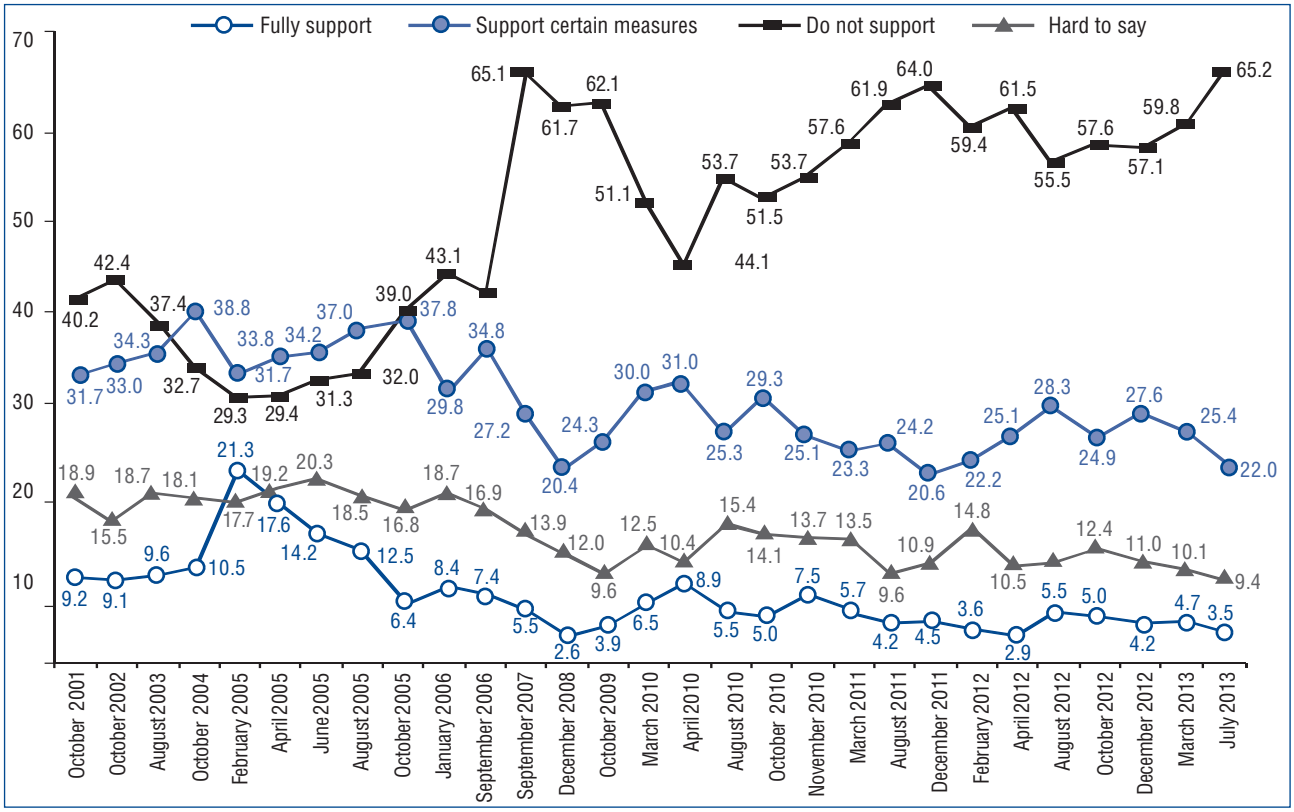
The result of social disappointment in the judiciary and fair justice is that extra-legal methods to realize inevitable crime punishment principle are appreciated more and more (mob punishment is now accepted by the majority (56%) of citizens).

Results of the sociologic survey prove that negative evaluation of the judiciary emerged not only because its activity was covered by media, but also through personal experience of citizens or their family members participating in trials, as one out of five Ukrainians has this kind of experience. Meantime, some opinions and evaluations of all respondents and those who actually participated in proceedings are not different. It brings to a conclusion that although it is often claimed that media shapes negative image of courts, this statement should be doubted.

It is not only the media that provides negative information on national justice. The activity of courts also contributes to this unattractive image leading to reduction of trust and support of the society.

1. PUBLIC CONFIDENCE IN COURT AND SUPPORT FOR ITS ACTIVITY

Do you support the activity of courts in Ukraine?
% of all respondents



Do you trust the following state institutions?
% of all respondents

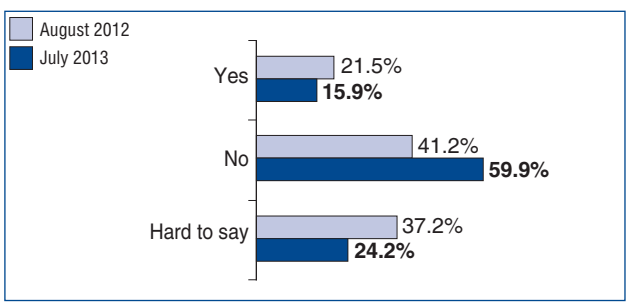
	Trust	Mostly trust	Mostly distrust	Distrust	Index of trust*	Hard to say
The Armed Forces of Ukraine	7.9	33.2	23.1	20.2	*- 2.2*	15.6
Local authorites	5.0	36.4	25.5	23.9	*- 8.0*	9.2
The Security Service of Ukraine	4.8	26.4	25.6	28.7	*- 23.1*	14.6
The President of Ukraine Victor Yanukovych	6.9	22.5	22.4	43.3	*- 36.3*	4.9
The Constitutional Court of Ukraine	**3.3**	**19.3**	**24.9**	**37.1**	*- 39.4*	**15.4**
The Government of Ukraine	2.9	23.2	27.9	40.9	*- 42.7*	5.1
The Public Prosecution Office	2.7	20.3	25.7	40.1	*- 42.8*	11.1
The Verkhovna Rada of Ukraine	2.1	17.6	34.6	39.7	*- 54.6*	6.0
Police	2.0	16.7	28.3	46.4	*- 56.0*	6.6
Courts	**1.7**	**16.1**	**28.3**	**45.6**	*- 56.1*	**8.2**

* The difference between the sum of "Trust" and "Mostly trust" answers and the sum of "Mostly distrust" and "Distrust" answers.

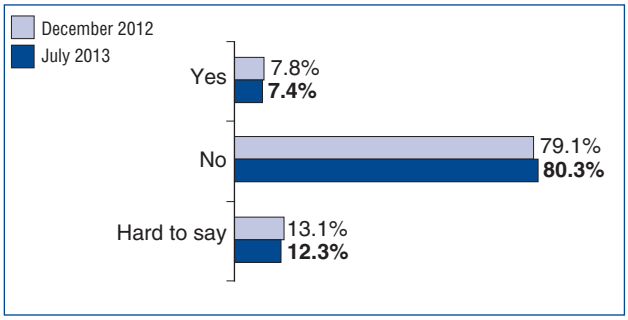
July 2013

2. GENERAL IDEA OF THE JUDICIAL AUTHORITY, COURTS AND JUDGES

Does the Ukrainian state provide for the constitutional principle of separation of power into legislative, executive and judicial?
% of all respondents



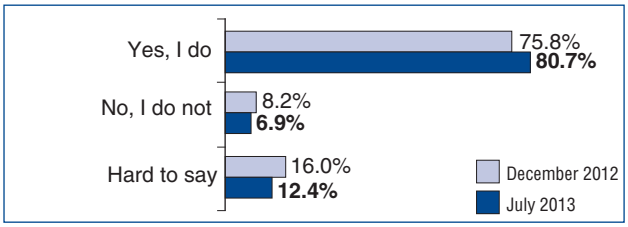
Are there independent courts and impartial judges in Ukraine?
% of all respondents



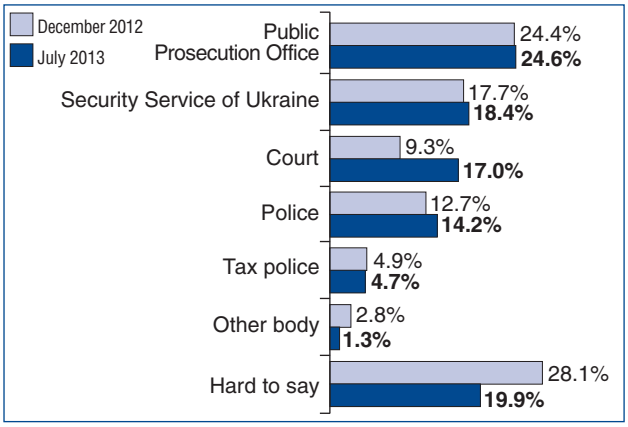
Are these institutions and branches of power independent in Ukraine?
% of all respondents

	President		Verkhovna Rada		Judiciary		Executive authority (The Cabinet of Ministers, ministries, local state administrations)	
	August 2012	July 2013	August 2012	July 2013	August 2012	July 2013	August 2012	July 2013
Independent branch of power	64.6	**61.5**	15.2	**17.8**	22.8	**11.4**	9.4	**8.3**
Depend on the President	-	-	51.9	**46.5**	42.0	**51.2**	63.2	**65.7**
Depend on the executive authority	4.3	**5.0**	14.5	**12.8**	13.7	**17.7**	-	-
Depend on the Verkhovna Rada	8.7	**9.5**	-	-	13.2	**13.5**	21.8	**17.0**
Depend on the judiciary	3.9	**3.2**	9.1	**6.5**	-	-	13.1	**11.6**
Hard to say	22.0	**23.9**	23.1	**24.9**	24.3	**24.6**	20.5	**18.4**

National courts are often accused of corruption, political bias and partiality. Do you agree with these characteristics of Ukrainian courts?
% of all respondents



Which body dominates in the law enforcement system of Ukraine?
% of all respondents



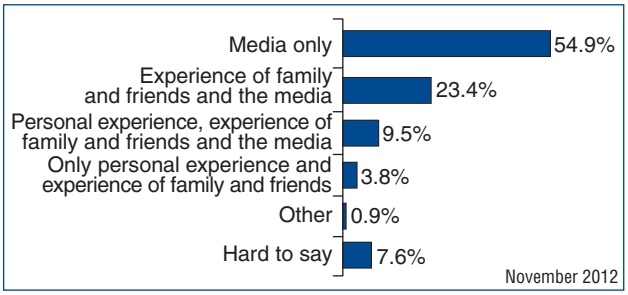
How widespread is corruption in the following spheres?
% of all respondents

	Spanned with corruption	Corruption is quite common	Some corruption practices happen	Almost no corruption	Hard to say
Judicial system	47.3	36.1	7.7	1.8	7.1
Law enforcement bodies	45.4	38.6	8.5	1.5	6.0
State authority in general	44.9	37.4	8.4	1.1	8.2
Political sphere in general	43.4	36.2	9.5	1.3	9.7
Public prosecution bodies	41.5	35.2	8.7	1.8	12.7
Tax authorities	41.3	35.3	9.0	1.5	12.8
Health care	40.6	44.0	10.9	1.3	3.2
Political parties	38.3	37.7	11.6	1.4	11.0
State Customs Service	37.3	34.6	11.2	1.9	14.9
Local self-administration in general	32.7	35.1	17.8	3.4	11.0
Higher education	31.5	45.9	13.4	2.0	7.1
The Security Service of Ukraine	30.4	27.6	14.3	3.2	24.4
Economy, activity of enterprises	30.2	37.1	15.2	1.8	15.7
Secondary education	20.9	31.8	29.3	10.1	7.9
The Armed Forces	19.6	27.2	22.8	8.1	22.4
Trade unions	18.7	26.5	18.4	9.7	26.8
Public organisations	15.8	23.3	18.1	14.4	28.3

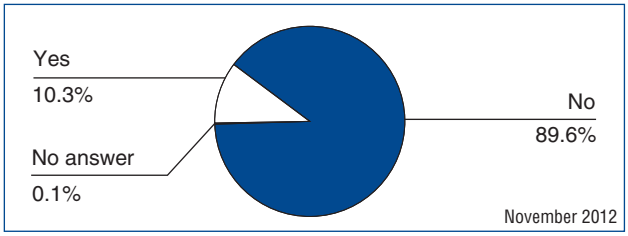
October 2013

3. SOURCES OF INFORMATION ON THE ACTIVITY OF COURTS AND PERSONAL EXPERIENCE OF PARTICIPATION IN TRIALS

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



Over the last five years, have you participated in legal proceedings in any capacity (as a witness, claimant, defendant, accused, victim, expert, judge, defence attorney, court employee, etc.)**?**
% of all respondents

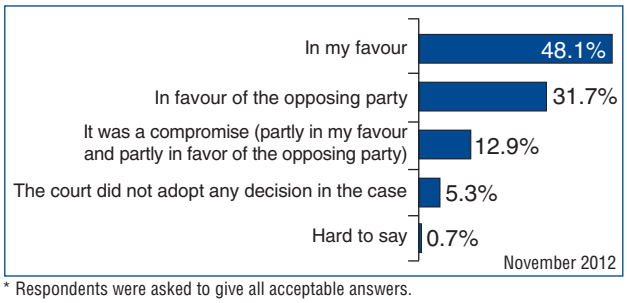


In legal proceedings, you participated as ...?*
% of respondents who participated in legal proceedings

Claimant	32.4
Witness	28.2
Defendant	20.3
Victim	11.4
Accused (offender)	4.9
Court employee	2.4
Judge	1.9
Expert	1.1
Defence attorney	0.7
Legal prosecutor	0.0
Else	2.9

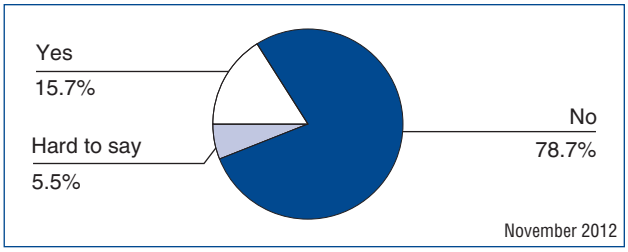
* Respondents were asked to give all acceptable answers. November 2012

Was (were) the court judgment(s) in your favour or in favour of the opposing party?*
% of the respondents who participated as claimants, defendants, offenders or victims

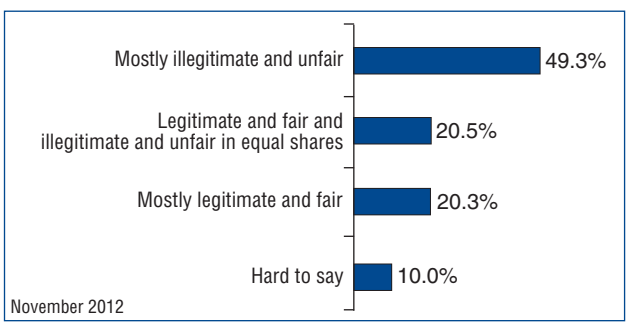


* Respondents were asked to give all acceptable answers.

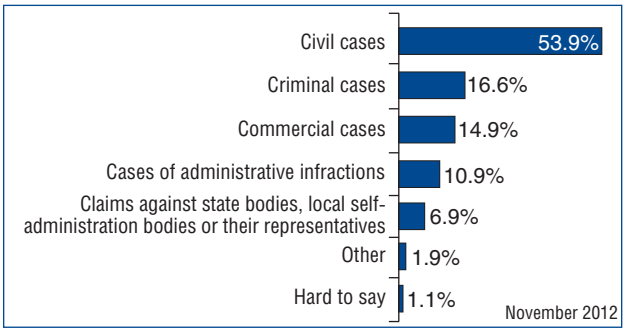
Over the last five years, have members of your family or close friends participated in legal proceedings in any capacity
(as a witness, claimant, defendant, victim, offender, expert, judge, court employee, etc.)?
% of all respondents



Based on their feedback, was (were) the court judgment(s) in trial(s) they participated in legitimate and fair or illegitimate and unfair?
% of respondents whose friends or family members participated in legal proceedings



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



* Respondents were asked to give all acceptable answers.

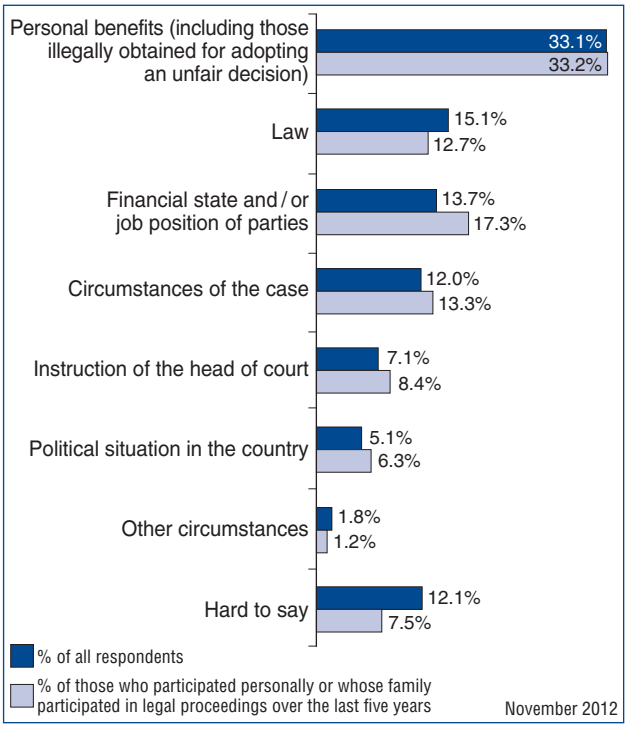
Was (were) the court judgment(s) in trial(s) you participated in legitimate and fair?*
% of respondents who participated in trials as claimants, defendants, offenders or victims

	% of respondents that participated in trials as claimants, defendants, offenders or victims	% of respondents who won the case	% of respondents who lost the case
Yes, it was legitimate and fair	59.8	91.0	15.4
No, it was not legitimate and fair	32.5	7.6	75.5
I do not know what the decision was	3.5	1.4	7.0
Hard to say	3.9	0.0	2.0

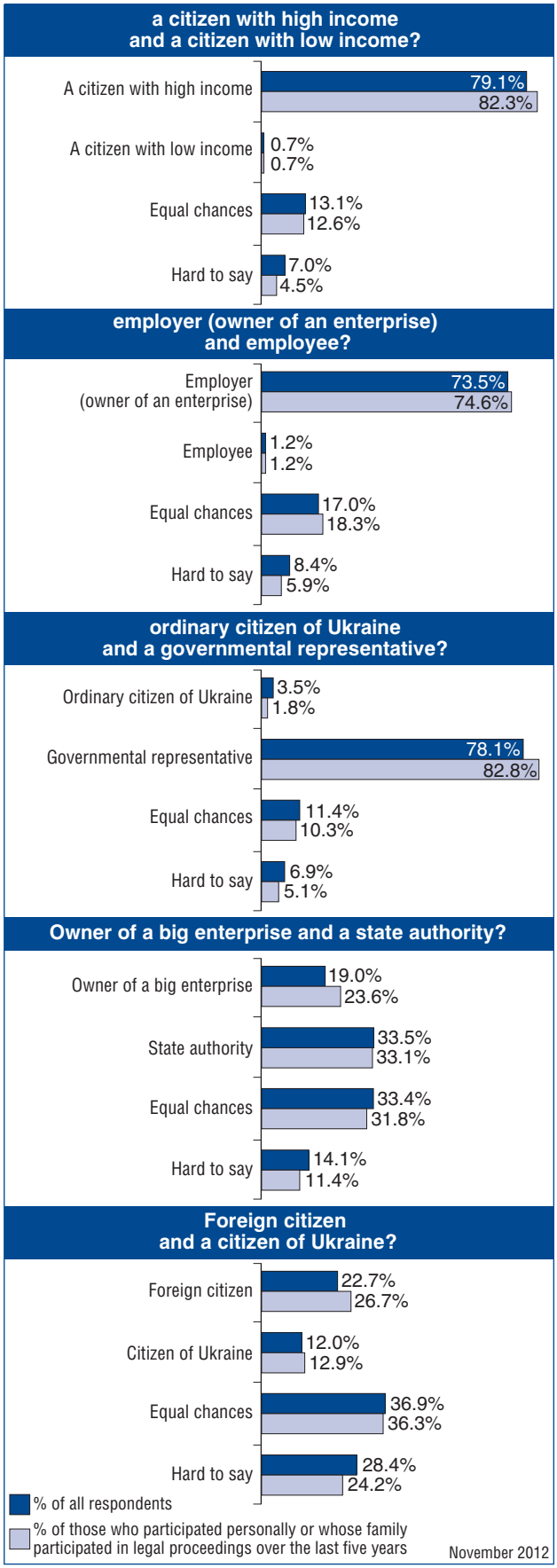
* Respondents were asked to give all acceptable answers. November 2012

4. COURTS' ACTIVITY, INDEPENDENCE AND IMPARTIALITY OF JUDGES

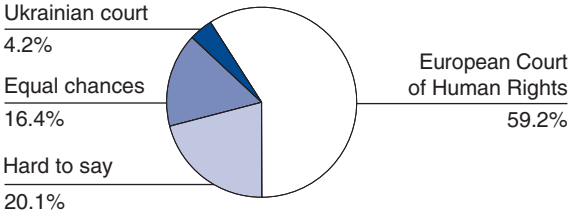
What are judges mostly governed by when passing court judgments?
% of all respondents



Who has more chances to win the case in Ukrainian courts if the parties are ...
% of all respondents



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



December 2012

How can it be explained?*
% of all respondents

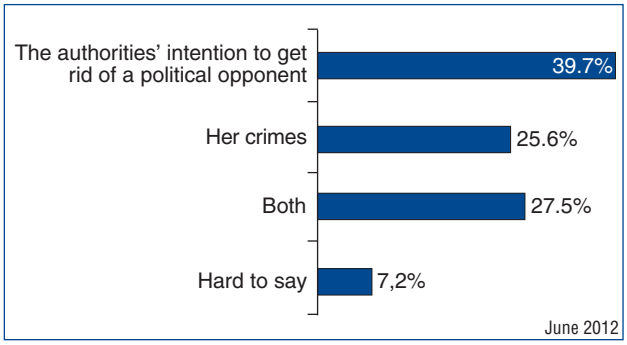
	% of respondents who think that getting a fair judgment is more possible in one of the courts**	% of respondents who think that getting a fair judgment is more possible in Ukrainian courts	% of respondents who think that getting a fair judgment is more possible in the European Court for Human Rights
Higher level of qualification of judges	28.8	27.1	28.9
Higher level of independence and impartiality of judges	66.7	7.9	70.9
Better knowledge of laws by judges	18.0	23.4	17.6
More extensive investigation of circumstances of the case by judges	24.3	40.7	23.2
Other	3.6	5.7	3.4
Hard to say	2.1	12.4	1.4

* Respondents were asked to give all acceptable answers.
** Respondents that believed that a fair judgment is more likely to be obtained either in Ukrainian court or in the European Court for Human Rights.

December 2012

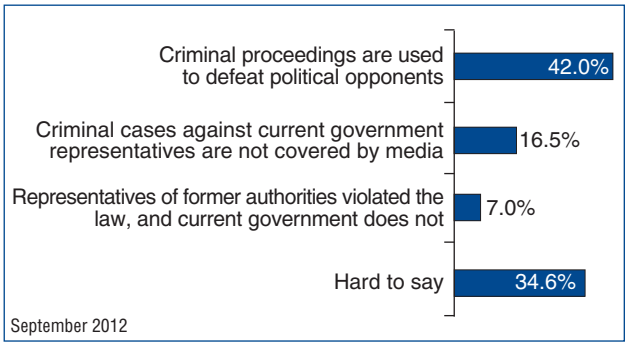
5. EVALUATION OF CERTAIN HIGH PROFILE CASES AND JUDGMENTS

Is the initiation of criminal proceedings and trials against Yulia Tymoshenko actually caused by her crimes or the authorities' intentions to get rid of a political opponent?
% of all respondents

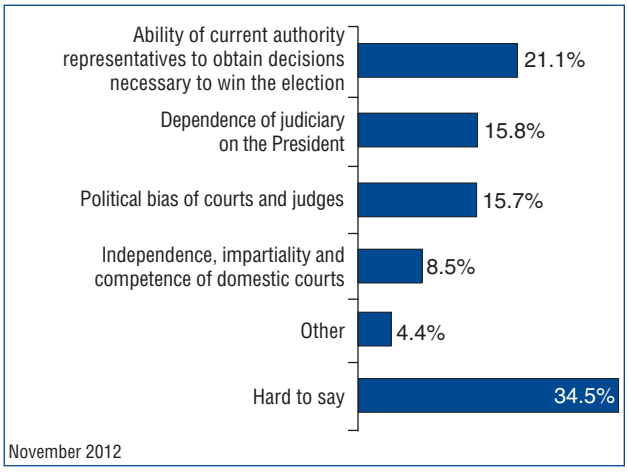


June 2012

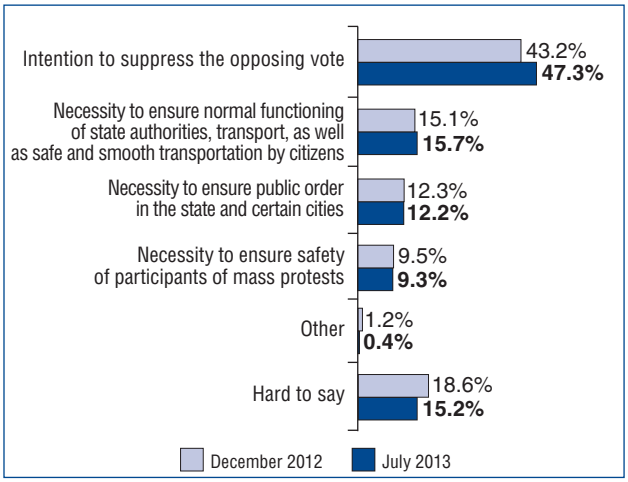
Some representatives of the opposition declare that law enforcement bodies have recently initiated legal proceedings against many former high level officials. Meantime, there are no criminal proceedings initiated against representatives of the current authorities (even if they are, the society knows nothing about them). What is the main reason for this situation?
% of all respondents



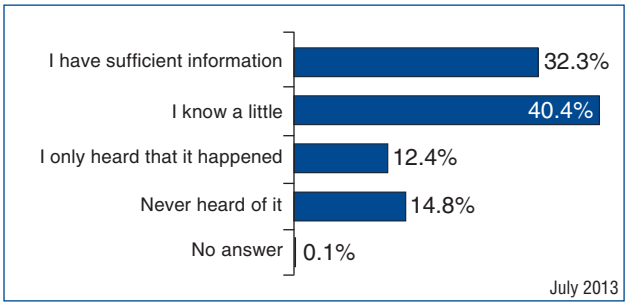
What did the election dispute trials during the 2012 Parliamentary election demonstrate?
% of all respondents



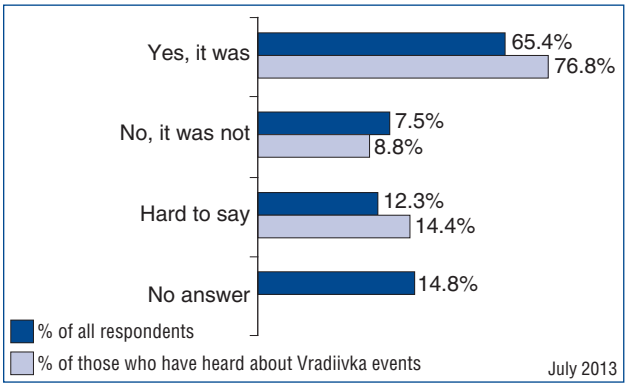
Recently, the courts of Ukraine have adopted a large number of decisions to prohibit peaceful assembly (demonstrations, meetings, etc.) in the central part of Kyiv and other cities, including areas close to governmental buildings. What was the main reason for such decisions?
% of all respondents



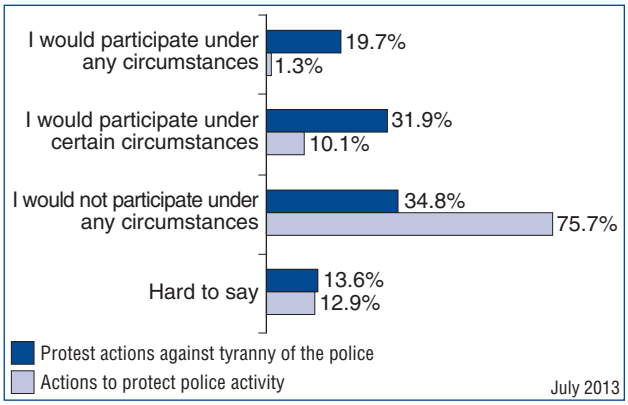
Do you know anything about the protest actions in Vradiivka, Mykolaiv region, which happened recently?
% of all respondents



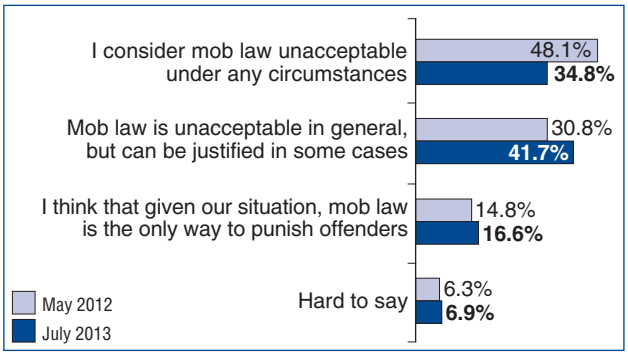
Was the assault on the local police department by Vradiivka citizens justified?
% of all respondents



