Essays

Advancing the Rule of Law: Creating an Independent and Competent Judiciary

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Abstract

An independent and competent judiciary is an essential element in rule of law systems. The rule of law continues to be tested, even in countries where the principle has been firmly entrenched as in the United States. The judicial reform movement in Ukraine offers a case study in the creation of such a system. The government and civil society recognize the necessity of developing a rule of law culture as a precursor to economic development. The judicial reform movement has resulted in new laws that include revisions to the qualifications and evaluation process for judicial appointments. Recent Constitutional amendments have given foundational authority for a wide-ranging assessment process requiring judges to meet standards of competency, professionalism and integrity. The core belief is that any approach to improve the quality of the judiciary needs to be ambitious enough to create public trust and confidence in the courts. This article analyzes the current status of reform in Ukraine, its shortcomings, and suggests how the judicial reform process may be improved. It is a case study relevant to countries transitioning from former autocratic regimes to rule of law systems.

'Power corrupts and
absolute power corrupts
absolutely'.[1]

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[1] The phrase 'Absolute power corrupts absolutely' is traced to the 1887 Lord Acton's writing of 1887. See https://tinyurl.com/ycqbyjke (last visited 30 June 2021).

I. Introduction

Contemporary Western society places high value upon two ideals: individual liberty and rule of law.[2] Another tenet of democratic societies is the principle of separation of powers, in order to provide checks and balances against the arbitrary use of power by a single person or group. The judiciary's role is to prevent the capricious use of power by other branches of government and act as the protector of individual rights.

It is generally conceded that a system of democracy coupled with a market economy is the most efficient creator of economic growth. The two are intimately connected as proved by the relative wealth of Western democracies. One of the key characteristics of the democratic, market economy is the free and fair election of government officials. This article will argue that popular election of officials is not sufficient to create a fair and just society. As important as the right to vote, is a system that distributes power so that no institution of government becomes all-powerful, where no two branches of government may collude to consolidate power. The most important protector of personal rights and safeguard against government corruption is a fair, independent, and competent judiciary.[3] This article focuses on all three of these elements of an effective judiciary.

As a case study on the attempt to create Western-style judiciaries in countries formerly under autocratic rule, this article focuses on the judicial reform movement in Ukraine as it struggles to create an independent judiciary. Ukraine's economic stagnation is linked to its failure to obtain sufficient funding from the EU and foreign investors due to widespread governmental corruption.[4] It has achieved the status of a democratic, free market system but, this is not enough for the rule of law requires a separation of powers guarded by an independent and competent judiciary, and a mostly corruption-free government.

Ukraine is an ideal case study for a number of reasons. It is a country evolving out of years of authoritarianism and the yoke of corruption. The transition to democracy has been successful given that different Presidents have been elected in the last two elections.[5] The problem with corruption is seen as a major societal issue. In response, a host of judicial reform laws have been enacted. Despite their shortcomings, Ukraine's path to create an independent judiciary and rule of law system should not be viewed as a hopeless quest. Hope can be seen in the creation

[2] K. Wangmo, 'Rule of Law – A Comparative Analysis of the Rule of Law in Australia and Bhutan' *JSW Law Research* Paper no 18-6, 24 October 2018, available at https://tinyurl.com/y6dqa2sf (last visited 30 June 2021, rule of law and liberty are closely related).

[3] I. Kaufman, 'The Essence of Judicial Independence' 80(4) *Columbia Law Review*, 671, 671-701 (1980) (meaning of judicial independence); S. Burbank, 'What Do We Mean By 'Judicial Independence?' 64 *Ohio State Law Journal*, 323, 323-330 (2003).

[4] European Court of Auditors, 'Special Report EU Assistance to Ukraine', available at tinyurl.com/72ot531j (last visited 30 June 2021).

[5] On 25 May 2014, Petro Poroshenko won the Presidential elections and on 21 April 2019, Volodymyr Zelensky was elected as his successor.

of civil society groups and the existence of political will to follow through on judicial reform.

An independent and competent judiciary is pivotal in order for the courts to enforce anti-corruption laws. There has been substantial progress in reforming the law related to the selection and competence of judges at all levels of the court system, as Ukrainian reform laws have followed international standards.[6] Unfortunately, the lack of an overall framework of reform and the haste in the implementation of the reforms has produced numerous legal problems and false starts.

Despite good intentions, the article will show that the initial attempts at judicial reform, 2015 to 2020, have been only partially successful. Their failures were due to hastily drafted reform laws, whose implementation was problematic since the laws were insufficiently comprehensive. The article poses that reformers in Ukraine need to adopt an evolutionary or progressive approach to the improvement of its judiciary and reject the more radical approach of the mass replacement of all judges attempted in the initial reform laws.[7] There is evidence that Ukraine will persist in reforming its judiciary. At the end of 2019 and in early 2020, the new government has recognized the weaknesses of the initial judicial reform effort by beginning to amend its reform laws in order to fill in gaps and create a more general framework for reform. This trial and error process is inherent in an evolutionary or progressive approach.

This article will look at the initial steps in the implementation of judicial reforms in Ukraine including creation of two self-governing judicial bodies, implementation of a new judicial appointment process, and appointment of a new Supreme Court. It will look at the shortcomings of the appointment process including constitutional law issues. It will review the most recent reform of creating and appointing the High Anti-Corruption Court. Part two examines the definitional issues relating to the meaning of the rule of law and its numerous elements. Part three examines the obstacles faced by countries transitioning from autocratic or corrupt legal regimes to rule of law systems. An analysis will be undertaken of the patterns of judicial reform found across a variety of countries, such as former Soviet-bloc countries trying to shake long

[6] See European Commission for Democracy through Law (Venice Commission) (2015a), Joint Opinion on the Law on the Judicial System and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine, CDL-AD (2015) 007, 23 March 2015; European Commission for Democracy through Law (Venice Commission) (2015b), Preliminary Opinion on the Proposed Constitutional Amendments regarding the Judiciary in Ukraine, CDL-PI (2015) 016, 24 July 2015, paras 19-20; European Commission for Democracy through Law (Venice Commission) (2015c), Opinion on the Proposed Amendments to the Constitution of Ukraine Regarding the Judiciary as Approved by the Constitutional Commission on 4 September 2015, CDL-AD 027.

[7] European Commission for Democracy through Law, 'Venice Commission Welcomes Judicial Reform in Ukraine' (2 June 2018), available at https://tinyurl.com/y2axn8px (last visited 30 June 2021).

histories of autocratic rule. Most of these judicial reform movements have failed to create truly independent court systems. In most of these countries, judicial reforms have been enacted into law but not functionally implemented and in some cases, implementation has been followed by retrenchment. Part four analyzes the judicial reform program underway in Ukraine since the 2014 Maidan Revolution.[8] Part five discusses the weaknesses of judicial reform in Ukraine and provides recommendations based on the earlier review of the essential elements of the rule of law. It concludes with the most recent changes on the reform agenda that recognizes judicial reform as a long-term project, needing formal institutional change and the creation of a rule of law culture.

II. Rule of Law

The judiciary acts as a check against self-interested use of government resources by the executive and legislative branches of government. Judicial independence enables courts to 'serve as an institutional check on the legislative and executive branches and is essential for the judiciary to protect the rule of law'.[9] The American federal judiciary provides a benchmark for judicial reform because of its recognition as being insulated from corruption due to provisions found in Article III of the US Constitution.[10] First, the pool of federal judges appointed ideally represents the best legal minds in the country with the highest ratings given by the American Bar Association.[11] Second, from the very beginning of the Republic it was acknowledged that federal courts were the sole arbiters of the constitutionality of government actions and laws. This power of judicial review is ensconced in American legal tradition. Third, federal judges are appointed for life freeing them from political pressure. Fourth, federal judges are well compensated and have access to substantial resources. Finally, any hint of judicial corruption would attract an immediate investigation by the Federal Bureau of Investigation, Justice Department, and so forth.

1. Definition and Components

The rule of law by itself is a vague concept. Numerous definitions have been offered some more expansive than others. Brian Tamanaha provides a short

[8] On 1 December 2013 hundreds of thousands of people protested pro-Russian President Viktor Yanukovych refusal to sign a long-anticipated agreement to become an EU associate member (Euro Maidan or Revolution of Dignity).

[9] E. Larkin, 'Judicial Selection Methods: Judicial Independence and Popular Democracy' 79(1) *Denver University Law Review*, 65, 65-90 (2001).

[10] Art III §1: 'judges shall hold their offices during good behaviour'.

[11] 'ABA Standing Committee rates nominees 'Well Qualified', 'Qualified' or 'Not Qualified' ABA, 'Ratings', available at https://tinyurl.com/y3wln5lr (notion of 'well qualified' has been questioned in the Trump Era where judicial qualifications have not always been the measure for judicial appointments, last visited 30 June 2021).

and simple definition: 'The rule of law means that government officials and citizens are bound by and generally abide by law'.[12] This simple definition provides the core idea of the rule of law, but it fails to capture the complexity of the different elements that make up such a system. The elements associated with the rule of law include the recognition that the

> exercise of power arbitrarily cannot be conferred or upheld by law... the rule of law connects in ... different ways to a collection of institutional, formal, and procedural requirements – powers of government must be separated, laws are public, stable and non-retroactive, and courts are accessible and governed by principles of due process and justice.[13]

American legal philosopher Lon Fuller spoke of the inner morality of law:

> the principles of legality often thought to form the core of the rule of law – generality, publicity, non-retroactivity, clarity, non-contradiction, possibility of compliance, stability, and congruence between official action and declared rule constitute the 'inner morality' of the law.[14]

Legal rules that meet the inner morality of law are complimented by procedurally just administrative and judicial systems.[15] For example, anti-corruption laws may be enacted, but are of little practical significance if the processes of rule of law are not available.

2. Judicial Independence

One of the core principles of the rule of law is a 'diverse, competent, independent, and ethical lawyers and judges'.[16] An essential element of an independent court system is the insulation of judges from political and corruptive influences.[17] An independent judiciary is characterized by decisional independence, institutional independence, competency, and accountability.

[12] B. Tamanaha, 'The Rule of Law and Legal Pluralism in Development' 3(1) *Hague Journal Rule of Law*, 2, 1-17 (2011).

[13] L. Austin and D. Klimchuk, *Private Law and the Rule of Law* (New York: Oxford University Press, 2014); see also, UN Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General' S/2004/616 (23 August 2004), available at https://tinyurl.com/y4troclf (last visited 30 June 2021).

[14] ibid 3, citing Lon Fuller (1964, 3).

[15] D. Wood, 'The Rule of Law in Times of Stress' 70 *University Chicago Law Review*, 455, 455-470 (2003).

[16] T. Banducci, 'Rule of Law and the Judiciary that Upholds It' 50(3) *Advocate*, 6, 6-7- (2017).

