

Four Years After: The “Long March” of Justice-Sector Reforms in Ukraine

by Cono Giardullo

ABSTRACT

Four years after the Euromaidan protesters demanded an end to corruption, a transparent democratic process and greater accountability, Ukraine is struggling to bring the reform of its justice sector to completion. While the international community and an outspoken handful of non-governmental organizations tirelessly propose solutions to overcome fresh stumbling blocks, which are often of a political rather than a technical nature, entrenched and vested interests are slowing down the process. A newly established Anti-corruption Court and a renewed Supreme Court might prove a “litmus test” for all justice-sector reforms in the country. Either way, the time has come for Ukraine to deliver; the momentum for reform might soon come to an end with the approach of the presidential election in 2019.

Ukraine | Judiciary | Domestic policy

keywords

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by Cono Giardullo*

Introduction

“We will return to Ukrainians the right to truth, the right to justice, fight for a fair trial in Ukraine”,¹ President Petro Poroshenko told the Verkhovna Rada (the Ukrainian parliament, hereinafter Rada) on 2 June 2016, when the assembly passed a package of constitutional amendments and a new judicial law.

Since the beginning of the Euromaidan demonstrations in Kiev’s Independence Square in November 2013, citizens and representatives of civil-society organizations (CSOs) have identified the judiciary as a priority sector for reform. Indeed, judicial reforms have been high on the list of public demands over the 26 years of Ukraine’s independence. The fact that even Viktor Yanukovich, the corrupt president ousted in the aftermath of the Euromaidan protests, felt it necessary to establish a constitutional assembly in May 2012 and submitted to the Rada a draft law aiming at guaranteeing the independence of judges in July 2013 eloquently proves the point.²

Several opinion polls have recorded extremely low confidence in Ukraine’s judiciary. In March 2015, a public survey reported that 46 percent of respondents identified judiciary reform as the country’s most urgent issue, and 81 percent expressed distrust of the courts. Two surveys commissioned by the Fair Justice Project of USAID, the US aid agency, in early 2016 confirmed that distrust of the judiciary stood at 79 percent, with a stunning 89 percent in favour of a “lustration” process, aiming to exclude from public office the civil servants who had worked

¹ Alexei Kalmykov and Alessandra Prentice, “Ukraine’s Corrupt Judges Targeted in Constitutional Reforms”, in *Reuters*, 2 June 2016, <http://reut.rs/22zW4oB>.

² Cfr. Consultative Council of European Judges (CCJE), *Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy*, London, 16 October 2015, <https://rm.coe.int/16807481a1>.

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under ex-President Yanukovich and former members of the Communist *nomenklatura* in the judiciary.³ Two other polls in 2016 showed the judiciary to be the state institution with the lowest level of approval (10 percent) – well below the approval rating of the voluntary battalions (50 percent) and the army (47 percent) fighting Russian-backed forces in the war-torn eastern regions of Donetsk and Luhansk.⁴ In a February 2017 poll, 46 percent of respondents said that Ukraine’s justice system had not changed since the beginning of the reform period,⁵ and in June 2017 another poll indicated that fewer than 6 percent of interviewees had confidence in the courts.⁶

Watchdogs have continued to publish disheartening reports about widespread corruption and decaying rule-of-law institutions in the country. According to the *Rule of Law Index* (2016 data), Ukraine ranks 78th out of 113 countries for adherence to the rule of law, up only three places since 2015. It also scores badly in its own region, ranking 9th out of 13 Eastern European and Central Asian countries.⁷ Similarly, Transparency International’s *Corruption Perceptions Index* (again, 2016 data) ranks Ukraine 15th out of 19 countries in the region, and 131st out of 176 in the world.⁸ Years after the first popular chants invoking the renewal of the judiciary and the cleansing from the administration of corrupt officials, such reforms are still far from materializing.

This stands in contrast to other sectors, where reforms have been implemented or at least have made some progress. Here, international actors have praised Kiev’s efforts.⁹ The European Parliament, in particular, has appreciated the “outstanding steps forward in areas such as public procurement, macro-economic stabilisation and the decentralisation process”.¹⁰

³ USAID Fair Justice Project, *Survey of Judges of Ukraine Regarding the Judicial Reform in Ukraine... Summary of the Survey*, Kyiv, 16 May 2016, p. 12, http://www.fair.org.ua/content/library_doc/FAIR_Judges_Survey_Summary_2016_ENG1.pdf.

⁴ USAID Fair Justice Project, *National Public Opinion Survey Regarding Democratic Development, Judicial Reform and the Process of Purification of Government*, 8 September 2016, p. 28, http://www.fair.org.ua/content/library_doc/fair_gfk_eng.pdf.

⁵ Vitalii Rybak, “Ukraine’s Judiciary Reforms: 5 Things to Know”, in *Hromadske International*, 17 March 2017, <https://en.hromadske.ua/posts/ukraines-judiciary-reform-5-things-to-know>.

⁶ Sofia Center for Social Research, *Crisis of Trust in Power* (in Ukrainian), June 2017, <http://sofia.com.ua/page.page226.html>.

⁷ World Justice Project (WJP), *Rule of Law Index 2016*, January 2017, p. 5, 22 and 150, <https://worldjusticeproject.org/node/1841>. The WJP index “measures rule of law based on the experiences and perceptions of the general public and in-country experts worldwide”. *Ibid.*, p. 4.

⁸ Transparency International, *Corruption Perceptions Index 2016*, January 2017, p. 9 and 5, https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2016.