Would you participate in mass protest like this?
% of all respondents

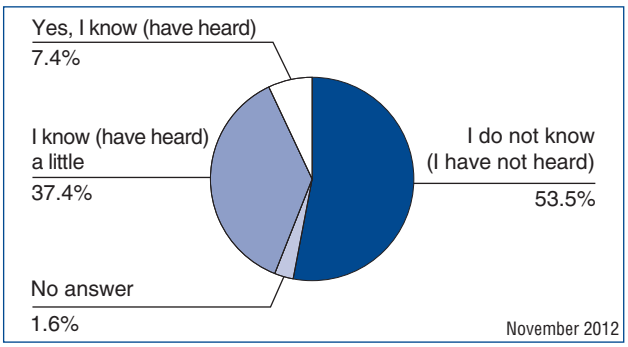


We can now hear calls to take justice into our own hands and punish offenders. What do you think about it?
% of all respondents

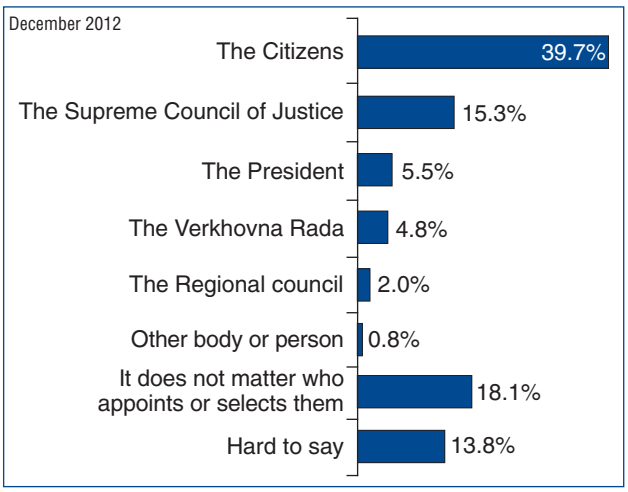


6. AWARENESS OF THE JUDICIAL REFORM. EVALUATION OF ITS RESULTS AND OPINIONS ON CERTAIN ISSUES OF COURT ACTIVITY

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



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

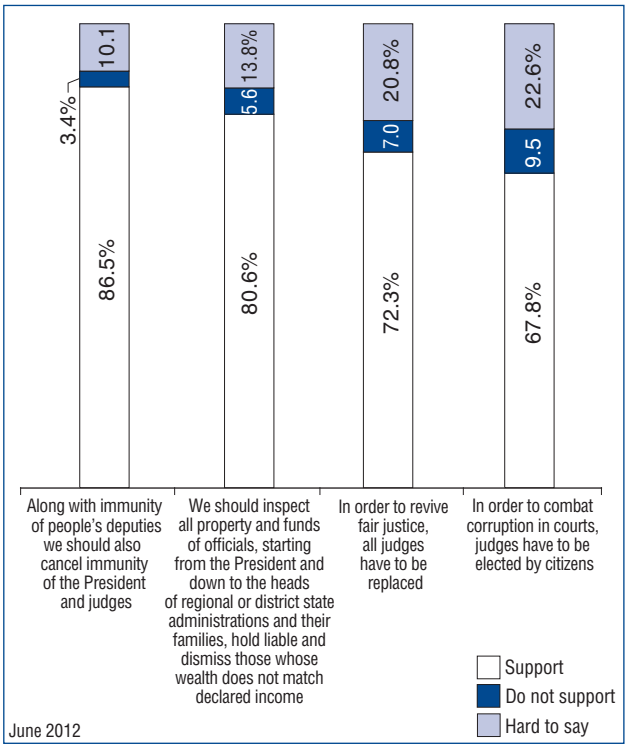


In 2010 there was a judicial reform allegedly conducted to improve justice in Ukraine. How can you comment on this reform and its results?
% of all respondents

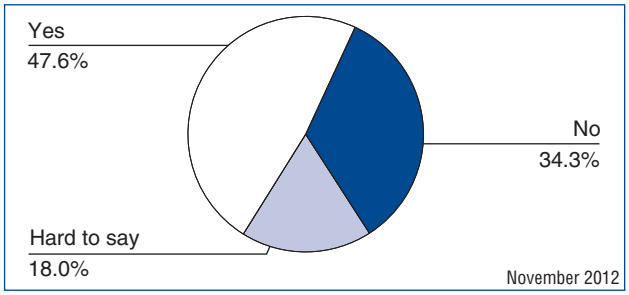
I do not know anything about the reform, but judiciary situation in Ukraine has improved over the last few years	3.9
I do not know anything about the reform, but judiciary situation in Ukraine has worsened over the last few years	21.3
I do not know anything about the reform, but judiciary situation in Ukraine has not changed over the last few years	18.0
I know about the reform and consider it to have fulfilled its declared purpose; judiciary situation in Ukraine has improved over the last few years	2.0
I know about the reform and consider it to have failed in fulfilling its declared purpose; judiciary situation in Ukraine has worsened over the last few years	13.2
I know about the reform and consider it to have failed in fulfilling its declared purpose; judiciary situation in Ukraine has not changed over the last few years	8.7
I know about the reform and believe that its genuine goal was not to improve justice, but to set control over courts and make them adopt "right" decisions. This is the goal that was achieved.	7.9
It is difficult for me to tell anything about the reform and its results	24.9

October 2013

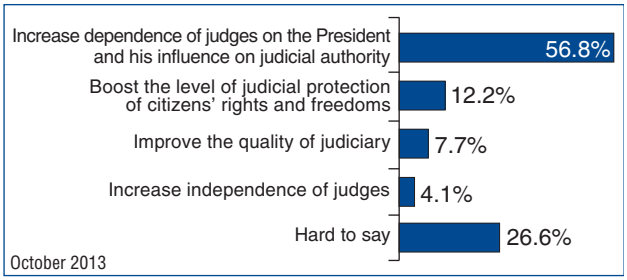
Do you support the following proposals?
% of all respondents



Is it necessary to increase the age limit for holding a position of judge from 25 to 30 years old?
% of all respondents



President Victor Yanukovych has proposed to make amendments to the Constitution of Ukraine, according to which the Parliament will no longer elect all judges for life and the right to appoint them for an unlimited term will belong to the President. What consequences may these changes have? It will ...*
% of all respondents



* Respondents were asked to give all acceptable answers.

COURT IN UKRAINE: OPINIONS OF CITIZENS WHO DEALT WITH THE NATIONAL JUDICIAL SYSTEM

As part of the project, the Razumkov Centre's Sociological Service on 25-28 November 2012 arranged four focus groups (two in Kyiv, two in the city of Alchevsk, Luhansk region). They gathered mainly persons who have had personal experience of dealing with courts or participated in court proceedings, in particular, as claimants, defendants or witnesses (noteworthy, the focus group participants took part in civil, administrative, business, criminal cases and cases of administrative offences).

About 86% of those who took part in discussions reported of their own personal experience of participating in court proceedings. They also said that their attitudes to the national judicial system and assessments of courts' activity primarily rest on their experience, the experience of their friends and relatives.

Also, all focus group participants reported that their stand was influenced by mass media, in particular, television.

At that, they expressed the opinion that mass media covered the judicial system activity mainly in connection with publicised political trials (cases of Yuliya Tymoshenko, Yuriy Lutsenko), paying little attention to court trials in which "ordinary" Ukrainians defended their rights.[1] As a result, the majority of the panellists called information about the judicial system obtained from mass media unnecessary for them, of no practical use. They unanimously said that the national media did not promote legal literacy in society.[2]

Assessments and opinions of focus group participants and the conclusions that may be made from the discussions are summarised below.

I. ATTITUDE TO THE JUDICIAL SYSTEM AND FACTORS SHAPING IT

The overwhelming majority of the panellists reported their negative attitude to the national judicial system, for which, they feel: distrust (it is seen as unfair, corrupt and inefficient); disappointment (impossibility to have one's problems resolved in court); fear and helplessness (non-protection against ungrounded and unlawful prosecution, fear of appearing in court as a defendant).

Moderator: Please, complete the statement: "In connection with what is going on in Ukraine's judicial system now, I feel ..."[3]

Alchevsk-1

- *Unprotected*
- *Corruption*
- *Estrangement of the judicial system from the people*
- *In the judicial system, someone will hardly help you without money and connections*
- *Uselessness of that system*
- *It is too far from the people*
- *It has no future*
- *You will do nothing without lawyers*
- *It exists, nothing good can be added*
- *No, just as in any organisation, there are kind people there who are humane*
- *But they are few*
- *They are few. And when they come to that system, they just feel it hard to survive*
- *They are good only in movies*

Alchevsk-2

- *A deep financial pit*
- *Sad*
- *It defends interests of certain groups of the population*
- *Lost*
- *Fear*
- *Society changes somehow, but compared to political changes in society, there are no changes in the judicial system*

[1] Many panellists saw mass media as a biased tool shaping the public opinion that intentionally stirs interest in the judicial system, its deficiencies and problems. Actually all focus group participants shared the opinion that the national media promoted a negative image of the judicial and law-enforcement systems: most often, they give information about certain facts one-sidedly, without their analysis; report on violations in the judicial system, not monitoring further developments.

[2] In particular, it was noted that there are no educational TV programmes clearly explaining, for instance, how justice is exercised, what rights the parties have, what to do in specific situations related with defence of their rights in court. The focus group participants rather critically assessed past or present programmes (like the Court Trials programme), as inconsistent with real situations of consideration of cases in courts and inefficient for growth of legal literacy in society.

[3] In this case, all answers of focus group participants to the moderator's questions are given. Noteworthy, the panellists later repeated and elaborated their points of the factors of negative attitude to the national judicial system, as its deficiencies and problems. Extracts from records of focus group discussions are selectively quoted below in the source language – to illustrate the opinions summed up in the text.

Kyiv-1

• *Changes?*

• *Injustice*

• *There are omissions*

• *Recently, there've been changes, indeed. We have not realised however in what direction*

• *Recently, there's been much desperation. Previously, it was easier. Applying to different court instances, one might secure revision of an unsatisfactory judgment. Now, everything is much harder*

• *I would like to add: total corruption*

• *There is room for improvement*

• *This is not a court*

• *Full absence of a possibility for ordinary citizens to apply for assistance to the state*

• *I live in a country not ruled by law*

Kyiv-2

• *Suspense, discomfort*

• *Total corruption*

• *Instability*

• *Fear. God save you from getting there*

• *Mistrust in the current authorities and their reforms*

• *A new toy for the authorities*

• *Puppets*

Moderator: With what would you explain your negative attitude to the judicial system?

Alchevsk-1

• *He who has the money is always right*

• *We tested the system ourselves*

• *It's a road-roller that smashes everything*

• *Judges are dependent. Some persons, some phone calls influence court judgements*

• *Judges are influenced by various organisations*

Alchevsk-2

• *You never know how much money to prepare*

• *Probably, money is the main thing, because people are not deeply versed in law terms … You just understand that you need to go to a lawyer, a barrister, a notary – dependent on whom you deal with. And you perfectly realise that a sack of money must be prepared. Lawyer's advice alone makes you think where to take money for that advice*

• *One more point … "ignorance of the law is no excuse". Our ordinary people, common herd do not know the laws. And even if they apply for assistance, they may get disservice, pay money for it, and never get that money back. There is no protection. And where do you go then, with that grievance and sorrow?*

Kyiv-1

• *The reason is that our state is very young, compared to European states … [The problem of growth] is a part of the problem.*

• *I guess, total corruption is the main reason. And no jury*

• *I agree entirely*

• *Lack of legal education*

• *Judges are well brought-up and literate. But everything is decided dependent on the judge's interest*

• *Money decide everything*

• *The thing is not that they are well brought-up and literate. The thing is that they are venal*

Kyiv-2

• *The judicial system has no stability, first of all. The legislation does not provide for the rule of law. The Ministry of Justice is absent as such, because all laws are either undermined at the grassroots or do not reach the implementation stage*

• *Laws are not followed: there is a selected caste that are a law unto themselves, and for interiors, the law is applied selectively*

• *There is an untouchable group*

II. DEFICIENCIES OF THE JUDICIAL SYSTEM, LEGAL PROCEEDINGS AND JUSTICE

Focus group participants noted a number of deficiencies in the judicial system, making it hardly accessible and inefficient for protection of citizens' rights. Namely:

Systemic deficiencies

(1). State-centric nature of proceedings, its orientation to protect state interests and interests of state components (institutions of authority, state establishments, officials, etc.) over rights and concerns of citizens. According to the panellists, courts in their activity are keener to take into account the interests of the state (the authorities) than those of ordinary citizens (society). From own experience and own observations, focus group participants made a conclusion that in the relations between an individual and the state, an ordinary citizen more often appears in court as a defendant before the authorities, subject to coercive measures on the part of the state (legal responsibility). And since the state (the authorities) is now closely related with big business, business interests prevail in courts over the interests, rights and freedoms of ordinary Ukrainian citizens. At that, lawyers sometimes refuse to support individual claims to the authorities or representatives of administrative or business structures.

• *All judges side with the state… (Alchevsk-1)*

• *A claim to the state cannot be won at any stage, no matter if you are right or not (Kyiv-1)*

• *I always thought that it was not the case until I personally met it. And only having met it personally, I realised that I live in a state not ruled by law and cannot win a trial, despite I am right, despite the law is on my side. Yes, I won the first court, but I cannot win against the state. Even if I am right, you understand? (Kyiv-1)*

• *Court is always with the strong. Strong state, strong companies … (Kyiv-1)*

• *In such case, a lawyer may help you write an application but he will refuse to represent you in court (Alchevsk-1)*

• *In our city, lawyers do not risk to be at law with our social security service (Alchevsk-2)*

This results, *first of all*, in inequality of citizens before the law and court, caused by the social status of the parties to a trial, connections in the judicial and law-enforcement systems, as well as financial capabilities.

• *Inequality of people before the system (Alchevsk-2)*

• *For ordinary Ukrainians, laws actually do not work (Kyiv-2)*

• *The judgment is predetermined, no matter what steps you make. A man is not needed there [in a court session], in principle. He comes and goes. Nobody listens to him. Nobody needs him. Whatever documents he brings … (Kyiv-1)*

***Secondly*, in disrespect to a person, his dignity, rights and freedoms.** That disdain is seen everywhere – from the court room furniture, conduct of the judge and court clerks, to the neglect of an individual as a party to a trial.

• … Everything happens behind closed doors. There is no dialogue between the court and a man. It's only a monologue of a judge (Kyiv-1)

• The proceedings themselves are arranged like this: they speak indistinctly, jerkily, to be through asap, you cannot say a word, even in presence of your lawyer. Very incorrectly. In a swinish manner, I would say (Kyiv-2)

• … Here, a person is treated like a criminal even before they see him (Alchevsk-1)

• I would like to say about the treatment of ordinary people not by judges and lawyers but by small officials – clerks, court secretaries. When I came to pick up the judgement, they nearly cursed me. I was to bring a paper with the case number. But I never held it in my hands (Alchevsk-2)

(2). Dependence of the judicial system. Focus group participants particularly stressed the dependence of courts on the President, politicians and "money bags" exerting pressure on judges, making them to pass "pre-ordered" judgements.

Moderator: Can you say that court in Ukraine is independent?

• Of course not! (Alchevsk-1)

• On the contrary, it is dependant on everything (Kyiv-2)

• On the President, first of all, because he dictates all the conditions and all decisions taken by the court. Everything is under the President's supervision (Kyiv-2)

Who can influence a judgement?

• The President (Alchevsk1, Kyiv-1)

• The President, first of all (Kyiv-2)

• Politicians, public prosecutor offices (Alchevsk-1)

• The authorities and money bags (Alchevsk-1)

(3). Corruption, non-transparency and corporate character of the judicial and law-enforcement systems. The panellists note strong corruption in courts that makes you "buy" even just judgements, and believe that we in Ukraine have the code of silence of officials of the judicial, law-enforcement and control systems, mutually beneficial exchange of services among their officers, nepotism in the judicial and law-enforcement systems, spread of the "telephone justice". For instance, militia officers can exert pressure on a citizen who applied to court to defend his rights.

• Corruption is the main thing (Alchevsk-1)

• If a judge cannot be bought for big money, he can be bought for very big money (Alchevsk-1)

• Corruption is probably the first and the biggest problem (Alchevsk-2)

• The main thing in which those people are united is corruption (Kyiv-1)

• Corruption is the core of the judicial system (Kyiv-2)

• The code of silence: the judge who tries me during the day in the evening goes to a sauna with the same head of the board of trustees, the same representative with whom we are at law, the same bank manager. How can he defend my rights if they are all friends there? In addition, our glorious militia recommended me to stay put and keep a low profile (Alchevsk-1)

• Corruption involves many, including city and militia officials. And everything moves in a groove with them (Alchevsk-1)

• Oh yes. In the morning you write a complaint [about a judge], and in the evening you are visited by militia, saying: "Why did you offend such a nice person?" (Alchevsk-1)

• It's a lean system: the prosecutor, the lawyer, and the judge (Kyiv-1)

• Professional court officials are few because they are not let in there. Even if you have the experience, you will not be easily let in, you will always need a patron. It's nepotism, the code of silence, where friends and relatives are admitted (Kyiv-2)

• Courts are manual, telephone justice (Kyiv-2)

• The judicial system is largely guided by telephone justice (Kyiv-2)

(4). Arbitrariness of judges in court proceedings and passage of court rulings, caused by imperfection and frequent change of the legislation, impunity of judges and lack of proper control of the judicial system activity.

• The law is absent! It can be turned in either direction (Kyiv-1)

• Knowingly unlawful rulings are being passed … because there's one law for the rich, and another for the poor (Kyiv-2)

They try to observe the protocol, but you know – the smaller a city is, the more deviations from the law there may be (Alchevsk-1)

• … and no one knows that, because laws here change every week (Alchevsk-1)

• I received a judgement, because my apartment was taken, a subpoena and a notice that a notary writ will be made and a decision to sell my apartment will be taken. I received all that two weeks after the trial, in one package

• That is, a man wages a normal life – and suddenly receives a judgement. In fact, this can happen to everyone?

• It does happen

• That is why life is so frightful (Alchevsk-1)

(5). Non-execution of court rulings. The panellists relying on their own experience reported that in many cases, even having got a court judgement in their favour, they failed to secure execution of that judgement by the defendant, first of all – when the defendant was a state body, a bank or an official.

• There is no control of execution of court rulings … And no one assumes responsibility for execution of court rulings (Alchevsk-1)

• … The judgement was in my favour: I agreed to pay [debts for heating] for three years. I went to the municipal heating company, and they said that for a certain amount of cash, they could do something. They don't care about the judgement. Everything was to be agreed with them personally (Alchevsk-1)

• … The court passed a judgement … But when it came to the executive service, I realised that they really don't care … Throughout the year I visited the executive service with that problem – and every time was sent back. Finally, they told me to come in two years … (Alchevsk-2)

These and other drawbacks of Ukraine's judicial system pose the main (most often mentioned by focus group participants) obstacle for application to court for defence of one's rights – the lack of trust in courts and lack of confidence that the court judgement will be fair for an ordinary citizen.

• There is no trust in court and no belief in justice (Alchevsk-2)

• … We are helpless. If we realised that the court really means protection, we would pay attention to many things (Kyiv-2)

• And knew that if you apply to court, it will be fair, you have chances to win (Kyiv-2)

• No justice (Kyiv-2)

• [A man] does not believe in the fairness of a court

• First of all, he does not believe in our state (Kyiv-2)

• Distrust consists of many doubts: distrust in militia, distrust in a consumer organisation, producing in the result general distrust in the judicial system. What's the sense of going there, if I saw so much evil and realise that it's all the same? Not all distrust comes from mass media. Rather, it's personal negative experience (Kyiv-2)

In the end result, **the panellists do not see the national court as an independent tool (actor) to protect rights of citizens**.

More than that, many panellists reported that they were afraid of negative effects for them in case of resolute defence of their rights in court, in particular – revenge of the local authorities and representatives of law-enforcement structures. That is why they prefer extrajudicial (including unlawful) methods of settlement of disputes (a private arrangement with the other party, bribes to concerned officials, etc.).

Only a few respondents reported that they could apply to court on principle, seeking justice. Instead, the absolute majority reported that they would apply to court in the extreme case, for instance, in the event of a threat to life or health, the risk to lose property.

III. DEFICIENCIES INFLUENCING THE ACCESS TO JUSTICE

(1). Deficiencies that influence the fairness of court rulings:

- **high litigation costs**. According to the panellists, the majority of citizens realise that having applied to court, they will sustain unpredictable expenses without guarantees of a positive result of the trial;
- **non-transparency (inaccessibility) of information** about the judiciary **for ordinary citizens**;
- **extremely strong and unreasonable bureaucracy**, "red tape" at consideration of cases.

(2). Deficiencies that influence the promptness and quality of trial:

- **complex procedures** of consideration of cases in court related with collection, preparation and execution of documents necessary for dispute settlement in court;
- **shortage of courts and judges of lower instances**, leading to the great load on judges and a formal approach to consideration of cases, and long litigation terms; all this takes applicants much time and efforts;
- **low professional level** of judges and other judicial system officers, caused by the non-transparent mechanism of appointment of judges and "nepotism" at staffing the corps of judges.

IV. FACTORS HINDERING APPLICATION TO COURT AND COMPLICATING COURT PROCEEDINGS

Discussing problems encountered by citizens applying to court, focus group participants noted that they usually encountered difficulties with execution of documents (statements of claim). Proceeding from their experience, they argued that **an ordinary citizen in most cases has no proper legal literacy and does not have the required information about the judiciary**, namely – the procedure for application and rules of execution of procedural documents, specificities of proceedings in cases of the subject matter of the claim, as well as the rights and duties of the parties.

Nearly a third of respondents tried to make out the effective legislation in their case on their own, applied for assistance to reception rooms of juristic public organisations, institutions in charge of consumer rights, etc. All this proved inefficient, and the majority of respondents came to the conclusion that they lacked legal education to apply to court on their own and defend their interests there. That is why many of them consulted a lawyer as early as at the stage of drawing up a statement of claim. However, reference to lawyer services only partially solved the problem and did not remove the need to independently collect documents, immediately take pat in court trials. Furthermore, it appeared that many lawyers lacked professional knowledge and experience to present the client's interests in court on a proper level (they themselves often could not literally draw up a statement of claim). That is, lawyers in many cases demonstrated lack of professionalism and dishonesty, seeking to earn money "at any cost".

Many respondents spoke of the inconveniencies they encountered in court proper, filing a statement of claim: hours-long queues; congestion, lack of seats in lobbies of court premises; few visiting days; the need to visit many rooms (of different services), etc.

The majority of focus group participants rather poorly assessed the court that considered their case and reported the following problems that arose during its consideration:

- refusal to consider a statement of claim in connection with its incorrect execution;
- high litigation costs (sometimes, actual expenses exceed the claimed amount);
- difficulty of collection of additional documents and their submission within the term set by the court;
- frequent postponement of court sessions and failure to notice (or late notice) of the parties thereof;
- long litigation, intentional protraction of cases by judges creating a situation prompting offer of unlawful reward for sooner and lawful solution of cases;

- difficulties (intentional obstacles) of familiarisation with materials of the case at all stages of the trial;
- impracticability of getting the judgement within terms set by the law, which complicates compilation and filing of appeal;
- low qualification of judges, irresponsibility of the court staff, their supercilious attitude to the parties.

Respondents more rarely mentioned: a biased attitude of the judge; consideration of cases and passage of judgements in absence of one of the parties even without a notice to it; pressure on the part of the judge, prosecutors, officers of militia, the executive service, organised by opposite party.

V. ASSESSMENTS OF THE 2010 JUDICIAL REFORM

The majority of panellists said that they had heard about the reform but did not know exactly its essence. They were anonymous in that **over the past two years, they personally saw no improvements in the judicial system work**, so they assume that the changes made in the judiciary have not produced any effect yet.

Some respondents noted the following ***more or less positive* novelties in the judiciary**:

- **introduction of obligatory computer registration of claims and automated distribution of cases among judges.**

According to respondents, introduction of automated distribution of cases was intended to do away with corruption in courts. **However, they are sure that that step was inefficient, since the computer system is controlled and regulated by the court administration.** So, new distribution of cases is automated in word rather than in deed. The discussion participants cited examples how with formally automated distribution of cases, a case can be practically given to the "right" judge (in particular, court clerks can do that through regulation of the queue of claim registration). That novelty may bring a negative effect, since with automated distribution, a case may appear with a judge who has no proper qualification for its review. The majority of respondents who applied to court did not know if automated distribution was used to assign the judge who considered their case. At that, they expressed confidence that **introduction of automated distribution of cases among judges did not resolve the task of doing away with corruption in courts and could lead to growth of actual legal costs** (in particular, to give bribes for the case to come to the "right" judge);

- **reduction of litigation terms**, intended to speed up consideration of cases *per se*.

The respondents mentioned as **negative novelties of the judiciary**:

- **establishment of tougher rules of appeal against court rulings**, reduction of terms for the appeal from 30 to 10 days;
- **restriction of procedural rights of parties to a trial** and growth of legal costs (in particular, because the defender in a criminal case may only be a professional lawyer).

According to the panellists, all this will restrict citizens' ability to defend their rights in court.

Procedure for appointment (election) of judges

The discussion showed that focus group participants could not definitely describe the principles and criteria of selection of candidates for the position of a judge and outline the present mechanism of appointment (election) of judges. Many of them expressed the opinion that judges are appointed only "thanks to connections and for big money". The situation did not change even after the judicial reform that introduced a new procedure for staffing the corps of judges. Respondents mentioned among the actors deciding those issues the President, Parliament, the High Council of Justice and the Council of Judges of Ukraine, not specifying their powers.

According to the majority of focus group participants, ideally, judges should be elected by the population. At that, they noted that residents of a small populated locality or a city district can assess human and professional qualities of a judge, fairness and lawfulness of his judgements. Respondents admitted that most of city or regional district residents cannot properly assess the personal qualities and professional level of a candidate for the position of a judge, and the work of a concrete judge. So, election of judges by citizens may lead to outsiders (without proper professional training and with poor personal qualities) becoming judges. **The optimal method of election of judges, according to respondents, is a system whereby candidacies for the position of a judge are recommended by known lawyers, and citizens make their choice on the basis of such recommendations and full information about the candidate's person and previous professional activity**.

Meanwhile, respondents disagree with the proposal that judges should right off be appointed for an indefinite term by the President.[4] They consider such a procedure for appointment of judges undemocratic, enabling "purchase" of the judge's office. **That procedure aggravates dependence of the judicial system, expands possibilities for manipulation of judgements and pressure on courts by the President and his Administration, opens up the room for ordered political trials and at the same time reduced Parliament's ability to influence the judicial system.**

Respondents most of all criticised the proposal to appoint judges for an indefinite term right away. In their opinion, indefinite appointment of judges creates ideal conditions for corruption and arbitrariness of judgements and gives judges impunity. Respondents expressed confidence that the term of office of a judge should be substantially reduced (to from 2-3 to 10 years).

[4] The proposal set out in the Bill "On Amendments to the Constitution of Ukraine Strengthening the Independence of Judges" presented in October, 2012, by the Presidential Administration to the Constitutional Assembly. In March 2013, the Constitutional Assembly Chairman Leonid Kravchuk sent the Bill to the Venice Commission for expert examination.

Furthermore, there should be a system of judges' rotation, whereby a judge goes to a new court after some time (for instance, in two years). According to the panellists, this will prevent formation of corrupt ties within the judicial system.

According to the majority of respondents, the optimal age for a judge is 35(40)-60 years. By 35 (40) years, men and women are mature enough as professionals, have sufficient experience and professional employment history. Meanwhile, raising the age ceiling for judges to 70 years is unreasonable, since at that age people have age changes hindering efficient work in the responsible position of a judge.

System of judiciary

Respondents have a dim idea of the present system of courts in Ukraine and the changes that took place in it in course of the judicial reform. They wondered about the court system only in connection with consideration of their cases, as a rule, considered by a district (local) court. A few respondents had experience of dealing with business and administrative courts.

Some respondents believe that narrow specialisation of courts may lead to more efficient and prompt review of cases. Others however expressed the opinion that the present system of courts (of different kinds and specialisation) is cumbersome and simplifies the work of judges but creates serious inconveniences and problems for ordinary citizens. *First*, people find it difficult to find out to what court they are to file a claim or a complaint. This especially refers to appeals against judgements of a district (city) court. *Second*, it limits accessibility of the judiciary – raises legal costs, takes more time (first of all, for residents of small populated localities) to apply to a specific court (in particular, administrative) or appeal against judgements of a district court.

According to focus group participants, in line with its status, the Supreme Court: reviews appeals and makes final judgements in cases; controls judgements of all inferior courts; interprets laws; considers offences committed by council members.

