Centre of Policy and Legal Reform

NEWSLETTER

№ 8/2018 (May, 2018)

The monthly information bulletin of the Center of Policy and Legal Reform (CPLR) is dedicated to the analysis of state reforms, in particular in the areas of parliamentarianism and elections, constitutional and judicial reforms, civil service, anticorruption, etc. The goal of the publication is to increase the level of expert awareness among the citizens and to strengthen their capacity to influence the government authorities in order to expedite democratic reforms and to establish good governance in Ukraine.

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CONSTITUTiON

We warn against unconstitutional appointment of the judges of the Constitutional Court

The Verkhovna Rada has delayed the appointment of two judges of the Constitutional Court (CCU) by its quota for six months. First of all, this situation is caused by the defects of the selection procedure of candidates for the position of the Constitutional Court judges by the Verkhovna Rada Committee on Legal Policy and Justice. Thus, in accordance with Committee Decision of November 16, 2017, candidates who submitted their candidacies independently were refused to participate in the selection procedure. Instead, only nominees of parliamentary factions were allowed to participate in the selection.

Within the framework of the selection procedure upon the parliamentary quota, the Verkhovna Rada Committee on Legal Policy and Justice adopted a Decision that 3 candidates, the ones who submitted applications for participation in the selection independently and without consent of parliamentary factions or groups, violated the requirements of the Law. Therefore, the Committee did not allow them to participate in the competition for the positions of judges of the CCU. The CPLR considers this decision of the Committee to be contrary to the Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine".

After the constitutional amendments dated June 2, 2016, there was a radical change in the logic of the formation of the Constitutional Court regarding the appointment and dismissal of judges. It should be reminded that these constitutional changes were carried out with the aim of strengthening the independence of a single body of constitutional jurisdiction. In particular, at the level of the Constitution, there was introduced a competitive selection of candidates for the position of a judge of the Constitutional Court of Ukraine in accordance with the procedure established by law. And of course, the Constitution did not provide for the need to support candidates for the position of a judge of the CCU by parliamentary factions or groups. There is no such requirement in the Law of Ukraine "On the Constitutional Court of Ukraine".

However, Article 2084 of the Law "On the Rules of Procedure of the Verkhovna Rada of Ukraine" actually contains an additional requirement for a candidate for a position of judge of the CCU, not established by the Constitution and the Law "On the Constitutional Court of Ukraine". It is about being nominated by a deputy faction (deputy group) or a group of non-factional people's deputies. According to experts of the Center, such provisions of the Rules of Procedure of the Verkhovna Rada contradict part three of Article 22, part two of Article 24, Article 38, part three and part four of Article 148 of the Constitution of Ukraine, and therefore are unconstitutional.

In addition to undesirable politicization of the formation of the CCU, the appointment of judges of the Constitutional Court in an unconstitutional way may undermine the legitimacy of constitutional justice and cast doubt on further decisions of the Constitutional Court.

Julia Kyrychenko: "Politicization of the process of selection of the CCU judges in the Parliament is a movement in the opposite direction from the objective of the constitutional reform declared by this Parliament in the summer of 2016: strengthening the independence of the Constitutional Court".

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EFFECTIVE GOVERNMENT

Resubordination of the SFS and the State Reserve Agency would contradict the public administration reform

The Government prepared a decision on the direct subordination and coordination of the activities of the State Fiscal Service (SFS) and the State Reserve Agency (State Reserve). Currently, the SFS activities are directed and coordinated through the Minister of Finance, and the State Reserve activities – through the Minister of Economic Development and Trade.

According to the CPLR experts, such a decision contradicts the public administration reform. The current practice of directing and coordinating the activities of central executive bodies (CEB) by the Government proves its ineffectiveness. Therefore, the Public Administration Reform Strategy suggested to gradually abandon this practice. The activities of CEB should be directed and coordinated through the relevant ministers. Ministries should formulate state policies, while services, agencies and inspections are responsible for implementing it.

