LAW ON THE JUDICIARY
AND THE STATUS OF JUDGES OF UKRAINE

Summary of Comments by Bohdan A. Futey*
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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.

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.

Article 6 of the Ukrainian Constitution declares the separation of power concept. The principle of checks and balances sets up a system of balances under which the different branches watch each other and keep each other in check. The Constitution in Article 8 recognizes the importance of the rule of law and declares this principle to be "recognised and effective" in Ukraine. For the rule of law to be upheld, there must be a strong and independent judiciary. This judiciary, furthermore, must be one that exists in a system of separate powers.

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. 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.

[1] For more information, see Bohdan A. Futey, *Comment on the Law of Judiciary and the Status of Judges*, October 14, 2010.

The new law contains some improvements that will help the judiciary become independent. Positive and progressive provisions of the Law to ensure judicial independence are as follows:

- **Selection Process of Judges**. It is very positive that the candidate for a judicial position will be tested under video surveillance and within the anonymous testing system (Article 70). This will help to avoid the improper attempts to bypass testing or change the results.
- **Facilitating the Report of Threats to Judiciary Independence**. This provision, if properly implemented, can effectively minimize undue influence on judges and strengthen their independence (Article 47).
- **Automatic/Random Case Assignment**. Under the new Law, the cases will be distributed randomly between the judges by the automatic system. This will enhance judges' independence and help to avoid assignment of certain cases to a particular judge who has shown favoritism towards a party or parties.
- **Inclusion of State Judiciary Administration into the Judicial Control.** The fact that the State Judiciary Administration was the executive body responsible for courts' organizational and financial matters was widely criticized. The new Law addressed this problem by including the Administration under the judicial control (Article 145). It is vital to ensure that the State Judiciary Administration is completely excluded from the executive branch.
- **Improvement of Financing of the Courts.** All courts of general jurisdiction will be responsible for spending the budget allocations without interference of any body (Article 142). It is a good sign, but sufficient funds must be available from the state budget to ensure proper administration and infrastructure in the courts. 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.
- **Financial Disclosure Requirement**. Judges have a duty to disclose annually their financial status and property which will be publicly posted at the official web-site of the judiciary (Article 54).

- **Training of Judges**. Judges will take appropriate training constantly at the National School of Judges to improve professional skills. It seems that the training will no longer be under the auspices of the Ministry of Education (Article 81). This provision, however, should be clarified.

- **Improvement of Discipline Practice Procedure.** Any person can file a complaint against the judge, and a sample complaint will be available on the High Qualifications Commission's web-site (Article 84).

- **Reduction of Justices of the Supreme Court.** The Law wisely strengthened the role of the Supreme Court by reducing the number of justice to twenty (Article 39).

- **Political Neutrality**. 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. He or she should resign first. 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 a trade union and hears a case on commercial or labor matters, his objectivity might be questioned. The judge must recuse himself.

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. For example, the involvement of the High Council of Justice and High Qualifications Commission in the selection process of judges 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. While the High Qualifications Commission consists mostly of judges, the High Council of Justice remains too political and can have undue influence on judges.

Judicial independence does not mean that judges can do whatever they want. Some form of judicial immunity is critical, since the threat of liability could hinder a judge's freedom of reasoning. 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. The new law should be modified to only protect judges from those actions taken in accordance with his judicial office.

The new law 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.

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.

The new law foresees that a judge can be dismissed for a breach of oath (Article 105). Pursuant to Article 55, a person first appointed to a judicial position shall take the oath "to comply with moral and ethical principles of judicial conduct and not to commit any action disgracing the title of a judge and diminishing the authority of the judiciary." This provision can have a very broad reading and can cause some problems in interpretation. This seems particularly dangerous because of the vague terms used and the possibility of using it as a political weapon against judges. A more precise definition of what constitutes "the breach of oath" by a judge is needed.

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. Another example is Article 19 of the new Law. It grants the President the power to abolish courts. It is unconstitutional. Article 106(23) of the Constitution allows the President to establish courts but does not reside the power to abolish the courts. Laws cannot grant more power to any state body or institution than it is envisaged by the Constitution. Moreover, granting such powers in the hands of executive can have dangerous ramifications.

Another example of constitutional controversy is the decreasing role of the Supreme Court of Ukraine under the new Law. The Supreme Court under the Constitution is the highest judicial body within the courts of general jurisdiction. Pursuant to the new Law, however, the high specialized courts will now decide whether to submit a case for appeal on questions of law (cassation) for further review to the Supreme Court. The Supreme Court must retain the position as the highest court in the system of courts of general jurisdiction in compliance with the Constitution.

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. 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.

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

The Law cannot function properly, however, without relevant amendments of the Constitution in order to ensure full harmony of the new Law and the Constitution. For example, High Council of Justice with a majority or a substantial element of judges elected by their peers into a central body would be a development in the right direction and cannot be achieved unless relevant amendments are introduced to the Constitution. Article 131 of the Constitution of

Ukraine provides that the High Council of Justice consists of twenty members. The majority of the members belong to or are appointed by the executive or legislature. Moreover, the Head of the Security Service of Ukraine (SBU) has been appointed to this body by the President recently. Apparently, there is a conflict of interest when such political figures are involved in the selection process. The present composition of the High Council of Justice of Ukraine does not correspond to international standards and should be changed. 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. While some improvements of the Constitution are needed, first of all, it is vital to adhere to the current Constitution and ensure its proper implementation.

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. 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.

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