

# Judiciary System and Reform



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## Introduction

The judicial system in Ukraine is inefficient, opaque, and suffers from extremely low public confidence. In 2013, 16 percent of the population reported that they trusted the courts. By late 2014, that trust was down to 10 percent. Those who fully trusted the court system were a mere one percent.<sup>27</sup> Currently, despite all the other developments in Ukraine, the strength and independence of the judicial system remains under threat. This risk is linked to the rigidly corrupt oligarchic system that has prevailed since Ukraine gained its independence in 1991. Each new government in Ukraine subjugated the judicial system, which then worked in the interest of those governing and ignored the needs of society.

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<sup>27</sup> See, for example, “Anti-Corruption Reforms in Ukraine,” Organization for Economic Co-operation and Development (OECD), Anti-corruption Network for Eastern Europe and Central Asia, Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan, 24 March 2015.

After the 2013-2014 Revolution of Dignity, one of society’s most pressing demands was immediate judicial reform, which began only in October 2014. The gov-

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ernment was able to enact some positive changes but these have not been sufficient to increase public confidence or accelerate reforms in other sectors.

Existing judicial reforms were initiated, developed, and implemented by a top-down command structure stemming from President Poroshenko. This approach provided little opportunity for any public input or for

any influence from civil society. Thus, the risk that the changes are only superficial is high, leaving the judicial system dependent on and heavily influenced by other branches of government in Ukraine. In order for judicial reforms to be sustainable and accepted by the people of Ukraine and its civil society, the reforms process must be supported by the international community.

## Ukraine's Justice System

The judicial system of Ukraine consists of general jurisdiction courts and the Constitutional Court of Ukraine. The courts of general jurisdiction form a single system, which consists of both general and specialized courts. The Supreme Court of Ukraine is the highest judicial body of general jurisdiction in Ukraine, ensuring the consistency of jurisprudence, although the Supreme Court may review the decisions of the high specialized courts only in circumstances specified by law.

Today, the justice system does not perform its responsibilities properly. The primary reasons behind this include a low level of “legal culture” and legal conscious-

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ness in the society, the prevalence of corruption in the field of justice, as well as the continuing dependence of judges on Ukraine’s executive and legislative branches.

In addition, imperfect procedural tools, including an undeveloped system of alternative methods to dispute resolutions like mediation, are an impediment to protecting people’s rights and interests and the efficient functioning of the justice system. The system also suffers from imperfect methods of determining the workload of judges, leading to a disproportionate and highly variable caseload among judges. There is also insufficient use of modern information systems (e.g.,

e-justice). All of this leads to low public visibility of the justice system and low public confidence in the effectiveness and impartiality of judges.

Second, the current system of legal counsel is also dysfunctional. The professional rights and guarantees of the bar enshrined in law are not provided with adequate mechanisms for their implementation. As a result, lawyers are ignored, there is disrespect to the profession, and the role of lawyers in society is diminished. The system of professional self-regulation of lawyers by means of associations or other professional organizations is flawed, and lawyers receive insufficient professional training. The legal counsel system also lacks a balanced and comprehensive approach to the distribution of power and responsibility regarding pro bono work.

Third, there are significant problems in the execution of court rulings. Very few judgments are actually executed (according to the Ministry of Justice, only 20% of judgments are actually carried out).<sup>28</sup> There is no effective incentive structure for bailiffs, and the interaction of bailiffs with other government and non-government agencies is highly inefficient. Parties that win lawsuits sometimes often wait years for the judgments to be executed. Ironically, in order to get state-guaranteed execution of judgments, people resort to bribing government contractors.

Ukraine’s criminal justice system is plagued with structural flaws. The impunity of prosecutors, for example, is not in keeping with European norms, and internal tools to fight corruption remain underdeveloped. There are significant structural obstacles to the autonomy of criminal investigators. The entire system suffers from inadequate IT infrastructure, preventing efficient electronic administration. On a practical level, there is a lack of respect for the adversarial principle in criminal proceedings. There is also no individualized, evidence-based approach to crime prevention, rehabilitation, or resocialization, with limited use of non-incarceratory punishment. There are also differences between the procedural responsibilities and actual

<sup>28</sup> See, for example, “Ministry of Justice: Only 20% of Adjudications Are Executed in Ukraine,” International Center of Reforms, *icrua.org*, 2015.

institutional functions of criminal justice bodies. For example, between 2012-2014 Ukraine conducted substantial reform in the criminal justice process, and the powers granted by the reforms far exceeded the institu-

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tional functions specified in Ukraine’s Constitution and other laws. As a result, there were significant issues in the implementation of the provisions of the new Code of Criminal Procedure.