[17] A. Hamilton, 'Federalists Papers, No. 78 (1787-1788)', available at https://tinyurl.com/px3yxtf ('The complete independence of the courts of justice is peculiarly essential in a limited Constitution', last visited 30 June 2021). See also, C. Montesquieu, Spirit of Laws (Amherst-New York: Prometheus Books, 2002, first published in 1748), 181 ('there is no liberty, if the power of judging be not separated from the legislative and executive powers').

Decisional independence involves judicial actions unaffected by personal interest, threats or political pressure. Decisional independence is measured by individual decisions and whether they are fair and impartial.[18] *Institutional independence* refers to the constitutional and political acknowledgement of the judiciary as an equal branch of government. Institutional or structural independence requires that:

> The judiciary to be organized, governed, and funded in an autonomous manner. The *competency* of judges has a direct impact on the rule of law and requires the selection of individuals based on merit. Finally, the integrity of the judiciary requires *accountability* including the establishment of codes of ethics, impartial disciplinary boards, decisions that adhere to the constitution, and transparency.[19] The area of judicial accountability relates to both decisional and insular independence.[20]

Oversight of the judiciary is needed to make sure that decisions are free of illicit influences.

a) Selection of Judges

How should judges be selected has been a long running debate in most legal systems. In the eighteenth and early mid-nineteenth century, appointments were restricted to the elite; in the middle of the 19th century democratic elections of judges became popular; and by the end of the 19th century countries experimented with the concept of 'merit selection' by establishing judicial appointment commissions.[21] In some countries, executives appoint higher court judges, sometimes with the aid of judicial commissions. Some countries have retention systems in which judges serve an initial term but, additional terms require further assessment.

The goals of merit selection are to appoint independent, competent, and diverse judges. The rationale for merit selection is to 'de-emphasize politics while stressing qualifications' and increase diversity.[22] The general consensus is that these outcomes are best achieved through the use of independent nominating commissions. However, this begs the question of whether nominating commissions or judicial councils are any less political than other means of appointment? In a recent study, Greg Goelzhauser concluded that the method of judicial appointment

[18] R. Souders, 'A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States' 25 *Review Litigation* 532, 519-574 (2006).

[19] L. Arkfeld, 'The Rule of Law and an Independent Judiciary' 46 *Judges Journal*, 13, 12-15 and 46-47 (2007).

[20] J. Tunheim, 'Challenges to Judicial Independence in Our World' 84 *Hennepin Lawyer*, 5, 4-6, (2015).

[21] G. Goelzhauser, *Judicial Merit Selection: Institutional Design and Performance for State Court* (Philadelphia: Temple University, 2019), 1-2.

[22] ibid 2 and 128.

is less important than the transparency of the process and accountability for making purely political nominations: 'The emphasis should be on issues concerning transparency, applicant pool composition, and commission decision-making'.[23] One step towards greater transparency is the keeping of merit selection records made available for inspection and review by citizens and civil society groups.

The greatest safeguard is the creation of a rule of law culture that sees an independent judiciary as indispensable.[24] The culture of judicial independence, like most cultural norms, takes a long time to be acculturated into society. The first step is 'creating adjudicative arrangements and jurisprudence and maintaining ethical traditions and codes of judicial conduct'.[25] In transitioning countries, a progressive plan to implement the various elements of an independent and competent judiciary needs to be set in place from the beginning.

b) Judicial Diversity

Ukraine recognizes the underrepresentation of women in the judiciary. The United Kingdom, previously had hoped to advance the quality and diversity of its judiciary, through the creation of the Judicial Appointments Commission (JAC) in 2005.[26] Despite fifteen years of existence the overall outcomes in diversifying the judiciary have been minimal.[27] Neutrality and impartiality on the surface leads to the preservation of the status quo and discrimination in application. For example, judicial experience is considered a prerequisite to judicial appointment. But this provides an obstacle for underrepresented groups, since their lack of experience is replicated throughout the levels of the court system.[28] In sum, diversity is a type of qualification that should be recognized independently in the appointment process.

3. Impartiality and Judicial Conduct

The other side of the coin of independence is accountability. A judiciary with unchecked power can in the wrong hands become the thing that it was established to prevent. Therefore, it is important for the judiciary to build a culture of impartiality and when individual judges fail to honor this standard they need to be held accountable.[29] 'There is an inextricable link between judicial

[23] ibid 136.

[24] See generally Int'l Association Judicial Independence and World Peace (2008, 1).

[25] ibid 3.

[26] The Constitutional Reform Act of 2005 created the Judicial Appointments Commission to review judicial applications and make non-binding recommendations, based 'solely on merit'.

[27] B. Karemba, 'Debating Judicial Appointments in an Age of Diversity' 39 *Legal Studies*, 358, 358-360 (2019).

[28] ibid 121.

[29] J. Moliterno et al, 'Independence and Accountability: The Harmful Consequences of EU Policy toward Central and Eastern Europe Entrants' 42 *Fordham International Law Journal* 481, 480-552 (2018).

ethics and judicial independence'.[30] Prompt publication of judicial decisions, media access, removal of corrupt or incompetent judges, and high standards of ethics enhance judicial accountability.[31]

4. Benefits of Rule of Law

The benefits of a rule of law system include lower levels of corruption, with attendant efficient use of scarce resources; trust in government; enhancing economic growth, and the protection of human rights. In its preamble, the Universal Declaration on Human Rights states that 'human rights should be protected by the rule of law'.[32] The United Nations noted that

> transparency and accountability in both the development and application of the law are powerful tools for ensuring public oversight of the use of public resources and preventing waste and corruption.[33]

The most debilitating influence on the Ukrainian economy and its ability to attract foreign investment has been government corruption. An independent and competent judiciary, along with independent government prosecutors, is pivotal in fighting the country's war on corruption.

The separation of powers and an independent judiciary are essential to maintaining a democratic system. The separation of powers helps ensure that law creation is based upon the building of consensus by democratically elected representatives. The judiciary functions as a protector of individual rights and as a check on the other two branches. The recurring problem in new democracies and countries transitioning to rule of law systems is that the political branches (executive and legislative) attempt to enhance their power (for personal gain) by co-opting the power of the courts.[34]

Another obstacle to independent judiciaries is a weak constitution that fails to provide adequate judicial powers or is easily amended by ruling parties.

[30] M. Greenstein, 'The Challenge of Maintaining Confidence in a Judiciary Lacking in Diversity' 55 *Judges' Journal*, 40 (2016).

[31] American Bar Association, 'Judicial Reform Index Factors' (7 January 2019), available at https://tinyurl.com/y63awovq (last visited 30 June 2021). See also, United Nations High Commission on Human Rights, 'Basic Principles in the Independence of Judiciary', UN Resolutions 40/32 (29 November 1985) and 40/146 (13 December 1985), available at https://tinyurl.com/y2ju848t (last visited 30 June 2021); Council of Europe, 'Judges: independence, efficiency, and responsibilities', Recommendation CM/Rec (2010) 12 (17 November 2010), available at https://tinyurl.com/y6qk3ntp (last visited 30 June 2021).

[32] Universal Declaration of Human Rights (10 December 1948), available at https://tinyurl.com/ybqpqebq (last visited 30 June 2021).

[33] United Nations General Assembly, 'Strengthening and coordinating United Nations Rule of Law Activities: Report of the Secretary-General: Addendum', A/68/213/Add. 1 (11 July 2014), available at https://tinyurl.com/yyh6gdfx (last visited 30 June 2021), hereinafter, A/68/213/Add. 1.

[34] See, eg, J. Rankin, 'EU Challenges Poland over Judicial Independence' *The Guardian* (10 October 2019), available at https://tinyurl.com/y3g7u2du (last visited 30 June 2021).

Many countries allow for amending national constitutions by simple votes of the legislature. In China, constitutional amendments require a two-thirds vote of the National Peoples' Congress (NPC).[35] The Polish Constitution requires a two-thirds vote of parliament.[36] A strong constitution is one that is extremely difficult to amend in order to relocate the balance of powers among the branches of government. Under Art V, amending the US Constitution requires approval of two-thirds of Congress and three-quarters of fifty state legislatures. Governments ultimately work and survive based upon the stability and legitimacy of their foundational laws.[37]

The democratic, market economy has been firmly recognized as the most efficient way of ordering societies. A United Nations Report states that:

> The rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law is essential for sustained economic growth.[38]

The rule of law provides the context for fair and predictable legal environments where businesses and entrepreneurship flourish. In the case of Ukraine, developing a rule of law system is a precondition imposed by the EU, IMF and other potential donors and investors.

An independent and competent judiciary advances the due process rights of a fair hearing under law. Without due process, personal and human rights are subject to abuse by corrupt or authoritarian governments. The enforcement of rules that conform to procedural justice norms is the means of protecting constitutional freedoms and fundamental rights. The United Nations recognizes that:

> The rule of law provides a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of human rights.[39]

Without due process rights there is no assurance a government will not move towards authoritarianism through the suppression of fundamental rights.

[35] 'China to Amend Constitution for Fifth Time' *The NPC Observer* (15 Jan 2017), available at https://tinyurl.com/y669qjhh (last visited 30 June 2021).

[36] Polish Constitution of 1987, Art 235, available at https://tinyurl.com/y2572w5f (last visited 30 June 2021).

[37] See generally, J. Locke, *Two Treatises on Government* (Cambridge: Cambridge University Press, 2013, first published anonymously in 1689), (government legitimacy through social contract of the people); C. Montesquieu, n 17 above, 181 (theory of separation of powers); D. Hume, *Essays: Moral, Political and Literary* (New York: Wallachia Publishers, 2015, first published circa 1776), (government based upon the rule of law); J.J. Rousseau, *The Social Contract* (Amsterdam: M.M. Rey, 1762), available at https://tinyurl.com/q7lhx9y (last visited 30 June 2021, legitimate political order within a framework of classical republicanism; sovereignty is in the people).

[38] A/68/213/Add. (1 and 12).

[39] ibid 3.

5. Importance of Judicial Reputation

This section examines the particularly important role of judicial reputation in the building of trust in government institutions[40] and the elements associated with the development of a positive collective judicial reputation.[41]

a) Judicial Councils and Merit Selection

The use of judicial councils or merit commissions has become common. Judicial reform is in continuous flux routinely done in common and civil law systems, as well as in developed and underdeveloped countries, and in countries with long traditions of judicial independence and those just beginning to create such independence.[42] Judicial councils have been recognized as an international best practice.[43] Garoupa and Ginsburg estimate that sixty percent of countries, mostly within civil law systems, have adopted judicial councils.[44] The reputation of a judiciary is dependent on the reputation of the appointing councils. Judicial councils can enhance their reputations by encouraging public participation in council activities. Civil society groups can be used as a tool to monitor judicial councils, ensuring transparency, which is a key to building public trust.[45]

b) Judicial Selection in Context

Judicial reform does not transpire in a vacuum. The use of judicial councils or merit commissions in themselves does not ensure the selection of a quality judiciary. The council must be placed in the context of the politics and legal tradition of each country. This is especially true in countries with little history of merit based judicial selection and in countries bereft by corruption. A quality judiciary is a product of the quality of lawyers seeking appointment, systems of accountability, rendering of well-reasoned opinions, and when judicial corruption is thoroughly investigated.

