LAW ON THE JUDICIARY AND THE STATUS OF JUDGES OF UKRAINE

Comments by Bohdan A. Futey*
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I. Background

Ukraine adopted its Constitution on June 28, 1996. This document exclusively tasks the court system with the administration of justice, according to Article 124, and judicial proceedings are to be held before the Constitutional Court of Ukraine and the courts of general jurisdiction. Under Article 125, the Supreme Court of Ukraine is the highest judicial body for courts of general jurisdiction, while the "respective high courts are the highest judicial bodies of specialised courts." Elsewhere in the Constitution, Article 126 sets nine different events that allow the removal of a judge, and that article also guarantees the independence and immunity of judges. The people participate directly in the administration of justice as jurors and people's assessors.

The qualifications for judges are set forth in Article 127 of the Constitution. Judges are supposed to be professionals and apolitical. In addition, the Constitution requires that they be at least twenty-five years of age, have been residents of Ukraine for ten years, have at least three years of work experience in the relevant area of law, have command of the state language, and have the recommendation of the Qualification Commission of Judges. The Constitution also allows additional requirements to be set for certain categories of judges.

The selection process for judges is set forth in Article 128 of the Constitution. Under that article, the President of Ukraine is responsible for the first appointment of a professional judge for a five-year term. All other judges, except those of the Constitutional Court, are elected by the Verkhovna Rada to permanent terms. The Chairman of the Supreme Court is elected by the Plenary Assembly of the Supreme Court by secret ballot.

Finally, Article 129 sets forth numerous guiding principles for legal proceedings. Under that article, the Constitution specifies, among other things, that all are equal before the law, that trials must be open, and that all are entitled to the adversarial process.

The Constitution in Chapter XV provided for a five-year transitional period to establish the judiciary system outlined in the Constitution. Under these provisions, the Supreme Court of Ukraine was to begin to exercise its authority in accordance with the current laws in force, while a system of courts was set up that would meet the requirements of Article 125. This period was to last no longer than five years. Many of the provisions of the Constitution, however, were not put into effect by the end of that five-year window. This has necessitated a series of successive laws in order to set up the judiciary, including the small law on the judiciary in 2001.[1] The latest, the Law of Ukraine On the Judiciary and the Status of Judges, No.2453-VI, was adopted by the Rada on July 7, 2010, and signed into law by the President on July 27, 2010.

[1] For more information on these events, see Bohdan A. Futey, *Judicial Independence or Constitutional Crisis? A New Challenge for Ukraine*, UKR. WKLY., June 10, 2001, at 6.

II. General Principles

Before discussing the specifics of the new law on the judiciary, some of the general principles and practices that make a judiciary effective are worth reviewing.

a. Rule of Law

The Constitution in Article 8 recognizes the importance of the rule of law and declares this principle to be "recognised and effective" in Ukraine. The rule of law is the lynchpin of the promotion of democracy throughout the world, and democracy, in turn, provides a better and more prosperous economic life. The rule of law has at least two important components to it. First, the law must be supreme. All persons, whether private citizens or government officials, must be subject to the law. Second, there must be a concept of justice that emphasizes interpersonal adjudication; law must be based on standards and universally applicable procedures.

For the rule of law to be upheld, there must be a strong and independent judiciary; as there cannot be a market economy without private property ownership, there cannot be respect for the rule of law without an independent judiciary to enforce it. This judiciary, furthermore, must be one that exists in a system of separate powers.

b. Separation of Powers

A political system based on the separation of powers with appropriate checks and balances is vital to the preservation of democracy. The aim of a judiciary and, more broadly, of a government, is to provide stability through the consistent application of the law and adherence to the Constitution. The separation of powers is an especially effective way to do this, since it sets up a system of balances under which the different branches watch each other and keep each other in check. In order for separation to be effective, the different branches of government must be co-equal, with each wielding sufficient power; no one branch can so dominate the government as to render separation irrelevant. This type of balancing is especially important in regards to elections. If citizens cannot be assured of a fair and honest election process, they will have no faith in other components of the political process. Social stability rests on the individual's confidence in the electoral process to function correctly in every respect. Separation of powers bolsters this confidence by using the judiciary to check any undue pressure that might be exerted by the executive or legislative branches.