⁹ Cfr. Natalia Zinets and Matthias Williams, “Ukraine Passes Long-delayed Health Reforms Praised by West”, in *Reuters*, 19 October 2017, <https://reut.rs/2xS6uej>; “World Bank praises adoption of pension reform in Ukraine”, in *Interfax-Ukraine*, 14 November 2017, <http://en.interfax.com.ua/news/economic/461762.html>; *G7 Ambassadors Statement on Healthcare Reform in Ukraine*, 23 October 2017, http://www.ambkiev.esteri.it/ambasciata_kiev/tiny/348.

¹⁰ EU-Ukraine Parliamentary Association Committee, *Final Statement and Recommendations - 6th EU-Ukraine PAC*, Dnipro, 20 September 2017, par. 14, <http://www.europarl.europa.eu/>

Decentralization has indeed been an undoubted success story, particularly given the long history of rigidly centralized rule inherited from the Soviet Union. Thanks to backing provided by Sweden through the “Support to the decentralization in Ukraine” programme (2014–17),¹¹ the central government accepted an increase in local budget revenues by 42.0 percent in 2015 and 49.3 percent in 2016, so that the newly established “unified territorial communities”, i.e. voluntary amalgamation of small communities into larger, more viable districts,¹² could triple their funds in three years.¹³ The reform of public procurement, for years beset by particularly corrupt schemes, stands as Ukraine’s second most widely recognized successful reform thanks to the online procurement system, ProZorro. Winner of the World Procurement Award in 2016, this system aims to eliminate corruption and deliver better prices – and is mandatory for large purchases, saving millions for the national budget.¹⁴

Without a functioning judiciary, however, even these important achievements will fail to deliver on their full potential. As John Lough and Iryna Solonenko state, “creating a functional justice system and reducing Ukraine’s rampant corruption are the litmus test of the will of Ukraine’s current leaders to transform the country”.¹⁵

1. Who wants to reform the judiciary?

1.1 An overview of the main judicial reforms

We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.

United Nations General Assembly¹⁶

Ukraine’s justice system has historically fallen far below standards set by international organizations such as the United Nations and the Council of Europe.

cmsdata/129640/6thPAC_recommendations_final_20092017.pdf.

¹¹ Cfr. SKL International website: *Support to Decentralization in Ukraine (DSP) 2014-2017*, <http://sklinternational.se/?p=3874>.

¹² Carnegie Endowment, *Ukraine Reform Monitor: April 2017*, 19 April 2017, <http://ceip.org/2pBDIXj>.

¹³ Cfr. Volodymyr Yermolenko and Tetyana Ogarkova, “Ukraine’s Reforms Are a Breakthrough, Despite Slow Pace”, in *Hromadske International*, 1 September 2017, <https://en.hromadske.ua/posts/op-ed-ukraines-reforms-are-a-breakthrough-despite-slow-pace>; Dan Peleschuk, “Ukraine’s Solution to Saving Democracy: Let the Towns Run Themselves”, in *Ozy.com*, 27 September 2017, <http://www.ozy.com/fast-forward/81094>.

¹⁴ Volodymyr Yermolenko and Ruslan Minich, “Ukraine’s Reform Drive Is Powering Ahead”, in *The Financial Times*, 6 September 2017.

¹⁵ John Lough and Iryna Solonenko, “Can Ukraine Achieve a Reform Breakthrough?”, in *Chatham House Research Papers*, April 2016, p. 10, <https://www.chathamhouse.org/node/21592>.

¹⁶ United Nations General Assembly, *Resolution 67/1: Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (A/RES/67/1)*, 24 September 2012, par. 13, <https://undocs.org/A/RES/67/1>.

After the Euromaidan protests, the country’s new government put in place a series of legal measures to address the problems of the judiciary and prove to public opinion and international community alike that the people’s requests were being taken into account.

The law “On the Renewal of Trust in the Judiciary” (the so-called lustration law) entered into force on 10 April 2014. It aimed mainly at restoring trust in the court system by curbing corruption and dismissing judges known to have failed to uphold citizens’ constitutional rights. Its implementation, however, has been a near failure. In fact, the share of judges dismissed for unlawful decisions taken against participants of the Euromaidan protests remains very low to date: only 34 judges out of the 351 against whom complaints to the High Council of Justice (HCJ) were filed have been dismissed, while 29 still await a final decision at the time of writing. In addition, the HCJ has refused to open disciplinary proceedings against 204 of these judges, to the chagrin of rule-of-law-promoting non-governmental organizations (NGOs).¹⁷

In Autumn 2014, President Poroshenko decided to take matters into his own hands and created a consultative body, the Judicial Reform Council. The new body drafted a “Strategy for the reform of the judiciary and related legal institutions”, which the President approved in May 2015. The strategy is based on five pillars: increasing the independence of the judiciary; streamlining judicial governance and the system for judges’ appointments; improving the competence of the judiciary; increasing the transparency and accountability of the judiciary; and increasing the efficiency of justice, and streamlining the competences of different jurisdictions.¹⁸

In spite of presidential involvement, however, the reform process has stalled – for two reasons. First, reformers pinned great hopes on the law “On Assuring the Right to a Fair Trial”, adopted in February 2015, which, however, adopted only 27 of the 77 guidelines suggested by the Council of Europe, thus making it less acceptable to donors and supporters of Ukraine.¹⁹ Second, it soon became clear that after years of widespread corruption (a regular occurrence in former Soviet republics) there was a need for fresh blood and more professional people – who could, by definition, not be the judges who had served under Yanukovich’s presidency.²⁰ While the new legislation rightly set better qualification criteria for selecting judges, judicial self-governing bodies first delayed the process and then eventually managed to limit

¹⁷ “90% of Ukrainian Judges Who Prosecuted Euromaidan Activists Still in Office – Lustration Committee”, in *Euromaidan Press*, 21 September 2017, <http://wp.me/p9bppX-tEh>.