The quality of the judicial council is linked to the number of high-ranking judges on the council. Israel is an example of how tradition and customs play an important role in the selection of quality judges. The Judicial Selection Committee is composed of four political appointments, two members of the bar

[40] N. Garoupa and T. Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago: Chicago University Press, 2015), 16 (Judicial reputation 'conveys information to the uninformed public about the quality of the judiciary and the legal system').

[41] Any reference to judicial reputation refers to the reputation of the judiciary as a whole.

[42] N. Garoupa and T. Ginsburg, n 40 above, 10.

[43] See V. Autheman and S. Elena, 'Global Best Practices – Judicial Councils: Lessons Learned from Europe and Latin America' *IFES White Paper Series* (April 2004), available at https://tinyurl.com/y3ncemvr (last visited 30 June 2021). See also, Palermo Doctrine (Elements of a European Statute of the Judiciary), available at https://tinyurl.com/y3y7uvxs (last visited 30 June 2021. In the United States, the judicial council movement began in the 1920s).

[44] N. Garoupa and T. Ginsburg, n 40 above, 101.

[45] V. Autheman and S. Elena, n 43 above, 15-16.

association, and three sitting justices. Even though the justices are in the minority they play an outsized role in the appointment process; no new justice has never been appointed without the approval of the three justices.[46]

Judicial selection of judges in the United Kingdom has gone through a unique evolution. The high court was historically part of the English House of Lords and was never viewed as a separate branch of government.[47] This changed with the Constitutional Reform Act of 2005, which created an independent UK Supreme Court. The Reform Act also established the Judicial Appointments Commission (JAC), Judicial Appointments and Conduct Ombudsman (JACO), and the Directorate of Judicial Offices for England and Wales (DJO). These various judicial oversight entities ensure a transparent judicial appointment process and accountability through continuous monitoring of judicial conduct.

III. Struggle for Rule of Law in Transitioning Countries

The court system in England is a product of centuries of evolution from the ecclesiastical courts to the royal courts to the modern unified law courts.[48] The story of judicial reform in Ukraine is part of a broader movement being replicated in numerous countries in former or current authoritarian countries. The success in these countries transitioning to rule of law systems has been mostly a record of failure.[49] The substantive failures include hasty attempts to transport Western-style laws and systems into countries with little experience in Western-style legal traditions.[50]

John Tunheim discusses a number of countries where the creation of an independent judiciary has been problematic.[51] In Uzbekistan, the government provides little job security with judicial terms lasting five years and reappointments delegated to an executive branch committee. Thus, judges 'simply do not know how to be independent'.[52] He notes that Kosovo has a well-constructed formal law of judicial independence, with appointments lasting to the age of retirement, but that in practice, 'courts remain weak in the face of corruption based on

[46] E. Salzberger, 'Judicial Appointments and Promotions in Israel: Constitution, Law and Politics', available at https://tinyurl.com/y5emggut (last visited 30 June 2021).

[47] The breadth of judicial review was shown in the court's holding Prime Minister Boris Johnson's suspension of Parliament was unconstitutional. See R (on the account of Miller) v Prime Minister, et al, (2019) UKSC 41 (24 September 2019), available at https://tinyurl.com/y4p6mxsf (last visited 30 June 2021).

[48] See A. Hogue, *Origins of the Common Law* (Bloomington: Indiana University Press, 1966), XII, 276 (history of English common law and the evolution of court system).

[49] B. Tamanaha, n 12 above, 1 (referring to countries in Africa and Asian).

[50] L.A. Di Matteo, 'Rule of Law in China: The Confrontation of Formal Law with Cultural Norms' 51 *Cornell International Law Journal*, 393, 391-444, (2018).

[51] J. Tunheim, n 20 above, 4.

[52] ibid.

family or friendship relationships'.[53] Tunheim assessment of Ukraine in 2015 is similar to Kosovo, with formal law in favor of judicial independence at odds with the judiciary playing little role in combatting corruption and the public's perception that judges are tools of the wealthy and powerful.

1. Commitment to Creating an Independent Judiciary

The success of creating a rule of law system is anchored in an independent judiciary, granted with the power to interpret and enforce constitutional rights and preserve the allocation of power among the three branches of government. Like Ukraine, 'the justice reform going on in Albania aims for a total reformation of the judicial system and the functioning of the courts', emphasizing criteria for the selection of judges of high quality.[54] The new Albanian Constitution decrees that the President's rejection of a candidate has no effect if the majority of the members of High Judicial Council vote for appointment.[55] As in Ukraine, this is an important first step but the success of the Albanian judicial reform process is far from being secured.

The experience in Serbia over the past few decades illustrate that judicial reform laws hastily designed and too slowly implemented fail in their goal of creating an independent judiciary. The result 'has not been an evolutionary process, but instead a vicious circle ... leading to serial reforms of the judiciary'.[56] Thus, it is important that reform laws be well crafted and comprehensive before implementation. Sadly, this has not been the case for Ukraine but, there is recent evidence that the government is learning from past mistakes.

2. Eternal Vigilance Needed to Maintain Rule of Law Systems

Some countries initially created independent systems but have retreated towards authoritarianism by limiting that independence. This has been the case in countries where the independence of the judiciary is a relatively new phenomenon (Poland), but also in countries with a long tradition of judicial independence (Turkey).[57] The maintenance of an independent judiciary once established requires external vigilance. The best example is the destruction of the independence of the Turkish judiciary, which is traced to the creation of a

[53] ibid.

[54] ibid 47.

[55] B. Bara and J. Bara, 'Rule of Law and Judicial Independence in Albania' 2(1) *University of Bologna Law Review*, 32-33, 23-48 (2017).

[56] V. Petrov, 'Constitutional Reform of the Judiciary in Serbia and EU Integration', 2 *EU & Comparative Law Issues & Challenges*, 4, 8, 1-9 (2018).

[57] In Turkey, an independent judiciary hardly exists. MEDEL-Association, 'La Justice en Europe: II n'y a plus de Justice en Turquie', Magistrats Europeens pour la Democratie et les Libertes (MEDEL), La justice en Europe, MEDELNET.EU 29, 36 (23 May 2017), available at https://tinyurl.com/y5743au9 (last visited 30 June 2021).

secular state by Kemal Ataturk in 1922.[58] The judiciary has long served as a vanguard against autocratic rulers and enforced the separation of religion from government. Almost a century of judicial independence was quickly washed away due to the election of a populist autocrat, resulting in the arbitrary dismissal of 4,400 judges.[59]

After the fall of communism, Poland used the government model of the United States by establishing three separate and equal branches of government including an independent judiciary.[60] Unfortunately, the current ruling party has passed laws allowing executive branch 'capture' of the judiciary.[61] A new law went into effect on 15 January 2018 that introduced a retirement age for Supreme Court judges forcing numerous existing judges off the court.[62] The law also fixed the terms of existing district court judges to four years. More importantly, the power to appoint and dismiss judges was transferred to the Ministry of Justice in the executive branch without review by the National Council of the Judiciary.[63]

The events in Turkey and Poland

> should give pause to states such as Slovakia, Czech Republic, Croatia, Montenegro as well as Ukraine, Serbia, and Kosovo.

The creation of an independent judiciary remains vulnerable in countries if authoritarian, populist's parties come to power. Maintaining judicial independence requires persistent monitoring from private actors and civil society:

> Private actors can have a significant impact on the promotion of judicial independence by utilizing both economic threats and investments in NGOs that promulgate judicial independence.[64]

The following section examines the judicial reform movement in Ukraine.

[58] A. Bali, 'The Perils of Judicial Independence: Constitutional Transition and the Turkish Example' 52 *Virginia Journal International Law*, 235, 235-320 (2012) (reviews the history of the Turkish judiciary).

[59] E. Felter and O. Aydin 'The Death of Judicial Independence in Turkey: A Lesson for Others' 38 *Journal National Association Administrative Law Judiciary*, 42, 34-56, (2015).

[60] M. Zimmer, 'Judicial Independence in Central and East Europe: The Institutional Context' 14(1) *Tulsa Journal Comparative & International Law*, 85, 101-132, (2006).

[61] See G. Goelzhauser, n 21 above, 103-127.

[62] A. Sanders and L. von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy' 19(4) *German Law Journal*, 779, 769-816 (2018).

[63] See Amnesty International (10 August 2017). The new laws have been condemned by the Venice Commission. Venice Commission, Opinion 904/2017), available at https://tinyurl.com/yxo6th2m (last visited 30 June 2021).

[64] R. Stopchinski, 'Enforcement Mechanisms for International Standards of Judicial Independence: The Role of Government and Private Actors' 26(2) *Indiana Journal Global Legal Studies*, 693, 673-694, (2019).

IV. Rule of Law in Ukraine

The above section illustrated that building a rule of law legal system has been problematic in many countries. However, a bit of caution is needed here since, the history, culture, role of law in society, and evolution of government and social institutions in Ukraine are unique in themselves.[65] Insights can be gained from more developed rule of law systems and from the failures of other countries in their attempts to establish such systems, but these insights or rules of thumb need to be tailored to the uniqueness of Ukraine.

The history of the Ukrainian government and court system is one characterized by corruption. The public perception of the Ukrainian judiciary as independent and competent has been overwhelmingly negative.[66] As of 2014, a majority of Ukrainians (fifty eight percent) saw corruption as a fact of life.[67] The weakness of the court system has resulted in under-enforcement of anti-corruption laws.[68] Transparency International's 2018 Corruption Index rated Ukraine one hundred and twenty out of one hundred and eighty countries and territories. The situation in Ukraine was summarized as follows:

> Four years since anti-corruption legal and institutional frameworks were introduced, progress is too slow. The newly established anti-corruption bodies have not succeeded.[69]

Transparency International, however, listed Ukraine as a 'Country in Transition' and noted that things may change with the growth of civil society organizations to combat the country's vested interests.[70]

1. Past: Lurching Toward the Rule of Law

An early attempt at reforming the judiciary after the Maidan Revolution of 2014 failed.[71] It consisted of the drafting of a Constitution and the Coalition

[65] B. Tamanaha, n 12 above, 1 (each rule of law project is unique).

[66] International Foundation for Election Systems (November 2005).

[67] ibid (September 2012).

[68] Business Anti-Corruption Portal, Ukraine Corruption Report (2019, 12); United States Department of State, 'Country Reports on Human Rights Practices' (2017), 2.

