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KEY LEGAL REFORMS 2014-2015: How Have the European Standards Been Implemented?

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For two years, the experts of the Centre of Policy and Legal Reform have been measuring the progress in three reform areas – constitutional reform, judicial reform, and prosecutorial reform – which are seen as key for the rule of law, by using a new tool known as the Reform Speedometer (eu.pravo.org.ua). This Speedometer shows the degree of Ukraine's implementation of European standards and recommendations in the relevant areas. This report focuses on key events that have influenced the development of legal reforms and, consequently, the Speedometer indices, and their significance for European integration.



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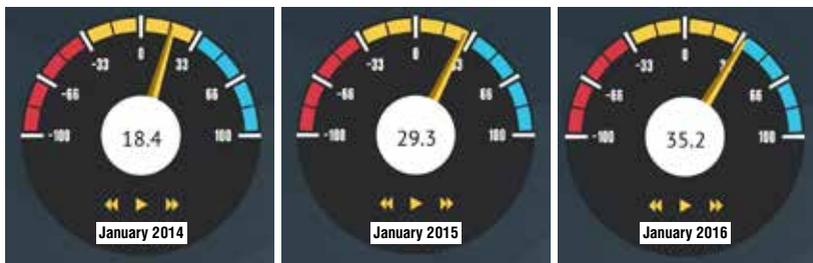
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INTRODUCTION



This dashboard is a Reform Speedometer. It determines the speed of Ukraine's approximation to European standards in three key reform areas to strengthen the rule of law: constitutional reform, judicial reform and prosecutorial reform. They are evaluated in accordance with more than a hundred recommendations set forth by the bodies of the Council of Europe.

The Center of Policy and Legal Reforms, supported by the European Union, launched the Reform Speedometer in December 2013, after President Yanukovich refused to sign the European Union Association Agreement. Euromaidan, the Revolution of Dignity, and changes in political power followed after this event.

In 2013, during the preparations to sign the Association Agreement, Ukraine made some efforts to implement these reforms and European standards. That is why the speedometer pointed to 18.4 points out of 100 (rather than 0) in the midst of Euromaidan in early 2014.

At that time, the government took steps to implement European standards and recommendations, but they did not restrict President Yanukovich's power. Moreover, under the guise of implementation of European standards, Yanukovich and his legal team tried to push through the decisions that could enhance the President's influence over the courts.

The Revolution of Dignity and the first decisions of Parliament after Yanukovich's escape temporarily shifted the Speedometer's gauge all the way to the left, as the European standards do not offer any recipes for overcoming the consequences of usurpation of power, but rather create an ideal to be aspired to. That is why the path to this ideal has been difficult, and it was sometimes necessary to start at the very beginning in order to accelerate and move on.

At the same time, in two years (2014-2015) we have made it through only one-third of the way. At the beginning of January 2016, the Reform Speedometer pointed to 35.5 points. This is not as much as we have wanted. We have come close to adoption of important decisions, but are still far away from complete implementation.

During this time, dozens of events took place. They had both positive and negative impact on the implementation of the European standards and recommendations by Ukraine. These events will be detailed below through the prism of the three reforms.

The current Speedometer indices, along with list of European standards and recommendations and the algorithm of evaluation, are available on the website "Reform Speedometer", *eu.pravo.org.ua*.

1. CONSTITUTIONAL REFORM

(by: Yu. Kyrychenko, A. Barikova)



1.1. Background

Ukraine entered 2014 with an invalid Constitution that was amended unconstitutionally, and with the authoritarian regime of President Yanukovich. After taking the office in 2010, Yanukovich created conditions for usurpation of power. Judges of the Constitutional Court were replaced due to political motives. Some judges of this Court resigned under pressure. They were replaced with more loyal judges, as the majority at the Verkhovna Rada of Ukraine (the Ukrainian Parliament) and the Congress of Judges were, in fact, under the President's control.

Decision of the Constitutional Court of Ukraine of September 30, 2010¹ declared as unconstitutional the Law No. 2222-IV on Amendments to the Constitution of December 8, 2004, on the grounds of violation of constitutional procedure of its consideration and adoption. In this way, Yanukovich regained significant presidential powers, which President Kuchma had previously. Later, decisions of the Constitutional Court were regularly used to legitimize decisions that were dubious from the constitutional viewpoint but needed by the President (particularly, on eliminating local elections in Kyiv in 2013, validating the President's

1 Decision of the Constitutional Court of Ukraine in connection with the constitutional petition of 252 people's deputies of Ukraine concerning the compliance of the Law of Ukraine No. 2222-IV *On Amendments to the Constitution of Ukraine* of December 8, 2004 with the Constitution of Ukraine (Re: Compliance with the procedure for amending the Constitution of Ukraine) // <http://www.ccu.gov.ua/uk/doccatalog/list?currDir=122407>.

right to abolish the courts, etc.). Case law of the Constitutional Court was entirely predictable from the political point of view. At the same time, the Constitutional Court ignored its previous case law to satisfy political demands².

On January 16, 2014, Parliament arbitrarily adopted a set of laws aimed at establishing dictatorship in Ukraine. After this, a two-month peaceful protest in Kyiv's Independence Square grew into a violent confrontation between the authorities and the public.

On February 21, 2014, Agreement on Settlement of Political Crisis in Ukraine was signed at the Administration of President Yanukovich. It contained the following five provisions:

- 1) to restore the Constitution in its 2004 version within 48 hours, and to establish the coalition in Parliament and the national unity government within 10 days thereafter;
- 2) to launch the constitutional reform that would ultimately result in rebalancing the powers between the President, Government and Parliament, and to complete it by September 2014;
- 3) to hold the presidential elections by December 2014, under new electoral legislation and with new members of the Central Election Commission established in compliance with the norms of the OSCE and the Venice Commission;
- 4) to investigate the recent acts of violence during Euromaidan under the joint supervision by the government, the opposition and the Council of Europe;
- 5) the government and the opposition are to refrain from the use of violence, and the government would not declare the state of emergency³.

The Agreement was signed by President Yanukovich, V. Klitschko (leader of the parliamentary party Ukrainian Democratic Alliance for Reform), A. Yatseniuk (leader of the parliamentary party All-Ukrainian Union "Fatherland"), O. Tiahnybok (leader of the parliamentary party Svoboda). On the part of the European Union, the signatures were wit-

2 R. Kuibida, Politically Consistent in Legal Inconsistency: A New Trend from the Constitutional Court // <http://pravo.org.ua/2010-03-07-18-06-07/lawreforms/880-2011-07-26-11-41-22.html>.

3 Agreement on the Settlement of the Political Crisis in Ukraine // <http://www.pravda.com.ua/articles/2014/02/21/7015533/?attempt=1>.

nessed by Foreign Ministers of Poland and Germany R. Sikorski and F.-V. Steinmeier, respectively, and by E. Fournier, the head of the Department for Continental Europe of the Ministry of Foreign Affairs of the French Republic⁴.

On February 21, 2014, a few hours before Yanukovich fled, Parliament adopted the Law *On Restoration of Certain Provisions of the Constitution of Ukraine*⁵, which was later signed by Turchynov, acting President and new Parliament Chairman. On February 22, 2014, Parliament Ukraine adopted resolution *On the Text of the Constitution of Ukraine as of June 28, 1996, as Amended by the Laws of Ukraine No. 2222-IV of December 8, 2004, No. 2952-VI of February 1, 2011, and No. 586-VII of September 19, 2013*⁶. Both documents were adopted by more than two-thirds of the constitutional membership of Parliament.

Therefore, the victory of the Revolution set forth the task to reform the state and to establish, first of all, an effective, balanced mechanism of power that would make it impossible to return to the arbitrary regime of Yanukovich.

Constitutional reform took the key spot among comprehensive reforms. This was a result of two basic pre-conditions.

First, it is necessary to restore the legitimacy of the Constitution as an act of constituent power. From the legal point of view, at present such legitimacy has been essentially destroyed due to dubious decisions made as part of the constitutional process over the last ten years.

Second, it is necessary to correct the substantive defects, including improving a mixed system of government towards a greater balance of power, establishing the system of effective public administration, establishing an independent Constitutional Court, conducting decentralization, restoring court system and establishing an independent court.

Within the constitutional reform area, the most pressing issues are as follows:

-
- 4 Opposition Makes Agreement with Yanukovich // <http://www.dw.com/uk/опозиція-уклала-угоду-з-януковичем/a-17449550>.
 - 5 Law of Ukraine *On Restoration of Certain Provisions of the Constitution of Ukraine* // <http://zakon3.rada.gov.ua/laws/show/742-18>.
 - 6 Resolution of the Verkhovna Rada of Ukraine *On the Text of the Constitution of Ukraine as of June 28, 1996, as Amended by the Laws of Ukraine No. 2222-IV of December 8, 2004, No. 2952-VI of February 1, 2011, and No. 586-VII of September 19, 2013* // <http://zakon3.rada.gov.ua/laws/show/750-18>.

- to establish an effective mechanism of government that operates in the interests of an individual (improvement of mixed system of government);
- to create constitutional pre-conditions for decentralization of power;
- to create conditions for updating the judiciary's membership, strengthening of judicial independence and professionalism;
- to ensure that the Constitution does not merely declare, but guarantees human rights and freedoms.

This process must comply with the principles of constituent power of the people and with the constitutional procedure. In addition to amended constitutional provisions, the reform must enhance the authoritativeness of the Constitution as an act of constituent power, where the letter and the spirit of the law are one and the same.

1.2. Expectations from the Reform

According to a sociological survey conducted by Kyiv International Institute of Sociology, the level of priority of the constitutional reform from the public's point of view as of 2015 is at 5.6% (sixth after the prevention of corruption, overcoming the economic crisis, resolving the political crisis, reform of justice sector to implement a fair trial and judiciary, and decentralization aimed at redistributing power at local level)⁷.

According to a sociological survey on the Constitution and constitutional reforms carried out on request of the Center of Policy and Legal Reforms by the Ilko Kucheriv Democratic Initiatives Foundation and the Razumkov Centre's Sociological Service, the majority of the population are aware about reforms in the constitutional sphere: 46.6% have heard something about it and 9.7% know about these plans definitely. 5.2% of the population know which exactly amendments to the Constitution are being proposed and 41.6% state that they have heard something about these proposed amendments⁸. But this situation is paradoxical,

7 Survey of civic activities, attitudes to reforms and corruption // http://uniter.org.ua/upload/files/PDF_files/Pact_survey_April2015_public.pdf.

8 Opinions and Views of the Ukrainian Population on the Constitution, Constitutional, Judicial, and Prosecutorial Reform // http://pravo.org.ua/img/zstored/files/Опитування_12_15_повні_дані.doc.

because almost the same number of citizens are not at all aware of these amendments taking place or have heard nothing about them (49.2%).

Most of the citizens think that constitutional reform is needed in Ukraine. 27.7% think that it is necessary to conduct it as soon as possible, and 38.5% support the reform but think that it can start after the situation in the country is stabilized. Only 9.5% of the population find the constitutional reform in Ukraine to be unnecessary and irrelevant⁹. There is a significant number of those who have not yet made up their mind (24.1%)¹⁰.

At the same time, the majority of the population (55%) think that mass media does not provide enough information on the constitutional reform. Only 11% of respondents stated that the media pays enough attention to constitutional reform and 2% consider this attention to be excessive¹¹.

According to sociological survey, the public gave the following answers to the question “If constitutional reform is conducted, who should draft amendments to the Constitution?”: 8.8% responded that it had to be done by a special commission of Parliament; 4.5% responded that it had to be done by a special body under the President; 45.6% responded that it had to be done by an independent body that includes representatives from different branches of government and independent experts; 21% responded that it had to be done by expert organizations of the civil society; 0.9% provided other answers; and 19.3% responded that it was difficult to answer¹².

At the same time, according to a sociological survey conducted by the Razumkov Centre’s Sociological Service to gauge the attitude of experts toward constitutional reform, the majority of experts (80%) think that the current Constitution of Ukraine must be amended, and 66% think that the Constitution must be amended as soon as possible, 25% think that constitutional process can last for several years, and 7% think that the Constitution must be amended after completion of the anti-terrorist operation (among the general public, 42%, 30%, and 20%

9 Ibid.

10 Ibid.

11 Constitutional Reform: What Do Citizens Know and Think About It? // http://pravo.org.ua/files/Const_reform/Const_sociology.pdf.

12 Opinions and Views of the Ukrainian Population on the Constitution, Constitutional, Judicial, and Prosecutorial Reform // See *supra* note 8.

hold these opinions, respectively)¹³. It is therefore worth noting that experts influence public opinion regarding constitutional reform, while any differences in indicators can be explained by greater passivity on the part of the public, resulting from a high percentage of those who have yet to decide on their opinion.

In the meantime, indicators on the nature of amendments to the basic law have similar values. 60% of citizens who support amendments to the Constitution and most of the experts (74% of those who think the Constitution must be amended) believe that the Constitution must be only partially amended¹⁴. At the same time, 22% of experts think that drafting and adoption of the new Constitution of Ukraine is justified.

Most frequently, experts stated that chapter XI “Local Government” needs to be amended (82% of experts who support amending the Constitution held this opinion), followed by chapter VII “Prosecution” (79%), chapter VIII “Justice” (74%), chapter IV “Verkhovna Rada of Ukraine” (71%), chapter VI “Cabinet of Ministers of Ukraine. Other Executive Authorities” (70%), chapter V “President of Ukraine” (66%), chapter IX “Territorial Structure of Ukraine” (65%), chapter XII “Constitutional Court of Ukraine” (55%)¹⁵.

1.3. Significant Events during 2014-2015

1.3.1. Restoration of the Law No. 2222-IV On Amendments to the Constitution of Ukraine of December 8, 2004

On February 21, 2014, a few hours before Yanukovich fled the country, Parliament adopted the *Law On Restoration of Certain Provisions of the Constitution of Ukraine*¹⁶, which was later signed by Turchynov, acting President and new Parliament Chairman. On February 22, 2014, Verkhovna Rada of Ukraine adopted resolution *On the Text of the Constitution of Ukraine as of June 28, 1996, as Amended by the Laws of Ukraine No. 2222-IV of December 8, 2004, No. 2952-VI of February*

13 Constitutional Process in Ukraine: New Realities, New Challenges, New Approaches // http://www.uceps.org/upload/1436517797_file.pdf.

14 Ibid.

15 Ibid.

16 Law of Ukraine On Restoration of Certain Provisions of the Constitution of Ukraine // <http://zakon5.rada.gov.ua/laws/show/742-18>.

1, 2011, No. 586-VII of September 19, 2013¹⁷. Both documents were adopted by more than two-thirds of the constitutional membership of Parliament.

These politico-legal decisions of the Parliament were aimed at restricting powers of the President and restoring the constitutional order that existed prior to usurpation of power by President Yanukovich. Political situation in Ukraine required rapid action to restore the constitutional order, creating a vital necessity to go outside of the constitutional procedure.