¹⁸ Mykhailo Zhernakov, “Judicial Reform in Ukraine: Mission Possible?”, in *International Renaissance Foundation Policy Reports*, December 2016, p. 4, http://rpr.org.ua/wp-content/uploads/2017/02/Renaissance_A4_5JURIDICIAL-REFORM.pdf.

¹⁹ “Information on the Implementation of the Council of Europe Bodies’ Recommendations in the Ukrainian Law ‘On Assuring the Right to a Fair Trial’ of 12.02.2015” (in Ukrainian), in *Reforms Speedometer*, 17 February 2015, http://eu.pravo.org.ua/uk/news/view?news_id=114.

²⁰ Instead, the law allowed previously dismissed presidents of courts to occupy their positions for four years, more than compared to the old laws.

the law’s implementation to the establishment of state-funded additional training for judges. The problem was that, technically, judges could not be fired unless the constitution was changed first.²¹

In March 2015, a constitutional commission was created – again, as a consultative body to the president. The commission produced a number of draft amendments to the constitution, mainly regarding judicial matters. Both the proposal from the commission and another one from the Reanimation Package of Reforms (RPR),²² the largest coalition of NGOs and justice experts in Ukraine, were submitted to the Venice Commission (VC), the advisory board on constitutional matters of the Council of Europe. In its final opinion, the VC strongly welcomed the reform proposals.²³ The commission agreed with the extraordinary measure, to remedy corruption and incompetence, of dismissing judges appointed in the previous period. It did, however, also note that replacing more than 8,000 judges would not be feasible and proposed that former judges could retire or apply for a new position.

In the meantime, Ukraine was moving on with the establishment of three institutions focusing on combating corruption: the National Anti-corruption Bureau (NABU), the Specialized Anti-corruption Prosecutors’ Office (SAPO) and the National Agency on Corruption Prevention (NAPC).

NABU, established in late 2014 and operational since April 2015, has exclusive authority to investigate acts of corruption by high-level officials, has access to information covered by banking secrecy and is legally mandated to publish six-monthly reports. To minimize the risk of corruption affecting the bureau itself, NABU’s director and staff receive competitive remuneration. SAPO, set up in December 2015, is meant to strengthen the fight against corruption by having the head of a dedicated section of the Prosecutor General’s Office operate with a strong degree of autonomy and also act as deputy procurator general. NAPC, which started work in August 2016, is responsible for implementing the national anti-corruption strategy and essentially verifies public servants’ asset declarations and maintains the country’s only state register of declarations.

NABU and SAPO have investigated and prosecuted some high-level officials. For instance, the arrest of the head of the State Fiscal Service in March as well as of the deputy minister of defence and the head of the defence ministry’s procurement department in October 2017 – widely considered to comprise a watershed in Ukraine’s fight against corruption – originated from NABU’s investigations.²⁴ In

²¹ Mykhailo Zhernakov, “Judicial Reform in Ukraine: Mission Possible?”, cit.

²² Cfr. RPR official website: *Who We Are*, <http://rpr.org.ua/en/?p=2949>.

²³ Venice Commission, *Opinion on the Proposed Amendments to the Constitution of Ukraine Regarding the Judiciary...* (CDL-AD/2015/027), 26 October 2015, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)027-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)027-e).

²⁴ Helsinki Commission, *The Internal Enemy. A Helsinki Commission Staff Report on Corruption in Ukraine*, October 2017, p. 8, <https://www.csce.gov/international-impact/publications/internal-enemy>; Timothy Ash et al., “The Struggle for Ukraine”, in *Chatham House Reports*, October 2017, p.

the latter part of 2017, attacks on the Bureau have intensified. An amendment to the code of criminal procedure have given investigative judges the power to block NABU investigations. The Prosecutor General’s Office (PGO) has begun transferring around 15,000 old cases to the bureau, flooding the NABU and preventing it from smoothly processing all its current cases. The PGO has also triggered a criminal investigation, upon the request of a political party, against the NABU director for alleged disclosure of state secrets.²⁵

Nonetheless, as of 30 October 2017, NABU claimed that there were 461 proceedings under investigation, 293 notices of suspicion, 149 indictments and 97 cases in court, with the most common charges being “misappropriation” and “embezzlement”, “abuse of power or authority” and obtaining and providing “illegal benefits”.²⁶ Unfortunately, these efforts may well come to naught unless the Ukrainian Government sets up the last and most important link in the chain of judicial reform, the Anti-corruption Court. According to civil-society experts, most investigations are hampered at the trial stage as court authorization is needed for them to begin.

1.2 Reform-pushers: international actors and civil society

NABU’s creation formed part of the list of measures that in late 2014 the International Monetary Fund (IMF) demanded that the Ukrainian government adopt in order to receive a 17.5 billion dollar loan.²⁷ By July 2017, the IMF had disbursed 13.2 billion dollars to Kiev.

The European Union has also conditioned aid to Ukraine on judicial reform. The Union has pledged a package of 12.8 billion euros for the next few years in order to support the reform process. Programmes include, *inter alia*, 3.41 billion euros in loans as EU macro-financial assistance, of which 2.81 billion euros has already been provided, as well as 879.2 million euros in grants. These grants include a 355 million euro state-building contract supporting the fight against corruption as well as reforms of the country’s public administration, judiciary, constitution and electoral framework; a 10 million euro programme to strengthen the capacity of civil-society organizations (CSOs) to support and monitor the reform process; a 15 million euro anti-corruption programme supporting the newly established anti-corruption institutions, strengthening parliamentary oversight and the capacities of civil society and independent media to contribute to the fight against corruption; and a 52.5 million euro rule-of-law programme providing support to justice and

81, <https://www.chathamhouse.org/node/32139>.