[69] Transparency International, 'Eastern Europe and Central Asia' (29 January 2019). The 2019 Trade Economics 'Perceptions of Corruption' ranked Ukraine 126 out of 180 countries, available at https://tinyurl.com/y684jxn8 (last visited 30 June 2021).

[70] S. Shumska, 'Shadow Economy in Ukraine: Methodology and Evaluation' 10(148) *Actual Problems of Economics*, 78, 74-83 (2013).

[71] The Law of Ukraine. On Ensuring the Right to a Fair Trial, (Zakon Ukrainy 'Pro zabezpechennya prava na spravedlyvyi sud') 18, 19-20 *Bulletin of the Verkhovna Rada* (VVR), 132, available at https://tinyurl.com/y6ogjjgx (last visited 30 June 2021) The Law of Ukraine. On the Judiciary and the Status of Judges (Zakon Ukrainy 'Pro sudoustrii ta status suddiv'), 41-42, 43, 44-45 *Bulletin of the Verkhovna Rada of Ukraine* (VVR), 529 available at https://tinyurl.com/n9c6fwt (last visited 30 June 2021). 'All translations from Ukrainian into English are by the author of the present work unless otherwise noted'.

Agreement of parliamentary fractions to move toward a 'European Ukraine'.

a) Draft Constitution of July 2014

Constitutional amendments,[72] proposed in 2014, included the abolition of supervisory powers of the Public Prosecutor's Office over the judiciary. The removal of the supervisory powers was particularly important since the Prosecutor's Office neglected its duty to fight corruption. However, the draft constitutional amendments shifted power from the Verkhovna Rada (Parliament) to the President. The President was granted the competence to appoint and dismiss key state officials, including Constitutional Court judges.

b) Presidential Decree and Coalition Agreement

President Poroshenko's 2015 Decree, entitled 'The Commission on Sustainable Development Strategy ('Ukraine – 2020'), noted that:

> An important basis for security (is) honest and impartial justice and the implementation of effective mechanisms for combating corruption.[73]

Poroshenko highlighted the low quality of the Ukrainian judicial system and the Ukrainian people's lack of trust or confidence in its workings.[74] Art 3 on 'Judicial Reform' stated that:

> (The goal was to) reform the judiciary and related legal institutions for practical implementation of the rule of law and ensuring everyone the right to a fair hearing by an independent and impartial court.[75]

The President deferred judicial reform to the Ukrainian Parliament.

On 21 November 2014, the leaders of the five major political parties initiated a draft Coalition Agreement[76] that set an ambitious reform agenda committing the country to reform numerous sectors of the government including, Constitutional Reform; Anti-corruption Reform; Justice Reform; and Law Enforcement Reform.

[72] Draft Law on Amendments to the Constitution of Ukraine on Decentralization of Power (Proekt Zakonu pro vnesennya zmin do Konstytutsii Ukrainy (shchodo detsentralizatsii vlady), no 2217a (1 July 2015), available at https://tinyurl.com/ohz5y5b (last visited 30 June 2021).

[73] Decree of the President of Ukraine no 5/2015 'The Commission on Sustainable Development Strategy' ('Ukraine–2020') (Ukaz Prezydenta Ukrainy Pro strategiu stalogo rozvytku 'Ukraina – 2020'), available at https://tinyurl.com/yy9g6y5u (last visited 30 June 2021), Art 2.

[74] President Petro Poroshenko, Address to Verkhovna Rada, 'On the internal and external situation of Ukraine', available at https://tinyurl.com/yymkckqv (last visited 30 June 2021).

[75] ibid Art 3.

[76] 'Coalition Agreement of Deputy Fractions European Ukraine' (2014) Eighth convocation of the Parliament of Ukraine (*Verkhovna Rada Ukrainy vos'mogo sklykannya Ugoda pro koalitsiu deputatskyh fraktsii 'Evropeiska Ukraina'*) (2014), available at https://tinyurl.com/y2eq7wro (last visited 30 June 2021).

Unfortunately, the follow-up implementation program[77] only established a general framework for defense and anti-corruption policies. No meaningful laws in the area of judicial reform were enacted.

c) Laws on 'Constitutional Reform' and 'Ensuring the Right to Fair Trial'

As a result of pressure from civil society organizations[78] international donors,[79] and the Venice Commission,[80] President Poroshenko introduced draft legislation at the end of 2015, which was widely criticized for its selection procedure for judges,[81] jurisdiction of the courts, and delays in implementing existing legislation.[82] In response, the Parliament voted against the 'Law on the Constitutional Court',[83] since it failed to create the independence of the Court under the Constitution.

The 2015 law 'On Ensuring the Right to Fair Trial'[84] was Parliament's response to public and international demands for judicial reform. The law's purpose was to improve the independence of the judiciary and ensure citizens' right to a fair trial. The framework of the law sought to improve judicial competence; reduce political interference; create an efficient structure; ensure financial independence; improve procedural law; ensure enforcement of judgments; and improve the quality of legal aid.

The strengthening of the role of the Supreme Court in unifying jurisprudence, substantive evaluation of judges and verification of compliance with anti-corruption laws, role of self-governance bodies in the appointment and of judges (HQCJ and HCJ), enhanced process for disciplining judges, and adoption of competitive procedures for judicial appointments were positive improvements. However, the law received mixed reviews from Ukrainian civil society and the Venice Commission.[85] The Venice Commission noted the law's numerous deficiencies did not ensure the independence of the judiciary. This is primarily due to the Constitution, which placed the power over judicial

[77] Adopted on 11 December 2014.

[78] Reanimation Package of Reforms, Anti-Corruption Action Center, Transparency International, and so forth.

[79] EU Delegation in Ukraine, US Embassy, EUAM, EUACI, COE, USAID, OECD, and so forth.

[80] Venice Commission, Opinion no 801/2015 (23 March 2015).

[81] Draft Law on High Anti-Corruption Court (Proekt Zakonu pro Vishchyi Antykoruptsiinyi sud), no 7440 (22 December 2017), available at https://tinyurl.com/yxmm78y8 (last visited 30 June 2021).

[82] R. van Rooden, 'Letter to Ihor Rainin, Head of Presidential Administration of Ukraine' (11 January 2018), available at https://tinyurl.com/y3t7y26k (last visited 30 June 2021).

[83] See Verkhovna Rada voted against the 'Law on the Constitutional Court', available at https://tinyurl.com/y4rufeaw (last visited 30 June 2021).

[84] Law on Ensuring the Right to a Fair Trial, n 71 above.

[85] Venice Commission, 'Opinion No. 801/2015' ('On the Law on the Judicial System and Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine'), (23 March 2015), available at https://tinyurl.com/y38ldrxs (last visited 30 June 2021).

appointments with the President and Parliament. The Constitution needed to be amended in order to transfer the power of the President to appoint judges (initial five-year terms) and Parliament to appoint judges to permanent terms to the self-governance bodies. The Venice Commission also recommended that the new qualification assessment process be codified. Finally, the reform law has been criticized by the judiciary and civil society[86] because the process of its drafting and adoption lacked transparency.[87]

The core innovation of the law 'On Ensuring the Right to Fair Trial' was to depoliticize the judicial appointment process through the creation of new self-governance bodies – High Council of Justice (HCJ)[88] and High Qualification Commission of Judges (HQCJ).[89] Unfortunately, they were not made immediately operational because the Constitutional amendments to authorize their creation had been rejected. The lesson here is that failure to amend the Constitution first to place judicial reforms on strong legal footing led to problems in the implementation of reforms. Despite the underlying constitutional law problem, the judicial reform movement went forward with the establishment of the HCJ and HQCJ. After much delay, other initiatives were also implemented, most importantly, the establishment of the High Anti-Corruption Court to be discussed below.[90]

d) Trial and Error, Mostly Error in the Process of Selecting Judges to Supreme Court

The Ukrainian parliament enacted the law 'On the Judiciary and Status of Judges'[91] for the review and selection of judges to the Supreme Court. Ukraine established a new Supreme Court, consisting of a Grand Chamber and four specialized cassation courts.[92] Although, an issue arose as to the constitutionality of the creation of the new Supreme Court before the liquidation of the old Supreme Court, which will be discussed below.[93] The Judiciary Law also provides for two

[86] O. Ostrovska, 'Shadow' Side of Judicial Reform' (18 January 2019), available at https://tinyurl.com/yyfrvm4w (last visited 30 June 2021); O. Ovcharenko, 'Problems of Ensuring the Right to a Fair Trial' (Problemy zabezpechennya prava na spravedlyvyi sud), available at https://tinyurl.com/yygb5q72 (last visited 30 June 2021); R. Kuybida, 'On Pros and Cons of the New Law on Ensuring the Right to a Fair Trial', available at https://tinyurl.com/y6m52v2x (last visited 30 June 2021).

[87] H. Rakhalska, 'Problems of Restoring Confidence in the Judiciary in Ukraine' *Scientific Journal of HQCJ*, available at https://tinyurl.com/yxdbs5wb (last visited 30 June 2021).

[88] Ukraine Constitution, Art 125 (1996), available at https://tinyurl.com/r (last visited 30 June 2021).

[89] See 'HCJ and HQCJ' infra IV.B.2.

[90] Law of Ukraine, On the High Anticorruption Court n 81 above.

[91] Law of Ukraine, On the Judiciary and the Status of Judges n 71 above.

[92] S. Shtogun, 'Judicial Reform or Face-Lift of System of Judicial Power' 2(14) *Chasopys of National University Ostrog Academy*, 1, 1-13 (2016).

[93] B. Poshva, 'Reforms Should Be Made in a Way, Not Be Ashamed in front of Philip Orlyk while Looking into His Eyes' ('Reformy maut' provodytysya takym chynom, abi ne soromno bulo

new specialized first-instance courts – the High Court for Intellectual Property Law (HCIP)[94] and the High Anti-Corruption Court (HACC).[95] The HCIP is intended to be a specialized court of first instance for IP-related cases, with an appeal chamber, but has yet to be established. The HACC's purpose is to defend society from corruption and related crimes and provide judicial oversight over pre-trial criminal investigations. In addition, the Constitutional Court is now required to hear constitutional complaints brought by the President or through a petition from ten percent of the Parliament.

Judges are required to obtain a minimal score of six hundred and seventy out of one thousand points on a test, based upon criteria developed by experts, covering areas of substantive and procedural law, as well as a practice component relating to judging.[96] The one thousand points is divided into five hundred points for competence, two hundred and fifty points for professional ethics, and two hundred and fifty points for integrity.[97] The applicants' overall qualifications are deduced from their test scores, along with psychological evaluations, examination of their judicial dossiers; and a final review of professional activities before the HQCJ. The psychological testing of judicial candidates is unusual but was thought to be needed to ensure the appointment of ethically minded judges. Professional activities requirement includes annual submissions of asset declarations, as well as information provided by investigations of the National Anti-Corruption Bureau and the State Security Service.