The panellists were unanimous that **deprivation of citizens of the right to apply directly to the Supreme Court is an impairment of the civil right to judicial defence.** The novelty whereby a permit to apply to the Supreme Court is given by a lower court whose judgement is appealed against is unreasonable and illogical from the viewpoint of the procedure for appeal against court rulings. Respondents were unanimous that in the present situation, lower (high specialised) courts will intentionally raise obstacles for submission of complaints about their judgements to the Supreme Court. Such a novelty will add to corruption in the judicial system and undermine chances of ordinary citizens for fair judgement in Ukraine.[5]

VI. EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

Focus group participants expressed the opinion that Ukrainian citizens who failed to get a fair judgement in Ukrainian courts may apply to the European Court of Human Rights or to another international court. They were unanimous that such application is more realistic for known politicians, other public persons and businessmen. **For the absolute majority of ordinary Ukrainian citizens, application to ECHR is less feasible: after all judicial instance in Ukraine, people have neither powers nor money left for that.**

According to respondents, a citizen applying to ECHR faces the following difficulties:

- significant expenses;
- new requirements to the execution of the complaint and other documents and their translation into a foreign language (English);
- long litigation (a few years at the least);
- the need to get services of an international lawyer;
- difficulty of translating the ECHR verdict into a native language;
- big risk of non-execution of a judgement of that court in Ukraine, *since it is of a recommendatory nature.*

In this connection, respondents produced a number of ideas for raising the accessibility of ECHR for "ordinary Ukrainians": permission to draw up documents and carry on correspondence in the mother language; reduction of litigation terms; introduction of efficient measures for execution of its judgements in Ukraine (by the national legal system).

The majority of focus group participants are sure that **ECHR can pass a fair judgement, since it is free of most drawbacks of the national judicial system, and the European law-enforcement system is more democratic.** They substantiate their opinion by their own experience of defence of rights abroad, and by the great number of Ukrainians applying to that court.

VII. GENERAL CONCLUSIONS

Focus group discussions witnessed strong prevalence of the negative attitude to the national judicial system and distrust in courts among their participants. Respondents termed the national judicial system unfair; the judiciary – inaccessible to the majority of citizens; courts – inefficient for the defence of their rights. In their opinion, a citizen in fact has no chances to win a trial against the state in court, even in case of evident violation of his rights and freedoms by state officials. They see extrajudicial means (including unlawful) as more efficient methods of problems solution and defence of citizens' rights.

The survey revealed little interest and poor information of respondents about the progress of the judicial system reform. However, after the discussion of some aspects of the judicial reform and recognition of some good points about it, the focus group participants expressed a common opinion that **the judicial reform of 2010 aggravated rather than mitigated drawbacks of the national judicial system**. Those panellists who in the recent years applied to court saw no improvement in the judicial system operation.

[5] See Table "*Admission of cases by high specialised courts for proceeding to the Supreme Court and results of their review*" published in this journal.

According to many respondents, the main deficiency of the reform is that it failed to provide efficient mechanisms of public control of the judicial branch and public influence on it. **The reformed judicial system**:

- limits citizens' ability to defend their rights in court;
- limits accessibility of the judiciary for citizens;
- turns the law-enforcement system into a repressive machinery.

Respondents see the main problem of the judiciary in Ukraine that needs urgent solution in the venality of judges. At that, they are sure that the rise of judges' salaries is a futile method of fighting corruption in courts.

Respondents are also sure that the present mechanism of control of the court activity does not work because the current authorities are not interested in a change of the situation in the judicial system. So, public initiatives, efforts of human rights organisations to enhance public control of the judicial branch are and will be vain.

The key demands of respondents on the judicial system include: first of all – a possibility to get a fair judgement (even not in their favour but passed pursuant to the law and properly motivated); simplification of judicial procedures and reduction of litigation terms; reduction of legal expenses; guarantee of unconditional execution of judgements within terms set by the law.

VIII. RECOMMENDATIONS

During the discussion, respondents produced a number of recommendations, implementation of which, in their opinion, will promote perfection of the national judiciary, exercise of justice on the principles of law and fairness. They also gave recommendations of improvement of legal literacy of citizens and their information about the court practice.

A) Improving the access to justice and its efficiency for citizens:

- state-guaranteed possibility of free legal advice at state legal institutions;
- drawing a short list of documents necessary for application to court and consideration of a case in court, public access to that list and placement of templates of the key procedural documents on the website of a local court (or on a billboard);
- simplification of the mechanism of the judiciary, first of all, in urgent disputes and with respect to minor offences;
- minimisation of personal communication of the parties with judges and court clerks – introduction of electronic exchange of information between the parties and the court at all stages of the process;
- expansion of the network of local courts and an increase in the number of their judges;
- expansion of possibilities for pre-trial settlement of disputes;
- introduction of non-state judicial bodies – private courts or courts created by local self-government bodies;
- improvement of conditions for citizens staying in court rooms and premises.

B) Guarantee of lawfulness of court rulings and eradication of corruption in courts:

- Enhancement of responsibility of judges, especially for passage of unlawful judgement;
- cancellation of appointment of judges for an indefinite term; introducing shorter terms of service for judges;
- introduction of election of judges by residents of a populated locality (area);
- introduction of a mechanism of revocation of a judge who regularly passes unlawful judgements, and a mechanism of removal of a judge from office in case of his violation of the law;
- permission for claimants to select the judge for their cases and to disqualify judges from trial;
- introduction of a personal ratings of judges drawn up by independent practical lawyers, human rights activists (publication of such ratings in mass media);
- introduction of regular professional certification and medical examination of judges;
- introduction of transparent and clear conditions of competitions for vacant judges positions;
- regular rotation of judges (for instance, every two years);
- introduction of the jury and collective review of all cases;
- enhancement of transparency in the court activity by providing public access to all court rulings, permitting mass media representatives to attend any trial.

C) Legal knowledge and information on judicial practice

According to the panellists, citizens might benefit from information about general practice of consideration of cases typical for an ordinary citizen; the content of court rulings in such cases; valuable initiatives of citizens and human rights organisations concerning the judiciary and justice. ■

THE 2010 JUDICIAL REFORM: DOES IT BRING THE UKRAINIAN JUSTICE ANY CLOSER TO EUROPEAN STANDARDS?

The Expert Discussion organised by the Razumkov Centre in Kyiv on 4 April 2013 was supported by the Embassy of Netherlands in Ukraine and the German Foundation for International Legal Cooperation.

The participants included deputies of the Verkhovna Rada, representatives of the Presidential Administration, the Ministry of Justice, the Constitutional Assembly, the Constitutional, Supreme and High Specialised Courts of Ukraine, the Council of Judges, the Supreme Council of Justice, the High Qualification Commission of Judges, the Association of Judges of Ukraine, law schools and scientific institutions, specialised international funds and projects, NGOs working in the sphere of judicial legislation and authority, justice and human rights protection, and the mass-media.

International representatives and ambassadors were also invited. Mr. Pieter Jan Wolthers, the Ambassador Extraordinary and Plenipotentiary of the Kingdom of Netherlands in Ukraine made a greeting speech and Mr. Hans-Otto Bartels, President of the Regional Court Aurich of Land Lower Saxony (Germany), reported on the provision of independence of judges in Germany.[1]

The agenda included the following:

Does the judicial reform in Ukraine pursue the declared goals?

Has the reform ensured the actual independence of the judiciary and justice for Ukrainians?

What are the prospects of the second (constitutional) stage of the judicial reform?

Opinions and proposals of the participants were taken into account by the Razumkov Centre when preparing the Analytical Report "*Judicial Reform in Ukraine: Current Results, Prospects and Risks of the Constitutional Stage*" and developing proposals for improvement of the judicial activities in Ukraine.

The speeches made during the discussion are provided below.[2]

OUR GREATEST PROBLEM LAYS IN THE QUALITY OF THE JUDICIARY

Mykola KOZIUBRA,
Head of State and Legal Sciences Department of National University "Kiev-Mohyla Academy", Member of the Constitutional Assembly

No one in this hall has doubts that the judicial reform, if it can be called so, does not meet the declared objectives. It not only failed to provide a true independence of judges, but also led to the growth of their dependence on the executive and the legislative power, and, most of all, on the President.

The question then arises: can the changes that took place, including the Law "On the Judicial System and Status of Judges", adopted in 2010, be called a judicial reform?

On the one hand, it would seem that they can. And if we look at some specific provisions of this law, we can say that there are some of them that truly meet European standards. It concerns the procedure for appointing judges, the introduction of automated case management system, etc.

On the other hand, all this appears to be just a decoration and it confirms our long-standing tradition:

[1] Mr. Hans-Otto Bartels speech summary is provided in this issue in the form of an article entitled "*Ensuring the Judicial Independence in Germany*" published in this journal.

[2] The texts were processed using short-hand notes and provided in summaries according to the sequence of speeches made during the Expert Discussion.

to appreciate all the human achievements, make them laws and even include them in the Constitution, but not to perform them. The stated things appear very far from what happens in reality.

In general, **the court is worthless without independent, moral, and virtuous judges. Our greatest problem lays in the quality of the judiciary.**

I understand that it is very difficult to change the quality of the judiciary in a totally corrupt country. But it is necessary to start this process and, obviously, to start from the judges.

As concerns the further reforming of the judicial system, no one disputes that it should be done. Evidently, the system of selection and appointment of judges has to be changed; the Parliament and the President have to be withdrawn from this process. Although the ceremonial function of the President in the following process is characteristic of many countries, where the President, at least, signs a relevant act of appointment of judges, we know how it all happens in Ukraine. Therefore, despite the prevalence of such a practice in Europe, it is worth to consider whether we should automatically try to apply their norms to our realities.

The questions of transfer of judges from one court to another, career development, dismissal of judges have to be resolved not in a way they are being resolved today. Political institutions, including the President, must not be involved.

The problem of judicial immunity must be resolved in other way, too. If we refer to the Western experience, we will see that the issue of depriving judges of immunity is not decided by the Parliament, but by the court or the Supreme Council of Magistracy (justice). However, it raises the question of its reform. Of course, the majority in the High Council of Justice should be composed of judges, but who will form this judiciary, – that is the question.

So, there are many questions. They should be resolved by amending the Constitution. But the current Constitutional Assembly is unlikely to do it. As early as today, despite objections expressed by individual members of the Assembly, the draft laws, including those relating to justice, are prepared outside of it, and, as a rule, the members of the Assembly can only criticize them in the best case-scenario. I have great doubts as to whether this criticism will be accepted and considered.

Even if we agree that the Assembly, in the end, is able to work out something, it is doubtful that these developments will be adopted by the constitutional majority in the Parliament, as it is required by the provisions of Chapter XIII of the Constitution.

And above all, I am not sure that after that some significant changes will occur within the judiciary. I think everything will depend on its quality**. I have never been a fan of lustration of judges, but now I am getting more and more inclined to believe that without "cleansing" the judiciary we will not be able to move forward.** ■

OUR MISFORTUNE IS THAT INSTEAD OF CHANGING THE JUDICIARY, EVERYONE WANTS TO HEAD IT

Victor MUSIYAKA,
Professor of National University "Kiev-Mohyla Academy"

What does the 2010 judicial reform show? The reform saw the adoption of a number of amendments to the laws on the status of the High Council of Justice, on the judiciary and the status of judges, and a number of procedural laws. But **if you look systematically, all this has an important conceptual characteristic – the desire to transform the courts into controllable mechanisms** of political, financial, economic, corporate or personal interests of the government and persons organising and taking part in this process. Quietly, they have been creating a system that they could easily influence. But they know what they have based this system on.

Today, we witness the stage of the constitutional legitimacy of the events that have happened in recent years. In fact, the Constitutional Assembly is a respectable "veil" which is used to cover the events that are actually happening in the state, and, especially, in the judiciary. There is no concept for constitutional changes, no single act that would be adopted by the Assembly. Different "pieces" are being brought to the Assembly, and it "sanctifies" them. This concerns the amendments to Article 98 of the Constitution on powers of the Accounting Chamber and the judicial system.

So, what is happening? *Firstly*, the work on Concept for constitutional amendments has not been finalised yet; the Assembly has not yet approved this concept and has not prepared any amendment to the Constitution of its own, and a draft law concerning the legal procedure has been already sent to the Venice Commission. The Coordination Council sent it is despite the fact that the Constitutional Assembly did not take the decision to send any draft laws to the Venice Commission. Why? The Commission has already given its opinion on the judicial reform in Ukraine about five times.

Secondly: why there is no one single law, but some separate pieces of proposed changes to the Basic Law? If it is done by "pieces", we will not have a holistic view of constitutional reform; constitutional amendments will not have a systemic character.

And what do they want to get as a result of such constitutional amendments, including the amendments to the section on justice? **The whole point of this is to finally legitimise the presidential power of a Latin**

American type. A state of this type would appear in the heart of Europe, and the judiciary would simply provide for its formation and existence.

The problem is not in the Constitution, not in the laws, "the problem is the heads", as it is written in a famous novel. The recent trials indicate that the judiciary is functioning abnormally. When the legal basis for making a decision is apparent, the courts adopt the other ones. **I agree that the state of current judiciary requires changing the personal composition of all courts, starting from the Constitutional Court**, which has practically made a constitutional coup in the state.

As for the future, I do not see any great prospects. Why? Be honest and do not try to deceive yourself by some virtual signs: remember that the current opposition when it was in power had offered the same amendments to the laws on the judiciary. That is, their main purpose was not to change the system of judicial power, but to head it. That is our misfortune. **A positive prospect is possible only under condition if those who organise the system of power will be under a professional pressure**, including in the form of such events as today by reporting our conclusions to the state leadership and the legislature. ■

THE EUROPEAN INSTITUTIONS, AND THE ANTI-EUROPEAN CONSEQUENCES OF THEIR ACTIVITIES

Serhiy HOLOVATY,
Former Minister of Justice of Ukraine (1995-1997; 2005-2006)

First of all, I want to emphasise – and I am convinced the participants would agree with me – that the first two questions of the polemic are the rhetorical ones. So, the discussion should be held around another issue: were changes to legislation in 2010 a reform or an anti-reform?

I believe that that was an anti-reform, because the reforms must provide a change for the better. However, the objectives established by the authors of the 2010 reform, were quite different. If such things as the emasculation of the Constitution, politicisation of the judiciary and re-enforcement of its dependence take place, then it is obviously an anti-reform.

That is why, **I am interested in the third issue of the debate concerning the prospects of the second (constitutional) stage of the judicial reform**.

What are the prospects? They can be described in one word as the sad ones. And it has been unknown when they reveal themselves.

The legislative prospects should be considered in two aspects: the legislative and the institutional ones.

As concerns the legislative prospects: do not we really know how to deal with legislation in order to achieve European standards? What to do with the Constitution to improve the liberal values of separation of powers and independence of the judiciary that were introduced to it in 1996? Indubitably, there are some issues with the Constitution, but they define that particular stage of political process, the level of knowledge of experts and judges who adopted it.

Going forward, remember the *Concept for improving the justice system to ensure fair trial in Ukraine in line with European standards*, dated 2006, which defined the direction of the development of the domestic proceedings and passed the examination of the Venice Commission. Over the years of existence of Ukrainian Constitution, the Venice Commission over 5 times gave different opinions on its assessment and improvement. Certainly, the legal system should be changed, and we know what direction it has to follow. It does not require any expertise. We have understood it ourselves, and after years of search, we have found a circle of like-minded professionals who know it, too. In the future, we will not need any advice.

Let us consider the **institutional aspect**, which often gets ignored. We talk a lot about the judicial system and the judiciary, but we never talk about the status and functions of the Prosecutor's Office. This applies not only to criminal proceedings. We cannot bypass things that are totally left out of the reform process.

In the context of many institutional issues, Ukraine became closer to Europe. Do we not have the Constitutional Court? We do. Do we not have a branch of government that is institutionally independent (I lay an emphasis on the word "institutionally")? We do. Do we not have a human rights commissioner, who must carry out an adequate protection of human rights? We have it all. All of these are available. But it turns out that the institutions that meet modern conditions – the rule of law and European values – do not operate in Ukraine. **They are "imported", and their effect is either equal to zero, or rather the opposite.**

Another institution in question is the administrative justice. It appeared in Europe namely to protect rights and freedoms. And our Administrative Court, established for protection of these European objectives, for the maintenance of the rule of law, has become a tool not only of politicisation, but of denying the aforesaid. **This is an example of the situation where the institution is European, and the consequences of its activities are the anti-European ones.**

Everything rests on two things, where one creates the other.

The first of them is a political prospect. In Germany this became possible after the victory over Nazism. As long as the political prospect is not opened for Ukraine, we should not talk about these things. Perhaps, the political prospect, rather than something else, will help to change the "substrate", which exists today and which has allowed to do it all. By "substrate" I mean **a human being**. The judiciary has allowed doing so. Read the decision of the last Congress of Judges: I did not see the judges to be interested in the power and the status of the Supreme Court, in the jurisdictional problem or in other problems. There is no concern about the judiciary therein.

And one more thing: professionalism and integrity of academics and others who belong to the Constitutional Assembly and who "sanctify" all that is happening today with the judiciary already on the constitutional level. The question is about the academic, professional, and finally civic responsibility. A lack of responsibility leads to the fact that Ukraine would not have such (in the spirit) a Constitution, as we have now, supporting liberal values.

Never mind that the Constitutional Court changed the Constitution, going beyond its powers. The liberal values left therein. There is another trouble consisting in the fact that today we are on edge of losing the Constitution and the liberal values provided there. There is a great danger that Ukraine can suffer the same they have done in Belarus, Russia and Kazakhstan. For example, we have been proud that the Ukrainian Parliament prevented the introduction of a bicameral parliament in Ukraine. **But will we ever see a change of the political situation? Will we continue opposing the "russification" of Ukraine – not in terms of language, but in terms of moving away from liberal European values?** A return of capital punishment, of criminal liability for defamation, a practice of prohibition of peaceful assemblies and so on. In other words, through "russification" of the legal sector, the "russification" of the political regime might soon take place. **And we have to point out that this is already happening.** ■

FIRST OF ALL, THE PEOPLE UNDERSTAND THE IMPORTANCE OF THE RULE OF LAW

Roman ZVARYCH,
Former Minister of Justice
(Feb-Sep 2005, Aug-Nov 2006)

Just yesterday I read a book putting forward rather an interesting concept. The author, a renowned scholar, argues that the Western civilisation rests on six key ideas, one of them being the idea of the rule of law. That said, the author attributes the success of that idea not to institutional (legislative) prescriptions. He tries to prove that **this notion – of the rule of law – was in the first place rooted in the conscience of western societies, in particular, of their legal elites**.

We are trying to do something opposite – to introduce the rule of law through adoption and amendment of laws. I ask myself: can legislative amendments, including those mentioned here, reverse the situation?

Thinking about the problems raised here, I realised that this so-called judicial reform did not change the situation but substantially deteriorated it, seriously aggravating the problems, I would even say – the crisis experienced by our state. **The reason for that crisis lies in the problem with the judicial branch, an independent or, more precisely, honest court – honest to itself, in the first place**.

The reform seriously aggravated the problems, allowed the High Council of Justice to interfere directly in the work of courts by requesting materials of proceedings, substantially enhanced the President's role in staffing the corps of judges, created an absurd institution titled the High Specialised Court for Civil and Criminal Cases (to me, this institution is pure nonsense), liquidated the Supreme Court (I do not even know what the SCU is doing now, if anything). Judges' self-government was undermined, and so on.

I disagree that the "Orange" authorities did nothing. The Code of Administrative Justice was adopted, the Register of court judgments was introduced. All this happened when I was the Minister of Justice, and I was sure that that Register will at least give anyone an opportunity to look at the judgments passed by judges, which, in turn, will make judges pass lawful judgments. But when I read that the High Administrative Court had deprived national deputies of Ukraine Petro Baloha and Oleksandr Dombrovskyi (elected by voting) of their mandates, I realised that no register would influence judges, it will not make judges even in the High Administrative Court to pass fair judgments.

The crisis is in the fact that the people entirely mistrust courts. Note that in the West, the situation is just the opposite – among the three branches, courts enjoy the highest respect and trust, the executive branch is the second, the legislative – third. Here, it's just the opposite, mirror-like.

I will cite an example of the court of the first instance in the case of Yuliya Tymoshenko. Clear thing, the judgment was ordered – it was clear from the behaviour of the judge. But what was the behaviour of the defence like? There was cool aversion to the person of the judge, a sheer confrontational line. I say this because such a pattern of defence of the former Prime Minister could not build trust in court. The very fact that the defence chose this pattern of behaviour shows that nobody had the slightest doubts that the court judgment had already been written. Judging by the judge's behaviour, I think that the defence might be right, although initially, I was very critical about such an approach. A whole set of politically motivated judgments passed recently certainly do not build trust in society. There is a saying that every nation has the government it deserves. The government is like the people. There is something in it.

So as long as we as a nation continue to tolerate open corruption of branches of power, pay 50 *hryvnias* to traffic police inspectors who stop us, as long as we debate whether the use of intellectual property of others is a theft, the situation will not change.

So the conclusion I wish to make is as follows: we should work very seriously, first of all, not in the legislative domain. **We should work to raise the general awareness of the importance of what is called the rule of law, the legal and political culture and consciousness of the people, for us finally to be able to live in a country we deserve.** ■

REAL CHANGES IN THE JUDICIAL SYSTEM CAN ONLY HAPPEN WHEN THE POLITICAL REGIME IS CHANGED

Mykola ONISHCHUK,
President of the Institute of Legal Policy, Member of the Constitutional Assembly

The present Government characterises the judicial reform of 2010 as the most important, despite the fact that between 2005 and 2010 we actually had a truly independent judiciary. Back then, there had been a renaissance, a rebirth of justice in the state, although there were plenty of problems, but it was the only historical period in life of modern Ukraine where the judicial system had a great impact even on political processes. Just at that time, the Council of Judges of Ukraine appointed judges to administrative positions, and courts were making decisions freely, regardless of the position of the prosecutor. We can mention many other signs of independence of the judiciary at that period, yet the system had its own flaws.

It is no coincidence that the new Government planned the judicial reform as the most important, although the society had and still has a lot of other outstanding issues in the social and economy sectors. This indicates the role of courts that should be played by them in the society according to the Constitution and in line with democratic tradition and their impact on the activity of political institutions by means of judicial review. I mean how the courts should protect citizens from violations of their rights and how the citizens are protected *de facto*.

The 2010 judicial reform, among other things, has expanded the grounds for bringing the judges to responsibility, and was intended "to establish control" of the judiciary, to set mechanisms to support policy decisions. The right of the High Council of Justice to appoint judges to administrative positions and many other innovations are also among these mechanisms. It is appropriate to draw attention to the fact that the heads of almost all court of general jurisdictions were reappointed at that time. Normally, with the change of government, the heads of ministries and departments, i.e., the heads of the executive branch are being replaced, too. But it is absolutely abnormal when the change of Government causes the change of the heads of court's jurisdictions, and the heads of courts.

In view of the new political realities, a "bootstrapping" of judges in the form of the introduction of "political self-censorship" has taken place: once the court considers an issue that has the smallest relevance to the political process, it will take the decision that is "politically correct".

So, we have to understand that **real changes in the judicial system can only happen when the political reality is changed**. But does this mean that we should just wait? No, it does not. Now through legislative mechanisms, through constitutional changes a significant groundwork should be laid out, able to work in the future when the level of political and legal culture will be higher. And this position, which has no alternative, in my view, must be manifested by both the professional communities and the civil society.

What opportunities do we have for this? First of all, it is the work of the Constitutional Assembly. Today we receive some materials, which describe in detail (mostly, in a critical manner) the events that are happening inside the Constitutional Assembly. I would like to draw attention to a few things that deserve a mention.

Firstly, the proposed constitutional changes, despite their shortcomings, provide a reinforcement of the range of existing institutions and introduction of new ones, in particular, the justice of peace, when the citizens elect judges directly and there exist a simplified procedure for hearing the cases and equal access to justice for citizens. *First of all*, it is the impact of people, albeit indirectly, on the administration of justice. *Secondly,* it is possible to count on the fact that magistrates will be more independent of political processes and influences in the course of justice delivery. Unfortunately, the attempts to achieve this have failed yet, but it is necessary to expand the influence and the role of the jury trial. In particular, the right to trial by jury must be enshrined in the Constitution: it does not exist now. And, the question about the type of the jury trial – continental or Anglo-Saxon system – this is a matter of debate.

Secondly, a clear separation of judicial administration from the delivery of justice must be achieved through the constitution. That is, to change powers of the High Council of Justice in order to bring into its subordination all other institutions of judicial administration. It is also about reducing the role and influence of political institutions (the Government, the Parliament, and the President) on the formation of the judiciary, on the promotion and careers of judges, etc.

Thirdly, the inability to influence court decisions on the execution of powers by other state bodies must be enshrined on the constitutional level. The Constitution has a canon that the jurisdiction of courts extends to all legal relations. For this reason, we have precedents when the courts adopt decisions related to the exercise of powers by Parliament; in particular, stripping Mr. Dombrovskyi and Mr. Baloha of their mandate. The list can be continued. That is why similar events need to be prevented on the constitutional level.

In conclusion, I want to say that **all political processes have one common feature: fluidity and variability. And the task, objectives and principles of forming the judiciary are fundamental elements that have to exist outside of time and political processes.** ■

AMENDING THE CONSTITUTION WITHOUT CHANGING THE JUDICIARY WILL NOT CHANGE ANYTHING FOR THE BETTER

Ihor KOLIUSHKO,
Board Member of the Centre for Political and Legal Reforms

The current situation in the judicial system can be described in such a way: we have judges, dependent on political authorities and independent of their rights and law; we have a selective disciplinary prosecution of judges, as a tool for their subordination to political authority; we have the appropriate personnel policy in the judicial system, which is also a tool for subjugating judges. Yet another tool is a "judicial self-governance", which has ceased to reflect interests of judges, at least partially, and has now become an instrument for conducting policy by state authorities.

In such a situation, there is no question as to what **institutional and legislative changes should take place. Everything has already been worked out and written, here. Among the key things, the first one** is to ensure transparency and competitiveness of all appointments to positions of judges, since our law applies only to the first appointment of judges; as if all others do not require any transparency and competitiveness.

Secondly, it is necessary to ensure the competitiveness and the fairness of disciplinary prosecution and an objective consideration of all complaints. This is not provided even at the level of the law.

Thirdly, the law should clearly define the powers of the Heads of courts and separate them from the powers of the Heads of the judicial administration to ensure the independence of judges. During the 2010 judicial reform, it was done very incoherently, in fact, it was distorted. The draft, which was taken as a basis, was much better written than the law that was finally adopted.

Fourthly, it is necessary to complete the process of unification of commercial and civil courts. Without this, we will not be able to establish some order, and the interjurisdictional chaos will prevail.

Fifthly, it is necessary to define the status of the Supreme Court.

The materials distributed here contain a document: "Conceptual principles for perfection of constitutional regulation of justice in Ukraine". This is a decision of the Constitutional Assembly Commission in the matter of justice. Have a look at what it says about the Supreme Court: "The task of the constitutional reform is to secure the powers of the Supreme Court of Ukraine as the highest judicial authority on the constitutional level (by the way, it is provided by the Constitution even now), in order to ensure its proper place and role in the judicial system of Ukraine". That is what they need. They do not determine any function, such as, i.e., ensuring the uniformity of the application of laws in justice; they do not determine as their task to safeguard human rights, but the key objective is defined as "to ensure a proper place and role in the judicial system". The rest of this document refers to the need for providing an actual, and not fictitious independence of judges and ensuring the adoption of decisions by independent judges in accordance with the law. In other words, the authors of the document are primarily concerned about *their proper independent status and level*, and not about the functions they have to perform.

It has been already written a lot on what has to be done and how to change the laws. In my opinion, **amendments to the Constitution will not change anything for the better in the judiciary.** So all the talks that amending the Constitution slows down the judicial reform is the evil one; this is a manipulation, nothing else.

It may seem sad, but I have realised that even **changing political power in the country, even amending the laws and the Constitution will not automatically lead to bringing order to the system of justice, since the biggest problem is the judges**. What shall be done with them?

From my perspective, several rules should be used to resolve this problem. First of all, these "Vicars of Bray"[3] in judicial robes should be punished; **the society should identify those who personally took part in "bending" of the judicial system to suit political purposes of state leaders, and these individuals should be designated and punished.** And everyone else who is not found guilty, should repent of his/her actions, and then, perhaps, have a chance to work in the new judicial system. Without this step, the judicial system will never be revitalised. The political power will change, but the same people will serve a new government as they did before. And all this has nothing to do with justice.

I believe that the success of Germany in reforming the post-war German society was primarily based on the fact that they gave a principled and honest assessment of the events that had happened during the Third Reich. And we must sooner or later put through it. Otherwise, I see no other way to solve this situation.

Finally, today we all have to focus on two issues.

Firstly, it would be right if we, no matter what is done or not done at the Constitutional Assembly, publish a common vision of what a true constitutional reform of the judiciary should be. Because the value of a publication is nothing compared to the value of a document that is approved by, at least, a dozen of independent experts.