²⁵ Anticorruption Action Centre, *Monthly Anti-Corruption Overview: November 2017*, 4 December 2017, <https://map.antac.org.ua/?p=638>.

²⁶ Cfr. NABU official website: <https://nabu.gov.ua/en>; “Reform Roundup: Ukraine Struggles to Fight Corruption, Improve Efficiency”, in *Hromadske International*, 2 September 2017, <https://en.hromadske.ua/posts/reform-roundup-ukraine-struggles-to-fight-corruption-improve-efficiency>.

²⁷ Anticorruption Action Centre, *NABU Establishment and Effective Cooperation*, 21 July 2015, <https://map.antac.org.ua/?p=46>.

law enforcement reforms.²⁸ Arguably more importantly, on 1 September 2017, the EU–Ukraine Association Agreement (AA) came into force in its entirety.

The Agreement is considered “the most dramatic EU deal with a non-EU country”, and “a symbol of the changes that many Ukrainians are striving for”.²⁹ While the AA is not a preliminary step to candidate status (as openly stated by the December 2016 European Council, upon request by the Netherlands)³⁰ it does aim to bring Ukrainian standards closer to those of the EU. In the eyes of many observers, the AA has become a “catalyst for change”, a “reform agenda” and the “blueprint for the country’s reformers”; its symbolic value cannot be underestimated. After all, it was Yanukovich’s decision to step away from it in late 2013 that sparked the Euromaidan protests. The Agreement is the most powerful instrument for the EU to regain its ability to work as a normative power inducing change in its surroundings.³¹ Wisely, the Union has set up a support group that coordinates and advises on different reform processes.³²

Ukraine has received conditional support from a number of other donors. The US, Canada, Germany, Sweden and other countries have also been very supportive of all reform processes on a bilateral basis. Ukraine has benefited from non-financial supporting measures as well. The EU, to take just one example, granted Ukraine a visa-free regime in June 2017, after verifying progress on a tailor-made visa-liberalization action plan that the EU and Ukraine had agreed on in 2008. The Venice Commission has provided Ukrainian lawmakers with invaluable technical assistance, replying to over 20 requests for opinion. Officials from friendly governments have constantly pushed for reform at every turn, by giving discreet warnings each time the process has risked going off track, helping to ease interinstitutional frictions and giving outright support to CSOs.³³

²⁸ European External Action Service (EEAS), *EU-Ukraine Relations. Factsheet*, 6 November 2017, <http://europa.eu/!CC46jt>.

²⁹ Volodymyr Yermolenko and Ruslan Minich, “Ukraine’s Reform Drive Is Powering Ahead”, cit.

³⁰ European Council, *European Council Conclusions on Ukraine*, Brussels, 15 December 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-euco-conclusions-ukraine>.

³¹ Kataryna Wolczuk, “EU Must Be Bolder in Driving Reform in Ukraine”, in *Chatham House Expert Comments*, 12 April 2017, <https://www.chathamhouse.org/node/29202>.

³² Gwendolyn Sasse, “A Reminder to Continue Ukraine Reforms”, in *Judy Dempsey’s Strategic Europe*, 4 September 2017, <http://carnegieeurope.eu/strategieurope/72985>.

³³ Three recent examples attest to the point: (1) in October, the EU Delegation statement concerning the proposed list of candidates to the Supreme Court, which included several individuals for whom a negative opinion was expressed by the Public Council of Integrity; (2) in September, the visit of IMF First Deputy Managing Director Lipton who warned the Ukrainian government that there are risks of Ukraine “going backwards” in terms of reforms, referring to the stalemate around the establishment of the Anti-Corruption Court; (3) in May, the US Ambassador to Ukraine, Yovanovitch, stated that the justice sector reforms are “absolutely critical” for the country, and that Washington is closely monitoring the hiring of the new Supreme Court justice.

The latter point is critical because the role of the country’s civil society has proved essential to the reform process. According to an expert-opinion survey from February 2017, 99 percent of interviewees consider CSOs to be reform-promoting forces. Western countries (63 percent), the government (37 percent) and the president (29 percent) all received lower scores in the poll.³⁴

The role of CSOs in promoting judicial reforms has indeed been crucial. Experts and volunteers have been working tirelessly – monitoring bills presented in the Rada, drafting policy and research papers, and conducting public surveys. According to a Chatham House survey of CSOs, activists consider indirect pressure via the media (25 percent), civic protests (20 percent) and mobilizing public opinion (15 percent) to be the most effective tools for promoting policy change.³⁵

One of the ostensible success stories of CSO action in Ukraine has been the establishment by law of the Public Integrity Council (PIC), a civic body mandated to assist the High Qualification Commission of Judges (HQCJ), a state body of judicial self-government,³⁶ in determining the eligibility of judges based on integrity and professional-ethics criteria.³⁷ The Council consists of 20 members, drawn from human-rights defenders, journalists, law scholars and law practitioners. A supermajority of 11 out of 16 votes is required in the HCQJ in order to recommend the appointment of a judicial candidate who has received a negative recommendation from the PIC.

