Tyt ANDREIEV

**JUDICIAL REFORMS IN UKRAINE:**

**ACHIEVEMENTS AND CHALLENGES**

*International Conference “Crisis over the judiciary in Poland and Ukraine”*

*(Online)*

*23 February 2024, at 15:00 (Polish time), at 16:00 (Ukrainian time)*

The Revolution of Dignity, also known as the Euromaidan events, have profoundly changed the political and social landscape of Ukraine and once again raised the issue that has been on the agenda since gaining the independence – the reform of the judiciary. The events before and during the Revolution of Dignity clearly demonstrated that the strategies and tactics chosen since independence to develop the national justice system are not capable of ensuring Ukraine’s progress as a democratic rule of law state, which ensures effective protection of fundamental rights and a favourable legal environment for doing business.

The key problems of the judiciary in 2014 include the following:

1) Imperfect institutional structure of the judicial system, which at that time included 4 levels of courts of general jurisdiction with a special role of the Supreme Court of Ukraine;

2) Lack of independence of the judiciary from other branches of power, primarily the executive, as well as other socio-political actors, and lack of proper respect for the judiciary in society;

3) Post-Soviet legal reasoning and thinking, including judicial thinking and worldview, which consisted in the self-perception among significant number of judges as “expressors” (representatives) of the will of the state, rather than independent arbitrators called upon to resolve conflicts fairly and independently, including rendering decisions not in favour of the government or other influential social actors. It is also important to pay attention to the post-Soviet method of legal thinking, which consisted of excessive formalism, legalistic consideration of legal issues and the argumentation techniques of court decisions, their unreasonableness and unconvincing nature for the parties involved, especially in complex cases, as the result of the excessive reliance on the purely positivistic concept of law. In addition, the absence of an effective system for bringing unfair judges to justice and liability, as well as the existence of a complicated mechanism for their criminal prosecution in cases of offences, led in some cases to a sense of “exclusivity” and impunity among some judges.

4) Lack of developed political and legal culture and respect for the rule of law among public authorities, identification of law with parliamentary acts and executive regulations, and thus a lack of understanding of general legal principles and values, and, as a result, often inability and unwillingness to apply them in practice;

5) Excessive duration of court proceedings;

6) Excessive workload of judges and administrative staff of courts;

7) Insufficient financial support for judges and court staff, as well as insufficient material support for the conduct of court proceedings;

8) Inadequate level and quality of enforcement of court decisions;

9) Shortcomings in the system of selection and appointment of judges, ineffective system of bringing judges to justice for violations of judicial ethics and committed offences, including corruption;

10) Low public trust in the judiciary and court decisions.

In order to address these problems, the Government of Ukraine and civil society organisations began to develop various models of judicial reform, which included both amendments to the Constitution of Ukraine and current legislation, and the implementation of practical policies to increase the independence and professionalism of the judiciary, to “cleanse” it of unfair and unprofessional individuals and to increase the trust of society and international partners. Thus, the key changes were as follows:

1) Depoliticisation of the bodies that appoint and dismiss judges, in particular, removal of the Parliament from this process, reform of the High Council of Justice, High Qualification Commission of Judges; involvement of civil society representatives (e.g., creation of the Public Integrity Council), as well as international experts to assess the moral and professional qualities of candidates for judicial positions.

2) Changing the “rules of the game”, i.e. introducing at the level of legislation and announcing open and transparent selection procedures for the position of a judge, expanding the range of potential applicants (candidates), in particular, allowing lawyers and representatives of the academic community to participate in the selection process for judge positions, which could significantly improve the quality and reasonableness of court decisions, especially of the higher courts.

3) In order to diminish corruption, mandatory electronic declaration of judges’ income and expenses has been introduced, i.e. submission of asset declarations, and the declarations of integrity and declarations of family ties for Supreme Court judges;

4) “Reboot” of the Supreme Court of Ukraine via creating a new institution – the Supreme Court, which led to the simultaneous existence of two supreme courts in Ukraine for several years, former of which continued existed *de jure*, but did not administer justice *de facto*;

5) Transformation of the four-tier court system into a three-tier system;

6) Adoption of legislation on the functioning of higher specialised courts, in particular the High Anti-Corruption Court;

7) Changes to the procedure for appointing judges and cancellation of the 5-year term of their appointment for the first time;

8) Establishing a clear list of grounds for dismissal of judges, first of all, excluding such a vague ground as “breach of oath”, which had been lacking definition in Ukrainian legislation and had been repeatedly used by the Parliament to dismiss “politically inconvenient” judges;

9) Increasing financial support for judges;

10) Introduction of certain elements of electronic mechanisms in administering justice.

Both national and international methodologies can be used to assess judicial reforms [3]. Among them is the assessment of the administration of criminal and civil justice within the framework of the WJP Rule of Law Index. Formal national methods of assessing the effectiveness of judicial reform include general and special indicators. Thus, among the general ones, it is important to pay attention to the level of trust and assessment of the judiciary by citizens and legal professionals, including the study of specific issues, such as the perception of corruption, the level of professionalism, the quality and validity of court decisions, *etc*. Among the formal and narrowly focused methods of assessing individual components of the judicial reform are generalisation of statistical data on the duration of court proceedings in different subject jurisdictions, the level and timing of enforcement of court decisions, *etc*. In the context of strengthening European integration processes, it is also important to pay attention to reports and recommendations made by different bodies of the Council of Europe and the European Union, their assessments of the functioning of the national judicial system and the results of joint meetings, including the meeting of the Subcommittee on Freedom, Security and Justice of the EU – Ukraine Association Committee, which discusses important issues and challenges in the administration of national justice.