On 30 September 2016, the main laws aimed at reforming Ukraine's judiciary came into force.[98] The initial step in a multi-stage process required the selection of new Supreme Court judges, introduction of judicial qualifications at different levels, formation of an anti-corruption court, application of electronic tools in the judicial system, and improvement of the legal framework of the court system. The HQCJ conducted an open competition for new justices to the Supreme Court, which attracted one thousand four hundred thirty six applications.[99] Judges from all levels of the court system, advocates, and

dyvytys' u bronzovi ochi Pylypa Orlyka'), Center of Judicial Studies (2018), available at https://tinyurl.com/y5ybw3mq (last visited 30 June 2021).

94 Order of President of Ukraine on Establishing an Intellectual Property High Court (*Ukaz Prezydenta Ukrainy 'Pro utvorennya Vyshchogo sudu z pytan intelektualnoi vlasnosti'*) (19 September 2017).

95 Law of Ukraine On High Anti-Corruption Court, n 81 above, Arts 1 and 3.

96 See High Qualification Commission of Judges, available at https://tinyurl.com/y4tywf7h (last visited 30 June 2021).

97 Legal Newspaper Online (2018).

98 J. Kirichenko, 'Changes to Constitution that launches judicial reform. How it will work? Infographics' *Ukrainian Pravda* ('Zminy do Konstytutsii, shcho zapuskaut' sudovu reformu. Yak tse pratsuvatyme? Infografika' Ukrainska Pravda) (30 September 2016), available at https://tinyurl.com/yxdlz3qj (last visited 30 June 2021).

99 New Supreme Court: Was the system reloaded? Center of Civic Monitoring and Control ('Novyi Verkhovnyi Sud: udalos li perezagruzit sistemy?' Tsentr gromadskogo monitoryngu ta kontrolu) (3 August 2017), available at https://tinyurl.com/y6rv739h (last visited 30 June 2021).

academicians applied for the positions. After its review, the HQCJ selected one hundred and eleven candidates for presidential approval.[100] In a parallel process, the Public Integrity Council (PIC) alleged that twenty-five of the candidates had previously engaged in politically motivated decisions, including the support of bans on public assembly, violations of human rights, or had not fulfilled their income-declaration requirement with sufficient transparency. The PIC, consisting of representatives of human rights communities, academic lawyers, advocates, and journalists, was established to assist the HQCJ in determining the professional ethics and integrity criteria of candidates. The PIC provides opinions on non-conformity of a judge.

Unfortunately, the process was marred by tensions between the PIC and the HQCJ.[101] In a number of cases, the PIC provided important information, which the HQCJ used in making its final selections.[102] However, the PIC process lacked transparency as to the procedures and methodology used for producing its opinions. HQCJ noted that at times the PIC did not follow its own procedures. Finally, some members did not participate in PIC decisions.[103]

The vetting of judicial qualifications for different positions continued throughout 2017. The overall number of sitting judges declined dramatically with more than three thousand judges resigning.[104] About one thousand of the resignations were due to judges failing to comply with the new transparency requirements that required judges to file income declarations.[105] Another one hundred and seventy two judges were discharged due to disciplinary actions.[106] The shortage of judges during the selection process reduced the efficiency and effectiveness of the judicial system, which threatened anti-corruption reform. Newly created bodies, National Anti-corruption Bureau of Ukraine (NABU) and the Special Anti-corruption Prosecutor's Office, faced significant impediments

[100] Poroshenko received one hundred and eleven candidates for the Supreme Court nomination, UNIAN (29 September 2017), available at https://tinyurl.com/y5mjv4e5 (last visited 30 June 2021).

[101] B. Poshva, n 93 above. See also, Center of Judicial Studies, 'The HQCJ Offered the PIC Reconciliation Outside the Court', (2018), available at https://tinyurl.com/yy835sbc (last visited 30 June 2021); Dejure Foundation, 'Formation of the New Supreme Court: Key Lessons' (Dejure Foundation, 'Formuvannya Novogo Verkhovnogo Sudu: Kluchovi Uroky') (January 2018), available at https://tinyurl.com/yy4lxb8n (last visited 30 June 2021).

[102] G. Mykhailiuk, 'Current Challenges for the Implementation of Constitutional Reform on Judiciary in Ukraine on its way towards European Integration' 14 *Journal Contemporary European Research*, 44, 40-46, (2018).

[103] Despite the lack of transparency, the PIC's decisions were deemed to be impartial. B. Poshva, n 92 above. See also, High Qualification Commission of Judges in Ukraine, available at https://tinyurl.com/y4tywf7h (last visited 30 June 2021).

[104] O. Zhukovska, 'Reform of courts without people', Ukrainian Pravda (17 August 2017), available at https://tinyurl.com/y399t666 (last visited 30 June 2021).

[105] M. Zhernakov, 'Independent anti-corruption courts in Ukraine: the missing link in anti-corruption chain', available at https://tinyurl.com/y5vpheua (last visited 30 June 2021).

[106] Espresso TV (19 March 2018), available at https://tinyurl.com/y5769fqx (last visited 30 June 2021).

in bringing cases to court.[107]

On 24 July 2018, the HQCJ announced the beginning of the registration of candidates for additional selections to the Supreme Court[108] and High Anti-Corruption Court (HACC). In 2017, one hundred and twenty out of two hundred Supreme Court positions were filled, while about eighty judges were selected in 2018-2019. The announcements were made in the presence of the media to increase transparency. The establishment of the HACC continued to be delayed.

e) Evaluations of Judges for Appellate and District Courts

The initial part of the selection process consisted of the evaluation of existing judges, begun in 2018, with those passing the evaluation process receiving higher salaries.[109] The next stage involved the evaluation and selection of appellate court judges. The plan was to promote the more qualified first instance court judges. But this strategy became problematic due to the high degree of attrition (retirements and resignations[110]) at the lower court level.[111] Some local courts did not have a single judge in place.[112] To cope with this situation, the HQCJ transferred eighty-nine trial judges to areas with shortages of judges.[113] The temporary secondment of judges was only a stopgap measure for six months. Further, about two thousand eight hundred judges from the pre-existing court system had their five-year terms expire before the implementation of lifetime terms under the new, ongoing appointment process.

Due to the above crisis, the process of appointing new judges was expedited. The idea was to duplicate the process used to select the first batch of Supreme Court judges. However, the time schedule proved to be overly ambitious, as the processing and appointment continued well into 2019. The comprehensiveness

[107] O. Zhernakov, n 105 above.

[108] In 2017, one hundred and twenty out of two hundred Supreme Court positions were filled, while eighty judges were selected in 2018-2019.

[109] R. Maselko, Realities of Judicial Reform: 99% of Old Judges and Significant Increase of Their Salaries ('Realii sudovoi reformy: 99% staryh suddiv ta znachne zbilwennya ihnoi zarplaty), available at tinyurl.com/dycgucp5 (last visited 30 June 2021).

[110] Resignations of nearly 1,500 judges occurred after the passage of the 2016 Constitutional Amendments, most did not want to participate in the new evaluation process.

[111] V. Gaponchuk, 'Judicial Reform: Pluses and Minuses of Transitional Period', *Legal Visnyk of Ukraine* (Victor Gaponchuk, 'Sudova Reforma: Plusy I Minusy Perekhidnogo Periodu', Jurydychnyi Visnyk Ukrainy) (27 February 2018), available at tinyurl.com/ydjl5n38 (last visited 30 June 2021). See also, O. Balanda, 'Ukraine and Judicial Reform: Results of the Last Year', *Ukrainian Law* (Oksana Balanda, 'Ukraina ta sudova reforma: pidsumky roku, shcho mynuv', Ukrainske pravo) (31 December 2017), available at tinyurl.com/38ygca2w (last visited 30 June 2021).

[112] Council of Judges of Ukraine, available at http://www.rsu.gov.ua/ua/pro-rsu (last visited 30 June 2021). See also, V. Pryhid, 'Orphaned Courts: How Hundreds of Thousands of Ukrainians Live without Justice' ('Sudy-syroty: yak sotni tysyach ukraintsiv zhyvut bez pravosuddya'), (10 September 2018), available at https://tinyurl.com/4y6ebdxm (last visited 30 June 2021).

[113] Fourteen judges seconded to courts without judges and another seventy-five to manage judicial caseload.

of the qualification assessment process was undermined by it being too hastily performed, resulting in the PIC resignation from the review process.[114] Regis Brillat, Special Adviser of the Secretary General of the Council of Europe for Ukraine stated that: 'There are not many examples in Europe where the entire judiciary has been reshuffled at the same time'.[115] In response, the HQCJ stated its confidence in the qualification assessment of judges due to the structure put in place before the actual assessments were performed including, benchmarks that de-politicized the process; establishment of criteria related to ensuring judicial independence and responsibility; and establishing transparent competitive procedures to prevent corruption of the process.[116]

Another rule of law issue related to the assessment process that included the changing of rules about the calculation of scores during the appointments process. Retroactive changes in assessment criteria are a technical violation of due process. However, the procedural and subsequent changes helped to improve the process to ensure the appointment of quality judges. For example, psychological testing was re-designed with the help of international donors, based on American and Western European standards that differ greatly from Eastern European standards. Unfortunately, the test questions were simple word-to-word translations from English, not adapted to the nuances of the Ukrainian language. Also, the transliteration of foreign words, such as abdication (*абдикація*), defamation (*дифамація*), procrastination (*прокрастинація*) was used without any translation into the Ukrainian language. Thus, the fairness and objectivity of the tests were less than optimal.

The compensation of judges and age discrimination were other issues that were confronted during the appointments process. The law 'On the Judiciary and the Status of Judges' did not provide guidance for judges nearing retirement age who fail new assessment tests. The Head of the State Judicial Administration recommended that if judges pass the tests, then their salaries would be increased immediately; secondly, if applicant-judges pass the qualification assessment and are older than sixty-two point five years old (sixty-five being the retirement age), then they should receive the higher pensions being provided to younger judges who had passed the assessment.[117] Unfortunately, the Ukrainian

[114] Center of Judicial Studies, n 93 above, 194.

[115] The Establishment of the New Judicial System in Ukraine is in Line with the Principles of the Council of Europe: Mr. Regis Brillat, Special Advisor to the Council of Europe Secretary General, available at tinyurl.com/1uzz6e20 (last visited 30 June 2021).

[116] Y. Shemshuchenko, 'Judicial Power in Ukraine: Current Doctrine, Mechanisms and Perspectives of Implementation' 2 *Visnyk of National Academy of Science in Ukraine* ('Sudova vlada v Ukraini: suchasna doktryna, mekhanismy ta perspektyvy realisatsii, Visnyk Natsionalnoi Akademii Nauk Ukrainy'), 37-47 (2017). See also, O. Scherbanuik, 'Competitive Selection of Judges: Problems of Constitutional Implementation' 3 *Law of Ukraine* ('Konkursnyi dobir suddiv: problem konstytutsijnoi realisatsii, Pravo Ukrainy 3'), 95, 92-109 (2018).