From the legal point of view, these decisions raised many questions because they did not take place in accordance with procedure provided for by the Constitution. Given a number of illegitimate decisions on the amendments to the Constitution of Ukraine, however, it was impossible to make a decision completely accurate from a procedural viewpoint.

Evaluation of the Impact on Implementation of the Recommendations of the Council of Europe (CoE) bodies: Restoration of the Law No. 2222-IV *On Amendments to the Constitution of Ukraine* of December 8, 2004 that was carried out in a politico-legal manner has resulted deterioration of the level of implementation of the recommendations of the CoE bodies (-6 subtracted from the Speedometer). The Law had restored the Constitution of Ukraine as of December 8, 2004, which, on one hand, is in line with some of the Venice Commission recommendations – but, on the other hand, does not comply with them. Notably, the revival, on the constitutional level, of “parliamentary coalition” definition, the restoration of imperative mandate, the establishment of the procedure for forming the Government that causes problems of unity among Government members, and the restoration of general supervision function of prosecution do not comply with the recommendations of the Venice Commission.

17 Resolution of the Verkhovna Rada of Ukraine *On the Text of the Constitution of Ukraine as of June 28, 1996, as Amended by the Laws of Ukraine No. 2222-IV of December 8, 2004, No. 2952-VI of February 1, 2011, and No. 586-VII of September 19, 2013* // <http://zakon2.rada.gov.ua/laws/show/750-18>.

1.3.2. Establishment of the Temporary Special Commission for Amending the Constitution

On March 4, 2014, Parliament adopted resolution *On Establishment of the Temporary Special Commission to Develop the Draft Law on Amending the Constitution of Ukraine*¹⁸. The Commission included only the people's deputies. Out of a total of only 15 members of the Commission, 8 had voted for the so-called "dictatorship laws of January 16".

The Commission was supposed to prepare and submit the draft law on amending the Constitution of Ukraine to Parliament by April 15, 2014, but did not meet this deadline because it failed to reach a compromise.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Activities of the Temporary Commission to Develop the Draft Law on Amending the Constitution of Ukraine did not have any impact on the implementation of recommendations of the CoE bodies, because the parliamentary commission was unable to develop the draft law on amending the Constitution.

1.3.3. Consideration of the Draft Amendments to the Constitution Related to the Powers of the State Authorities and Local Self-Governments

Newly elected President Poroshenko made the second attempt to launch the constitutional reform. On June 26, 2014, he submitted Draft Law No. 4178a on Amending the Constitution of Ukraine¹⁹ to the Parliament. The draft was developed behind closed doors, without public hearings or participation of leading national experts²⁰. All of this took place within less than three weeks of the inauguration, and the draft was introduced as urgent.

18 *On Establishment of the Temporary Special Commission to Develop the Draft Law on Amending the Constitution of Ukraine* // <http://zakon2.rada.gov.ua/laws/show/849-vii>.

19 *Draft Law On Amendments to the Constitution of Ukraine (Concerning the Powers of the State Authorities and Local Self-Governments)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=51513.

20 *Opinion of the Group of Scholars and Civic Experts on the Draft Law No. 4178a On Amendments to the Constitution of Ukraine of June 26, 2014* // <http://bit.ly/1tsTD9E>.

The draft envisioned amending 22 articles and introducing an additional article within eight chapters of the Constitution.

On July 3, 2014, the draft law was added to the agenda. In October 2014, the Venice Commission issued its opinion on the draft law²¹. However, this constitutional initiative also failed. The draft law did not move beyond being placed on the agenda, and following the convocation of the newly elected Parliament, it is deemed removed from the agenda (it was formally withdrawn on November 27, 2014).

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The draft law took into account some recommendations of the Venice Commission, particularly on elimination of the imperative mandate and of the supervisory power of prosecution. Amendments proposed by the draft law were sufficient to establish the constitutional basis for decentralization of government powers (envisioning a three-level system of administrative divisions – comprised of regions, districts, and communities; eliminating the performance of local self-governance functions by executive authorities – although complete elimination of local state administrations should be assessed negatively). The draft law proposed introducing regional self-governance, as it envisioned establishing executive committees of regional councils. It is a decisive step that, as mentioned, should be assessed positively. But regional self-governance should not be introduced until after capable local self-governance is established. In the meantime, the majority of European recommendations have not been taken into account, particularly on openness and transparency in the implementation of constitutional reform. Logic and phasing of public administration reform were not respected in the draft law, which means that the consequences of its adoption could have been unpredictable and rather destructive.

The constitutional reform's false start had no impact on indicators of compliance with European recommendations concerning constitutional reform.

21 Opinion on the Draft law amending the Constitution of Ukraine, submitted by the President of Ukraine on 2 July 2014, endorsed by the Venice Commission at its Plenary Session (Rome, 10-11 October 2014) // [http://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD\(2014\)037-e](http://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD(2014)037-e).

1.3.4. Constitutional Reform in the Coalition Agreement

After the election of the new convocation of Parliament, the people's deputies started developing the Coalition Agreement. On November 21, 2014, representatives of five political parties – Petro Poroshenko Bloc, People's Front, Self-Reliance, Radical Party of Oleh Liashko, and Fatherland – signed this agreement. The Coalition Agreement's 73-page-long final text devoted so much attention to constitutional reform that the relevant text can be quoted in its entirety:

“We will carry out reforms that will require amending the Constitution of Ukraine. We strive to make the procedure for amending the Constitution transparent and high-quality.

1. Ensuring public and responsible procedure for amending the Constitution of Ukraine

1.1. Establishment of the Temporary Special Commission of Parliament (TSC) to develop amendments to the Constitution agreed upon by the Coalition. The TSC shall be guided by the principles of transparency, publicity, professionalism, scientific justification, collegiality, and independence in its decision-making;

1.2. The TSC shall be staffed on the basis of proportional representation of deputy factions in Parliament, so that the Coalition representatives will comprise the majority of the TSC membership. The President of Ukraine, the Cabinet of Ministers of Ukraine and the constitutional law experts will be engaged in the activities of the TSC;

1.3. The TSC shall develop an agreed-upon draft law on amendments to the Constitution of Ukraine taking into account the opinions of the Venice Commission”²².

For some reason, the preamble of the Coalition Agreement included the issue which is not a key priority and should have become one of the items under constitutional reform: “we will eliminate the deputies' immunity and will bear full responsibility for our actions before the Ukrainian people”.

The Temporary Special Commission of Parliament as the Coalition Agreement's chosen format for the development of constitutional amendments would not have been fully in line with the objectives of the constitutional reform. Under such a model, only the people's deputies

22 Coalition Agreement of the Deputy Factions “European Ukraine” // <http://zakon4.rada.gov.ua/laws/show/n0001001-15>.

would be members of the constitutional commission, while the “engaged experts” would serve as advisers without voting rights during the commission’s meetings. On numerous occasions, scholars and non-governmental organizations petitioned the Parliament and the President to establish a constitutional commission in accordance with the criteria of professionalism and impartiality, which would include as its members not only the people’s deputies but also impartial constitutional law scholars. The latter should comprise the majority on such a commission. Such a format for the body to develop constitutional amendments also enjoys the greatest support among the society²³.

However, the statements in the Coalition Agreement remained merely on paper. The Parliamentary majority factions never started implementing these commitments.

Evaluation of the Impact on Implementation of the CoE Bodies’ Recommendations: The Coalition Agreement set forth a political framework for subsequent adoption of draft laws and undertaking of other procedural actions in the area of constitutional law. At the same time, the objectives and certain provisions of this document were obviously noncompliant with the recommendations of the CoE bodies relating to implementation of a comprehensive constitutional reform with participation of independent experts.

Once again, the speedometer’s gauge does not indicate acceleration for the constitutional reform (+1 added to the Speedometer).

1.3.5. Consideration of Draft Amendments to the Constitution Related to the Immunity of People’s Deputies and Judges and to Accession to the Rome Statute

On January 16, 2015, the President introduced to Parliament draft law No. 1776 *On Amendments to the Constitution of Ukraine (concerning the Immunity of the People’s Deputies of Ukraine and Judges)*²⁴. The draft law provided for “targeted” amendments to the Constitution – i.e., eliminating the deputies’ immunity and restricting the judicial immunity.

23 Opinions and Views of the Ukrainian Population on the Constitution, Constitutional, Judicial, and Prosecutorial Reform // See supra note 8.

24 Draft Law *On Amendments to the Constitution of Ukraine (Concerning the Immunity of the People’s Deputies of Ukraine and Judges)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53602.

On February 5, 2015, Parliament decided to submit the draft law to the Constitutional Court to obtain an opinion on its compliance with articles 157 and 158 of the Constitution. On June 16, 2015, the Constitutional Court issued a positive opinion on the draft law²⁵. But Parliament never got around to considering this draft law.

On January 16, 2015, a group of people's deputies also registered draft law No. 1788 *On Amendments to the Constitution of Ukraine concerning Recognition of the Provisions of the Rome Statute*²⁶. Consenting to the jurisdiction of the International Criminal Court at the constitutional level is one of the recommendations of the Venice Commission. However, Parliament did not consider these amendments either.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Registration of the draft amendments to the Constitution had a varying impact on the implementation of recommendations in the constitutional sphere.

The Parliamentary Assembly of the Council of Europe views the idea of eliminating deputies' immunity as a threat to parliamentarianism in Ukraine. Therefore, it would appear more prudent to limit deputies' immunity rather than eliminate it entirely.

At the same time, the proposed amendments on the immunity of judges and consenting to the jurisdiction of the International Criminal Court received positive reviews from the European bodies. Thus, taken together, these events have slightly improved the Speedometer's indicators relating to constitutional reform (+1 added to the Speedometer).

1.3.6. Establishment of the Constitutional Commission

The Constitutional Commission was established as a special advisory body to the President by a Decree of the President of March 3, 2015. The main tasks of the Constitutional Commission are:

25 Opinion of the Constitutional Court of Ukraine in connection with the application by the Verkhovna Rada of Ukraine to provide an opinion on the compliance of the draft law *On Amendments to the Constitution of Ukraine (Concerning the Immunity of the People's Deputies of Ukraine and Judges)* with Articles 157 and 158 of the Constitution of Ukraine // <http://zakon3.rada.gov.ua/laws/show/v001v710-15>.

26 Draft Law of Ukraine No. 1788 *On Amendments to the Constitution of Ukraine (Concerning Recognition of the Provisions of the Rome Statute)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53621.

- to develop coordinated proposals relating to implementation of the constitutional reform in Ukraine;
- to ensure broad public and professional discussion of proposals relating to implementation of the constitutional reform in Ukraine;
- to develop draft law(s) on amendments to the Constitution, taking into account results of broad public and professional discussion;
- to inform the public on activities connected with the development of proposals relating to implementation of the constitutional reform.

According to the Decree of the President of March 3, 2015, the Parliament Chairman manages the Commission.

The Decree of the President *In re Constitutional Commission* of March 31, 2015 approved the membership of the Constitutional Commission and supported the recommendations by international organizations to engage international consultants and observers in the Commission's activities. A number of civil society representatives active in the area of constitutional reform were also included as Commission members.

Three working groups were established within the Constitutional Commission:

- 1) on decentralization;
- 2) on justice and related legal institutions; and
- 3) on human rights, freedoms and duties.

Proposed amendments to the Constitution developed by the working groups are classified as open-access information. They are published on the official website of the Constitutional Commission (<http://constitution.gov.ua>), where anyone can review them and submit their comments.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Establishment of the Constitutional Commission has provided some foundation for preparations to the constitutional reform in line with CoE recommendations, albeit through an advisory body to the President. The government has rejected the plans to carry out a comprehensive constitutional reform, initiating instead the process of amending to the Constitution through adoption of three separate laws, as provided by with chapter XIII of the Constitution: on human rights,

freedoms and duties; on decentralization; and on guaranteeing independence of the judiciary (including reform of the Constitutional Court).

Establishment of the Constitutional Commission has had a positive impact on the implementation of one of the recommendations in the constitutional sphere. At the same time, the general impact on the progress of constitutional reform has been very insignificant (+0.5 added to the Speedometer).

1.3.7. Launch of the Decentralization Reform

The working group of the Constitutional Commission developed constitutional amendments on decentralization in the beginning of summer 2015. These were based on drafts that had been previously developed by the experts. The group developed its proposals behind closed doors, without public consultations.

On June 24, 2015, the Venice Commission issued an Opinion of the draft law On Amendments to the Constitution (concerning Decentralization of Government) developed by the Constitutional Commission²⁷. On October 26, 2015, the Venice Commission issued a final positive opinion on the draft law²⁸. The Venice Commission approved the provision of the draft law, making a few comments and providing minor recommendations.

Subsequently, constitutional amendments were revised behind closed doors at the Presidential Administration. On July 1, 2015, the President introduced draft law No. 2217a²⁹ in the Parliament. After the decentralization draft was introduced, it turned out that the text that was initially approved by the Constitutional Commission was not only slightly revised by the Presidential Administration prior to being introduced in Parliament – but that an entire new clause was inserted, dealing with issued of local self-governance in select districts of Donetsk

27 Preliminary opinion of the Venice Commission (draft of constitutional amendments was changed after the opinion, taking into account recommendation) // [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)008-e).

28 Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Territorial Structure and Local Administration as proposed by the Working Group of the Constitutional Commission in June 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).

29 Draft Law *On Amendments to the Constitution of Ukraine (Concerning Decentralization of Power)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55812.

and Luhansk regions. Not all the majority factions supported such amendments. As such, the probability that the Parliament would approve the draft constitutional amendments on decentralization was decreased, as this would require 300 votes of the deputies.

On July 16, 2015, Parliament submitted the draft law to the Constitutional Court³⁰. On July 30, 2015, the Constitutional Court ruled³¹ that the draft law was in compliance with Articles 157 and 158 of the Constitution of Ukraine. This gave green light to Parliament for preliminary approval and adoption of the draft law. On August 2015, Parliament provisionally approved the draft law. The voting in Parliament was accompanied by rallies outside of the Parliament building, which included human casualties.

As for the sectoral constitutional reforms, government decentralization can be broken down to the following three issues:

- change of administrative and territorial division, including enlargement of communities;
- liquidation of regional and district administrations and replacing them with the institution of prefectures;
- transfer of the majority of functions currently performed by local state administrations to local self-government authorities and their executive bodies.

The constitutional reform shall aim at developing an effective system of local government which can ensure the right to participate in public administration, and the right and the ability of community to effective local government.

To achieve these goals, at least the following is necessary:

- to implement a three-level structure administrative division – community, district, and region. Such administrative division as community currently does not exist in Ukraine. So, it is necessary to constitute it and stipulate that it shall be established in accordance with the procedure provided for by law, taking into account

30 Chronology of Consideration of the Draft Law *On Amendments to the Constitution of Ukraine (Concerning Decentralization of Power)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=2217%E0&skl=9.