c. The Judiciary as an Independent and Co-Equal Branch

A strong judiciary must be co-equal with the other branches of government. This means that the judiciary–and each individual judge–must act as co-equal with and independent from the other branches of government. Judges can only achieve independence and respect if they are not beholden to any other branch of government or political party. It is vital that courts have jurisdiction and the power to restrain the legislature or executive by declaring laws and official acts illegal or unconstitutional when they abridge the rights of citizens. Furthermore, for judicial independence to have practical effect, the court's interpretation must be accepted and enforced

by the legislative and executive branches of government. This premise of equality forms the backbone of democracy.

Judges must also internalize the importance of equality. In the United States, becoming a judge represents a noticeable achievement and responsibility. Being a judge means holding one of the most respected positions in American society. Judges must be honest-brokers; they must be independent from and neutral among the parties that appear before them. Judges must decide matters before them impartially, on the basis of the facts and the law, without any restrictions, improper influences, inducements, or threats, direct or indirect, from any party or institution for any reason. A judge's moral commitment to this form of independence eliminates favoritism and corruption from the nation's judicial system. If judges fail in this duty the public will lose confidence in the basic equity of its society, generating cynicism, anger and instability.

As part of internalizing the importance of equality and independence, judges must refrain not only from conduct that is improper but also from any conduct that could create an appearance of impropriety. For instance, *ex parte* communications must be avoided. An e*x parte* communication is a meeting of a judge with only one party in a case. The Supreme Court of Ukraine and other, lower courts currently have visiting hours where parties can individually meet with the judges. To prevent an appearance of impropriety, these *ex parte* meetings should cease immediately and all communications between the court and the parties should be conducted in an open forum with both parties present.

d. Judicial Independence

The judiciary will remain weak if it is merely theoretically co-equal with and independent from the other branches; it must also be practically independent. There are several practical concerns that must be addressed for the judiciary to act as an independent, co-equal branch.

An adequate budget is required to have an independent judiciary. Courts must receive enough funding to pay judges salaries comparable to those of members of the other branches of government. Enough money must be available to fund the administration, buildings, and salaries of other court officials. A viable court system will not be able to exist without overcoming these economic hurdles.

Judges must also be guaranteed a lengthy tenure, whether for life or until retirement age, and a non-reduced salary for them to be independent. The United States Constitution guarantees this so that federal judges will not fear losing their jobs and getting pay cuts if they make a decision that is unpopular with the President or Congress. This protected freedom to make decisions that are politically or socially unpopular is one of the imperatives of democracy. The United States Constitution does allow for the involuntary removal of federal judges from office but only by impeachment and conviction of "treason, bribery, or other high crimes and misdemeanors." Impeachment is a constitutional process whereby the House of Representatives by a majority vote may charge high officials of the government suspected of misconduct with "malfeasance of office" for a trial before the Senate. The Senate may then, by a two-thirds vote, convict a judge and remove him from office.

e. Selection and Appointment of Judges

Without an adequate system to select and appoint judges, an independent judiciary will not be ensured of the quality of judges needed to act with the intelligence and conscience that a judiciary requires.

In the United States, there are few official requirements for who can serve as a federal judge. There are no age or education requirements, but, as a practical matter, judges must have an outstanding record of experience in the legal field. The Constitution requires that federal judges be nominated by the President and confirmed by the Senate, and federal judges must therefore possess enough experience to warrant a nomination and withstand Senate scrutiny. Furthermore, federal judges must undergo an exhaustive screening of their professional and personal backgrounds to ensure that they have the mental sagacity and temperament required of a judge. The American Bar Association plays a role in this process by rating every candidate for a federal judicial position on a scale from "well qualified" to "not qualified." This input from a neutral source is invaluable in attempting to select those most qualified to be federal judges.