1.3 *The turn of the tide: the constitutional amendments and the law of judiciary*

In June 2016, the Rada passed two fundamental laws: “On amendments to the Constitution of Ukraine (regarding the judiciary)” and “On the judicial system and the status of judges”, with 335 votes – 35 more than the required majority, including 38 from the Opposition Bloc (Ex-President Yanukovich’s party). Both laws entered into force on 30 September 2016, a date that some commentators consider the real beginning of Ukrainian judicial reform and others a missed opportunity.³⁸

³⁴ Ilko Kucheriv Democratic Initiatives Foundation (DIF), *Reforms in Ukraine: Public Attitudes and Expert Evaluation*, 17 February 2017, <http://dif.org.ua/article/reforms-in-ukraine-public-attitudes-and-expert-evaluation>; “One Year of Groysman’s Government in Ukraine, Examined”, in *Hromadske International*, 17 April 2017, <https://en.hromadske.ua/posts/one-year-of-ukrainian-pm-groysmans-reforms-examined>.

³⁵ Timothy Ash et al., “The Struggle for Ukraine”, cit., p. 68.

³⁶ The HCQJ has one main function: it submits to the High Council of Justice its recommendations on appointing a candidate to a judicial position. See Art. 92, Law No. 1402-VIII of 2 June 2016: *On the Judicial System and the Status of Judges*, https://vkksu.gov.ua/userfiles/doc/Law_on_Judiciary_and_Status_of_Judges_16%2007%202016_ENG.pdf.

³⁷ *Ibid.*, Art. 87.

³⁸ Author’s interview with Mykhailo Zhernakov, director of DeJuRe Foundation, RPR Board member and PIC member, 24 October 2017.

The VC applauded the reforms, notably the removal of the powers of the Rada to appoint judges, the abolition of a probationary period for junior judges, the abolition of “breach of oath” as a ground for dismissal, the introduction of a constitutional complaint mechanism and the removal of the power of the Rada to express no confidence in the prosecutor general.³⁹ The most notable provisions are the following.

The Constitutional amendments introduced the obligatory competitive selection of judges; defined additional grounds for dismissing judges; and established a new High Council of Justice (HCJ) responsible for recommending new judges (hitherto appointed by the president and granted life-long tenures), and dismissing and launching disciplinary proceedings against existing ones. The amendments also instituted an extended non-renewable term for the prosecutor general.

The law on the judicial system turned the four-level judicial system into a three-tier system: first-instance local courts, appellate courts, a single Supreme Court and two specialized courts (the High Anti-corruption Court and the High Court of Intellectual Property). The law also introduced new qualification requirements for judges (e.g. Ukrainian citizenship and more than five years of experience), increased salary remuneration and restricted judicial immunity. Anti-corruption provisions were strengthened, as it also established a monitoring system of the income and expenditure of judges and their families, with the obligation to submit an income declaration on an annual basis and the enlargement of grounds for judges’ dismissal (if illegitimate source of property was proved) and for disciplinary liability.⁴⁰

Over 1,200 judges appointed prior to these constitutional amendments decided to resign, with the parliament approving almost 1,000 of them in September 2016. This resulted in reiterated calls by the United Nations to urgently face the understaffing problem across the 765 Ukrainian courts; these require a little over 9,000 judges to properly function, while only 6,063 were allegedly in place in June 2017.⁴¹ The law additionally came in for criticism over other aspects. NGOs, for instance, blamed President Poroshenko for failing to push for the removal from the law of a provision that kept Yanukovich-appointed chief judges in office for

³⁹ Venice Commission, *Secretariat Memorandum on the Compatibility of the Draft Law of Ukraine on Amending the Constitution of Ukraine as to Justice...* (CDL-AD/2015/043-e), 21 December 2015, p. 2-3, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)043-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)043-e).

⁴⁰ Cfr. Anastasiya Leukhina et al., “Ukraine’s Slow Struggle For Reform” [audio], in *Carnegie Articles*, 27 April 2017, <http://ceip.org/2pfysfi>; Volodymyr Yakubovskyy and Denys Vergeles, “Legal Alert: Constitutional Judicial Reform in Ukraine”, in *Nobles Blog*, June 2016, <https://www.nobles-law.com/single-post/2016/06/07/Legal-Alert-Constitutional-judicial-reform-in-ukraine>; US-Ukraine Business Council (USUBC) website: *Judicial Reform in Ukraine*, 28 July 2016, <http://www.usubc.org/site/Asters/judicial-reform-in-ukraine>.

⁴¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Reports on the Human Rights Situation in Ukraine*, 15th (15 September 2016, p. 8-9), 16th (8 December 2016, p. 46-47), 17th (15 March 2017, p. 39-40), 19th (12 September 2017, p. 34-35), <http://www.ohchr.org/EN/Countries/ENACARegion/Pages/UAREports.aspx>.

seven more years.⁴²

The reform of Ukraine’s judiciary is of vast scale, but resistance from vested and long-established interest groups remains strong. Convincing or forcing them to cooperate is the ultimate hurdle that reform-minded officials and NGOs need to overcome in order to achieve a successful transition to a modern, efficient and corruption-free judicial system.

2. Who does not want to reform the judiciary?

2.1 Barriers to reform: the judiciary and who else?

As the Association Agreement with the EU requires Ukraine to “attach particular importance to the consolidation of the rule of law [by] strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality”, Kiev is legally bound to push forward reforms.⁴³ However, as stated previously in this paper, the speed of reforms has slowed since mid-2016 according to most observers.⁴⁴ This section delves into the difficulties that the reform process has encountered.