31 Opinion of the Constitutional Court of Ukraine in connection with the application by the Verkhovna Rada of Ukraine to provide an opinion on the compliance of the draft law *On Amendments to the Constitution of Ukraine (Concerning Decentralization of Power)* with Articles 157 and 158 of the Constitution of Ukraine // <http://zakon3.rada.gov.ua/laws/show/v002v710-15>.

historically established joint social and economic infrastructure, existence of conditions and opportunities for provision of public services to the population in line with the established standards, and guarantees of adequate operation of local self-governance;

- to set forth the principle of universality of local self-governance, including by extending the jurisdiction of territorial communities and community associations over the territory that covers both the localities and any adjacent land necessary for the development of localities in question (economic, social, transport and other infrastructures). The limits of one territorial community must coincide with the limits of the neighboring community;
- functions that are currently performed by local state administrations should be delegated to the executive bodies of local councils as a result of the constitutional reform. Instead, local state administrations (or other bodies of this kind with a similar title) should exercise supervisory functions over the compliance with legislation by local self-government bodies, organize the activities of state inspections at the local level, and coordinate the activities of all public administration bodies under the state of emergency.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Approval of amendments to the Constitution will enable implementing the recommendations of the CoE bodies on decentralization and strengthening of local democracy, including: departure from a centralized model of administration in the state; building capacity of local self-governance and designing an effective system of territorial organization of government in Ukraine, complete implementation of the provisions of the European Charter of Local Self-Government, principles of subsidiarity, universality, and financial self-sufficiency of local self-government.

Registration of the draft law and its preliminary approval had a positive impact on implementation of recommendations (+2 added to the Speedometer).

1.3.8. Launch of Justice Reform to Ensure the Independence of the Judiciary

The working group of the Constitutional Commission developed constitutional amendments on the independence of the judiciary in the

end of summer 2015³². After several rounds of revisions to the draft law³³, it was introduced by the President in the Parliament in November 2015.

On December 22, Parliament submitted the draft law *On Amendments to the Constitution (concerning Justice)* to the Constitutional Court to verify compliance with Articles 157 and 158 of the Constitution of Ukraine. The draft law subsequently received a positive opinion and was provisionally approved by Parliament on February 2, 2016.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Procedural issues in connection with constitutional amendments related to judicial reform generally comply with European standards.

For evaluation of the substantive aspect of judicial reform, see chapter II “Judicial Reform”.

1.3.9. Launch of Reform in the Area of Constitutional Protection of Human Rights

The Constitutional Commission actively reviewed issues relating to amendments of the Basic Law's chapter on human rights and freedoms. As of July 15, 2015, the human rights working group developed a new draft version of the Chapter II of the Constitution³⁴.

As of early December 2015, there is still no final version of the draft amendments to the Constitution on these issues. Constitutional amendments on human rights, freedoms and duties proceed slowest, but with the greatest transparency, with adequate public participation in the constitutional process. Public discussions are currently taking place at Kyiv-Mohyla Academy and in the regions to develop a coordinated version of the human rights draft.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The current version of the draft law needs to be revised through public and expert discussions. The work of the Constitutional Commission in this area is still ongoing. It is hard to predict

32 Draft Amendments to the Constitution of Ukraine in the Area of Justice // <http://constitution.gov.ua/work/item/id/13>.

33 http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209.

34 Draft Chapter II of the Constitution developed by the Working Group on Human Rights as of July 15, 2015 // <http://constitution.gov.ua/work/item/id/9>.

now which of the CoE recommendations will be taken into account in the final version of the draft law.

Therefore, it is currently impossible to assess the impact of reform developments in the area of constitutional protection of human rights on the implementation of the recommendations of the CoE bodies.

1.4. General Evaluation of the Reform Progress

Several events took place simultaneously throughout 2014, which had a negative impact on the implementation of the recommendations of the CoE bodies and, as a consequence, on the Constitutional Reform Speedometer. First and foremost, significant negative impact was related to the “dictatorship laws of January 16, 2014”. Subsequently, the Law *On Restoration of Certain Provisions of the Constitution* was adopted in dubious, from a legal viewpoint, manner. Despite this decision being politically and morally justified, it caused deterioration with respect to implementation of the CoE bodies’ recommendations.

2014 was also marked by two false starts of the constitutional reform and the loss of time, preventing rapid and successful constitutional reform in Ukraine. This was due to mistakes in the organization of the constitutional reform process. Entities that were initiating constitutional reform did not take into account its constituent nature and did not ensure public participation in the constitutional update process.

As a result, there was a regression in the constitutional area in 2014. Speedometer’s indicators dropped by 10 points and, as of January 1, 2015, they pointed to +4 (out of 100 possible points).

2015 was more successful for constitutional reform than the previous year. The advancement was due to the establishment and activities of the Constitutional Commission. A positive step was the development of a draft law *On Amendments to the Constitution of Ukraine (concerning Decentralization of Government)*, its introduction in Parliament by the President, a positive opinion of the Constitutional Court, and its provisional approval by Parliament.

Another step forward was the registration of a draft law *On Amendments to the Constitution of Ukraine (concerning Justice)* and its submission to the Constitutional Court.

At the same time, the working group of the Constitutional

Commission is still developing amendments relating to improvement of the constitutional protection of human rights.

The fourth main area of constitutional reform – i.e., the balance of powers within a mixed parliamentary and presidential form of government – is still awaiting its launch.

Thus, the constitutional reform is proceeding unevenly. In practice, only three of the four wheels of our vehicle began turning. They are moving at different speeds, while the fourth wheel does not turn at all. As a result, the Constitutional Reform Speedometer was only able to restore the positions it lost last year and to move forward marginally (17 points as of January 1, 2016). Further progress in constitutional reform will depend entirely on the Parliament's adoption of the draft laws that were developed.

Recommendations

The main tasks facing the current constitutional process include:

- to improve the societal authoritativeness of the Constitution through an open and transparent constitutional reform that maximized engagement of civil society at all stages;
- to ensure the efficiency of the Constitution, so that the actual functioning mechanism of government complies with the mechanism envisioned by the Constitution;
- constitutional rights must be guaranteed by the state and not merely declared;
- to establish the conditions for an in-depth decentralization of public power;
- to achieve the balance of power within the a mixed parliamentary and presidential form of government;
- to enshrine the status of Government that would enable effective design and implementation of the public policy; to ensure the unity of public policy;
- to establish an independent court system, including renewing the ranks of judges;
- to establish an authoritative and independent Constitutional Court, including replacement of judges who voted for amendments to the Constitution in unconstitutional manner in 2010;

- to remove the Soviet-style prosecution and to constitutionally provide for public prosecution service, with the basic function of supporting of public accusation within the criminal procedure.

In addition to the substance of future constitutional amendments, the way in which constitutional reform would be carried out is also important. This time around, it has to be done in a professional, open, and transparent manner, in accordance with the rule of law. Yet another modification of the Constitution in a politico-legal manner will result in deepening of the constitutional crisis, and thus may have unforeseeable negative consequences for the society. Thus, the text of the constitutional amendments must be driven by the public interest rather than temporary political interests. The public needs to be engaged, to the extent possible, in discussing of the constitutional amendments at all stages.

Whether Ukraine will establish itself firmly on the path of fair governance or follow yet another path of lawlessness will depend on the quality of constitutional reform.

Theoretically, two options of constitutional reform are possible:

- *amendment of the Constitution by Parliament in accordance with the procedure provided for by Chapter XIII.* The drawback of this option is the low capacity of the existing political players to reach consensus and carry out constitutional reform in the society's interests rather than in the interests of their own political forces;
- *adoption of a new Constitution.*

Taking into account generally fading respect for the current Basic Law, adoption of a new constitution looks attractive. This can be accomplished in two legitimate ways:

- after Parliament amends Chapter XIII of the Constitution (with subsequent ratification by an all-Ukrainian referendum) to establish the procedure of adopting a new Constitution by a constituent power entity. As with the previous option, the main drawback here is the low probability of political consensus to carry out constitutional reform in the society's interests.
- through a legislatively defined procedure for developing the draft of a new Constitution by a constituent power entity and its ratification by an all-Ukrainian referendum (i.e., adopting the *Laws On Procedure of Adopting the New Constitution of Ukraine* and *On All-Ukrainian Referendum* by Parliament).

2. JUDICIAL REFORM

(by: R. Kuibida, M. Sereda)



2.1. Background

After gaining independence, Ukraine inherited its judicial system from the USSR, where all power belonged to the communist party. Gradually, the power center shifted from the communist party to political authorities (President, Government, and Parliament) that emerged on the basis of former party bodies and retained their influence over judicial system. Corruption came into play in addition to the dependence of courts on other branches of government.

Under President Yanukovich, the so-called “judicial reform” of 2010 significantly increased the dependence of courts and judges on political authorities. Yanukovich created a widespread system of influence on judicial system, with several influence centers that occasionally competed against each other. At the same time, this competition did not impede the realization of Yanukovich’s basic interests – i.e., the consolidation of his power and the growing wealth of his family. Key influence centers included the President’s Administration, Parliament and Yanukovich himself, as well as his older son Oleksandr, a “successful” owner of multiple businesses whose assets multiplied by many degrees during the presidency of Yanukovich.

Total control over judicial self-governance as a whole was achieved. Congress of Judges took place according to a predetermined scenario, without particular discussions; decisions that were prepared in advance were approved almost unanimously.

Key staffing entities in the judicial system – the High Qualification Commission of Judges and the High Council of Justice – were completely loyal towards Yanukovych and his cronies. Different influence centers were represented at the High Council of Justice, but one way or another, they depended on the President (Portnov) and pro-presidential majority in Parliament (Kivalov).

The High Qualification Commission of Judges and High Council of Justice are authorized to make decisions on disciplinary responsibility of judges. Grounds for such responsibility are formulated in such a manner that any judge could be brought to discipline. For instance, in 2010, amendments to procedural codes reduced the terms for consideration of cases. Given the heavy workload on judges, compliance with these terms without infringing the quality of justice is practically impossible. Thus, almost every judge could be charged with / held responsible for violating the terms for consideration of cases. Disciplinary proceedings were inquisitorial in nature. Results of public monitoring of the practice relating to bringing judges to disciplinary responsibility suggest³⁵ that these practices were inconsistent and often had features of selective persecution.

All of this had a restraining effect on judges and forced them to self-censor their decisions, even in the absence of any instructions as to a specific outcome of resolution of a case.

Under the 2010 reform, court presidents formally lost a significant number of their powers that they used to influence the judges. Nevertheless, judges continued to perceive court presidents representatives of the “center”, because between 2010 and April 2014, the High Council of Justice appointed court presidents (and their deputies) upon recommendation of, respectively, the council of judges of general courts, the council of judges of commercial courts, or the council of judges of administrative courts. This function of the High Council of Justice was set forth by law, but it was not mentioned in the exhaustive list of functions of this body provided by the Constitution. The Constitutional Court refused to review the constitutionality of this provision of the law.

As evidenced by the practice, councils of judges of respective

35 Disciplinary Responsibility of Judges in Ukraine: Problems of Legislation and Practice / Kuibida R., Sereda M. – K.: Moskalenko O.M. Private Entrepreneur Publishing, 2013. – 72 p. // http://pravo.org.ua/files/A_D_NEW_final.pdf.

courts, the High Council of Justice, the High Qualification Commission of Judges, the President and Parliament acted in complete unison (synchronously) while deciding on staffing issues and appointing court president and their deputies. Far too often, judges who were shortly before transferred from another court (most commonly, from Donbas – the region where Yanukovych, for a long time, used to head the regional state administration) were appointed as court presidents and their deputies.

Judges feared that, should they fail to fulfill a “request” of their court presidents regarding consideration of specific cases, they would be subjected to responsibility mechanisms through the High Council of Justice or the High Qualification Commission of Judges. Moreover, the general meetings of judges at each court decided upon the area of each judge’s specialization upon recommendation of the court president. Thus, the court president could assign particularly trusted judges to hear sensitive categories of cases.

The court president could also interfere in the assignment of cases. By law, allocation of cases was computerized. But the Council of Judges of Ukraine provided that, in case of judge’s vacation or sick leave, a case was to be reassigned anew without using a computer. In practice, this new assignment was done by the court president manually.

Another way to maintain judges’ loyalty was to use discrediting information against judges, which was available to law enforcement authorities, with a threat of criminal responsibility. Law enforcement authorities would refrain from criminal prosecution of those judges as long as they stayed loyal.

During the events on Maidan, the courts played an important role in stifling the protests. Decisions made by courts were patently arbitrary and coordinated from Yanukovych’s administration.

2.2. Expectations from the Reform

According to results of a national survey (November 2015), only 3.1% of citizens trust the judicial system³⁶. The level of trust in the

36 The State of Corruption in Ukraine: Comparative Analysis of Nationwide Studies of 2007, 2009, 2011, and 2015 // http://uniter.org.ua/upload/files/PDF_files/Anticorr-survey-2015/CorruptionFULL_2015_Ukr_for%20public.pdf.

judiciary is the lowest among all branches of government in all regions of Ukraine³⁷.

The citizens named the following as the main problems that contribute to lack of trust in the judicial system: prevalence of corruption among judges (65.5%), dependence of judges on oligarchs (40.1%) and politicians (33.8%), issuing judgements “on demand” (34%), prevalence of mutual cover-up within the judiciary (29.8%).

Sociologists also note the high demand within the society for significant reforms in the judiciary: 47.3% are in favor of radical changes, 31.3% think that such changes should be serious, and only 8% of citizens prefer partial and cautious changes³⁸. Support for two petitions to the President of Ukraine regarding judicial reform implementation confirms the citizens’ decisive attitudes. More than 25 thousand people have signed the petition on the reappointment of the entire judicial ranks in the same manner as patrol police³⁹ and the petition on urgent lustration of judges and prosecutors, with publication of results⁴⁰.

Experts share the citizens’ views regarding urgent need for implementation of judicial reform. 80% of experts surveyed believe the reform of the judiciary and other law enforcement authorities is the most important task for Ukraine, and the same number of respondents support radical and urgent changes in the judicial system⁴¹.

79% of businessmen surveyed also expressed dissatisfaction with the situation in the judiciary. Among all government authorities, investors named judicial bodies and the fiscal service as the least efficient⁴².

Unfortunately, the lack of trust in judicial system and delays with

37 National Public Opinion Survey on Democratic, Economic, and Judicial Reforms, Including Implementation of the Law *on the Purification of Government* (July 2015) // http://www.fair.org.ua/content/library_doc/2015_FAIR_July_Public_Survey_Lustration_UKR.pdf, http://www.fair.org.ua/content/library_doc/2015_FAIR_July_Public_Survey_Lustration__ENG.pdf.

38 Opinions and Views of the Ukrainian Population Concerning the Constitution, Constitutional, Judicial, and Prosecutorial Reform // See supra note 8.

39 Petition No. 22 / 00538-en // <https://petition.president.gov.ua/petition/5381>.

40 Petition No. 22 / 000256-en // <https://petition.president.gov.ua/petition/256>

41 International Center for Policy Studies. Findings of Experts’ Survey on the Evaluation of the Concept Paper on Judicial Reform (September 2015) // http://www.icps.com.ua/assets/uploads/images/files/sudova_reforma_anal_z_derzh_r_shen.pdf.