Secondly, a civil society needs to pay maximum attention to monitoring the situation and to move to, including, without limitation, a personal fixation of decisions made by different judges, and to make it public on the available resources. In this way, we can make a contribution to the future improvement of the national judicial system. ■

[3] The Vicar of Bray is a satirical description of an individual fundamentally changing his principles to remain in ecclesiastical office as external requirements change around him.

THE MAIN THING IS TO UNDERSTAND THAT NO POSITIVE CHANGE WILL HAPPEN WITHOUT COURT ACTING AS AN EXECUTIVE BODY

Mykhailo TSURKAN,
Deputy Chairman of the High Administrative Court

As a judge, I feel uncomfortable. On the one hand, I have to agree with many things that have been said here, and it would be unwise to deny the existence of problems and negative trends. On the other hand, I am asking myself: who am I today? How could it happen that after having been passed all stages of the judicial career for 28 years; after having been for a time a member of the Council of Judges of Ukraine, which had taken the liberty to appoint judges to administrative positions; as the Deputy Chairman of the High Administrative Court of Ukraine designated by the Council of Judges of Ukraine, I have now to listen to these criticism towards judges? Do I agree with the statement that I am among those eight thousand people who improperly consider the cases? And note: millions of such cases are considered each year, and more than 75% of the decisions in these cases are not appealed, that is to say that they were resolved in favour of those who had applied, or the persons in conflict were satisfied with those decisions.

I am fully aware that after having been heated with dispute everybody can accuse the judicial system of being "utterly worthless". Judge us as you wish, dear politicians and ex-politicians, but you have to remember **that it is the court, which should remain the only legitimate authority destined for considering legal disputes**. Otherwise, the calls for lynching and mob punishment will return us to "tumultuous 1990s" and that is much worse.

In my opinion, you should pay less attention to the composition of the system. The structure of the courts does not solve anything, as nothing can be resolved by the lustration of judges only, without other necessary measures. There are countries that completely changed the composition of judges and the corruption component has only increased. Even the democratic countries, the experience of which we now refer to, and where almost 100% of the judge's staff has been changed, claim that it is virtually impossible to win a case versus a state.

Perhaps there is something that journalists call "self-censorship". But what do we mean by the concept of an independent judiciary and the courts? When and who needed an independent judiciary? It became necessary in the late 1990s because it was the time to legalise and to legitimise the stolen property. But even at the beginning of the glorious 2000s, when the transitional period for ordering the system had ended, nothing was done, and instead, the Head of State said that one of the best ways to put judges in place is to "hang them"...

Then, after having implemented the so-called "small judicial reform",[4] and without investing any real content in it or making any real changes, we took the decision of Supreme Court on the third round of the presidential election, which by law had two stages, as "the triumph of the rule of law". And just a month later, the President, who in the wake of this decision came to power, argues that the courts are a threat to national security. In a short time, the Prime Minister said that if the courts made a decision to satisfy social or other benefits, than this was an illegal, criminal decision; and they did not need to be executed. There are multiple examples; such an approach is also inherent to the current government.

Personally, I would be satisfied if by removing us, the judges in power, everything could change for the better. We would have to go away. However, it will not improve the situation. There must be something else: a real independence of courts, social control, transparency, and the ability of the judiciary to conduct "self-cleansing". The main thing is that the society in general and the government in particular, have to understand that there will not any proper improvement without letting the court act as an independent body. We cannot "import" German judges and citizens, therefore we have to solve our problems using our own resources and by doing it all together. ■

WE STILL HAVE A LOT TO DO TO BRING ORDER TO OUR LEGAL CONSCIOUSNESS

Mykola SIRYI,
Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine

A high percentage of satisfying court decisions and a low percentage of appealed cases is a good performance. However, the more precise figures will attract investments to the country and improve public confidence in the judiciary. If the judicial bodies focused on these factors, they would better reflect the true interests of justice and the society.

I remember the session in the Presidential Administration held before the 2010 judicial reform. Having the opportunity to speak there, I repeatedly drew attention to the fact that as a result of the provided actions, we would reduce the volume of investments to Ukraine, and only two or three neighboring countries would invest in our country, no one else. I think we have just achieved this state since, just the other day, I have heard that the revenues from our "migrant workers" abroad have already exceeded the current volumes of foreign investments in Ukraine.

In order to see the evolution of the system, it is important to find the most striking comparison criteria. As for me, such a criterion of the difference of the judicial system during the period of 2011-2013 from the previous

[4] "Small judicial reform" is the restructuring of the court system by several laws adopted in 2001, pursuant to the Constitution of Ukraine. More: Chapter 2 of the Analytical Report, published in this journal. – *Ed.*

20 years is **the disappearance of internal discussion within the judiciary.** It had existed for 20 years. I do not want to say that most of these discussions led to the adoption of right decisions, many of them deserved criticism, but there was a freedom of professional speech, there was a search for understanding of justice, for proper structure of the judiciary and proper legal proceedings. Today, this search has stopped; the judicial system exists actually in one-dimensional mode. There is an "idea", which is prepared for the session, and the session has to "sanctify" it. This is a road to nowhere.

So, **the first thing to do is to renew the debate on the law and justice within the judiciary.**

If the approach is only formal that is to increase the number of judges at the High Council of Justice and nothing else, then no real effect will be achieved. It is well known that the law is based on free will and trust. This is a fundamental factor in both private and public law. Accordingly, if there is no internal debate within the judiciary, then there will not be any assurance that the real will of judges is not distorted by any external factors; there will not be any confidence in decisions made by judicial authorities. The legitimacy of congresses and conferences of judges is in question in such circumstances – as well as of any body that is formed within this judicial self-government. For this reason, **the basis of legitimacy has to be revived**: then, the European formula in Ukraine will act and will have the same effect, which is expected of it.

It has been previously said that it is possible to note a positive movement of Ukraine in order to find ways to reform the judicial system, launched in 2001. I would add that some pushes in this direction have occurred even earlier. The first one was in the early 1990s and it really led to qualitative changes in the judicial system, the second one took place in 1995 and 1997. During the adoption of the Constitution, the ideas were raging, and the judiciary returned to the basic principles of justice.

In this context, I would like to recall the beginning of the 1990s, when our Institute was actively involved in the development of Concept for judicial reform in Ukraine, mentioned above. 95% of its regulations completely meet the needs of the present day and play a key role in all the aspects related to the judiciary.

The statement that "everything is already clear, we are in need of political freedom only, and after having achieved it, everything will miraculously change" has been pronounced more than once today. I do not agree with it, because there is no country where "everything is clear" in the field of justice. For example, the principle of instances has been proposed to be added to the text of the Constitution. Does the North Korea not have the same principle? Did the Soviet Union not have it within the meaning of the hierarchy of the judiciary? A structural hierarchy is required, of course. But when we talk about court instances, it should be understood that the court of first instance is based on one legal argumentation, the appeal is based on another, and the basis of the cassation is not related to the previous ones. And they are not united by a common principle. In other words, I want to stress that there is no, and there should not be such a general principle for all the justice system.

You have also heard of the thesis concerning the unity of the judicial system, which, according to its authors, should be considered as a function. It is not a function, because when the purpose of the judiciary is converted to a function, it distorts **our legal consciousness**.

The next thesis is related to the principle of specialisation of courts. There is no such a principle because when we talk about specialisation in the judiciary, we mean at least three different things, not united by a single legal structure. Once a legal form involves multiple legal regulators, the confusion in **our legal consciousness** begins.

In fact, **a key trouble in the context of justice that has occurred in Ukraine is not a lack of political freedom. The trouble has occurred in the community of lawyers, including those involved in drafting the judicial reform and its concepts.** As a clear example of unacceptable distortion, we could point to the confusion in the judiciary of the specialised jurisdiction and of the general one. Why do judicial systems in the countries, where the right is provided on a stable basis, function properly? It is because the general jurisdiction has a justified priority and dominates the judiciary. In addition, the general justice always is less prone to corruption. On the contrary, the most problematic "areas" are economic disputes where the judges are affected by a high price of action, and the administrative sphere where the judges are affected by factors of power. When the statuses of the administrative, economic and general jurisdictions were aligned and the priority was given to the first ones, then the judicial system was simply buried and nothing more. It was done not only by politicians, but also as a result of poor debates in the community of lawyers.

So, we still have a lot to do to bring order to our **legal consciousness**. If we take the first steps, it does not mean that we will do everything, because the work on this way will never end. ■

THE JUDICIARY IS THE MOST VULNERABLE BRANCH OF POWER

Natalya PETROVA,
Deputy Head of the USAID Project "Ukraine: Fair Justice"

Every time after such events, we have to remember that the courts are also a kind of power, but among the three branches of power, they are the most vulnerable one, because the courts are based on laws created in Parliament and depend on the funds allocated by the Government. This creates a vulnerable situation for the judiciary as a whole.

Independently of the number of complaints about the lack of independence of the judiciary, we have to remember that independence cannot be given or taken: either it exists, or it does not. Independence should be guaranteed.

The first guarantee of an independent judiciary is a professional judge, and the second one is a proper legal framework that can guarantee a judicial independence.

So, **the first key concept is the professionalism of judges**. It is obviously impossible to evaluate the progress made in 22 years of independence of Ukraine without mentioning the historical background of the laws governing the status of judges and the activity of the judiciary. Remember the Declaration of Independence, which proclaimed the first principle of separation of powers. The first Law on the judiciary was adopted in 1992, and the year of 1993 was the year of creation of the Law on Judicial Qualifications Commissions, according to which there were 13 such commissions acting in the entire country on a voluntary basis, where judges, representatives of the Department of Justice and of the Advocacy were selecting candidates for judicial vacancies.[4] This practice existed before 2010.

However, as long ago as 2003, a process called "secretarisation" was initiated by one of judicial branch leaders, when the judges were chosen mostly from secretaries, assistants, and staff of administration. Can a young person of 25 years old, without independent legal practice experience, demonstrate professionalism and independence in decision-making, if he/she immediately falls under dependency on the process of appointment and the feeling of gratitude? Many years of our practice in this selection has showed that a third part (if not more) of the current 9 000 judges consists of former judges' secretaries and assistants.

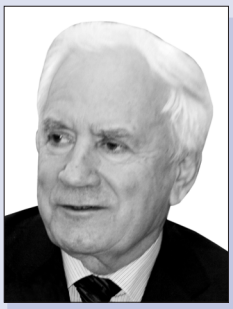
The second key concept is the legal framework. If we analyse carefully the national legislation on the status of judges, we should honestly admit that the laws are written in such a way as to keep judges dependent. Among them are the first appointment for 5 years, the composition and the proportions of judges in HCJ, the scope of judicial immunity, the grounds to deprive judges of this immunity, and a dismissal of judge for "oath-breaking", and an article in the Criminal Code for making a knowingly unjust verdict/judgment or decision, etc.

Another problem is the inadequate quality of legislation basis. One may accuse the President so many times and in so many way as he wants (it is quite popular nowadays), but the laws are made by politicians, the Parliament. Quite frequently, a law is written incompletely, poorly and has gaps. Then a rule works: where the law is silent, the interests are speaking for it. So, at present time, **all politicians must recognise** that since the years of independence **no one has ever showed a political will "to free" the courts, everyone wanted to keep judges dependent**. As long as every politician, every judge will not realize the value of an independent judiciary, the situation will remain the same.

Did the law of 2010 complete the task of judicial reform? It is too early to discuss now, as this is a long-term task. Ukrainian citizens cannot assess the results of such reform in just two years. It was primarily focused on structural changes of the judicial power and on raising the guarantees of judicial independence to the level of law. A new system for appointing judges has been mentioned here. Even if there are any complaints about corruption, nepotism, etc. "sons, daughters, nephews" have to go and pass a test too. Following the new system, only approximately 1 thousand out of 3.9 thousand of judges were really appointed. This is 10% of the total number. When this number reaches at least 50%, our citizens will be able to feel the effect of this reform.

In conclusion, I will repeat: the judges are vulnerable. There are associations of attorneys, lawyers in democratic countries who form the stand and speak for the judges in their best interest, because when the judges speak for themselves, it looks as if they are making excuses and have nobody to protect them. ■

THE PROBLEM LIES IN THE NUMBER OF JUDGES AND IN THE QUALITY OF THE JUDICIARY



Yuri SHEMSHUCHENKO,
Director of Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Deputy Chairman of the Constitutional Assembly

Just a few points about issues raised in the discussion.

Firstly, I would like to note that the question "What has changed since the adoption of the Law of 2010?" has the right to life, but it would be worth talking about what has happened and what has changed since Ukraine gained its independence. Even then, the scientific foundations of the development of the national judicial system were laid, in particular, on the basis of the Concept for Judicial Reform in Ukraine, adopted in 1992.[5] The Concept has defined the very judicial system and its structure. However, a lack of consistency between the Concept and its practical implementation has led to the emergence of many specialised courts, various institutions and quasi-judicial bodies. The judiciary was not administered. However, all subsequent efforts to reform it were usually focused on changing the "tip of the iceberg" – the highest judicial authority in Kyiv. Alternatively, a system of local courts still has not been properly reformed, especially in terms of providing an adequate level of professionalism of judges.

Secondly, we cannot focus exclusively on the principle of judicial independence. Of course, no one denies it, but there are many other principles, which are not less important and which are widely used in Europe. First of all, we have not developed an equal access

[4] The Law "On the Qualification Commission, Qualification Examinations and Disciplinary Responsibility of Judges of Ukraine" (repealed in 2002 due to the adoption of the Law "On the Judicial System of Ukraine"). – *Ed.*

[5] Approved by the Resolution of the Verkhovna Rada of Ukraine №2296-XII dated April 28, 1992.

to justice. I have read recently that "the number of judges should be equal to the number of citizens to be protected". Using this formula, it is difficult to say exactly how many judges we do need, especially as the number of citizens has been gradually declining in the state. There are 17 judges per 100 thousand of inhabitants in Ukraine. There are fewer judges per 100 thousand of inhabitants in other countries: 15 in Russia; 7 in the US; 5 – in England; 10 – in Sweden and Britain. And our judges consider approximately 8 million cases each year. So, a good analysis is required: why should Ukraine have so many judges? Now, the problem lies both in the number of judges and in the quality of our judiciary.

Thirdly, it should be noted that the Constitutional Assembly has been actively working. There are seven commissions, including the Commission for Justice. Currently, the draft of the relevant section of the Concept for Amending the Constitution of Ukraine has been developed; many of the proposals by judges and other professionals have been included. I think the final version of this section of the Concept will be ready in May. All materials are published on the website of the Assembly, and everyone can take part in the discussion of issues dealt with by the Constitutional Assembly. I invite the audience to participate in this process. ■

WE HAVE PLENTY MORE TO ACHIEVE

Pavlo HVOZDIK,
Deputy Chairman
of the High Specialised Court
for Civil and Criminal Cases

Our discussion has been declared a professional one, but this is a political debate, in which certain views on the system of separation of powers in the state are expressed. We must be honest. For example, we have stated that the first two questions are the rhetorical ones. But it is not exactly true, because such a statement represents a political assessment and a kind of labeling, too.

Has there been a political component to appointing judges before and after 1991? I have been working since 1985 and I can say that it was present even back then. I was "led by the hand", literally said, to the Administration Department of the Regional Party Committee, where an appropriate discussion was held with me. The same thing happened during another period when there were representatives of various political structures within the qualification commissions. Thus, in the region of Ivano–Frankivsk, the qualification commission was headed by V.Kostytskyy who, at the same time, was a deputy of Ukraine. It is our history, and we cannot reject it, but it is possible and necessary to judge it on its own merits.

I have a question for the Ministers of Justice, who had worked in different periods of time: why the things that are in question now were not implemented back then in 2005-2010? The decision by the Council of Judges of Ukraine to appoint the heads of courts was criticised in the society. But it was a forced decision due to the political crisis as the Verkhovna Rada was unable to solve our issues and did not wish to consider them. The Judiciary has responded accordingly. We cannot request the judge to do more than he/she can do using the tools we gave him. We defined his powers by law; we gave him some tools and materials that are not very good. Is a shoemaker guilty, if he is given bad tools? No.

Nowadays, there is only one fundamental task before us: we have to give the public a new judge who will change the face of Ukrainian justice system for the better.

However, I am not an advocate of immediate dismissal of all our judges. It would be similar to what had happened in 1939, when in September, in Western Ukraine, the Soviet power was established, and as early as in October the NKVD tribunal considered the first case, and the first defendants were judges, working at Polish courts, including even a prison priest, because the authorities believed that he participated "in the persecution of workers". This approach is really wrong, and I do not think we should use it. I do not think that after having worked as a judge for almost 30 years, I have to be dismissed...

The vast majority of judges perform their duties according to the law and the legal realities existing in our lives. We have to be realistic. What can a judge do when the law does not give him any opportunity to make other decisions? He operates in the context of existing legal frameworks.

Without doubt, there are some negative aspects; there are a number of problems that need to be resolved. Analysing the reforms implementation according to the Concept for Judicial Reform of 1992 (which, incidentally, was the most consistent, but, unfortunately, was not implemented in full), we can see that the principles of judicial independence, such as liberty, impartiality, objectivity of justice, were the last ones to have been dealt with.

What exactly should be reformed? Obviously, a judge should be the central figure of the reform as someone who has to bear the entire burden: the legal and professional, the moral and ethical, including the political one. It is also clear that the local court, namely the court that mostly deals with ordinary people has to be put at the center of reforms. And we must define the necessary, scientifically based number of judges, and not be guided by some imaginary norms inherited from the past.

The judicial community is open to discussion, and the debates do take place. Only the reluctance of some politicians and of some our colleagues-lawyers to listen and to take into consideration all the positive things elaborated during the debates, prevents to consider and implement the proposals by judges – the people who are directly involved in justice.

In general, I believe that the judicial reform in Ukraine did take place, but it was only the first stage, and we have plenty more to achieve. ■

JUDICIAL REFORM IN UKRAINE: ITS PROGRESS, PROBLEMS AND PROSPECTS AS SEEN BY NATIONAL EXPERTS AND POLITICIANS

THE JUDICIAL REFORM WAS A FAILURE

Oleh BEREZIUK,
Head of the Ukrainian Law Society

– Have the goals of the judicial reform of 2010 been achieved? What are the main positive and negative effects of the reform?

Proceeding from the logic of action of the current authorities, one may argue that the goals of the judicial reform of 2010 have been achieved. Another question is, whether the reform was useful for the state and society?

It seems that the efficiency of the past judicial reform should be assessed in the context of the administrative reform.

As we know, after his election the President of Ukraine, Viktor Yanukovych took steps to centralise state governance, which in the end has led to excessive concentration of powers in the President's hands and an attempt to establish an authoritarian political regime in Ukraine.

That process commenced with the unlawful ruling of the Constitutional Court, following which, the Constitution of 1996 was reinstated in Ukraine.

That version of the Basic Law gave Ukraine's President unlimited powers. As a result, **the President became the main political figure in the country**.

Having subordinated the executive branch and secured control of Parliament, the President and his Administration made a number of steps intended to gain total control of the judicial branch. Through adoption of relevant laws and amendment of effective regulatory-legal acts, deep changes were made in organisation of the system of justice, appointment and dismissal of judges. Those changes had a negative effect on the independence of the judicial branch and strongly affected the lawfulness of court judgements and passed rulings.

In such situation, it is difficult to find any gains of the judicial reform. Among its negative effects, it should be mentioned that **the present organisation of court districts and four-level system of judiciary substantially complicate judicial procedures**, which, in turn, reduces public access to justice. The Supreme Court deprived of the functions of a cassation instance became a redundant element in Ukraine's judicial system. The current procedure for bringing judges to responsibility and release from office made them fully and entirely dependent on the High Council of Justice, most members of which depend on the executive branch.

So, it may be concluded that the past judicial reform, from the viewpoint of provision of justice, was a failure.

– How would you describe the present situation in the field of justice with regards to the independence of judges, access to justice, and the efficiency of judicial protection of civil and human rights and freedoms?

Now, it may be argued that Ukraine *de facto* has no independent judicial branch.

Independence of judges is formal and exists only on paper. This was showily demonstrated by the cases of Yuliya Tymoshenko and Yuriy Lutsenko.

The absence of true independence of judges barred implementation of the principle of competitiveness in those trials and resulted in ungrounded conviction of the opposition political leaders.

The judicial system complexity, dependence of courts on the executive branch create conditions restricting public access to justice, facilitating passage of unjust judgements and illegal court rulings.

All this gives grounds to state that in **the result of the implemented judicial reform, the efficiency of judicial protection of human and civil rights and freedoms substantially deteriorated**.

* Interviews were conducted in January-March 2013.

If necessary measures are not taken now, the logic of developments may lead to the establishment of a totalitarian political regime in Ukraine or provoke mass protests, leading to destabilisation of socio-political relations, which, in turn, will undermine the basis of the national security.

– What are the key measures and in what sectors should they be implemented in order to establish independent and impartial courts in Ukraine?

To establish independent and unbiased court, relevant amendments should be made to the Constitution of Ukraine, and a system of "checks and balances" should be created, to rule out excessive concentration of power in the same hands and bar establishment of a totalitarian political regime in Ukraine.

The judicial system should be simplified, with reinstatement of the classic three-level organisation of the judicial branch.

To mitigate financial dependence of the judicial branch on the executive one, the State Court Administration should be liquidated as a central executive body and subordinated to the Supreme Court of Ukraine.

The High Council of Justice of Ukraine should be the supreme judicial instance, tasked to organisationally support the judicial system functioning, review cases under the cassation procedure, settle disputes between supreme bodies of state power as a court of the first and last instance, interpret the Constitution and laws of Ukraine.

Finally, courts should be made less dependent on the executive and legislative branches, and the judicial branch should be put under stricter public control. With that purpose, it makes sense to study in more detail the US experience, in particular, the so-called Missouri Plan of appointment of judges, now deemed the best and the most efficient for selection of professional judges and execution of justice. ■

A FULLY-FLEDGED REFORM OF THE JUDICIAL SYSTEM IS IMPOSSIBLE WITHOUT AMENDING THE CONSTITUTION

Valeriy KARPUNTSOV,
National Deputy of Ukraine, Faction of Vitaliy Klychko's UDAR Party

– Have the goals of the judicial reform of 2010 been achieved? What are the main positive and negative effects of the judicial reform of 2010?

It makes sense to assess the success of the judicial reform in Ukraine through the prism of goals and objectives set by the initiators of changes. For instance, according to the authors of the draft Law "On the Judicial System and the Status of Judges" adopted in 2010, de-politicisation of the judicial system was one of the key ideological principles of the reform, and the judicial reform was intended to establish the principle of independence of judges and to draw Ukraine closer to the European legal culture.

Over two years have passed since the adoption of the legislation on fundamentals of the judiciary, which enables to assess the success of reformist attempts by representatives of the current authorities and to identify the main gains and losses in the process of the judicial system perfection.

As well as any other reform, the judicial reform has a national and an international dimension. **The reform success on the national level may be judged by the data of public opinion polls of the Ukrainian population support for the reform results**, showing that, in November 2012, the activity of courts was fully supported by 5.7% of Ukrainian citizens – while before the reform, in April, 2010, the level of support for courts hit 8.9%. *For comparison*: following the police reform in Georgia, the level of public trust in it within a few years rose from 5% to over 90%.

The situation with international assessment of the judicial reform effect is no better. Over the past two years, all specialised European organisations and institutions without exception, along with the European Court of Human Rights, very critically assessed the Ukrainian authorities' achievements in the judicial system reform. The European Commission for Democracy through Law (Venice Commission) in its Opinion on the Constitutional Situation in Ukraine of 17-18 December 2010, and the Joint Opinion on the Law of Ukraine "On the Judicial System and the Status of Judges" by the Venice Commission and the Cooperation Directorate of the Directorate General of Human Rights and Rule of Law of the Council of Europe of 11 October 2010, PACE in Resolution No.1755 "Functioning of Democratic Institutions in Ukraine" of 6 October 2010, the EU Foreign Affairs Council in its Conclusions on Ukraine of 10 December 2012, expressed reasonable criticism of legislative regulation of the judicial branch activity in Ukraine and called for further steps aimed at perfecting legislation on the judiciary.

Speaking of the judicial reform results, one should distinguish between the political and institutional-legal aspects of the matter. So, we should recognise that **in policy terms, there were no positive shifts**: the judicial branch got no legislative guarantees of independence from the legislative and executive branches, no incentives were provided to restore the authority of and trust in courts and judges in society, no simple and efficient system of judges' self-government bodies was created, the status of the Supreme Court of Ukraine as the supreme judicial body was shattered. The reform was implemented in the conditions of strong political pressure on the High Council of Justice and its members through legislative limitation of powers and reduction of the number of members of the supreme judicial instance. Despite the assumed obligations, the Venice Commission opinion was totally ignored during the Bill adoption. Additionally, the law adoption procedure was violated, which did not add trust in the reform

among the concerned parties (let alone that the authors of the reform had not asked the opinion of the judicial community).

In the institutional-legal aspect, the judicial reform also has many fundamental drawbacks. *First*, the High Council of Justice powers of appointment, disciplinary proceedings and dismissal of judges were unreasonably extended, giving huge opportunities for pressure on judges. *Second*, it introduced a lame model of trial by jury involving two professional judges and three jurymen. *Third*, despite some improvement, problems in the system of appointment and dismissal of judges have not been resolved. In particular, the Verkhovna Rada role in judges' appointment for an indefinite term seems unreasonable. *Fourth*, the judges' self-government system is too tangled and includes too many institutions. *Fifth*, the issue of transparency of the procedure for the first selection to the position of a judge remained unresolved. Furthermore, the judicial reform was implemented in isolation from the reform of law-enforcement bodies and public prosecutor's offices, and without amendment of the procedural legislation, which did not contribute to harmonisation of legal regulation of the judiciary.

However, **the main problem of the judicial reform was presented by disintegration and imbalance of the judicial system**, since the Law liquidated the tools of the Supreme Court influence on the court practice. The High Council of Justice lost its powers to give explanations to courts concerning interpretation and application of the legislation, although high specialised courts retained that right. It retained the right to review judgements of high specialised courts only in case of dissimilar application of norms of the law of substance, rather than the procedural law.

Against this background, gains of the judicial reform look rather dim, but for the sake of justice we must mention them. National and international experts unanimously mention among the judicial reform gains: liquidation of military courts, introduction of the automated system of paperwork and distribution of cases, simplification of the procedure for appointment of judges for an indefinite term, transfer of the State Court Administration under the control of judges' self-government bodies.

By and large, judging by the words of reputable European experts and organisations, there is a strong impression that the under-reformed judicial system now remains the main obstacle for development of recognised democratic institutions in Ukraine and further European integration.

– How would you describe the present situation in the field of justice with regards to the independence of judges, access to justice, and the efficiency of judicial protection of civil and human rights and freedoms?

An independent observer of the process of the judicial branch reform in Ukraine may have an impression that the main goal of the reform was to deprive judges of their slightest independence. Neutralisation of the Supreme Court of Ukraine, merger of instances of review of criminal and civil cases in one special court, expansion of the High Council of Justice powers, with the right to appoint judges to administrative positions in courts, introduction of a complex and tangled system of judges' self-government bar fully-fledged protection of civil rights and freedoms, with fair and impartial rule of law.

Violation of the principle of independence of judges in the Ukrainian practice is a widely spread, even regular phenomenon, as witnessed by the number of applications to the European Court of Human Rights from Ukrainian citizens who exhausted legal methods of defence of their rights at home, and by the number and substance of its rulings passed against Ukraine. European politicians and lawyers have already worked out a system of euphemisms regarding Ukraine to describe the state of affairs within the Ukrainian judiciary, such as: selective justice, politically motivated prosecution, insufficient impartiality and fairness of judges, etc.

The national legal system got used to loud statements by top state officials on consideration and review of cases by the court, made contrary to the principles of independence and autonomy of judges and resulting in defamation of the judicial branch in society. Numerous cases of pressure on judges and assessment of their actions in mass media even before the passage of a judgement are observed during the review of so-called "publicised cases".

The grounds for disciplinary responsibility (including dismissal), the procedure for bringing to responsibility, and the procedure for appeal against decisions imposing disciplinary punishments should be clearly specified in the law, for the bodies whose competence includes dismissal of judges not to interpret its relevant provisions arbitrarily. For instance, **the notion of "oath-breaking" remains judgmental, and guarantees of judge' protection against unreasonable dismissal – rather weak**.

Over the years of independence, Ukraine saw substantial progress in accessibility of justice, as witnessed, in particular, by the steady growth in the number of claims filed to courts by Ukrainian citizens. Development of social relations and complication of their legal regulation lead to excessive load on the judicial system, creating artificial obstacles for access to justice due to unreasonable delay of trial. Still, **low public trust in the judicial branch presents the main obstacle for wider access to justice**.

– What are the key measures and in what sectors should they be implemented in order to establish independent and impartial courts in Ukraine?

It may be concluded that the judicial reform in Ukraine through amendment of the common legislation has run out of fuel. Without amendment of the Constitution, a fully-fledged reform of the judicial system is impossible. This primarily refers to the procedure for appointment of judges, staffing of the High Council of Justice, organisation of the system of courts, etc.