Many of these systemic problems stem from poor strategic planning in the legislative process. Policymakers focus on short-term solutions, leading to the lack of a systemic vision for democratizing the justice sector. There is insufficient coordination and consultation among the political parties, groups responsible for executing the reforms, and civil society.

## Progress on Judicial Reforms

The goal of judicial reform in Ukraine is to reinforce the rule of law through the right to fair hearings by independent and impartial tribunals, the effective implementation and enforcement of court rulings, and the introduction of a higher level of “legal culture” into society. Judicial reforms should also meet the standards and adopt the best practices of the Court of Justice of the European Union (CJEU). Respect and adherence to the rule of law should flow from the highest tiers of government down to the provincial, district, and municipal levels.

The first step toward comprehensive judicial reform was Presidential Decree No. 826, which created “The Coun-

cil on Judicial Reform” (hereafter – the Council).<sup>29</sup> The Council is an advisory body to the President of Ukraine. The Council consists of 32 experts, including representatives of the Council of Europe, the OSCE, and the EU project “Support for Justice Reforms in Ukraine.” The Coordinator of the Council is Alexey Filatov, the Deputy Head of the Presidential Administration.

The Council developed a “Strategy for Reforming the Justice System, 2015–2020,” approved in May 2015.<sup>30</sup> The Strategy provides for reform in two stages: first, immediate updating of relevant legislation to *restore confidence* in the judiciary in Ukraine; and second, *systemic changes*, such as adopting constitutional amendments concerning the judicial system, judiciary, and other related legal institutions.

The Strategy’s goals, plans, expected results, and success metrics for implementing these reforms are outlined in the “Action Plan” for the implementation of the Strategy. According to the Action Plan, new legislation should be adopted in the following areas:

1. The right to a fair trial (already adopted February 12, 2015)
2. Amendments to the Constitution of Ukraine regarding justice and related legal institutions, as well as actual implementation of provisions laid out in legislation (already adopted June 2, 2016)
3. Enforcement of court decisions (adopted June 2, 2016)
4. Procedural law
5. The bar
6. Pro bono legal counsel

As required in the Strategy of Judicial Reform, Ukraine’s Parliament adopted the Law “On Ensuring the Right to a Fair Trial” (Law No. 192-VIII)<sup>31</sup> on February 12, 2015. This law provides mechanisms for updating the judiciary itself, including the evaluation of all judges’ qualifications to verify their competence, integrity, and professional ethics. The law introduces a new method of keeping track of a judge’s professional history and provides for new rules for the structure of the High Council of Justice (HCJ) and the High Judicial

<sup>29</sup> Presidential Decree No. 826, 27 October 2014.

<sup>30</sup> Presidential Decree No. 276, 20 May 2015.

<sup>31</sup> To read the full text of this law, see [zakon.rada.gov.ua/go/192-19](http://zakon.rada.gov.ua/go/192-19).

Qualification Commission of Ukraine (HJQC). In addition, the law establishes mechanisms of disciplinary proceedings against a judge and provides for extremely competitive procedures for the appointment and transfer of judges. Finally, it returns the Supreme Court of Ukraine to its role as the highest judicial body in the government system of Ukraine.

On June 2, 2016, Parliament adopted amendments<sup>32</sup> to the Constitution in an attempt to depoliticize the judiciary and to ensure its independence. The amendments include legislation on the formation and liquidation of courts and the elimination of opportunities to politically influence judges. To do this, the amendments establish a new High Council of Justice, (hereinafter — GRP, to distinguish it from the current HCJ, which it will replace before April 2019). The GRP will submit nominations for judgeships to the President, since judges can only be appointed by the President. The GRP will have the sole authority to suspend, relieve, or transfer judges. In addition, the five-year probationary period for a judicial appointment will be eliminated — appointments will take effect immediately.

The amendments solidify the mechanisms for updating the judiciary (assessment and evaluation of judges, the basis for their authority and their dismissal) and significantly reduce the dependence of the Constitutional Court on political bodies. The amendments deny Parliament, the President, and the Congress of Judges

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the right to dismiss a judge of the Constitutional Court. This may only be done by two-thirds of the Court itself.

In addition, the June 2 amendments provide for the possibility of creating a three-tiered judicial system in the future and establish anti-corruption protections (including the competitive selection of judges, the reg-

ulation of sources of income, and the introduction of some degree of public control). The amendments grant everyone the right to file suit in the Constitutional Court in the case of a discrepancy of a law with the Ukrainian Constitution, after the exhaustion of other remedies. Prosecutors no longer have oversight over law enforcement. In a controversial move, the amendments also grant the right to defend clients (or oneself) in court exclusively to attorneys.