Many states constitutions set specific qualifications for judges, such as length of residence in the state, age, or legal experience.[2] The age limits imposed on judges vary quite widely; some states require a minimum age of thirty-five, while others only require a minimum age of twenty-five.[3] Some states require a higher age for their highest courts, while allowing younger lawyers to serve as lower court judges. Other states have no minimum age for any type of judge and rely merely on elections to ensure an experienced judiciary.[4] Many states also emphasize the experience necessary to be a judge; in Ohio, for instance, a person must have been an attorney for at least six years in order to be a judge.[5] Judges often vary quite widely in the type of legal experience they have; some judges have worked for the government, while other judges have worked for small or large law firms.[6] In addition, judges in the American system can enter the judicial system at any level, whether as a judge on the highest court or the lowest one.[7] This variety of requirements helps to ensure that the judiciary has a wide breadth of experience.

Chief Judges for most federal chief judgeships in the United States are not selected by any person or body; instead, judges assume the position of Chief Judge based on seniority.

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[2] Alan Tarr, *Designing An Appointive System: The Key Issues*, 34 FORD. URB. L.J. 291, 308 (2007).

[3] Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORD. URB. L.J. 73, 115 n.150 (2007).

[4] Jessica Conser, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C.J. INT'L L. & COM. REG. 255, 330 n.510 (2005).

[5] *Judicial System Structure*, THE SUPREME COURT OF OHIO, http://www.supremecourt.ohio.gov/JudSystem/default.asp (last visited Sept. 2, 2009).

[6] *Selection Training and Discipline of Judges: Legal Seminar on the Rights and Responsibilities of the Judiciary and the Prosecutors* (January 19-28, 1993) (comments of Bohdan A. Futey, Judge, United States Court of Federal Claims).

[7] *Id.*

Within a given district or circuit, the Chief Judge will be the most senior judge who is (1) 64 years of age or younger, (2) has served for at least one year as judge, and (3) has not previously served as chief judge. Chief Judges serve a term of seven years, or until they reach the age of 70, whichever occurs first. After the expiration of a Chief Judge's term, the judge resumes his position as a normal judge. The primary exception to this selection process is the Chief Justice of the Supreme Court; the Chief Justice is nominated by the President and confirmed by the Senate for that particular position and serves until retirement or removal from office.

III. Comments Specific to the New Law

a. Creation and Abolition of General Jurisdiction Courts (Article 19)

Under Article 19 of the new law, the President of Ukraine can create and abolish courts of general jurisdiction, based on the proposal from the chief judge of the relevant high specialized court. That Article also specifies the appropriate grounds for the creation or abolition of a court: a change in the system of courts pursuant to the current law, "the need to improve access to justice," or "changes in the administrative and territorial division."

This currently places too much power related to the judiciary in the hands of the President. Commenting on a draft of the new law for the Council of Europe, Stephan Gass noted that the system is problematic because it leaves "the creation and abolition of courts to the discretion of the highest executive organ, the President."[8] A neutral way of establishing the number of judges should be used. In the United States, the Judicial Conference of the United States surveys the needs of the judiciary every other year; based on facts such as the number of filings, geography, and the types of cases, the Judicial Conference makes recommendations to Congress, who then must enact legislation to create new judgeships. This Conference is comprised of the Chief Justice of the United States Supreme Court, as well as judges from every circuit and district in the nation.[9]

Not only does the system in the new law place too much power in the hands of the President, but it also is unconstitutional. Under Article 106(23) of the Constitution, the President has the power to "establish" courts through the procedure determined by law. The new law, however, gives the President the power not only to create but also to abolish courts. The Constitution does not seem to contemplate this, and putting such a large power into the hands of the executive could have dangerous ramifications. Judges might be hesitant to uphold the rule of law, if they are afraid that their court could be abolished due to an unpopular decision.

b. Specialization of Courts (Articles 18, 31, 32, 36)

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[8] Stephan Gass, *Preliminary Observations on the Draft law on the Judicial System and the Status of Judges of Ukraine*, JOINT PROGRAMME BETWEEN THE EUROPEAN COMMISSION AND THE COUNCIL OF EUROPE ON THE TRANSPARENCY AND EFFICIENCY OF THE JUDICIAL SYSTEM OF UKRAINE (July 1, 2010). Gass also helped draft the Venice Commission report on the new law.