SFS is a central executive body that implements tax and customs policies. Therefore, it is logical that its activities are directed and coordinated by the Minister of Finance, who is responsible for developing state policy in this area.

Such a decision of the Government regarding the SFS may negatively affect the activities of the Ministry of Finance. Withdrawal of the SFS from the scope of its management will mean that the policy developed by the Ministry on relevant issued will not be implemented by any agency.

A similar situation with the State Reserve, which implements the policy on the state reserve. The only difference is that for the Ministry of Economic Development, implementation of the policy in this area is less important than for the Ministry of Finance – in the area of taxation and customs.

The Government is a collegiate body. Fulfillment of its functions in directing and coordinating the activities of CEB is complicated by the busy schedule of the Prime Minister.

There are no substantiated reasons for the withdrawal of the SFS and the State Reserve from the direction and coordination of the relevant ministers except for purely subjective ones.

Civil service: competitive selection and professional training are both equally important

The Government has introduced amendments to the competition Procedure for civil service positions and approved an Action Plan for the implementation of the Concept for reforming the system of professional training of civil servants.

The CPLR positively evaluates changes to the Competition Procedure, which stipulate clarification of the following: the competitive procedure for the positions of reforms exerts of the categories “B” and “C”; testing of foreign language proficiency for candidates to positions of category “A”; testing of the knowledge of special legislation, the availability of analytical skills and abilities to process information. Improved competitive selection will help to accept the most qualified applicants for the civil service, who will work according to European standards, as well as to increase the level of public confidence in the Government authorities in Ukraine.

The Action Plan for the implementation of the Concept will enable to create a modern system of professional training for civil servants. But this will only happen in case of its accurate implementation, instead of keeping in the drawer together with many similar documents.

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No 8/2018 (May, 2018)

FRIENDLY ADMINISTRATION

Preliminary conclusions of the work on the draft law on the administrative procedure were drawn

On May 10, a press conference "Why do we need the Law on Administrative Procedure?" was held. At the event, the CPLR experts together with European experts and the Deputy Minister of Justice of Ukraine S. Hlushchenko, presented the first results of the revision of the draft law on the administrative procedure.

The law on the administrative procedure has a 20-year history in Ukraine. In January 2018, the Ministry of Justice established a renewed working group to finalize the draft law. It is critically important for Ukraine, because different ministries, services and local government authorities take decisions according to different rules of procedure. At the same time, most part of standards of a fair administrative procedure are not reflected in Ukrainian legislation at all.

The main provisions of the draft law on the administrative procedure in the version of 2014-2015 remain approved in the text, which is currently being finalized by the working group of the Ministry. This very version of the draft law 3 years ago received a positive conclusion of the experts of the EU Program SIGMA.

Today, we managed to keep the following key provisions of the draft law unchanged in the wording: a person has the right to be heard before a negative administrative act is drawn in relation to him/her; introduction of a category "interested persons" (persons affected by the administrative act); the administrative bodies are obliged to justify their own decisions and explain how to appeal against them; an administrative act comes into force only after the person concerned is informed about its approval, etc.

A number of provisions of the draft law were updated in accordance with modern conditions, in particular the development of information technologies.

Ihor Koliushko, Head of the Board of the CPLR and a member of the working group of the Ministry of Justice, explained why the adoption of this draft law is so difficult for Ukraine and why it should be adopted as soon as possible.

Ihor Koliushko: "Officials of the USSR times were guided by instructions that were inaccessible to citizens. Today, many laws were adopted instead of them. Each sector has its own laws, and most officials have prepared them for themselves. But when a simple citizen wants to use some provision, he/she again does not know where and how to look for an answer. There should be one law regulating the basic provisions of the procedure in all cases where a citizen has to settle something with the government and local self-government authorities, accordingly, this law must be studied and promoted at all levels".