According to an expert-opinion survey, 77 percent of interviewees consider oligarchs the main barrier to reform, followed by public officials (71 percent, including judges), law-enforcement bodies (54 percent), the Rada (49 percent) and the president (46 percent), who is considered a barrier to reform by more experts than those who see him as a reformer.⁴⁵

Part of the problem certainly lies within the judiciary itself. An aforementioned survey showed in March 2016 that 40 percent of judges were aware of the strong public distrust towards their profession and a similar proportion (42 percent) also acknowledged the need to reform.⁴⁶ Judges also felt that the greatest external influence over their conduct originated mostly from protesters (48 percent) and NGOs (34 percent), not from politicians (25 percent). This suggests that judges do not feel any urge to change because of state officials’ insistence, and only feel

⁴² Cfr. Mykhailo Zhernakov, “Will Judicial Reform Survive?”, in *Ukrayinska Pravda*, 17 August 2016, <http://www.pravda.com.ua/eng/columns/2016/08/17/7117997>; Tadeusz A. Olszański, “The Beginning of Reforms to the Ukrainian Judicial System”, in *OSW Analyses*, 8 June 2016, <https://www.osw.waw.pl/en/node/24430>.

⁴³ Art. 14 of the *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part*, 21 March 2014 [OJ L 161, 29 May 2014], [http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:22014A0529\(01\)](http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:22014A0529(01)).

⁴⁴ Cfr. Willem Aldershoff, “Ukraine’s Reforms on the Rule of Law Have Stagnated”, in *The Financial Times*, 13 September 2017; “Reform Watch: Sept. 15-22”, in *Kyiv Post*, 25 September 2017; Melinda Haring, “The Tragedy of Ukrainian Politics”, in *UkraineAlert*, 21 September 2017, <http://www.atlanticcouncil.org/blogs/ukrainealert/the-tragedy-of-ukrainian-politics>.

⁴⁵ Ilko Kucheriv Democratic Initiatives Foundation (DIF), *Reforms in Ukraine...*, cit.

⁴⁶ USAID Fair Justice Project, *Survey of Judges of Ukraine...*, cit., p. 13.

the pressure when journalists or NGOs report cases of ineptitude, corruption or incompetence.

Furthermore, while a majority of judges welcome the change involving the new Supreme Court (66 percent), they question the need for a re-evaluation of their own skills (only a third agreed that this system would help to remove unfair and incompetent judges). During such reforming times, judges tend to be very jealous of their prerogatives and welcome most of the constitutional changes that go in their direction – ranging from restrictions on a president’s powers to transfer and dismiss judges (around 70 percent in this case) as well as to establish and reorganize the courts, to the removal of the probationary period for junior judges (59 percent).⁴⁷

An example of how slow or imperfect implementation of judicial reforms undermines the whole reform process relates to the High Council of Justice, the new body created by the June 2016 constitutional amendment and operational since January 2017.⁴⁸ In theory, the HCJ has the right to select, dismiss, transfer and decide over the disciplinary liability of judges. However, the body will acquire full powers on the transfer of judges only in September 2018. Until then, the president will retain them. Moreover, the HCJ has only appointed 199 new judges in the first six months of 2017, despite a shortage of almost 3,000 officials. To date, the Council has been regarded with suspicion, together with the High Qualification Commission of Judges, as serving the interests of the judiciary and the president.⁴⁹

The PGO is also unanimously perceived as being more a barrier to than an agent for reform. In May 2016, President Poroshenko appointed a close ally with no legal expertise, Yuriy Lutsenko, as prosecutor general. Ukraine’s PGO retains far-reaching Soviet-era powers, such as investigation and procedural oversight, which allow it to set the direction in which trials should go in advance by “recommending” the “correct” ruling, thus severely distorting the proper functioning of the country’s judicial system.⁵⁰

The impediments for Ukraine on the road to completing full justice-sector reform are manifold. However, recently Ukrainians and international observers have been fixated on the renewal of the Supreme Court and the establishment of the Anti-corruption Court, which might shift the current perception of Ukraine’s judicial reforms.

⁴⁷ Ibid., p. 12-13, 16-17.

⁴⁸ Law No. 1798-VIII of 21 December 2016: *On the High Council of Justice*, http://www.vru.gov.ua/legislative_acts/24.

⁴⁹ Vadym Miskyi (ed.), *Reforms under the Microscope (as of April 2017)*, Kyiv, Centre for Democracy and Rule of Law, September 2017, p. 21, <http://rpr.org.ua/en/?p=15220>.

⁵⁰ Oleg Sukhov, “Justice Delayed and Denied”, in *Kyiv Post*, 30 September 2016, <https://www.kyivpost.com/ukraine-politics/justice-delayed-denied.html>.

2.2 The renewal of the Supreme Court: a failed test for civil society

We [the PIC] were basically used as a facade. We managed to fend off some of the most notorious candidates, but not much more than that.
Mykhailo Zhernakov⁵¹

A long and ostensibly transparent competition process involved more than 1,400 candidates in order to fill the 120 positions available in the new Supreme Court, divided in four branches (administrative, economic, civil and criminal).⁵² In July 2017, the list of the 120 winners of this competition was published by the HCCJ: 93 were former judges, and the remaining 27 legal scholars or attorneys. However, the inclusion in the list of 30 candidates who had received a negative opinion from the Public Integrity Council prompted a public outcry. The PIC was in charge of assessing the integrity of the winners through various tools and methods – including free access to state registers, declarations of integrity and judicial dossiers – but also by receiving information from ordinary citizens and using media investigative reports. However, as the HCCJ can override PIC evaluations with a two-thirds majority, the candidatures stood. NGOs have called for an independent audit of the selection process.⁵³