[117] N. Mamchenko, 'Discrimination in Judges' Remuneration: The State Judicial Administration does not Believe that the Problem will be Solved before the Elections' ('*Diskriminatsia v sudejskom*

Parliament rejected the proposals of the State Judicial Administration. Therefore, the discrimination within the retirement compensation packages for long-serving judges remains unsettled.

Although the above discussion demonstrates that new laws and processes have been adopted with good intentions. The selection and appointment process unfortunately were plagued with problems including, an overly ambitious implementation schedule and qualifications for judicial positions was set too low.

2. Present: Transitioning to Rule of Law System

This section focuses on the evolving nature of the HQCJ, including the 2019 amendments on self-governance bodies, as well as, the seating of the HACC and the alarming state of judicial salaries and budgets.

a) HCJ and HQCJ

The HCJ consists of twenty members with three members each appointed by the Parliament, President, Congress of Judges, Congress of Advocates, Congress of Representatives of Higher Legal Educational Establishments and Research Institutions and two members appointed by the Conference of Employees of Public Prosecution. The jurisdiction of the HCJ includes making proposals to the president for the appointment and dismissal of judges; executions of disciplinary proceedings against judges of the Supreme Court and the high specialised courts, and consideration of complaints regarding decisions of courts of appeal, local courts, and misconduct of prosecutors.

The HQCJ is entrusted with the assessment and selection of judges. Previously the HQCJ was loyal to the president. The new HQCJ has been largely detached from the executive and legislative bodies and has been given a broad area of competences including, organizing the selection of candidates, verification of judicial candidates' compliance with the requirements set forth by law, recommend judges for appointment, conducts disciplinary proceedings of local and appellate court judges, and monitor the lifestyles of judges. The HQCJ is divided into two chambers – one for the qualification of judges and the other for the disciplining of judges.

The reform law adopted international best practices by changing the HQCJ membership to include a majority of judges and members of the legal profession, with few appointments from the executive branch. The members are composed of eight members selected by the Congress of Judges,[118] two selected by the

voznagrazhdenii: v GSA ne veryat, chto problema reshitsa'), (2018), available at tinyurl.com/bqmn8j5i (last visited 30 June 2021).

[118] Law of Ukraine on Judiciary and the Status of Judges, n 71 above, Arts 123 and 127 (responsible for the enforcement of decisions of the Congress).

Congress of Representatives[119] of law schools and research institutions, two members by the Congress of Advocates,[120] and one each appointed by the Government Ombudsman[121] and the State Judicial Administration.[122] The Congress of Judges is the highest body of judicial self-government. The Congress of Representatives of law schools and research institutions is made up of educational and research institutions certified by the National Academy of Sciences. The Congress of Advocates is the supreme body of advocates selected by the Bar Council of Ukraine. The State Judicial Administration is a state body in the justice system that provides organizational and financial support to the judiciary and is accountable to the HCJ. Only the last two are political appointments. The importance of the amended reform laws is discussed in the next section.

b) Law 'On Amendments to Laws on Activities of Judicial Self-Governance Bodies'

The Law 'On Amendments to Some Laws of Ukraine on Activities of Judicial Self-Governance Bodies' (AJSB)[123] was enacted on 4 November 2019. The law is important in a number of ways. The AJSB requires the use of international experts, as noted above, in the judicial selection process and greater ethical investigation of candidates. However, this is another case of taking the good with the bad, as the 'devil is in the details'. The AJSB also mandates a reduction in the number of Supreme Court judges from two hundred to one hundred but fails to specify how the reduction should be implemented. Again, this is the recurring problem of good intentions hastily enacted without a deliberative process to make the law comprehensive. The result is vague mandates, such as the reduction of judges, but no legally approved process for achieving the goal. For example, an EU Delegation to Ukraine and the Canadian Embassy's 'Joint Letter' advised against the reduction of judges on the Supreme Court, arguing that

> any reduction should be based on a thorough analysis of its current structure, workload and jurisdiction.[124]

[119] Law of Ukraine on High Council of Justice (Zakon Ukrainy 'Pro Vyshchu Radu Justytscii'), Art 17.

[120] Law of Ukraine on the Bar of Ukraine (Zakon Ukrainy 'Pro advokaturu Ukrainy'), Art 54, available at tinyurl.com/3j8fdgpj (last visited 30 June 2021).

[121] Ombudsman – Ukrainian Parliament Commissioner for Human Rights, available at https://tinyurl.com/7f6nhhew (last visited 30 June 2021).

[122] See https://tinyurl.com/2hdzr7vd (last visited 30 June 2021).

[123] Law of Ukraine, On Amendments to Some Legislative Acts of Ukraine Regarding Judiciary (Zakon Ukrainy 'Pro vnesennya zmin do deyakyh zakonodavchyh aktiv Ukrainy shchodo pravosuddya') (2019).

[124] 'Joint Letter of the EU Delegation to Ukraine and Canadian Embassy to the Parliament of Ukraine' (11 September 2019).

The law changes the membership of the HQCJ and the way its members are appointed. Future candidates to the HQCJ will be assessed by a special selection panel partially composed of international experts, taken from the Public Council of International Experts (PCIE).[125] More important, a candidate must receive the unanimous support of all international experts.[126] The application process for positions on the HQCJ started in January 2020 and documents are under consideration at the present. The interview process has not started and has been postponed due to the Covid-19 pandemic. As a result, the HQCJ relaunch has been delayed for an indefinite time. Until the HQCJ is re-established, judicial appointments and the implementation of the amended reform laws are on hold.

The core mechanism of the legal reform movement, discussed in the previous sections, is the role of the HQCJ as the means to developing a competent, qualified, and independent judiciary. The relationship between the HQCJ and the creation of an independent court system is symbiotic—the higher the independence and competency of the HQCJ the greater the likelihood of creating an independent judiciary staffed by competent judges. The formula for appointing Commission members is promising, as noted above, only two of the fourteen members are government appointees. The HQCJ, along with qualifying and selecting new judges, is entrusted with drafting a judicial code of conduct, monitoring the 'lifestyles' of judges, and conducting judicial disciplinary proceedings. In sum, the HQCJ is the pivotal player in the current attempt to transform the court system from one anchored in the past, characterized by corruption and incompetency, to one that will act as a vanguard for the rule of law.

c) Appointments to High Anti-Corruption Court

Law on the HACC, enacted in 2018, includes procedural provisions dealing with the selection and training of its' judges, and how the Court conducts business.[127] Art 8 states that candidates apply and submit to the process of the HQCJ. Art 12(6) provides an ordering of criteria in the appointment of judges to the HACC: preference is given to the participant who has received a greater score for the practical part of the qualification exam; if the score is identical, the participant who has more judicial experience is given preference; the same experience, the participant who holds a scholarly degree (PhD) is preferred.

Instead of a role for the Public Integrity Council, Art 12 of the law requires the HACC to establish a Public Council of International Experts (PCIE). The PCIE is empowered to challenge the qualifications of a judicial candidate. In such cases, it meets with the HQCJ and a vote of fifty per cent of the PCIE is

[125] O. Halushka and H. Chyzhyk, 'Is Ukraine's New Judicial Reform a Step Forward?' *Atlantic Council* (24 October 2019), available at https://tinyurl.com/1kwpforc (last visited 30 June 2021).

[126] ibid.

[127] Law of Ukraine, On the High Anticorruption Court, n 81 above.

needed to advance the candidate. Given the nature of this specialized court, Art 12 requires HACC judges to continue to acquire specialized training by expanding their knowledge of professional competence, such as any new international anti-corruption standards and best practices in the fighting of corruption.

Art 11 requires the monitoring of the lifestyles of HACC judges and their families. Investigations can be pursued at the request of the HQCJ, HCJ, and PIC as well on information received from individuals and legal entities, from media and other open information sources containing data on the incongruence between the lifestyle of the judges and their declared incomes. On 20 March 2019, the HCJ sent the list of successful candidates for positions on the HACC to the President. On April 11, 2019 the President appointed the judges,[128] with the HACC becoming operational on 5 September 2019.

d) Judicial Salaries and Budgets

The law 'On the State Budget of Ukraine for 2019' suspended the planned increase in the salaries of judges of local, appellate and high specialized courts.[129] Currently, the monthly salaries of judges are less than a salary of a junior lawyer. The initial Budget of Ukraine increased salaries for new Supreme Court judges and members of the HQCJ to nine thousand two hundred euros per month. Unfortunately, law 'On the State Budget of Ukraine for 2019' suspended the planned increase in the salaries of judges, as was the case in past years.[130] To add salt to the wound, judicial salaries were cut to relocate funds to fight against Covid-19. On 1 April 2020, all judges' salaries are set at one thousand three hundred euros per month. Judicial salaries of judges and the budget for the court system remain anemic. The unreasonably low salaries are unlikely to attract the best and the brightest of legal practitioners. The financial resources needed to implement judicial reform and to create a robust independent judiciary are still lacking in Ukraine.

V. Future: Staying the Course

The judicial reform movement in Ukraine is both admirable and necessary, but its ultimate success will depend on a complex set of factors. The rule of law

requires attention to myriad deficits such as, lack of technical capacity,

[128] Presidential Decree no 128/2019 'On Appointment of Judges to the High Anti-Corruption Court' (Ukaz Prezydenta Ukrainy 'Pro pryznachennya suddiv Vyshchogo Antykoruptsijnogo sudu') (2019), available at tinyurl.com/7l6exlov (last visited 30 June 2021).

[129] Law of Ukraine. On State Budget of Ukraine 2019 ('Zakon Ukrainy Pro Derzhavnii Budget Ukrainy na 2019 rik'), available at https://tinyurl.com/emhtvhld (last visited 30 June 2021).

[130] 'Draft State Budget for 2019 Suspends Planned Increase in Salaries of Judges,' Ukrainian News, available at tinyurl.com/1dpyemph (last visited 30 June 2021).

lack of material and financial resources, and a lack of public confidence in government.[131]

The immensity of the task of creating an independent judiciary is captured in the following statement:

> Training judges accomplishes little by itself. A sizeable group of trained legal practitioners are needed to handle cases and help develop legal practices and shared legal knowledge. Competent clerks with adequate office space and equipment are necessary to process cases and record proceedings. Judicial compensation must be set to attract qualified individuals and ... government officials must abide by judicial rulings.[132]

Ukrainian judicial reform aims to create a competent, independent, and incorruptible judiciary. This will be a long-term project – numerous new laws are still needed, training sufficient numbers of quality judges will be extremely challenging, and continued vigilance by civil society will be required. The next sections will take a longer-term perspective, examining the importance of the right to a fair trial, oversight and accountability of judges, and the need to create a rule of law culture.