First, the professionalism and principled stand of judges should be enhanced, which requires transparent, free of personal factors, publicly controlled competition during the first selection to the position of a judge.

Second, Ukraine should part with the two-level appointment of judges. Powers of appointment of all judges should be transferred to the High Council of Justice, staffed solely by the Congress of Judges of Ukraine, with guaranteed representation of courts of different instances and specialisations. Furthermore, it seems reasonable to propose a mechanism of incorporation of candidates from human rights organisations into that body. The Constitution should provide that judges' immunity is guaranteed not by the Verkhovna Rada but by a truly independent judicial body.

Third, powers of the Supreme Court of Ukraine require review and perfection by means of expansion. In particular, the grounds for review of judgements by the Supreme Court should be supplemented with dissimilar application of norms of not only the law of substance but also the procedural law by a cassation court.

Fourth, courts should be created and liquidated by laws.

Fifth, the system of judges' self-government bodies should be simplified and unified, and the State Court Administration should become an element thereof.

Furthermore, we should part with appointment of judges to administrative positions in courts by the High Council of Justice and, as an option, let judges of the relevant courts elect to administrative positions their most respected colleagues.

It seems reasonable to set up a public board under the High Qualification Commission of Judges of Ukraine to ensure public control of its activity. This will contribute to impartial selection of candidates for judges' positions and mitigate bias of the High Qualification Commission of Judges of Ukraine members solving issues of disciplinary responsibility of judges. **On the legislative level, there should be clear and coherent grounds for responsibility of judges, and an efficient procedure for bringing to disciplinary responsibility.**

For review of grave crimes, a court of 12 jurymen should be created.

Furthermore, admission of cases reviewed by Ukrainian appellate and cassation courts as courts of the first and second instances to the Supreme Court of Ukraine should be legislatively regulated. Now, there is a gap in the legislative regulation of that issue: for instance, in election disputes contesting decisions, actions or inaction of the Central Election Commission, the court of the first instance is the Kyiv Administrative Court of Appeal, the appellate court is the High Administrative Court of Ukraine, whose judgements are final and cannot be appealed against. So, contrary to the Constitution, Ukrainian citizens are deprived of the full and effective right to judicial defence (using all three instances) – since only cases reviewed by a cassation court are admitted to the Supreme Court of Ukraine for review, in presence of exceptional circumstances. ■

1 Internal specialisation of the judiciary is implemented in the form of functional division of duties among judges of the same court, when special chambers (separate structural units) are created or separate judges are nominated to review only some categories of cases falling within the court jurisdiction. – Radnyk Ukrainian Legal Portal, *http://radnuk.info/pidrychnuku/sydovi-orgonu/502-tuxui/10748-33---.html* (*Ed.*)

POWER OF THE JUDICIARY SHOULD BE RAISED

Serhiy KIVALOV,
Chairman of the Verkhovna Rada of Ukraine Committee for the Rule of Law and Judiciary

– Have the goals of the judicial reform of 2010 been achieved? What are the main positive and negative effects of the reform?

The judicial reform in Ukraine has been underway since 1992. So, measures related with the Law "On Judicial System and the Status of Judges" adopted in 2010 and associated regulatory acts are another and, probably, not the last stage of the judiciary and judicial system reform. Given the complexity of problems in the sector, one cannot imagine that all novelties immediately produce positive effects.

The following results are sure to be assessed positively.

First, it is the **completion** of the long-planned **specialisation of judicial bodies**, creation of a plain and clear three-level structure of local, appellate and high specialised courts with a special status of the Supreme Court of Ukraine, measures aimed at internal specialisation of judges.[1]

Second, regimentation of competences of courts of different jurisdictions and different levels by the principle "one link of the judicial system – one judicial instance", **liquidation of the disgraceful practice of some local courts** that in pursuance of political and not only political orders **by their decisions cancelled acts of supreme bodies of state power**, including the President and the Verkhovna Rada of Ukraine.

Third, **fundamental restructuring of the system of formation of the corps of judges** by leaving selection of contenders for judges' positions to one state body – the High Qualification Commission of Judges of Ukraine. This maybe not entirely but substantially barred interference of influential persons willing to have their own "pocket judges" in those processes. Furthermore, it added to the corps of judges almost 1 200 new judges, which helped to resolve the problem of overloaded courts. Now, every district court has at least four judges' positions.

Fourth, the assessment of the conduct of judges guilty of improper discharge of official duties and breach of judge's oath has become much more principled, as witnessed by the results of review of those issues by the High Qualification Commission of Judges and the High Council of Justice. And this list of gains at the present stage of the judicial reform is not exhaustive.

As far as negative effects are concerned, I believe that they stem not from the essence of the legislation novelties but from the lack of consistency at their implementation – although some adjustments in the legislation on the judiciary and judicial system have

already been made in the past two years. This will be done in the future, too. However, one should not question the fundamental provisions of the judicial reform here. Attempts to deny its gains are initiated by political and narrow corporate circles within the judges' community that in 2010 did their best to disrupt adoption of the bills on the judicial system modernisation.

– How would you describe the present situation in the field of justice with regards to the independence of judges, access to justice, and the efficiency of judicial protection of civil and human rights and freedoms?

In a law-ruled state, independence of a judge means his protection against unlawful influences, not from the law and moral norms. A lot has been done recently to oppose such influences, in particular, an automatic system of distribution of cases among judges was introduced, administrative powers of court presidents were limited, etc. However, the decisive role in solving this problem belongs not to external independence of a judge but to his internal pattern of behaviour, his personal conviction of the need to preserve his independence as one of the key merits of a judge, not to give in to threats and temptations.

Assessment of judges' independence by society immediately depends on the respect for the judicial branch, and vice versa, that respect is conditioned by judges' independence. So far, according to public opinion polls, it is rather low, although such assessment, unfortunately, also applies to other state institutions. To be sure, the judges' community itself should get rid of persons who undermine reputation of the judicial branch. That is why it is so important to promptly respond to cases of corruption and breach of the judges' ethics, up to expulsion of persons compromising the high title of a judge from the judges' community.

Independence of judges is strongly influenced by the judicial system funding and social security of judges. Despite some positive shifts in that field, the state now cannot meet all requests of judicial bodies and judges in this respect. Its capabilities depend on economic recovery in the country.

On the accessibility of justice: low trust in courts does not prevent millions of citizens from applying to courts for assistance. The dynamic of applications to bodies of administrative justice looks especially comforting, most of them are satisfied by courts. However, the low rate of practical execution of judgements remains a bottleneck in the system, for which, we are rightfully criticised by the Council of Europe structures.

– What are the key measures and in what sectors should they be implemented in order to establish independent and impartial courts in Ukraine?

The very question rightfully stresses the correlation between independence and impartiality of judges, being evident that independence of a judge conditions his impartiality. **A judge dependent on others' will, or with distorted ideas of his role in society, cannot be unbiased.**

In this respect, efforts should be continued, first of all, in court staffing, primarily by amending the Constitution of Ukraine in its present or renewed version.

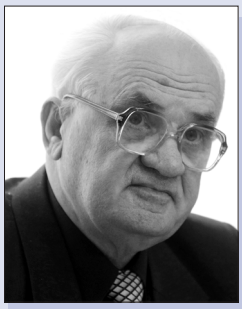
I consider it unnatural that city and district residents cannot influence local court staffing. This gives some judges the feeling of superiority over ordinary citizens, disrespect for them, impunity for infringement and even crimes against justice. So, one should think seriously about the option of direct election of judges by the population (of course not on a political platform), and revocation for judge oath-breaking. A judge elected by the people would be much more independent than an appointed one from unlawful influences of different authorities and their representatives. Solution of that issue could rest on the experience of election of judges in pre-revolutionary Ukraine, and in such modern countries as the Russian Federation (peace commissioners), the US and Switzerland. A detailed concept for such election was developed by scholars of the National University "Odessa Law Academy" and presented to the Constitutional Assembly.

I also see it reasonable:

- to raise the qualifying age for appointment of judges from 25 to 30 years – to appoint to judges' positions people tested by crucible of life and experience of work in the field of law;
- to provide in the Constitution provisions that the majority of the High Council of Justice members should be made up by judges elected by the Congress of Judges of Ukraine;
- to officialise the procedure for appointment and dismissal of court presidents and their deputies now provided by the Law "On the Judicial System and the Status of Judges";
- to gradually increase to six the number of jurymen in criminal proceedings of courts of the first instance, and to provide for participation of jurymen in consideration of all disputes of grave violent crimes.

Those and other proposals dealing with guarantees of independence and impartiality of judges should be discussed by law scholars and practicing judges. ■

FOCUS SHOULD BE ON TRUE INDEPENDENCE OF A JUDGE



Vasyl MALIARENKO,
President of the Supreme Court of Ukraine (2002-2006), Chairman of the Justice Committee of the Constitutional Assembly

– Have the goals of the judicial reform of 2010 been achieved? What are the main positive and negative effects of the reform?

The judicial reform results are manifested in the current state of the national judiciary, with its numerous problems and drawbacks, in particular, with guarantees of lawfulness and fairness in the country.

Those problems became a key policy point in Ukraine's relations with countries of the world and in fact shape its international image. But is everything so bad? Should we dramatise the situation?

Analysis of the available national and international data does not let us consider Ukraine an odious state among other European countries in this respect.

Statistics of the European Court of Human Rights are demonstrative here.

By the number of cases considered by that court, Ukraine, compared to other states, ranks fifth, after Russia, Turkey, Italy and Romania.

However, by the number of complaints per thousand residents, Ukraine ranks approximately 15th among 47 European countries with a rate of one complaint per 4 500 residents. For comparison, rates of other post-socialist countries may be cited: in Georgia, the rate is one complaint per 1 660 residents, in Moldova – 1 050, Serbia – 1 460, in Bulgaria – one complaint per 1 925 residents. So, **Ukrainians complain about the national judiciary three times less than Georgians, Moldavians, Serbs or Bulgarians**.

Of course, we should follow Great Britain, France, Germany, Belgium, the Netherlands, Sweden and Switzerland. However, one should be aware that they entirely differently view the court, law and order.

Assessing the work of Ukrainian courts from the viewpoint of European standards, one should be aware that over the 11 recent years, by September, 2012, the European Court of Human Rights passed 1 282 judgements against Ukraine that established 1 405 violations of the European Convention of Human Rights and Fundamental Freedoms. In that: 368 violations dealt with duration of execution of national court rulings, 175 – duration of proceedings in civil cases, 65 – duration of proceedings in criminal cases, 254 – problems with pre-trial investigation, etc. And only 55 (i.e., less than 5% of all violations) were violations committed by the courts proper.

So, not underestimating problems dealing with consideration of cases in courts, for **Ukraine to look fait, it should pay priority attention to execution of judgements, problems dealing with duration of court proceedings and pre-trial investigation**.

– How would you describe the present situation in the field of justice with regards to the independence of judges, access to justice, and the efficiency of judicial protection of civil and human rights and freedoms?

The key problem for the Ukrainian judiciary now is to ensure independence of judges and their guidance only by the law. Many regulatory acts intended to ensure independence of courts were passed but the **judiciary has not become more independent**. Court presidents continue to be summoned to high offices. Their promotion is coordinated, as before. Court presidents continue to summon judges. Court presidents continue to tap money from executive bodies.

To understand the standing of a judge in his relations with the authorities, one should just see how he treats barristers and prosecutors. Unfortunately, everybody sees the dependent, humiliating standing of a judge, including international structures. To support this thesis: at the National School of Judges, an anonymous poll was held among student judges, and answering one of the questions – "*Are you independent, deciding a case?*", 94% of judges gave a negative answer, saying that they are not independent. This is the seat of the trouble in Ukraine's judicial system. So, main attention should be on real, not imaginary independence of a judge and his guidance only by the law.

Speaking about the quality of court trial, it is deteriorating, litigation terms grow. Public opinion polls prove that society ever less trusts courts and judges, although 83% of all judgements are not appealed against, and only some 10% of contested judgements are ruled wrong. This is an alarming fact. It makes the state and every court to rethink its activity and take the required measures to change the society attitude to courts and judges.

Society makes conclusions of how the judicial system works on the basis of facts reported by mass media. Unfortunately, those facts are significant and therefore shape the image of the judicial system. It increasingly loses its attractiveness.

The key factors that prompt judges to do wrong and to pass unlawful decisions include:

- the mentality of people grown up in the conditions of the totalitarian system of governance, and impracticability of its rapid change;
- the imperception of the law as an obligation, as the basis of a state, by society and judges in particular;

- the inadequately wrong perception of the court as something secondary, less important than the legislative or executive branches – inadequately poor social protection of judges and their families, compared to officials of the same rank, as a result of which, the judicial branch does not feel of walk like a fully-fledges branch of power;
- promotion of a consumer ideology in the country infecting the whole society and judges as society members;
- dependence of judges on the authorities and executives;
- non-protection of judges and resultant fear of the authorities and their representatives;
- low morality of some judges, conditioned by the absence of education in courts and by emphasis on theoretical knowledge during personnel selection;
- concentration of all structures responsible for maintenance of judges' discipline in Kyiv, long and cumbersome procedures of bringing judges to responsibility;
- absence of legal mechanisms of immediate detection and cancellation of unjust judgements, especially if the concerned parties do not complain;
- impairment of the role and significance of the Supreme Court of Ukraine as a reputable generator of ideas, an exponent and defender of the judicial system, the guide of the court practice ensuring uniformity of the execution of justice in the country;
- extreme weakness of judges' self-government bodies that hardly can ensure the integrity of and order within the judicial system.

Ukraine demonstrates the lowest level of allocations to judges' training, the lowest level of IT support of courts, lacks special systems for assessment of judges' work. It is the only country in Europe that has no system monitoring the number of cases transferred to courts, the number of judgements, and the duration of proceedings.

At the same time, Ukraine is among the leaders by the number of disciplinary proceedings against judges. That is, the perception of punishment as the main driver of proper work of judges persists.

– What are the key measures and in what sectors should they be implemented in order to establish independent and impartial courts in Ukraine?

First – to make sure that court presidents (and, consequently, judges) are not made to stand at attention.

This depends on who, how, and on what terms elects or appoints them to that position. Just note how difficult it is to influence the Chairman of the Supreme Court of Ukraine. Why? Because the Court Chairman and his deputies are elected by the collective of judges. With such approach, judges will not let anyone give them unlawful directives or somehow exert pressure on them. If we want a judge not to be dependent on the court president, and the court president – on others, the latter should be elected by the collective of judges in all courts. Judges will not elect a nonentity, and will not let their elect manipulate them.

During the anonymous poll of judges at the National School of Judges, answering the question: "*Who should elect the court president and his deputy to ensure independence of judges?*", the High Council of Justice was mentioned by 31% of those polled, the Council of Judges of Ukraine – 3%, the collective of judges – 66%. Those figures demonstrate the assessment of the Council of Judges and the High Council of Justice. As regards the possible appointment of court presidents by the High Qualification Commission of Judges of Ukraine, no judge gave it its vote.

Second – the issue of responsibility of a judge. International norms require clear and concrete grounds to bring judges to responsibility. However, **grounds to bring judges to responsibility in Ukraine are now diluted and unclear, being one of the reasons why a judge is afraid to argue with the authorities**. The Constitution of Ukraine should contain a clear norm that a judge is dismissed from office for unlawful conduct only for concrete acts. The procedure and grounds should be clearly provided by the law.

To ensure independence of a judge is only a half of the battle. An independent judge also may break the law. So, the second half of the battle is to ensure that the independent judge passes judgements in strict conformity with the law. It is not less difficult than to gain independence.

Passage of judgements by an independent judge in conformity with the law rests, on one hand, on his high morality and honesty, on the other – on the fear of punishment, loss of job, damnation.

To ensure lawfulness of judgements, public control of the activity of a concrete judge is also needed. There should be an opportunity to audit and cancel an unjust judgement that entered into force even in absence of complaints.

In my opinion, the situation in the domain of justice may be fundamentally changed by three things:

- *first*: creation of favourable general preconditions for proper functioning of the court – social, political, legal, economic;

- *second*: actualisation of effective provisions of the Constitution and guarantee of their implementation;
- *third*: perfection legislative (including – constitutional regulation) judiciary. ■

SEPARATING CAPITAL FROM POWER IS THE NECESSARY CONDITION OF AN EFFECTIVE JUDICIAL REFORM

Petro SYMONENKO,
Head of the Communist Party of Ukraine faction

– Have the goals of the judicial reform of 2010 been achieved? What are the main positive and negative effects of the reform?

It depends on who pursued what goals, implementing the so-called judicial reform. If we speak about the interests of certain political and business clans willing to fully control the judicial branch and more, it may only be stated that they achieved much of what they planned.

But if we look at the so-called judicial reform from the viewpoint of an ordinary man, no changes for the better took place. On the contrary, possibilities to defend one's legitimate interests and freedoms, to prove one's rightness in an unbiased court trial were substantially complicated and actually reduced to the principle that the truth is not with him who is right but with the one who is richer and mightier.

In fact, all that reform is nothing but a "mechanical" process of redistribution of duties within the system and creation of its new structures, which made the judicial system fully controlled by the "golden calf" that seized power in Ukraine, so to speak, from bottom to top – from the tiniest farmstead to the Pechersk hills.

Therefore, **the main feature of the so-called judicial reform, without any reservations, is that the bourgeois government entirely disclaimed responsibility for legal protection of citizens and fully concentrated on guarantees of its immunity and impunity**.

I will illustrated this by the example of the new Code of Criminal Procedure, the main and most serious problem of which is presented exactly by the absence of any state guarantees of the victim's right to have offenders brought to responsibility for committed crimes.

What is meant?

For instance, according to Article 477 of the new Code of Criminal Procedure, the list of cases that may be initiated only upon the victim's application and considered by the court without obligatory participation of a public prosecutor now includes 60(!) elements of crimes. They include, in particular: intentional infliction of moderately severe bodily injuries; threat of homicide, battery; violation of equality of citizens dependent on their racial, national affiliation; violation of secrecy of correspondence; violation of inviolability of housing; abuse of official powers, etc.

Therefore, bringing to criminal responsibility for those crimes now becomes a personal problem of each separate citizen.

Under the new Code of Criminal Procedure, a victim now has to oppose a criminal in court on his own, since operational search bodies are no longer responsible for detection of crimes. Furthermore, the rights of a suspect or an accused person, according to the new Code of Criminal Procedure (Article 42), are much wider than those of a victim (Article 56).

What does this mean in practice? This means that, for instance, a pensioner or an ordinary citizen suffering from the arbitrariness of a rich neighbour or official, in order to prove his rightness in court and to have criminals punished, is not only to file an application to law-enforcement bodies – he has to investigate the case independently: hire detectives, collect evidence, etc. It is big money, where a simple worker, peasant, small entrepreneur can take it …?

More than that, the victim is obliges to reveal to the accused all available materials produced to the court as evidence of guilt. And the accused may conceal any data and documents of circumstances of the crime.

That is, he is right who has more "rights" and money.

– How would you describe the present situation in the field of justice with regards to the independence of judges, access to justice, and the efficiency of judicial protection of civil and human rights and freedoms?

I will say briefly: **the judicial system existing in Ukraine both before and after the reform does not meet the demands of society**, does not ensure protection of an ordinary citizen, connives impunity of mighty and wealthy criminals, naturally provokes victims to establish justice on their own, resorting to the mob law. All this, against the background of a severe socio-economic crisis, may be the last drop that will fill up the cup and lead to an uncontrolled social explosion and civil confrontation.

– What are the key measures and in what sectors should they be implemented in order to establish independent and impartial courts in Ukraine?

The first and foremost – **no reform, including the judicial system reform, will benefit an ordinary man and woman as long as power belongs to capital**.

Second, the reform is to provide for stronger responsibility of the state for protection of its citizens and equalise conditions for parties to litigation, irrespective of their wealth and social status.

Next, responsibility of judges for knowingly unjust judgements, responsibility of law-enforcement officers for violation of civil rights and freedoms, unconscious performance of their duties, responsibility for performance of criminal or unlawful orders and directives given, so to say, "from above", must be very severe.

I am absolutely positive that judges' activity should be transparent and public, and judges should be not appointed but directly elected by citizens.

But the main thing, I say again, **is to separate capital from power – this is the necessary condition of an effective judicial reform and of any reform serving interests of ordinary men, men of work**. ■

HOW NOT TO REFORM THE JUDICIAL SYSTEM

Vasyl SIRENKO,
Member of the Constitutional Assembly

– Have the goals of the judicial reform of 2010 been achieved? What are the main positive and negative effects of the reform?

The judicial branch, the judicial system, courts and judges are to pursue one goal – to ensure unbiased, honest, fair, lawful, accessible, comprehensible justice. From this viewpoint, **there was no judicial reform in Ukraine in 2010 in connection with the adoption of the Law "On the Judicial System and the Status of Judges"**. On the contrary, that Law threw Ukraine's justice back into the "embrace" of corruption and judge "collectors", which is inconsistent with the natural purpose of courts. Since the adoption of the Constitution of Ukraine in 1996, administrations of all Presidents had sought the adoption of the law whereby the ruling political-oligarchic establishment could control the judicial branch. Parliament for 12 years withstood those encroachments of Presidents Leonid Kuchma and Viktor Yushchenko, but only President Viktor Yanukovych with the Party of Regions helped by Communists with the adoption of the Law "On the Judicial System and the Status of Judges" managed to do that in 2010.

What was the main idea of the authors of the Law "On the Judicial System and the Status of Judges"? *First*. To create a system of high specialised courts in all lines of the judiciary as closed corporate systems where judgements are made final and cannot be appealed against. *Second*. To deprive the High Council of Justice of procedural capabilities to revise judgements of High specialised courts by utmost restricting its competence. Therefore, specialised courts, according to the law, strongly influenced by the executive branch in the issues of funding, appointment of judges, determination of the number of courts and judges, etc., were released from professional control of the Supreme Court and could "make" arbitrary justice jointly with the Presidential Administration, the executive branch and the judicial union of Regionalists and Communists in Parliament. It is hard to invent better, more optimal conditions for development, literally "fostering" of corruption in courts. Indeed, after the Law "On the Judicial System and the Status of Judges" entered into effect in 2010, the practice showed that it secured the achievement of the corrupt objectives. However, it failed to provide justice.

They say: "ends do not meet". The authors had to urgently make amendments to that ill Law. Nearly 15 amendments have been made. However, the essence of the Law as an algorithm of corruption in courts did not change. Judge by yourselves: the High Specialised Business Court reviewed a case. According to amendments to the Law, a party may file an appeal to the Supreme Court, but the permission for that (admission) is given by the High Specialised Court whose judgement is contested. This is below criticism even for a naïve mind. It is an ordinary corrupt pork barrel, intentionally made for high specialised courts, for "collectors" to never be empty. Court presidents' influence on judges was not removed, really automated distribution of cases is not provided: automatics work, but next to it, people work, too, producing the required result; the Ministry of Justice influence on the judicial system was not removed, judges' meetings with parties beyond the court room are not ruled out, **nothing has been done to enhance responsibility of judges for unlawful rulings**, incorrupt, professional, impartial selection of candidates for judges is not provided, and many, many other issues important for the judicial system are not resolved, or were resolved only to ensure control by the establishment.

What was good about this "judicial reform"? Only one thing: **it showed how the judicial system should not be reformed**. We learn from mistakes. The Law "On the Judicial System and the Status of Judges" of 2010 is a crude, unconstitutional, corrupt attempt to reform courts in the interests of not the state but the politicians now in power. By the way, all "opposition members" in Ukraine pay little attention to that lame Law on judiciary, maybe because they secretly hope to come to power and use its corrupt potential and tools of influence on judges. So, from the viewpoint of state interests, that so-called "judicial reform" not only failed to achieve the legitimate goals of the judiciary but buried them under its selfish goals – to secure control of courts.

– How would you describe the present situation in the field of justice with regards to the independence of judges, access to justice, and the efficiency of judicial protection of civil and human rights and freedoms?

Independence of judges is a myth cultivated in Ukraine for all 20 years of its independence. Under this political system, under this legalised judicial system, without radical volitional political changes, it is naïve to speak about independence of judges.

There are dozens of methods to influence a judge by the executive branch and by big business now in power, by court administrations, let alone the "collectors" who, as the practice shows, also exert their influence. Now, the situation is paradoxical: on one hand, influence on judges exists, on the other – judges became irresponsible, thanks to their indefinite stay in office, they felt that they can do whatever they want and not answer for that. **Unjust judgements, discretional interpretation of the law and discretional assessment of facts of a case became usual things in judges' life.** Tell me how many times a judge

must make a mistake, pass an unjust judgement, to be brought to responsibility, of even removed from office? Neither the Law nor the practice gives an answer. Even when the European Court of Human Rights following people's claims obliges Ukraine to reimburse losses to Ukrainian citizens in excess of €179 million, judges who "led" citizens to the European Court are not guilty. They inflicted losses on the state to the amount of €179 million – and bear no responsibility, so what achievement of the judicial reform goals can we talk about? **We achieved nothing but collapse, paralysis, deadlock in the judicial system' development in Ukraine.**

Why is Ukraine among the five countries whose citizens the most often (thousands of applications) apply to the European Court of Human Rights? Because **in Ukraine, the problem of judges' independence is not corrected, not solved, along with the problem of judges' responsibility**.

In Ukraine, judges became independent, first of all, from the law and entirely irresponsible for their decisions. The issue of accessibility of justice should be viewed from that viewpoint. If a court that passed a judgement in a case itself decides whether to allow it to be appealed against in the Supreme Court, what accessibility of justice can we talk of? We should also note the total poverty of Ukrainian citizens, compared to Europeans. They simply cannot afford litigation costs. **The issue of unconditional execution of court judgements is also not resolved, as a result, litigation becomes a waste of time and money.** Some cases last for years. I think that accessibility of justice in Ukraine is another "Ukrainian dream".

The efficiency of judicial protection of human and civil rights and freedoms is out of the question. Although formally, human and civil rights and freedoms are declared in the in Constitution of Ukraine, and everyone may apply to court to defend his rights, it is a mere formality. In reality, neither the legislative not the executive or judicial branch provides conditions and opportunities for a Ukrainian citizen to exercise his constitutional rights and freedoms. The efficiency of judicial defence of civil rights and freedoms is vividly illustrated by thousands of applications of Ukrainian citizens to the European Court of Human Rights for protection of their rights. Up to 8 million cases are annually considered in Ukraine. Judges mention that figure as an indicator of respect for the judicial system in Ukraine. I see it as an indicator of imperfection, lack of mobility and lawfulness in the judicial system activity in Ukraine.

They rightfully say: "do not be afraid of the law – be afraid of a judge". Unjust, arbitrary judgements are a source of great many cases and an indicator of inefficiency of judicial protection of human and civil rights and freedoms. Adding the total corruption of the judicial system, how can a citizen have his rights and freedoms defended in Ukrainian courts? Practically, difficult, very difficult, more exactly – incidentally, rather than as a norm. **Ukraine is next to living not by the law but by the codes of the ruling elite.** Rights and freedoms an ordinary citizen are not on the agenda. Unfortunately, this is true not only for those who are in power but also for those who still fight for it.

– What are the key measures and in what sectors should they be implemented in order to establish independent and impartial courts in Ukraine?

I think that first of all, an entirely new Law "On the Judicial System and the Status of Judges" should be urgently developed and adopted, and the Constitution of Ukraine should be seriously amended in the issues of justice. The High Council of Justice of Ukraine should be readmitted to the domain of justice as the supreme judicial body. It should be empowered to audit judgements of High specialised courts, then the European Court of Human Rights will have fewer problems with Ukraine. The Supreme Court judgements in concrete sectoral cases should serve as precedents, this will stop arbitrariness of judges in courts of lower instances. Departure from the precedent should be viewed as a ground for cancellation of a judgement. The High Council of Justice should become the methodological centre of the judicial branch activity in Ukraine. It should be responsible for all issues of the judiciary in Ukraine and have the right of legislative initiatives in the issues of justice and judiciary. The new law on judiciary should be developed by systemic network methods. First, the goals of the law should be clearly set. For instance, the law on judiciary is to achieve the following goals:

- liquidation of corruption in courts;
- guarantee of independence of judges and their responsibility for the passed judgements;
- provision of accessibility of justice;
- guarantee of proper and full funding for courts;
- guarantee of impartiality, lawfulness, fairness of judgements;
- development of court internal democracy and judges' self-government; liquidation of influence of any actors on judges;
- introduction of mutual control of judges; organisation of round-tables and conferences of judges to review disputable judgements; procedural capabilities to revise erroneous judgements because of not only newly revealed circumstances but also, say, misinterpretation of the law by a judge, or unjust assessment of facts of the case, and other goals. **A judicial system should be created that can cure itself, correct mistakes, rule out unprofessional or biased conduct of judges.**

For each of these or other goals, a system of measures, means, methods, ways, tools of the goal achievement should be developed. Only after that, the results should be formalised as the legal substance of the law on judiciary. During that systemic and urgent work, amendments dealing with justice in the new wording of the Constitution of Ukraine will also be formulated. **The main thing is to snatch the judicial system away from the selfish mercenary embrace of the ruling politicians.**

The court must be free, that is – responsible, unbiased, accessible, transparent, clear to everyone why applies to it. Creation of fair court in Ukraine is also the first strong link in the chain of reforms that may pull the whole chain to the level of democratic, progressive state-building. In all developed market economies, market outrage and all associated problems are cured and brought in compliance with the law and common interests, using fair courts and fair media.