These amendments took effect on September 30, 2016, while provisions for the recognition of the International Criminal Court jurisdiction in Ukraine come into force in three years. Under the transitional provisions, until the end of 2017 the President has the authority to establish, reorganize, and liquidate courts. In addition, until September 30, 2018, the President may transfer judges to another court upon the submission of the GRP.

## Implementing Legislation

Along with the changes to the Constitution, Parliament adopted the Law “On the Judicial System and the Status of Judges” (No. 1402-VIII),<sup>33</sup> which aimed to implement the provisions of the June 2 constitutional amendments. According to the law, the current four-tiered justice system is replaced with a three-tiered system, comprising local courts, courts of appeal, and the new Supreme Court. The high specialized courts (Supreme Administrative, Economic and Civil, and Criminal Courts) are eliminated, and instead cassation divisions will be created within the structure of the Supreme Court.

In addition, two new courts are created, the Supreme Anti-Corruption Court and the High Court of Intellectual Property, which will have original jurisdiction over the corresponding categories of cases. The High Court of Intellectual Property is to be created by September 30, 2017, and the Supreme Anti-Corruption Court will be operational a year after the relevant legislation is adopted.

<sup>32</sup> The full text of the law can be found at [zakon2.rada.gov.ua/laws/show/1401-viii](http://zakon2.rada.gov.ua/laws/show/1401-viii)

<sup>33</sup> The full text of the law can be found at [zakon0.rada.gov.ua/laws/show/1402-viii](http://zakon0.rada.gov.ua/laws/show/1402-viii)

The implementing legislation creates the Supreme Court *de novo*. The Supreme Court should be established by March 30, 2017. Its bench will comprise not only experienced judges, but lawyers and legal academics who have at least ten years of experience. The High Judicial Qualification Commission (HJQC) will select Supreme Court judges. To ensure the Supreme Court is not politicized, it can only be reorganized or liquidated by law and not by Cabinet, Presidential, or judicial decree.

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ples for the composition of the bench. Ukrainians who were educated or worked abroad will have access to the competitive selection process for judgeships.

The law also creates a Public Council of Integrity, which will assist the HJQC in establishing criteria for evaluating the ethics and values of judges. Provisions for monitoring the lifestyle of judges are introduced. Judges are required to declare the income of their families in addition to their own. At the same time, the remuneration of judges is significantly but gradually increased.

In addition, on June 2, 2016, Parliament passed laws relating to the enforcement of judgements, including the law “On Organizations and Persons Engaged in the Enforcement of Judgments and Other Decisions of Other Bodies” (No. 1403-VIII) and the law “On Enforcement Proceedings” (No. 1404-VIII). The laws introduce a hybrid system of judgment enforcement by allowing for the existence of private judgment-enforcement bodies. Following the example of a number of European countries, private and public judgment-enforcement bodies will have similar rights and tools at their disposal so that citizens will have the choice to apply to either the

state or private enforcement agency.

There are also bills pertaining to the justice system that are still at various stages of the legislative process, including draft amendments to the Civil Procedure Code, the new version of the Commercial Procedure Code, draft amendments to the law “On Legal Counsel,” “On the High Council of Justice” — these are already developed and are currently in a process of public and expert discussion. Parliament is also considering bills on electronic writ proceedings and computer-aided seizure of funds in civil and commercial proceedings.

As part of the Strategy, updates were made to the authorities responsible for judges’ professional careers. After a competitive selection process, new members were appointed to the High Council of Justice and HJQC, using the newly-enacted procedures. The HJQC and the Council of Judges of Ukraine approved new provisions regarding new procedures for evaluating judges’ qualifications, and this qualification assessment process has begun. The proposed plan for optimizing infrastructure for the judiciary was approved. In particular, the plan provides for the creation of a unified information and communication systems, as well as the introduction of electronic instruments for procedural justice.

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The level of public approval of the reform, according to research firm TNS, is 17% (one of the lowest percentages, compared to the other reforms carried out). Only 25% of the members of the National Reform Council saw the reform positively, which is very low when compared to other reforms. The National Reform Council had placed reforming the justice system



as one of its four high-priority projects for 2016.

The general public's poor approval of the judicial reforms might be explained by the fact that the changes have not yet reached their main goal — guaranteeing the right to a fair trial heard by an independent, professional, and impartial court.

The poor assessment of the judicial reforms by the expert community is largely due to the absence of any serious debate or discussion of the draft laws, either on the public or expert level. The reforms are also perceived as including imperfect and slow mechanisms for updating the judiciary, as well as loopholes that could be abused by the political authorities.