The RPR coalition of NGOs compiled a list of the “dishonourable thirty”. Eight of them had submitted false information in the declaration of property, a mismatch between their lifestyle and income was found in the case of seven of them, and yet another seven gave false information in integrity declarations and pronounced arbitrary decisions – even violating a decision of the European Court of Human Rights.⁵⁴

When, on 14 September, the HCCJ commenced its consideration of the 120 candidates, public pressure, both from civil-society and international organizations, mounted. The latter reminded the Council that the appointment of these candidates would undermine the very purpose of reforming the Supreme Court. The EU Delegation in Kiev referred to this process as a “historic opportunity” and pointed out that the Supreme Court could already begin working with a complement of 65 judges, concluding that “the appointment of even a few judges with tainted integrity risks compromising the credibility of the entire reform”.⁵⁵ The US Embassy, for its part, tweeted, “A number of strong Supreme Court nominations, but integrity

⁵¹ Author’s interview with Mykhailo Zhernakov, cit.

⁵² Carnegie Endowment, *Ukraine Reform Monitor: October 2017*, 10 October 2017, <http://ceip.org/2yd6TGr>.

⁵³ Author’s interview with Mykhailo Zhernakov, cit.

⁵⁴ Reanimation Package of Reforms (RPR), *The Dishonourable Thirty*, 4 August 2017, <http://rpr.org.ua/en/?p=15114>.

⁵⁵ EU Delegation to Ukraine, “Comment on final and crucial stage of Supreme Court selection”, in *Facebook*, 12 September 2017, <https://www.facebook.com/EUDelegationUkraine/posts/1620328718011750>.

concerns of many nominees remain”.⁵⁶ Notwithstanding, President Poroshenko inaugurated the new Supreme Court on 13 November 2017.⁵⁷ He proceeded with the appointment of 113 judges, among which were 25 out of the 30 judges opposed by the PIC – a move inevitably destined to undermine public trust in the judicial reforms.⁵⁸

2.3 A new Anti-corruption Court: time to deliver

Intervening at the annual Yalta European Strategy Forum in September 2017, President Poroshenko made it clear that he felt no need for an independent anti-corruption court, and advocated specific anti-corruption panels within the current judicial system instead.⁵⁹ However, on 4 October, he announced support for a separate Anti-corruption Court as foreseen in the law on the judicial system of Ukraine.⁶⁰

Whether the President has definitively made up his mind or not, the IMF and EU require Ukraine to establish the Anti-corruption Court in order to unlock the next tranche of their billion-dollar aid packages. In order to convince national politicians, the case for a separate court has been strongly made by a broad range of organizations, which have repeatedly insisted that it would bring a great number of advantages. Transparency International has called for an independent court, in which judges must be elected through open competition with international partners playing a role in the selection process.⁶¹ The Anti-corruption Action Centre rebuts the legal constitutional argument, according to which special courts are prohibited in Ukraine, by highlighting the fact that the decisions issued by the newly born court would be appealed in the Supreme Court in accordance with general rules, whereby the court would be part of the judicial system rather than representing a separate, “special” body.⁶² The RPR coalition of CSOs links the inability of the judiciary to deliver decisions regarding high-level corruption cases to the absence of such a court – with allegedly 34 out of 40 cases stalled in first-instance courts after investigations by NABU. Additionally, special guarantees are

⁵⁶ US Embassy in Ukraine, “A number of strong Supreme Court nominations...” in *Twitter*, 30 July 2017, <https://twitter.com/USEmbassyKyiv/status/891916176758116352>.

⁵⁷ Ukraine’s President, *Speech by the President of Ukraine during the swearing-in ceremony of judges of the new Supreme Court*, 11 November 2017, <http://www.president.gov.ua/en/news/vistup-prezidenta-ukrayini-pid-chas-skladannya-prisyagi-sudd-44378>.

⁵⁸ Author’s interview with Anastasia Krasnosilka, Advocacy Manager for the AntiCorruption Action Centre, 24 October 2017.

⁵⁹ “Reform Watch: Sept. 15-22”, cit.

⁶⁰ Ukraine’s President, *President: A Separate Anti-Corruption Court Must Be Created in Ukraine*, 4 October 2017, <http://www.president.gov.ua/en/news/glava-derzhavi-v-ukrayini-maye-butistvorenij-okremij-antiko-43742>.

⁶¹ Transparency International, *Ukraine Must Create an Independent Anti-Corruption Court*, 20 September 2017, https://www.transparency.org/news/pressrelease/ukraine_must_create_an_independent_anti_corruption_court.

⁶² Oleksandr Yevseev, “Anti-corruption Court and UA Constitution: Nothing Extraordinary”, in *Anticorruption Action Centre Direct Speech*, 29 September 2017, <https://antac.org.ua/en/?p=11823>.

proposed for anti-corruption judges, entailing higher wages and round-the-clock security for a judge and his/her family members.⁶³

A few days after the newly declared presidential position, the VC adopted its favourable opinion on the draft law on the Anti-corruption Court. For several months, Ukraine’s entire political class referred to the VC’s position as the decisive expert opinion on how the anti-corruption structure should look. The President, aware of the imminent opinion, decided to cleverly give the impression that the VC had sanctioned his plans, rather than the other way round.⁶⁴

The VC had already thrown its full institutional weight behind the Anti-corruption Court; Commission President Gianni Buquicchio had admitted that, differently to other countries, in Ukraine there was no other working alternative to the establishment of an Anti-corruption Court.⁶⁵ The VC welcomed the draft law and recognized the new institution as a “specialized” court, rather than an unconstitutional special or extraordinary one, which therefore does not undermine the unity of the judiciary. The VC argued in favour of a body competent to select specialized anti-corruption judges, with the presence of international organizations and donors.⁶⁶