Unfortunately, those institutions are in decay in Ukraine, and as long as courts are venal, and the authorities ignore mass media and disregard critical reports, Ukraine will only see the PR noise and liberal fluff of democracy, reforms, state-building, and in the real everyday agenda – decay, corruption and tacit protests of the absolute majority of the population that, driven to despair, will once erupt with social hatred to its infamous selfish rulers. I guess that **reforms in Ukraine should begin with courts and all law-enforcement bodies, with obligatory, official response of the authorities of all levels to criticism in mass media**. Without such beginning, all reforms in Ukraine are doomed to smudge and fade away, smudge and fade away.[2] ■

TRUE INTENTIONS AND ACTIONS OF THE "REFORMISTS" IN NO WAY MET THE PUBLICLY ANNOUNCED GOALS

Mykola SIRYI,
Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine

– Have the goals of the judicial reform of 2010 been achieved? What are the main positive and negative effects of the reform?

Specific of the "judicial reform of 2010", the true intentions and actions of the "reformists" in no way met the publicly announced goals. In reality, the goals of introduction of reasonable litigation terms, uniform application of the law, reduction of administrative influences in the system of justice and so on were proclaimed nothing but declarations. The "reformers" intentions from the very beginning pursued different goals, namely – to effectively liquidate the High Council of Justice of Ukraine as the supreme judicial body, to undermine fundamentals of the judges' self-government system, to destroy independence of judges, to *de facto* subordinate courts to political power.

Positive results are absent. Forms that outwardly may seem good, such as competitive selection of candidates for judge's positions, in reality do not serve the interests of society and justice due to total politico-administrative influences and corruption.

The main deficiency is that the "current reformists" struck out 20 year of efforts by many domestic and foreign politicians and men of law at gradual improvement of the system of justice in Ukraine. In particular, over the past three years, the structure of the judicial system and judges' self-government was seriously distorted, the judicial procedure deteriorated, the High Council of Justice was deprived of powers of the supreme judicial body in the country, the improperly staffed High Council of Justice was used to totally control all courts and all judges, and finally, political persecutions and "selective justice" were introduced.

– How would you describe the present situation in the field of justice with regards to the independence of judges, access to justice, and the efficiency of judicial protection of civil and human rights and freedoms?

Now, the level of independence of judges is the lowest for the period of 1990-2013. There is a firm impression that in some cases, judgements are entirely written beyond court rooms and not by judges. Mass media from time to time reasonably report that publicised cases are "accidentally" reviewed by judges subject to criminal prosecution or disciplinary proceedings, fraught with dismissal from office. Court funding remains extremely low. Accessibility of justice has been entirely done away with in the constitutional, administrative, business and criminal justice, the situation with civil cases is a bit better. The situation with execution of judgements remains too bad. **The efficiency of judicial protection of human and civil rights and freedoms is now left to the mercy of political authorities and the executive branch** (take for instance the Government's letters to courts in cases of pensions and social benefits) **and is a derivative of politically manipulation of courts**. All this is fully attested to by the critically low public trust in courts (now, some 80% of Ukrainian citizens distrust national courts).

– What are the key measures and in what sectors should they be implemented in order to establish independent and impartial courts in Ukraine?

To achieve the set goal, the following should be done, in the first place: to legislatively restore the constitutional status of the Supreme Court of Ukraine; to restore the fundamentals of judges' self-government, in particular, the principle "one judge – one vote"; to renew the High Council of Justice according to the principle "the majority belongs to judges democratically elected by judges"; to bring powers of the High Council of Justice in compliance with the Constitution of Ukraine; to amend procedural codes in order to establish the judicial branch supremacy within the legal system; to "reset" constitutional justice, now politically motivated (in this respect it is desirable to change the procedure for the Constitutional Court of Ukraine staffing); to promote professional freedom of speech within the law community and to reform allied legal institutions that immediately influence judges' independence.

The task of orientation of Ukrainian judges to the practice of the European Court of Human Rights remains high on the agenda. ■

[2] I have presented concrete proposals of the judicial system reform in a few big articles in the *Holos Ukrayiny* newspaper: Another draft law on judiciary, or a plan of building a fully corrupt judicial system of March 14, 2009; The end of reforms? of December 10, 2009; The judicial branch: a fundamentally new concept of reform is needed of April 13, 2010; They try to deprive citizens of an opportunity to defend their constitutional rights and freedoms in the Supreme Court of Ukraine of June 18, 2010; Complicity in forcible takeover became usual practice for courts of September 6, 2012; What do we do with judiciary. Reform deadlocked. What to do? of October 9, 2012; *Pravo Ukrayiny* journal: Ukraine's judicial system requires fundamental radical reformation, No.8, 2012; On the issue of the Supreme Court place and role in Ukrainian judiciary, No.12, 2012 (*in Ukrainian*).

Those willing to see my proposals of reformation of Ukraine's judicial system in more detail may read those articles, almost everything is presented there.

ENSURING THE JUDICIAL INDEPENDENCE IN GERMANY*

Hans-Otto BARTELS,
President of the Regional Court Aurich
of Land Lower Saxony (Germany)

Courts occupy a special place in the mechanism of the state power of Germany. The courts serve as the guarantors of the rights and ensure the compliance of Germany with its legal character, enshrined in the Basic Law.

German judicial system, which main task is to provide justice in the state, hasa long tradition and a long history of development. Its experience can be useful to young democracies such as Ukraine. This experience confirms, in particular, a generally accepted idea that the independence of the judiciary, which is implemented primarily in the independence of judges, is the key to justice in a legal state.

This article outlines the main principles and mechanisms that ensure judicial independence in Germany. The excerpts from the documents that are commented in the text are listed in the Box "*The Main Legislative Acts of the Federal Republic of Germany on the Independence of Judges and Justice*".

THE MAIN LEGISLATIVE ACTS OF THE FEDERAL REPUBLIC OF GERMANY ON THE INDEPENDENCE OF JUDGES AND JUSTICE (excerpts)

The Basic Law of the Federal Republic of Germany
Grundgesetz der Bundesrepublik Deutschland

Article 20

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the nation. It is administered by the nation through elections and votes and through specific bodies of legislative, executive and judicial powers.

(3) The legislative power is related to the constitutional order, the executive and the judicial ones are related to the laws and rights.

(4) If other means cannot be used, all Germans have the right to resist anyone who tries to eliminate this system.

Article 92

Judicial power is entrusted to judges; it is performed by the Federal Constitutional Court, by the federal courts and land courts as provided for by this Basic Law.

Article 97

(1) A judge shall be independent and subject only to the law.

(2) Judges, appointed permanently to full-time position may be involuntary dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of juridical decision and only for the reasons and in the manner specified by the laws. The legislative may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

German Law on Judges
Deutsches Richtergesetz

§ 25 The principle (*Grundsatz*)

A judge shall be independent and subject only to the law.

§ 26 Official supervision (*Dienstaufsicht*)

(1) Judges are only subject to disciplinary supervision as long as it does not interfere with judicial independence.

(2) Upon condition of the observation of the requirements of paragraph 1, a service supervision provide powers to make observations in the case when the judge carries out his responsibilities in a manner inconsistent with the established order, and give him a warning with demand to perform his duties without delay and in accordance with established procedures.

(3) If the judge says that the actions within official supervision violate his independence, at the request of the judge, the court takes decision in accordance with this Law.

I. Independence of judges and justice

The main provisions of ensuring an independent judiciary in Germany are the second part of Article 20 and also Articles 92 and 97 of the Basic Law of the Federal Republic of Germany. It should be emphasised that the principle of separation of powers enshrined in the second paragraph of Article 20 of the Basic Law, the definition of foundations of the judiciary in the Constitution (Article 92) and the independence of judges belong to the essential elements of the theory of law (political and legal theory) and the theory of constitutional law. Also, they represent the generally accepted European standards of the judiciary.

* This is a short summary of the report presented by the author at the Expert Discussion "The 2010 Judicial Reform: Does it Bring the Ukrainian Justice Any Closer to European Standards?" (Kyiv, April 4, 2013).

More detailed provisions on the status of judges in Germany are enshrined in the German Law on Judges (hereinafter – the Law on Judges), as well as in similar laws of the federal lands.[1]

Judicial Independence

According to our understanding of constitutional right, judicial independence is divided into subject (functional) and personal ones.[2]

(*a*). **Subject independence** means that judges delivering justice cannot be given any instructions. That is to say that neither his Chief Officer (the President of the court) nor the Minister of Justice or other state officials can interfere in his decision making.

The interventions that affect or may affect the course of the proceedings and thus the making a fair decision by the judge are also recognized as forbidden. We are talking about any directives, suggestions or recommendations of the Chief Officer, even related to the appointment of the date and the time of hearings, to the citation of certain persons to the hearing or reduction or extension of the terms within the consideration of a particular case by the judge.

If the judge finds that one or another event of supervision affects its judicial independence, he may appeal to the special court – the Court of judicial services (hereinafter, the disciplinary court) – and get its decision.

(*b*). **Personal independence** guarantees to the judge that he, even in the case of making unpleasant and unpopular decisions will have no negative consequences for himself, for his life and career. Thus personal independence also serves to ensure the subject independence of judges and is enshrined in Article 97 of the Basic Law.

According to this article, judges, appointed permanently to full-time position may be involuntary dismissed, permanently or temporarily suspended, transferred or retired **only by virtue of juridical decision** and only for the reasons and in the manner specified by the laws.

Such reasons are specified in §24 of the Law on judges. In accordance with the provisions of this paragraph, official powers of the judge are over after the entry into force of the judicial decision, if:

- he was found guilty, and a custodial sentence was imposed on him for at least 1 year for committing an intentional act,
- a sentence was imposed on him for committing an intentional act as a betrayal of peace, treason, endangering the democratic rule of law or the treason with endangering external security,
- his inability to hold public office was recognised or
- he was denied the basic right (rights) according with Article 18 of the Basic Law.[3]

That is to say that, in these cases, the decision is not made by the Disciplinary Court, but by other competent courts. Therewith, the judicial powers are over without the need for any additional actions / decisions on behalf of the state.

In conclusion, two important theses on judicial independence should be emphasised:

- not only in the case of "forced" resignation and dismissal, but also in relation to the transfer of the judge in case of his disagreement, the decision is made by a special disciplinary court,
- an official supervision has to be very restricted and should not extend to the area of justice delivered by the judge, i.e. the consideration of his cases.

II. DISCIPLINARY SANCTIONS AGAINST JUDGES

Along with the fact that the judge has a subject and a personal independence, he is subject to official supervision and, respectively, to the performance of the particular disciplinary law.[4]

Disciplinary measures that may be applied to a judge are the following: reprimand, fine, transfer (with a possible reduction in salary); dismissal.

A distinguishing characteristic of the disciplinary law against judges, compared with the general requirements of the disciplinary law in the public service, consists in the fact that the Chief Officer can independently apply to the judge **only one** disciplinary sanction of the first level, i.e. to declare him a reprimand. All other activities must be allowed by disciplinary tribunal. This means that the highest governing body of justice (usually the Ministry of Justice) must apply to the disciplinary court with a petition for receiving a permission to apply one of the above disciplinary sanctions to a judge.

This order of disciplinary proceedings helps to prevent the situations where a governing body in the area of justice could apply to disobedient and "uncomfortable" judges certain penalties or even dismiss them from office. The current system also provides effective protection of judicial independence as widely as possible.

In summary, there are two important statements fixed herein:

- disciplinary sanctions are applied in the vast majority only with the permission of the special court instance,
- several types of penalties should be provided for a full consideration of the circumstances of the disciplinary case and judge's conduct.

III. LEGAL PROCEEDINGS IN DISCIPLINARY CASES AGAINST JUDGES

Legal proceedings in disciplinary cases against judges are organised in accordance with §79 of the Law on Judges and involve at least two instances (and three instances, if the cassation is allowed).

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1 In Ukrainian literature it is translated as the "Federal Law on Judges". – *Ed.*

2 In Ukrainian literature it is translated also as "material", "substantial": *sachliche und persönliche Unabhängigkeit – Ed.*

3 The above mentioned article states: "Anyone who uses freedom of expression, including the freedom of the press ... teaching ..., collections ... associations ... secret correspondence, postal, telegraph and telephone services ... the right to property ... or the right of asylum for struggling against the foundations of democratic system loses these basic rights. Loss of rights and its limits are defined by the decision of the Federal Constitutional Court". – *Ed.*

4 German Law on Judges, §26, paragraph 2.

Thus, in Lower Saxony the Disciplinary Court is established as the corresponding body of the Land Court in Hanover. It consists of a Presiding Judge, one permanent and one non-permanent member. All members of the Court shall be appointed permanently by professional judges and appointed to its body by the Presidium of Land Court for three years. Since the body of the Presidium is elected by all judges of this Land Court, the appointment of judges to the disciplinary court is considered as a basic democratic event, which also aims to ensure judicial independence.

The second instance is the Judicial Chamber. In Lower Saxony it is formed in the Supreme Land Court in Celle. This court makes decisions consisting of: one Presiding Judge, two permanent and two non-permanent members. The appointment of members of the court takes place in the same way as in the previous case – by the Presidium of the Supreme Land Court.

The competences of the Disciplinary court and Judicial Chamber are fixed in more detail in §§51-52 of the Law on Judges of Lower Saxony. The peculiarity lies in the fact that the Chamber for judicial service operates not only as a second instance, but as authority that deals with complaints of judges about judicial measures taken to them by official supervision. It can take place when a judge states that some actions of official supervision violate his independence.[5]

Decisions on **cassation appeals**, the admissibility of which is also regulated by law, are taken by the Disciplinary Court on the level of Federation, where it is formed as a relevant court body in the Federal Supreme Court.

Thus, an important thesis of this chapter is that a judge can not only apply to the Disciplinary Court, but he also has the possibility to challenge its decision in a few instances.

IV. SELECTION OF CANDIDATES FOR A POST OF JUDGE AND PROMOTIONS

If there is a need to appoint new judges, a relevant announcement is published in professional journals and daily press declaring a competition. Anyone interested in participating in the competition must submit specified documents to the relevant regulatory body in the area of justice – usually it is the Highest Land Court or the Ministry of Justice.

Then a pre-selection takes place, based on the grades obtained by candidates in the first and second legal state examination.[6] The pre-selection is based only on the level of professional competence of candidates.

The best of the candidates (i.e., those with the highest scores after the legal state exams) are invited to the so-called interview, which takes place following the form of the Assessment Center.[7]

The main purpose of the interview is to form commissioners' impression of personal suitability of the candidate to occupy the post of judge. The most important properties that he has to show to the members of the commission shall be his social behavior, his ability to work in a team, his readiness for action in conditions of high mental and physical stress, as well as intelligent and sympathetic attitude to the needs and concerns of others.

A representative of the Minister of Justice, a representative of the Land courts and a representative of judicial public authorities participate in this interview on behalf of the agencies of justice. The Commission conducts interviews with candidates in small groups of 3-5 people in several stages. It should be noted that during these interviews real court cases are discussed or certain court situations are acted out, or members of the group have to perform some common task (to prepare texts of rulings, decisions, etc.).

After interviewing the members of the commission make decision about the suitability of candidate(s) to occupy the post of a judge and report their viewpoint to the Ministry of Justice, which makes the final decision regarding the appointment of a candidate.

When the question is about administrative positions in courts (e.g., the Presiding Judge in the Land Court, the Head of district or other court, etc.), it also must be announced without any exceptions in the relevant print media of justice agencies, in particular in Federal professional newspapers and journals.

The first precondition for participation in the competition is a successful completion of the trial practice by the candidate, taking place in the High Land Court by sending there a potential judge for a period of six months.[8] During the practice, the candidate for promotion works at one of the senates of the respective court. After the trial practice the Chairman of the Senate expresses his opinion on the qualifications of the candidate in a written expert report. Based on this conclusion, the president of the relevant High Land Court gives the ultimate character reference for the candidate.

As for specific administrative position, which was a subject of competition, the future judge receives another characteristic of his Chief Officer. This characteristic has to be completed by a precise evaluation of the capability of the judge to occupy the position announced for the competition.

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5 Ibid, paragraph 3.

6 The practice of legal education in Germany involves the first legal state examination after the four-year study of jurisprudence. In case of successful examination, a mandatory two-year internship involving practical work, e.g. in civil court, prosecutor's office, advocacy etc. is required. After this practical training to the professional activity, the second legal state exam, which consists primarily of practical deciding cases, is passed. Only after passing these two exams lawyer shall be entitled to aspire to the position of judge (to participate in the relevant competitive selection) or practice law. – *Ed*.

7 Assessment Center is one of the methods of selection and evaluation of personnel, which is widely used in Germany. It consists of a group testing that includes role-playing games, solving practical problems, acting out real situations and so on. The participants of testing are observed by psychologists who assess not so much their professional training as their so-called "soft skills" - leadership skills, ability to make decisions in crisis situations, ability to work in team etc. – *Ed*.

8 Testing practice should be usually passed five years after the judge's appointment to a permanent position.

Example: As a result of competition for appointment to the post of the Presiding Judge, Mr. (Mrs.) X is suitable for the position in question

absolutely /
more than very good /
very good /
good /
satisfactory /
unsuitable.

The documents submitted by the candidates are sent to the Ministry of Justice, which has to form a ranked list (Ranking) and to appoint the best ranked candidate to the post of judge.

Depending on the importance, the appointment can also be made by the land government or its minister-president.[9] The law provides the possibility of the involvement of representatives of the judiciary, the Commissioner for Women and the Commissioner for persons with disabilities in the process of selection and appointment of judges.

Before the decision is taken by the competent institution and the position is given to one candidate, other members of the selection process must be informed about it. They are informed that an appointment of a certain candidate to the post, after the declaration of the result, has been prepared. In this way it guarantees that the participants who were not successful in the competition may initiate a verification of the intended appointment by an appeal to the administrative court (usually, in the form of lodging a complaint using a temporary legal protection, i.e. the final appointment does not occur before the adoption of the final decision by the administrative court). This ensures that the position, which was the purpose of the competition, will remain free until the case is considered by the administrative court.

In consideration of the foregoing premises, we should pay attention to the following important statements:

- a public competition has to be announced not only for the permanent position of judge, but also for administrative positions in courts,
- during a transparent selection procedure as an estimation of candidate's professional expertise as an estimation of his human qualities, his suitability for the administration of justice and dialogue with the parties and other participants of the process should be considered,
- the participants of the selection process should have the right to appeal the decision of the relevant body in the court using the temporary legal protection to avoid creating irreversible circumstances when considering such an appeal (i.e. the appointment of a candidate before the completion of the hearing of the complaint per se).

Expert Dicussion, 4 April 2013

[9] It should be added that collegial bodies, committees for appointing judges to judicial and administrative positions, function in Germany as at the federal level, as in some federal states.

"OLEKSANDR VOLKOV vs UKRAINE": THE ECHR JUDGMENT AND ITS EXECUTION[1]

Mykola MELNYK,
Legal Research Consultant of the Razumkov Centre

The case of Oleksandr Volkov vs Ukraine has become unprecedented, both for ECHR and for Ukraine. For ECHR – in terms of the remedies provided in the judgment, for Ukraine – because of two reasons. The first reason is the nature of committed violations of the European Convention on Human Rights and remedies provided by ECHR. The second is that the Committee of Ministers of the Council of Europe set September 2013 as the date by which, Ukraine was to inform about the execution of the ECHR judgment. That term has expired but the ECHR judgment remains to be executed. At its meeting on 26 September the Committee once again called upon the Ukrainian authorities to immediately reinstate the judge in his position, noting, in particular, the presence of vacancies in the Supreme Court.[2]

Apparently, this situation is conducive neither to Ukraine signing the Association Agreement with the EU, nor to the improvement of its international image of a state strictly abiding by the international commitments voluntarily assumed by it.

"THE CASE OF OLEKSANDR VOLKOV": ORIGINS AND EVOLUTION

On 17 June 2010, in the midst of the judicial reform, the Verkhovna Rada acting upon the submission of recommendations by the High Council of Justice (HCJ) and the concerned parliamentary Committee dismissed the Supreme Court Judge Oleksandr Volkov due to an alleged "breach of oath". At that time, Mr. Volkov was also the Deputy Chairman of the Council of Judges of Ukraine and played a key role for judicial self-government. His dismissal was initiated by Volodymyr Kolesnychenko and Renat Kuzmin, the HCJ members.

The events termed as the "breach of oath" took place as far back as 2003-2006 and dealt with a number of procedural judgments passed by Mr. Volkov, and his participation as a member of a panel of the Supreme Court judges in cassation review of judgments involving his wife's brother – a judge of an appellate court.

From the very beginning of the "case", the biased position of HCJ and ill-founded nature of its judgment were obvious, which was openly noted by experts. In particular, right after the passage of the decision, the HCJ member Serhiy Safulko sent a letter to the Verkhovna Rada noting that the HCJ showed bias and partiality in taking decisions, its breach of the legislatively provided decision-making procedure and its political motives, and requesting the unconstitutional submission not to be considered.[3]

The Supreme Court President Vasyl Onopenko also warned Parliament against the unlawful approach to the issue of dismissal of judge Oleksandr Volkov, reporting violation of the law by the concerned Committee when considering the matter, and doubts about the impartiality and fairness of its consideration at a plenary sitting by the Parliament. In his appeal to the Parliament he stressed: "There is evidence that a demonstrative reprisal of a judge of the Supreme Court of Ukraine is planned, on contrived grounds, without giving an opportunity to defend himself from the accusations made, to retaliate for his principled stand in office of the Deputy Chairman of the Council of Judges of Ukraine and a member of the High Council of Justice".[4]

However, HCJ and Parliament ignored the requests.

Oleksandr Volkov appealed against his dismissal to the High Administrative Court of Ukraine (HACU) which, however, refused to rule illegal and cancel the relevant acts of HCJ and the Verkhovna Rada.

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1 A reduced version of the article was published in *Dzerkalo Tyzhnya* weekly on August 31, 2013, *http://gazeta.dt.ua* (*in Ukrainian*).

2 Council of Europe reminded of the need to return Volkov to the Supreme Court. – *Tyzhden,* September 26, 2013, *http://tyzhden.ua* (*in Ukrainian*).

3 Umanets A. Speaker is requested to defend the Supreme Court. – *Ekonomicheskie Izvestia,* June 14, 2010, *http://state.eizvestia.com* (*in Ukrainian*).

4 Letter by the Supreme Court of Ukraine President Vasyl Onopenko to the Verkhovna Rada of Ukraine Chairman Volodymyr Lytvyn dated June 7, 2010. – Supreme Court web site, *http://www.scourt.gov.ua (in Ukrainian).*

Then, Oleksandr Volkov applied to ECHR, arguing that his dismissal involved numerous violations of the European Convention on Human Right, the Constitution and laws of Ukraine. The Government of Ukraine (whose stand was presented in ECHR, first, by Valeriya Lutkovska, and then – by Nazar Kulchytskyi) denied the rationale of Oleksandr Volkov's complaint.

JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

On 9 January 2013, ECHR passed a judgment that ruled the dismissal of Oleksandr Volkov illegal, **finding** that the Ukrainian authorities' decision to dismiss Oleksandr Volkov from the office of a judge had been taken in violation of such basic principles of the Convention as: independence and impartiality; legal certainty; consideration of the case by "a court pre-established by the law"; the right to respect for private life (Articles 6 and 8 of the Convention). On 27 May 2013, after ECHR overruled Ukraine's objections, the judgment in the case became final and binding on Ukraine.

The ECHR judgment means legal recognition by an international judicial body of the fact of arbitrary reprisals against judge Oleksandr Volkov using state bodies tasked to establish the rule of law in the country. Furthermore, that fact was seen not as an isolated case but as a systemic problem. ECHR concluded that the dismissal of Oleksandr Volkov in violation of the above-mentioned principles could be viewed **as a threat to the independence of the judiciary as a whole**.

ECHR found concrete violations of the Convention by each of the national bodies that took the decision to dismiss Oleksandr Volkov from the office of the judge.

• High Council of Justice: bias and partiality

ECHR came to the conclusion that consideration of the "case of Oleksandr Volkov" by that body was not compatible with the principles of independence and impartiality.

First, regarding the HCJ membership. Most of its members work on a permanent basis and are paid beyond it – which makes them administratively, hierarchically and materially dependent on their primary employers. In particular, HCJ *ex officio* members include the Minister of Justice and the Prosecutor General, hence, the loss of their primary job entails resignation from the HCJ. ECHR particularly noted the danger of the Prosecutor General being an HCJ member – which, given his functional duties, creates a risk that **the Prosecutor General will not act impartially towards judges of whose decisions he disapproves**.

At the time when HCJ took the decision to submit to Parliament a proposal to dismiss Oleksandr Volkov, HCJ included many persons who were political figures or worked in the bodies of prosecution, executive bodies and the Presidential Administration.[5]

Second, ECHR noted personal bias of some HCJ members against judge Oleksandr Volkov, primarily those who put forward the proposal of his dismissal, performed preliminary investigation in the case, and further were involved in the decision to dismiss him from office (e.g., Volodymyr Kolesnychenko and Renat Kuzmin).

ECHR noted that the role of those HCJ members in disciplinary charges against Oleksandr Volkov **caused reasonable doubt** about their impartiality when deciding the matter per se. Furthermore, ECHR noted the personal bias of the HCJ member – Chairman of the parliamentary Committee on Justice Serhiy Kivalov, who had previously interfered with Oleksandr Volkov taking the oath of an HCJ member and made public comments about his actions.

ECHR saw the fact that judge Oleksandr Volkov had been dismissed from office for breach of oath disregarding the period of limitations as a violation of Article 6 of the Convention.

• Verkhovna Rada: a judgment inconsistent with the Constitution

ECHR noted that solution of the case of Oleksandr Volkov by Parliament **did not remove the structural defects** of a lack of "independence and impartiality" but rather only **served to contribute to the politicisation** of the process and **to aggravate the inconsistency** of the procedure with the principle of the separation of powers.

This was manifested, in particular, in the fact that the Chairman and one member of the concerned Parliamentary Committee on Justice (Serhiy Kivalov and Valeriy Bondyk) were HCJ members and were involved in the "case of Oleksandr Volkov" at three levels – of HCJ, the Parliamentary Committee and a plenary sitting of Parliament. ECHR also took notice of the fact that in due time, it was Serhiy Kivalov who, together with two other members of the parliamentary committee, applied to HCJ, demanding investigation of Oleksandr Volkov's "improper conduct".

At a plenary sitting of the Verkhovna Rada "the case of Oleksandr Volkov" was introduced by Serhiy Kivalov (as the Chairman of the concerned Parliamentary Committee) and Volodymyr Kolesnychenko (as the HCJ head). ECHR noted that the procedure of review of the matter by Parliament had not provided conditions for proper assessment of evidence and legal assessment of facts.

ECHR established that Parliament took a decision to dismiss the judge with a gross violation of the Constitution and laws of Ukraine, and by abusing the electronic voting system. The voting took place in absence of the majority of the national deputies, some of the present MPs voted, using several cards – contrary to Article 84 of the Constitution, Article 24 of the Law "On the Status of a National Deputy of Ukraine", Article 47 of the Verkhovna Rada Procedures. This violates the principle of legal certainty provided by Article 6 of the Convention.

Noteworthy, this ECHR judgment **in fact questions the legitimacy of all decisions of Parliament passed in violation of Article 84 of the Constitution concerning personal voting by MPs**.

[5] E.g.: MPs Serhiy Kivalov and Valeriy Bondyk, Prosecutor General Oleksandr Medvedko and his deputies Viktor Kudriavtsev, Renat Kuzmin, Viktor Pshonka, Minister of Justice Oleksandr Lavrynovych, Deputy Head of the Presidential Administration – Head of the Main Department of the Judicial Reform and Judiciary Andriy Portnov. Later, the President appointed the Security Service of Ukraine Head Valeriy Khoroshkovskyi an HCJ member.

• HACU: doubts about legitimacy

The ECHR pointed out that **"the review of the applicant's case by the HAC was not sufficient and thus could not neutralise the defects regarding the procedural fairness at the previous stages of domestic proceedings".** This was conditioned by a number of factors, including:

- insufficient legal competence of HACU that did not let it, in case that the HCJ and Parliament decisions are ruled unlawful, fully restore the rights of Oleksandr Volkov – pass a resolution of his reinstatement in the office of a judge. According to the ECHR judgment, considering cases of that category, HACU cannot be seen as the court settling the dispute of the applicant's rights (Article 6 of the Convention);
- improper consideration of important arguments cited by Oleksandr Volkov and evasion from assessment of the evidence of illegitimacy of the procedure for voting on the issue of his dismissal in Parliament;
- questionable independence and impartiality of the judges who considered the case, since they fell within the jurisdiction of HCJ that was a *party* to the case. They themselves could be brought to disciplinary responsibility.