[9] For more information on the Judicial Conference and the determination of the appropriate number of judgeships in the United States, see *Frequently Asked Questions*, UNITED STATES COURTS, http://www.uscourts.gov/Common/FAQS.aspx (last visited Aug. 31, 2010).

Under Article 18, courts of general jurisdiction are supposed to specialize in civil and criminal, commercial, and administrative cases. The new law in Articles 31 and 32 also calls for a "High Specialized Court" to be set up for each of these areas of law. Fragmenting the general jurisdiction courts into specialized areas may neuter their effectiveness and may not be the best way to dispense justice.

It is also unclear what effect this specialization of courts would have on the Supreme Court. Under Article 125 of the Constitution, the Supreme Court is supposed to be the highest judicial body in courts of general jurisdiction, while the respective high courts of specialized courts act as the highest judicial body of their respective jurisdictions. Under Article 36 of the new law, however, the plenary sessions of these high courts are ordered to "decide on applying to the Supreme Court of Ukraine regarding submission of a constitutional petition requesting assessment of compliance of laws."

These provisions raise many questions. Under Article 18 of the new law, does the fact that courts of general jurisdiction specialize into one of the above-mentioned four areas mean that they are now "specialized courts" that do not fall under the jurisdiction of the Supreme Court? Or are these courts merely an intermediary step on the way to a final appeal with the Supreme Court? Since Article 36 of the new law provides that the High Specialized Courts decide whether to submit a case to the Supreme Court, does this mean that the Supreme Court would not hear cases in these four areas of law, unless the specialized court requested guidance? Stephan Gass commented that this system may violate Ukraine's Constitution, since it appears to strip the Supreme Court of its role as the highest judicial body. Essentially, according to Gass, the Supreme Court will be "annihilated" by this new law.

This system should be clarified to specify precisely what cases may be appealed to what bodies. The new law has already wisely strengthened the effectiveness of the Supreme Court by lowering the number of justices to twenty, but the law must also be changed to ensure that the Supreme Court retains its position as the highest court for courts of general jurisdiction. The new law should not allow any readings that remove this court's jurisdiction. If the Supreme Court is to effectuate its constitutional role as the highest court, it must not be forced to rely on a lower court to recommend it cases to hear. Furthermore, the proliferation of courts seems unnecessary; the current law proposes numerous courts in which appeals could be heard, and an attempt should be made to prune potentially unnecessary courts. The jurisdiction of courts must be made specific, so that parties can know precisely where their cases will proceed.

c. Selection and Removal of the Chief Justice (Articles 42 through 45)

Under the new law, the Chief Justice of the Supreme Court of Ukraine will be elected by the Plenary Session of the Supreme Court. The Plenary Session is comprised of all twenty justices of the Supreme Court, and they select who will be the Chief Justice by a majority vote.

Under the new law, a vote of no-confidence in the Chief Justice can be issued by a lower-than-normal quorum of the Plenary Session of the Supreme Court. This is a rather questionable practice. Under Article 45, a Plenary Session is competent if at least two-thirds of its members are present, "except for events envisaged by this Law." Under Article 43, a Plenary Session can

convene to issue a vote of no-confidence in the Chief Justice with only a majority of the Plenary Session present. This type of vote is sufficiently serious to warrant at least the presence of the normal quorum of the Plenary Session, and it is questionable why a lower-than-normal quorum should be able to convene to take such serious action. The new law should be amended to require at least the normal two-thirds quorum, if not a more stringent one, to take the serious step of issuing a vote of no-confidence in the Chief Justice.

d. Selection of Chief Judges (Article 20)

The selection process for Chief Judges outlined in the new law is too political. Under Article 20 of the new law, the Chief Judge is selected and appointed for a five-year term by the High Council of Justice. The involvement of the High Council of Justice could unnecessarily politicize the selection of Chief Judges; in the report of the Co-Rapporteurs on Ukraine to the Parliamentary Assembly of the Council of Europe ("PACE"), many worries about the politicization of the High Council of Justice were mentioned. The PACE report notes that many have been concerned about the neutrality and capacity of this Council, since the President has recently appointed a close ally with no legal background to it.