42 European Business Association. Results of the Investment Attractiveness Index (2nd Quarter 2015) // http://www.eba.com.ua/static/indices/iai/Index_28_eng_2015.pdf.

the implementation of judicial reform result in high level of acceptance of vigilante justice in the Ukrainian society (around 47%). Thus, 12% of the population agree that “vigilante justice under our conditions is the only way to punish criminals”. 35% of the population believe that vigilante justice, while unacceptable, may be justifiable in some instances. 46% the population is against vigilante justice under any circumstances⁴³.

As to judges, their cautious assessments indicate low level of readiness for changes and demonstrate a huge gap with the expectations of the society. 67% of judges do not support lustration of any kind⁴⁴. Results of surveys of judges, experts and citizens are unanimous only in their support for the idea of overcoming political influences.

2.3. Significant Events during 2014-2015

2.3.1. Strengthening the Role of Parliament and its Justice Committee

Among the revolutionary decisions made immediately after Yanukovich’s escape on February 23, 2014, Parliament adopted the law that vested the Parliament Rada and, in particular, its Committee on Rule of Law and Justice with significant authority regarding the staffing issues in judicial system⁴⁵.

The law provided that the High Council of Justice can make any decision within its competence only if there is a preliminary opinion of the parliamentary Committee on Rule of Law and Justice, which is binding. In essence, the High Council of Justice has turned into a ceremonial body with powers akin to those of the British Queen, which is directly against the European standards.

The Law also returned to the parliamentary Committee on Rule of Law and Justice the authority to conduct preliminary review in cases relating to election and removal of judges before introducing these matters on Parliament floor (the Committee lost this authority in 2010,

43 Public Opinion of the Population of Ukraine: Protest Moods in the Times of Crisis (July 2014) // http://www.dif.org.ua/en/publications/press-relizy/gromadska-dumka_1439554738.htm.

44 Analytical Report on the Nationwide and Expert Survey on *Judicial Reform: Pressure Points* // http://pravo.org.ua/files/Analitichniy_zvit_Deminiatsiyvy.doc.

45 Law of Ukraine *On Amendments to Certain Laws of Ukraine concerning Certain Issues Regarding the Judiciary and Status of Judges* // <http://zakon2.rada.gov.ua/laws/show/769-18>.

ensuring a ceremonial role of Parliament in making decisions regarding election and removal of judges).

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Although adoption of the Law was politically justified (complete non-confidence in members of the High Council of Justice formed during Yanukovych's presidency), it negatively impacted the implementation of CoE's recommendations (-2 deducted from the Speedometer). The law enhanced the political influence of Parliament on judges' career development, making the decision of the High Council of Justice dependent on the relevant parliamentary committee. At the same time, the law was barely applied in practice, because soon the Parliament terminated the mandate of the High Council of Justice's members.

2.3.2. Strengthening Judicial Self-Governance through Adopting the Law on Restoring the Trust in the Judiciary in Ukraine

On April 8, 2014, Parliament adopted the Law *On Restoring the Trust in the Judiciary in Ukraine*⁴⁶. The law provided new opportunities for judicial self-governance, introduced lustration elements (dismissal of judges from administrative positions) and envisioned conducting inspections into possible oath violations with respect to certain categories of judges.

Under the new law, the Congress of Judges of Ukraine was to be congregated in accordance with a one delegate per twenty judges formula, putting its membership at nearly 400 delegates instead of 96 previously. The new Council of Judges of Ukraine was to consist of 40 members (only 11 previously), representing judges of all levels and specializations proportionally.

Since the law took effect, all court presidents and their deputies have lost these positions, even though they remained judges. Judges working in each court received the right to elect their court president and his/her deputies by themselves. At the same time, the law did not provide for any safeguards to prevent dismissed court presidents and their deputies from returning to these positions. Thus, judges chose the same court presidents at approximately 80% of the courts.

46 Law of Ukraine *On Restoring the Trust in the Judiciary in Ukraine* // <http://zakon4.rada.gov.ua/laws/show/1188-18>

In order to vet judges involved in prohibiting peaceful assemblies during the Maidan events and persecution against protesters, the Law *On Restoring the Trust in the Judiciary* established a temporary special commission under the High Council of Justice. The temporary special commission verified complaints against such judges and issued opinions as to existence of evidence of violations of oath. Opinions were referred to the High Council of Justice, which, in accordance with the Constitution, is authorized to submit requests on removing of judge from office.

To prevent the temporary special commission from functioning, former Parliaments members associated with Yanukovich challenged the law *On Restoring the Trust in the Judiciary* at the Constitutional Court, in addition to trying to nullify some of its accomplishments through a number of draft laws. Some of the judges subjected to vetting also tried to stymie the Commission, using figureheads to challenge the appointment of its members and the Commission's authority. Some of the judges are currently appealing the Commission's opinions in order to prevent their review by the High Council of Justice.

Taking into account its public and political significance, the law became an object of heightened attention for European institutions. More details about the degree to which the law takes into account CoE experts' recommendations can be found in the legal opinion on the Law of Ukraine *On Restoring the Trust in the Judiciary in Ukraine: European Standards and Challenges of Implementation*⁴⁷.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Adoption of the Law had a positive impact on the implementation of three recommendations of the CoE's bodies (+2 added to the Speedometer). The law significantly strengthened the judicial self-governance system, introducing greater proportionality in representation of judges of various levels and specializations on the judicial self-governance bodies. It has also fulfilled a recommendation concerning rejection of mandatory invitation of the ministers of justice and of finance to the Council of Judges of Ukraine sessions.

47 Kuibida R., Syroid O. Legal Opinion on the Law of Ukraine *On Restoring the Trust in the Judiciary in Ukraine: European Standards and Challenges of Implementation* // http://pravo.org.ua/files/Sud/Opinion_Law_On_Restoration_of_Trust_RK_OS_UKR_final.pdf.

2.3.3. Dissolution of the High Council of Justice and the High Qualification Commission of Judges, as well as Obstructing the Appointment of New Members to These Bodies

In April 2014, the law *On Restoring the Trust in the Judiciary in Ukraine* terminated the mandate of the High Council of Justice and the High Qualification Commission of Judges members, as they were the part of power usurpation system under President Yanukovich.

However, representatives of former political and judicial elites put up heavy resistance to the appointment of new members to these bodies.

Contrary to the law, the former chair of the High Qualification Commission of Judges restored its former membership, and the Commission even took up disciplinary proceedings concerning judges who made decisions against participants of the peaceful assemblies (e.g., terminating disciplinary proceedings against such judges or issuing reprimands, as a means to prevent their removal from office). The mandate of these former members was restored under the pretext of a dubious judgment in a labor dispute, which required the chair of the High Qualification Commission of Judges to review an employment termination request by one of the Commission's administrative staff members. Thus, the court deemed the mandate of the High Qualification Commission of Judges' chair as valid. At the same time, a pocket entity "No one but us," which is said to be associated with intelligence agencies, organized a small picket near outside of the Commission's office, holding banners that read "Act!" and "We demand lustration". To legalize its activity, a public council was also established, which included both authoritative experts and scholars with dubious reputation.

"Revived" in such a dubious way, the High Qualification Commission of Judges issued recommendations concerning the transfer of judges, as well as reprimanded a number of judges who were under the threat of dismissal for violations of oath, resulting from their participation in arbitrary repression of civic protests (this should have prevented their removal).

During summer-autumn 2014, a new composition of the High Qualification Commission of Judges was put into place, which began operating in December 2014. The new membership of this body, as well as the President and Parliament, did not recognize the decisions of "self-appointed" members of the High Qualification Commission of Judges, whose mandate were terminated by the law.

Only on December 25, 2014, the High Qualification Commission of Judges managed to conduct its first meeting with new members. As for the High Council of Justice, its new membership was put into place only in the first half of 2015 (see s. 2.3.11 of this Report). Prior to that, the appointments of this body's members by the Congress of Advocates and the Congress of Representatives of Higher Legal Education Institutions were blocked in courts based on petitions by certain former Parliament members.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: According to the recommendations of the Consultative Council of the European Judges, the council of justice (judges) should operate continuously, and its members should not be all replaced at the same time. Thus, a lengthy forced "idleness" of the High Council of Justice and the High Qualification Commission of Judges negatively affected the implementation of this recommendation.

2.3.4. Rejection of the Amendments to the Constitution, Introduced by the Ex-President Yanukovich

On July 3, 2014, Parliament rejected a draft law *On Amendments to the Constitution of Ukraine to Strengthen the Guarantees of Independence of Judges*⁴⁸, submitted during the Yanukovich presidency. In general, the draft law received a positive opinion from the Venice Commission. In particular, it envisioned removing the Parliament from the judiciary's personnel decisions, increasing the age requirements for judicial office, establishing the network of general jurisdiction courts by law, and incorporating automatic case assignment as one of the main principles of judicial procedure. The draft law also ensured that the majority of members on the High Council of Justice would be judges elected by their peers, in line with European recommendations⁴⁹.

At the same time, Ukrainian experts negatively evaluated the possible consequences of the adoption of the draft law. The criticism of

48 Draft Law of Ukraine No. 2522a *On Amendments to the Constitution of Ukraine to Strengthen the Guarantees of Independence of Judges* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=47765.

49 Opinion of the Venice Commission No. 722/2013 on the Draft Law *on the Amendments to the Constitution of Ukraine, Strengthening the Independence of Judges* // [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)014-e).

the draft was based on its merely pro forma compliance with European standards. In the absence of reform of judicial self-governance system, the draft perpetuated the possibility of having members of the High Council of Justice and the High Qualification Commission of Judges pre-selected by Presidential Administration. Furthermore, any final decision on personnel issues in the judiciary depended on the President.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Parliament's refusal to adopt the draft law *On Amendments to the Constitution of Ukraine to Strengthen the Guarantees of Independence of Judges* had a negative impact on the implementation of recommendations (-8 subtracted from the Speedometer). To some extent, the draft law influenced the implementation of ten important recommendations of CoE bodies. However, changes proposed by the draft law would, in reality, only increase the dependence of judges on the President, as every step in a judge's career would depend on him.

2.3.5. Adoption of the Law *On Cleansing the Government*

On September 16, 2014, Parliament adopted the Law *On Cleansing the Government*⁵⁰. Even though the mechanisms for restoring trust in the judiciary have already been regulated by another law, the law *On Cleansing the Government* extended the lustration procedure to judges. The drafters explained the need for this step by the fact that the previous law proved inefficient, while its provisions made it impossible to prohibit lustrated judges from holding another government office.

On November 17, 2014, the Plenum of the Supreme Court petitioned the Constitutional Court, alleging that certain provisions of the law were unconstitutional. Judges believed that they allegedly were subject to double jeopardy for their actions, contrary to the Constitution. Moreover, the Supreme Court believed that lustration without reviewing the legality of court decisions violated the Constitution⁵¹.

50 Law of Ukraine *On Cleansing the Government* // <http://zakon0.rada.gov.ua/laws/show/1682-18>.

51 Resolution of the Plenum of the Supreme Court of Ukraine No. 8 *On Constitutional Petition to the Constitutional Court of Ukraine Concerning the Compliance with the Constitution of Ukraine (Constitutionality) of clause 6 section 1, clause 2 section 2, clause 13 section 2, and section 3 of Article 3 of the Law of Ukraine No. 1682-VII 'On Cleansing the Government' of January 16, 2014, and on Addressing the President of Ukraine, the Chairman of the Verkhovna Rada and the Prime Minister of Ukraine on Bringing the Law*

The Venice Commission negatively evaluated the provisions of the law *On Cleansing the Government*, as far as they concerned the lustration of judges. In the opinion of the Commissions' experts, if the previous law proved inefficient, it had to be repealed and replaced by a new law. In a final opinion concerning the law *On Cleansing the Government*, the Commission recommended to remove judges from the scope of the lustration law, and instead continue applying the law *On Restoring the Trust in the Judiciary in Ukraine*⁵².

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Adoption of the law *On Cleansing the Government* had a negative impact on the implementation of judicial reform recommendations of CoE bodies (-1 subtracted from the Speedometer). According to one of the recommendations, any lustration of judges should be governed by a single act of legislation. In practice, the law has not been applied to remove judges for their decisions.

2.3.6. Signing of the Coalition Agreement and the First Session of New Parliament

On November 27, 2014, the first session of the Parliament's VIII convocation took place. On the same day, representatives of five parliamentary factions signed a Coalition Agreement, under which they undertook certain public commitments, including in conducting judicial reform. Among others, the Agreement envisioned the following:

- selection to judicial office by competition only, based on objective criteria;
- introduction of public participation in judicial selection;
- removal of political bodies from judicial career decisions;
- introduction of integrity criteria, and making compliance with these mandatory for appointment to a judicial office;

of Ukraine 'On Cleansing the Government' in Line with International Standards for Judiciary, Human Rights and Freedoms, the Constitution of Ukraine, and Current Legislation of Ukraine // [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/77D6430312BF-3285C2257D95002C5F9C](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/77D6430312BF-3285C2257D95002C5F9C).

52 Final Opinion of the Venice Commission No. 788/2014 on the Law on Government Cleansing (Lustration Law) of Ukraine // [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e).

- establishment of a clear procedure for bringing judges to disciplinary responsibility, and introduction of additional disciplinary sanctions against judges;
- formation of the Supreme Court and the Constitutional Court from among recognized experts in the area of the law, including thorough discussions of each candidate;
- formation and operation of the High Council of Justice and the Qualification Commission of Judges on the basis of the European standards;
- taking measures, through transitional provisions to the Constitution, for renewal of judicial ranks⁵³.

The new Parliament's first session also meant rejection of a number of legislative initiatives concerning judicial reform, which were under Parliament's consideration. By law, all draft laws registered and not considered by the previous convocation of Parliament are deemed non-adopted.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The new Parliament's first session and the signing of the Coalition Agreement had a varying impact on the implementation of European institutions' recommendations. Thus, the impact from the withdrawal of draft laws was more negative than positive, as a fair number of registered draft laws aimed at implementation of recommendations of the CoE bodies. In particular, the draft law *On Amendments to Certain Legislative Acts Concerning the Improvement of Measures to Restore Trust in the Judiciary* remained unheard. Among others, the draft provided for necessary minimum changes to the system of disciplinary responsibility of judges, which resulted from the European Court of Human Rights decision in the case of *Oleksandr Volkov versus Ukraine*. At the same time, the signing of the Coalition Agreement had a positive impact, as it reflects the commitment to implement 19 recommendations of the CoE bodies relating to the judicial sector.

Therefore, taken together, these events slightly improved judicial reform Speedometer's indicators (+1 added to the Speedometer).

53 Agreement on Coalition of Deputies' Fractions "European Ukraine" // <http://zakon4.rada.gov.ua/laws/show/n0001001-15>.