ECHR came to another very important legal conclusion: the panel of judges that considered Oleksandr Volkov's complaint **could not be termed "a tribunal established by law"**. I.e., the persons in judges' robes who considered "the case of Oleksandr Volkov" and passed a judgment in the name of Ukraine were not a court, in legal terms. This was a result of breach of the court staffing procedure established by the law.

The thing is that in December 2009, the legislatively provided term of office of the HACU President Oleksandr Paseniuk expired.[6] However, he continued to exercise the President's powers, in particular – to form HACU chambers and to staff them through a relevant submission to the Presidium.

Since December 2009, the Council of Judges of Ukraine and the Supreme Court President Vasyl Onopenko had repeatedly stressed that the **illegal** occupation of the position of the HACU President by Oleksandr Paseniuk (in fact – assumption of official powers) "undermines the legal principles of the judicial branch activity and exercise of justice in Ukraine", "compromises the powers of the illegally formed tribunal and lawfulness of the exercise of judiciary by HACU".[7] However, their appeals to the concerned bodies of power were ignored – from 23 December 2009 till 6 September 2010, Oleksandr Paseniuk continued to exercise the powers of the HACU President in excess of the term provided by the law.

Meanwhile, since May 2010, acts, actions or inaction of Parliament and HCJ have been reviewed by a separate chamber of HACU, established and staffed by a person whose period of office as the President had expired. So, ECHR could not conclude that the chamber was set up and composed in a legitimate way satisfying the requirements of a "tribunal established by law" (Article 6 of the Convention).

The problem of legitimacy of the HACU acts deals not only with the "case of Oleksandr Volkov" but is of a global nature. The ECHR judgment in fact recognised illegitimacy of the judiciary for a long time exercised by HACU, whose chambers were composed in violation of the law, so, in terms of the Convention, were not a "tribunal established by law". This means that the judgments passed under such circumstances (that may amount to tens of thousands) cannot be considered court judgments.

The problem was created artificially and caused by Oleksandr Paseniuk discharging the powers of the HACU President after the expiration of the statutory five-year term of his office.

ECHR JUDGMENT: PROBLEMS OF EXECUTION

Having established the unlawfulness of dismissal of Oleksandr Volkov, ECHR **ruled** that Ukraine is to promptly **provide for his reinstatement** in office of the Supreme Court judge. Ukraine is also to pay €18 000 (€6 000 – as reimbursement of moral damages to the applicant, €12 000 – as reimbursement of legal expenses to his representatives).

Furthermore, ECHR noted that for proper execution of the judgment in this case, the defendant state is to **take appropriate general measures** aimed at reformation of its legal system.

Most probably, there will be no problems with the payment of the amount of just satisfaction to Oleksandr Volkov. Payment of damages has become the easiest (and most often – the only) method of execution of ECHR judgments for Ukraine's leadership.

A much more difficult situation arose with the **reinstatement of Oleksandr Volkov in the office of the Supreme Court judge.** Right after the ECHR judgment became final, Ukrainian officials said that there were no legal mechanisms and practical capabilities to execute that ECHR judgment. Then **Minister of Justice Oleksandr Lavrynovych** who in 2010 as an HCJ member voted for the dismissal of Oleksandr Volkov [8] said: "I am unaware of such a mechanism".[9] The stand of the present Minister of Justice Olena Lukash was very much the same: "The Ukrainian legislation has no mechanism of automatic reinstatement of judges. As soon as amendments to the Constitution are adopted, the High Council of Justice will immediately execute the ECHR judgment".[10]

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6 Oleksandr Paseniuk was elected a HACU judge (indefinitely) on December 11, 2003 (before the election – Deputy Minister of Justice); appointed HACU President on December 22, 2004; the term expired on December 25, 2009. On September 6, 2010, he was unanimously elected to the HCJ for the second term. On November 3, 2011, Parliament elected Oleksandr Paseniuk a judge of the Constitutional Court of Ukraine.

7 Council of Judges of Ukraine recognised M.V.Sirosh as the only legitimate executor of powers of the High Administrative Court of Ukraine President. – Supreme Court web site, *http://www.scourt.gov.ua*; Council of Judges Decision "On the Decision of the Presidium of the Council of Judges of Ukraine dated December 14, 2009. No.5 "On the Situation Arising in Connection with the Expiration of Powers of the High Administrative Court of Ukraine President" No.101 of December 28, 2009. – Ibid.; Appeal of the Supreme Court of Ukraine President to the President of Ukraine on the situation arising in connection with organisational management of the High Administrative Court of Ukraine. – Ibid.; High Administrative Court of Ukraine turns from the guarantor of law into a threat to democratic election of the President of Ukraine. – Ibid. (*in Ukrainian*).

8 Judge Volkov recommended Lavrynovych not to comment on his case. – *http://www.bbc.co.uk/ukrainian/politics/* (*in Ukrainian*).

9 Lavrynovych cannot guess how to meet the European Court judgment concerning Volkov. – http://www.pravda.com.ua/news/2013/05/29/6990954/ (*in Ukrainian*).

10 Lukash admits reinstatement of Volkov as the SCU judge. – October 13, 2013, *http://www.urainform.com* (*in Ukrainian*).

Recently, Oleksandr Lavrynovych, this time as the HCJ President, has said: "…Reinstatement of the former judge of the Supreme Court Oleksandr Volkov in office will be possible, when special norms appear, how such judgments can be executed. Today, the laws of Ukraine do not envisage reinstatement in office of persons elected or appointed by Parliament". "Regarding this judge again taking office in the Supreme Court, I see no legal possibilities for that now. This may be done by means of his reappointment in line with the current effective norms".[11]

Then **Government Agent before the ECHR Nazar Kulchytskyi** stressed that the issue of reinstatement of Oleksandr Volkov in office fell within Parliament's competence, but the problem was that the Supreme Court was staffed to its full strength.[12] In reality, the problem noted by the Government Agent is absent – both at the time of its mention and now. The legislatively provided staff count of the Supreme Court (48 judges) has had two vacancies since 18 April 2013.[13] But even if the Supreme Court were fully staffed, it would pose no obstacle for execution of the ECHR judgment.

According to the labour legislation, reinstatement of an employee in pursuance of a court judgment has nothing to do with the manning schedule of the legal entity. Furthermore, if necessary (including for execution of a court judgment), the number of the Supreme Court judges may well be increased (in 2010-2011, it was fundamentally changed twice – first, reduced from 95 to 20, and then – increased to 48).

Summing up, a few points concerning the legal mechanism of reinstatement of Oleksandr Volkov in office of a judge may be pointed out:

1) such a mechanism is absent;

2) the mechanism presumes reconsideration of the issue on the national level by the same bodies that took the decision to dismiss Oleksandr Volkov (HCJ, Parliament, HACU);

3) Oleksandr Volkov is to apply to HACU or the Supreme Court in accordance with the established procedure for revision of the HACU decision in his case in connection with the ECHR conclusion of violation of international commitments by Ukraine during the consideration of his case by HACU;

4) Parliament is to solve that resolution on its own by passing a relevant resolution.

In this connection, a few points are important.

(1). In the case "Oleksandr Volkov vs Ukraine", ECHR for the first time in its history ordered to reinstate in office a person whose dismissal was considered contrary to the Convention.

(2). ECHR specially drew the attention of Ukraine to the method of solution of that issue, noting that in many cases it had passed judgments of restoration of broken rights by means of reconsideration of the case domestically. But **in this case, ECHR saw no point in ordering such a step, since it did not believe that a repeated domestic consideration of "the case of Oleksandr Volkov" would present a proper form of restoration of the broken rights of the applicant**. The Court did not believe that in the near future the case would be reconsidered in line with the principles of the Convention.

At the same time, ECHR noted that it could not leave the applicant in a situation of uncertainty regarding the ways of reinstatement of his rights. It came to the conclusion that by its very nature, the situation discovered in the case **left no real choice of individual measures** required to remedy the violations of the applicant's Convention rights.

Hence, **ECHR actually expressed no-confidence in Ukraine's legal (including judicial) system** and **ruled out a new** (repeated) review of "the case of Oleksandr Volkov" by all national institutions that had reviewed it in 2010, ECHR doubts (quite reasonably) that such review, even after its judgment, will be lawful and unbiased. In fact, ECHR left Ukraine the **only way** of restoration of the rights of Oleksandr Volkov – to pass a decision of his immediate reinstatement in the office of a judge.

(3). Ukraine **has the experience of reinstatement of judges** after domestic courts ruled their dismissal for breach of oath illegal. This was done by Parliament amending resolutions that had dismissed those judges. For instance, on 23 December 2010, Parliament passed Resolution No.2872-VI "On Amendments to Some Resolutions of the Verkhovna Rada of Ukraine Concerning Dismissal of Judges". According to it, the mention of eight judges dismissed for breach of oath was removed from three such resolutions. The amendments even concerned Resolution No.2352-VI of 17 June 2010 that dismissed Oleksandr Volkov – the provision of dismissal of five judges of different Ukrainian courts was **removed** from it. As the legal ground for such decisions, Parliament referred to the relevant decisions of HACU that ruled unlawful the resolutions of dismissal of those judges. At that, HACU in its judgments did not even oblige Parliament to reinstate illegally dismissed judges in office, as ECHR did with respect to judge Oleksandr Volkov.

Hence, to reinstate Oleksandr Volkov in office in pursuance of the ECHR judgment, Parliament is just to amend its own Resolution No. 2352-VI of 17 June 2010, **ruling that it lost effect with respect to the dismissal of Oleksandr Volkov**. Noteworthy, as far back as 17 January 2013, MP Mykola Katerynchuk registered draft Resolution of the Verkhovna Rada "On Execution of the European Court of Human Rights Judgment in Case "Oleksandr Volkov vs Ukraine" (reg. No.2042) that envisaged exactly such a mechanism of reinstatement of Oleksandr Volkov in office of a judge of the Supreme Court. However, the draft has not been considered yet by the concerned Parliamentary Committee (chaired by Serhiy Kivalov) or the Verkhovna Rada.

However, execution of the ECHR judgment is not confined to the reinstatement of Oleksandr Volkov in office. The key message of the Court Judgment is that Ukraine should take **general measures** for solution of fundamental problems of its legal system, caused by the

[11] See: Lavrynovych: Judge Volkov may be reinstatement only by a new appointment. – *Ukrayinska Pravda*, October 8, 2013, *http://www.pravda.com.ua* (*in Ukrainian*).
[12] Rada is to reinstate a judge dismissed by "pushbutton". – Ibid., May 29, 2013 (*in Ukrainian*).
[13] Ukraine has not executed the European Court judgment concerning dismissed judge Volkov yet. – BBC Ukraine web site, July 31, 2013, *http://www.bbc.com* (*in Ukrainian*).

inability of the state to enforce the principle of separation of power and of the rule of law in the activity of the HCJ and courts (HACU). This means the urgent need of a fundamental change of the principles of functioning of the entire legal system in Ukraine.

Noteworthy, ECHR did not accept the stand of the Ukrainian Government that asserted that the problems of the legal system functioning noted by the applicant and acknowledged by ECHR were largely resolved following the adoption of the laws "On the Judicial System and the Status of Judges" on 7 July 2010, and "On Amendments to Some Legislative Acts of Ukraine Ukraine Strengthening the Independence of Judges" on 5 June 2012. ECHR came to the conclusion that those legislative steps **did not solve the problems** (systemic dysfunctions of the Ukrainian judicial system) revealed during the consideration of "the case of Oleksandr Volkov". In that way, ECHR actually produced a negative assessment of the entire judicial reform of 2010 and refuted the assertions of its authors that the main problems of the judiciary in Ukraine were reduced to the "obsolete" legislation, now actively updated "in line with the international standards".

A separate aspect of execution of the ECHR judgment is presented by legal measures with regard to officials (including judges) guilty of unlawful dismissal of judge Oleksandr Volkov.

Particular importance of ECHR judgment in "the case of Oleksandr Volkov"

The ECHR judgment is not confined to the solution of the personal case of judge Oleksandr Volkov but deals with the principles of operation of the state authorities in Ukraine. Having considered the personal application by Oleksandr Volkov and ruled his dismissal from office of a judge unlawful, ECHR noted that "the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary". As ensues from its judgment, such problems include:

- **absence of practical separation of state power into legislative, executive and judicial**, causing political and other dependence of courts and judges;
- **politicisation of the mechanism of formation of the corps of judges**, manifested in strong political influence and its "manual" management. Analysis of the HR policy in the judicial system after the "judicial reform" witnesses that HR issues are actually decided in one administrative centre staying beyond the judicial branch, and the role of the state institutions designed to form the corps of judges is confined to formalisation of its decisions;
- **domination of personal criteria in the procedure for bringing judges to responsibility for breach of oath.** This is showily demonstrated by the activity of HCJ, whose members combine four different kinds of functions: 1) initiation of dismissal; 2) investigation of circumstances of the activity of judges specified in the submission; 3) conclusions of the presence of grounds for dismissal; 4) adoption of decisions on the merit of the charges;
- **legal uncertainty in the issue of dismissal of judges from office for breach of oath.** Ukraine has no limitation period for dismissal of judges from office for breach of oath, the grounds for it are unclear and vague. This leads to unpredictable and selective application of sanctions against judges;
- **no protection of judges facing unreasonable disciplinary sanctions, in particular, accusations of breach of oath.** Combined with other circumstances mentioned above, this creates in the judges' community an atmosphere of fear and leads to total dependence of judges.

Full-scale execution of the ECHR judgment, on one hand, gives a chance to begin to "revive" justice in Ukraine, on the other – presents a litmus test that will clearly show the true attitude of the Ukrainian political authorities to the principle of the rule of law.

The national authorities now try to escape execution of the judgment – their efforts focus of search of mechanisms not for its execution, but for evasion from its execution. And this is clear, since: *first*, its execution will mean the authorities' recognition of their guilt in the actual reprisals against judge Oleksandr Volkov; *second*, execution of the ECHR judgment is vested in the same persons who organised the unlawful dismissal of Oleksandr Volkov; *third*, practical execution of the judgment presumed actual cancellation of the "judicial reform" of 2010.

At present, all efforts are made to constitutionally "freeze" the present situation in the judiciary and to further enhance the President's influence on the judicial branch. And the amendments to the Constitution regarding the judiciary proposed by him will be presented to Europe as execution of the ECHR judgment in "the case of Oleksandr Volkov" – as it was done with execution of ECHR judgments in the cases of Yuriy Lutsenko and Yuliya Tymoshenko – the arbitrariness of prosecutors and judges against them was ascribed to the obsolete law of criminal procedure and "covered" with the new Code of Criminal Procedure.

Meanwhile, the delay of execution of the ECHR judgment in the "case of Oleksandr Volkov" was not left unattended not only by official European structures but also by the world lawyers' community. In particular, the European Foundation in defence of judges' independence *Judges for Judges* on 29 August 2013, sent to the Committee of Ministers of the Council of Europe an official letter expressing concern about the non-execution of that ECHR judgment. Its letter reads: "We are concerned by the fact that Mr. Volkov not only is not reinstated yet as a Supreme Court Judge, but that it seems that no concrete steps have been taken by the Ukrainian authorities to implement the binding European Court of Human Rights judgment".[14]

Meanwhile, the national judges' self-government bodies, called to care about legal protection of Ukrainian judges, have not publicly expressed any concern about the non-execution of the ECHR judgment in "the case of Oleksandr Volkov". The judges' community keeps silent. This silence maybe the gravest illustration of the current standing of the Ukrainian judges and the judiciary in general. ■

[14] European foundation of judges demands reinstatement of Volkov. – September 25, 2013, *http://zik.ua/ua/news/2013/09/25/431107;* Foreign colleagues sue the Council of Europe for ex-judge Volkov who won a case in ECHR. – September 19, 2013, *http://racurs.ua* (*in Ukrainian*).

JUDICIAL SYSTEMS OF UKRAINE AND THE EU COUNTRIES

Ivan NAZAROV,
Associated Professor of the National University "Yaroslav the Wise Law Academy of Ukraine", Kharkiv

Current interactions between states in the course of international cooperation, as well as the European aspirations of Ukraine, call for comparative analysis of the European judicial systems and application of the results obtained in reformation of the Ukrainian judicial system.

Knowledge of international legal experience and foreign legal traditions are essential factors for unbiased and critical evaluation of the national judicial system, as they help to reveal pros and cons, find a path for development and deal with issues that have already been solved in most democratic countries. All of this is required to become a fully legitimate member of the European society.

This article gives a brief analysis of general tendencies, development and functioning of the EU judicial systems; describes the structure of the system in general; offers classifications of foreign systems and possible criteria for such classifications, as well as ways for improving the national judicial system.

Judicial systems of European countries: common and distinctive features

EU countries have different backgrounds and stages of establishment of their legal systems, state-building and judicial traditions. On the other hand, belonging to one supranational organisation forces them to look for a compromise and find a single judiciary model potentially acceptable to every member.

Nevertheless, although a compromise system proves to be necessary, it still does not exist. International discussions and European standards only helped to define general principles of what judicial bodies of a European country must be like, and to set goals and aims of the court in a modern democratic society.

In this situation, researchers of European systems have to analyse measures taken by the individual EU countries to reform their judiciaries and make them capable of fulfilling the established tasks, as well as to get closer to an universal European model.

First, we should define a range of factors that shape judiciaries in most European countries and could be used in future to establish the classification criteria.

***First of all,* a judicial system can undergo modification; in particular, it can be reformed by the state.**

The history of judicial system in Ukraine and European countries proves that its structure can suffer dramatic changes – not only because the court activity needs to be optimised or improved, but also due to external emergencies or state crisis. When the entire state mechanism goes back to normal and the crisis is overcome, the system attains more logical structure dictated by the need of sustainable and uninterrupted functioning.

In a few recent decades, the EU countries have not experienced any commotions that would have considerable impact on gradual and smooth evolution of judiciaries. This allowed them to optimise court activity and take into account not only national needs, but also the need for international cooperation. It was assured in several ways, namely: (a) unification of procedure; (b) unification of judicial structures; (c) establishment of inter-governmental and non-governmental institutions and units. The more progress European countries will make in these directions, the more similar their judiciaries will eventually become. However, the evolution is slow, consequently, now European systems have a lot of individual distinctive features.

The difference is felt even when the structures seem identical. Most countries have three-level judiciaries and two types of courts (general jurisdiction and administrative), however, even when similar in major aspects, judiciaries might be completely different, as a list of their characteristics is much bigger and includes points other than horizontal and vertical division.

***Secondly,* when comparing judicial systems, we cannot but mention the structure of a judicial system, as well as its composition.** In most cases the composition is defined by two elements – judges and courts.

The court, as a judiciary element, has to meet three main requirements:

1) it has to be a state court;

2) it has to be allowed to execute justice;

3) its establishment and activities must be enshrined in law.

Of course, there are more features of the court as a specific governmental body. In this case only the main ones differ, those that describe the court as an element of a system. These three features make it different from other state or quasi-judicial agencies.

We should also mention that theoretically the state could include non-governmental institutions entitled to review legal disputes. In this way, the first main feature will be neglected. However, it is hardly achievable in practice as introduction of non-governmental (social) institutions (that provide alternative dispute resolution) or quasi-judicial agencies calls for legislative definition of their status, establishment and activity, and requirements to persons who review cases in these courts (judges), as well as unification of their procedure with procedures of state courts in order to establish a unified judicial practice. And this makes the establishing and functioning of these institutions rather pointless.

The main reason for establishing alternative bodies is that the procedure for their establishment and activity is much easier. Therefore, disputes are resolved faster, legal expenses of the parties are reduced and the court is more accessible. For that reason, most countries have alternative means to settle disputes, however the responsible bodies do not belong to the judicial system. Consequently, quasi-judicial bodies shall not be considered its part.

As for judges as an element of the judiciary, we should mention the arguments that make this statement doubtful. The point is that elements of a system have to be comparable in their meaning, conditions and capabilities. If there is a gap between their capabilities, then it is most likely that larger elements will subsume smaller ones and subsystems will appear to protect integrity and harmony of the system itself.

***Thirdly,* although the judicial system consists of courts, it also has internal divisions.** It can be divided horizontally (into levels) and vertically (into branches).

Horizontal division is necessary to ensure level arrangement and to classify courts according to their competence. Therefore, we can talk about one-, two-, three- and four-level (or more) judicial systems. Accordingly, a judiciary level is composed of its elements – courts united by jurisdiction and procedural features.

Vertical division is an optional structuring of a judicial system and is possible only in case of external specialisation of judiciary bodies and sufficient independence of specialised courts. As for now, **the accepted international standards do not set the requirements for external specialisation of courts**, which makes it theoretically possible to form the judiciary only with "courts of general jurisdiction" or by separating the specialised courts, but not at all levels, without giving them independence and subordinating them to the Supreme Court. In this case, there will not be any branches within the structure. Vertical division is present only if general and specialised courts are clearly separated and have the same number of levels so it is possible for a specialised dispute to go though all corresponding levels. In this case specialised courts are subordinate to the High Specialised Court.

We also have to take into account that **most European standards or requirements to the national judiciary are of non-judiciary character.** They create the system and yet have an indirect influence on the structure of judiciary. The EU documents setting the requirements to its member states concerning the judiciary, judges and protection of citizens' right to judicial protection contain no information on the required number of judiciary levels, institutions or types of specialised courts. **These documents deal with standards that guarantee the compliance of the national legislation with criminal law and ensure the protection of procedural rights and freedoms, as well as basic principles of court proceedings.** In particular, the right to a fair trial within reasonable terms by independent and impartial court selected according to the law, the right to appeal against court decision, the right to legal aid, and etc.

And as far as the judiciary classification is concerned, Europe is very careful about the fact that it can be divided into types or kinds. Thus, the European Commission for the Efficiency of Justice was not able to come up with a single system of classification for European judiciary in the course of preparation of the 2006 Report, and provided some separate information by placing it in the alphabetical order. Meantime, it mentioned that classification is possible using several criteria based on:

1) characteristics of judicial systems, dividing them into continental and common law countries, transition stage countries and those with long-term judiciary traditions;

2) geographic location and taking into account the territory and population;

3) economic criteria, dividing the territory into Eurozone and non-Eurozone.[1]

Analysis of classifications provided in books, as well as the position of public European institutions concerning this matter **give reasons to assert that specific features of the judiciary in every country prevent from establishing a single and universal classification of judicial systems.** Therefore, for the purpose of accurate research, classification criteria have to be defined by goal and tasks of the research.

Specific features of European judiciary depending on their membership (intention of gaining membership) in the EU

If we take membership or intention of gaining membership in the EU as a criterion, then first we would have to classify the countries. Currently, EU countries can be divided into two types:

[1] Systems of Justice of European countries: Issue 2006 (based on 2004 data). European Commission for the Efficiency of Justice (CEPEJ). European Council 2006, pp.12-13.

1) the countries of the so-called EU-15 that have sustainable democratic traditions and the highest level of adherence to European standards in the sphere of judiciary, court organisation and human right to legal protection;[2]

2) the countries that have been part of the EU for a relatively short period of time and continue reforming their systems.[3]

Besides, we should also mention that the EU works with many neighbouring states willing to join. The countries close to the EU legal standards get an official candidate status. The experience of these countries is very important to Ukraine; therefore, they constitute the third type.[4]

As regards current tendencies of judiciary legislation of the European countries, we should mention that they have common and individual features. There are several points to take into account:

1. Even countries like the Great Britain, Germany, and France keep improving their judicial system aiming to increase its efficiency and quality and lower costs of justice, reduce terms of proceedings and provide their citizens with more opportunities for alternative dispute resolution.

2. The countries that have recently joined the EU face the same goals of reforming the judiciary, although each country has set its own requirements, namely:

- optimising co-joint work of the executive bodies (the Ministry of Justice) and the judicial self-governance bodies in the area of judicial administration (Poland, Lithuania);
- arranging efficient interaction between national judicial bodies with European courts both at the state level and at the level of judicial self-governance bodies; ensuring principles of fair court management, create a system to control the quality of administrative activity, establish an internal control system in every court (Latvia);
- establishing a robust system of administrative courts (Estonia).

3. The requirements for candidate countries concerning the reformation of judiciary bodies have been different, since almost all of them demonstrate the lack of state activity in ensuring an independent, impartial and transparent judiciary, high level of democracy and human rights protection. Accordingly, it calls for measures that were taken in the EU countries long ago. Namely:

- organising a proper judicial infrastructure, transparent and merit-based selection of judges;
- resolving issues related to execution of court judgments;
- organising a unified statistics system that would describe the status of cases in courts;
- eliminating any political influence on judicial bodies;
- establishing a special authority to train judiciary specialists within the system, to improve their qualification and professionalism and fill all positions;
- improving public trust in the judicial authority;
- ensuring equal access to justice;
- establishing the judiciary self-governance bodies with equal representation of all judges.

Therefore, Ukraine must realize that membership in the EU will make it face the same tasks related to the judiciary reform as it happened in Poland, Latvia, Lithuania, Estonia and is happening now in Turkey and the Balkan states. The tasks are clear and we should start working right now.

In particular, **the judicial reform in Ukraine has to be accompanied with the following steps:**

1) optimising the structure of judicial system (eliminating the fourth judiciary level), increasing the efficiency of courts, establishing the respective court infrastructure;

2) ensuring a transparent and objective selection process of judges;

3) preventing delays in court proceedings, especially if it exceeds three months;

4) resolving problems of execution of court judgments in order to ensure court efficiency;

5) establishing a unified statistics system that would describe the status of cases in courts;

6) setting an efficient system to evaluate responsibility, professionalism and competence of judicial authorities;

7) eliminating political influence on the judiciary;

8) completing work aimed at creating a special judiciary body responsible for training of specialists, improving their qualification and professionalism;

9) implementing alternative ways of dispute resolution (more efficient use of courts of arbitration and establishment of other quasi-judicial bodies);

10) systematic evaluation of the impact of the judiciary reform on court efficiency;

11) improvement of the court management system, administrative aid to judges;

12) conditions to organise judicial self-governance bodies with equal representation of all judges.

Considering how important it is for Ukraine to meet European legal standards, define prospects and work out a procedure for cooperation of the Ukrainian judiciary with Europe and European Court, the judiciary reform is of primary importance today.

The reform has to aim at simplifying the judiciary by taking into account the principles of unification and stage structure, specialisation, equal access to justice and the independence of judiciary, as well as improving the mistakes that arose from implementation of hierarchy and level structure principles. These issues are crucial for the country, for ensuring human rights and freedoms, the rule of law and protecting national interests of Ukraine. ■

[2] Six EU founding members (Belgium, Italy, Luxemburg, Netherlands, Germany, France) and nine countries that joined during 1973-1995 (Austria, Great Britain, Greece, Denmark, Ireland, Spain, Portugal, Finland, Sweden).

[3] 13 countries that joined EU during 2004-2013 (Bulgaria, Estonia, Cyprus, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, Hungary, Croatia, and Czech Republic).

[4] As for now, the EU candidates are Albania, Bosnia and Herzegovina, Island, Macedonia, Serbia, Turkey and Montenegro.

PUBLIC PROSECUTION IN UKRAINE: ITS ROLE AND POSITION AMONG JUDICIAL TOOLS FOR PROTECTION OF THE LEGAL ORDER

Serhiy PRYLUTSKYI,
Senior Research Assistant of
Koretsky Institute of State and Law
of the National Academy of Sciences of Ukraine

Judicial reform, modification of criminal laws, preparations to carry out a constitutional reform in Ukraine put emphasis on the issue of legal status of the Public Prosecution, its role and functions in the state authority system, considering positive and negative experiences acquired by Ukraine during 20 previous years.

As for now, the Prosecution does not belong to any of the authority branches and functions as an independent centralised system responsible for prosecution in court, representing citizens in legally specified cases and control over law enforcement authorities dealing with judicial actions and execution of court decision in criminal cases, and their adherence to the letter of law.

Meantime, Transitional provisions of the Constitution (para. 9) state that the Public Prosecution shall continue to perform its functions of pretrial investigation and so-called "general supervision" – a control of respecting and following the laws – for a while, until special state bodies are established and laws regulating their activities are adopted.

When joining the European Council in 1995, Ukraine promised to relieve the Prosecution from its general supervision function, however, even now this issue is being one of the most discussed in national expert and social circles.

The issue of legal determination of the Public Prosecution

Currently, national legal science cannot offer a single vision of the Prosecution both in terms of its institutional and functional aspects. There are several approaches with regards to its place and role in the state system. For instance, it might be considered an executive or legislative institution or an independent supervisory branch. It is often alleged that the Public Prosecution is, on the one hand, not an independent branch, but it does not belong to the other three.[1] Others believe that Prosecution is an individual judiciary branch.

One of the main criteria to define the role of Prosecution is its function. The function the Prosecution has in a constitutional state defines its value. Obviously for this reason, the issue of its functions is the most controversial in European circles, namely the Consultative Council of European Prosecutors (CCPE).[2]

[1] For example, a brief review of positions of Ukrainian scientists is available in the Abstract of scientific sources on the directions of reforming the public prosecution. – Information and analytic reviews "Improvement of the public prosecution activity in Ukraine: a way to reform criminal justice", No.1, pages 4-10, *http://www.cga.in.ua/fckfiles/procur.pdf*

[2] *Consultative Council of European Prosecutors* (*CCPE*) was established by the Committee of Ministers of the European Council in July 2005 to prepare resolutions on prosecution service and to assist in execution of corresponding recommendation of the Parliamentary Assembly of the EC.