To remove any appearance of impropriety and to avoid political partisanship, Ukraine should consider adopting the tenure-based system used in the United States for the selection of Chief Judges of lower courts; as described above, this system automatically appoints the judge with the most seniority to the position of Chief Judge. This type of system would reduce and minimize the opportunity for external, political pressure. In the event the tenure-based system is not adopted, Ukraine should consider instituting a system whereby lower court judges could elect their Chief Judges through secret ballots.

e. Judicial Immunity (Articles 47 and 48)

Some form of judicial immunity is critical, since the threat of liability could hinder a judge's freedom of reasoning.[10] The current provisions for judicial immunity in the new law, however, go too far. Under Article 48, no judge may be arrested without the consent of the Verkhovna Rada, and only the Prosecutor General or his deputy may open a criminal suit against a judge. It strains the rule of law to protect a judge from criminal liability for any actions. In the United States, judges are absolutely immune from liability for almost all actions taken in the judge's judicial capacity.[11] A judge, however, can be prosecuted for criminal acts unrelated to his judicial office. The new law should be modified to only protect judges from those actions taken in accordance with his judicial office. A judge will not be hindered in his independence by knowing that he will be prosecuted for pilfering a pair of pants from a department store or for

[10] *See* ***Forester v. White***, 484 U.S. 219, 223 (1988) ("When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.").

[11] ***Mireles v. Waco***, 502 U.S. 9, 11-12 (1991). Judges have absolute immunity for actions taken in their judicial capacity, except those actions "taken in the complete absence of all jurisdiction." *Id.*

taking a bribe. These types of prosecutions have no relation to a judge's independence, and protecting a judge from them will not in any way ensure the independence of the judiciary.

f. Jury Trial (Article 63)

Ukraine's Constitution guarantees the right to a jury trial for some cases, yet the country currently has no jury trial system and has never, in fact, held a jury trial.[12] Juries serve numerous functions, such as legitimizing the outcome of cases, providing a forum for democracy, and overriding government abuse.[13] Implementing the procedures for selecting a competent jury and conducting jury trials would enforce the democratic guarantees of the Constitution. It would, furthermore, erase the longstanding inconsistency that exists today, where the Constitution guarantees something that the real world does not provide.[14] Currently, Article 63 in the new law merely specifies that jurors shall be citizens of Ukraine. More procedures for the selection and participation of jurors should be included, so that the guarantees of the Constitution can be carried out.

g. Requirements to be a Judge

i. Rights and Responsibilities (Article 54)

Under Article 54, judges are required to take a two-week training course annually in the National School of Judges. A judge with a lifetime position is required to take this two-week course at least once every three years. Ihor Koliushko and Roman Kuybida, from the Centre for Political and Legal Reform, have noted that this new system of judicial education has little clarity and is, problematically, under the control of the executive branch.

Judicial training should be independent from the executive branch. In the United States, many state judges take courses through the National Judicial College, an independent organization that prepares lawyers to serve as judges. For federal judges, educational support is provided by the Federal Judicial Center, and judicial seminars and conferences are conducted at the yearly District Judges' Meetings and Circuit Judges' Conferences. As discussed above, overall administration of the federal judiciary is provided by the Judicial Conference of the United States, while the Administrative Office of the United States Courts administers the everyday operations of federal courts, including preparation of the budget for the judiciary to be submitted to Congress for approval.

ii. Judicial Oath of Office (Article 55)

The new law requires a judge to take an oath of office. The law also requires a judge to be sworn in at a ceremony in the presence of the President. This could be problematic. For

[12] Elizabeth R. Sheyn, *A Foothold for Real Democracy in Eastern Europe: How Instituting Jury Trials in Ukraine Can Bring About Meaningful Governmental and Juridical Reforms and Can Help Spread These Reforms Across Eastern Europe*, 43 VAND. J. TRANSNAT'L L. 649, 651 (2010).

[13] *Id.* at 690.