The establishment of the Anti-Corruption Court has become the top priority in the renewed joint effort of Ukraine’s civil society and the international community to achieve a “structural benchmark included in the IMF’s most recent review”.⁶⁷ NGOs remain its strongest supporters, complaining about the “failure of the independent procedure for selecting judges of the Supreme Court”⁶⁸ and stating that “the Anti-corruption Court with national jurisdiction only requires 70 judges to start functioning”.⁶⁹

⁶³ Mykhailo Zhernakov and Iryna Shyba, “Independent Anti-Corruption Courts in Ukraine: The Missing Link in Anti-Corruption Chain”, in *International Renaissance Foundation Policy Reports*, February 2017, http://rpr.org.ua/wp-content/uploads/2017/02/Renaissance_A4_3ANTI-CORRUPTION-COURTS-.pdf.

⁶⁴ Author’s interview with Anastasia Krasnosilska, cit.

⁶⁵ Sergei Sidorenko, “President of the Venice Commission: Anticorruption Court Is Absolutely Necessary in Ukraine” (in Ukrainian), in *Evropeiska Pravda*, 13 October 2016, <http://www.eurointegration.com.ua/interview/2016/10/13/7055823>; “Venice Commission Ready to Support Establishment of Anti-Corruption Court in Ukraine”, in *Ukrinform*, 14 October 2017, <https://www.ukrinform.net/rubric-polytics/2101519-venice-commission-ready-to-support-establishment-of-anticorruption-court-in-ukraine.html>.

⁶⁶ Council of Europe, *Venice Commission invites the President of Ukraine to submit a revised draft law on anti-corruption courts to Parliament, based on its recommendations*, 6 October 2017, https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=090000168075b110.

⁶⁷ Helsinki Commission, *The Internal Enemy*, cit., p. 25.

⁶⁸ Author’s interview with Mykhailo Zhernakov, cit.

⁶⁹ Author’s interview with Anastasia Krasnosilska, cit.

On 22 December 2017, the president submitted to the Rada a draft law on the Anti-corruption Court that failed to take many of the recommendations of the VC into account. The draft gives the appointees by international donors a simple advisory role rather than real authority over the selection process for new judges. Furthermore, the jurisdiction of the court does not cover all cases investigated by NABU, and unrealistic eligibility requirements are set for judicial candidates.⁷⁰

Conclusion

As summarized by experts from the British think-tank Chatham House, Ukraine “has undertaken deeper and more extensive reform in the past four years than in the previous 22 of its post-Soviet life”.⁷¹ With presidential elections in 2019, with no end in sight to the conflict in the Donbas region,⁷² and with external and internal pressure exerted from opposing interest groups, a slowdown in the path of reforms is to be expected. In the first quarter of 2017, the VoxUkraine Index for Monitoring Reforms (iMoRe) dropped to a value of zero on a scale of -5 to +5 – the lowest average since early 2015. The governance component of this index, which includes judicial reforms, has scored continuously poorly since May 2017.⁷³

Judicial reforms in Ukraine are slowing down because of a political, rather than a technical, problem,⁷⁴ whereby the President decides the first move and the government and parliament are left with the option of either supporting or delaying any new input. “The autumn of reforms” announced by Andriy Parubiy, the speaker of the Rada, failed to bring the two long-awaited reforms of a new Supreme Court and the establishment of an Anti-corruption Court to a completion satisfying for all actors.

Furthermore, a growing body of commentators worries that Ukraine’s reform “window of opportunity” is closing.⁷⁵ Signs of pre-election political campaigning are to be seen all around the country, and politicians might soon switch to focus

⁷⁰ Anticorruption Action Centre, *President’s Draft Law on Anticorruption Court Neglects Venice Commission Recommendations*, 26 December 2017, <https://map.antac.org.ua/?p=718>.

⁷¹ Timothy Ash et al., “The Struggle for Ukraine”, cit., p. iv.

⁷² The conflict and corruption continue to be cited as the most important issues facing the country. See Center for Insights in Survey Research, *Public Opinion Survey of Residents of Ukraine, September 14-October 10, 2017*, November 2017, p. 30, <http://www.iri.org/node/4529>.

⁷³ See iMoRe website: *Releases*, <http://imorevox.org/releases-pdf>.

⁷⁴ Cfr. Marta Králiková, “Power Structures and Normative Environment: Limits to the Rule of Law and the EU’s Normative Power in Ukraine”, in *UPTAKE Working Papers*, No. 3/2017 (June 2017), http://www.uptake.ut.ee/wp-content/uploads/2017/06/03_kralikova.pdf.

⁷⁵ Cfr. Olena Prokopenko and Cristina Parandii, “Will Ukraine’s Parliament Accomplish Anything This Fall?”, in *UkraineAlert*, 6 September 2017, <http://www.atlanticcouncil.org/blogs/ukrainealert/will-ukraine-s-parliament-accomplish-anything-this-fall>; Melinda Haring, “The Window for Reform Is Closing in Ukraine”, in *The Washington Post*, 11 July 2017, <http://wapo.st/2ubtwJM>; Carnegie Endowment, *Ukraine Reform Monitor: October 2017*, cit.

on that contest rather than on pushing forward reforms.⁷⁶

If the reform process were to stall entirely, it would be most unfortunate – as the largest of Ukraine’s bailers and international partners have closely linked the success of judicial reforms to the disbursement of additional funds. Reform-pushers cannot rest, yet.

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⁷⁶ Center for Insights in Survey Research, *Public Opinion Survey of Residents of Ukraine...*, cit., p. 6.

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