As of today, the judicial reform is not yet complete, both at the level of legislative regulation of justice reform and at the level of implementation of relevant measures, policies and selection procedures. Accordingly, any assessment of the reform will be interim, except for the assessment that the reform itself has been quite long without any significant results, although some achievements can be highlighted.

The achievements of the judicial reform include the following:

1) Renewal of the composition and resumption of the work of the High Council of Justice and the High Qualification Commission of Judges of Ukraine, and thus resumption of the processes of selection and recruitment of judges and consideration of proceedings against them [8];

2) Expanding the use of electronic mechanisms in administration of justice, further digitalisation of the judiciary;

3) Establishment of the Supreme Court and generally successful selection of judges to it allowed to start forming a new judicial practice with new standards of preparation and reasoning of court decisions, as well as consideration of cases as a whole [4].

At the same time, other problems have not only not been resolved, but some of them have worsened, and completely new ones have emerged that threaten the administration of justice. In particular, these problems and challenges include the following:

1) Underfunding of the judiciary, in particular the apparatus of judicial bodies, and, as a result, a decrease in the number of court clerks and other personnel and an increase of their workload;

2) Reduction in the number of judges administering justice. According to the Head of the High Council of Justice Hryhorii Usyk, in 2023, more than two thousand positions of judges were vacant, 3 courts had no judges administering justice, and 12 courts had only one judge [7]. In other courts, there are problems with the formation of panels in cases provided for by law and the replacement of judges in case of their recusal. All of this leads to an excessive workload for judges who continue to administer justice, as well as to an increase in the time taken to consider cases;

3) Weak independence of the judiciary and lack of respect for it from the state authorities and society, undue influence on the administration of justice and the pressure on judges. In the context of martial law, this is particularly true in cases related to the criminal prosecution of persons suspected or accused of committing crimes against the national security;

4) The low level of professionalism and dishonest acts of some judges, e.g., committing offences, including corruption, violation of judicial ethics and rendering unjust decisions;

5) The post-Soviet way of judicial thinking continues to exist among a large part of the judges, such as the lack of understanding of the role of the judiciary and individual judges in a free democratic society, the lack of claims to such status and the specific, old-fashioned legalistic argumentation techniques of court decisions;

6) The persistence of generally low trust in the judiciary and judicial decisions.

There are several reasons which could be used for explanation of judicial reform shortcomings and undressed issues. Among the most important ones are the desire of political branches of power to reform the judiciary’s “façade” (only formally) without its substantive renewal, in order to preserve some degree of control over justice administration in politically and economically sensitive cases.

Furthermore, there appears to be a widespread lack of appreciation for the importance of an independent and competent judiciary for the economic and political well-being of the nation, both on the part of society and its elite, which leads to insufficient prioritization of judicial reform efforts. Although it worths to acknowledge the active work of non-governmental organisations in advocating proper and effective national judicial reform. However, the challenges are not diminishing, they are only growing. Ukraine has to anticipate the period of transitional justice and thus develop relevant strategies and tactics with justice system playing pivotal role, deepening the European and Euro-Atlantic integration also requires independent and professional judiciary which effectively resolves conflicts and protect fundamental rights, and thus could be trusted both by national and international actors.

REFERENCES

1. European Commission. Report on Ukraine 2023. URL: <https://neighbourhood-enlargement.ec.europa.eu/document/download/bb61ea6d-dda6-4117-9347-a7191ecefc3f_en?filename=SWD_2023_699%20Ukraine%20report.pdf> (accessed: 14.02.2024).
2. Ukraine and the EU discussed cooperation in the field of freedom, security and justice. 2023. Official website of the *Ministry of Justice of Ukraine*. [In Ukrainian]. URL: <https://minjust.gov.ua/news/ministry/ukraina-ta-es-obgovorili-spivrobitnitstvo-u-sferi-svobodi-bezpeki-ta-yustitsii> (accessed: 14.02.2024).
3. R. Smaliuk. How is justice measured? Published on 12.01.2022. Official website of the *Centre of Policy and Legal Reform*. [In Ukrainian]. URL: <https://pravo.org.ua/blogs/yak-vymiryuyut-pravosuddya/> (accessed: 14.02.2024).
4. Formation of the New Supreme Court: Key Lessons. 2018. *Centre of Policy and Legal Reform*, *DEJURE Foundation*. [In Ukrainian]. URL: <https://pravo.org.ua/wp-content/uploads/2020/10/1518518656formuvannya-novogo-vs_klyuchovi-uroki.pdf> (accessed: 14.02.2024).
5. Kolotylo M. Persistent problems with bringing judges to disciplinary liability. 2021. *DEJURE Foundation*. [In Ukrainian]. URL: <https://new.dejure.foundation/constant-problems-with-disciplinary-proceedings/> (accessed: 14.02.2024).
6. Report on the results of the study “Citizens’ Attitudes towards the Judiciary”. 2020. *Razumkov Centre*. [In Ukrainian]. URL: <https://rm.coe.int/zvitsud2020/1680a0c2d7> (accessed: 14.02.2024).
7. The number of vacant judicial positions is increasing day to day – HCJ Head. 2023. *Ukrinform*. [In Ukrainian]. URL: <https://www.ukrinform.ua/rubric-society/3683830-kilkist-vakantnih-posad-suddiv-sodna-zbilsuetsa-golova-vrp.html> (accessed: 14.02.2024).
8. Kunytskyi O. The High Qualification Commission of Judges of Ukraine resumed its work. Published on November 13, 2023. *DW (Deutsche Welle).* [In Ukrainian]. URL: <https://www.dw.com/uk/visa-kvalifikacijna-komisia-suddiv-ukraini-vidnovila-robotu/a-67383707> (accessed: 14.02.2024).