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FAIR TRIAL

Parliament started considering the draft law on the Anticorruption Court

On May 23, the Parliament began to consider the draft law on the Anticorruption Court in the second reading. Before this, Andriy Parubiy, the Chairman of the Verkhovna Rada stated that the provisions of the draft law were agreed with the IMF and the Venice Commission, and discussions continue only with respect to the powers of the Public Council of International Experts.

The draft law initiated by the President at the request of international partners of Ukraine and a number of Ukrainian public associations, provided for the participation of representatives of international organizations in the selection of judges of the anticorruption court. However, such participation is nominal.

Roman Kuybida, the CPLR Expert: "Isolated from the selection, the Public Council of International Experts can be used to "cover" the results of the competition, which will ultimately be affected by politicians and oligarchs. It will be done through the existing members of the HQCJ, who, in fact, will determine the winners of the competition. Not surprisingly, if most of the positions in this court will be held by loyal judges, party lawyers, lawyers of the oligarchic business".

Internationalists need to be involved in the selection of the best, and not just deselection of the worst. Therefore, it is necessary to create a separate competitive commission or panel within the HQCJ with the participation of international experts for the selection of anticorruption judges. At the same time, the participation of the Public Council of Integrity, which will be able to ensure the withdrawal of candidates on the criterion of integrity, should be kept.

For other negative scenarios and how to prevent them, see the column of R. Kuybida "Who will have an influence on the anticorruption court?", as well as analytical reports of the CPLR. The final vote is scheduled for June. Adoption of the law will determine whether Ukraine will receive macro-financial assistance.

Higher Qualification Commission of Judges continues to evaluate judges without public participation

At the end of May, the Commission completed interviews with 699 judges. Only 23 of them were recognized as not having confirmed their ability to administer justice after interviewing. This means that the Commission had claims to integrity or professional ethics of only 3 % of judges assessed.

According to the law, the Public Council of Integrity (PCI) should be involved in the process of evaluating the judges. However, in March 2017 it stopped its participation in the process of qualifying judges. One of the reasons is that the evaluation process is non-transparent, hold in the conveyor mode, and the qualification commission, by changing its Rules of Procedure, excluded the effective participation of the PCI. At present, changes to the Rules of Procedure have been appealed to the Supreme Court.

The problem is also that the HQCJ takes a decision on whether to leave a judge on a position or not based on the scores that are given in a closed mode and are not motivated in any way. In other words, judges do not know what kind of behavior is evaluated negatively and for what they can be dismissed from office.

What was the impact of Russian aggression on the judicial system in the east of Ukraine?

On May 25, the authors presented the results of an unprecedented study entitled "Justice in the East of Ukraine in conditions of armed aggression of the Russian Federation".

The study was initiated and supported by the International Renaissance Foundation, it was conducted during the period 2016-2017 by a group of experts and non-governmental organizations using different methods of information collection and verification. The CPLR was one of the participants in the research group. Three experts of the CPLR became part of the author's team.

As a result, four key issues were identified and described in detail in the relevant sections:

- weak institutional capacity of judicial authorities in the East of Ukraine;
- legislative regulation of the judicial system largely does not correspond to the conditions of armed aggression;
- complicated access to justice;
- prevalence of impunity for crimes committed in conditions of armed aggression.

Full text of the study in Ukrainian can be downloaded here. A shortened version in English can be downloaded here.

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HONEST LAW ENFORCEMENT AUTHORITIES

Draft law on the improvement of the State Investigation Bureau activities approved in the first reading

On May 17, the draft law on the improvement of the activities of the State Investigation Bureau No. 5395-d was approved in the first reading. It will allow faster launch of the Bureau work and solve a number of problems related to its authority.

Basic innovations of the Draft Law 5395-d are as follows: introduction of a detective position, which will allow to announce competitions for positions in all operational units; providing to SBI's subdivisions powers related to operative investigation activities (surveillance, wiretapping, etc.); transfer from the external to the internal competition commission of the authority to select employees of the central office of the Bureau.