## Challenges in Implementing Reforms

There were very few discussions and debates on the draft laws, both on public and expert levels. All legislative initiatives are legally in the hands of the President — the bill is drafted by a Council chaired by the deputy head of the Presidential Administration, and the law is adopted by the pro-presidential majority in Parliament. This, therefore, can form the basis for the abuse of power and requires a very broad discussion and monitoring of proposed projects.

There is no plan to structurally improve the judiciary, nor any mechanisms or draft laws that would consolidate the system to three tiers. Thus, the transition from the current four tiers to three tiers looks more like a superficial transformation that will have no substantive effect.

The law on the judicial system does not regulate the procedure for the establishment of the High Anti-Corruption Court, and hence its creation requires the development and adoption of a special law. This, in turn, allows compromised judges and chief judges to keep their posts. The High Anti-Corruption Court needs to be established within one year after the adoption of the relevant legislation.

The paucity of mechanisms to ensure the independence of judges allows for the possible abuse of power by the political authorities. Judges are still appointed and sworn in by the President of Ukraine. This may contribute to the fact that the heads of key courts are invited for an “audience” with the Presidential Administration but are actually there to establish informal contacts with the President’s “curators” of the judicial system.

There are also no effective mechanisms for the public to exert any influence on the selection and evaluation of judges. Thus, the findings of the Public Council for Integrity will be simply information for the HJQC, which they are free to ignore. There is no obligation on the part of the HJQC to accept the Council’s recommendations since it makes decisions unilaterally. In addition, the Public Council will have no impact on the competitive process for filling vacant positions on local courts.

There are no representatives of the public on the HJQC, members of which are mostly judges. Instead, the composition of the HJQC is extended by two members — the Chairman of the State Judicial Administration and the Parliamentary Commissioner for Human Rights (previously, HJQC members were appointed by judges only). Therefore, the threat of the preservation of collective responsibility in the judiciary remains. Until 2019, the powers of the High Council of Justice (GRP) will be performed by the current HCJ, which over the past year has not proven to be much of an agent for reforms.

There are no provisions for effective mechanisms to update the composition of the benches of the first and second appellate courts. The new laws contain no provisions preventing a court’s chief judge from being re-elected, and some have been elected to this position four or even five times — despite there currently being a ban to hold the chief judgeship twice in a row.

In addition, restricting the right to litigate cases to lawyers is an excessive restriction on access to the justice system, and it is particularly unnecessary at this stage of the reform process. Moving forward, Ukraine needs to develop an environment that enables people better access to qualified lawyers and legal assistance for *pro se* litigators.

Ukraine must also ensure the rapid formation of a “dossier” of judges by consolidating information collected by the National Anti-Corruption Bureau of Ukraine, the Ministry of Internal Affairs, the General Prosecutor of Ukraine, the State Security Service of Ukraine, the Ministry of Justice of Ukraine, the State Fiscal Service, the State Service for Financial Monitoring, and the National Agency for the Prevention of Corruption

relevant parliamentary committees and members of Parliament, since the process of reforms is currently carried out exclusively by the Poroshenko Administration. The participation of MPs will allow society to come to a consensus on reforms faster.

- 4. The U.S. should help Ukraine develop alternative dispute resolution tools**, in order to reduce the burden on the judicial system and increase public confidence in the justice system.

## RECOMMENDATIONS

- 1. The U.S. should encourage Ukraine to create public forums and establish a public comment period for draft laws on judicial reform.**

The public should be notified in advance and by various means (online, by mail, etc.) of the date, times, and place of these forums. Several forums should be held in each major city in order to ensure participation. Ukraine should conduct an education campaign to make the public well-informed ahead of any discussion forums. The U.S. should ensure the participation of foreign experts in public debate and monitoring, as well as public coverage of these discussions. The public should be able to submit written commentary on the reforms by various means, including electronically. After the comment period closes, a summary of the submitted comments should be published for public viewing.

- 2. The U.S. should assist in the systemic monitoring of judicial reforms that is done by several non-governmental organizations** — in particular, the coalition of NGOs called Reanimation Package of Reforms,<sup>34</sup> the European Business Association,<sup>35</sup> and American Chamber of Commerce in Ukraine.

- 3. The U.S. should help strengthen the Council for Judicial Reform by providing specialized experts and grant support.** This should be done in coordination with the work of the

*Special thank you to Eugene Bondarenko for assistance in translation.*

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<sup>34</sup> “Judicial Reform: Expectations and Possible Scenarios,” Reanimation Package of Reforms, 15 August 2016. For more, please visit [rpr.org.ua](http://rpr.org.ua).

<sup>35</sup> “EBA Considers Mechanisms to Ensure Independence of the Judiciary in the Judicial Reform Voted by Rada as Insufficient,” *Interfax-Ukraine*, 3 June 2016.