2.3.7. Adoption of the Law *On Ensuring the Right to a Fair Trial*

On December 17, 2014, a group of Parliament members registered a draft law *On Amendments to the Law of Ukraine 'On Judiciary and Status of Judges' concerning Improvements in the Principles of Organization and Operation of Judiciary in Accordance with European Standards*⁵⁴. The draft was developed by experts of civic initiative "Reanimation Package of Reforms"⁵⁵ jointly with the Ministry of Justice of Ukraine. Experts tried, as much as possible, to take into account the recommendations of the CoE bodies during the drafting.

On December 26, 2014, the President of Ukraine registered a draft law *On Ensuring the Right to a Fair Trial*⁵⁶. The President's draft law concerned, in particular, the issues relating to judicial selection, re-evaluation, qualification ranks, and the system of disciplinary responsibility of judges.

In substance, the President's draft in content was alternative to the one prepared by Parliament members. Although both drafts implement a significant number of European institutions' recommendations, they had significant differences. The President's draft, in particular, preserved opportunities for political influence over the judges – and even, in violation of the Constitution, expanded such opportunities for the President. To learn more about the key differences between the presidential and the parliamentary drafts, please refer to the comparative table prepared by experts of civic initiative "Reanimation Package of Reforms"⁵⁷. The President's draft's level of incorporation of European standards is significantly lower than in the alternative Parliamentarian's draft.

On January 13, 2015, Parliament approved in the first reading both draft laws concerning judicial reform. Nevertheless, during revisions for the second reading, the President's draft was taken as the baseline that incorporated some of the provisions from Parliament's draft.

54 Draft Law of Ukraine No. 1497 *On Amendments to the Law of Ukraine 'On Judiciary and Status of Judges' concerning Improvements in the Principles of Organization and Operation of Judiciary in Accordance with European Standards* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52976.

55 Reanimation Package of Reforms is an association of experts in different areas that was established to develop urgent reforms. It emerged in early 2014, immediately after the Revolution of Dignity.

56 Draft Law of Ukraine No. 1656 *On Ensuring the Right to a Fair Trial* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53217.

57 Draft Laws Nos. 1656 and 1497: Key Differences // <http://img.pravda.com/files/3/e/3e9b-caa-zakonoproekty.pdf>.

On February 12, 2015, Parliament adopted the Law *On Ensuring the Right to a Fair Trial*, with the effective date of March 28, 2015 for most of its provisions⁵⁸. Parliament's committee in charge of the draft "reviewed" approximately 4 thousand modifications that were suggested in connection with the draft law in the course of a single meeting. In essence, the comparative table for the draft's second reading was developed by the Presidential Administration.

For the most part, the Law took into consideration judiciary-related recommendations of the CoE bodies, except those that would allow limiting the political influence of President and Parliament (more details about the extent to which European recommendations were taken into account are available in a reference document on the implementation of recommendations of the Council of Europe bodies in the Law of Ukraine *On Ensuring the Right to a Fair Trial*)⁵⁹.

The following accomplishments of the Law *On Ensuring the Right to a Fair Trial* can be singled out:

- introduction of competitive selection of judges to all positions;
- increasing the duration of specialized training for future judges to one year;
- introduction of competitive appointments to the High Council of Justice and the High Qualification Commission of Judges;
- providing for direct appeals of high courts' decisions to the Supreme Court and expansion of grounds for such appeals;
- ensuring that a judge's prior activity is taken into account in his/her career, with varying information on such activity stored in a judge's personnel file;
- introduction of system of regular evaluation of judges by various entities, including by trained representatives of civic associations on the basis of monitoring of judicial proceedings;
- enhancement of adversarial nature of disciplinary proceedings and introduction of six disciplinary penalties instead of the current two;

58 Law of Ukraine *On Ensuring the Right to a Fair Trial* // <http://www.pravda.com.ua/news/2015/10/30/7086948>.

59 Center for Policy and Legal Reform. Information on the Implementation of Recommendations of the Council of Europe Bodies in the Law of Ukraine *On Ensuring the Right to a Fair Trial* // http://eu.pravo.org.uk/news/view?news_id=114.

- introduction of a simplified system of judicial self-governance, with the congress of judges appointed from bottom up rather than from the center (i.e., by meetings of judges of relevant courts);
- providing for possibility to conduct video-recording of proceedings without special permission from a court;
- ensuring that all judicial decisions and dissenting opinions of judges are entered into the registry of court decisions.

At the same time, the law contains a number of deficiencies:

- preserving the President's powers that are not envisioned by the Constitution and enable him to influence the courts and judges: i.e., the right to abolish courts, the powers to administer oath to judges, to transfer judges from one court to another (lateral transfers), to sign ID certificates for court presidents and their deputies (even though the President has no role in their selection);
- preserving Parliament's authority to transfer judges, which is not envisioned by the Constitution, as well as Parliament's specialized committee's authority to review in its sessions these cases and the cases relating to confirmation of judges for life tenure;
- lack of certainty in grounds for denying a judge's confirmation for life tenure;
- lack of clarity in grounds for dismissal of judges for oath violations ("undertaking actions that discredit a judge's office or diminish the authority of justice", "lack of integrity in judge's conduct");
- preserving the provisions that make judges dependent on local self-government bodies (e.g., providing housing to judges) and on security services (e.g., additional salary allowance for judges with clearance to access state secret), etc.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations:

The Law *On Ensuring the Right to a Fair Trial* has implemented a significant number of the recommendations of the CoE bodies: 27 recommendations have been fully taken into account, and 21 recommendations – partially. However, the number of implemented recommendations would have been much higher if the draft law developed by Parliament members were adopted.

In general, the registration and adoption of the draft law have radically improved the implementation of recommendations (+31 added to the Speedometer). At the same time, despite the Law going into force

on March 28, 2015, some of its provisions are yet to be implemented. In particular, re-evaluation of judges of the Supreme Court and high specialized courts, which should have been completed six months after the law's effective date, did not even come to start in 2015.

2.3.8. Introduction in Parliament of the Draft Amendments to the Constitution Related to Accession to the Rome Statute

On January 16, 2015, a group of Parliament members introduced in Parliament a draft law *On Amendments to the Constitution of Ukraine Related to Accession to the Rome Statute*⁶⁰. The need to accede to the jurisdiction of the International Criminal Court is envisioned in the EU-Ukraine Association Agreement (Article 8)⁶¹.

At the same time, Parliament, most likely, will not review these amendments, as this issue falls within a comprehensive draft of constitutional amendments in the area of justice initiated by the President (see sec. 2.2.12 of this Report).

It ought to be reminded that in May 2014, draft amendments to the Constitution needed for the ratification of the Rome Statute have already been introduced in Parliament's previous convocation, but they ended up not being considered⁶².

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Registration of the draft law is a step towards accession to the jurisdiction of the International Criminal Court, which is one of the Venice Commission's recommendations (+1 added to the Speedometer).

2.3.9. Introduction of the Draft Amendment to the Constitution regarding Immunity of Parliament Members and Judges

On January 16, 2015, the President introduced a draft law *On Amend-*

60 Draft Law of Ukraine No. 1788 *On Amendments to the Constitution of Ukraine (Concerning Recognition of the Provisions of the Rome Statute)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53621.

61 Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part // http://zakon5.rada.gov.ua/laws/show/984_011, https://www.dropbox.com/s/6etxfsz847y8r3l/Association_agreement_full.pdf.

62 Draft Law of Ukraine No. 4873 *On Amendments to Article 124 of the Constitution of Ukraine (Concerning Recognition of the Provisions of the Rome Statute)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=50903.

*ments to the Constitution of Ukraine Regarding the Immunity of the Parliament Members and Judges*⁶³. On June 16, this draft law received a positive opinion of the Constitutional Court of Ukraine, confirming the compliance of its provisions with Articles 157 and 158 of the Constitution of Ukraine⁶⁴. The draft law's provisions envision elimination of Parliament members' immunity, transfer of authority to lift judges' immunity to the High Council of Justice, and converting the judges' immunity from general to functional, which complies with recommendations of the Venice Commission.

However, seven judges of the Constitutional Court came out with a dissenting opinion, referencing, in particular, the prohibition on amending the Constitution under the state of emergency or martial law. Some judges opined that the conduct of Anti-Terrorist Operation in the East of Ukraine did not allow amending the Constitution, as this operation was, in substance, a military one rather than anti-terrorist.

The consideration of this draft law will likely be suspended until after the adoption of comprehensive draft amendments to the Constitution in the area of justice introduced by the President (see sec. 2.3.12 of this report). It should be noted that, according to the Constitution, Parliament may not amend the same provisions of the Constitution twice during the same parliamentary term.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Registration of the draft law opens up opportunities for implementing the recommendations of CoE bodies regarding narrowing of judges' immunity to a functional one and transfer of authority to lift judges' immunity to the High Council of Justice (+1 added to the Speedometer).

2.3.10. Approval of the Strategy for Reforming the Judiciary, Judicial Proceeding and Related Legal Institutions for 2015-2020

On May 20, 2015, the President approved the Strategy for Reforming

63 Draft Law of Ukraine No. 1776 *On Amendments to the Constitution of Ukraine (Concerning the Immunity of the People's Deputies of Ukraine and Judges)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53602.

64 Opinion of the Constitutional Court of Ukraine in connection with the application by the Verkhovna Rada of Ukraine to provide opinion on the compliance of the draft law *On Amendments to the Constitution of Ukraine (Concerning the Immunity of the People's Deputies of Ukraine and Judges)* with Articles 157 and 158 of the Constitution of Ukraine // <http://www.ccu.gov.ua/doccatalog/document?id=276619>.

the Judiciary, Judicial Proceedings and Related Legal Institutions for 2015-2020⁶⁵. This Strategy and the action plan for its implementation were initiated and developed by the experts of the EU project “Support to Justice Sector Reforms in Ukraine”. Ukraine can receive funds from the European Union to implement this Strategy, but there is no information yet about the allocation of funds.

Generally speaking, measures under the Strategy, following revision at the Presidential Administration, sound too abstract. The action plan is more specific, focusing on the status of judges, judicial proceeding, the bar, prosecution, and enforcement of judgments, but does not envision any radical changes. Perhaps the most visible actions would be the introduction of e-justice (enabling communication on specific cases between courts and users of their services via electronic channels), as well as the creation of non-government judgments enforcement service (the state enforcement service currently hold a monopoly in this area, and therefore operates highly inefficiently).

The President wanted to delegate the responsibility for implementation of this Strategy to the Cabinet of Ministers; however, the government established a mechanism, under which the implementation is to be coordinated by the Judicial Reform Council under the President. At the same time, the Judicial Reform Council has proven itself as a rather inert instrument.

Evaluation of the Impact on Implementation of the CoE Bodies’ Recommendations: Adoption of the Strategy became yet another example of the “public commitment” to implement some of the recommendations of the CoE bodies in the judiciary area. Previously, such promises have already been mentioned in the Coalition Agreement and repeatedly raised in public speeches by the President and other politicians. It should be noted that, compared to the text of the Coalition Agreement, measures envisioned by the Strategy are less specific. In light of this, the adoption of the Strategy did not have any impact on the Speedometer’s judicial reform indicators.

2.3.11. Resumption of the Work of the High Council of Justice

On June 9, 2015, after more than a year’s hiatus, the High Council

65 Decree of the President of Ukraine No. 276/2015 *On the Strategy for Reforming the Judiciary, Judicial Proceedings, and Related Legal Institutions for 2015-2020* // <http://zakon5.rada.gov.ua/laws/show/276/2015>.

of Justice resumed its operations. The mandate of the High Council of Justice was terminated by the Law *On Restoring the Trust in the Judiciary in Ukraine* of April 8, 2014. However, the appointment of new membership to the High Council of Justice was blocked for a long time with the help of court decisions. Particularly, courts have declared six members appointed by legal scholars and attorneys as incompetent. This prevented the High Council of Justice from starting to operate. The new membership of this body began working only after the appointment of its new members was re-launched under the law *On Ensuring the Right to a Fair Trial* in February 2015.

Despite the generally positive impact the resumption of the High Council of Justice's operations had on the implementation of European recommendations, there are doubts as to the capacity of this body to lead the process of quality cleansing of judicial ranks. The majority its members are judges appointed by different entities. Decision to submit recommendations on removal of a judge from office are made by secret ballot. This is the likely reason why the High Council of Justice could not muster enough votes to remove from office several judges who issued judgments against protest participants with numerous procedural violations.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Resumption of work of the High Council of Justice had a positive impact on the implementation of the recommendation regarding the functioning of the High Council of Justice as a permanent body (+0.5 added to the Speedometer).

2.3.12. Preparation and Introduction in Parliament of the Draft Amendments to the Constitution regarding Justice

On March 3, 2015, the President established the Constitutional Commission as an advisory body charged with the development of coordinated approaches regarding amendments to the Constitution⁶⁶. A working group on justice and related legal institutions was established within the Commission.

The Constitutional Commission developed a set of draft amendments

⁶⁶ Decree of the President of Ukraine No. 119/2015 *On the Constitutional Commission* // <http://zakon0.rada.gov.ua/laws/show/119/2015>.

concerning the justice system. It integrates a number of the European standards regarding appointment of judges for life tenure; removal of Parliament from appointment and dismissal of judges; introduction of the Superior Council of the Judiciary (a new body to replace the High Council of Justice) with the majority of members comprised of judges will be elected by their peers; restriction of judges' immunity to a functional one; narrowing of the prosecutor's functions; etc.

At the same time, the abstract wording of the draft's original version failed to conceal the preservation – and even strengthening – of the Presidents' influence over judges. The authority to transfer judges falls entirely within the President's purview; and certain provisions could be interpreted as authorizing the President to appoint court presidents and their deputies. The four-tier court system was also preserved, while personnel-related powers remained divided between the Superior Council of the Judiciary and the High Qualification Commission of Judges.

On June 24, the Venice Commission issued a preliminary opinion on the draft prepared by working group of the Constitutional Commission⁶⁷. It noted the following positive aspects: removal of Parliament from appointment of judges; rejection of a 5-year probationary period for judges; rejection of "oath violation" as a ground for dismissal of a judge; and ensuring that the majority on the Superior Council of the Judiciary would be judges elected by their peers. However, the Commissions also made a number of critical remarks.

During the revisions process, the Constitutional Commission followed the Venice Commission's advice and removed the President's authority to dismiss judges from the draft's text, as well as provided that courts are to be established only by law – but this authority will temporarily rest with the President.

At the same time, the Constitutional Commission used a covert approach to preserve the President's authority to transfer judges (both laterally and vertically), ignoring the Venice Commission's recommendation that any connection between a judge and a political authority is to be terminated after appointment. In addition, the draft's provisions preserved the four-tier court system, even though the Venice

67 Preliminary Opinion of the Venice Commission No. 803/2015 on the proposed constitutional amendments regarding the judiciary of Ukraine // <http://www.venice.coe.int/web-forms/documents/?pdf=CDL-PI%282015%29016-e>.