1. False but Important Start

Despite the numerous shortcomings, the judicial reform movement has been firmly established. The 2018 selection of Supreme Court judges marked the first time in history that an open competition was held for judicial positions. The pool of candidates was expanded to include current judges, advocates and academics.[133] The Law 'On the High Council of Justice' was established and provides the rules for reviewing and nominating of judges by the HQCJ. Political influence of the HJC was addressed by a composition that includes as majority of judges and non-political appointments. The HQCJ improved the level of transparency[134] and developed qualification criteria based on international standards. Transparency was also improved by advertising positions, the establishment of information channels, such as opening a Facebook account[135] and creating a YouTube channel,[136] resulting in nine thousand viewers watching the first day of applicant interviews for the Supreme Court. However, such transparency practices need to be institutionalized in law.

[131] S/2004/616, n 13 above, 3.

[132] B. Tamanaha, n 12 above, 3.

[133] Law of Ukraine on Judiciary and Status of Judges, n 71 above, Art 38.

[134] G. Mykhailiuk, n 102 above, 42-43.

[135] Facebook Page of the High Qualification Commission of Judges in Ukraine (2018) (Facebook HQCJ), available at https://www.facebook.com/vkksu (last visited 30 June 2021).

[136] YouTube Channel of High Qualification Commission of Judges in Ukraine (2018) (YouTube HQCJ), available at https://www.youtube.com/watch?v=pQh7shQ-ZrA (last visited 30 June 2021).

The goal at the core of the competition was to create a more diverse Supreme Court. First by expanding the pool of applicants to include practicing lawyers and academics. Secondly, to improve gender diversity.[137] This first goal of broadening qualifications to increase the quality and background diversity was mixed:

- Cassation Civil Court: eleven PhD degrees; twenty-five existing judges, three academicians, and two advocates;
- Cassation Commercial Court: eight PhD degrees, nineteen existing judges, four academicians, six advocates, and one varied;
- Cassation Administrative Court: nine PhD degrees, twenty-three existing judges, four academicians, and two varied; and
- Cassation Criminal Court: five PhD degrees, twenty-four existing judges, four academicians, one advocate, and one varied.[138]

On the positive side, 28.5% appointees had earned an advanced graduate law degree. On the negative side, 23.5% of appointees had no or minimal judicial experience.

In the area of gender diversity, the competition resulted in a more diverse pool of judges: (1) Cassation Civil Court with sixteen female and fourteen male judges; (2) Cassation Commercial Court with eleven females and nineteen males; (3) Cassation Administrative Court with sixteen females and fourteen males; and (4) Cassation Criminal Court with twelve female and eighteen males. In sum, forty-four percent of the judges appointed to the Supreme Court were women.

2. Judicial Accountability

In the rush to create an independent judiciary, the importance of judicial accountability is often neglected: established rule of law systems took a long time to develop the proper balance between judicial independence and judicial accountability.[139] With independence must come accountability; without accountability the seeds of corruption remain in place.

Ukrainian civil society has exposed the lifestyles of public servants at variance with their official salaries. Unfortunately, the role of civil society groups has largely been neglected in the judicial reform process.[140] Civil society is not represented on the HQCJ. Olena Halushka concludes that civil society's inability to apply to the HQCJ to open disciplinary proceedings or to appeal a

[137] R. Kuybida, 'Judicial Reform: Seven the Most Awaited Events of 2017' ('Sudova Reforma: sim najbilsh ochikuvanyh podij 2017 roku'), Center for Policy and Legal Reform (13 January 2017), available at tinyurl.com/1ui6as0h (last visited 30 June 2021).

[138] See, https://tinyurl.com/tynuuf8u (last visited 30 June 2021).

[139] J. Moliterno et al, n 29 above, 515-516.

[140] O. Halushka, 'What's next for judicial reform in Ukraine?' *Kyiv Post Ukraine Digest* (2016), available at tinyurl.com/15273fxe (last visited 30 June 2021). See also, R. Kuybida, 'Judicial Reform: Cognitive Dissonance with a Hope for Advancement' *Center for Policy and Legal Reform* (2016), available at tinyurl.com/57xfn6rn (last visited 30 June 2021).

decision needs to be remedied.[141] Another shortcoming is that PIC opinions that certain candidates fail to meet the criteria of professional ethics and integrity can be rejected by the HQCJ by a vote of eleven of sixteen members.

On the positive side, the Constitution was belatedly amended. At the same time, the new law on the 'Judiciary and the Status of Judges' was enacted to bring the pre-existing reform laws on the judicial system into conformity with the Constitutional amendments. The key elements of the amendments include: (1) removal of the power of Parliament to appoint judges and the President to dismiss judges; (2) abolishing of probationary periods for junior judges; and (3) transferred authority to discipline judges to the HCJ, the majority of whose members are required to be judges.[142] The amendments give Parliament the responsibility for establishing and dissolving courts under a procedure approved by the Venice Commission.[143]

The Venice Commission has recommended changing the four-level judicial system to a three-level one with the specialized courts within the Supreme Court.[144] The amendments authorize the creation of the High Court for Intellectual Property and High Anti-Corruption Court. The use of judicial councils to insulate the judicial selection process from improper influences has become a common feature in European countries.[145] They are seen as the best mechanism to ensure a merit-based selection of competent judges.

3. Creating a Rule of Law Culture

Brian Tamanaha notes that

> functioning legal systems require a host of secondary supportive conditions, involving a confluence of social, economic, cultural, and political factors.[146]

The transition for a country from a non-rule of law, authoritarian government to a fully democratic, rule of law country with an independent judiciary is a 'long and winding road'.[147] Creating an independent judiciary is only the first

[141] O. Halushka, n 140 above.

[142] Ukraine Constitution (2016).

[143] Venice Commission, 'Opinion 803/2015' ('Preliminary Opinion on the Proposed Constitutional Amendments Regarding the Judiciary of Ukraine'), (24 July 2015), available at tinyurl.com/yq2p79w4 (last visited 30 June 2021).

[144] S. Shtogun, n 92 above, 183.

[145] Judiciary commissions are found in Andorra, Belgium, Cyprus, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, the Former Yugoslav Northern Macedonia and Turkey. See CCJE, Opinion no 1 on standards concerning the independence of the judiciary and the removability of judges, available at tinyurl.com/22jtkjwq (last visited 30 June 2021).

[146] B. Tamanaha, n 12 above, 3.

[147] Beatles (P. McCartney and J. Lennon), 'The Long and Winding Road,' Let It Be Album, Apple Records (released 11 May 1970).

step in creating a rule of law system.

Historian Lawrence Friedman defines legal culture as 'the attitudes and expectations of the public with regard to law'.[148] Unquestioned obedience and devotion to the sanctity of an independent judiciary only comes with many years of fidelity to it as a bedrock principle of democratic societies. Western societies have had hundreds of years to create a culture among citizens, judges, and lawyers that holds judicial independence as sacrosanct. Currently, Ukraine is at the very beginning of implementing judicial reform. The current judicial reform movement needs to be placed in the context of an evolutionary process of creating a rule of law culture.

The Constitutional Court has been slow to hear disputes over the implementation of judiciary reform laws.[149] An active and independent Constitutional Court is needed to ensure a stable environment for judicial reform. Pressure by citizens and civil society groups must continue to ensure the government continues the reform process.[150] The United Nations has acknowledged the importance of civil society in such reform movements in order to increase the confidence of people, international monetary organizations, and foreign investors in a country's government and court system:

> Civil society organizations, national legal associations, human rights groups and advocates of victims and the vulnerable must all be given a voice in these processes.[151]

These voices are needed to ensure that judicial reforms are properly implemented. The reform movement will require reforming the Constitutional Court, improve the functioning of the PIC, and increasing the salaries and resources of judges. The likelihood of success will depend on institutional effort, political will, and guidance of the international community.[152]

4. Judicial Independence: Just a Piece of the Puzzle

Judicial independence and competency are essential elements in rule of law systems, but in and of themselves do not ensure the creation of a rule of law country. The complexity of a rule of law system is captured in the following description:

[148] S. Macaulay, L. Friedman and J. Stookey, *Law & Society: Readings on the Social Study of Law* (New York: W.W. Norton & Co., 1st ed, 1995), 71-77.

[149] G. Borkowski and O. Sovgyria, 'Current Judicial Reform in Ukraine and in Poland: Constitutional and European Legal Aspect in the Context of Independent Judiciary' 2(3) *Access Justice Eastern European*, 28, 5-35 (2019).

[150] United Nations, S/2004/616 (2004, 10), n 13 above ('Restoring the capacity and legitimacy of national institutions is a long-term undertaking').

[151] ibid 7.

[152] G. Mykhailiuk, n 102 above, 40, 44.

> ... well-established legal systems (are) highly differentiated (legislatures, police, prosecutors, judges), amply funded and have solidified legal institutions, well trained and disciplined legal officials, a well-educated legal profession, and a substantial body of legal knowledge ... (and) by and large the system operates effectively owing to the combination of broad voluntary compliance backed up by the threat of coercive sanctions imposed upon violators.[153]

The above description makes clear that judicial reform through the enactment of new laws is only a first step. The importance of an independent judiciary needs to be supported and accepted at a societal level, by politicians, business entities and civil society.[154] Civil society groups must remain diligent in monitoring the operations of the judiciary after the reform laws are implemented. It is only when trust and acceptance of the judiciary as an equal and independent branch of government, with unchallengeable power to review and strike unconstitutional acts can civil society be re-cultured. True constitutionalism and respect for the power of the courts need to be indoctrinated into civil society.[155] Until the public acknowledges the integrity of the judiciary as the protector of individual rights and as a safeguard against government corruption will the rule of law have a solid foundation in Ukraine. This perspective must be earned by the judiciary itself, with support from the government, over the coming decades.[156]

Government support of judicial reform was demonstrated by the enactment of the Law 'On Amendments to Some Laws of Ukraine on Activities of Judicial Self-Governance Bodies'[157] (ASL) on November 4, 2019. The ASL paused the process of judicial appointments to allow a greater role for international experts in the judicial selection and ethical oversight processes, and in appointments to the HQCJ. One essential reform requires future appointments to the HQCJ will be determined by a special selection panel partially composed of international experts.[158]

Despite good intentions, the new reform law repeats the errors of previous attempts. The EU Delegation to Ukraine and Canadian Embassy in a 'Joint Letter' asserted that any new reform law should come only through a deliberative and informed analysis:

[153] B. Tamanaha, n 12 above, 2.

[154] See H. Porsdam, Legally Speaking: Contemporary American Culture and the Law (Ambers: University of Massachusetts Press, 1999), 17 ('courts have generally been perceived to have a special social responsibility as arbiters, even legitimators, of change').

[155] ibid 16.

[156] G. Wood, 'The Origins of Judicial Review' 22 *Suffolk University Law Review*, 1293, 1301, 1293-1307 (1988).

