

Comments on USAID's "Proposals Regarding Next Steps in the Judicial Reform in Ukraine" (November 12, 2010)

Conference: On Constitutional Provisions of the Judicial Reform in Ukraine

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The Constitution of Ukraine was adopted on June 28, 1996. This basic law consists of matters important to the Ukrainian people and has "the highest legal force" in the country. When it was passed, it addressed the concerns of Ukrainians about their national interests, the establishment of their statehood, the suppression of their rights by the Soviet Union, and the changes a democratic future would bring. It established the concept of separation of powers, the rule of law, and the President-Parliament form of government. A number of international organizations, including the Venice Commission, commended it, particularly for its guarantee of many human rights.

While the Constitution needs some improvement to bring the judiciary into line with international standards, first and foremost it must be fully implemented by the legislature and upheld by the judiciary. In rendering decisions, judges must adhere to the Constitution and the rule of law, rather than political or personal motives. In making improvements to the Constitution and laws, the legislature must heed the aim of Ukraine's judicial system. The goal of any judicial system, whether civil law or common law, is to provide stability through the consistent application of the law and adherence to the Constitution, since arbitrary decisions can

instill uncertainty and confusion not only in legal circles but also in the people of a given country and the international community.<sup>1</sup>

Following the Conference on Judicial Reform in Ukraine and International Standards for Judicial Independence, held in October of 2010, USAID prepared a document containing proposals for the reformation of Ukraine's laws and Constitution. That document contains some valid recommendations, and these comments address the existing recommendations. Along with those comments, there are some additional suggestions for bringing Ukraine's laws into step with its Constitution.

#### Comments on Existing Recommendations to Modify Ukraine's Laws

- The power to **create and liquidate courts** (§2): The elimination of such power from the Executive is a much needed recommendation. Under Article 106 of the Constitution, the President "establishes courts by the procedure determined by law." The Constitution does not, however, give to the President the power to liquidate courts, and allowing the executive to do so would place too much power in one person's hands. I agree with the recommendation to move this process to the Verkhovna Rada, but also believe that the use of a neutral body, which could analytically determine when and where new courts are needed, would benefit the process. Under Article III of the United States Constitution, "the Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress solicits recommendations regarding the judiciary's needs from the Judicial Conference of the United States, a body comprised of the Chief Justice of the United

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<sup>1</sup> In its 2010 Corruption Perceptions Index, which ranks countries by the level of perceived corruption, Transparency International ranked Ukraine in the bottom third, at 134<sup>th</sup> out of 178. *Corruption Perceptions Index 2010 Results*, TRANSPARENCY INTERNATIONAL, [http://transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://transparency.org/policy_research/surveys_indices/cpi/2010/results).

States as well as appellate and trial judges from around the country. The Conference analyzes the number and type of filings that courts receive, as well as their geographic location, and recommends to Congress changes in the number of judges. Based on these recommendations, Congress enacts legislation to create new courts and judgeships. This type of system helps to ensure that judgeships are created based on judicial, rather than political, need.

- **Role of the Supreme Court (¶4):** In accordance with Article 125 of the Constitution, the Supreme Court of Ukraine is the highest judicial body in the country, and any attempt to whittle away at its status through the proliferation of specialized courts must be rejected. The lack of clarity in the current system is troubling. Not only is the system confusing, but it may completely weaken the Supreme Court's status. Lower courts should not decide whether to refer cases to the Supreme Court; the Supreme Court should be able to exercise its own discretion over the cases it hears.
- Barring judges from being **candidates for political office (¶5):** Judges should not be allowed to run for office while still holding their judicial positions. They must resign prior to running. This recommendation helps to ensure both the actual political neutrality of the judiciary, as well as the appearance of neutrality.
- Modifying the **swearing-in requirement (¶7):** This is a good recommendation, since allowing judges to be sworn-in by their colleagues would provide needed flexibility. The Constitution itself only requires an oath of office to be taken by the President and by the National Deputies of the Verkhovna Rada, although Article 126 specifies that a judge may be dismissed for "breach of oath." The swearing-in requirement for judges has thus come from the laws passed in Ukraine, rather than the Constitution. Several years ago,

Ukraine experienced a problem when Parliament refused to convene to swear in the Constitutional Court judges, which caused that court to lack a quorum for ten months. Any future problems such as this should be avoided by allowing more officials than just the President to swear judges into office.

#### Comments on Existing Recommendations to Modify Ukraine's Constitution

- Guaranteeing **trials within a reasonable time** (§1): This recommendation will help ensure the efficient administration of justice in Ukraine. In the United States, the accused in criminal prosecutions are guaranteed a “speedy and public trial” under the Sixth Amendment to the Constitution, and the European Convention on Human Rights also guarantees trial within a “reasonable time.” In addition to amending Ukraine’s Constitution, the legislature should pass a law, such as the United States’ Speedy Trial Act, that sets guidelines and deadlines for the protection of this right.
- Protection against **double jeopardy** (§2): This recommendation will bring Ukraine’s laws in line with the laws of many other nations. In the United States, the Fifth Amendment to the Constitution protects a person from being prosecuted twice for the same crime, and the European Convention on Human Rights also bars second prosecutions for the same offense.
- Change from “Justice” to “**Judicial Power**” (§3): This is a good and proper change. The United States Constitution refers to “The Judicial Branch” in Article III.
- The power to **create and liquidate courts** (§4): Judicial management should be non-partisan, as discussed above.
- The increase in the **maximum tenure term** (§6): Guaranteeing that the term in Article 126 of the Constitution will extend for either life or a very long period helps to insulate

judges from political pressure. Article III of the United States Constitution guarantees life tenure to federal judges, during good behavior, and also protects them from having their pay lowered while they serve in office. This allows judges the freedom to make legally correct but sometimes unpopular decisions.