Commission had called upon the Ukrainian authorities to simplify the court system in numerous opinions. Likewise, the diffuse system of judicial bodies – the Superior Council of the Judiciary, the High Qualification Commission of Judges, and the Council of Judges – was preserved. Previously, the Venice Commission recommended establishing one powerful body.

Moreover, provisions concerning cleansing of judicial ranks were added to the draft. The tenure of those judges who were appointed for 5 years are to be terminated at the end of this term (most of these were appointed under the Yanukovych presidency). Other judges are to be subjected to an evaluation, with negative results serving as the ground for dismissal.

At the same time, an alternative draft law known as the Reanimation Package of Reforms' draft was developed by the civil society community. The Reanimation Package of Reforms proposed establishing a new three-tier court system and opening up a transparent competition for each judicial position. The new court system would have rejected the notion of having four cassation-level courts (the Supreme Court and three high courts). As a result of decentralization and consolidation of territorial communities, as well as due to significant decrease in the number of court cases, the number of judges on bottom-tier courts would have been reduced (there are currently approximately 7000 of them). The draft law also envisioned a phased creation of new courts. In addition, the draft law completely removed political authorities from decision-making in issues relating to the carrier of a judge.

On September 4, 2015, the Constitutional Commission approved its draft law and decided to send it for a new review to the Venice Commission. At the same time, on September 9, proposals by the Reanimation Package of Reforms' draft regarding the mechanisms for re-appointment of judges (i.e., open competitions for all judicial positions) were also sent for review, as an alternative to the mechanism of evaluating all judges.

On October 26, 2015, the Venice Commission issued the final opinion regarding the draft constitutional amendments⁶⁸. The Commission

68 Opinion of the Venice Commission No. 803/2015 on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 // <http://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD%282015%29027-e>.

positively evaluated the integration of its recommendation to remove the President's influence over judicial dismissal and to entitle a group of no less than 45 Parliament to petition the Constitutional Court concerning the constitutionality of issues put forward to an all-Ukrainian referendum. At the same time, the Commission once again criticized the preservation of a four-tier court system and the President's ability to influence the transfer of judges. The Commission also expressed its opinion regarding the possibility of reloading the judiciary by dismissing all judges and opening up a competition for judicial positions. In the Commission's opinion, the dismissal of all judges, save for certain exceptional cases such as "constitutional discontinuity" does not meet the European standards. In the event of reorganization of certain courts, sitting judges of such courts must be entitled to either participate in competition for the new positions or resign. In the Ukrainian experts' opinion, such a wording opens up a path to reappointment of judges through replacement of the existing courts with the new ones and extensive selection of entirely new judges⁶⁹.

On October 30, 2015, the Constitutional Commission approved the final text of draft amendments to the Constitution of Ukraine⁷⁰. Ultimately, the Commission took into account the Venice Commission's recommendation regarding the elimination of political factors from the process of transfer of judges. At the same time, the President will maintain this authority temporarily (for 2 years) for national security reasons, which was deemed acceptable by the Venice Commission given Ukraine's current circumstances. As for the renewal of judicial ranks, the draft envisions conducting a mandatory evaluation of all judges, on the basis of which a judge may be dismissed. In the event of dissolution or reorganization of certain courts, a judge will be able to either resign or apply for competition to a newly established court. The Constitutional Commission also chose to remove itself from offering any clear resolution to the issue of three- versus four-tier court system. This issue may be resolved by law.

On November 10, the National Reforms Council consented to the draft amendments to the Constitution, and on November 25, the Pres-

69 Naidenova V. Judicial Reform at a Low Start: What Is Missing? // http://humanrights.org.ua/material/do_vidboru_novih_suddiv_potribno_zaluchati_aktivistiv_ta_zhurnalistiv.

70 Proposals of the Working Group on Justice of the Constitutional Commission concerning Amendments to the Constitution of Ukraine // <http://constitution.gov.ua/work/item/id/17>.

ident introduced draft amendments to the Constitution of Ukraine (regarding justice) in Parliament⁷¹. The final version of the draft law contains a number of positive changes, in particular:

- removing the Parliament's influence over the appointment and dismissal of judges, as well as creating conditions for preserving the President's authority over judicial appointments only;
- converting judicial immunity to a functional one and authorizing the Superior Council for the Judiciary to lift a judge's immunity;
- providing for the establishment of the Superior Council for the Judiciary, with the majority of members comprised of judges elected by their peers;
- providing that the creation, reorganization and liquidation of courts are to be determined by law;
- laying a legal foundation for renewal of judicial ranks;
- narrowing the authority of prosecutor's office and removing Parliament's authority to express a vote of no confidence in the Prosecutor General.

The drafters of the alternative draft law – experts of the Reanimation Package of Reforms – supported the draft law introduced by the President. At the same time, they emphasized that it is impossible to carry out a judicial reform in line with the society's expectations without adopting a package of implementing laws simultaneously with the constitutional amendments. These laws, in particular, should provide for the following:

- setting strict deadlines for transition to the three-tier court system and reorganization of the top-tier courts;
- launching effective mechanisms for conducting evaluations and competitions for judges, and ensuring the public's participation in these processes;
- establishing a transparent procedure for selection of judges of the Constitutional Court, as well as for competitive selection of candidates for the Prosecutor General's position.

At the same time, experts of the Reanimation Package of Reforms did not agree with two of the provisions found in the presidential draft

71 Draft Law of Ukraine *On Amendments to the Constitution of Ukraine (Regarding Justice)*
// http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209.

– regarding the need to introduce the bar’s monopoly on representation in court in the Constitution (this could be provided for by law, given the right preconditions and the existence of a developed bar), as well as postponing the ratification of the Rome Statute of the International Criminal Court for three years⁷².

Evaluation of the Impact on Implementation of the CoE Bodies’ Recommendations: Constitutional reform of the judiciary is necessary for the implementation of the CoE bodies’ recommendations in the judicial sphere. The President’s introduction of the draft amendments to the Constitution in Parliament has a positive impact on the implementation of 16 recommendations (+3 added to the Speedometer). Further progress in implementation of judicial reform depends, to a large extent, on the adoption of these amendments and their adequate implementation.

2.4. General Evaluation of the Reform Progress

During 2014-2015, meeting the societal expectations in relation to judicial reform proved impossible. In the end, the level of trust in the judiciary decreased even comparing with the Yanukovych era. Barriers to the implementation of judicial reform included the of prior political elites, as well as the courts and judges under their control – coupled with the desire of new authorities to take advantage of a “manual” justice for their own needs. Another impediment was the unwillingness to change on the part of a significant number of judges.

Following the Revolution of Dignity, opportunities were created for self-cleansing of the judicial ranks. To achieve these objectives, the law *On Restoring the Trust in the Judiciary in Ukraine* terminated the mandate of the High Council of Justice and the High Qualification Commission of Judges, terminated the mandates of court presidents and their deputies, created new opportunities for judicial self-governance, and launched the vetting of judges who made decisions in connection with the Maidan participants. However, soon after the law was adopted, it became clear that any hopes for self-cleansing of the judicial ranks would not come to fruition.

The law *On Cleansing the Government* also failed to bring desired

72 Judicial Reform Will Not Be Effective Unless a Package of Laws Is Adopted Together with Amendments to the Constitution // <http://rpr.org.ua/ua/news/2015-12/0/438>.

outcomes, particularly in relation to the judiciary. Among others, the law introduced verification of information regarding the ownership of property (property rights) and correspondence of the value of property (property rights) with that stated in a declaration. However, such inspections are mostly a formality, and thus judges are able to easily pass them.

Since expectations for self-cleansing of the judiciary have not materialized, the expert politician communities started discussing other mechanisms for renewal of judicial ranks, which would enable building public trust in the courts. There were two competing ideas: one involving re-evaluation of judges, and the other providing for reappointment of judges through transitional provisions to the Constitution of Ukraine that would open up a transparent competition for each judicial position. The law *On Ensuring the Right to a Fair Trial* incorporated the idea of re-evaluations, which, however, remains a paper declaration.

Draft amendments to the Constitution concerning the judiciary that were introduced in Parliament by the President provide for the introduction of a mandatory evaluation of all judges, with the results serving as a potential basis for a judge's dismissal. At the same time, the draft leaves open an option for dismissing judges and announcing the competitions in the event of reorganization or liquidation of certain courts. According to the draft, judges of these courts are entitled to either resign or apply for competition to another position. Thus, the draft constitutional amendments opens up a path to renewal of judicial ranks.

General evaluation of the progress in judicial reform implementation is presented on the Judicial Reform Speedometer, which shows the dynamics of the implementation of CoE recommendations. The Speedometer registered an increase of +8 points (out of 100 possible points) in 2014 and +23 points in 2015.⁷³ This increase became possible primarily due to the fact that the law *On Ensuring the Right to a Fair Trial* incorporated many of the recommendations of the CoE bodies. At the same time, after this law's entry into force on March 28, 2015, the Speedometer registered an increase of just +4 points in eight months, which illustrates a certain stagnation in conducting judicial reform. Further progress toward the implementation of recommendations

73 Center for Policy and Legal Reform. Ukraine-EU Speedometer: Constitutional and Judicial Reform // http://eu.pravo.org.ua/uk/Spheres/view?sphere_id=1.

depends on the constitutional amendment process; in the absence of such amendments, implementation of many of the European institutions' recommendations will be impossible.

It must also be pointed out that even complete implementation of CoE recommendations may not lead to desired outcomes in the form of restored public trust in the judiciary. In particular, there is a threat that, even if any influence by political authorities over judges is removed, the courts will still continue operating as a closed corporate system, with their self-governance bodies fully reflecting all of the judiciary's existing problems. That is why, in the experts' opinion, achieving genuine judicial independence must be accompanied with actions aimed at renewal of judicial ranks and appointment to judicial positions of lawyers with impeccable reputation, on the basis of a transparent competition.

Conclusions and Recommendations

Over the last two years, the legislature has created certain prerequisites for reform of the courts. The reform process largely takes into account European standards and recommendations.

Monitoring the implementation of the CoE's recommendations in conducting the judicial reform indicates certain progress – the Reform Speedometer increased from 16 points to 47.4 points (out of 100 possible points) between January 1, 2014 and January 1, 2016.⁷⁴

At the same time, legislative amendments have failed to address the key problem; the judiciary remains dependent on political influences and contaminated by corruption.

As a result, the public is not perceiving any reforms in this sphere. Corrupted in the public's eyes, judges are putting up insane resistance to changes and failed to make use of "soft forms" of self-cleansing offered by the legislature. This has a highly negative effect on the trust in the judiciary, which is considered by many as the principal factor dragging the reforms in Ukraine. At the same time, there is a high societal demand for radical changes and total cleansing of the judicial ranks.

For a full-fledged judicial reform, it is necessary to promulgate

74 Judicial Reform Speedometer // http://eu.pravo.org.ua/en/Spheres/view?sphere_id=1.

amendments to the Constitution that were drafted and introduced in Parliament by the President.

In connection with the establishment of a new court system, it is necessary to ensure complete reappointment of all judges or, at the very least, of judges on the top-tier courts through conducting a competition for each judicial position on new courts. Both sitting judges and other lawyers should be entitled to take part in the competition.

Changes to the law should also provide for strict deadlines for transition to the three-tier court system and reorganization of the top-tier courts, and introduce effective mechanisms for conducting evaluations and competitions for judges, as well as for ensuring the public's participation in these processes.

3. PROSECUTORIAL REFORM

(by: O. Banchuk, I. Dmytriieva)



3.1. Background

Upon entering the Council of Europe on September 26, 1995, Ukraine undertook a commitment to transform its prosecution system into an institution corresponding to the European standards. Nevertheless, Ukraine’s prosecutorial model remained outdated and commitments went unfulfilled for a long time.

Under the 1996 Constitution of Ukraine, the prosecution system had lost two “Soviet-style functions” – supervision over enforcement and application of the law and preliminary investigation. However, prosecution bodies continued performing these functions during the subsequent years, on the basis of transition provisions to the Constitution of Ukraine.

In addition to excessive authority, the Ukrainian procuracy was dependent on political authorities and utilized a closed process for access to the profession, professional promotion, disciplinary responsibility, and removal of prosecutors from office. In practice, the prosecution was often used to exert pressure on political opponents or business rivals.

As a consequence, the level of public trust in the prosecution system is low. According to the data of a survey carried out by the Democratic Initiatives Foundation, the index of trust in justice and legal sector among Ukrainian population was only 2.26 points on a 10-point scale

in 2011 (the lowest among the European countries). By comparison, the same index in Denmark was 7.35 points, in Poland – 4.26, in Russian Federation – 3.84. According to the same study, the level of trust in the prosecution system in Ukraine was 2.1 points (on a 5-point scale) in 2012 (even astrologists enjoyed higher confidence at the time, at 2.4 points)⁷⁵.

New data indicates that the level of distrust in the prosecution system in Ukraine skyrocketed to -67% in 2005, a significant increase compared to -48% in 2010⁷⁶.

There have been some attempts to change the prosecution system in order to improve this situation, but these were not comprehensive. Thus, on July 12, 2001, the “small judicial reform” deprived the procuracy of the authority to independently issue arrest and search warrants, to carry out supervision over the legality of judicial opinions, and to initiate disciplinary proceedings against judges⁷⁷. Beginning in 2003, prosecutors no longer carry out supervision over enforcement proceedings, and starting from July 1, 2007, the investigation of crimes against a person (15 articles of the Criminal Code)⁷⁸ was transferred to the Ministry of Internal Affairs of Ukraine. On April 13, 2012, amendments to the Law *On Procuracy*⁷⁹ significantly limited the prosecutors’ authority in non-criminal area. However, all of these were clearly insufficient to radically change the prosecution system’s work.

Several attempts to conduct a comprehensive prosecutorial reform were made in 2004 and 2009⁸⁰, but the draft laws prepared as part of these initiatives did not advance beyond the first reading.

75 Ukraine Is Last in the Level of Trust in Government Institutions // <http://www.pravda.com.ua/news/2013/02/11/6983262>.

76 Pyrih V. Ukrainians Do Not Trust Any Government Institutions in the Country: Survey // http://zaxid.net/news/showNews.do?ukrayintsi_ne_doviryayut_usim_instytutsiyam_vladi_v_krayini_opituvannya&objectId=1360742.

77 Law of Ukraine *On Amending the Law of Ukraine ‘On Procuracy’* // <http://zakon0.rada.gov.ua/laws/show/2663-14>.

78 Law of Ukraine *On Amending Article 12 of the Criminal Procedural Code of Ukraine* // <http://zakon5.rada.gov.ua/laws/annot/965-16>.

79 Law of Ukraine *On Amending Certain Laws of Ukraine in Connection with the Adoption of the Criminal Procedure Code of Ukraine* // <http://zakon0.rada.gov.ua/laws/show/4652-17/print1447161621411987>.