[14] *Implementation of Judicial & Legal Reforms in Ukraine: Hearing at the Verkhovna Rada* (Mar. 16, 2005) (testimony of Bohdan A. Futey, Judge, United States Court of Federal Claims).

instance, what if the President refuses to show up for a ceremony? Would this prevent a judge from being sworn in? This must be changed. Ukraine has experienced a similar problem when the Parliament would not convene to swear in Constitutional Court judges, and this caused the Constitutional Court to lack a quorum for a ten-month period. This should not be allowed to take place again, and judges should not be required to take the oath of office in the presence of one particular person or group of persons. Such a requirement is not in Ukraine's Constitution. In the United States, for instance, judges are required to take an oath of office, but they only need to take this oath before a person competent to hear oaths, such as a notary public or a judge. Judges, especially on the Supreme Court, often take part in a ceremony to celebrate the administration of their oath, but they are also free to take that oath outside of a ceremony.

iii. Judicial Ethics (Article 56) and Political Neutrality (Article (53)

The new law also requires a judge to comply with a Code of Judicial Ethics, which the Congress of Judges of Ukraine will adopt. It is unclear what the specifics of this code will be or what it will require judges to do. Furthermore, if courts are to become self-governing, they should adhere to the Code of Judicial Ethics and regulate themselves, even if the Rada does not pass one. Presently, there is a Code of Judicial Ethics, but a violation of that code cannot be used to instigate disciplinary proceedings against a judge. This hinders the self-governance of the judiciary.

The new law in Article 53 wisely prohibits a judge from being a part of a political party or taking part in "political actions, rallies, or strikes." This should be expanded to specify that a judge may not run for office while serving as a judge. The prohibition of judges becoming members of trade unions prevents a possible conflict of interest and appearance of impropriety. If a judge is a member of the trade union and hears the case on commercial or labor matters, his objectivity can be under question. The judge must recuse himself. If a judge wishes to take part in politics, a judge should have to resign from his judicial post. Anything else compromises the impartiality and political neutrality that is expected of the judiciary.

iv. People's Assessor (Article 59)

Under Article 59, a people's assessor must be at least 30 years old. This is five years older than the twenty-five years of age required for a judge in Article 64. It is unclear why this discrepancy exists and why there should be a difference in the age requirements for the two positions.

v. Judicial Appointment Procedure (Articles 66 through 74)

The appointment and selection of judges currently occurs through a long process that is outlined in Article 66. After a notice of judicial vacancies has been posted by the High Qualifications Commission of Judges of Ukraine, candidates for judicial positions submit applications to the Commission. These applications are then reviewed, and candidates take a series of examinations, specialized training courses, and more examinations. Eventually, the High Council of Justice recommends candidates to the President, who makes a final decision on the candidates' appointments. Judges then serve a five-year term.

A subsequent procedure must be followed for a judge to receive a lifetime appointment. When a judge's five-year term has expired, he can apply to the Commission for a recommendation to be elected to a lifetime position. The Commission then reviews information about the candidate and decides whether or not to recommend the candidate to the Verkhovna Rada, which then votes on and decides whether or not the individual will receive a lifetime appointment.

The involvement of the High Council of Justice and High Qualifications Commission is too political and very problematic in the new law. As it stands, judges must be recommended by the High Council of Justice and pass examinations conducted by the High Qualifications Commission in order to secure an appointment. While the new law does seem to attempt to set up a neutral way to select qualified judges, the involvement of these two bodies could act as, essentially, political gatekeepers to the judiciary. The PACE report, as well as other commentaries, has highlighted the problems with the unconstitutional involvement of a deeply political body in the selection process. While the High Qualifications Commission consists mostly of judges, the High Council of Justice remains too political. The Head of the Security Service of Ukraine (SBU) was appointed to this body by the President. Apparently, there is a conflict of interest when such political figures are involved in the selection process. Ukrainians must be able to trust that their judiciary serves the law, rather than a political party, and requiring judges to receive the recommendation of a political body hinders this trust.