Analysis of these discussions and corresponding documents proves that the only function that raises no doubts is supporting a state charge in criminal proceedings. Meantime, it is also said that first of all "*in most legal systems prosecutors have powers, sometimes in a great scope, in civil, commercial, social and administrative proceedings, and are even authorised to control adherence of governmental decisions to the law*.[3]

Secondly, the European Council admits that the Public Prosecution does and can perform certain functions outside criminal law. In 2005 this issue first became a topic for European discussion (Conference of Prosecutors in Budapest). In September 2012, the Recommendation on the role of public prosecutors outside the criminal justice system was published.[4] The document provides general principles for the European Council countries, where prosecution has corresponding functions.

Therefore, today it is not about limiting functions and role of Prosecution within the criminal law, but rather defining its powers outside it. It is believed that this approach can be applied to supervision function as well, and the latter in its turn has to get closer to rights protection. This considered and taking into account recent EC documents on the role of Prosecution in a constitutional state, we can offer the following vision of national prosecution in Ukrainian state authority mechanism.

Public Prosecution as an institution of justice[5]

The system of justice emerged due to the need in "the unbiased third party" able to "turn a conflict into a competition, as in this case the parties not willing to follow a substantial law provision at least have to (if they still want to resolve the dispute legally) accept the procedure of their interaction for resolution". And the very "turn of a social conflict into relations of procedural actors within the institution of justice allows to regulate its settlement with procedural law, which is much more stable than substantial".[6]

Obviously, criminal norms cannot be used outside criminal proceedings, as well as the latter has no sense if the subject is not application of exact criminal provisions. If we accept a widespread opinion that the trial is a form of existence of law with its own procedural norms, then we have to admit that punitive (criminal, administrative, disciplinary) responsibility emerges from the moment of accusation of a committed violation and is defined by procedural acts of authorised bodies and officials.[7]

Therefore, we can assert that philosophical and legal nature of justice is triune and suggests interconnection of accusation, defence and final judgment – a verdict.[8] This trinity can be expressed using the analogy of a wide-known logical scheme of a simple deduction (or logic triad): *thesis* → *antithesis* = ***synthesis***, and will look like: *accusation* → *defence* = ***judgment /verdict/.***

Absence (ignoring, takeover, change) of one element makes the mechanism of objective and impartial judgment impossible (difficult).

Competitive nature of justice gives rules and conditions upon which prosecution and defence are assigned to the parties – the prosecutor (victim) and the defendant (the accused). In the course of delivering justice, the judge undergoes a "confrontation" in his mind, an integral process of evaluations and conclusions about the facts proved and unproved, and eventually – the guilt of a person. The prosecutor and the defendant (defence lawyer) actively help the court and serve as councilors of the judge helping him reach an internal belief in order to establish the truth.

This considered, we could say that ***criminal justice***[9] – is a complex legal mechanism of organisation and delivery of judicial authority designed to provide justice in criminal relations. Within this context, the court, the Public Prosecution and advocacy act as independent institution of justice with independent procedural functions, yet similar or unified principles and harmonised status.

Therefore, **the prosecution (criminal proceeding) function is an important and integral part of justice** realised within the mechanism of competitive trial. The National criminal procedural law has provisions stating that the court is not allowed to review the case on the merits (meaning to execute justice authority) without prosecution (prosecutor) and the defence parties.[10]

Thus the Prosecution as a central body in the criminal proceedings is an integral part of justice. By supporting the charge in court, the prosecutor ensures realisation of the judicial authority. According to Article 34 of the Law "On Public Prosecution", a prosecutor taking part in proceedings has to follow the principle of independence of judges and their subordination to law and help to fulfill provisions on comprehensive, full and objective consideration of cases and make court decisions based on law. It fully complies with European norms that require legal status, competence and procedural role of prosecutors to be

[3] The role of public prosecution outside criminal law: Resolution No.3 (2008), CCPE, p.11.

[4] Centre for Political and Legal Reforms (Kyiv) offers a translation of the document: "The Role of Public Prosecutors Outside the Criminal Justice System". See.: the Centre's Web site – *http://www.pravo.org.ua/files/rec_chodo_publ.PDF.*

[5] Detailed ref.: Prylutskyi S. Reforming the public prosecution – a way to reform criminal justice. Information and analytic reviews "Improvement of the public prosecution activity in Ukraine: a way to reform criminal justice". Issue No.10, p. 44-50. Web source *http://www.cga.in.ua/fckfiles/procur.pdf.*

[6] Matiukhin A. A. *The state in the sphere of law: institutional approach*. Almaty, 2000, p. 440.

[7] Leist O. E. *Nature of law. Problems of law theory and philosophy*. Moscow, 2002, p. 88.

[8] A distinctive feature of an ideal publicly competitive criminal justice (procedure).

[9] *Justice (*Lat. *justitia)* – a group of judiciary institutions and their activity.

[10] Articles 161, 264, 289 of the Criminal Procedure Code of Ukraine (1961), Articles 22, 26, 36, 318, 324 of the Criminal Procedure Code of Ukraine (2012).

defined by law so that independence and impartiality of judges was beyond any doubts.

Of course, in the process of criminal proceeding a prosecutor (as well as the judge) has to be guided with a high level of responsibility for legitimacy and impartiality of decisions he makes, being objective and independent from external and internal influences and interference, is obliged to act honestly and objectively, as it is required by European standards of prosecuting activity.[11]

Consequently, the Prosecution has to be considered not a punitive tool of the state, but an **independent judicial body responsible for independent and unbiased delivery of prosecuting function**.

It should be pointed out that the issue of including the Public Prosecution in the judicial branch was initiated and supported by the Public Prosecutor's Office of Ukraine in 2005-2006. In particular, it developed a Draft Law "*On Amendments to the Constitution of Ukraine concerning the Public Prosecution*" that in Article 121 specified that the "Public Prosecution of Ukraine will be an independent system of judicial bodies".

Moreover, including the Prosecution into the judiciary system seems logical in terms of current Ukrainian legislation. Thus, courts and Prosecution are organisationally "united" by the Supreme Council of Justice that under Article 131 of the Constitution includes representatives of both and is competent in the matters of disciplinary responsibility of judges and prosecutors.[12]

The bottom line is that **we should not forget, when resolving the issue of including the Prosecution into the judiciary, that both of them have to be improved to European standards at the same time. Only if independence of judiciary is real, including the Prosecution will make point.**

Provision of legitimacy and improvement of the legal status of Prosecution

Provision of legitimacy is one of the main problems of national state building that calls for a solution starting from the highest constitutional bodies such as the Verkhovna Rada, the President, the government, etc. What can make the Parliament follow the Constitution and the Law "On the Rules of Procedure of the Verkhovna Rada of Ukraine" as regards, let us say, individual voting of the deputies? What is the status of the "laws" contradicting the Constitution that were being adopted for years and still remain in force?

On the other hand, as it has already been mentioned, support of legitimacy is an important function of the national Prosecution called "supervision".

It seems that criticism towards this function heard from the national experts and right defendants, as well as the European Council is first of all caused by its improper fulfillment, starting from the retrospective.

Another reason is political dependence of the Prosecution caused by current protocol of assigning and dismissal of the Public Prosecutor. He is directly influenced by the President (his surrounding) and leading political circles of the Parliament as they define his authorities, career and status. A good example is a provision included in 2010 to the Article 2 of the Law "On Public Prosecution": "*The Public Prosecutor of Ukraine is dismissed from his office upon other reasons as well*". It means that political will is enough to dismiss him, there is no need in legal reasons.

This situation also proves that **the problem is not that the Prosecution can perform or avoid performing its supervision functions, but in its current status. In other words, it is not the function that has to be changed, but rather the status of the Public Prosecutor and his subordinates**.

First of all, the most important part is clear legal regulation of the prosecution activity of general supervision. We should not forget that **the prosecution needs competence for provision of legitimacy and legal order within the state**. This activity must have a well-defined procedure. Thus, prosecutor's inspections are to be initiated only upon specified reasons and grounds, and a person should be entitled to address the court claiming illegal inspection in order to prevent violations.

Acts of persecutor's response to violations of law have to become preliminary procedural measures of pretrial prevention of these violations and fast resolution of legal disputes. If the parties are not able to come to an agreement, the dispute is to be submitted to the court. Meantime, the prosecutor's resolution in the course of supervision has to be a procedural action of holding a person liable, which is to be decided by a court or another authorised body.

We should also mention a provision developed by the participants of the Strasbourg meeting of European specialists in December 2011: "In cases when the Public Prosecution supervises state, regional or local authorities, or other legal entities in order to ensure their legitimate operation, it has to perform its functions independently, transparently and fully complying with the principle of the rule of law".[13]

It is not less important **to apply a self-administration principle to the basics of the prosecution system,** organising a system connection between the central body

[11] Ref.: Recommendation 19 (2000) of the Committee of Ministers of the European Council *On the role of Public Prosecution in criminal justice system*. Web site of the Committee of Ministers of the European Council, *https://wcd.coe.int/ViewDoc.jsp?id=1568277&Site=CM*

[12] Detalied ref.: Sereda H. *Reformation of the Public Prosecution in the context of modernization of judiciary and legal system in Ukraine*. Collected book "Reformation of the prosecution bodies of Ukraine: problems and prospects, materials of the International Science and Practice Conference" (2-3 October 2006). Kyiv, Academy of Prosecutors of Ukraine, 2006, p. 29.

[13] Specialised meeting No.4 devoted to the role of Prosecution outside the criminal field (7-8 December 2011, Strasbourg, The European Council): the Project of meeting report. Web site of the General Prosecution of Ukraine *http://www.gp.gov.ua*.

and regional (local) prosecutions. Maintaining the unity of command, the Public Prosecutor could be elected at the Congress of prosecutors of Ukraine. This way, the principle of self-administration would be the same for judges and prosecutors. This issue shall be regulated by the Constitution and could be formulated as follows: "*The Public Prosecution of Ukraine is headed by the Public Prosecutor elected at the Congress of the prosecutors of Ukraine for seven years*.

Upon recommendation of the High Council of Justice the President of Ukraine can initiate distrust to the Public Prosecutor in the Parliament, and upon decision of the Verkhovna Rada the Public Prosecutor can be dismissed".

Considering the fact that the Prosecution can belong to judiciary bodies, the candidate for the Public Prosecutor could be delegated from the judges of the Supreme Court. Having suspended the authority of judge, yet remaining one (maintaining the status and the immunity), the Public Prosecutor could be actually independent from political influences. **And such depoliticisation of his status would come in handy to improve independence of all prosecution bodies.**

Going back to the problem of maintaining legitimacy in the country and taking into account current close-to-critical situation, we can assume that **the Public Prosecution could become a constitutional supervising body of supreme importance organised on the quota of parliamentary opposition and preventing the abuse of power by the parliamentary majority (coalition) and executive bodies it establishes.**

Consequently, **there is a need to establish clear differentiation of Public Prosecution divisions in terms of its functions:**

(1) Public Prosecution as a constitutional body of parliamentary control (supervision) for preventing and revealing of violations of law;

(2) Public Prosecution as an independent judiciary institution within the judiciary system to provide criminal proceedings and represent interests of citizens and the state in court.

How shall these functions be delivered in terms of organisation? This calls for expert discussion and individual research. A new legal mechanism to provide democratisation and independence of Prosecution is to be found within the Constitutional Assembly and a wider academic and research platform. Reformed and conceptually upgraded Public Prosecution of Ukraine has to enter a new stage of national state building as a reliable guarantor and protector of legitimacy and legal order.

In this context, we should mention the position of M. Mikheienko who back in 1992 stood for decentralisation of the Public Prosecution and establishment of two sub-systems: 1) supervision prosecution of the Parliament to perform one of the functions (supervision) of the legislative authority; 2) court public prosecution, like in France, to support charges and supervise adherence to law by the bodies of inquiry and pretrial investigation, as well as those executing court decisions.[14] The author believed that it was necessary to structure the organisation of the prosecution, not limit its functions. Today, this position is quite adequate and calls for further scientific research.

To sum up, we can allege that the problem with regards to the supervisory role of the Public Prosecution is not that it has to be removed, but regulated in laws, and in a wider picture – that we have to provide for the actual independence of the Prosecution and eliminate all chances of political interference.

Organisational mix of the Prosecution as an independent judiciary institution and a constitutional body of parliament control (supervision) requires additional research as well as public and professional discussion.

In any case, the above mentioned Recommendation on the role of prosecutors outside criminal justice system is to be taken into account in the process of changing the legal status of Prosecution and its legislative (and constitutional) regulation.

This document, for instance, specifies that the mentioned role has to be fulfilled "*with a special attention to protection of human rights and main freedoms and in full adherence to the rule of law*". The mission of the Prosecution outside the criminal justice is that it "*represents general and public interests, protects human rights and main freedoms and provides the rule of law*". In other words, supervision function of the Prosecution has to get close to the rights protection, and when performing this function the prosecutors "*have to fulfill their obligations and duties…in full adherence with the principles of legitimacy, objectivity, justice and impartiality*".[15]

It is obvious that reformatting of the Public Prosecution, regulation of its functions, particularly outside criminal justice, is possible and advisable to be carried out along with reformation of the court and advocacy as trial actors, and to the extent that democracy basics of judiciary and state authority in general are established. ■

[14] Mikheienko M. M. *Problems of development of criminal proceedings in Ukraine*. Kyiv, 1999, p.195.

[15] Detailed ref.: *On the role of public prosecutors outside the criminal justice system*. The Center for Political and Legal Reforms *http://www.pravo.org.ua/files/rec_chodo_publ.PDF*.

THE BELL THAT TOLLS FOR THE ADVOCACY

Serhiy SAFULKO,
Attorney, Member of the High Council of Justice

Securing proper status, role and position of defence attorneys is essential for an independent system of justice in Ukraine, and in the more general sense – for constitutional state and civil society.

Legal aid of an attorney is considered one of the most important guarantees proving that human rights and freedoms will be protected by the state. These aspects are either enshrined in law, or rely upon old legal traditions of a society. Independence of an attorney is not less important than independence of a judge in terms of impartial and fair justice.

Nevertheless, defence attorneys in modern Ukraine often face difficulties when making requests for information to protect their clients, not always get necessary help, suffer violations of lawyer's secrecy, have their means of protection limited and their offices legally searched. In some cases judges even do not try to conceal that they only tolerate an attorney, as it is legally required, otherwise they would do perfectly without defence.

Consequently, underestimation of the attorneys' role and value caused advocacy crisis, and the latter, in its turn, led to critical condition of the national justice.

Advocacy crisis and its factors

Advocacy crisis in Ukraine is obvious and can be denied only by those who are not capable of analysis or those who actually caused it. **The result achieved is unavailability of adequate legal aid, which is the right protected by Article 59 of the current Constitution, for ordinary people.**

We can name three main triggers that led to the crisis:

- adoption of a new Law "On the Bar and Advocacy" and its one-sided implementation;
- unprecedented governmental influence during primary establishment of advocacy self-administration bodies in order to subordinate them;
- creation of a mandatory pyramid – the National Association of Advocates where all Ukrainian advocates were accepted regardless their will.

The Law "On the Bar and Advocacy"

Statutory regulation of legal activity in Ukraine has always been somewhat remote from the European standards. The greatest doubt was caused by a provision stating that the functions of defence (legal representative) in court can be performed by "legal specialists", the term not being explained. Another controversial provision allowed to provide legal aid in state bodies or courts only, limiting the area of defence activity and the right of citizens for legal aid.

New documents worsened the situation. For instance, the new Tax Code[1] brought more difficulties to defence attorneys and their associations, and the new Criminal

[1] Before adoption, the attorneys could be registered as entrepreneurs. As for now, they are considered self-employed persons leading to significant increase of the income tax and social contribution.

Procedure Code neither eliminated inequality of defence and prosecution, nor dealt with fees of assigned attorneys.

The Law "On the Bar and Advocacy" adopted on 15 August 2012 was the final straw, as it helped the government to get closer to the goal of subordinating the advocacy like it was previously done with courts.

The Law was submitted by the President,[2] meaning that it was prioritised and evaluated as the "President's initiative". Of course, there is not much from the President in this Law. No president – including Ukrainian – knows more about advocacy as the advocacy itself. However, the President's surrounding knows how to tame it. The Law was elaborated and adopted mainly by those who have never been involved in legal practice, but spent quite a time as "advocacy authorities" and considered themselves to be representing the common will of attorneys. Now, the advocacy has to deal with consequences of this legislating activity. Avoiding mentioning it means humiliating the advocacy even more.

The Law has many flaws, but we will point out only the major ones. There are two of them – the first deals with independence of advocacy; the second is related to "governmentalisation" of their self-administration.

First, let us talk about independence.

Why do we need advocacy at all? It serves as a core of human protection. Protection against tyranny of government, courts, prosecution, and means to help a person understand legal problems and find a way to solve them. Besides, thousands of legal entities slip into "legal coma" and advocacy can make them recover. Ukraine has more than 35 000 of registered defence attorneys. The number is large. However, around a quarter do not operate for various (natural, legal, etc.) reasons. Another part is certified but in fact do not work as attorneys as they have other legal or non-legal activity. Only 17-20 thousand are practicing, and they bear most responsibility for "legal aid" to the society.

For years the advocacy tried to maintain distance in its relations with government, as the latter always had reasons to treat it with caution or even enmity. Current Ukrainian government is not an exception. The more the distance between authority and advocacy is, the better. Independence is a main attribute of decent advocacy, as only an independent attorney can ensure legal protection. Of course, full independence is hardly achievable, although it is a guarantee of its productive work for the benefit of the society. This principle was also enshrined in the new Law, but in fact this independence is only virtual. The attorney is dependent on his client, self-administrating bodies, the court, where he is representing, and government agencies that define rules of his work and behavior.

Current rules are designed to prevent the attorneys from efficient work with their clients, as well as self-protection. The new Law destroyed the basics such as lawyer's secrecy and immunity.

Lawyer's secrecy. The client working with an attorney has to trust him and sometimes shares secrets that nobody is allowed to know. This is called "lawyer's secrecy", a scarified principle established more than 500 years ago. Advocacy is hardly possible without it. The client needs to trust his attorney, needs to be sure that what he shares will not be used against him. On the other hand, an attorney wants to be sure that his actions and advice to the client will not be discovered by an investigator, court or Public Prosecution, if the client wants to avoid it. The previous Law prohibited interrogating attorneys as witnesses in order to protect the secrecy.

There is no such thing in Ukrainian advocacy from now on. The new Law declared that a person sharing his secret with an attorney relieves the latter from the confidentiality obligation, thus the attorney will not have immunity. Awful provision that made a muck of century-long advocacy achievements. An attorney and his client working together come up with tens or even hundreds of patterns of the client's behavior in court. Their conversations, projects, discussion and tactics are confidential. Otherwise, there is no sense in advocacy at all, as an attorney who realizes that his advice might be disclosed turns into a frightened shyster.

The previous Law included the following "ironclad" provision: "*Professional rights, honour and dignity of a lawyer are protected by law. It is prohibited to interfere with legal activity and to demand disclosing of the lawyer's secrecy from an attorney, his assistant, officials and technical workers. They cannot be interrogated as witnesses in this matter*".

The new Law cancels this guarantee with the following: "*Information or documents can lose the lawyer's secrecy status upon written request of a client …*". Even now, when it has been only about a year of this Law in force, we can see multiple examples when clients who shared their secrets with attorneys suffer influence of law enforcement authorities and "relieve" the attorney from this "burden", thus the attorney is obliged to witness on everything he learned from the client. How can he be respected if he "sells" his client? The answer is – he cannot. Potential clients and society in general must be aware that Ukraine does not have lawyer's secrecy any more. As long as this insane provision is in force, we recommend the clients to keep their secrets to themselves, as there is no guarantee they will not be disclosed.

Attorney's immunity (immunity of documents related to the attorney's activity, his office and correspondence). Attorney's immunity, another important tradition and guarantee of advocacy, has also been discarded. The previous Law suggested that "*documents related to the attorney's activity, are not subject to revision, disclosure or confiscation without the attorney's consent.*

[2] Submitted by the President of Ukraine on 28 April 2012, registration No.10424. The draft law was accepted as a basis on 5 July 2012, adopted on 5 July and signed by the President as a law on 9 August 2012.

It is prohibited to interfere with private communication of a defence attorney with a suspect, defendant, convicted and the exonerated". Confiscation of an attorney's records or files and search were prohibited without exceptions. Although cases happened when it was ignored, it was possible to address the court on this matter and to expect its protection. Now the situation is different.

Technically, everything is just as it used to be. Article 23 of the new Law (paragraph 4 part 1) declares that "*it is prohibited to review, disclose, demand or confiscate documents related to defence attorney's activity*". Three paragraphs after the Law however cancel what has been declared and state "*particularities of certain investigative actions concerning a defence attorney are referred to in the part two of this article*".

Part 2 Article 23 in its turn states that "*In case of search or examining of an attorney's apartment, other property, premises of his activity, temporary access to possessions and documents of an attorney, the investigating judge and the court in its decision shall specify the list of possessions and documents planned to be found, revealed or confiscated in the course of a certain investigative action or application of a measure to protect criminal proceedings ...*

A representative of the district advocate council shall be present at the search and examining of the apartment, other property of an attorney, premises of his activity, temporary access to possessions and documents of an attorney ... In order to ensure his presence, an authorised official carrying out the corresponding investigative action or applying a measure to protect criminal proceedings has to inform the relevant advocate council at the place of performance in advance.

In order to secure fulfillment of this Law concerning lawyer's secrecy in the course of the procedure actions mentioned above, a representative of the advocate council can ask questions, provide his remarks and objections concerning the procedural order specified in the protocol.

Absence of the representative of the district advocates council, provided that proper notification was given, shall not prevent the corresponding procedure action".

Can you see the difference? There were no procedural requirements before, as the action itself was forbidden. Now we have a detailed description of how the guarantee can be neglected. There is no such guarantee anymore and the investigating judge is only required to list what to confiscate. And the rummage is so easily conducted. You should only "notify in advance" the representative of the council, and he will even "be allowed to ask questions". No representative? Okay, we will do completely fine without him, let us just make sure the notification is proved on paper. With such guarantees, who will dare make and compile records if they can be confiscated, searched and "added to the protocol"? There are plenty of examples of such "legal" rummages and confiscations.

So, thanks to the "Presidential" Law as of 15 August 2012, we buried two most important aspects of advocacy independence – prohibition to interrogate an attorney on lawyer's secrecy matters and to search their offices and apartments.

Collegial principles of advocacy. The Law also destroyed a fragile basis the advocacy relied upon – collegial principles of its activity. It is not a coincidence that we call each other "colleagues" and that the main advocacy organisation form in Ukraine (and in the whole world) has always been a bar – collective advocates units that were mandatory before 1 February 1993 and became voluntary after.[3] As of the end of 2011, Ukraine had more than 50 registered advocates associations of different kind (firms, companies, bars, legal consultancies etc.) each of them having at least two defence attorneys. A certain part of them did not belong to any unit but still stuck around certain groups. Being a member allowed to cooperate on cases, define their positions, react on emergency calls timely and adequately, and to give each other moral and financial support. Good associations were families and schools for young specialists.

However, the government could not tolerate development of associations as their members (usually powerful) always acted together. Therefore, it decided to use ideologists of the "new advocacy" to dispose of this organisational form in a single line of the Law.

An attorney builds his relations with a client on agreements, and he is accountable for the case to his client. The goal of advocates associations was to assist the attorneys in fulfillment of their agreements.

However, the authors of the Law included a provision stating that agreements are concluded with an association in general, not an individual attorney. It changed not only the nature of mutual obligations of parties, but also altered fiscal practices, as individuals and associations as legal entities have different schemes of taxation. The associations simply cannot afford to pay as much as bodies corporate.

Thus, a single line crossed out a long-term tradition of making agreements with individuals. And if member of associations cannot sign agreements, then the point of an association is lost. Consequently many of them left firms, companies and bars.

This way the legislators stepped on the future of the Ukrainian advocacy, and in fact now we do not have any associations of this kind. This is what the new "leaders" actually needed, as leading an unguided "mass" is no doubt much easier and safer than dealing with strong associations that do not actually need their guidance. The key to the riddle of eliminating advocates associations is found: future "ministers" of advocacy started to see a real threat in them.

[3] The Law "On Advocacy" came into force on 1 February 1993.

Destruction of advocates self-administration

Self-administration is an essential attribute of the advocacy as an independent institution that protects human rights and freedoms, against governmental tyranny among others. Accordingly, self-administration bodies are supposed to be selected by the attorneys themselves based on democracy principles and without political and governmental interference.

However, the provisions of the new Law in fact make non-democratic and pro-governmental establishment and activity of self-administration bodies quite possible. For instance, none of the regions of Ukraine had anonymous poll, and the election itself did not have any results. And those who disagreed in some cities (Uzhhorod, Kharkiv, etc.) were not allowed to vote.

Activity of these so-called "self-administration bodies" astonishes with its non-advocacy orientation and revenge attempts of those who are now leading the crowd but cannot be called an attorney in full.

In fact, what we have now is a closed administrating caste that has created a specially designed pyramid with the advocacy at the bottom and administrators to be supported on top. Every region has a council of advocates (up to 20 persons) with its head, deputies and secretaries, all of them paid on regular basis. There are also qualifications and disciplinary commissions (20 persons as well) with their own chairs, deputies, secretaries, heads of chambers, their deputies and secretaries, rewarded as well, and revision committees – all the same. Ukraine has the Council of Advocates (30 persons), High Qualifications and Disciplinary Bar Commission (30), revision committees, all of the members with fixed salaries. There are also administrations, consultants and inspectors … all of them to be supported by those at the bottom!

They in turn get paid and issue multiple provisions, regulations, instructions, orders, letters and claims against attorneys. Aiming to put a hand on the advocacy they came up with a system of measures and "safety leverages", and even created a department to "control legitimacy of actions of the attorneys". If only this army worked on a voluntary basis, they would not multiply "departments" and "divisions" instead of supporting the lawyers. Currently, people who have nothing to do with the advocacy make attorneys pay as much as an average monthly salary to support them. In case an attorney refuses to pay, they would threaten to cancel his license.

It is clear now why some "administrators" insisted on *obligatory membership* in this collective burden called "the National Association of Advocates of Ukraine. Only this way it is possible to make the advocacy pay for their well-being.

In some regions of Ukraine big execs of advocacy got so used to their positions that they no longer remember locations of courts, do not understand how difficult and humiliating it is sometimes for attorneys to work there. The bosses only care about safety of their thrones, and the new Law gives them enough protection, as it states that self-administration bodies are selected by an open vote for five years and two terms in a row. And, in order not to allow young and troubled, it is stated that five years of advocate experience is required to participate.

Traditionally, the Ukrainian advocacy selected its representatives by secret ballot for three years max. Now – it is only a pathetic ghost of the history.

CONCLUSION

Were Ukrainian attorneys expecting this kind of law? The advocacy was stolen from them and self-administration suffered cynical usurpation. Those who would never be selected in fair and democratic secret ballot got on top. They would also never vote for a person who has never been a defence attorney[4] to chair the supreme disciplinary body, and for the government employee to head the conclave.[5]

This grave was dug by a law project group of the Union of Advocates of Ukraine, High Qualification and Disciplinary Bar Commission of Advocacy and the President's Administration. And if we can somehow understand governmental representatives (as the advocacy is their own pain in the neck), collaboration of insiders is worse than a betrayal and deserves disdain of the whole community.

This kind of advocacy and self-administration is a great shame.

And, why on earth, do I have to feel ashamed along with other attorneys who once swore to protect rights and freedoms? We should we be ashamed if we did not help to create this serpent, or select a random person to represent advocacy in the Supreme Council of Justice,[6] or establish a supervision department, or develop a provision on warrants for fiscal bodies? We also did not threaten those who do not like the new Criminal Code with confiscation of their licenses, and did not overflow courts with claims to shut up those who wanted to speak up. We had nothing to do with hundreds of proceeding against lawyers who dared to ignore meetings aiming to confer power to usurpers. It is they who have to feel ashamed. Of course, if they know what shame actually is. ■

[4] The article mentions the High Qualification and Disciplinary Bar Commission of Advocacy. It is headed by V. Zahariia, ex-President of the Association of Advocates of Ukraine, a specialist in mergers and acquisitions, foreign investments, corporate and antitrust law and property rights.

[5] The article mentions the Council of Advocates of Ukraine. On 17 November 2012 the Congress of advocates of Ukraine elected L. Izovitova to chair the Council (and the National Association of Advocates of Ukraine). She worked in the Supreme Council of Justice since 2004 and is a class 1 state employee. According to media, she is one of the authors of the Law "On the Bar and Advocacy".

[6] On 17 November 2012, the Congress of advocates elected the Head of the Supreme Administrative Court V. Temkizhev to be the member of the Supreme Council of Justice.