[157] The Law of Ukraine on Amendments to Some Legislative Acts of Ukraine Regarding Judiciary (Zakon Ukrainy 'Pro vnesennya zmin do deyakyh zakonodavchyh aktiv Ukrainy shchodo pravosuddya') (2019).

[158] O. Halushka and H. Chyzhyk, n 125 above.

> (a) speedy adoption of imperfect laws seriously undermine the reform effort, compromise the good intentions of the new Government, and lead to an inadvertent legacy.[159]

The new government has also focused on reforming the prosecution system including the Office of General Prosecutor and State Bureau of Investigations. The Office of President noted that corruption persecutions have not increased since the appointment of a new General Prosecutor in August of 2019. Consequently, on March 5, 2020, the Parliament dismissed the General Prosecutor and Head of State Bureau of Investigations. In sum, despite the creation of a committed reform movement, Ukraine remains in the grip of corruption and the judiciary has only marginally proved itself as a means of reducing corruption. The World Justice Project 'Rule of Law Index 2020' showed that the quality of the rule of law and Ukrainian judicial system remains at a low level.[160] In the area of corruption the rankings and score (one equal highest score) show widespread perceptions of corruption across all branches of government, the judiciary is seen as less corrupt, but still low (Corruption in Executive Branch, .32, Corruption in Judiciary, .49, Corruption in Legislature, .09). The overall rule of law score for Ukraine improved slightly from the previous year but still placed seventy-two of one hundred twenty-eight countries (score, .51/1).

Unfortunately, key metrics for judicial and rule of law related issues were substantially lower than the country's overall score. Regarding the government, the scores and rankings show restraints on government power, .46 (ninety of one hundred twenty-eight); absence of corruption, .33 (one hundred ten of one hundred twenty-eight); regulatory enforcement, .43 (one hundred of one hundred twenty-eight); and government limited by judiciary .32. The low scores on restraint of power and judicial oversight of government indicate that the judicial branch remains weak. The scores relating to the operations of the judiciary show corruption scores are especially low in the criminal law system – criminal justice: effective investigations, .26 and civil justice: no corruption, .41. Related parameters also are disappointing: no improper government influence, .37; effective and timely adjudication, .38; and due process .44. The scores were higher in two areas: accessibility and affordability of court proceedings, .62 and effective and impartial ADR, .63.

5. Constitutionality of Judicial Reforms

The more fundamental critique of the implementation of the early judicial reform laws – selection and nomination of judges – was based on rule of law rationales. However, Article 126 of the Constitution does not provide grounds

[159] Joint Letter, n 124 above.

[160] World Justice Project, 'Rule of Law Index 2020', available at tinyurl.com/4qfl5lor (last visited 30 June 2021).

for changes in the Supreme Court and the new appointment process. A number of existing judges challenged the constitutionality of the selection process. This caused a great deal of uncertainty over whether the work conducted by the HQCJ in the vetting and appointment of judges under the new scheme would be invalidated. The Constitutional Court delayed ruling on the matter for an unduly amount of time. This delay in rendering a decision on such an important constitutional issue is further evidence that Ukraine is a long distance away from a functioning rule of law system and a rule of law culture.

Finally, on 18 February 2020 the Constitutional Court ruled on the legality of the new selection process and judicial appointments.[161] The Court upheld the work of the HQCJ and the legality of the new appointments proceeding from the presumption that the:

> amendment of the Constitution of Ukraine must ensure the principle of institutional continuity which means that the bodies of state power established by the Basic Law of Ukraine continue to function in the interests of Ukrainian people and exercise their powers, fulfill their tasks and functions defined in the Constitution of Ukraine, regardless of these amendments, unless such amendments provide for a substantial (fundamental) change in their constitutional status, including their liquidation.

Moreover, the Venice Commission in its opinion stated that when adopting a new Constitution, its transitional provisions should not be used as means of suspending the powers of persons elected or appointed under the previous Constitution. The dismissal of all judges, apart from exceptional cases, does not comply with European standards and the rule of law; it is not possible to replace all judges without prejudice to the continuity of justice.[162]

The Court reasoned that mass dismissals were not permitted under the Constitution in existence at the time of the new selection process put in place by the HQCJ. However, it validated the selection and appointment process of new judges. As a result the existing judges will remain in office, as well as those appointed through the new process implemented by the HQCJ. The end result is that the rationale can be seen that the court was simply expanded with new appointments, while most existing judges retained their positions. As a result, the 2019 law authorizing the reduction in the size of the court has been put on hold. This result incidentally is in line with the Venice Commission's recommendation that any downsizing of the Supreme Court should be done slowly and after careful deliberation.[163]

[161] Constitutional Court of Ukraine Ruling no 2-p/2020 (18 February 2020), available at https://tinyurl.com/d6sbfh5e (last visited 30 June 2021).

[162] Venice Commission, 'Opinion on the Legal Status and Remuneration of Judges', (CDL-REF (2012)006), available at tinyurl.com/1lvymm2i (last visited 30 June 2021) (2012, para 111).

[163] nn 127 and 128 above and accompanying text.

6. Summary: Untangling the Chaos

Ukrainian legal reforms have been enacted in a piecemeal fashion and at a haphazard pace. Going forward the government and civil society will need to visually construct a more comprehensive framework for a functional rule of law court system. Constitutional amendments and the establishment of the HACC is evidence that the government recognizes the gaps in existing laws and the need to amend existing judicial reform laws. Figure 1 summarizes the status of the judicial reform movement in Ukraine based on the key elements of an independent and competency judiciary.

Fig. 1 - 'Status Report: Rule of Law Elements (Independent Judiciary) in Ukraine'

Element	Status	Shortcomings	Improvements Needed
Constitutional Framework	Amended	Amended too late	Additional amendments
Non-Political Evaluators	Best Practices (non-political appointees & international experts)	Somewhat untested	To be Determined
Qualifications	Anti-Corruption standards (integrity) but low competency criteria	Shortage of qualified candidates	Long-term investment
Quality of Appointment Process	Framework in place	Hastily conducted	Deliberative process
Transparency	Video-taping available online	Uneven	Complete transparency
Judicial Salaries	Acknowledged	Not funded	Minimum: staged funding
Funding	Insufficient	Insufficient	Full funding
Judicial Training	Acknowledged	Pre-planning	Piggyback Training offered internationally
Legal education	Some quality law schools	Uneven	Require LLM to practice; curricular changes; English training
Independent and anti-corruption prosecutor	Transition (prosecutor recently discharged)	No established process to select independent prosecutor	Amendments to law needed; development of career prosecutors willing to investigate corruption
Ethics; judicial code	Recognized need	Transition	Training needed

The recent Constitutional amendments placed the HQCJ on more sound legal

footing, but more amendments will be needed as the reform movement continues to expand in its scope. The law creating the HQCJ adopted best practices fixing its composition to mostly non-political actors. The role of international experts in HQCJ and HACC processes is another best practice, but it is untested so, it is still to be determined whether the role of international exports will provide optimal input in selection decisions or whether their role will need to be fine-tuned. The major obstacle to the competency of judges is the low standards required for appointment. This is due to the shortage of quality candidates. This issue can only be resolved in long-term investments in legal education and professional training. The initial appointments process undertaken by the HQCJ was sound in substance but weak in implementation. In the future, the process will need to be undertaken at a reasonable time frame that allows for careful deliberation. Parts of the initial selection process was made transparent (placed online), while other parts where more secretive. Going forward complete transparency is imperative in order to gain the confidence of the public. Judicial salaries remain woefully inadequate. Despite budgetary constraints, the government needs to fully fund the judicial system in order to reduce corruption and attract foreign investment. A well-funded judiciary should be a high priority since it is a major building block in creating a more prosperous country. The government is aware of the need for improvements in legal education and the training of judges. It specifically mandates that members of the HACC continue their educations after appointment. However, the infrastructure for skill development has yet to be constructed. A stopgap measure would be the greater use of training programs in foreign countries.

As important as the improvement of the judiciary, a quality court system is dependent on the independence and competency of government prosecutors. In the past, prosecutors were closely aligned with government officials resulting in few corruption investigations. To the present, prosecutors have been reluctant to bring claims of corruption. This is clearly a major problem that needs to be addressed or the connection between an independent judiciary and anti-corruption efforts will be greatly diminished. Finally, accountability of judges requires the drafting and inculturation of judicial conduct and ethics codes, and continuous oversight. This again is a long-term project, but initial steps should be expedited.

VI. Conclusion

There are a number of binary relationships tied to an independent judiciary. First, the judiciary, as a core element of the rule of law, is vital to the creation of efficient markets. Second, an independent judiciary is needed to anchor anti-corruption programs. In the end, the future prosperity of Ukraine (and other transitioning countries) and its integration into the EU hinges on the creation of

a competent, independent court system and sufficient reductions in corruption.

The judicial reform movement in Ukraine has attracted much political, academic and civil society attention. However, it has been beset by uncertainty and miscues. The lessons learned from Ukraine's initial attempt at judicial reform include the need to make all necessary structural changes in the Constitution before enactment of judicial reform laws. Second, greater transparency in the vetting and selection of judges is of paramount importance. In sum, successful transitioning to a rule of law system is enhanced by a process of deliberative, careful drafting of judicial reform laws that comprehensively implement the many elements needed to create an independent and competent judiciary.

The countries of Western Europe developed independent court systems over the course of two hundred years or more. The countries previously under Soviet rule, countries of the former Yugoslavia, and others without a rule of law tradition will need to continue to fight to create independent court systems. The Venice Commission has welcomed changes that have taken place during the last few years of the Ukrainian judicial reform movement. Similarly, the Council of Europe has highlighted the significant achievements of Ukrainian judicial reform, one of which is the newly formed Supreme Court.[164]

The recent amending of the Constitution and the establishment of the High Anti-Corruption Court is a further signal that there is a political and civic will coalescing to continue judicial reforms. The features of the reform laws, such as the enforcement of anti-corruption laws and improving the education and expertise of judges, lay the basis for the creation of a rule of law culture. Unfortunately, Ukraine's hasty implementation of a country-wide evaluation and appointment process for judges at all levels of the court system failed in numerous ways. However, it set a threshold that every judge should be required to participate in a fair and open competition to ensure selection is based upon merit and not political connections. True success will be the product of a long-term, 'evolutionary' process, including bringing well-educated and experienced newcomers into the judicial system at the point of entry. The future remains uncertain, but there is reason to hope that Ukraine is on the road to a rule of law society.

[164] Center of Judicial Studies, 'Council of Europe Accesses the Judicial Reform in Ukraine' (Tsentr Suddivskyh Studij, 'Sovet Evropy Provodit Otsenku Sudebnoj Reformy v Ukraine'), available at https://tinyurl.com/56qmee7s (last visited 30 June 2021).