- Prohibition on **trade union membership** (§7): The Constitution’s prohibition of trade union membership in Article 127 should remain. If a judge were a member of a trade union, a variety of actual or potential conflicts of interest could present themselves in commercial litigation. As with the bar on being a member of a political party, the bar on being a member of a trade union will help to prevent both the appearance of impropriety and the need for recusal.
- Recommendations regarding the **High Council of Justice** (§10): There is a need to change the composition of the High Council of Justice outlined in Article 131 of the Constitution; requiring at least half of the members to be judges is a good beginning. The High Council of Justice seems to be under inappropriate political influence, which could harm the selection of qualified, non-partisan candidates for judicial office. In the United States, though the President appoints federal judges, the Senate has the task of confirming them before they can become judges. This system of checks and balances gives the legislative branch the chance to inquire into the qualifications and competence of a candidate for judicial office. Furthermore, in the United States, the American Bar Association participates in the approval of judges by rating every candidate for a federal judicial position on a scale from “well qualified” to “not qualified.” Allowing a non-partisan legal source to participate in the selection of judges would enhance the role of

lawyers in Ukraine, and using a screening method, such as the approval required by the United States Senate, could improve the selection of judicial candidates in Ukraine.

- **Constitutional prerequisites for ratification of the Rome Statute of the International Criminal Court (¶12):** The Rada should act promptly and in accordance with the July 11, 2001 decision of the Constitutional Court to ratify the Rome Statute. Additionally, courts need to be willing to enforce Ukraine's international obligations. The European Court of Human Rights recently named Ukraine the fourth most frequent violator of human rights for 2010.<sup>2</sup> If Ukraine is to be a party, as it should, to international agreements and tribunals such as the International Criminal Court, then Ukraine must take steps to bring itself into compliance with the demands of justice. Article 9 of the Constitution specifies that international treaties agreed to by the Verkhovna Rada become part of the national legislation of Ukraine, and the courts must be willing to enforce these treaties as such.

#### Further Recommendations

- **Process of reform:** The USAID document should contain a section discussing the proper procedural path to reform. In my opinion, the first step in reforming the judiciary should be to amend the existing laws to bring them into compliance with the Constitution. Allowing unconstitutional laws to remain in force threatens the rule of law. Once all existing laws have been modified to be in line with the Constitution, the next step in reform is to pass new laws that comply with the Constitution. If reforms are needed that go beyond the Constitution's provisions, then amendments must be made to the

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<sup>2</sup> EUROPEAN COURT OF HUMAN RIGHTS, *Violations by Article and by Country (2010)*, [http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU\\_VIOLATIONS\\_2010\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_2010_EN.pdf).

Constitution in order to allow for those reforms. Such amendments, however, must be enacted in accordance with the processes and provisions of Articles 154 through 159 of the present Constitution. Going about reform in this way will help guarantee the legitimacy and primacy of the Constitution, since Article 8 of that document specifies that laws in Ukraine must “conform” to the Constitution. Critics have stated that sections of the new law on the judiciary and the status of judges are unconstitutional, and Ukraine’s government must take action to rectify this. It is improper and unlawful to enact laws that conflict with the Constitution. The rule of law will be tarnished if laws that conflict with the Constitution are allowed to stand.

- **Powers of the President:** The President should only be granted the powers commensurate with the type of government Ukraine has. Now that the Constitutional Court of Ukraine in its September 30, 2010 decision overturned the political reform of 2004, the exact system of government that Ukraine will act under is unclear. If the country ends up in a Presidential republic, then the President must exercise the powers suitable for that system of government, but if a parliamentary system prevails, then the President should only be able to exercise the powers suitable for that style of government.
- **Juries:** 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. Juries serve numerous functions, such as legitimizing the outcome of cases, providing a forum for democracy, and overriding government abuse. 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 does not exist in practice.

- **Role of the Procurator General:** The role of the Procurator General could also be clarified; does he or she just prosecute on behalf of the state, or is the Procurator General also involved in a system of checks and balances and judicial oversight? The office of the Procurator General should not hold the powers it had under the Soviet Union, where it was essentially a fourth branch of government. The Procurator General should fall firmly within the authority of the Executive branch, and laws should not grant the Procurator General authority outside of the scope provided for in the Constitution.
- **Adversarial process:** the Constitution guarantees that judicial proceedings are conducted through the adversarial process, but courts in Ukraine continue to use an inquisitorial process. Ukraine's laws should be amended to bring judicial procedures into compliance with the Constitutional guarantees, and a recommendation to this end should be added to the USAID proposals.
- **Some positive aspects of the new law on the judiciary:** the new law on the judiciary contains a number of positive aspects, and the USAID document could contain a section covering the healthy changes already made. The reduction of the number of judges on the Supreme Court, the financial disclosure requirement, the provisions for the training and improvement of the judiciary, the inclusion of state judicial administration within the judicial branch, the streamlining of filing judicial complaints, and the improvements to the financing of the judiciary are all positive provisions that should be noted.



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