80 Draft Law *On Procuracy* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?p-f3516=2491&skl=7.

A working group of the Commission on Strengthening Democracy and Establishment of the Rule of Law, which included representatives of the Centre of Policy and Legal Reform (namely, Ihor Koliushko, Mykola Havroniuk, Roman Kuibida, and Oleksandr Banchuk) developed an additional draft law *On Procuracy*⁸¹. In the fall of 2013, it was adopted by Parliament in the first reading and received approval from the Venice Commission and the Directorate General on Human Rights and the Rule of Law of the Council of Europe. Their joint opinion of October 11-12, 2013⁸² stated that in the Draft Law “laid some very firm foundations for a public prosecution service in compliance with European standards and that will meet the needs of a modern criminal justice system... [T]he Draft Law is a good basis for completing the reform of the prosecution service”. But even after this, the specialized Parliamentary committee did not rush with preparing the draft law for the second reading.

According to experts’ expectations, the constitutional reform should result in removing the prosecution from the scope of the human rights protection system. As far as the supervision of law enforcement is concerned, this should be the function of local state administrations rather than prosecution. In essence, the prosecutorial functions should be concentrated in the criminal justice area.

3.2. Significant Events during 2014-2015

3.2.1. Constitutional Restoration of the Procuracy’s General Supervision Authority

The end of the Revolution of Dignity was marked by adoption of the Law of Ukraine *On Restoration of Certain Provisions of the Constitution of Ukraine* by Parliament on February 21, 2014. In essence, this has meant the return to the Constitution’s version as amended by the Law of Ukraine *On Amending the Constitution of Ukraine* of December 8, 2004. As a consequence of this decision, the procuracy’s fifth function – “supervision over the protection of human and citizen rights and

81 Draft Law *On Procuracy* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=48935.

82 Joint Opinion of the Venice Commission No. 735/2013 on the Draft Law on the Public Prosecutor’s Office of Ukraine (October 11–12, 2013) // [http://www.venice.coe.int/web-forms/documents/?pdf=CDL-AD\(2013\)025-e](http://www.venice.coe.int/web-forms/documents/?pdf=CDL-AD(2013)025-e).

freedoms, and over enforcement of the laws on these issues by the executive branch bodies, local self-government bodies, and their officials”.

However, the new Law of Ukraine *On Procuracy* of October 14, 2014 no longer provides for this function, and it is severely restricted during the transitional period – i.e., it is exercised by the prosecution through representation of interests of the state and individuals in court.

At present, there is inconsistency in this area between provisions of the Constitution and the Law *On Procuracy*. But, in practice, prosecutor’s offices ceased exercising their general supervision functions.

Evaluation of the Impact on Implementation of the CoE Bodies’ Recommendations: The return of the general supervision function on constitutional level does not correspond to recommendations of the Parliamentary Assembly of the Council of Europe and the Venice Commission. As a result of this event, the Speedometer’s indicators dropped by 4.7 points (from 27.5 to 22.8).

3.2.2. Adoption of the “August 12th Laws”

In connection with the conduct of an antiterrorist operation (hereinafter – ATO) in Eastern Ukraine, Parliament adopted the Law *On Amending the Criminal Procedural Code of Ukraine in Connection with a Special Regime of Pretrial Investigation under Martial Law, the State of Emergency, and within the Antiterrorist Operation Area*, as well as the Law *On Amending the Law of Ukraine ‘On Counterterrorism’ in Connection with Preventative Detention of Individuals Involved in Terrorism Activity within the Antiterrorist Operation Area in Excess of 72 Hours*.

These laws provided that, in conducting the investigation into a number of crimes within the ATO area, a prosecutor may independently, without a court warrant, decide on issues relating to conducting a house or other property search, carrying out covert investigative actions, as well as detaining a person in custody for a whopping period of up to 30 days. These provisions directly contradict the Constitution. Thus, Articles 30 and 31 of the Constitution state that conducting a house search and violating the privacy of correspondence or telephone communications may only occur on the basis of a motivated court decision.

Under Article 29 of the Constitution, no one can be arrested or

detained in custody without other than on the basis of a motivated court decision. Moreover, the issue on a person's detention or release must be decided on by a court within 72 hours. The "72-hour rule" remains effective even under martial law or the state of emergency.

The abovementioned provisions of the new laws also conflict with Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that everyone who is arrested or detained must be brought promptly before a judge who will decide to extend the detention or release the person. The European Court on Human Rights has interpreted this to mean that neither investigators nor prosecutors may perform a judge's functions in this situation, as well as that there are no possible exceptions to the rule of promptly bringing a detained person before a judge.

Under the "August 12th Laws", law enforcement bodies are given the right to detain a person in custody for 30 days, without any court decision or grounds, subject only to their own discretion. Moreover, these law enforcement powers should be classified as usurpation of judicial function by the prosecution, which is explicitly prohibited by Article 129 of the Constitution; and interpreted as excess of authority by law enforcement officials, which is explicitly criminalized and punishable under Article 365 of the Criminal Code of Ukraine.

It should be emphasized that there is no practical need in such a regime of restricting the human rights; even if there are no adequately functioning courts in the ATO area, there is always an option for law enforcement bodies transport a detainee to a court located in neighboring regions or districts within 72 hours, thus ensuring the adherence to safeguards provided to such a person by the Constitution and the Criminal Procedure Code.

There is also a problem with the definition of the "antiterrorist operation area" concept. As is evident from the "August 12th laws" and their drafters' explanations, these laws are meant to be applied during the ATO period and in the ATO area. However, the current legislation of Ukraine does not contain clearly defined characteristics and boundaries of such an area. The ATO area boundaries are determined exclusively by the Security Service of Ukraine leadership at their own discretion, and can change practically daily. That is, neither citizens nor rank and file law enforcement officers have any information as to the clear boundaries

of the ATO area, which raises numerous of questions and collisions and violates the principle of legal certainty.

Another important aspect is that the provisions of unconstitutional “August 12th laws” are not temporary, but permanent in nature. Thus, they can potentially be applied at the discretion of the Security Service of Ukraine anywhere within Ukraine’s territory, threatening the rights and freedoms of an unlimited number of people, while their implementation can cause significant harm to the rights and interests of citizens. Moreover, no one would apparently be held responsible for causing such harm.

Thus, the “August 12th laws” have, under the guise of providing for additional regulation of the law enforcement’s legal status in the ATO area, transferred the exercise of certain important judicial powers in the area of restricting the human rights into the competence of procuracy, in violation of the Constitution.

Further evidence of the danger of these laws for the protection of human rights and freedoms comes from the fact that, on May 21, 2015, Parliament was forced to adopt a Resolution *On Approving the Statement of the Verkhovna Rada of Ukraine ‘On Ukraine’s Deviation from Certain Commitments Set Forth by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms’*.

According to the Resolution, this deviation has to do with the commitments set forth by Article 2 Section 3 and Articles 9,12,14 and 17 of the International Covenant on Civil and Political Rights, as well as Articles 5, 6, 8 and 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms. These contain such fundamental human rights and freedoms as the right to liberty and personal inviolability, the right to a fair trial, the right to respect for private and family life, the right to effective measure of legal protection, etc.

This deviation will continue until complete cessation of the armed aggression by the Russian Federation, i.e., until all illegal armed units that are led, controlled and financed by the Russian Federation, the Russian occupier troops, and their military equipment are withdrawn from the territory of Ukraine; as well as restoration of Ukraine’s total control over its state borders and restoration of the constitutional law and order on the occupied territory of Ukraine.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The laws in question can lead to blatant, large-scale violations by the prosecution of universally recognized international standards in the area of human rights, particularly those provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as by the Constitution of Ukraine. With the adoption of the “August 12th laws”, the Speedometer’s indicators of prosecutorial reform decreased by 3.2 points (from 26.3 to 23.1).

3.2.3. Renewal of the Work of Military Prosecutors’ Offices, Implementation of the Procedure of Approving the Candidates for the Positions of Military Prosecutors by the President

Active military actions in Eastern Ukraine in response to the armed aggression by the Russian Federation forced the Parliament to adopt the Law *On Amending the Law of Ukraine ‘On Procuracy’ In Connection with The Establishment of Military Prosecutor’s Offices* on August 14, 2014. This Law determined the procedures for establishing, staffing, and equipping the military prosecutor’s offices, as well as for social protection of its employees in the military personnel ranks. It provides that, should the prosecutor’s offices in certain administrative and territorial units become non-functional due to extraordinary circumstance, the Prosecutor General of Ukraine may charge the military prosecutor’s offices to exercise regular prosecutorial functions.

Earlier in 2012, the Venice Commission applauded the elimination of the military prosecution system in Ukraine, finding it necessary to ensure the uniformity of the prosecution system, which would be reflected in coordinated principles of the procuracy’s organization and operation, uniform status of all prosecutors, uniform procedures for providing organizational support to the prosecutors’ activity, exclusive and exceptional funding of the prosecution system from the state budget, etc. In addition, the Commission believed the elimination of separate military prosecution system necessary for simplification of the system⁸³.

On September 22, 2014, the President issued Decree No. 738/2014 *On Amending the List of Leadership Positions of Military Units and*

83 Opinion of the Venice Commission No. 667/2012 on the Draft Law on Public Prosecutor’s Office of Ukraine // [http://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD\(2012\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD(2012)019-e).

Law Enforcement Bodies Whose Appointments Require Consent of the President of Ukraine.

Section 6 of this Decree authorizes the President of Ukraine to provide consent to appointments to the following military prosecutor positions:

- Deputy Prosecutor General – Chief Military Prosecutor;
- Military Prosecutor of the Central Region of Ukraine;
- Military Prosecutor of the South Region of Ukraine;
- Military Prosecutor of the West Region of Ukraine”.

Evaluation of the Impact on Implementation of the CoE Bodies’ Recommendations: Re-establishment of the military prosecutor’s offices contradicts the recommendations of the Venice Commission. Additionally, the consent of the head of state to appointments of regional military prosecutors appears unjustified, as the only stated ground for requiring such consent is the prosecutors’ military rank. Moreover, such consent is not referenced anywhere in Ukraine’s current legislation on prosecution system. Thus, the Decree has unreasonably strengthened the President’s influence over the procuracy and could lead to the abuse of power on his part. As a result of these events, the Speedometer’s indicators dropped by 3.7 points (from 23.1 to 19.4).

3.2.4. Adoption of the New Law *On Procuracy*

The adoption of the *Law On Procuracy* on October 4, 2014, which took into account recommendations of the Council of Europe, became a landmark event.

It stripped the prosecutorial system of quasi-supervisory authority to supervise the protection of human rights and freedoms and the enforcement of the law on these issues by the executive bodies, local self-government bodies, and their officials. Under this Law, the prosecution will no longer have a role in pretrial investigation, while selection and control over prosecutors will be vested with the newly established Council of Prosecutors and Qualification and Disciplinary Commission of Prosecutors.

The main accomplishments of the new Law include:

1) prosecutors gain greater autonomy and independence, and are essentially shielded from illegal instructions and unlawful influence;

2) the area of prosecutors' work is significantly restricted and falls mostly within the confines of criminal justice sphere;

3) stripping the procuracy of the general supervision and pretrial investigation functions helps strengthen the oversight over enforcement of laws in the areas of investigative operations and pretrial investigation.

The Law lays the foundation for increased autonomy and independence of prosecutors, and their protection from illegal instructions. At the same time, prosecutors become more accountable before the society, as private individuals are now entitled to influence the prosecutors by filing complaints with the Qualification and Disciplinary Commission of Prosecutors. At the same time, prosecutors significantly strengthen their self-governance through the Council of Prosecutors, resulting in stronger protection from abuse by higher-ranking prosecutors.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The *Law On Procuracy*, in general, has met with approval from European experts, because it integrates key CoE standards and recommendations. Adoption of the new *Law On Procuracy* is associated with an increase in the Speedometer's prosecutorial reform indicators by 28.3 points (from 19.4 to 47.7).

3.2.5. Removing the Prosecution System's Ability to Defend Its Own Budget

On December 28, 2014, the *Law On Amending the Budget Code of Ukraine to Reform Inter-Budgetary Relations* repealed the amendments that were previously made to the Budget Code by the new *Law On Procuracy*. Those prior amendments were aimed at prohibiting the introduction of financial limitations of budget requests by the prosecution bodies and the courts.

In accordance with the October 14, 2014 amendments to the Budget Code, the prosecution bodies had the ability to defend their budget requests both before the Government and before Parliament.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The repeal of amendments made by the new *Law On Procuracy* to the Budget Code is an inconsistent step since, according to European standards (reflected, e.g., in opinions of the Consultative Council of European Prosecutors – see CCPE(2012)3 sec. 14), the judiciary and the prosecution are to be independent in developing and

defending their budgets. As a consequence of this event, the Speedometer's indicators went down by 4 points (from 49.2 to 45.2).

3.2.6. Postponing the Prosecutorial Reform

On April 21, 2015, Parliament adopted the Law *On Amending the Law of Ukraine 'On Procuracy' to Postpone its Enactment*.

This Law postponed the effective date of the Law *On Procuracy* from April 26 to July 15, 2015. The primary reasons behind this delay have been inability to appoint the Qualification and Disciplinary Commission of Prosecutors, coupled with the fact that the local prosecutor's offices have not yet been established. The enactment of the law on April 26, 2015 could have led to a total collapse of the prosecutorial system in Ukraine, as the old law would no longer be in effect, while the new one would not be operational de facto. In light of this, postponing the enactment of the law until July was a forced but necessary step.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: Postponed enactment of the Law resulted in suspension of the prosecutorial reform process.

3.2.7. Enactment of the Law *On Procuracy*

The Law *On Procuracy* (most of its provisions) entered into force on July 15, 2015.

Prompt and practical implementation of the Law became the main task for the prosecutorial system's leadership. To do so, a number of urgent organizational and logistical measures were put into place.

In particular, the Prosecutor General signed a series of orders that approved the structure of the Prosecutor General's Office and the regional prosecutor's offices. The number of staff in prosecutor's offices was reduced by 3,000 employees. The number of structural units in prosecutor's offices and staffing within its leadership structure were also decreased.

The law required the elimination of a number of positions from the central office's organizational structure, including those of the first deputies of subdivisions, senior departmental prosecutors, senior assistants for special assignments, and senior assistants and assistants to the Prosecutor General and his deputies.

However, the transitional period of prosecutorial reform will last until April 15, 2016, time when the Council of Prosecutors of Ukraine and the Qualification and Disciplinary Commission of Prosecutors are expected to be functioning.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The enactment of the law has become an important moment in the prosecutorial reform, as the law integrates the majority of CoE recommendations in the area of prosecutorial function. As a result of this event, the Speedometer's indicators increased by 2.8 points (from 45.2 to 48).

3.2.8. Holding of Open Competition for the Positions of the Managers of Local Prosecutors' Offices

July 20, 2015 launched the start of the competition for appointments as heads, first deputy heads, and deputy heads of the new local prosecutor's offices. The competition was held according to a procedure governed by Order No. 98 of July 20, 2015⁸⁴, and included four stages:

- testing of the knowledge of the law (professional test);
- testing of general abilities;
- testing of personality characteristics (psychological test);
- interview.