At the same time, the Draft Law proposes to transfer territorial offices from Mykolaiv to Odessa and from Poltava to Kharkiv, which will create a corruption risk and may jeopardize the objective consideration of cases in the courts.

In addition, the draft provides for an increase of the requirements for candidates for the positions of a director of the territorial office of the Bureau (10 years of work experience) and a head of the unit in the central office (7 years of work experience). Such requirements will not allow the involvement of young law practitioners in the agency and will provide privileges to the "old" personnel of the current law enforcement agencies.

Parliament is eliminating defects as to the conduct of expert examinations stipulated by the CPC

On March 15, 2018, amendments to the Criminal Procedure Code (CPC) entered into force, which led to a paralysis of the criminal justice system. However, within a week, the Parliament passed the Law, which corrected the problem of examining by the courts of petitions submitted by investigators and prosecutors at the actual location of investigation bodies. This allowed reducing the burden on local courts in the regional centers and the city of Kyiv, as well as on the investigating authorities and the prosecutor's office.

And on May 16, the draft Law on the grounds for conducting the examination was approved in the first reading. The draft proposes to deprive courts of the exclusive authority regarding the appointment of examinations in criminal proceedings.

So far, the defense side is deprived of its competitive right to engage experts independently. And the prosecution side, as well as thousands of victims, have to wait for the permission of the court to conduct the necessary examination, in particular to determine the causes of death.

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ANTIcorruption

Anti-corruption Strategy for 2018–2020: playing ping pong

At the end of September 2017, the NACP approved the draft Law "On the Anticorruption Strategy for 2018-2020" – without any public discussion or expert communications. The expert environment learned about the existence of a working group on the development of this document only during its presentation.

Experts and representatives of the Government have repeatedly expressed the position of inadmissibility of the adoption of the Anticorruption Strategy in this version. In total, the draft law "stayed" for more than half a year in the Government, while the Government did nothing to improve it, and the requests of the expert and public environment on the creation of a working group and the revision of the document were ignored.

On April 25, the Cabinet of Ministers approved the document in its original version, and the next day it was submitted to the Parliament. On May 22, the Parliament returned the draft to the Government for further elaboration. Probably, then it will be sent to the NACP. Under such circumstances, one can not hope that in 2018 at least some Anticorruption Strategy will operate.

Turn the legal issue into a political one – and you will have a farce

On February 12, 2015, a Law was passed that provides for annual independent audit of the effectiveness of the NABU's activities. In addition, the document states that the conclusion of three auditors about the ineffectiveness of the NABU's activities and inadequate performance by its Director of his/her duties may serve as grounds for his/her dismissal from office.

During 2015-2018, the audit of the NABU's activities was never carried out and could not be carried out due to the fact that only the Government used its quota and appointed an auditor; the Parliament and the President do not appoint auditors. In May 2018, the fourth – and again unsuccessful – attempt took place with an auditor appointment in the Verkhovna Rada.

Instead of conducting honest professional evaluation each year and helping to ensure the operational and institutional independence of the law enforcement agency that is being formed, the Parliament and the President keep playing pseudo-politics for three years.

Corruption in Ukrainian football

On May 22, a mass raid took place to follow the organizers of contractual football matches: 40 searches were conducted simultaneously in 10 oblasts of Ukraine, and the referee Oleksandr Solovyan was arrested.

The National Police collected evidence base on the activities of 5 organized groups, which included presidents of football clubs, former and current players, referees, coaches – at least 35 out of 52 clubs. A total of 320 participants were documented in 57 episodes of crimes provided for in part 4 of Art. 368-3 (bribery of a person providing public services) and part 1 of Art. 369-3 (illegal influence on the results of official sports competitions) of the Criminal Code of Ukraine.

It is mainly about football clubs that do not represent the Premier League of Ukraine. Information about money "earned" by criminals (several million dollars a year) makes it clear that this is just the "top" of football corruption iceberg.

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