The selection process could be improved by the use of a neutral, non-governmental body. For instance, in the United States, the American Bar Association issues ratings on federal judicial nominees from "well qualified" to "not qualified." This aids the government in the selection process. The new law could be modified so that a neutral, non-governmental body is in charge of examinations and recommendations for judges. This would improve the transparency of the system and help to remove politics from the judiciary, which strives to be apolitical.

IV. Transitional Provisions

The Transitional Provisions in Section XIII of the new law have two important and immediate effects. First, under Article 6, which became effective August 3, the procedure for convening the recent Congress of Judges was changed. Under the new law, the Congress of Judges was called by an organizing committee, rather than the Council of Judges as foreseen by the previous law on the judiciary. It seems this was done in a way to eliminate the Supreme Court from the policy-making process and the nomination of candidates to the Constitutional Court of Ukraine. Second, the procedure for cassation complaints (appeal on questions of law) is also changing. After October 15, "cassation complaints against decisions of general courts in criminal and civil cases" filed with the Supreme Court must be referred back to the appropriate High Specialized Court of Ukraine for Civil and Criminal Cases. This High Court, under the new law, will not be formed until October 1 and will not begin operation until November 1. Nevertheless, the Supreme Court will hear the cassation complaints until this High Court is convened.

Also, in accordance with Section XII Final Provisions of the new law, a similar procedure for referral of petitions to the Supreme Court from the High Administrative Court and High Commercial Court has been established. Pursuant to the Final Provisions, the relevant amendments will be incorporated into the respective Codes of Procedure.

V. Conclusion

There is no question that the judiciary in Ukraine needs to be reformed, and the new law does make some improvements. What is needed is to strengthen the checks and balances—not control over the judiciary by the executive. Self-government by the judiciary must be enhanced and guaranteed. Provide adequate salaries for judges, insuring appropriate funding and assistance for the courts, prompt publication and availability of judicial decisions, transparency in decision making, and enforcement of judicial decisions—these are measures and ways to eliminate corruption among the judiciary. Nevertheless, greater access of citizens to judges should not mean or indicate *ex parte* communications behind closed doors with just one party in the proceedings. This practice should be eliminated completely. Judicial independence does not mean the judges do as they choose, but do as they must in accordance with the Constitution and laws of the country. Judicial independence in the final analysis will depend largely on the conscience and courage of the judges themselves. Judges will not be respected until they respect themselves.

While the new law contains many improvements that will help the judiciary become more apolitical, the law also has several areas where it can be improved. Most notably, the role of the various courts should be clarified, and those roles should be modified in order to keep the Supreme Court in a position of primacy, as mandated by the Constitution. The Constitution states that the Supreme Court is the highest judicial body, and the new law essentially removes this constitutional role.

There is still much work to do to bring Ukraine's judiciary in line with the Constitution; for instance, while the Constitution guarantees the adversarial process, courts still use the inquisitorial process. Disrespecting the Constitution's commands only hurts the rule of law and shakes Ukrainians' confidence in the government. Ukraine must also adhere to international guidelines on the judiciary, such as the Bangalore Principles of Judicial Conduct, comments of the Venice Commission, comments of the Council of Europe, and the judicial experience in other nations, such as the United States.

It is not too late to act on these recommendations. Recently, on August 30, the Rada amended the law on local elections as a result of criticism from international organizations. Unfortunately, on September 2, 2010, the Constitutional Court refused to open a case and rule on the constitutionality of this new law on the judiciary, despite the fact that 54 deputies of the Rada requested the intervention of the Constitutional Court. To maintain the trust of Ukrainians, the government must ensure that the Constitution is followed, and the new law should be modified accordingly.

* Bohdan A. Futey is a Judge on the United States Court of Federal Claims in Washington, DC, appointed by President Reagan in May 1987. Judge Futey has been active in various Rule of Law and Democratization Programs in Ukraine since 1991. He has participated in judicial exchange programs, seminars, and workshops and has been a consultant to the working group on Ukraine's Constitution and Ukrainian Parliament. He also served as an official observer during the Parliamentary elections in 1994, 1998, 2002, and 2006, and Presidential elections in 1994, 1999, 2004, and 2010, and conducted briefings on Ukraine's election Law and guidelines for international observers.