The competition was held in five regional centres, located in Kyiv, Dnipropetrovsk, Lviv, Odesa, and Kharkiv.

In general, over 5 thousand candidates applied, including over 2.6 thousand candidates who advanced to the final stage of competition and took part in interviews with competition commissions.

After the interviews with competition commissions, 930 participants were recommended for appointments as heads, first deputy heads, and deputy heads of the local prosecutor's offices. More than half of them (53%) have never held leadership positions on district prosecutor's offices before, and 73 candidates (8%) have never been employed by the prosecution system previously (external candidates).

84 Procedure for Conducting a Four-Stage Open Competition for Appointments as Heads, First Deputy Heads, and Deputy Heads of Local Prosecutor's Offices (approved by Order of the Prosecutor General's Office of Ukraine) // <http://zakon0.rada.gov.ua/laws/show/z0929-15>.

The competition commissions submitted 465 finalist nominations for heads of local prosecutor's offices (three candidates for each vacancy) for review by the Prosecutor General, including:

- 210 finalists (45%) – prosecutors who have never held leadership positions on regional or city prosecutor's offices before;
- 15 finalists (3%) – external candidates.

However, after appointments of almost all proposed heads of local prosecutor's offices were finalized by the Prosecutor General (a total of 154 persons – this excluded the districts where the competition commission did not recommend any candidates), it turned out that their breakdown was as follows:

- 109 persons (71%) – former heads of district or city prosecutor's offices;
- 20 persons (13%) – former first deputy heads or deputy heads of district or city prosecutor's offices;
- 25 persons (16%) – prosecutors who have never held leadership positions on district or city prosecutor's offices before;
- no external candidates.

Thus, even when he had a choice, the Prosecutor General showed a clear preference for former heads of prosecutor's offices.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: The procedure established for the selection of prosecutors to local prosecutor's offices, on the whole, complies with European standards, in particular, the recommendation that professional advancement of prosecutors should be based on objective criteria, such as competence and experience.

3.2.9. Establishments of Official Salary Ranges for Prosecution System Staff by the Cabinet of Ministers

On September 30, 2015, the Cabinet of Ministers adopted a Resolution No. 763⁸⁵, setting forth the official salary ranges for prosecution system staff (ranging between UAH 1,000 and UAH 3,500).

85 Resolution of the Cabinet of Ministers of Ukraine *On Amending the Resolution of the Cabinet of Ministers of Ukraine No. 505 of May 31, 2012* // <http://zakon5.rada.gov.ua/laws/show/763-2015-%D0%BF>.

Thus, the salary of the first deputy head of the newly created Specialized Anticorruption Prosecutor's Office is set at UAH 3,507-3,545. A major case investigator, employed by the Prosecutor General's Office, receives between UAH 2,172 and UAH 2,327.

These approved salary ranges are significantly below the remuneration amounts established by Article 81 of the Law *On Procuracy*. In this instance, the Government used its authority in connection with the implementation of Article 81 requirements taking into account the available financial resources, as provided by the transitional provisions of the 2015 State Budget Law.

It is clear that the salary ranges established for prosecutorial staff are way too low, which means they will have a negative impact on prosecutorial independence and will create fertile ground for corruption in the activity of the prosecution system.

Evaluation of the Impact on Implementation of the CoE Bodies' Recommendations: One of the CoE recommendations is that remuneration of prosecutors is to be regulated by a law. The resolution in question had a negative impact on the implementation of this recommendation. The official salary ranges envisioned for prosecutors is insufficient to ensure their independence. As a consequence of this mentioned event, the Speedometer's indicators decreased by 4.9 points (from 49.6 to 44.7).

3.2.10. Preparation and Introduction in Parliament of the Draft Amendments to the Constitution Regarding Justice

The Venice Commission has for many years emphasized the need for amending the Constitution. Without these amendments, reform of the judiciary and the prosecution would only be partial and will not fully comply with European standards.

In 2015, the Constitutional Commission prepared draft amendments to the Constitution⁸⁶ regarding justice, which received an overall

86 Draft Amendments to the Constitution of Ukraine in the Area of Justice // <http://constitution.gov.ua/work/item/id/16>.

approval in the Venice Commission's Preliminary Opinion of July 24, 2015⁸⁷ and Opinion of October 26, 2015⁸⁸.

On November 10, 2015, the draft amendments to the Constitution were approved at the National Reforms Council session, and on November 25, the President introduced the draft in Parliament⁸⁹.

The draft amendments to the Constitution envisioned the following key changes with respect to the prosecution:

- eliminating the Constitution's Chapter VII, Procuracy, and placing prosecution within the system of justice;
- retaining the following authorities of the prosecution (per new Article 131-1 of the draft): supporting public prosecution in court; organization and procedural management of pretrial investigation, resolving other issues in criminal procedure as provided by law, and supervision over covert and other investigative and search actions of law enforcement bodies; and representing interests of the State in court, in exceptional cases and a manner stipulated by law.

Supervisory authority that is currently provided for by Article 121, clause 5 of the Constitution, as well as other powers not inherent to the prosecution are removed from the Basic Law. However, according to clause 9 of the Draft's Transitional Provisions, the prosecution will continue to exercise pretrial investigation function as provided for by existing laws, until the start of operation of the bodies to which these functions are to be transferred by law; as well as the supervision function in connection with compliance with the law during the enforcement of judgments in criminal cases and application of other coercive measures involving the restrictions on personal freedom of the citizens, until the effective date of the law providing for the establishment of a dual system of regular penitentiary inspectorates;

87 Preliminary Opinion of the Venice Commission No. 803/2015 on the proposed constitutional amendments regarding the Judiciary of Ukraine // [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e).

88 Opinion of the Venice Commission CDL-AD(2015)027-e on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (23-24 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).

89 Draft Law *On Amendments to the Constitution of Ukraine (Regarding Justice)* // http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209.

- stripping Parliament of the to issue a vote of no confidence in the Prosecutor General, thus initiating his dismissal;
- increasing the Prosecutor General’s tenure from 5 to 6 years, while limiting it to a single term. His early removal from office would be possible “exclusively on the grounds stipulated by law”.

The Venice Commission recommended in its Preliminary Opinion that the Prosecutor General be appointed and removed from office by the President with the consent of supermajority of Parliament members⁹⁰. However, this is the only recommendation that was not taken into account by the Constitutional Commission, which is referenced in clause 22 of the final Opinion⁹¹.

Evaluation of the Impact on Implementation of the CoE Bodies’ Recommendations: The proposed amendments to the Constitution related to prosecutorial reform comply with European standards and recommendations of the Venice Commission, particularly with respect to the authority of the procuracy, the procedure for appointment and removal of the Prosecutor General, and the repeal of the constitutional provision on issuing a vote of no confidence in the Prosecutor General⁹². As a result, the Prosecutorial Reform Speedometer’s indicators increased by 0.3 points (from 44.7 to 45).

3.3. General Evaluation of the Reform Progress

In general, prosecutorial reform in 2014-2015 had both successes and failures. This process transitioned from the stage of laying down the legislative framework (enactment of the Law *On Procuracy*) to the practical implementation of new legislative provisions.

90 Preliminary Opinion of the Venice Commission No. 803/2015 on the proposed amendments to the Constitution of Ukraine regarding the Judiciary // [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e).

91 Opinion of the Venice Commission No. 803/2015 on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 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).

92 In January 2016, following a meeting with representatives of the parliamentary factions, the President introduced a “revised” draft of constitutional amendments regarding justice, which now included the right of Parliament to issue a vote of no confidence in the Prosecutor General. On February 2, 2016, Parliament provisionally approved the draft law, with 244 votes in favor.

By the end of 2015, the number of prosecutors decreased from 18.5 to 15 thousand. It is planned to further reduce this number to 10 thousand by the beginning of 2018.

Importantly, the Law *On Procuracy* laid the foundation for increasing the autonomy and independence of prosecutors, as well as shielding them from illegal instructions by higher-ranked prosecutors. The prosecution was finally able to rid itself of the general supervision functions, and divesting it of powers related to pretrial investigation will follow.

One achievement of the reform is the significant change in the procedure for selection of prosecutorial staff. Conducting multi-tier open competitions for the positions of prosecutors, heads, and deputy heads of local prosecutor's offices should result in quality renewal of prosecutorial personnel, increased effectiveness of prosecution's activity, and decreased corruption – and, as a consequence, in increased public trust.

Yet, along with progress, there are also “weaknesses” in the prosecutorial reform.

First, the restoration of military prosecutor's offices authorized to exercise general prosecutorial functions in certain administrative and territorial units carries a threat of violating human rights and freedoms.

Second, the procedure for selection of the heads of local prosecutor's offices remains flawed: the Prosecutor General has a clear preference for former heads of prosecutor's offices, which impedes the process of quality renewal of prosecutorial personnel. In essence, the competitive selection process for prosecutors and heads of local prosecutor's offices resulted in the reduction of the number of prosecutors, but did not bring about the renewal of personnel. Without the latter, no quality changes are possible – either from anticorruption standpoint or in connection with changing the approaches to prosecutors' work.

Third, the issue on prosecutorial salaries remains unresolved, as it is extremely difficult to attract the professional lawyers to working for the prosecution system without offering them a decent remuneration.

Speaking of the implementation of the new law's provisions that are yet to come into force, one of the drawbacks involves the Prosecutor General's right to disagree with a decision of highest self-governance body – the Council of Prosecutors – without providing justification (Article 71 of the Law *On Procuracy*); this provision weakens the role

of prosecutorial self-governance. It is impossible to predict how this problem could manifest in practice. But it can clearly become a threat to the independence of prosecutorial self-governance bodies.

General evaluation of the prosecutorial reform progress is reflected in the Prosecutorial Reform Speedometer, which shows the dynamics of the implementation of CoE recommendations. The Speedometer registered an increase by 18 points, from 27 to 45 (out of 100 possible points) in 2014, and no changes during 2015.

The rapid increase in 2014 was mostly due to the adoption of the new Law *On Procuracy*.

At the same time, the Speedometer's indicators registered varying changes in 2015. Among the deficiencies, it is worth noting the postponed enactment of the new law due to inability to appoint the Qualification and Disciplinary Commission of Prosecutors in a timely manner, along with failure to establish the local prosecutor's offices. Another factor behind decrease in the indicators was the significant reduction in prosecutors' remuneration, as provided by the resolution of the Cabinet of Ministers. At the same time, a number of events in 2015 had a positive impact on the prosecutorial reform. Primarily, positive expectations are connected with the registration of the draft amendments to the Constitution of Ukraine regarding justice.

Recommendations

Further steps in the prosecutorial reform in Ukraine should include:

- introducing an open competition for the Prosecutor General's position;
- amending the Law *On Procuracy* to require the Prosecutor General to provide justification when disagreeing with a decision of the Council of Prosecutors;
- ensuring the prosecution system's participation in the development of its own budget. The procedure of adopting the state budget in Parliament should envision taking into account the procuracy's opinion over its own budget;
- repealing of laws that, in experts' opinion, are unconstitutional: the Law *On Amending the Criminal Procedural Code of Ukraine*

in Connection with a Special Regime of Pretrial Investigation under Martial Law, the State of Emergency, and within the Antiterrorist Operation Area, and the Law On Amending the Law of Ukraine 'On Counterterrorism' in Connection with Preventative Detention of Individuals Involved in Terrorism Activity within the Antiterrorist Operation Area in Excess of 72 Hours (both dated August 12, 2014);

- complying with requirements of the law with respect to remuneration of prosecutors;
- making the status of military prosecutors identical to that of other prosecutors’;
- adopting the amendments to the Constitution of Ukraine regarding justice (which, along with positive aspects, contain a negative one – preserving the purely political mechanism for appointment and removal of the Prosecutor General).

EXECUTIVE SUMMARY

Two urgent priorities emerged on the agenda relating to the area of *constitutional reform* – decentralization and justice reform – but these, however, cannot be regarded as an all-encompassing and comprehensive constitutional reform. Unfortunately, Parliament has failed to make any final decisions to implement these priorities.

The greatest progress in the area of *judicial reform* can be associated with the adoption of the Law *On Ensuring the Right to a Fair Trial*, which has incorporated a number of European recommendations. Overall, however, the implementation of European standards does not yet guarantee the success of reforms. Much depends on those who will act as the implementers of European standards.

For example, the implementation of European standards for the independence of judges contrasts with the catastrophically low public trust towards judges. Strengthening the independence of judges, who are seen as corrupted by the society, can lead to entrenching the system of informal influences and corruption. It is completely obvious that strengthening of independence must be accompanied with a substantial renewal of judicial ranks. Even the Venice Commission recognized this need and conceded to the possibility of utilizing a number of mechanisms to this end, which would not be acceptable under normal circumstances.

However, conducting a comprehensive judicial reform and implementation of key European standards depend on adoption of amendments to the Constitution, which were only provisionally approved by Parliament on February 2, 2016. The prospects for final adoption remain rather vague.

Concerning the *prosecutorial reform*, the progress made on the legislative level (adoption of the new Law *On Procuracy*) was, unfortunately, negated by the poor implementation of legislative solutions. No meaningful renewal of the prosecutorial personnel took place. Not one, but two Prosecutors General put considerable effort into sabotaging the reform. What is worst is that, contrary to the European recommendations, the draft constitutional amendments, which could have made the Prosecutor General independent of political authorities, provides for a

purely political manner of appointment and removal of the Prosecutor General.

Observation the course of these reforms has enabled the experts of Reforms Speedometer to provide the following *key recommendations*:

as part of the constitutional reform:

- amend the Constitution with respect to decentralization and justice reform in accordance with the procedure provided for by Chapter XIII of the current Constitution;
- initiate constitutional amendments aimed at improving the mixed form of government, with the purpose to achieve the balance between the branches of government;
- create conditions for democratic and legitimate adoption of a new Constitution in the future, notably through a legislatively defined procedure for developing the draft of a new Constitution by a constituent power entity and its ratification by an all-Ukrainian referendum;

as part of the full-fledged judicial reform:

- adopt the draft constitutional amendments introduced in Parliament by the President, and simultaneously adopt the package of implementing laws that will set forth clear mechanisms for the renewal of judicial ranks and the simplification of judicial system;
- through changes to the law, provide for strict deadlines for transition to the three-tier court system and reorganization of the top-tier courts, and introduce effective mechanisms for conducting evaluations and competitions for judges, as well as for ensuring the public's participation in these processes;

as part of the prosecutorial reform:

- introduce an open competition for the Prosecutor General's position;
- require the Prosecutor General to provide justification when disagreeing with a decision of the Council of Prosecutors based on competition results;
- comply with requirements of the law with respect to remuneration of prosecutors;

- make the status of military prosecutors identical to that of other prosecutors’;
- adopt amendments to the Constitution regarding justice, rejecting the purely political mechanism for appointment and removal of the Prosecutor General.